

## N. J. Court of Errors and Appeals.

ARTHUR J. KING AND ROBERT DUN DOUGLAS, <i>Plaintiffs in Error,</i>	}	<i>On Error to the Supreme Court.</i>	10
<i>vs.</i> EMMA PATTERSON AND JOSEPH PATTERSON, HER HUSBAND, <i>Defendants in Error.</i>			

### ARGUMENT OF THOMAS N. McCARTER, 20 For the Plaintiffs in Error.

This writ of error brings to this Court for review the judgment of the Supreme Court rendered in an action for libel tried at the Monmouth Circuit.

Emma Patterson, plaintiff below, was a dealer in clothing at Red Bank, in the county of Monmouth.

The alleged libellous publication was a printed communication said to have been published by the firm of 30 R. G. Dun & Co., who conducted a business in the city of New York and elsewhere, familiarly known as a "Commercial Agency." The defendants below were sued as members of that firm, and the publication complained of was contained in what is known as a "Notification Sheet," by which the agency communicated to its subscribers information affecting the financial standing of merchants and traders in various parts of the country. The plaintiff below complained that in one of such notification sheets it was falsely stated that she had 40

put a chattel mortgage on her stock of merchandise, by means of which she sustained damage. She had a verdict and judgment for \$4,000, and the cause is here for review on a bill of exceptions, and various assignments of error therein.

10 The most important question presented in this case is whether the publication, if proved to have been made by the defendants, (and which it is admitted was untrue,) was or was not a "privileged communication," for the publication of which no action will lie without proof of actual malice, indicating an evil intent to knowingly defame and injure the plaintiff.

I will consider this question on the general statement of facts given above, and will endeavor to show to the Court what is the true rule of law in such a case, and that on its application to the admitted facts of the case no judgment could lawfully be rendered against the plaintiffs in error.

20 What, then, is a privileged communication ?

In *Starkie on Slander*, (Wendell's Ed.) 292, the rule is thus stated :

30 "In the next place when do the occasion and circumstances of the publication afford a qualified defence dependent on the item of express malice? In other words, when is express malice, or malice in fact, essential to the right of action? The extensive principle which governs this class of cases upon the existence of express malice as a civil responsibility, comprehends all where the author of the alleged mischief acted in the discharge of any public or private duty, whether legal or moral, which the ordinary exigencies of society, or his own private interest, or even that of another, called on him to perform, but when the occasion does not furnish an absolute defence, independently of the question of intention, as on the one hand it would be contrary to common convenience to fetter mankind in their ordinary communications by the apprehension of vexatious litigation.  
40 So on the other, would it be highly mischievous to

allow men to inflict the most cruel injuries to reputation and character with impunity under the cloak and pretence of discharging some duty to themselves or society, when they were *in fact* actuated by the most malicious intentions. The law, therefore, in such instances, and it seems most wisely, makes the issue to depend on the existence or absence of express malice, and thus all ample protection is extended to all who act fairly and prudently, in order that man may not be deterred by the fear of an action or prosecution from making communications, which are either important to themselves or beneficial to the public." 10

"The instances always cited in illustration of the general principle which makes the occasion operate as a defence, unless express malice be proved, are those when the occasion consists in the discharge of a duty of a public nature. The same principle, it is next to be seen, has an extensive application, *when a party acts fairly and bona fide* in the prosecution of *his own or even of another's* interest." 20

*Ib.* 315.

"In general when a communication is made in confidence, either *by or to* a person interested in the communication, supposing it to be true, or by way of admonition or advice, *it seems to be a general rule that malice is essential to the maintenance of the title.*"

*Ib.* 321.

See also pp. 322-3.

*Stephens' Dig. Crim. Law*, § 278.

"The publication of a libel is not a misdemeanor if the defamatory matter published is honestly believed to be true by the person publishing it, and if the relation between the parties by and to whom the publication is made, is such that the person publishing it is under any legal, moral or social duty to publish such matter to a person to whom such publication is made, or has a legitimate interest in so publishing it, provided that the publication does not exceed either in extent or in manner what is reasonably sufficient for its occasion." 40

In *Odgers on Libel and Slander*, 182, the rule is thus stated :

“It is a defence to an action of libel or slander, to prove that the circumstances under which the defamatory words were written or spoken, afforded an excuse for their employment, and this is so, even though the words be proved or admitted to be false. Circumstances will afford an excuse for writing or speaking defamatory words, *whenever the occasion is such as to cast upon the*  
 10 *defendant a duty, whether legal or moral, of stating what he honestly believes to be the plaintiff's character, and of speaking his mind fully and freely concerning him.* In such a case the occasion is said to be privileged, and the employment of defamatory words is, in the interest of the public, excused. Again, the circumstances will afford an excuse for writing or speaking defamatory words, whenever such words form part of a confidential communication made by the defendant to his partner or friend on a matter in which they have a common interest or  
 20 concern ; provided such communication is made honestly in furtherance of such common interest, not recklessly or maliciously. Here, too, the occasion is said to be privileged, and though the statement may prove, or be admitted to be false, still its utterance on such privileged occasions, is excused for the sake of common convenience and for the welfare of society.”

Among the illustrations of the principle, this author puts the following :

30 “A friend, recently come to live in the town, privately asks my opinion as to such and such a lawyer, doctor, tradesman, workman, &c. I may tell him in answer all I know concerning each of them, both as to their skill and ability or their business, and also as to their private character, their integrity or immorality.”

Then, after dealing with cases, which the author describes as “absolutely privileged,” such as words spoken in parliament, the language of a judge on the bench, or communications made in the public service, or in the ad-  
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ministration of justice, where the privilege is an absolute bar to any action, the author adds, (p. 183 :)

“In less important matters, however, where the interests of the public do not demand that the speaker should be freed from *all* responsibility, but merely require that he should be protected so far as he is speaking honestly and for the common good, in these the privilege is said not to be absolute, but qualified only; and the plaintiff will recover damages in spite of the privilege if he can prove that the words were not used *bona fide*, but that the defendant availed himself of the privileged occasion wilfully and knowingly to defame the plaintiff.” \* 10

“Whether the communication is or is not privileged by reason of the occasion is a question for the judge alone, when there is no dispute as to the circumstances under which it was made. If there be any doubt as to these circumstances the jury must find what the circumstances in fact were, *or what the defendant honestly believed them to be*, if that be the point to be determined; and then on their finding the judge decides whether the occasion was privileged or not. If the occasion was not privileged, and the words are defamatory and false, the judge will direct a verdict for the plaintiff. If the occasion was absolutely privileged, judgment will at once be given for the defendant. If, however, the judge decides that the occasion was one of qualified privilege only, *the plaintiff must then, if he can, give evidence of actual malice on the part of the defendant*. If he gives no such evidence, it is the duty of the judge to nonsuit him, or to direct a verdict for the defendant. If he does give any evidence of malice sufficient to go to the jury, then it is a question for the jury whether or no the defendant was actuated by malicious motives.” 20 30

Again, on page 196, the author proceeds :

“Cases of qualified privilege may be grouped under three heads—

“I. Where circumstances cast upon the defendant the duty of making a communication to a certain other 40

person to whom he makes such communication, in the *bona fide* performance of such duty.

“II. 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.”

(The third head is not material to the present inquiry.)

10 “In all these instances, if the communication has been made fairly, impartially, without exaggeration or the introduction of irrelevant calumnious matter, the communication is privileged.”

20 “§ 209. Privileged publications are usually divided into absolutely privileged and conditionally privileged. By an absolutely privileged publication is not to be understood a publication for which the publisher is in nowise responsible, but it means a publication in respect of which, by reason of the occasion upon which it is made, no remedy can be had in a civil action of slander or libel. A conditionally privileged publication is a publication made on an occasion which furnishes a *prima facie* legal excuse for the making of it; and which is privileged unless some additional fact is shown, which so alters the character of the occasion as to prevent it furnishing a legal excuse. The additional fact which, in the majority of cases, is required to be shown to destroy this conditional privilege is malice, meaning bad intent in the publisher, *i. e.*, an intent to injure the person whom or whose affairs the language concerns; and, therefore, by a conditionally privileged publication is very generally understood one which rebuts the presumption of malice, meaning absence of legal excuse, which in cases where no legal excuse is apparent, arises from the mere fact of publication. And, therefore, it has been said, ‘instead of the expression, “privileged communication,” it is more correct to say that the communication was made on an occasion which rebuts the presumption of malice.’ The proper meaning of a privileged communication is only this—that the occasion on which the communication was made rebuts the infer-

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ence, *prima facie*, arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact, that the defendant was actuated by motives of personal spite or ill will, independent of the occasion on which the communication was made.

“The description of cases recognized as privileged communications must be understood as exceptions to the rule, (that every defamatory publication implies malice,) and as being founded upon some apparently recognized obligation or motive, legal, moral, or social, which may fairly be presumed to have led to the publication, and therefore, *prima facie*, relieves it from the just implication from which the general rule of law is deduced. The rule of evidence as to such cases is, accordingly, so far changed as to impose it on the plaintiff to remove those presumptions, flowing from the seeming obligations and situations of the parties, and to require of him to bring home to the defendant the existence of malice as the true motive of his conduct. And it has been said: Few rules of law are of greater practical importance than that which requires proof of express malice, when the words are spoken under circumstances which make the communication privileged. The malice required to deprive communications of this sort of the protection arising out of the occasion of the speaking of the words, must be such as to induce the court, or any reasonable person, to draw the inference that the occasion has been taken advantage of to give utterance to an unfounded charge. *Privileged communications comprehend all statements made bona fide in performance of a duty, or with a fair and reasonable purpose of protecting the interest of the person making them, or the interest of the person to whom they are made.* 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 contain criminary matter, which without this privilege would be dangerous and actionable. But in this definition of a privileged communication, the word

duty 'cannot be confined to legal duties, which may be enforced by indictment, action or mandamus, but must include moral and social duties of imperfect obligation.' But, as was said by CRESSWELL, *J.*: 'It is not easy very precisely to define what is, and what is not, a privileged communication.' We venture, with much hesitation, to suggest the rule as to privilege to be: *One may publish, by speech or writing, whatever he honestly believes is essential to the protection of his own rights, or to the rights of*

10 *another, provided the publication be not unnecessarily made to others than to those persons whom the publisher honestly believes can assist him in the protection of his own rights, or to those whom he honestly believes will, by reason of a knowledge of the matter published, be better enabled to assert or to protect from invasion, either their own rights, or the rights of others entrusted to their guardianship."*

"§ 241. Every one who believes himself to be possessed of knowledge which, if true, does or may affect

20 the rights and interests of another, has the right, in good faith, to communicate such his belief to that other. (§§ 243, 244.) *He may make the communication with or without any previous request, and whether he has or has not personally any interest in the subject matter of the communication, and although no reasonable or probable cause for the belief may exist, the right is founded on the belief. 'All we have to examine is whether the defendant stated no more than what he believed, and what he might reasonably believe; if he stated no more than this he is not liable.'*"

30 "If A. believes that B. is intending to rob C., he has the right to communicate his belief to C., without waiting for C. to inquire on the subject; and if in so doing he injures B., B. is without redress. The exigencies of society require that such a right should exist. A's duty to B. is simply not unnecessarily to injure him (§ 48.) This right must be exercised as every other right is required to be exercised, in good faith (§ 40;) and all communications made in the exercise of this right are conditionally privileged (§ 209.) The existence of this

40 right, as will presently be shown, in cases where the

communication is made by one having no personal interest in the subject matter of the communication, and without any previous request has been questioned, *nevertheless we feel justified in laying it down for law that the right exists as well where there is not as where there is a previous request, and whether the publisher has or has not any such personal interest. The right, as we conceive, in nowise depends either upon the fact of a previous request or upon the interest of the publisher, although the fact that the communication is made officiously, as it is termed, i. e., unsolicited, or by one having no interests involved, may in some cases have a tendency to disclose the motive of the publisher in making the publication. The right, where the publisher is interested, or where the communication is made upon the request of the party in interest, seems never to have been doubted.*"

See also note to § 88, p. 129, as to the necessity of proof of malice in every action of libel and slander, and the difference between express and implied malice.

2 *Addison on Torts*, § 1091.

#### PRIVILEGED WRITINGS AND COMMUNICATIONS.

Where a communication is fairly made by one person to another in the discharge of some public or private duty, whether legal, moral or social, *or in the conduct of his own affairs*, in matters where his interest is concerned, "the occasion" observes Parke, B., "prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defence, depending upon the absence of actual malice." "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 rule," observes Lord Campbell, "is that if the occasion be such as repels the presumption of malice, the communication is privileged, and plaintiff must then, if he can, give evidence of actual malice; if he gives no such evidence it is the office of the judge to say that

there is no question for the jury, and to direct a non-suit or a verdict for the defendant." \* \* \*

10 "Whether the circumstances under which a communication was made constituted a privileged communication or not, is a question which the Court has assumed the jurisdiction of determining, but if there is any dispute about these circumstances the question must be submitted to a jury. It is essential to the existence of the privilege and protection that the communication, under whatever circumstances made, should be believed to be true by the party making it; for a person cannot shelter himself under the privilege if he believes the charge imputed untrue, unless he at the same time declares his belief of its untruth. If a man *knowingly* makes a false charge, there is at once actual malice, and the privilege is blown to the winds."

20 The subject of privileged communications has been very intelligently discussed by George H. Eurlé, Jr., of the Philadelphia bar, in an elaborate and learned note to the case of

*Munster vs. Lamb*, reported in 23 Am. Law Register, N. S. p. 12.

The note is on page 19 and *seq.*, and it is quoted here not only because of its intrinsic learning and value, but also because it has been cited with approval by the Supreme Court of Ohio,

*Liles vs. Gaster*, 42 Ohio, p. 631,  
and by the Supreme Court of Kansas, in

30 *State vs. Balch*, 31 Kansas, p. 465.

The following extracts from this note will show very clearly the present state of the law on this important subject:

40 "The doctrine upon which privileged communications stand, is nothing less than that of public policy, for, as is shown in the principal case, there are certain circumstances under which public good and convenience require that individuals should speak fearlessly, and that, therefore, a privilege exists, so to speak, for the public good, and not solely to benefit defamers. The

Master of Rolls, JESSELL, forcibly states this as the basis of the law in

*Waller vs. Lock*, 45 L. T. R. 243,

saying: '*Society could not go on without such inquiries. The doctrine of privilege must rest upon the interests and necessities of society.*'

"Public policy, then, being the foundation of the doctrine, the privilege has been liberally extended, so far as the public welfare requires that it should be, and there it finds its limits; but to the extent to which it exists, its protection is absolute, for the law does not content itself with simply declaring that one using defamatory language upon privileged occasions shall have a defence, which he may offer to an action; but goes further, saying no defence is necessary, as the defamatory statement never was a libel or slander. This doctrine is so well stated by BRETT, *M. R.*, in the principal case, that it is thought worth while to repeat his language. 'Actions,' he says, 'for libel and slander have always been subject to one principle—defamatory statements, although they may be actionable on ordinary occasions, nevertheless are not actionable libel and slander when they are made upon certain occasions. *It is not that these statements are libel and slander, subject to a defense; but the principle is, that defamatory statements, if they are made on a privileged occasion, from the very moment when they are made, are not libel or slander, of which the law takes notice.* \* \* \*

Qualified privilege exists in a much larger number of cases, and while the decided cases will be used as illustrations and authorities, it seems to be of first importance to find the general rule or principle upon which they all rest. The distinction between these and those absolutely privileged is simply, that while in the latter class, even intentional falsehood prompted by actual malice, gives no cause of action, public interests do not require so extended a protection in the former, but are fully guarded by establishing a privilege in those cases only where there is no sufficient evidence of actual malice, as distinguished from what the law terms implied malice. And the distinction between privileged communications of a

qualified nature and ordinary defamatory statements, is that in the former class there is no cause of action shown until there has been some sufficient evidence of actual malice, as distinguished from malice implied; or shortly, that actual malice is the very gist of the action; while in the latter, the occasion being an ordinary one, the law implies all the malice necessary to sustain an action from the statement itself, and that, therefore, while actual malice may be shown to increase the damages, it is  
 10 neither necessary for plaintiff to prove the existence of malice at all, nor is it open to the defendant to rebut the presumption of malice implied.' (See Article 26, Albany, L. J., 247.)

"Malice, then, express or implied, is an absolute requisite in all action for defamation, (26 Albany, L. J., 247,) and (except in the few cases where an absolute privilege exist,) where it exists of either character in publishing defamation, an action will always lie. It is, therefore,  
 20 *defining qualified privilege, in a broad way, to say that it exists where defamatory statement is made without malice of either kind;* and, as express or actual, malice means simply what the terms state, the only requisite of a complete definition is to find in what cases of defamation the law does or does not imply malice. Fortunately, the authorities show most clearly just where the line rests; but before examining them, it is proper to support the conclusions just stated by the concise and clear statement of them recently made in *Thompson vs. Dashwood*, L. R., 11 Q. B. D. 45. WATKIN WILLIAMS, J., there  
 30 says: 'The law stands thus—if a man writes and publishes of another that which is defamatory and untrue, the law will imply malice on his part, and the plaintiff need furnish no evidence whatever of malice. But there are occasions on which the law regards the defendant as so placed, *and having such an interest with respect to the subject matter of the libel*, that upon principles founded upon common sense, the legal implication of malice is removed. That is the doctrine of privilege.'

40 "Then, to advance, what are the occasions which rebut

the implication of malice ordinarily arising from the publication of defamation? To return to the authorities: this inference of malice is rebutted whenever it becomes right in the interests of society that a man should tell to a third person certain facts, even though the duty to do so be of but imperfect obligation, and this duty may be either 'legal, social or moral;' *Davis vs. Snead*, L. R., 5 Q. B. 611, and *Waller vs. Lock*, 45 L. T. R., 243, where JESSELL, *M. R.*, says: 'If an answer is given in the discharge of a social or moral duty, 10  
*or if the person who gives it thinks it to be so*, that is enough, it need not even be an answer to an inquiry, but the communication may be a voluntary one.' In *Somerville vs. Hawkins*, 10 C. B., 538, MAULE, *J.*, says, defining a privileged communication: 'It comprehends all classes of communications made *bona fide* in the performance of a duty, or with a fair and reasonable purpose of protecting the interests of the party using the words.' In *Toogood vs. Spyring*, 1 C. M. & R., 184, Baron PARKE—a 20  
 judge, who in so many cases has made the first clear statement of the principles upon which the law rests—says: "If such publications" \* \* \* "be 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*, in such cases the occasion prevents the inference of malice which the law draws from unauthorized communications." \* \* \* "If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of 30  
 society; and the law has not restricted the right to make them within any narrow limits." In *Bank vs. Henty*, L. R., 7 App. 741, Lord BLACKBURN says: "If the occasion is such that there was either a duty, though, perhaps, only of imperfect obligation, or a right to make the publication, it is said the occasion rebuts the presumption of malice." Again, Lord Ellenborough says, in *Delany vs. Jones*, 1 Esp. 193: "Though that which is spoken or written may be injurious to the character of the party, yet, if done *bona fide*, as with a view of investigating a 40

fact in which the party making it is interested, it is not libellous." JESSELL, *M. R.*, says, in *Wallar vs. Loch, supra* : "It appears to me that if you ask a question of a person whom you believe to have the means of knowledge about the character of another with whom you wish to have any dealings whatever, and he answers *bona fide*, this is a privileged communication." In *Laughton vs. The Bishop, &c.*, L. R., 4 P. C. 504, the House of Lords rules that "a communication made *bona fide* upon any

10 subject matter, in which the party communicating has an interest, or in reference to which he has, or believes he has, a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminatory matter which, without that privilege, would be defamatory and actionable." And finally SELDEN, *J.*, says, more generally, in *Lewis vs. Herrick*, 16 N. Y. 372 : "Where the circumstances show that the defendant may reasonably be supposed to have had a just and worthy motive for making the charge, then the law ceases to infer malice

20 from the mere falsity of the charge, and requires from the plaintiff other proof of its existence." From these cases it follows that the occasion rebuts the ordinary inference of malice in defamation; whenever there is a duty, though but of imperfect obligation, and whether legal, moral, or social, to speak, and whether it be in answer to inquiries or voluntarily; whenever a communication is made with a fair and reasonable purpose of protecting the interests of the party speaking; whenever a person speaks in discharge of a duty, private or public, or

30 in the conduct of his own affairs in matters where his interests are concerned; whenever there is a right to speak; whenever the person is investigating a fact in which he is interested; whenever the statement is made in answer to the inquiry of a person wishing to have any dealings whatever with a third person; or whenever the party communicating has an interest, or in reference to which he has, or believes he has, a duty, if made to a person having a like interest or duty, etc. So that it may be seen that Baron PARKE was well justified

40 in saying that "the law has not restricted the right to

make privileged communications within any narrow limits."

The burden of proving actual malice, which it is necessary to do to support the action, is, of course, upon the plaintiff; and its existence must be fully made out, the presumption being that it does not exist.

Therefore, as in an action for malicious prosecution, (see *Abrath vs. Railroad Co.*, L. R., 11 Q. B. Div. 448,) it is not enough for the plaintiff to show that he is innocent of the charge. MAULE, *J.*, says, in *Somerville vs. Hawkins*, *supra* : 10

"Supposing the defendant himself to believe the charge—a supposition always to be made where the question is, whether the occasion be privileged or not—it was the duty," etc.

And in *Spill vs. Maule*, L. R. 4 Ex. 232, COCKBURN, *C.J.*, says: "We have not to deal with the question whether the plaintiff did, or did not, act dishonestly and disgracefully," \* \* \* "if the defendant stated no more than what he believed, or what he might reasonably believe, he is not liable, and unless proof of the contrary is produced, we must take it that he did state no more." 20

See also,

*Clark vs. Molyneaux*, 3 Q. B. Div. 237,  
and *Lewis vs. Herrick*, 16 N. Y. 372,

in which SELDEN, *J.*, says: "The term 'privileged,' as applied to a communication alleged to be libellous, means simply that the circumstances under which it was made are such as to repel the legal inference of malice, and to throw upon the plaintiff the burden of offering some evidence of its existence beyond the mere falsity of the charge." If this were not so, there would be no meaning in the term "privileged," and there would be nothing left in such cases as a defence, but what is technically called "justification." It is also to be noted that there are many occasions in which a communication is privileged, although the party making it has no belief whatever as to its truth or untruth. Baron BRAMWELL, in 30 40

*Clark vs. Molyneaux*, 3 Q. B. Div., 237, thus calls attention to this principle: "A person may honestly make, on a particular occasion, a defamatory statement without believing it to be true, because the statement may be of such a character that on the occasion it may be proper to communicate it to a particular person, who ought to be informed of it."

- A good illustration of this is found in *Robshaw vs. Smith*, 38 L. T. R. (N. S.,) 423, where the manager of a bank, being applied to for information respecting the plaintiff, who dealt with the bank, by an applicant who was interested in the transactions between them, handed the applicant a defamatory and libellous letter which he had received, and, *although it was anonymous and had been received a year before*, the Court nonsuited. It has been said that where the defendant himself is the writer of a libel, it may be regarded as a picture of his mind at the time; and so the requisite evidence of malice may be obtained should the language of the paper be such as was not warranted, even though the defendant believed, as it is presumed he did, the facts that caused him to speak. But there has not been a case found where the language was held to be so violent as to justify the submission of an otherwise privileged communication, to a jury, although it will be seen, in some of them the language was very violent. And the courts certainly will not do so on this ground, unless in a very plain case. It is said in *Somerville vs. Hawkins*, *supra*:
- 30 "It is true, the facts proved are *consistent* with malice, as well as with its absence. But that is not sufficient to entitle the plaintiff to have the question of malice left to the jury; for the existence of malice is consistent with the evidence in all cases, except those in which something inconsistent with malice is shown in evidence; so that to say that in all cases where the evidence was consistent with malice, it ought to be left with the jury, would be in effect to say that the jury might find malice in any case in which it was not disproved—which would
- 40 be inconsistent with the admitted rule, that in cases of

privileged communications malice must be proved, and, therefore, its absence must be presumed until such proof is given."

And in the case of *Laughton vs. Bishop, &c., supra*, the Court says, "Some expressions here used undoubtedly go beyond what was necessary for self-defence, but it does not, therefore, follow that they afford evidence of malice for a jury. To submit the language of privileged communications to a strict scrutiny, and to hold all excess beyond the absolute exigency of the occasion to be evidence of malice, would, in effect, greatly limit, if not altogether, defeat that protection which the law throws over privileged communications." And see cases there cited, as well as the strong opinion of the Chief Justice, in *McIntyre vs. McBeau, supra*; and

*Brow vs. Hathaway*, 13 Allen, 241;

*Remington vs. Congdon*, 2 Pick. 311.

It has also been held not to take away the privilege, that third parties were present when the charge was made.

*Toogood vs. Spyring, supra*;

*Brow vs. Hathaway, supra, &c.*

The duty of the Court, where there is no sufficient evidence of express malice, is plainly to direct a verdict or nonsuit, and not subject the defendant to the chances of an adverse verdict for doing only that which it was his duty or right to do, and which public policy requires that he should do.

*Taylor vs. Hawkins*, 16 Ad. & El. (N. S.) 308; 30

*Somerville vs. Hawkins, supra, &c.*

As is forcibly said by WILLES, J., in *Henwood vs. Harrison*, L. R., 7 C. P. 626: "It would be abolishing the law of privileged discussion, and deserting the duty of the Court, to decide upon this as upon any other question of law, if we were to hand over the question of privilege or no privilege to a jury. A jury, according to their individual views of religion or policy, might hold the church, the army, the navy, or parliament itself, to be of no national importance, or the

liberty of the press to be of less consequence than the feelings of some thin-skinned disputant.

“It is to be remembered, however, that where the defamation is an accusation by the defendant, and not merely a statement that a charge had been made by another person, there can be no stronger proof of actual malice, than that it was known to be false when made, so that proof of the absence of probable cause is evidence of express malice, and was so ruled by GIBSON, C. J., in *Gray vs. Pentland*, 4 S. & R. 420.

“It seems necessary to say further only that where the occasion is privileged, and express malice is, therefore, requisite to sustain an action, that nothing can take its place. It is not sufficient that the defendant made the publication negligently; *Thompson vs. Dashwood*, L. R. 11 Q. B. Div. 43, (a very interesting case just decided.) Nor even that it was made rashly and without sufficient inquiry. *Clark vs. Roe*, 4 Ir. C. L. I, as express or actual malice, and that only will sustain an action for defamation, where the occasion is privileged.”

The subject is also elaborately discussed in a note to the case of *Howard vs. Thompson*, 1 Am. Leading Cases, p. 167. The following extracts from this note (commencing at page 180) further illustrate the law on the question under discussion:

“2. *In regard to privileged communications.* Malice is a necessary ingredient in slander and libel, and the declaration usually, though it is not necessary, charges the utterance or publication to have been malicious; but the word, as thus used, must be understood in its legal signification, for though in its common acceptation malice means ill-will against a person, in its legal sense it means a wrongful act, done intentionally, without just cause or excuse; and therefore every utterance or publication, having the other qualities of slander or libel, if it be wilful and unauthorized, is, in law malicious,

*Bromage vs. Prosser*, 4 Barnewall & Cresswell, 247, 255;

- Cockayne vs. Hodgkisson*, 5 Carrington & Payne,  
543, 548 ;  
*Chambers vs. Payne*, 2 Crompton, Meeson &  
Roscoe, 156 ;  
*Brown vs. Crome*, 2 Starkie, 297, 301 ;  
*Lewis vs. Few*, 5 Johnson, 1, 35 ;  
*King vs. Root*, 4 Wendell, 114, 136 ;  
*Washburne vs. Cooke*, 3 Denio, 110, 112 ;  
*Dexter et ux. vs. Spear*, 4 Mason, 115, 117 .  
*Parke vs. Blackiston*, 3 Harrington, 373, 378 ; 10  
*Layton vs. Harris*, Id. 406 ;  
*Dunn vs. Winters*, 2 Humphreys, 512 ;  
*Shelton vs. Simmons*, 22 Alabama, 466 ;  
*Byrket vs. Monohon*, 7 Blackford, 84 ;  
*Estes vs. Antrobus*, 1 Missouri, 193.

And see the distinction between legal malice, as intended in the declaration, and actual malice, under St. 3 and 4 Vict., c. 24, s. 2 ; *Foster vs. Pointer*, 8 Meeson & Welby, 395. Any defence which shows a rightful occasion and an authorized motive removes the legal presumption of 20 malice ; and matters thus protected are called *privileged communications*. The operation of such evidence is this : the showing of a privileged occasion, *prima facie*, removes the quality of malice and puts upon the plaintiff a necessity of showing express or actual malice, and if this be proved the defence entirely fails.

See *Child vs. Affleck*, 9 Barnewell and Cresswell, 403 ;

*Wright vs. Woodgate*, 2 Crompton, Meeson  
and Roscoe, 573 ; 30

*Warr vs. Jolly*, 6 Carrington and Payne, 497 ;

*Adcock vs. Marsh*, 8 Iredell, 360.

And this express proof of malice appears to consist, in all cases, in showing *mala fides* in the defendant ; that is, *that the occasion was made use of, colourably, as a pretext for wantonly injuring the plaintiff* ; and this express malice being a matter of fact and motive, is, upon sufficient evidence, a question for the jury.

*Smith vs. Youmans*, Riley's Law, 88 ;

*S. C.*, 3 Hill's South Carolina, 85;  
*Hart vs. Reed*, 1 B. Monroe, 166, 169;  
*Gray vs. Pentland*, 4 Sergeant and Rawle,  
 420, 423;  
*Filcraft vs. Jenks*, 3 Wharton, 158.

In some cases, the whole question of privileged communications has been left to the jury.

*Blackburn vs. Blackburn*, 4 Bingham, 375;

*S. C.*, 1 Moore and Payne, 33;

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3 Carrington and Payne, 146.

But there can be no doubt that properly the question, whether the occasion is such as to rebut the inference of malice, if the publication be *bona fide*, is one of law for the Court, and whether *bona fides* existed is one of fact for the jury; per CRESSWELL, *J.*, in *Coxhead vs. Richards*, 2 Common Bench, 569, 584, 600; but as the protection always involves matter of intention and good faith, it is said in *Cooper vs. Stone*, 24 Wendell, 434, 441, 442, that the question of privileged communication cannot be settled on demurrer to the declaration, but requires the intervention of the jury. \* \* \*

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It is said in *Toogood vs. Sprising*, 1 Crompton, Meeson and Roscoe, 181, 193, and *Padmore vs. Lawrence*, 11 Adolphus and Ellis, 380, that the fact of a communication, privileged in its nature, being made in the presence of another, is not of itself sufficient to take away the character of a privileged communication; but the seeking of such an occasion might be evidence of express malice.

30

The privilege which protects a communication, it would seem, must result either from some right on the part of the defendant to say what is complained of, (see *Hearne vs. Stowell*, 12 Adolphus & Ellis, 719-726,) or some duty, public or private, legal or moral, under which he is acting.

*Toogood vs. Sprising*, 1 Crompton, Meeson & Roscoe, 181-194;

*Cockayne vs. Hodgkisson*, 5 Carrington & Payne, 543-548; and see

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*Thorn vs. Moser*, 1 Denio, 488-493.

And when an occasion of this kind is made out, the question for the jury will be whether the defendant has acted *bona fide*, intending honestly to exercise a right or discharge a duty, or whether he has acted maliciously with intention to injure plaintiff; see

*Pattison vs. Jones*, 8 Barnewell & Cresswell, 578.

The cases of privileged communication may be conveniently arranged under three classes, in which it will be found that the elements of right and duty sometimes exist separately, and sometimes blended together. 10

1. Where a communication is required by the interest of the persons to whom it is made, and is reasonably called for, or warranted, by the relation in which the person making it stands to him; and still more, when the matter concerns the common interest of both, the matter is privileged. \* \* \*

2. Another class of cases is where matter is spoken or written by one who has a duty to perform to the public, or to individuals, and the speaking or writing is in good faith, and in the belief that it comes within the discharge of that duty. \* \* \* 20

3. A third class is where the communication is made in the honest pursuit of the person's own interest, or in necessary self-defence. Thus, a communication by an employer to his overseer, having reference to the protection and care of the property committed to his charge, is confidential and privileged; *Easeley vs. Moss*, 9 Alabama, 266-268. And any one, in a transaction of business or employment with another, has a right to use language, *bona fide*, which is relevant to that business or employment, and which a due regard for his own interest makes necessary. \* \* \* 30

There is no doubt, also, that a man has a right to communicate to another any information he is possessed of in a matter in which they have a common interest; *Shipley vs. Todhunter*, 7 Carrington and Payne, 680. Thus, a bank director would be, *prima facie*, justified in communicating at a meeting of the board any informa- 40

tion which he possessed relating to the solvency of a customer of the bank, and which would probably have an effect on the action of the board, but he would not be authorized to communicate such matter otherwise than in the performance of official service; *Sewell vs. Catlin*, 3 Wendell, 291."

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10 The article cited in Mr. Earle's note, from 26 *Albany Law Journal*, 247, also contains a clear and intelligent statement of the part which proof of malice plays in an action for slander or libel, and when the occasion of speaking the words or making the publication puts on the plaintiff the burden of proving actual malice.

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20 In addition to these copious extracts from elementary treatises, and other discussions of this subject, I will refer the Court to a few of the more prominent and striking of the very numerous adjudged cases, which will aid the Court in ascertaining the law to be applied to the facts of this case.

*Weatherstone vs. Hawkins*, 1 T. R. 1105.

30 This was an action by a discharged servant against his former master. One count of the declaration was for words spoken by the defendant to one Rogers, who applied to him for information about plaintiff's character. The other count was for libellous words contained in a letter written by defendant to one Collier, (plaintiff's brother-in-law,) after Rogers had declined to employ plaintiff. The letter accused plaintiff of embezzlement and other misconduct, while in defendant's employment, and alleged defendant's ability to prove his allegations.

40 This letter was clearly libellous if not privileged. On the trial before Lord MANSFIELD, a verdict was found

for plaintiff on the count founded on the letter, subject to the opinion of the Court on the following case :

“The plaintiff was brother-in-law to Mr. Collier. He was in the service of the defendant, and was by him turned away. Rogers, to whom plaintiff was recommended to be taken as a servant, applied to the defendant for a character, which, not being advantageous, but to the effect stated in the declaration, he (Rogers) did not take him. Collier upon this repeatedly called on the defendant; upon which the letter stated in the declaration was written, with an intent to prevent an action by the plaintiff for the words spoken by the defendant to Rogers. The writ was sued out on the same day the letter was written. The question for the opinion of the Court is, whether this action lies? ” 10

Wood, for plaintiff, contended that the letter was clearly slanderous, because it charged plaintiff with specific charges of fraud, almost amounting to felony, and that the case differed from that of a master giving a general bad character to a servant; for here defendant had “made specific charges of fraud.” 20

The Court will observe that the letter here complained of was not written in reply to any request for information as to plaintiff's character, nor under any injunction of secrecy; but its sole purpose seems to have been to vindicate defendant for having uttered the previous defamatory words, and thus prevent the bringing of a suit against him.

Bower, for the defendant, after mentioning the case of *Edmonson vs. Stephenson*, Bull. N. P. 8, was stopped by the Court. 30

Lord MANSFIELD, *Ch. J.*: “I have held more than once, that an action will not lie by a servant against his former master for words spoken by him in giving the character of a servant. The general rules are laid down as Mr. Wood has stated, but to every libel there may be a necessary and implied justification from the occasion, so that what, taken abstractedly, would be a publication, may, from the occasion, prove to be none; as if it were 40

read in a judicial proceeding. Words may also be justified on account of the subject matter, or other circumstances. In this case, *instead of plaintiff's showing it to be false and malicious*, it appears to be incidental to the application by Rogers to the master of the servant. And the letter was written to the brother-in-law of the plaintiff for the express purpose of preventing an action being brought."

10 BULLER, *J.*: "This is an exception to the general rule, on account of the occasion of writing the letter. *Then*, it is incumbent on the plaintiff to prove the falsehood of it. And in actions of this kind, unless he can prove the words to be *malicious* as well as false, they are not actionable."

20 *Hervey vs. Dowson*, Buller, N. P. 8: "In an action for saying of plaintiff, who was a tradesman, 'he cannot stand it long—he will be a bankrupt soon,' when special damage was laid in the declaration, viz., that one Lane refused to trust the plaintiff for a horse, Lane, the person named in the declaration, was the only witness called for the plaintiff; and it appearing in his evidence that the words were not spoken maliciously, but in confidence and friendship to Lane, and by way of warning him, and that in consequence of that advice he did not trust the plaintiff with the horse. PRATT, *Ch. J.*, said 'that though the words were otherwise actionable, yet, if they should be of opinion that the words were not spoken in malice, but in the manner before mentioned, they ought to find the defendant not guilty;' and they did so accordingly."

30

Here again it does not appear that the defendant was applied to for information as to plaintiff's credit, or that he had any other interest in the transaction than a friendly desire to warn Lane against a hazardous bargain.

40 *McDougall vs. Claridge*, 1 Campbell, 267, was for a libel on plaintiff in his profession as a solicitor. The libel complained of was a letter written by defendant to

bankers at Nottingham, charging the plaintiff with improper conduct in the management of their concern. It appeared, however, that the letter was intended as a confidential communication to these gentlemen, and that the defendant was himself interested in the affairs which he supposed to be mismanaged by plaintiff.

After the case had been opened by plaintiff's counsel, Lord ELLENBOROUGH said: "If the letter had been written by the defendant confidentially, and under an impression that its statements were well founded, he was clearly of opinion that the action could not be maintained. It was impossible to say that the defendant *had maliciously published a libel to aggrieve the plaintiff*, if he was acting *bona fide*, with a view to the interests of himself and of the persons whom he addressed." 10

Another decision of Lord ELLENBOROUGH is reported in a note to the case last cited. It is the case of *Dunman vs. Bigg*. The plaintiff was a dealer in beer, buying it of brewers and selling it to publicans. Wishing to open an account with the defendant, a brewer, one Leigh became his surety for the price of such quantities of beer as should from time to time be supplied to him, the defendant promising to inform Leigh of any default in his payments made by the plaintiff. After the parties had dealt together for some time, the defendant went to Leigh, and spoke to him in very opprobrious terms of the plaintiff, saying that he wished to cheat him; that he had sent back, as unmerchantable, beer which he himself had adulterated; that he was a rogue and a rascal, &c. At this period there was a sum of money due from the plaintiff to the defendant, in respect of the beer for which Leigh had given a guarantee. 20 30

Lord ELLENBOROUGH: "I am inclined to think that this was a privileged communication. Had the defendant gone to any other man and uttered these words of the plaintiff, they certainly would have been actionable. But Leigh, to whom they were addressed, was guarantee for the plaintiff; and the defendant had promised to acquaint him when any arrears were due. He therefore 40

had a right to state to Leigh what he really thought of the plaintiff's conduct in their mutual dealings; and even if the representations which he made were intemperate and unfounded, still if he really believed them at the time to be true, he cannot be said to have acted maliciously, and with an intent to defame the plaintiff. To be sure, he could not lawfully, under color and pretence of a confidential communication, destroy the plaintiff's character and injure his credit; but it must have the most dangerous effects, if the communications of business are to be beset with actions of slander. In this case, the defendant seems to have been betrayed by passion into some unwarrantable expressions; I will therefore not nonsuit the plaintiff; and it will be for the jury to say whether these expressions were used with a malicious intention of degrading the plaintiff, or, with good faith, to communicate facts to the surety which he was interested to know."

Still another decision of Lord ELLENBOROUGH on this subject is reported in the case of *Delaney vs. Jones*, 4 Espinasse, 191, referred to in the note of Mr. Earli.

The libel here complained of was an advertisement published by defendant in a newspaper, offering a reward of ten guineas for the discovery of certain information relating to a marriage of plaintiff, which was alleged by plaintiff to impute to him the crime of bigamy.

The defence was that the advertisement had been inserted by the authority of plaintiff's wife for the purpose of making a discovery, which it was important for her to know, namely, whether the plaintiff had another wife living. Lord ELLENBOROUGH, in charging the jury, in reply to the contention of plaintiff's counsel that the only thing they could take into consideration was whether the advertisement conveys a libellous charge against the plaintiff or not, said:

"I am of a different opinion; I conceive the law to be, that though that which is spoken or written may be injurious to the character of the party, yet if done *bona fide*, as with a view of investigating a fact, in which the party making it is interested in, it is not libellous. If,

therefore, this investigation was set on foot, and this advertisement published by the plaintiff's wife, either from anxiety to know whether she was legally the wife of the plaintiff, or, whether he had another wife living when he married her, though that is done through the medium of imputing bigamy to the plaintiff, it is justifiable; but in such a case it is necessary for the defendant who publishes the libel, to show that he published it under such authority, and with such a view. The jury are, therefore, first to say whether the advertisement imputes a charge of bigamy to the plaintiff; and if they think it does, then to enquire whether the libel was published with a view, by the wife, of fairly finding out a fact respecting her husband, in which she was materially interested. If it was so, the publication is not a libel, and the defendant is entitled to a verdict."

The jury found a verdict for the defendant.

Here, the communication was not in response to any request, but was purely voluntary. It was not made in confidence, but was advertised with an offer of reward, designed to attract the widest public attention. It was not made by the wife, who had the interest in ascertaining the information advertised for, but by defendant in her behalf, who, so far as appears, had not the remotest interest in the matter; yet, that eminent jurist, Lord ELLENBOROUGH, held, that if the publication was made with a view by the wife of fairly finding out a fact respecting her husband, in which she was materially interested, it was not a libel.

A leading case on that subject is that of *Toogood vs. Spyring*, 1 Cr. M. and R. 181, in which Baron PARKE pronounced a definition of a privileged communication as follows (p. 193): "In general an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another, (within the well-known limits as to verbal slander,) and the law considers such publication malicious, *unless it is fairly made by a person in the discharge of some public or private*

*duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned.*

“In such cases the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defence dependent upon the absence of actual malice. *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. \* \* \* \*

“One of the most ordinary and common instances in which the principle has been applied in practice, is that of a former master giving the character of a discharged servant; and I am not aware that it was ever deemed essential to the protection of such a communication that it should be made to some person interested in the inquiry *alone*, and not in the presence of a third person. If made with honesty of purpose to a party who has any interest in the inquiry, (and that has been very liberally construed,) the simple fact that there has been some casual bystander cannot alter the nature of the transaction. The business of life could not be well carried on if such restraints were imposed upon this and similar communications, and if on every occasion on which they were made they were not protected unless strictly private. In this class of communications is, no doubt, comprehended the right of a master *bona fide* to charge his servant for any supposed misconduct in his service, and to give him admonition and blame; and we think that the simple circumstance of the master exercising that right in the presence of another, does by no means, *of necessity*, take away from it the protection which the law would otherwise afford.”

This definition of privileged communications made by Baron PARKE, has been more generally adopted and recognized as correct than any other.

It was recognized by all the judges of the Common Pleas, although they differed as to its application.

*Coxhead vs. Richards*, 2 C. B. 569; *Blackhan vs. Pugh*, Id. 611; *Bennett vs. Deacon*, Id. 628.

Baron PARKE himself, in the subsequent case of *Kine vs. Sewell*, (3 M. & W. 302,) said, referring to the rule laid down in *Toogood vs. Spyring*, "I feel satisfied that there is not a doubt as to the propriety of the law that is there laid down."

In *Tuson vs. Evans*, 12 A. & E. 733, Lord Ch. J. DENMAN said: "Any one in the transaction of business with another has a right to use language *bona fide*, which is relevant to that business, and which a due regard to his own interest makes necessary, even if it should directly, or by its consequences, be injurious or painful to another; and this is the principle on which privileged communication rests." 10

In *Padmore vs. Lawrence*, 11 A. & E. 380, it was held that when a person is *bona fide* charged with the commission of a crime, *the presence of other parties would not do away with the privilege*, provided the charge was not made before more persons than was necessary." 20

The question of privileged communications came before Baron PARKE again in the case of *Wright vs. Woodgate*, 2 C. M. & R. 573. This was an action for a libel contained in a letter written by defendant to plaintiff's solicitor, containing severe strictures on the conduct and character of plaintiff, for whom defendant had previously acted as solicitor.

On the trial, Lord C. B. ABINGER expressed his opinion that the whole of the letter was privileged, except a sentence relating to the conduct of plaintiff as an apprentice, which he thought unnecessary to the letter. He left it to the jury to say whether the sentence relating to the plaintiff as an apprentice *was inserted with an intention to prejudice the plaintiff, and as an imputation on his moral character, or whether it was written without any malice*; in the latter case he directed them to find for defendants, and the jury so found. 30

On a motion for a new trial, it was contended by Sir F. Pollock, *that this being a voluntary communication, and* 40

*not in answer to any inquiry from Byrom, it must be shown not only to have been made bona fide, but also to be true, to justify the imputations contained in it. In pronouncing judgment, Baron PARKE said: "I entirely concur in the latter opinion expressed by my Lord ABINGER at the trial. The term 'privileged communication,' as it was applied in this case, is not, perhaps, quite a correct expression. The proper meaning of a privileged communication is only this: That the occasion on which*

10 *the communication was made, rebuts the inference prima facie arising from a statement prejudicial to the character of plaintiff, and puts it upon him to prove that there was malice in fact—that the defendant was actuated by motives of personal spite or ill will, independent of the occasion on which the communication was made. In the present case it became, in my opinion, incumbent on plaintiff to show malice in fact."* In this opinion all the Barons concurred, and a rule for a new trial was refused.

20 *Somerville vs. Hawkins, 10 C. B. (70 E. C. L.,) 580, was an action for slander for words spoken. Defendant had accused plaintiff, a discharged servant, of theft, in the presence of his other servants, whom he called into his counting-house to hear the conversation. He said to them: "I have dismissed that man for robbing me; do not speak to him any more in public or in private, or I shall think you as bad as him."*

30 *Ch. J. WILDE held the communication privileged, and nonsuited plaintiff.*

*On the hearing of an application for a new trial it was contended for plaintiff that "a statement to the prejudice of a third person, to justify it, must be made in pursuance of some duty, legal or moral, or in answer to an inquiry bona fide made by some person having an interest in making it;" to which MAULE, J., replied: "That is narrowing the rule too much; there are many cases in which volunteer statements have been held to be privileged when made bona fide."* Subsequently, in pro-

40 *nouncing the judgment of the Court, he said: "But we*

think that the case falls within the class of privileged communications, which is not so restricted as it was contended on behalf of the plaintiff. It comprehends all cases of communications made *bona fide*, in performance of a duty, or with a fair and reasonable purpose of protecting the interest of the party using the words. In this case, supposing the defendant himself to believe the charge—a supposition always to be made when the question is whether a communication be privileged or not—it was the duty of the defendant, and also his interest, to prevent his servants from associating with a person of such character as the words imputed to the plaintiff, as such association might reasonably be apprehended to be likely to be followed by injurious consequences, both to the servants and to the defendant himself. 10

“We think, therefore, the communication in question was privileged, *i. e.*, it was made under circumstances which rebut the presumption of malice, which would otherwise arise from the nature of the words used. That presumption being rebutted, it was for the plaintiff to show affirmatively that the words were spoken maliciously; for the question, being one the affirmative of which lies on the plaintiff, must, in the absence of evidence, be determined in favor of the defendant.” 20

*Finden vs. Westlake*, 1 Moody & Malkin, 461.

This was an action in which the libel complained of was a hand bill published by defendant, offering a reward for certain bills of exchange lost from his possession, which were described in the hand bill with this additional statement: “And which Mr. Westlake believes to have been embezzled by his clerk.” Plaintiff was the clerk alluded to in the hand bill. Ch. J. TINDALL charged the jury as follows: 30

“The general rule is that in actions for libel, nothing short of the actual truth of the statement is an answer to the charge; but there are privileged cases, in which the publication proceeds from a proper motive, and the party acting on his belief, and acting honestly, is protected. That may be the case with such a publication as the 40

present. If you think it was made in the opinion that it was necessary either for the purposes of justice, with a view to the discovery and conviction of the offender, or for the protection of the defendant himself against the liability to which he might be exposed on the bills, and that these or either of these were the defendant's only inducement to the publication, you may give him a verdict on the counts for the libel."

10 *Lawless vs. Anglo-Egyptian Cotton Co., L. R.*  
4 Q. B., p. 262.

This was an action against a joint stock association, the directors of which had published, in the form of a printed circular, issued and sent to all the stockholders, the report of an auditing committee appointed in pursuance of the articles of association, to make an annual investigation into, and a report upon the finances of the company. The report was made to the directors, and it contained defamatory statements concerning the plaintiff,  
20 who had been manager of the company, and whose conduct was severely criticised in the report.

In this case it was conceded that the report to the directors was privileged, and that the privilege extended to its communication by the directors to the stockholders present at a meeting, but it was strenuously contended that the directors exceeded their privilege when they caused the defamatory matter to be delivered to a printer and published, and sent to stockholders who did not attend the meeting. On the trial before KELLY, C. B.,  
30 plaintiff's view prevailed, and he had a verdict, the Chief Baron reserving to defendants leave to move to enter a nonsuit.

In pronouncing judgment that a nonsuit should be entered, MELLOR, J., said :

"What the directors did was this, in their report to a meeting of the shareholders they appended the statement which had been made to them by the auditors. There is nothing whatever to show that the directors had any reason to doubt the truth of that statement,  
40 and there was no evidence of any act on their part from

which malice could be inferred, and therefore I think the Chief Baron was right in not putting the question of malice to the jury. As to the question of intrinsic or extrinsic evidence, the report was one which the directors were fully warranted in believing was correct, and there is nothing to show that the directors acted otherwise than *bona fide* in communicating it to the shareholders. No doubt the directors are to make their report to a meeting of the shareholders, to be called for that purpose, and it is clear that those who are absent are bound by the acts of those who are present, but the absent shareholders are interested in the prosperity or adversity of the company, and in knowing all the circumstances upon which the welfare of the company depends. It seems to me, therefore, that to print the report was a necessary and reasonable mode of communicating it to all the shareholders who must be more or less numerous. \* \* \*

“Here I think the conduct of the directors negatives malice on their part, and it is clear that they acted *bona fide*. I think we should be going against what I may call progress, if we were to hold that the delivery of the manuscript of the report to the printer, for the purpose of having it printed, is a publication which prevents the communication from being privileged. I also think that it was the duty of the directors to communicate the report not only to the shareholders present at the meeting, but to all the stockholders, and that they had an interest in receiving it.”

HANNON, J., in a concurring opinion, said:

“I think this occasion was a privileged occasion, and that therefore it rebuts the inference of malice which is *prima facie* presumed to exist when a defamatory statement is published of another. I confess I cannot bring myself to understand how it can be thought that the directors of a company, who have been obliged by the articles of association to employ auditors to investigate their accounts, and to receive from those auditors a report expressing their opinion upon the state of the ac-

counts, *can be held to be acting beyond the scope of their duties* in communicating, *simpliciter*, without one word of comment of their own, the report of the auditors to their shareholders. I confess that I go so far as to say that I think it was the duty of the directors to do so, and that the failure of the directors to report to the shareholders a statement made by the auditors on their own responsibility of what they found to be the state of the accounts, might have led the directors into a position of great difficulty."

In dealing with the question that the delivery of the manuscript to a printer was a publication exceeding the bounds of the privilege, he said (p. 269): "That point does not appear to have been made at the trial, and it seems to me that there is nothing in it. It is obvious that a company itself cannot communicate by writing, it must communicate by the aid of some person to whom it deposes the duty of making the communication, and if the argument of plaintiffs' counsel were pushed to its logical conclusion it would amount to this, that a company must employ one of the shareholders to write, or if he be a printer to print the reports which they wish to communicate to the other stockholders.

\* \* \* \* It was not suggested that directors had departed in any way from what was the usual course, *having regard to the exigencies of business, and the necessary means of making known that which they thought ought to be made known to the shareholders at large.*"

The verdict was set aside and a new suit entered.

It is worthy of remark that both the judges in their opinions cited and gave much weight to the case of *Philadelphia, Wilmington and Baltimore R. R. Co. vs. Quigley*, 21 How. (U. S., S. C.) Rep. 202, which case is cited below herein.

*Bank vs. Henty*, L. R. 7 App. Cas. 741, is an interesting case, and although it did not turn on a question of privileged communication, that question was in the case and was discussed by the judges.

Henty and Sons were brewers, who had been in the habit of receiving in payment from their customers checks on various branches of plaintiffs' bank; having had a squabble with a manager of the bank, they sent a printed circular to a large number of their customers that they would not thereafter receive in payment checks drawn on any branches of that bank.

Plaintiff claimed that a run on the bank was caused by the publication, and brought its action. The question on which the case turned was whether the words 10 not being libellous *per se*, enough evidence had been given of their libellous meaning to permit the jury to pass on the question of libel or not, and the conclusion was that the Court below did right in refusing to permit the case to go to the jury. The judges, however, discussed the question of privilege.

Lord PENZANCE said: "The contention of the defendants on the state of facts is, that their circular was no more than an honest, innocent and justifiable announcement on their part to their customers that in future they 20 must not expect that Messrs. Henty would receive in payment any checks on the plaintiffs' book; that Messrs. Henty had a right to refuse such checks if they liked, and had also a right to announce their determination to do so to their customers, so as to prevent their being taken by surprise and put to inconvenience by this departure from their previous practice. And if this is the fair conclusion to be drawn from the facts, there can be little doubt, I think, but that they are not liable in this action; for passing by for the 30 moment all question whether the circular ought to be considered libellous as conveying an imputation on the plaintiffs' credit, the occasion of this circular being published would, on the above supposition, be so clearly a privileged occasion that nothing but proof of express malice would sustain the action, and express malice is upon the same supposition obviously excluded."

Then in speaking of plaintiffs' contention that the occasion was not privileged, he proceeds: "They, there- 40

fore, maintain that the circular was not privileged but malicious, for that it was not a statement 'fairly made in the discharge of any public or private duty, legal or moral, or in the conduct of their own affairs in matters in which their interests were concerned.' I here use the definition of a privileged communication given by PARKE, B., with the assent of the Court in *Toogood vs. Spyring*, which has been cited with approval in several subsequent cases." (P. 754.)

10 See also the remarks to the same effect of Lord BLACKBURN, on page 787. He says:

"But if the occasion is such that there was either a duty, though, perhaps, only of imperfect obligation, or a right to make the publication, it is said that the occasion rebuts the presumption of malice, but that malice may be proved; or, I should prefer to say, that he is not answerable for it so long as he is acting in compliance with that duty, or exercising that right."

20 See also the recent case of *Thompson vs. Dashwood*, L. R. 11 Q. B. p. 43, which illustrates in a striking manner the necessity of proving a bad state of mind—an evil intent to make a man liable for slander or libel for words spoken or published on a privileged occasion.

See also *Laughton vs. Bishop, &c.*, L. R. 4 P. C. 495; *Spill vs. Maule*, L. R. 4 Exch. 232.

30 In *Tuson vs. Evans*, 12 Ad. & Ell. 733, (40 E. C. L. 365,) Lord DENMAN, *Ch. J.*, said: "Any one in the transaction of business with another has a right to use language *bona fide*, which is relevant to that business, and which a due regard to his own interest makes necessary, even if it should directly, or by its consequences, be injurious or painful to another; and this is the principle on which privileged communication rests."

It is respectfully but confidently submitted that this definition of Lord DENMAN is as succinct, complete and satisfactory a statement of the result of all the cases on the subject as can be found anywhere.

See also *Taylor vs. Hawkins*, 16 Ad. & Ell. N. S.  
(71 E. C. L.) 307;

*Harrison vs. Bush*, 32 Eng. C. L & Eq. 173.

The same rule has been almost universally adopted in the American Courts.

*White vs. Nicholls*, 3 Howard, (U. S.) 266, 286;

*Phil. W. & B. R. R. Co. vs. Quigley*, 21 How. 202.

*Chapman vs. Calder*, 14 Pa. St. 365;

*Briggs vs. Garrett*, 21 Reporter, (Pa.) 406;

*S. C. 4 Eastern Rep.* 874; 10

*Kent vs. Bougartz*, 20 Reporter (R. I.) 570;

*O'Connor vs. Sill*, 21 Reporter, (Mich.) 781.

*Brow vs. Hathaway*, 13 Allen, 239;

*Hatch vs. Lane*, 105 Mass. 394;

*Billings vs. Fairbanks*, 136 Mass. 177.

*Washburn vs. Cooke*, 3 Den. 110;

\**Lewis & Herrick vs. Chapman*, 16 N. Y. 375.

In this case the rule is said to be "that when the communication is made *bona fide*, in answer to inquiries from one having an interest in the information sought, or where the relation between the parties by whom and to whom the communication is made is such as to render it reasonable and proper that the information should be given, it will be regarded as *privileged*." \* \* \* 20

"These cases show that all that is necessary to entitle such communications as *privileged* is, that the relation of the parties should be such as to afford a reasonable ground for supposing an innocent motive for giving the information, and to deprive the act of an appearance of an officious intermeddling with the affairs of others." Opinion of SELDEN, J., in which all the judges agree. *Van Wyck vs. Aspinwall*, 17 N. Y. 190; *Klinck vs. Colby*, 46 N. Y. 427. 30

Thus far the cases have been considered without reference to those decided in what are known as mercantile agency cases, and there is no difficulty in extracting from them a general principle which, in the absence of counter authorities, would certainly on the facts of the present case render the libel here complained of a *privileged* 40

communication. What are the facts now under consideration? For the purpose of considering this question, (and only for such purpose,) I will assume that defendants, as members of the firm of R. G. Dun & Co., are responsible for the acts of the agents of that firm, and that such firm published to its subscribers only, the notification sheet which contains the alleged libel.

10 The firm of R. G. Dun & Co. conducted the business of a mercantile agency in the city of New York. That firm had a sub-agency in Newark, New Jersey, under the management of one Henry E. Jepson, and the contract, defendants' Exhibit No. 1, page 267, shows the nature of the agreement into which each subscriber to the agency enters with the company on becoming a subscriber. Article 1, of this contract, provides that all verbal, written or printed information communicated to us, (*i. e.* the subscriber,) or to such confidential clerks as may be authorized to receive the same, and all use of  
 20 *the reference book hereinafter named, and the notification sheet of corrections of said book,* shall be strictly confidential, and shall never, under any circumstances, be communicated to the persons reported, but shall be exclusively confined to the business of our (the subscribers') establishment."

Article 3. "The said R. G. Dun & Co. are hereby requested to place in our keeping for our exclusive use, a printed copy of a reference book, containing ratings or markings of estimated capital, and relative credit  
 30 standing of such business men in such States as may be agreed upon, prepared by them, or the servants, clerks, attorneys and employes aforesaid, *together with the notification sheet of corrections.*"

This information is declared by the introductory clause of the contract to be furnished to subscribers, on request, for use in their business, as an aid to them in determining the propriety of giving credit, and the information is to be such as they (the agency,) may possess concerning the  
 40 mercantile standing and credit of merchants, traders, manufacturers, etc., throughout the United States, and

in the Dominion of Canada; such information was mainly to be obtained by persons employed by R. G. Dun & Co., *sub-agents of the subscribers.*

Charles T. Fleming, residing at Freehold, in Monmouth county, was employed by R. G. Dun & Co. to make reports to them of the business standing of persons in Freehold and in that neighborhood. Shortly before the issuing of the notification sheet in question, the records of Monmouth county disclosed that a chattel mortgage had been given by Emma Patterson to Samuel Ludlow for \$1,385. This fact was communicated by Fleming by letter to the office of the agency in Newark, in which he described the mortgage as having been given by Emma Patterson, of Red Bank, whose business was also therein described as clothing. Mr. Fleming knew that plaintiff carried on the clothing business at Red Bank, and supposed that she had executed the chattel mortgage. In fact the mortgage had been executed by another Emma Patterson, who resided at Asbury Park, in the same county, but who was unknown to Fleming. Thereupon the agency, in the next issue of the notification sheet, dated November 5, 1884, under the head of Record Items—

“RECORD ITEMS.”

“These items do not necessarily affect the credit or safety of parties mentioned. They are given just as we find them on the public records, and suggest further investigation or explanation.” Then under the head of “New Jersey,” was the item complained of, as follows: “Red Bank, Patterson Emma, chtl. mtge., \$1,385, clothing,” which occurred in a list of other names and data affecting them.

Concerning this business and this mistake, the judge charged the jury to the effect that the business of the agency was lawful and commendable; that it confers important and desirable benefits on the business men of the country; that it was guarded by care in the selection of agents and its means of doing business; that the business was conducted under carefully drawn contracts, and

that the defendants were honorable men engaged in lawful business, who appear to have thrown all possible safeguards about the business which may possibly injure others; that the injury to plaintiff by the publication in question, (if any), was an involuntary wrong, not intended by defendants at the time it was inserted; a mere error of their agent who mistook the plaintiff for another person of the same name who had given a chattel mortgage for the amount named. (*Charge*, p. 250-251.)

10 It also appeared that the publication in question was communicated to one Meyers, a creditor of plaintiff, by Lisberger & Weiss, a firm in Philadelphia, who had, some two years before, sold goods to plaintiff, and who were assumed to be subscribers to the agency, and Lyons, another creditor, saw a copy of it on the desk of Simon & Co., in New York, who were also assumed to be subscribers to the agency.

20 On this state of facts the judge was requested by defendants' counsel to charge the jury that the communication was privileged, and, as no express malice was proved, the verdict must be for defendants.

At the close of plaintiff's case, the Court was requested to nonsuit plaintiff on the same ground. (Case, 182 to 192.)

30 The Court declined to nonsuit, or to charge as requested, and charged that the communication was not privileged, because it did not appear that either Lisberger & Weiss, or Simon & Co., had at the time of the publication, such an interest in the credit of plaintiff as to make the communication privileged, as to them, and that defendants were answerable in law for the damage occasioned by their disclosure of the contents of the store. (See charge, pp. 242-3-4.)

See, also, requests of defendants' counsel, (p. 259 to 261.) Under these circumstances, was the action of the Court warranted by the law of the land?

Unless the case is to be controlled by the cases hereafter referred to, it would be difficult to conceive of a commu-

nication which more completely satisfies all the conditions of a privileged communication than the present one, as stated by the judge himself.

It was made in the transaction of a lawful business, in direct fulfilment of the terms of a lawful contract, in the faithful performance of which every subscriber had an interest, and it was communicated to the subscribers by the very method called for by the contract; the fact communicated was relevant to the business, and the knowledge of it could not have been withheld 10  
by defendants from their subscribers without a breach of contract and of duty, both moral and legal, or without the grossest disregard of defendants' own interests. It was made in good faith on information on which defendants had a right to, and did rely, and was guarded by all the care necessary to limit the publication to those having a right to it.

A reference to the Mercantile Agency cases will explain how the judge, in the haste of a trial at the circuit, fell into the error which is now being considered. 20

The case of *Taylor vs. Church*, was decided in the Court of Appeals of the State of New York in 1853, and is reported in 8 New York Rep., p. 452.

This was a case where defendant was employed by an association of merchants in New York to travel in Mississippi and ascertain by inquiry the pecuniary standing and credit of merchants in that State who were debtors of some one or more of the association, or who had applied to them for credit. He communicated the result 30  
of his inquiries to one of the firms employing him. In the course of time copies of his reports were printed for distribution amongst the subscribers.

The judge charged the jury "that if it were true, as alleged in defendant's answer, that he was furnished by each firm with a list of merchants with whom they respectively had dealings, and this was done as a guide to him in the matter of his employment, and a designation of the particular debtors and customers of whose standing and credit they desired information, *the defendant* 40

*should have confined his communication to each subscriber to matters affecting those embraced in such subscriber's instructions.* And if he distributed the information, or caused it to be distributed to parties not having any interest in the matter, not only to persons at whose instance he undertook the business, but from time to time afterwards to whatever merchants would subscribe and pay an annual sum—as a premium,—therefore he was not protected by law in communicating injurious statements not founded in truth.”

10 Under this charge plaintiff had a verdict, and on appeal JEWETT, *J.*, rendered an opinion in which the whole Court concurred, in which he disposed of that question in the following words:

“I think the Court below was right in holding that the publication could not be included within the protection of privileged communications. In this case the communication was not even confined to the persons making the inquiry of the defendant. The libel complained of  
20 was printed by his procurement, and distributed by him to persons who had no special interest in being informed of the condition of the plaintiff's firm.”

The case, however, did not turn on that point, but the judgment was reversed on another ground.

It may be observed of this case that, according to the charge of the trial judge, the nature of defendant's employment was such that he was able to discriminate and determine in what particular person his employers were respectively interested, and his failure thus to discriminate, and his subsequent selling of the information to  
30 others than those who employed him to obtain it, deprived his communications of the protection of privilege. A very different case from that now being considered. It is also manifest from a perusal of the whole charge that the trial judge was influenced by the great prejudice which, in the early history of these agencies, existed against them, and it is fair to presume that the judges of the court of appeals a third of a century ago,  
40 before the usefulness of these agencies had been fully

recognized, and their employment had been so universal, yielded somewhat to the influence of the same prejudice. The case does not seem to have been well considered. No authorities appear to have been cited, and the whole subject was disposed of in the brief sentences quoted above.

The next case in New York is that of *Ormsby vs. Douglass*, 37 N. Y., 477. In this case the defendant conducted a commercial agency similar to that of the present defendants. The subscriber entered into a similar contract, and the only circumstances which distinguish its facts from those of the present case are that the communication complained of was oral, made in response to a written request, presented by the subscriber, as to the plaintiff, against whom the subscriber held a note. 10

The Court held the communication privileged, and sustained a nonsuit granted at the trial. In this case Judges MILLER and WOODRUFF, who delivered opinions, cited nearly all the authorities then extant on the subject, gave the case most careful consideration, answered all the objections urged against the business, and fully vindicated the legality, propriety and usefulness of the business in which defendant was engaged. 20

Then came the case of *Sunderlin vs. Bradstreet*, 46 N. Y., 188.

This case followed and reaffirmed the decision in *Taylor vs. Church*; and while professing to recognize the rule above contended for, it limited its application to communications to persons who had a direct interest in the credit of the person about whose standing the communication was made. The Court said: "In the case at bar it is not pretended that but few, if any, of the persons to whom the 10,000 copies of the libellous publication were transmitted had any interest in the character or pecuniary interest of the plaintiffs, and to those who had no such interest there was no just occasion or propriety in communicating the information. The defendants, in making the communication, assumed 30 40

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.

“The communication of the libel to those not interested in the information was officious and unauthorized, and therefore not protected, although made in the belief of its truth, if it were in point of fact false.”

10 It does not appear by the statement of facts in this case that any contract existed between defendants and their subscribers by which they bound themselves to communicate to each subscriber information about dealers generally, nor can such a state of things be fairly inferred from anything disclosed by the report of the case. For all that appears, it may safely be assumed that defendants incurred no obligation to their subscribers by a contract such as exists in the present case, or that they did anything more than to accumulate information to be  
20 sold and delivered to all who applied, and that they made the publication complained of in the ordinary course of their business, without any restrictions as to confidence or secrecy, or any safeguards or protection against undue publicity, which exist in the present case. In such a state of facts it may have been proper to characterize the communication as officious and unauthorized, and therefore not privileged. If, however, the case can be held to declare the law to be that no communication by a mercantile agency to its subscribers can be held to be privileged, unless in case of an unintentional error in the  
30 communication, it can be made to appear that every subscriber to whom the communication was sent had a direct interest in every person about whom the information was communicated. Then it is respectfully insisted that such a position is contrary to the whole current of authorities on the subject, and in violation of the principle on which all communications rest, which is that, when the circumstances under which the communication was made repel the presumption of

malice the communication is privileged until express or actual malice is shown.

The question was before the Circuit Court of the United States, for the Southern District of New York, in the case of *Beardsley vs. Tappan*, reported in 5 Blatchford, 497. In this case the defendant conducted a mercantile agency in New York. Plaintiffs had recovered a verdict for \$10,000 in an action for a libel. On a motion for a new trial before Justice NELSON, he said :

“The defendant communicated through his clerks to several customers and their clerks facts seriously affecting the credit of the plaintiffs' house; and the main question in the case, on the merits, is, whether or not he is exempt from the consequences of the publication on the ground of its privileged character. The Court charged the jury that if the defendant himself had communicated the information to a person applying to him for the purpose, in good faith, the communication might have been a privileged one; but that the publicity given to it by recording the libellous words in a book, to which others had access, and to whom they were communicated, though standing in the relation of clerks, deprived the communication of its otherwise privileged character. This is, no doubt, a very important question, and one involving in its practical operation, whichever way it may be decided, interests of very great magnitude. On the one hand, to legalize these establishments in the manner and to the extent used by the defendant, is placing one portion of the mercantile community under an organized system of espionage and inquisition for the benefit of the other, exposed from the very nature of the organization to perversion and abuse; and on the other, to refuse to legalize them, may be restricting injuriously the right of inquiring into the character and standing of the customer asking for credit in his business transactions. I am strongly inclined to think that if the establishments are to be upheld at all, the limitation attached to them by the Court below is not unreasonable, to wit, that it must be an individual organization and not an

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establishment conducted by an unlimited number of partners and clerks. The principle upon which privileged communications rest, which of themselves would otherwise be libellous, imports confidence and secrecy between individuals, and is inconsistent with the idea of a communication made by a society or congregation of persons, or by a private company or a corporate body." This was in 1867, and it is plain that Mr. Justice NELSON was somewhat influenced by the early prejudice existing

10 against establishments of this character, and that he entertained serious doubts as their legality, and the expression, "I am strongly induced to think," indicates that he was not sure of the correctness of his position, while his conclusion that the communication could not be privileged, unless made by an individual, and that the principle of such communications is inconsistent with the idea of a communication made by a society or congregation of persons, or by a private corporation, or corporate body, has long since been repudiated, and, in fact, was in flat

20 contradiction to the rule previously laid down by the Supreme Court, in the case of *P. W. & B. R. R. Co. vs. Quigley*, above cited, (21 Howard, 202,) where a communication by a corporate body was expressly held to be privileged. It is also contrary to the case of *Lawless vs. Anglo Egyptian Cotton Co.*, (*supra*, p. 32.)

The next case is that of *Erber vs. Dunn*, in 12 Federal Reporter, 526. It was a case tried in the Circuit Court of the United States, for the Eastern District of Arkansas, before CALDWELL, D. J. On the trial on a state of

30 facts very similar to the present case, the judge charged the jury that the business of defendant was unquestionably a lawful business, and that it is now generally regarded as of utility and advantage to those engaged in conducting the business and commerce of the country, (p. 529,) and after having instructed the jury that the verbal statements which the defendants made in relation to the plaintiffs' business credit and standing as merchants to their subscribers who had an interest in knowing the facts, and in answer to inquiries made by them,

40 having been made in good faith and upon information

on which defendants relied, are privileged, and cannot be made the foundation of an action, (p. 530); but afterwards he further said, (531): "These daily 'notification sheets' were sent out by the defendants to all their subscribers in the city of St. Louis, numbering 600, irrespective of their interest in the question of the plaintiffs' credit or standing. *This sheet was distributed to persons having no interest in being informed of the condition of plaintiffs' firm.* This fact robs it of the protection of a privileged communication, and if it contains a libel on the plaintiffs, the defendants cannot escape responsibility for such libel on the plea that it was a privileged communication to their subscribers." In a subsequent part of the case, in which he delivers an opinion, (orally,) in reply to the requests to charge, he discusses the cases of *Beardsley vs. Tappan*, *Ormsby vs. Douglas*, and *Sunderlin vs. Bradstreet*, and he adopts the rule laid down in the last case, and reiterates the opinion expressed to the jury as above quoted.

In *Trussell vs. Scarlett*, 18 Fed. Rep. 214, Judge MORRIS, D. J., sitting in the U. S. Circuit Court for the Maryland district, held that a notification sheet of R. G. Dun & Co., sent to a subscriber, containing a charge of bankruptcy against plaintiff, was a privileged communication, and the facts which made it such appearing by the cross examination of the witness by whom the fact of publication was proved, he excluded the paper from going to the jury, and plaintiff was nonsuited.

There is a valuable note appended to this case by Dr. Francis Wharton, in which he discusses the whole subject, explains at some length the value and usefulness of mercantile agencies, and thus sums up: "The utility of mercantile agencies being unquestionable, and their utility being dependent on their confidential limitations, it is not strange that these limitations should be not only maintained but insisted on by the courts. And this is in two ways. If the limitations of confidence are thrown off by the agency—in other words if it publishes to the world the information it collects—then it is liable in

damages to parties whose character it disparages or whose standing it impugns. On the other hand, if it confines itself to the confidential communication of such information to its customers, then if it acts *bona fide* and without malice or recklessness, these communications are privileged, and the defendant, if sued for a libel in making such communications, would be entitled to a verdict. *Meddlesomeness*, it should be remembered, is an important test to be kept in mind in cases of this class. If a communication be merely meddlesome—if it be not dictated by a lawful business obligation, or by a lawful personal duty—then the privilege cannot be invoked.”

It is respectfully submitted that the rule as stated by this eminent jurist is the true rule.

A similar question was before the Circuit Court of the United States for the District of Minnesota, as reported in *Locke vs. Bradstreet Co.*, 22 Fed. Rep. 771. This was a mercantile agency case. The Judge, (NELSON, D. J.) charged the jury among other things as follows :

“The business of the defendant is to obtain information of the financial standing and character of business men throughout the United States, and for a consideration it enters into an agreement with its patrons to furnish them the information received. It does this in its own way, and gives the information in such form as it may deem advisable, and to its subscribers only. The corporation is engaged in a serviceable and useful business, unless there is abuse in its management. The corporation is not exempt from legal responsibility, and is subject to the same rules of law as other persons who may have a just occasion for making statements which are charged to be libellous. It has extensive facilities for securing information, and is of great service to the mercantile and financial interests of the country; but if its opportunities are abused, and it is negligent in obtaining and imparting information, and reckless in its conduct, great injury results to the class of men whose interest its purpose is to advance. \* \* \* \*

“It is my duty to instruct you that every wilful and

unauthorized publication, written or printed, which imputes to a merchant, or other business man, conduct which is injurious to his character and standing as a merchant or business man, is a libel, and implies malice; but 'whenever the author or publisher acted in the *bona fide* discharge of a public or private duty, legal or moral, or in the prosecution of his own rights and interests,' that which is communicated, in writing, under such circumstances is a privileged communication, unless actuated by malice. \* \* \* \* 10

"Applying the rule laid down to this case, and it is in proof that the information charged to be a libel was communicated to subscribers in the city of Minneapolis and Duluth, who had an interest in knowing it; and the communication is also volunteered to other persons who stood in such relation to the defendant as to make it a reasonable duty, or proper, that such information should be given; so that the conduct of the plaintiff consists of answers in writing to inquiries made, or volunteer information given to those who had an interest in it, 20 and there was just occasion for imparting it to them. Therefore I instruct you that the information given was a privileged communication."

In *Billings vs. Russell*, 8 Boston Law Rep., N. S., 699, the action was for a libel arising out of a communication made by a mercantile agency. Judge DEWEY, of the Supreme Court of Massachusetts, said:

"If the defendant, as the constituted agent of a commercial house, upon the application of his principal 30 made inquiries at the proper places, and under proper and reasonable guards to insure accuracy and privacy as to the information thus obtained, and the information which he thus obtained was repeated *bona fide* to his employer, and him alone, as the result of such inquiries, and for the purpose of governing his conduct in his business transactions with the party as to whom the inquiry was made, such communication may be justifiable as a confidential communication, and the defendant would not be responsible, although the information was incor- 40

rect and unfounded in fact, the defendant acting in good faith, and believing it to be true at the time he communicated it."

In the case of *Commonwealth vs. Stacey*, in the Philadelphia Common Pleas, on an indictment for a libel contained in a notification sheet, Judge FINLETTER, in charging the jury, said :

"It is very clear to me that this is a privileged communication. The party who received this paper had a right to know all the defendant knew about the credit and standing of the prosecutors. All that is said in that publication is, that something has occurred which changes the rating. It does not say whether it raises or lowers the rating; and the particular party must come to the office and receive the explanation. Now, I hardly think that if this was a single letter in writing, addressed to these parties by any individual who had a right to send it, that any one could claim that it was anything else than a privileged communication. Now, undoubtedly, the party receiving this letter or note, or whatever it may be called, had a right to know, as a member of the business community, all about any other member of the business community in which he traded. And the next question is, had they a right to give the notice? Now, undoubtedly, the testimony shows that a change had occurred; whether from delinquency or otherwise, these gentlemen had gone to protest. They don't even go so far as that in the communication. They simply say to whoever receives the paper, that something has occurred in the firm, the particulars of which may be obtained by calling at the office. It seems to me that associations of this kind are legal in this, and that communications of the kind now before us must be protected. Any express malice is, of course, out of the question. The surrounding circumstances explain much. The defendant, when first spoken to about this communication, offered to do anything he could to repair the injury, if any were done; indicating that there was no malice, but a desire on his part to rectify so far as he could any error into which he may have fallen.

"I am compelled to say that I could not sentence the defendant, if convicted on this charge, and I so instruct the jury."

In *State vs. Lonsdale*, 48 Wisconsin, 848, it was held that a communication to a "commercial agency," from its local correspondent as to the commercial standing of a person doing business in any place, is so far privileged in the hands of the persons conducting the agency that they may lawfully make known its contents confidentially to their subscribers, provided it is done without malice, and in the belief that the statements are true. 10

In the present case the trial judge adopted the rule as laid down in *Sunderlin vs. Bradstreet*, and *Erber vs. Dunn*, above cited, and held that the communication was not privileged, unless it was made to a person having a direct interest in the financial standing of the plaintiffs, inasmuch as the evidence showed that Lisberger & Weiss had no dealings with plaintiffs in two years, and it did not appear that Simon & Co. had ever sold goods to plaintiff, he held that they had no such interest in the subject as to make the communication privileged as to them. 20

The principle of this decision is, that to give the communication the benefit of privilege it is essential that the party to whom it is made shall have a direct interest.

In this we contend there was error, for although it is true that in some of the definitions given of a privileged communication, the expression is used, "To one having corresponding interest in the subject," still, that is by no means essential, and the adoption of that principle will exclude a large number of cases in which the communications have been held privileged by the highest authority. 30

It would exclude the case of *Delaney vs. Jones*, cited *supra*, which was an advertisement in a public newspaper offering a reward for certain information. The Court held the communication privileged, because it related to business which the defendant had a right to investigate, and it could not be pretended that the gen- 40

eral public to whom the communication was addressed, were in the least interested in the question.

Such a rule would exclude the privilege allowed in the case of *Bank vs. Henty*, cited above, where a circular was sent by a brewer to his tenants and customers announcing his determination not to accept thereafter checks drawn on plaintiff's bank. That circular was sent to 136 persons, not one of whom, so far as the case showed, had ever received or accepted a check drawn on the plaintiff's bank; and the case showed that only three such checks, amounting in all to £47, had ever been presented and paid; and yet the Court held that the communication was privileged, and that the facts above stated were not evidence to go to the jury on the question of actual malice.

It would exclude the privilege allowed in the case of *Lawless vs. Anglo Egyptian Cotton Company*; and that also in the case of the *Philadelphia, Wilmington and Baltimore Railroad Company vs. Quigley*, (which were cases of communication made by corporations to their stockholders,) and in fact all cases of communication made by directors to their stockholders at a meeting, if it should happen that by a mistake or otherwise, the communications were sent to or made in the presence of persons who are not stockholders.

It would exclude the case cited in this brief holding the communications to be privileged, although made in the presence of persons having no interest whatever in the transaction.

It would exclude the case of *Finden vs. Westlake* cited *supra*, p. 31, and the definition of a privileged communication given by Chief Justice TYNDALL in that case.

It would exclude the case of *Hatch vs. Lane*, cited *supra*, (105 Mass., p. 394.) In this case the defendant, who was a baker, employing drivers and delivering bread in Taunton and adjoining towns, published a notice in the newspapers reflecting upon the character of the plaintiff, who had formerly been in his employment. In an action

for libel in publishing this notice, the plaintiff requested the judge to rule that the community had no such interest in the subject matter as would authorize the defendant to make it through the medium of a newspaper. The judge refused so to rule, and ruled that the communication was privileged if made in good faith, and the jury should find that it was a necessary or reasonable mode of giving notice. On a review of that ruling, after verdict for the defendant, WELLS, Justice said: "The case shows that the defendant was entitled to the benefit 10 of his plea of privilege. No exception was taken to the ruling on that point. The exception is to the refusal of the Court below to rule as requested by the plaintiff, as a matter of law, that the whole community had no such interest corresponding to the interest of the defendant in the subject matter of the publication as would authorize him to make it through the medium of a public newspaper. The question thus raised relates only to the mode adopted to make the communication to those 20 for whom it was properly intended. They were the customers of the baker, who 'employed several drivers, selling and delivering bread in Taunton and adjoining towns.' The fact that a communication is made in the hearing of others than the parties immediately interested will not, of itself, defeat the defence of privilege. *Brow vs. Hathaway*, 13 Allen, 239. If the circulation of the newspaper was more extensive than the routes of the defendant's business, or if the communication thereby came to the notice of persons not customers of the defendant, that fact would not, of itself, defeat the defence of 30 privilege, nor necessarily prove malice. It would be evidence upon the question of express malice, to be considered by the jury. That question was submitted to the jury, under proper instructions, and the jury, by their verdict, have found that it was a reasonable mode of giving the notice, thus negating express malice."

The principle of this decision of the trial judge is contrary to the definition of a privileged communication given by PARKE, Baron, in the case of *Togood vs. Spyring*, which definition was adopted by Lord PENZANCE 40

in the case of *Bank vs. Henty*, as a statement "fairly made in the discharge of any public or private duty, legal or moral, or in the conduct of their own affairs in matters in which their interests were concerned." This definition is cited by Lord PENZANCE, because he says it has been cited with approval in several subsequent cases.

10 The rule adopted by the trial judge would also exclude the case of *Thompson vs. Dashwood*, cited above on page 36, in which a person intending to send a privileged communication to a person to whom he had an undoubted right to send it, by mistake enclosed it in an envelope to another person who had no interest what-  
 20 ever in the transaction. In that case the Court held the question was, whether the communication was made with malice and evil intent, and saying that it was clear no such intent or evil mind could be attributed to the writing of the communication, the fact that it was by accident enclosed in the wrong envelope, did not indicate any change in the condition of the writer's mind or deprive the writer of the protection of the privilege.

It would exclude that class of cases cited on page 21 of this brief, which class is described as, "where a matter is spoken of or written by one who has a duty to perform to the public or to individuals, and the speaking or writing is in good faith, and in the belief that it comes within the discharge of that duty."

30 And also the third class on the same page, where a communication is made in the honest pursuit of a person's own interest, or in necessary self-defence.

It would exclude all those cases in which it had been repeatedly held, that any one "in the transaction of business or employment with another has a right to use language *bona fide*, which is relevant to that business or employment, and which a due regard for his own interest makes necessary."

40 The charge to the jury in this case was contrary to the rule as laid down in *Somerville vs. Hawkins*, cited *supra*, pp. 31 and 32.

And it seems to me to completely ignore what all the cases hold to be the real question in any case of this kind, which is, whether the circumstances under which the communication was made repel the presumption of malice.

If it is conceded, as it has always been held, that the business conducted by a mercantile agency is lawful and useful, and if the contract which is shown in this case to have been made between the agency and its subscribers was a lawful contract, (which the Court held it to be in this case) then it is clear that this communication was made in good faith in the discharge of a duty both moral and legal to a person to whom, by the terms of the contract, the defendant had agreed to make the communication in the precise method adopted in this case, namely, by a reference book and notification sheets. And if to hold such a communication protected, it must also appear that the party to whom the communication was made had a direct interest in the credit and standing of every person mentioned in such notification sheet, whether that interest was known or unknown to the agency, it would at once shift the inquiry from a lawful one of what was the state of mind of the sender of the communication, to an irrelevant one of what was the state of mind of the party to whom it was sent. The cases all hold that where the relation of principal and agent subsists, or any other confidential relation, or where the relation between the parties is such by contract or otherwise, as renders it proper that the communication should be made, or where the party receiving the communication would have a right to reproach the party making it, had it not been made; in all these cases the communication is held privileged.

In this very case, suppose it had been true that the plaintiff had put a chattel mortgage on record, as stated in this communication, and information of it had been received by the agency from Fleming, as this was communicated, and the agency had neglected to communicate the intelligence to their subscribers, as by the contract they were bound to do, and in ignorance of the

chattel mortgage any subscriber had sold goods to Mrs. Patterson and had sustained a loss by reason of the chattel mortgage, which he would not have done had he been notified of it, would not the subscriber, in such case, have an action against the agency for neglect in not discharging the duty which it assumed by the contract between the parties? Or if the contract was so drawn as to screen the agency from legal liability because of the neglect of its employees, still, the subscriber, 10 in such case, would have just reason to complain that the agency had been derelict in its duty? The effect of this contract is an assertion on the part of the subscriber to the agency, that he has such an interest in all the business men of the community, or names appearing in the reference book and notification sheets, as entitles him to have from the agency information concerning them; and the business could not be carried on if the agency will not be protected by privilege in any case, unless it could look into the heart of the subscriber to see if he really 20 was interested in every person to whom the communication related.

If the doctrine of the judge's charge in this case were to prevail, there would be no privilege in a person's giving information about the credit of another, to a person who inquired of him on the subject, unless the person giving the information had first assured himself that the person making the inquiry had a real interest in the subject, and was not actuated by idle curiosity.

It is, therefore, respectfully insisted that the rule laid 30 down by the judge, in this case, was too narrow and restricted, and that under the testimony he should either have granted a nonsuit, or at least, should have charged the jury in accordance with the defendants' request.

In the case of the *Trenton Mutual Insurance Company vs. Perrine*, cited by Mr. Woodruff, on another point, Chief Justice GREEN said, (3 Zab., p. 413): "It must ever be borne in mind that the plaintiffs, in order to recover in such action, must prove not only that the 40 statement is false, and that they have sustained special

damage, but the jury must be satisfied that the defendant was actuated by malice, and when the statement is false and injurious, it is still open for the defendant to show that the publication was prompted by proper motives, and made for justifiable ends."

It may well be doubted whether malice will ever be inferred from a publication (although not authorized,) which is harmless in itself, and not libellous, *per se*, unless a knowledge of the extrinsic circumstances which render it libellous, is brought home to the person making the publication. The law implies malice from a publication, not because it is false, but because it is defamatory. Where a person recklessly and without lawful occasion makes a defamatory statement about another which is injurious, *per se*, the law, presuming that a party intends the consequences naturally following such an act, supplies the malice requisite to maintain the action, but when no injurious consequences naturally follows a publication, harmless or indifferent in itself, but such injury results from extrinsic facts, the proof of which is necessary to render the publication defamatory, it would be illogical and unreasonable for the law to imply malice in the absence of proof of knowledge of such extrinsic facts, which alone give the publication its injurious character.

## II.

It was also error in the judge to charge the jury as he did in this case, that on a publication of this character, general damages could be given.

It is an elementary rule in an action for slander or libel, that where the words spoken or published are not actionable *per se*, but are indifferent in themselves, and only become actionable by reason of some special injury arising to the plaintiff from their publication, no action will lie for such words unless such special injury is shown, and the damages are in all such cases limited to the special injury alleged and proved.

In this case the judge clearly stated that the allegation that a person had executed a chattel mortgage was not libellous, *per se*. His language (p. 248) is: "Taking the words charged in this case, the printing that a person has put a mortgage on her property, real or personal, is not, *per se*, a libel; but when connected with proper inuendoes and proof showing that she is a trader having creditors for a large amount, with a small capital and stock of goods, not more than enough to pay all her debts at a forced sale, and requiring credit to continue her business, and where the mortgage is of sufficient amount to impair the security of existing claims, then they are libellous, or may be libellous, so that the person aggrieved may recover both general and special damages, if the latter be charged with the proper averments in the declaration."

Without further argument on this head, I insist that the well settled general rule relating to actions of libel and slander, as laid down in the elementary works, as is shown by the authority cited in the points presented by my associate, is uniform and without exception that where the words are not libellous, *per se*, only special damages can be recovered, and they must be confined to those alleged in the declaration and proved on the trial.

For this error, if for no other, this judgment should be reversed.

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## III.

I also concur in the insistment of my associate that the Court erred in admitting the publication known as Wilson's Copartnership Directory, as proof of the partnership between the defendants in the suit and Robert G. Dun, under whose authority and direction the publication in this case was made. It did not appear that the defendants in this suit ever authorized that publication, or in any way consented to it, and how they or their rights can be affected by a publication made by third

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parties in which they had no manner of concern, or how the fact of their being in partnership with R. G. Dun could be proved by an advertisement in a newspaper, not authorized by them, I am at a loss to understand.

The doctrine that a party may be held to be a partner as to third persons, by reason of his holding himself out as such, grows out of the doctrine of estoppel, by the operation of which a person, so holding himself out, is estopped from denying as against any person dealing with such partnership on the faith of such holding out that such a partnership existed. But I know of no case in which it is held that such a doctrine could be asserted against parties who never warranted or sanctioned the assertion that they were such partners. 10

Besides, the doctrine has no application to an action of tort; *there*, if the liability of the defendant rests on his being a partner of the person doing the injury, the actual partnership must be proved, and no estoppel arises in favor of a party having no dealings with the partnership, but who only sustained damages by reason of its tort. And it is further contended that the contract offered in evidence, manifesting the real relation of this defendant to the so-called firm of R. G. Dun & Co., shows that there was no such partnership between them as to make these defendants responsible for the acts of their principals in that firm in which they did not participate. 20

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#### IV.

The Court also erred in permitting evidence to be given of the publication complained of to other persons than those named in the bill of particulars. The authority cited in the points prepared by my associate sufficiently make clear this proposition.

It must be manifest to the Court that in the charge of the judge in this case the damages were excessive. And 40

I have no doubt that this Court would, on rule to show cause, have set aside the verdict on that ground, had not the trial judge considered the case as a proper one to be reviewed in this Court, in view of the importance of the question involved in it; and although the excessive damages cannot be assigned for error, nor made a direct ground of reversal, the Court will not fail to see that in this case these damages must have been greatly enhanced by the rulings of the Court complained of in this case, 10 if they shall appear to have been erroneous.

# N. J. Court of Errors.

EMMA PATTERSON et als, Defts. in Error, ads.	} On Writ of Error. Defts' Points
ARTHUR J. KING and ROBERT DUNN DOUGLASS, Pltffs. in Error.	

## FACTS.

Emma Patterson carried on at Red Bank, New Jersey, a retail clothing business, and was successful and prosperous therein, and was thereby making a comfortable living and enjoyed good credit both with those to whom she sold and those from whom she bought.

Joseph Patterson was her husband and with her superintended the business.

The firm of R. G. Dun & Co. are a mercantile agency in the City of New York, and as such publish among other things a paper entitled "The Mercantile Agency Notification Sheet," which is issued weekly and sent to all their subscribers, several thousands in number.

This paper is printed and sent to all subscribers whether such subscribers are personally interested in the individuals therein reported or not.

These subscribers are scattered widely over the country, and in many States, including New Jersey, New York and Pennsylvania.

Mrs. Patterson's customers resided in Red Bank and vicinity, but the merchants of whom she bought resided and did business in other States, notably New York and Pennsylvania.

In the issue of said paper of November fifth, 1884, there was published under the head of New Jersey the following item:

"Red Bank, Patterson, Emma, chtl. mtge, \$1385, clothing."

This was understood, by those who saw it, to mean, and did mean, that Emma Patterson, a dealer in clothing at Red Bank, had made a chattel mortgage on her property for \$1385.

This item was seen by all, or most of, the merchants of whom she bought and with whom she dealt, and was understood by them as above stated.

The result was, that they all came down upon her at once, demanded payment of their claims, threatened her with suit, some of them did sue her and have recovered judgments, and all refused her further credit.

As a consequence thereof, her business was ruined, she was compelled to give up her business, her means of livelihood were taken away, she was made ill with nervous prostration, and has ever since been not only greatly impoverished in her pecuniary means, but has been physically disabled, and has suffered much bodily pain and mental anxiety, and at times her life has been despaired of.

Prior to that time she was a strong healthy woman.

In addition to the above, her husband, who is joined as co-plaintiff has been threatened by her creditors with indictment.

The statement in the said paper was untrue.

The defendants were two of the members of the firm of R. G. Dun & Co.

This suit is brought to recover damages for the injury caused by the publication of the untrue charge, made against the plaintiff Emma Patterson as above narrated.

The judge ruled out evidence of bodily pain and ill health, and mental distress and anxiety and charged the jury that these were not legitimate objects of damage in the case.

The jury rendered a verdict in favor of the plaintiff of three thousand dollars.

On this verdict judgment was entered, and from this judgment this writ of error has been taken.

We respectfully submit, that the errors assigned for a reversal of the judgment are not well taken for the following reasons.

#### I.

The words complained of were published by the firm of R. G. Dun & Co.

1. The Mercantile Agency sheet was published by that firm.

Douglass, case pp. 38-49.

King, case pp. 21-38, 192-207.

Dunn, case pp. 207-211.

Pl'ffs. Exhibits 1 & A, case pp. 265-266.

Def'ts. Exhibit 1, case pp. 277-268.

Jepson, case p. 171.

2. The item complained of was sent to them as follows.

Charles T. Fleming their regular agent in their employ at Freehold, sent it to Henry E

Jepson their general agent for that district located at Newark.

Fleming, case pp. 160-168.

Jepson received it and communicated to the firm in New York.

Jepson, case, pp. 168-176, 223-230.

Jepson, case, pp. 232-240.

3. The paper in question in the issue of Nov. 5, 1884, contained it.

See Pl'ffs Exhibits 1 and A, case, pp. 265-266.

See also testimony of Mrs. Patterson, case, p. 18.

Meyers, case, pp. 49-86.

Lyons, pp. 86-104.

Brumer, pp. 104-113.

Oppenheimer, pp. 113-116.

Joseph Patterson, pp. 120-160.

## II.

The defendants were, with their knowledge and consent, published and held out to the world as members of that firm, and were in fact members thereof, and co-partners with each other and with all the members of that firm.

King, case, pp. 21-38; 192-207.

Douglass, case, pp. 38-49.

Defts' Exhibits 1 and 2, case, p. 267-274.

Wilson's Copartnership directory, improperly omitted in the printed book.

In either case they were, as a consequence, responsible for all that the publication in question, issued by that firm, contained.

Parsons on Partnership, 30, Ed. 1867, 31-32, 157.

Watson on Partnership, 177 and 241.

Ogers on Libel and slander, 366, 359 and 360 and 366.

### III.

The matter published was untrue, and was spoken of the plaintiff, who was a trader, in her business, and were such that the natural consequence thereof was to injure her in her business, and in point of fact did injure her in her business, and not only so, but did destroy her health and peace of mind, and did subject her to disgrace and anxiety.

That they were untrue see

Mrs. Patterson, case, p. 19.

Joseph Patterson, case. p. 121, 147.

Fleming, case, p. 167.

That they did injure her in her business and to what extent, see

Mrs. Patterson, case, p. 18.

Joseph Patterson, case, p. 120, 177.

Meyers, case, p. 49-86.

Lyons, case, 86-104.

Brumer, case, 104-113.

Oppenheimer, p. 113-116.

Eschelbacher, p. 116-120.

## IV.

The words complained of, being uttered of a trader, earning her living by her trade, and the natural consequence thereof being to injure her in her trade, are actionable *per se*, whether libellous or not, and proof of special damages is not necessary, and a verdict may be had therefor in an action begun for libel.

Riding v. Smith, L. R. 1 Excheg. 91.

Evan v. Harries. 1 H. & N. 251.

1 Starkie on Slander, 10.

Ingram v. Lawson, 6 Bingham(N. C.), 212.

1 Chitty on Pleading, 396.

Hutchinson v. Granger, 1 Vt. 386.

## V.

The communication complained of was not privileged, within the meaning attached to that term, in as much as it was in a printed newspaper, and was made to all the subscribers thereof alike whether, such subscribers were interested in the plaintiff, and the statement reported regarding her or not.

That it was made to all alike whether interested or not, see

King, case p. 204, 28, 32.

Defendants Exhibit, No. 1.

Douglass, p. 40.

Jepson, p. 172.

That it was a newspaper and printed, see

Plffs. Exhibits, 1 and A, case 265-6.

That it was not privileged, see

Sunderland vs. Bradstreet, 46, N. Y. 188  
and cases cited.

Taylor vs. Church, 8, N. Y. 452.

Erber vs. Dun, 12, Fed. Rep. 526.

Shaddock vs. McArthur, 25, Fed. Rep. 133.

See special note by Kerr, 25 Fed. Rep. 135.

Carsley vs. Bradstreet, Superior Court of  
Montreal Nov. 1885, important opin-  
ion by Mr. Justice Loranger.

## VI.

The statement made at the head of the page, on which the matter complained of was published, to the effect that the items therein contained did not necessarily effect the credit or safety of the parties mentioned, and that "they are given just as we find them on the public records and suggest further investigation or explanation, does not save the defendants because,

1. That caution would protect them if at all, only as against their subscribers, and

2. The statement complained of was wholly untrue, and was not therefore included in or covered by the caution, inasmuch as it was untrue not only in the statement that a chattel mortgage had been made, but also in the statement that they found it on a public record, the proof being that there is not and never has been any such record.

Fleming, p. 166 and 167.

Mrs. Patterson's testimony, case, p. 18, 21.

## VII.

The defendants are not relieved by the fact that none of their subscribers appear to have been creditors or customers of the plaintiff, but on the contrary all doubt of their liability is removed by the proof that many patrons not subscribers were allowed access to their publication, in points widely scattered, and acted upon the statements falsely made by them.

That this is true, see testimony of

Meyers,

Lyons,

Brumer,

Oppenheimer.

Eschelbacher, above referred to.

See *Erber v. Dun*, and the other cases cited under the head of privileged communication.

## VIII.

The question of the libellous character of the words spoken, and the truth thereof, and the motives that prompted them, and whether justifiable or not is a question of fact for the jury, and the jury having passed upon that, the question is set at rest and can not be reviewed here or elsewhere.

Constitution of New Jersey, Art. 1, § 5.

*Erber v. Dun*, 12 Fed. Rep. 533.

*Jenner v. Abeckit*, Law Rep. 7 Queens Bench, p. 11.

*Oger*, 25-26.

2nd Greenleaf on Evidence, 363, sec. 411.  
 Shepherd v. Whittaker, L. R. 10 C. P. 502.  
 Fedder v. Herrick, 14 Vroom, 24.  
 Hand v. Winton, 9 Vroom, 122.

## IX.

The plaintiffs in error allege twenty-five errors.

1. That the trial justice admitted in evidence Wilson's Copartnership Directory.

The proofs on this point were :

That the book was a public business directory of the City of New York.

That it was well circulated throughout that city and was printed and sent to whoever would buy.

That it was for the year in question.

That under the title it contained the names of R. G. Dunn & Co., ostensibly as proprietors and publishers and gave the names of the parties constituting that firm, among whom were the defendants King & Douglass.

That the defendants were aware of this fact.

That it contained an advertisement of this firm.

That defendants were aware that the book was being circulated with the foregoing matter in it. That they knew the statements and advertisement were there.

The avowed purpose of offering the book was that it was evidence of the partnership. It was certainly admissible. It was some evidence at least. Its weight was for the jury.

See testy. of King and Douglass.

2. That the trial justice permitted the plaintiffs to ask the witness Meyers whether he had seen a copy of the alleged libellous publication, without first requiring evidence that the defendants had published or caused to be published the same.

We answer—

a. It was a mere matter of order of proof and within the discretion of the justice and is not a legitimate matter of error.

b. It is not true in fact, because before that time both of the defendants had been sworn, and it appeared by the testimony as follows :

That the firm in question consisted of four members.

That the defendants were among the four.

That they had been given out to the world as co-partners.

That the libellous publication in question was in a paper which bore the name of that firm.

There was then some evidence on this point, at that time, which, whether conclusive or not, was for the jury.

c. During the trial, the publication by the defendants was established beyond question, and we submit that it was so, when the question was asked.

3 & 4. Assignments, 3, 4, allege error in the admission by the trial justice, of questions to two witnesses as to the meaning of the words alleged to be libellous, after objection that knowledge of the witnesses on that point had not been established.

We answer that the objection was not founded on fact.

Meyers, prior to the admission of the question said he had seen the paper regularly for ten years. Had seen it thousands of times, sometimes twice a week and sometimes once a week, and had during all that time acted upon it in his business and had always found out what the abbreviations meant, and had always found it to mean what he there stated.

case, p. 57, 60.

Lyons also prior to admitting the question swore that he had formerly been a subscriber to the paper. Had been such subscriber for five years. In that time saw the paper from 150 to 200 times. His partners acted on it. Had seen and acted on it since and that he knows what the item means.

case, p. 88-90.

Surely this testimony laid proper foundation for the question in both instances.

5. Because the trial justice premitted the witness Lyons to be asked if he knew to what extent the mercantile agency notification sheets of R. G. Dunn & Co. were published in New York City, on the ground that any evidence tending to show publication to any persons except those specifically named in the bill of particulars was incompetent and also because it had not been shown that witness had knowledge.

We reply—

a. The question went only to the extent of ascertaining whether the witness had knowledge, not what that knowledge was.

b. But in any case the persons named in the bill of particulars were :

1. All subscribers.
2. Many persons unknown to plaintiff.
3. Five persons specifically named.
4. Any persons whose names might afterwards come to plaintiffs' knowledge.

c. The persons to whom this paper is sent by R. G. Dunn & Co., is by them kept secret.

It is known to them and can not by any possibility be known to plaintiffs to any great extent.

All law is founded on reason and common sense.

To say that a plaintiff may not legally prove a wide and general publication of a printed newspaper such as this appears to be, without first ascertaining the names of all who saw it and collating them in his pleadings is neither reason nor common sense and we submit is not law.

The evidence was admissible.

6. Because the trial justice permitted the plaintiff, Joseph Patterson, to be asked what reasons were given by creditors of Emma Patterson for refusing to grant her credit. The defendants' objection was, that such testimony could only be given by such persons as refused credit. We reply, the only means of ascertaining a person's motives are—

- a. His own testimony.
- b. Evidence of his declarations.

Both these means are legitimate and primary. The value of the evidence regarding declarations is for the jury.

c. The declarations of a creditor engaged in demanding payment of his debtor are on that subject admissible as part of the *res geste*.

d. Whether the motives of the creditor were such as he stated them to his debtor to be or not, they furnish the best proof of his course of conduct towards the debtor.

e. But in any case they are legitimate on the subject of damages. by reason of the fact that they form part of the injury caused to the plaintiff as a consequence of the publication, for whether the publication was the cause of the demand for payment or not, it furnished a ground which the creditor could and did allege for demanding payment.

The question was legal and admissible.

7. Because the trial justice permitted the witness Joseph Patterson, to be asked how much falling off there was in the customers at the plaintiffs' store after the alleged publication. This was objected to by the defendants' as tending to prove special damage, when no special damage was alleged in the declaration. Inasmuch as the names of the particular customers who had withdrawn their custom had not been specified.

We reply that the law is that such specific allegation in the pleadings on that subject is not requisite, nor possible.

And also, that the omission, if objectionable, can be taken advantage of only by special demurrer, or where special demurrers are abolished, by motion.

Townsend on Libel and Slander, 595, and 6  
Hewitt v. Mason, 24 Howard's Practice  
Reports, 366.

Weatheral v. Clarkson, 12 Modern, 597.  
Clark v. Periam. 2 Atkinson, 33.

8. Because the trial justice directed the witness Henry E. Jepson, to answer whether he communicated the contents of a report of the matter in question to the New York house of R. G. Dun & Company after the witness had declined to answer on the ground that it would criminate him.

We reply there was no error in this ruling of the Court.

a. Because by the testimony it appears that the witness was not a member of that firm, case, p. 170.

b. That he was an employee of the firm. p. 170.

c. That he had received the report in question. p. 169.

d. There could be no criminal liability attaching to him for the act of communicating the contents of the report to his employers.

e. Even if so, and there was error in the ruling, such error would not inure to the plaintiffs' benefit inasmuch as it was a question of privilege which he alone could demand and insist upon and the grievance, if any, is between him and the judge, and not between the plaintiffs and the judge.

9. Because the trial justice permitted the witness Jepson to be asked whether the sheet in question was sent to all the subscribers of R. G. Dun & Company who subscribed therefor, to which the defendants objected on the ground that only those persons could be proven that were mentioned in the bill of particulars.

We reply, that the question was not subject to

legal objection, for the reason stated in article 9, subdivision 5, of this brief.

10. Because the Court admitted in evidence two copies of the Mercantile Agency Sheet which contained the matter complained of. The objections will be found in the assignment.

We reply.

a. At the time the papers were admitted it had been proven by witnesses that the paper issued by the defendants was a printed paper; that it was sent either by mail or messenger to all subscribers; that those subscribers were very large in number; that they lived in different States of the Union; that the paper was printed and issued by the firm of R. G. Dun & Company; that the plaintiffs were members of that firm; that they were so held out to the world by their procurement and with their knowledge; that a number of witnesses were familiar with the sheet and knew it to be published by the house in question; that many witnesses had seen the very sheet in question; that one of the sheets offered was the identical sheet seen by the witness Meyers, and which actuated him to make the demand for payment of his claim, which demand was the first one made.

b. The question whether the words were libellous *per se* or not, was a question for the jury and not for the Court.

See cases cited under Article VIII.

c. Whether libellous *per se* or not was not material, because the words were words written of the plaintiff in her business as a trader, and tended to injure her in her business.

Riding v. Smith, L. R. 1 Exchq' 91.

Evans v. Harries, H. M. & N. 251.

and cases cited under article IV.

d. The words were libellous *per se*.

Jorolamen v. Pomeroy, 2 Zab. 277.

e. The evidence then in clearly established the fact that the meaning attached to the words by the inuendoes in the declaration was correct.

f. The language complained of was not a privileged communication inasmuch as it was issued in a printed paper to all subscribers, without regard to the personal interest in any in her business.

See cases cited under art. V.

g. Evidence of special damage was not necessary to the admission of the paper, because the words were libellous *per se*.

h. The words were spoken of the plaintiff as a trader in her business and calculated to injure her in her business.

i. They were admissible as evidence of general damage, and finally special damage had been alleged in the declaration and abundantly proven.

11. This assignment is for a refusal to non-suit.

We reply :

a. The question of the legality of this ruling is covered by this brief as a whole.

b. The case made at that time, not only justified the ruling, but the evidence taken after that time corroborated and made stronger the evidence at that time in.

c. The Court will not reverse for refusal to non-suit, if it appear from the whole case that the verdict is right. It does so appear in this case.

12. The remaining exceptions, namely, from 12 to 24, inclusive, are all covered by the argument made in other parts of this brief, excepting Nos. 13, 19 and 23.

With regard to assignment thirteen, which was that a communication asked for by Leisberger & Weiss or Simon & Company and sent to them by the plaintiffs, would not be privileged if they had no interest in plaintiffs' affairs, must be taken in connection with what preceded and followed it in the charge, and when so taken is correct. See cases cited above.

With regard to assignment nineteen, which was that the justice being asked to charge that, if the jury believe that the defendants are not co-partners with R. G. Dun, their verdict must be in their favor provided they are satisfied that the defendants did not publish the notification sheet except in their connection with him as employees.

We reply :

That the Judge did not decline to charge as the exception alleges, but what the Judge in point of fact did say was, that he had spoken fully on the relations of the parties to, and their liabilities growing out of them, and declined to make a further charge on the subject. What he had said was that if they were partners, or if they allowed themselves to be held out to the world as partners, and the paper was issued and published by R. G. Dun & Company, then they would be responsible for the publication—which was right.

Assignment twenty-three, alleged a declination by the Judge, to charge that if the words were not libellous in themselves, and the communication of the words by Leisberger & Weiss was without authority of the defendants, then the defendants were not lia-

ble in this action. The refusal of the Court to charge this request as proffered, was entirely legal. The Court had already carefully informed the jury of the law on the subject of the dissemination by Leisberger & Weiss of the statement contained in the defendants' paper, and had directed the jury that where matter, libellous in itself or actionable by reason of the circumstances of the case, was issued by the defendants to persons not interested in the plaintiffs, that then they were responsible for the effect of the statement, when communicated to others by those to whom they had sent them.

Finally. Here was a publication which was untrue, the natural consequence of which was, and the actual effect of which proved to be, the ruin of the plaintiff and which proved to be injurious to her, not only financially, but also in the matter of her health. It is admitted by the defendants to have been the result of a mistake made by them. If the verdict could have been sustained on no higher ground, it certainly could be sustained on the ground that of two innocent parties he that is negligent must suffer, but we submit that not only on this ground, but on all the grounds apparent in the case, the verdict was in accordance with law and ought to be sustained.

We submit therefore that there is no error apparent on the record sufficient to justify the Court in reversing the judgment.

WILLIAM PINTARD,  
FLAVEL MCGEE.

## N. J. Court of Errors and Appeals.

ARTHUR J. KING, <i>et al.</i> , <i>Plaintiffs in Error,</i>	} <i>On Writ of Error.</i>	10
<i>vs.</i>		
EMMA PATTERSON, <i>et al.</i> , <i>Defendants in Error.</i>		

BRIEF OF P. WOODRUFF, FOR PLAINTIFFS IN ERROR.	20
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It has been stipulated that the bill of exceptions shall be regarded as including the testimony as taken in the trial of said cause, as the same appears in the printed book prepared for the argument in this Court, and also the charge of the judge therein contained, and also such amendments to the declaration as appear by the record to have been allowed by the Court, although not formally written out. 30

Also, that if it shall appear that there are any errors or misprints in the printed book as to testimony or charge, they may be corrected by reference to the official stenographer's notes.

1.

It is contended first, that the Mercantile Agency Notification Sheet, referred to in the evidence and pleadings, is a privileged communication. 40

This question will be more fully argued by other counsel. It is sufficient here to refer to the following cases :

- Ormsby *vs.* Douglass, 37 N. Y. 477 ;  
 Henry *vs.* Dun, Mercantile Agency Cases, page 313 ;  
 Billings *vs.* Russell, Mercantile Agency Cases ;  
 Also, 5th Boston Law Reports, N. S. page 699 ;  
 Commonwealth *vs.* Stacey, Mer. Agency Cases, 270 ;  
 Trussell *vs.* Scarlett, 18th Federal Reporter, (Dr.  
 10 Wharton's note,) page 214 ;  
 Erber *vs.* Dun, 12th Federal Reporter, 526 ;  
 Locke *vs.* Bradstreet, 22d Federal Reporter, 771 ;  
 McDougal *vs.* Claridge, 1 Campbell, 267 ;  
 Weatherstone *vs.* Hawkins, 1 Tenn. Rep. 110 ;  
 Edmonson *vs.* Stephenson, Buller N. Prins, 8 ;  
 Herver *vs.* Dowson, Buller N. Prins, 8 ;  
 Delaney *vs.* Jones, 4 Espinasse, 191 ;  
 Wright *vs.* Woodgate, 2 C. M. & R. 573 ;  
 Somerville *vs.* Hawkins, 10 C. B. 538 ;  
 20 Toogood *vs.* Sprying, 1 C. M. & R. 181 ;  
 Davis *vs.* Snead, L. R. 5 Q. B. 611 ;  
 Wallar *vs.* Loch, 45 L. T. R. 243 ;  
 Laughton *vs.* The Bishop, &c., L. R. 4 P. C. 504 ;  
 Bank *vs.* Henty, L. R. 7 Appeal, 741 ;  
 McIntyre *vs.* McBean, 13 U. C. Q. B. 540 ;  
 Lawless *vs.* Cotton Co., L. R. 4 Q. B. 261 ;  
 Fuiden *vs.* Westlake, 1 M. & M. 461 ;  
 Thompson *vs.* Dashwood, L. R. 11 Q. B. D. 43 ;  
 P. W. & B. R. R. Co. *vs.* Quigley, 21 How. U. S. 202 ;  
 30 White *vs.* Nichols, 3 How. U. S. 266 ;  
 Van Wyck *vs.* Aspinwall, 17 N. Y. 191 ;  
 Brow *vs.* Hathaway, 13 Allen, 239 ;  
 Hatch *vs.* Lane, 105 Mass. 394 ;  
 Trenton Ins. Co. *vs.* Perrine, 3 Zab. 414 ;  
 Briggs *vs.* Garret, 21 Reporter, 406 ;  
 Hart *vs.* Cumpack, L. R. 4 P. C. 439 ;  
 Kent *vs.* Bougartz, 20 Reporter, 570 ;  
 1 Starkie on Slander, 292 ;  
 Odgers on Libel and Sl. 196, 209, 238, 264 ;  
 40 Addison on Torts, Sects. 1090, 1091, 1092.

Second, it is contended that the plaintiffs in error are not copartners of Robert G. Dun, and consequently the rulings of the judge below in respect to copartnership were erroneous.

The defendants in error called both the plaintiffs in error, Mr. King and Mr. Douglas, as their witnesses. Both Mr. King and Mr. Douglas testified that they had no proprietary interest in Mr. Dun's business, and that they were paid by him for their services a salary. Mr. King testified that he was constructively a partner, but had no ownership of or control over the business. 10

The contract between Messrs. Dun, Wiman, Douglas and King, is appended to the record, and of course shows what the exact relationship between the parties was.

It is contended that it is not a contract of copartnership, although in it all persons other than Mr. Dun are termed salaried partners. Mr. Dun had the right to discharge any one of them. They had no ownership of the business. They had no right to participate in the profits as such. 20

Hargrave *vs.* Conroy, 4 C. E. Green, 281 ;  
 Smith *vs.* Perry, 5 Dutcher, 74 ;  
 Voorhis *vs.* Jones, 5 Dutcher, 233 ;  
 Waugh *vs.* Carver, Smith's Leading Cases, Note.

The judge held in this case that if the plaintiffs in error had held themselves out to the world as partners, they could be held responsible as such both in contract and in tort. We are unable to find any cases sustaining the latter part of this ruling, and persons are only held responsible in actions on contract in such cases upon the ground of estoppel. 30

That doctrine could not properly be extended in actions of tort beyond holding the parties responsible for the costs of the action, for no credit had been extended to them by reason of such holding out to any greater extent than this. 40

If this position be correct the refusal of the Court to charge as to the effect of the agreement when requested so to do, was clearly error.

*Roe vs. The State*, 16 Vroom, 49.

And it was also error to admit Wilson's copartnership directory. As evidence of copartnership for the plaintiffs in error, both testified that they had not caused the statement therein contained of the names of the firm  
10 of R. G. Dun & Co. to be printed. The rule as laid down in the following cases undoubtedly is that the acts or declarations of one person is no evidence as against others of a partnership between him and them.

*Gulick vs. Gulick*, 2 J. S. Green, 580 ;

*Taylor vs. Webster*, 10 Vroom, 102 ;

*Whitney vs. Ferris*, 10 Johnson, 66.

20

3.

It is contended that the judge erred in permitting any damages to be given by the jury except nominal damages.

The first count in the declaration alleges that the words published meant "to charge her, the said Emma Patterson, with having placed a chattel mortgage upon her stock for the purpose of defrauding the creditors of her, the said plaintiff."

30 There was no proof of any kind even offered at the trial that the publication meant what was alleged in this count.

In *Herrick vs. Feder*, 14th Vroom, page 24, the Supreme Court said that it was very doubtful whether amendments ought to be permitted when the case has progressed as far as the stage of trial. The judge on the trial permitted the defendants in error to amend their declaration by inserting the allegation that certain creditors had refused to grant Emma Patterson further credit because of the  
40 alleged publication.

As to the first count, we contend that as no proof was offered to sustain it, and that general damages could not be given, by reason of it in the case, reference is made to the following cases:

Capital and Counties Bank *vs.* Henty, 5 C. P. D. 514  
 Ruel *vs.* Tapnell, 43 L. T. 507;  
 Mulligan *vs.* Cole, 10 Q. B. 549.

Which clearly hold that the plaintiff is bound by the meaning given to the words in the innuendo of the declaration.

10

As to the second count the words were not libelous  
*per se.* *Crigebury & Bradstreet 35 Hun 212*

Woodruff *vs.* Bradstreet, 35th Hun. 16;  
 Newbold *vs.* Bradstreet, 57 Md. 48;  
 Davis *vs.* Flagg, 8th Stewart, 491;  
 Odgers, Libel and Slander, 289.

Special damage which, the words not being libelous, *per se*, were the only damage recoverable, were not properly alleged or proved.

20

They were not properly alleged, first, because there was no time mentioned in the declaration as amended when credit was refused.

Second. There were no circumstances or particulars surrounding or connected with such refusal given.

Third. There was no averment of previous good standing with the particular creditors whose names were inserted in the amended declaration.

30

Odgers, Libel and Slander, 313;

“ “ “ 317;

Dixon *vs.* Smith, 5 H. & N. 450;

Ryerson *vs.* Marsellis, 1st Harr. 450;

Trenton Ins. Co. *vs.* Perrine, 3 Zab. 402;

Newbold *vs.* Bradstreet, 57 Md. 38;

Goldstern *vs.* Foss, 4 Bing. 489.

Kelly *vs.* Partington, 5th Barn. & Ad. 645.

It appears by the evidence in the cause that all of the persons who refused credit to the defendants in error,

40

before they refused such credit, convinced themselves that Mrs. Patterson had not given the chattel mortgage in question.

It has been held that special damage cannot be predicated upon the act of one who wholly disbelieves the alleged injurious statement.

Terwilliger *vs.* Wands, 17 N. Y. 57 ;

Wilson *vs.* Goit, 17 N. Y. 445 ;

Anonymous, 60 N. Y. 262.

10

## 4.

There was no evidence of publication to any of the persons named in the bill of particulars.

It is contended that where a bill of particulars has been, given publication to the persons named in the bill of particulars must be precisely proved, and direct publication by the defendants or their agents to such persons must be proved.

Chapin *vs.* White, 102 Mass. 139 ;

Downs *vs.* Hawley, 112 Mass. 237 ;

Perry *vs.* Porter, 124 Mass. 338 ;

Clark *vs.* Mensell, 6 Metc. 373 ;

Holland *vs.* Hopkins, 3 Esp. 163 ;

Wade *vs.* Beardsley, 4 Esp. 7 ;

Osborn *vs.* Foster, 22 Mich. 209.

No such evidence was adduced in this case, nor was there evidence proving publication to any one who acted upon it in respect to withdrawing credit from Mrs. Patterson.

30

The plaintiffs in error are not to be held liable for the act of others in publishing the sheet to her creditors.

2 Add. on Torts, Sec. 1128, and cases cited ;

Parkins *vs.* Scott, 1 H. & C. 153 ;

Terwilliger *vs.* Wands, 17 N. Y. 54 ;

Stevens *vs.* Hartwell, 11 Metc. 542 ;

40

Hastings *vs.* Stetson, 126 Mass. 329.

7.

5.

There was error in permitting the witness, Joseph Patterson, to testify as to the reasons given by his wife's creditors for refusing to trust her.

These could only be proved by such creditors.

*Newbold vs. Bradstreet*, 57 Md. 38.

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6.

There was error in the refusal to nonsuit—

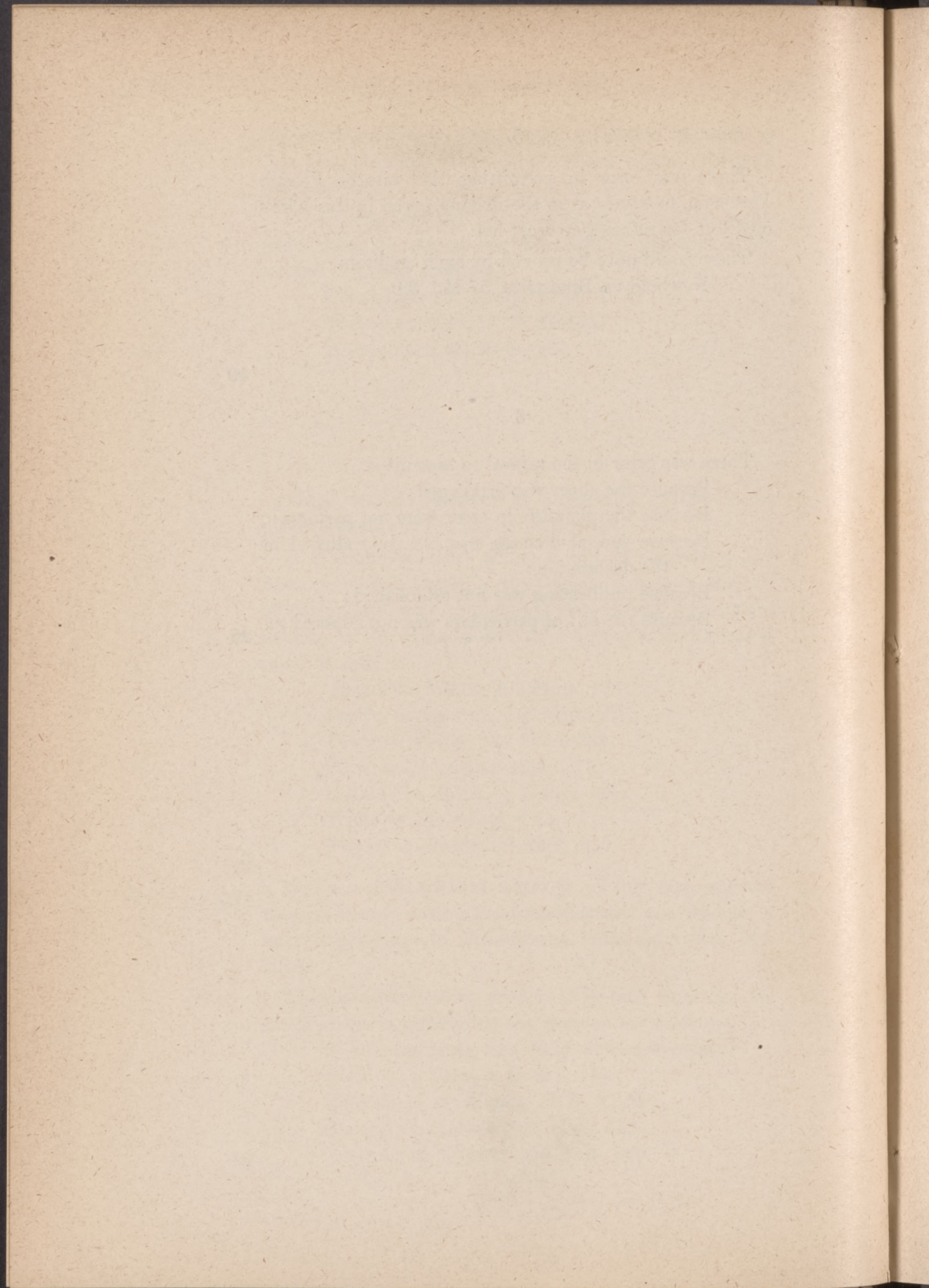
Because the sheet was privileged ;

Because the plaintiffs in error were not partners ;

Because special damage was not duly alleged in  
the declaration ;

Because publication was not established ;

Because the bill of particulars was not adhered to. 20



## N. J. Court of Errors and Appeals.

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ARTHUR J. KING, *et al.*,  
*Plaintiffs in Error,*

*vs.*

EMMA PATTERSON, *et al.*,  
*Defendants in Error.*

---

*Writ of Error.*

NEW JERSEY, *ss.*:

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\* } \*  
L. S.  
\* } \*

The State of New Jersey, to the Chief Justice  
and other Justices of our Supreme Court,  
Greeting :

Because in the record and proceedings, and also in the giving of judgment in a certain plaint which was in our said Supreme Court of Judicature before you, between Emma Patterson and Joseph Patterson, her husband, plaintiffs, and Arthur J. King and Robert Dun Douglass, defendants, of a plea of trespass on the case, manifest error hath intervened to the great damage of the said Arthur J. King and Robert Dun Douglass, as it is said ; 30

We being willing that speedy justice should be done to the parties aforesaid in this behalf, do command you distinctly and openly to send, under your seal, the record and proceedings aforesaid, with all things touching and concerning the same, to our Justices of our Court of Errors and Appeals in the last resort in all causes, on the seventeenth day of April next, together with this writ, that the record and proceedings aforesaid being 40

inspected, we may further cause to be done thereupon what of right and according to law ought to be done.

Witness, our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the twenty-ninth day of March, in the year of our Lord one thousand eight hundred and eighty-six.

HENRY C. KELSEY, *Clerk.*

10 PHILEMON WOODRUFF, *Attorney.*

## New Jersey Supreme Court.

EMMA PATTERSON, <i>et al.</i> ,	}	<i>In Case.</i>
		<i>Circuit Record 10</i>
<i>vs.</i>		<i>and Postea.</i>
ARTHUR J. KING, <i>et al.</i> ,		

PLEAS BEFORE THE JUSTICES OF THE SUPREME  
COURT OF THE STATE OF NEW JERSEY,  
OF FIFTEENTH DAY OF JANUARY, A.D.  
EIGHTEEN HUNDRED AND EIGHTY-FIVE.

Witness, MERCER BEASLEY, Esq., *Chief Justice.* 20

BENJ. F. LEE, *Clerk.*

WILLIAM PINTARD, *Attorney for Plaintiffs.*

PHILEMON WOODRUFF, *Attorney for Defendants.*

MONMOUTH COUNTY, *ss:*

Arthur J. King and Robert Dun Douglass, the defendants in this suit, were summoned to answer unto Emma Patterson and Joseph Patterson, her husband, the plaintiffs therein, of a plea of trespass on the case, and thereupon the said plaintiffs by William Pintard, their attorney, complain: 30

For that whereas, the said plaintiff, Emma Patterson, before and at the time of committing the grievances by the said defendants hereinafter mentioned, had been and was a retail dealer in clothing at Red Bank, in the county of Monmouth and State of New Jersey, and had used, exercised and carried on the said business of retail clothing dealer with great credit and reputation, and the said plaintiff, Emma Patterson, had always behaved and 40

conducted herself and her said business therein with care and judgment, honesty and integrity, at Red Bank, to wit, at Freehold, in the county of Monmouth aforesaid, and had enjoyed and was enjoying great credit and reputation in the business community of New York and New Jersey, to wit, at Freehold, in the county of Monmouth aforesaid.

- Yet the said defendants, well knowing the premises and contriving to falsely and fraudulently, and intending
- 10 to injure the said plaintiff, Emma Patterson, in her said credit and reputation and also in her said business, and to cause it to be suspected and believed that the said plaintiff, Emma Patterson, had conducted herself improperly in relation to her said business of retail clothing dealer aforesaid; and had been guilty of the misconduct hereinafter mentioned to have been charged and imputed to her by the said defendants, and to vex, impoverish and wholly ruin the said plaintiff, Emma Patterson, and to bring her into public contempt and ridicule, and to
- 20 render her unworthy of credit heretofore, to wit, on the fifth day of November, in the year of our Lord one thousand eight hundred and eighty-four, at New York, to wit, at Freehold, in the county of Monmouth aforesaid, wrongfully, maliciously and injuriously composed and published, and caused and procured to be composed and published in a certain newspaper or pamphlet called the "Mercantile Agency Notification Sheet," to wit, at Freehold, in the county of Monmouth aforesaid, and elsewhere, a certain false, scandalous, malicious and defamatory libel of and concerning the said plaintiff, Emma
- 30 Patterson, and of and concerning her in the way of and in respect to her said business as a retail clothing dealer aforesaid, containing among other things false, scandalous and defamatory matter following, of and concerning the said plaintiff, Emma Patterson, and of and concerning her said business, that is to say, "Red Bank," meaning the said Red Bank at Monmouth county aforesaid; "Patterson Emma," meaning the said plaintiff, Emma Patterson; "chtl. mtge." meaning chattel mortgage;
- 4) "\$1,385," meaning the sum of one thousand three hun-

dred and eighty five dollars; "clothing," meaning the clothing business carried on by the said plaintiff, Emma Patterson; the said "Red Bank, Patterson Emma, chtl. mtge., \$1,385, clothing," meaning that she, said plaintiff, Emma Patterson, had placed a chattel mortgage upon her stock of clothing in her place of business at Red Bank, Monmouth county, New Jersey aforesaid, for the sum of one thousand three hundred and eighty-five dollars.

And the said plaintiffs say that said words were used 10  
 in a defamatory sense, meaning thereby to charge the said plaintiff, Emma Patterson, with having placed a chattel mortgage upon her stock of clothing in her place of business in Red Bank, Monmouth county aforesaid, and to bring said plaintiff, Emma Patterson, into public ridicule and contempt, and to charge her the said plaintiff, Emma Patterson, with having placed said chattel mortgage upon her stock of clothing as aforesaid, for the purpose of defrauding the creditors of her the said plaintiff, Emma Patterson, and for the purpose of weakening, 20  
 injuring and completely destroying the good name, fame and credit of the said plaintiff, Emma Patterson, which she had theretofore enjoyed in carrying on her business as a retail dealer aforesaid, at Red Bank, to wit, at Freehold, in the county of Monmouth aforesaid.

By means of which said premises the said plaintiff, Emma Patterson, hath been and is greatly prejudiced in her credit and reputation aforesaid, and brought into public scandal, infamy and disgrace, and is suspected to have been guilty of the misconduct so as aforesaid to 30  
 have been charged and imputed to her, and to have acted fraudulently and dishonestly in the way of her said business, and to have conducted herself fraudulently and dishonestly in relation to her said creditors; and has been greatly vexed, harassed, oppressed and impoverished, and has also lost and been deprived of divers great gains and profits which would otherwise have arisen and accrued to her in said business, and hath been and is otherwise much injured and damnified therein at Red 40

Bank, to wit, at Freehold, in the county of Monmouth aforesaid.

By means of the publishing of which said several false, scandalous, malicious and defamatory statements by the said defendants as aforesaid, the said plaintiff, Emma Patterson, became and was greatly troubled and anxious and affected in her peace of mind, so much so and on account of the troubles and perplexities and litigation arising from the premises, that she became very sick and  
 10 infirm in her health, and so remained for a long space of time, to wit, for the space of three months, and incurred much expense for the care and attendance made necessary on account of said trouble and sickness, and the care made necessary by reason of her said sickness, and incurred expense incident thereto, and in payment of the bills of physicians and for medicine and other necessities, to the amount of a large sum of money, to wit, to the sum of ten thousand dollars, at Red Bank, to wit, at Freehold, in the county of Monmouth aforesaid.

20 And the said plaintiffs further say that the said defendants afterwards, to wit, on the day and year aforesaid, at the city of New York, to wit, at Red Bank, in the county of Monmouth aforesaid, were owners of a certain mercantile newspaper, entitled the "Mercantile Agency Notification Sheet," in which amongst other things was printed the names of various business people throughout the United States, in the different States, who had given mortgages on their lands or goods and against whom judgments had been recovered, which newspaper circulated extensively throughout all the States of the United  
 30 States, and especially throughout the States of New York, Pennsylvania and New Jersey, and amongst the people of whom the said Emma Patterson was accustomed to buy goods.

The said plaintiffs further say that on the same day and year last aforesaid, said Emma Patterson then was, and for a long time prior thereto had been, a dealer in clothing at Red Bank, in the county of Monmouth aforesaid, and there kept and then did keep a clothing store  
 40 and enjoyed a good reputation amongst her customers,

and a good financial credit amongst the merchants of whom she was in the habit of purchasing goods, and was carrying on a prosperous and successful business as a clothing dealer at Red Bank aforesaid.

And these plaintiffs further say that the said defendants being such owners of said newspaper, entitled the "Mercantile Agency Notification Sheet" as aforesaid, further contriving and intending to injure the credit of the said Emma Patterson as aforesaid, heretofore, to wit, on the day and year last aforesaid, at New York, to wit, at Freehold aforesaid, falsely, wickedly and maliciously did publish in said newspaper a certain other false, scandalous, malicious and defamatory libel of and concerning the said plaintiff, Emma Patterson, containing amongst other things the false, scandalous, malicious, defamatory and libellous matter following, namely: On the second page of said newspaper under the head of Record Items, and under the head of New Jersey, meaning the State of New Jersey, these words, "Red Bank," meaning Red Bank in the county of Monmouth, in the State of New Jersey aforesaid; "Patterson Emma," meaning the plaintiff, Emma Patterson; "chtl. mtge. \$1,385," meaning chattel mortgage for one thousand three hundred and eighty-five dollars, "clothing," meaning that the business of the said plaintiff, Emma Patterson, was that of a dealer in clothing.

The whole of said paragraph meaning that the said plaintiff, Emma Patterson, of Red Bank, New Jersey, had placed upon her chattels at that place a chattel mortgage for the amount of one thousand three hundred and eighty-five dollars, and that the said plaintiff, Emma Patterson, was a dealer in clothing.

Whereas, in truth and in fact, the said Emma Patterson had not at that time or any other time, placed upon her chattels at Red Bank or elsewhere, a mortgage for one thousand three hundred and eighty-five dollars or any other sum, and said statement was wholly and utterly and completely false, and untrue in every respect.

By means whereof the financial credit of the said plaintiff, Emma Patterson, has been and is entirely ruined,

and all her creditors, afterwards, to wit, on the day and year and aforesaid, at Freehold aforesaid, in consequence thereof demanded immediate payment from the said plaintiff, Emma Patterson, of all moneys owing by her to them; and the said Emma Patterson was unable further to purchase goods on credit, and her business was thereby and as a direct consequence of said libel utterly ruined, and her good name, financially, and her credit was destroyed with and amongst all those with whom she had

10 been in the habit of dealing, insomuch that the merchants with whom she had been dealing hitherto wholly refused and still do refuse to sell goods to her on credit or to trust her for any sum whatever, and by reason thereof she hath lost her business and her means of livelihood therefrom, and hath become greatly harassed and impoverished thereby, and hath been thereby greatly disturbed in mind and rendered anxious and unhappy, so much so that her bodily health has been affected thereby, and she has been thereby rendered sick and infirm in body and

20 hath so remained for a long space of time, to wit, from thence hitherto, and hath incurred much expense for physicians' bills and medicines and other necessaries, and hath been put to much loss of time and expense in litigation, amounting in all to a large sum of money, to wit, to the sum of ten thousand dollars, at Red Bank, to wit, at Freehold, in the county of Monmouth aforesaid. To the damage of the said plaintiffs ten thousand dollars, and therefore they bring their suit, &c.

And the said Arthur J. King and Robert Dun Doug-

30 lass, by Philemon Woodruff, their attorney, come and defend the wrong and injury, when, &c., and say they are not guilty of the said supposed grievances laid to their charge or any or either of them, in manner and form as the said plaintiffs have thereof complained against them. And of this the said defendants put themselves upon the country, and the plaintiffs do the like.

I, BENJ. F. LEE, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true transcript of the pleadings in above stated cause, as the same remains on file in my office.

\* — \*      In testimony whereof, I have hereto set my  
 { L. S. }      hand and the seal of said Court, at Trenton, this  
 \* — \*      nineteenth day of September, A.D. eighteen  
 hundred and eighty-five.

BENJ. F. LEE, *Clerk.*      10

## New Jersey Supreme Court.

	ARTHUR J. KING, <i>et al.</i> , <i>ads.</i> EMMA PATTERSON, <i>et al.</i>	} } }	<i>In Case.</i> <i>Notice.</i>
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Please take notice that on Friday, the 25th day of September inst., at the Court House in the city of New Brunswick, at the hour of ten A.M., I shall apply to his Honor EDWARD W. SCUDDER, one of the Justices of the above Court, for an order directing you to furnish me with a bill of particulars in the above cause, containing a statement of the name of each and every person to whom you intend to prove, on the trial of the above cause, any publication of the matters set forth in your declaration was made by the defendants or either of them.

Very respectfully,

PHILEMON WOODRUFF,  
*Attorney for Defendants.*

Dated September 19, 1885.

30 To WILLIAM PINTARI, Esq., *Attorney for Plaintiffs.*

# New Jersey Supreme Court.

JUNE TERM, 1885.

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ARTHUR J. KING, *et al.*,

*ads.*

EMMA PATTERSON, *et al.*

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*In Case.*

*Rule.*

10.

It appearing to the Court that due notice of a motion to be made in the above cause for an order "directing the plaintiffs' attorney to furnish the defendants' attorney with a bill of particulars, containing a statement of the name of each and every person to whom the plaintiffs' attorney intends to prove, on the trial of said cause, any publication of the alleged libellous matter set forth in his declaration was made by the defendants or either of them," has been duly served upon the attorney of the plaintiffs; and the said plaintiffs having appeared by their attorney, William Pintard, Esq., and the said defendants having appeared by their attorney, Philemon Woodruff, and argument having been duly had upon the merits of said motion, and briefs having been duly submitted,

It is, on this ninth day of October, A.D. eighteen hundred and eighty-five, ordered that said motion be granted, and that the plaintiffs' attorney, within ten days after the date of the service of a copy hereof upon him, serve upon the attorney of the defendants a bill of particulars containing a statement of the name of each and every person to whom he intends to prove, on the trial of said cause, any publication of the alleged libellous matters set forth in the plaintiffs' declaration was made by the defendants or either of them.

Let this rule be entered.

E. W. SCUDDER,  
*Justice Supt. Ct.*

Entered October 10, 1885.

On motion of PHILEMON WOODRUFF,  
*Attorney of Defendants.*

40

## New Jersey Supreme Court.

EMMA PATTERSON, <i>et al.</i> , <div style="text-align: center; padding: 5px 0 5px 40px;"><i>vs.</i></div> ARTHUR J. KING, <i>et al.</i>	}	<i>In Case.</i> <i>Bill of</i> <i>Particulars.</i>
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SIR: Please to take notice, that on the trial of the above entitled cause, the plaintiffs intend to prove that publication of the libellous matter set forth in the plaintiffs' declaration in said cause, was made by the defendants to all their subscribers and to many persons whose names the plaintiffs do not know, and specially that it was made to the following persons, namely:

20 Daniel Meyers, Philadelphia, Pa.; Max B. Brummer, New York city; Alexander M. Oppenheimer, Philadelphia, Pa.; Emanuel Katz, Philadelphia, Pa.; Charles Lyons, New York city.

This statement is made in obedience to an order allowed by the Honorable E. W. SCUDDER, a Justice of said Court, dated the ninth day of October instant, but is made under protest, and if hereafter, before or at the trial, other names come to the knowledge of the plaintiffs, they will insist on their right to make proof thereof, notwithstanding this bill of particulars.

30

Yours respectfully,

WM. PINTARD,  
*Plaintiffs' Attorney.*

Dated 16th October, 1885.

To PHILEMON WOODRUFF, Esq., *Defendants' Attorney.*

## New Jersey Supreme Court.

ARTHUR J. KING, <i>et al.</i> , <div style="text-align: center; padding: 2px 0;"><i>ads.</i></div> EMMA PATTERSON, <i>et al.</i>	}	<i>In Case.</i> <i>Interrogatories</i>	10
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To WILLIAM PINTARD, Esq., *Attorney of Plaintiffs* :

Please take notice that I demand that, within fifteen days from the date of the service hereof, you cause answers to the following interrogatories to be made under oath of the plaintiffs, and that you cause the same to be served upon me within said time: 20

*First Interrogatory.* What person or persons, if any, refused to grant credit to the plaintiff, Emma Patterson, by reason of the publication of the alleged libellous matter set forth in the declaration in this cause, and where does or do such person or persons reside?

*Second Interrogatory.* To what persons do you intend to prove, on the trial of this cause, were the alleged libellous words published, and how were they published?

*Third Interrogatory.* Was the clothing business of 30 Emma Patterson actually carried on by herself and by her individual efforts, or by her husband as her agent?

*Fourth Interrogatory.* If said business was carried on by her husband as her agent, did he receive money consideration for his services from said Emma Patterson, and if not what did he receive from her for such services?

*Fifth Interrogatory.* In what city or town, if any, were the alleged libellous words published? 40

*Sixth Interrogatory.* Were or were not the alleged libellous words, if published by the defendants, published in the regular course of their business as a mercantile agency ; and if published in such regular course of business, did the defendants communicate the alleged libellous words to any persons other than subscribers to said agency, and if so to whom ?

10 *Seventh Interrogatory.* What person or persons, if any, refused to continue any credit which they had formerly been accustomed to give said Emma Patterson by reason of the alleged libellous words, and where does or do such person or persons reside, and does or do such person or persons refuse to renew such credit ?

*Eighth Interrogatory.* How much profit was made in said clothing business during the six months immediately preceding the alleged publication, and how much profit was made in said business during the succeeding six months ?

20

Very respectfully,

PHILEMON WOODRUFF,

*Attorney of Defendants.*

Dated October 1st, 1885.

## New Jersey Supreme Court.

EMMA PATTERSON, <i>et al.</i> ,	}	<i>Plaintiffs.</i>	<i>In Case.</i>
<i>vs.</i>		<i>Defendants.</i>	<i>Answers to</i>
ARTHUR J. KING, <i>et al.</i> ,			10 <i>Interrogatories</i>

To PHILEMON WOODRUFF, Esq., *Att'y of Defendants* :

Please to take notice, that the following are answers to the interrogatories served upon me on the second day of October, A.D. 1885 :

*Answer to First Interrogatory.* Daniel Meyers, Philadelphia, Pa. ; Alexander M. Oppenheimer, Philadelphia, Pa. ; Emanuel Katz, Philadelphia, Pa. ; Max B. Brummer, New York City ; A. Eschelbacher, New York City. 20

*Answer to Second Interrogatory.* Daniel Meyers, Max B. Brummer, Alexander M. Oppenheimer, Emanuel Katz, Charles Lyons, and any others whose names the plaintiffs may ascertain at or before the trial.

And the alleged libellous words were published to the persons above named by said persons reading or hearing read the said libel in the "Mercantile Agency Notification Sheet," of the issue of November 5th, 1884, a newspaper printed and published by said defendants. 30

*Answer to Third Interrogatory.* The clothing business was carried on by Emma Patterson herself, in her own name, assisted by her husband.

*Answer to Fourth Interrogatory.* Said business was not carried on by her husband, as her agent.

*Answer to Fifth Interrogatory.* In New York City, Philadelphia City, and the town of Red Bank, New Jer- 40

sey, and many other places all over the United States, which the plaintiffs are not able to specify, but which they claim the right to specify and prove on the trial, if they shall then be able to do so.

*Answer to Sixth Interrogatory.* Whether the libel was published in the regular course of business by the defendants, and whether it was communicated by the defendants to other persons than subscribers, the plaintiffs have no means of knowing and cannot answer, but they  
 10 know and will prove on the trial that the libellous words were published to and read by the persons named in the above answer to the second interrogatory, and to many others whose names they are not now able to specify; and that the paper containing them was a weekly or monthly publication, and has a large circulation throughout the United States, and especially in the States of New York, New Jersey and Pennsylvania, which are the States where the said Emma Patterson bought and sold in the conduct of her said business; and they will further  
 20 prove that said persons hereinabove named, or some of them, were not at that time subscribers to said paper.

*Answer to Seventh Interrogatory.* Daniel Myers, Philadelphia, Pa.; Alexander M. Oppenheimer, Philadelphia, Pa.; Emanuel Katz, Philadelphia, Pa.; Max B. Brummer, New York City; A. Eschelbacher, New York City, and said persons still refuse to give credit to Emma Patterson.

*Answer to Eighth Interrogatory.* The net profit over  
 30 and above all expenses and deductions made in said clothing business during the six months immediately preceding the said publication, was \$646.60; and the net profits, similarly calculated, made in said clothing business during the succeeding six months, was \$136.18

Dated 13 October, 1885.

WILLIAM PINTARD,  
*Plaintiffs' Attorney.*

STATE OF NEW JERSEY, }  
 COUNTY OF HUDSON, } ss:

Joseph Patterson, of full age, being duly sworn, on his oath saith, that he is one of the plaintiffs named in the suit in which the foregoing answers to interrogatories are made, and he saith that he is familiar with the facts of the case, and that the facts set out in said answers, and that the statements made in said answers, are true to the best of his knowledge and as he verily believes.

JOSEPH PATTERSON.

10

Sworn and subscribed before me, this }  
 13th day of October, A.D. 1885, }

BENJ. J. DOWNER,

*Notary Public of N. J.*

## Monmouth County Circuit Court.

DECEMBER 7TH, 1885.

10	EMMA PATTERSON, <i>et al.</i> , <i>vs.</i> ARTHUR J. KING, <i>et al.</i>	}	<i>In Case.</i>
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For Plaintiffs, PINTARD and MCGEE.

For Defendants, P. WOODRUFF and WAGNER.

Mr. PINTARD opened for the plaintiffs.

Mr. PINTARD read the declaration, and also the deposition of Emma Patterson, as follows :

20 **Emma Patterson**, a witness produced on the part of the plaintiffs, being duly sworn according to law, on her oath saith :

I am thirty-four years old ; I am the wife of Joseph Patterson ; have been married to him nearly sixteen years ; I live in Red Bank now ; have lived here four years ; I have transacted business—the clothing business in Red Bank—in my own name for the past four years ; I ceased transacting business in my own name about a year ago the twelfth of December ; the business was  
 30 in my name here because my money started it ; I have called to the store to assist at times, and I have always helped Mr. Patterson with his books in taking stock ; Mr. Patterson assisted me in conducting the business in the store.

(Paper being shown witness.) I have seen the paper ; it is the Mercantile Agency Notification Sheet, of the date of Wednesday, November fifth, 1884.

Paper marked Exhibit A.

I have seen in that sheet under the head of Record  
 40 Items, the words, “ Red Bank, Patterson Emma, chtl.

mtge., \$1,385, clothing." The Emma Patterson mentioned there was meant for me, I suppose; there was no other Emma Patterson doing business here at that time, and no one by that name in the clothing business; I don't know any one in the place of that name; I had not at that time or at any time previous to that time, had any chattel mortgage on my stock of clothing in my store in Red Bank; the effect of that publication was to break up my business altogether; I mean the publication of the Mercantile Agency Notification Sheet, mentioned by me 10 heretofore; immediately after that publication of that sheet nearly every creditor came down to see me and acted as if they were wild; they stated that they had heard that I had placed a chattel mortgage on my stock and demanded immediate payment of their claims; Mr. Meyers, the largest creditor, said that if I had placed a chattel mortgage on my stock he would drive me to the wall, and he demanded that I give him a chattel mortgage to secure him, and I did so for four thousand and three dollars. 20

I, afterwards, when my other creditors began to push, gave him a bill of sale of my stock; my lawyer, Charles H. Trafford, told me it was the best thing I could do then; previous to that time no one whatever had ever brought suit against me while I have been engaged in business; I mean by that, previous to the time of that publication; afterwards several creditors brought suit against me; before that publication I was able to get all the credit I wanted in New York and Philadelphia and other places; I have not been able since to get credit. 30

Q Did the publication of the Mercantile Agency Notification Sheet of November 5, 1884, affect, in any way, your personal health, or did it not?

Objection is made to the question by the defendants' attorney as incompetent, on the ground that injury to health cannot be shown in this cause as it is an action for libel.

A Yes, sir; seriously.

Q Please state in what way?

Same objection.

A It brought on nervous prostration ; at least that is what my physician, Dr. J. H. Patterson, terms it.

Q How long were you ill with that nervous prostration ?

Same objection.

A From that time to this, to a greater or less extent ; sometimes I have been confined to my bed for several weeks at a time ; I am in bed now while this testimony is being taken ; I have not been out of my bed at any  
10 time for more than twenty minutes for the past two weeks ; I have been confined to my bed most of the time since—before Thanksgiving ; for the past year I have not been able to ride more than three miles at a time, and then never alone, on account of these nervous, sinking turns.

Q Was, then, the statement in the Mercantile Agency Notification Sheet of November 5, 1884, to the effect that you had placed a chattel mortgage on your stock of clothing in Red Bank for the sum of \$1,385, true or false ?

20 A It was false.

I am not in business now in my own name ; Daniel Meyers, of Philadelphia, carries on the business formerly owned by me in Red Bank ; he has carried it on since the 12th of December, 1884, the date on which I made the bill of sale.

*Cross-examined :*

I invested nineteen hundred dollars in the business when I first started—my own money ; the details of the  
30 business were looked after by Mr. Patterson ; he received no stated salary ; we jointly lived from the profits of the business ; I am one of the plaintiffs to this action ; I don't know what the assets of the business were in November, 1884.

Objected to as not called for in direct examination.

I don't know what the liabilities were.

Same objection.

I have not attempted to carry on business since Decem-  
40 ber 12, 1884 ; I have nothing to carry it on with—that is

what worries me ; I have not asked credit of any one of the people with whom I formerly dealt with since December 12, 1884 ; during the period between November 5, 1884, and December 12, 1884, I was refused credit by all of them I owed at the date of that publication.

Sworn and subscribed to, this } (Signed)  
 26th day of December, }  
 1885, before me, } EMMA PATTERSON.

D. H. APPLGATE,

*Master in Chancery.*

10

Plaintiffs' counsel offers the deposition of Emma Patterson in evidence.

*The Court:* What portion do you object to ?

*Defendants' counsel:* We object to the presentation of any testimony relating to circumstances arising from this publication, until there is proof of publication of the alleged libel.

*The Court:* The deposition will be admitted at present, having been read in the presence of the jury and Court ; I don't think it will affect the cause yet ; I think the order of proof ought to have been the other way, subject to being made competent by subsequent proof. It is not admitted as full evidence until it is made competent by the evidence. 20

30

**Arthur J. King**, one of the defendants, called and sworn on the part of the plaintiffs :

*Mr. Woodruff:* What do you propose to prove by this witness ? He is one of the defendants in this case, and if it be any testimony tending to show him to have been guilty of any libel, we object to it.

*Mr. McGee:* I suppose that the Court will rule on the questions as they are asked. I don't know why I should be called upon to be confidential in advance, unless his 40

Honor rules that there is some law to provide that I must tell beforehand.

*The Court:* The witness has been put upon his guard by counsel, and of course can refuse to answer the questions. He is a competent witness, undoubtedly. He may come here before the Court and choose to tell everything he knows. He may waive his own privilege.

*Q* Where do you reside, sir?

10 *A* I live in Newark, sir.

*Q* Where do you do your business?

*A* In New York.

*Q* And are you connected with any firm in New York?

*A* Yes, sir.

*Q* What firm?

*A* R. G. Dun & Co.

*Q* Will you tell us the names of the members of that firm?

20 *A* Robert Graham Dun; he is the proprietor.

*Q* I think you haven't given an answer to my question; I asked who were the members of the firm; I didn't ask you about the proprietary rights; I simply asked about the names of the members of the firm of R. G. Dun & Co.?

*A* Constructively, there are four members.

*Q* Will you give us their names?

*A* Robert Graham Dun, Erastus Wyman, Arthur J. King and Robert Dun Douglas.

30 *Q* You are the Arthur J. King?

*A* Yes, sir.

*Q* You are a defendant in this case?

*A* I suppose I am.

*Q* (Witness shown book.)—Did you ever see that little book, or a copy of it; I don't mean that particular one; but a copy of that book; it is for the year 1885; 'Wilson's Copartnership and Corporation Directory of New York City, for 1885?'

40 *A* Yes, sir; I have seen that.

Q Now, that is a business directory of the copartnerships of New York city?

A I believe it is.

Q As you understand it, it is reasonably well circulated throughout the city?

A No doubt of that.

Q A good many people have it?

A Yes, sir.

Q This was for the year 1885—(indicating to witness)—that is the advertisement of R. G. Dun & Co., on this page? 10

A It reads that way.

Q Do you have any doubt that it was inserted by that concern?

A I don't know, sir.

Q My question is whether you have any doubt?

A I have no doubt.

Q You presume it was authorized?

A No reason to doubt it.

Q By R. G. Dun & Co.?

20

A I can't say anything at all about that; I know it was not authorized by me.

Q But is there any doubt in your mind that it was inserted there at the instance of R. G. Dun & Co.?

A Seeing it there I should not have any doubt about it.

Q Now, I find under the title "D," or under the letter "D," at the head of the page, the first column of the page, "Dun," I think it is the 50th page—is "Dun, R. G. & Co.; Robert G. Dun, Erastus Wyman, Arthur J. King and Robert Dun Douglas, 314 Broadway;" that is the firm of R. G. Dun & Co.?

30

A Constructively, I say it is.

Q I don't want to catch you; that is the firm—that is the advertisement—here in the front?

A No doubt about it.

Q You were aware of the fact that this book was being circulated with the name of R. G. Dun & Co., so stated in it?

40

A No doubt about it; yes, sir.

Plaintiffs' counsel offers book in evidence.

Objected to. Admitted subject to objection.

(See Exception 1, for defendants, *post.*)

Q Now, this firm of R. G. Dun & Co. publish a book, do they not?

A Yes, sir.

10 Q How often?

A Four times a year.

Q And how large a book is it?

A Well, they have many sizes of it—many classes of the book.

Q They publish more than one book, then?

A Oh, yes.

Q How many books?

A I am ignorant of it; I don't know; I say there are four different classes of the book, or size, or editions.

20 Q What do they contain?

A Well, they contain business names.

Q Of people all over the country?

A All through the country.

Q In all the States; and after the name is there some indication of the business standing of the concern?

A Yes, sir.

Q Did you bring one of those books with you?

A No, sir.

Q We subpoenaed you to do so, didn't we?

30 A Yes, sir, you did.

Q You received the subpoena?

A Yes, sir.

Q And didn't bring the book?

A No, sir.

Q Why not?

A For the reason that I had no authority to bring it.

Q Have you no copy of it?

A You mean in my own—

Q In your possession—within your reach?

40 A There are copies of it in the office.

Q You could have taken one?

A No, sir, I couldn't.

Q Was there any physical incapacity?

A No, sir, no physical incapacity.

Q Would anybody have stopped you?

A Yes, sir, I think so.

Q Isn't the restraint more moral than physical?

A Well, I hardly understand your question. What do you mean?

Q I mean to say, was there anything to prevent you 10  
from carrying one of those books with you?

A Yes, sir.

Q What?

A I had no ownership of it; it belonged to another party, and that party objected to my taking it.

Q Did you ask him?

A Yes, sir.

Q Who?

A Mr. Dun.

Q What reason did he give? 20

A Simply because he objected, and he didn't give any reason.

Q He simply said no?

A He simply said no.

Q You being his employee you didn't dare bring it?

A No, sir, I didn't.

Q Now, then, after each of these business names was some mark indicating the standing of the concern, wasn't there? 30

A Yes, sir.

Q Now, do you remember what mark there was after Emma Patterson's name?

A No, sir.

Q You don't remember it. Now, somewhere in that book were the names of the members of the firm given?

A I am not sure of that.

Q Besides that book what else do your firm publish? You publish any newspaper?

A They publish a notification sheet, yes, sir. 40

Q (Witness shown paper.) Is that it?

A Let me look at it.

Q Or is that one copy of it?

A Well, this purports to be the "Mercantile Agency Notification Sheet" of R. G. Dun & Co.

Q There isn't any doubt, is there, Mr. King, that that is one of it?

A It is very like it, you know; of course I cannot identify it.

10 Q Do you know anybody else that publishes a notification sheet with R. G. Dun & Co. at the head of it?

A Do you mean in any other place?

Q Is there any other Mercantile Agency Notification Sheet?

A I don't know that there is any other Mercantile Agency Notification Sheet except R. G. Dun & Co.

Q You never heard of a sheet entitled like that being published by any other concern?

20 *Defendants' counsel:* We would like to make a formal objection to any questions to the defendant in this case as to the publication of the libel, any question tending to show the publication of the alleged libel, for the simple reason that libel is an indictable offence at common law, and it is an indictable offence by statute in the State of New Jersey.

*The Court:* The Court say to Mr. King that if he believes that it may subject him to any criminal prosecution he may refuse to answer.

30 A Do you mean any bearing that name, or a similar sheet?

Q A sheet entitled as this one in question; a sheet of R. G. Dun & Co., or Russell & Co.?

A That is the question; well, I don't really get it just quite.

Q I will put another question. Do you know of any other Mercantile Agency Notification Sheet, bearing the name of R. G. Dun & Co., being issued during the year 1884, excepting that one, and other issues of the same  
40 sheet during the same year?

A Do you mean at any particular place, or as a general publication?

Q Anywhere in the country?

A Do I know of any other? I know of others.

Q Bearing the name of R. G. Dun & Co.?

A Yes, sir.

*The Court:* Do you object to that?

*Defendants' counsel:* No, sir.

Q By whom were the others issued?

10

A By whom were the others issued?

*The Court:* That may not be material, gentlemen. We don't want to go into the history of all the other sheets of the country.

*Mr. McGee:* By whom were the others that he knows of published?

Objected to as immaterial.

*The Court:* Except to identify this one.

Q Do you know of any other Mercantile Agency Notification Sheet, bearing the name of R. G. Dun & Co., being issued during the year 1884, except that one and other issues of the same sheet during the same year? 20

A Do you mean at any particular place, as a general publication?

*Defendants' counsel:* That is precisely a repetition of the previous question.

*The Court:* Go on, gentlemen.

A I think I said yes, sir, to that; I don't know whether I said yes under a misapprehension of the question; I think, perhaps, I did; what I meant to say was that there were other sheets issued by the Mercantile Agency of R. G. Dun & Co., besides the one purporting to be issued in New Jersey. 30

Q But all these Mercantile Agency Notification Sheets are issued by R. G. Dun & Co.—is that so?

A They are issued by the same firm.

Q I suppose you have no objections to admitting that your firm issued this, if they did?

A Do you want me to identify that particular sheet? 40

*Q* No, sir; I want to know if—

*A* Conceding the fact that they do issue a mercantile agency sheet, but would you ask me to identify that one? I can't do it.

*Q* Have you any doubt about it?

*A* That is another thing.

*Q* Have you any doubt about this one?

*A* Well, that is a question that I decline to answer.

*Q* On what ground?

10 *A* I decline.

*Q* You must give us the ground, unless you decline on that ground.

*The Court:* I have just told him upon what ground he may refuse to answer, and he says he declines to answer merely after the instructions given him by the Court.

*Mr. McGee:* I would like to have it appear on the notes that the ground is that it will tend to criminate him.

20

*The Court:* You say that under advice of counsel?

*Witness:* Yes, sir; I refuse to answer under advice of counsel.

*Q* The only ground on which you refuse is that it will tend to criminate you?

*A* That isn't the reason.

Plaintiffs' counsel takes exception to the ruling of the Court.

30

*Q* What member of the firm of R. G. Dun & Co. prepares these Mercantile Agency Notification Sheets, or what employee?

*A* That I decline to answer.

*Q* For the same reason?

*A* No; I don't know.

*Q* How often were these Mercantile Agency Notification Sheets issued?

*A* Well, I might answer to my best belief; that is not my department at all; I think they are semi-weekly.

40

*Q* Is there any Mercantile Agency Notification Sheet issued in the city of New York, with the exception of this one—in the city of New York by any other concern than by R. G. Dun & Co.?

*A* Yes, sir.

*Q* So called by that name?

*A* I think they are entitled, may be a little different, but I think they call themselves the improved mercantile agency.

*Q* (By the Court.) In this name? 10

*A* By that name; well, there are several mercantile agencies; I couldn't answer.

*Q* Is there any other Mercantile Agency Notification Sheet issued in New York bearing the name of R. G. Dun & Co., except this one?

*A* Not that I know of.

*Q* Do you know where this was published?

*A* You mean this sheet?

*Q* This sheet.

*A* I can read on the title page here. 20

*Q* What does it say?

*The Court:* Your own knowledge, without looking at the paper, except to identify it.

*Witness:* I didn't identify this thing at all, did I? I don't know.

*Q* Is there one published in Philadelphia?

*A* That I don't know.

*Q* Does the firm of R. G. Dun & Co. publish one in Philadelphia? 30

*A* I think they do; I can't say.

*Q* Is there any Mercantile Agency Notification Sheet published in Philadelphia bearing the name of R. G. Dun & Co. that is not published by R. G. Dun & Co.?

*A* That I can't say.

*Q* Is there any Mercantile Agency Notification Sheet bearing the name of R. G. Dun & Co. published in Philadelphia by any concern except R. G. Dun & Co.?

*A* I say I don't know. 40

Q Who are this E. Russell & Co. that are mentioned here?

A That is a pretty general question—who is E. Russell & Co.; E. Russell & Co. of what place do you mean?

Q I don't know; on this sheet I see "Mercantile Agency Notification Sheet, R. G. Dun & Co., E. Russell & Co."; I want to know if you know who E. Russell & Co. are?

A I know E. Russell & Co.

10 Q Well, who are they?

A Do you know? I haven't—

Q I don't want to catch you; I will give you the paper; I shouldn't think you would object to stating what your firm—

A You can't expect me to be very pliant under the circumstances.

Q I don't.

A If you could locate this E. Russell & Co.; I don't know any E. Russell & Co. in New York; I am  
20 acquainted with an E. Russell & Co.

Q Where are they?

A That is hardly fair to ask me; you ask me if I know E. Russell & Co. of a certain place, and I will—

Q Do you know E. Russell & Co. of Philadelphia?

A No, sir.

Q Do you know of any E. Russell & Co. in the mercantile agency business?

A I know E. Russell & Co.

30 *Mr. McGee*: I submit I am entitled to an answer.

*The Court*: What is its relevancy?

*Mr. McGee*: That paper has not been identified. It is only before the Court in Mrs. Patterson's depositions, which were only admitted provisionally.

Q Is there a firm of E. Russell & Co., in the employ of R. G. Dun & Co.?

A No, sir.

Q Or associated with them in business?

40 A Yes, sir; there is.

Q Now, where?

A Well, now, is that fair?

Q I think so.

A I don't want to be mulish about this thing.

Q Do you know E. Russell & Co., of a certain place?

A Yes; but I want you to locate the place.

Q What connection is there between the E. Russell & Co. that you know, and R. G. Dun & Co.?

A Oh, the E. Russell & Co. that I know is an associate of R. G. Dun & Co. 10

Q Now, I ask you again, where they are located?

A Well, I suppose I had better answer it—they are located in Boston.

Q And this sheet, then, is issued jointly?

A No; I don't know anything about that sheet.

Q Well, the "Mercantile Agency Notification Sheet?"

A I will admit this—that the sheet published by the Mercantile Agency shows on its face the name, E. Russell & Co.

Q How many copies of the Mercantile Agency Notification Sheet are issued? 20

Objected to.

A I don't know.

Q Are there a thousand?

Objected to.

A I don't know.

Q Are there a good many?

A A good many.

Q How were these Mercantile Agency Notification Sheets delivered, by mail or by messenger? 30

A As a matter of fact, I don't know; I can suppose—

*The Court:* No; they are not asking you to do that.

Q When you say you don't know, do you mean to say that you haven't done it?

A Yes, sir; I mean to say that I haven't done it myself.

Q But you do know what the method is, don't you? 40

A I believe I know.

Q Well, now—

A But it doesn't come within my province; I have nothing, whatever, to do with it, and I couldn't say, absolutely, how they were delivered; I believe they are delivered in various ways.

Q Both by mail and by messenger?

A I believe so; but as a fact, I don't know.

Q You do know the methods of business in your firm—they are delivered in some way or other—and to  
10 all subscribers?

A I presume so.

Q Do you know whether the sheets are left with the subscribers, or whether after they have been read they are sent back again, or required to come back to the firm?

A They are returnable.

Q When?

A At the end of the subscription.

Q Then they are entitled to have them all back—  
20 doesn't that apply to the books only?

A I think it applies, also, to everything pertaining to the books.

Q Now, the subscriptions run for a year?

A I believe the books are returnable and the sheets I think are, but that is not my department and I am not competent to answer that.

Q Do the subscriptions run for a year?

A Yes, sir.

Q Beginning the first of January?

30 A It varies.

Q Beginning any time?

A Yes, sir.

Q (By the Court)—Are the subscriptions yearly?

A Yes, sir.

Q Did you see a copy of the Mercantile Agency Notification Sheet issued by R. G. Dun & Co., on the 5th of November, 1884, of that date?

A No, sir.

Q What is your department in the business?

40 A I have charge of what is termed the city department.

Q That is what?

A That is matters pertaining to New York city, especially.

Q You prepare the reports as to New York city people?

A I supervise them.

Q Don't you look over the notification sheets to see if they are published correctly?

A No, sir; outside of my department.

Q After you have prepared them you let them go 10 without further examination?

A Yes, sir.

Q Who prepares and who supervises the reports for New Jersey?

A I don't know.

Q As to any part of New Jersey?

A No, sir.

Q Do you remember when the summons was served on you in this case?

A I think I do; yes, sir. 20

Q Now, after the summons was served on you, didn't you make any inquiries as to the subject matter of the suit?

A I sedulously kept from it, sir; I didn't at all.

Q Didn't you look to see whether there was any such publication?

A No, sir; I didn't.

Q Purposely didn't?

A Purposely didn't.

Q You are quite sure that you didn't read it? 30

A I am quite sure.

Q That you didn't read any number of the notification sheet?

A I sedulously kept away from all of it—or talk whatever.

Q I am asking you whether you didn't read it?

A No, sir; I didn't, surely.

Q You are quite sure you never saw that number of the sheet?

A I never did, sir; never. 40

Q You mean until you saw it here to-day?

A I have seen that sheet there, of course, but then I haven't seen the name even on that.

Q I will show it to you.

Objected to.

A I have seen the sheet in your hand, you know—the heading of it.

*Cross-examination, by Mr. Woodruff:*

10 Q You testified upon your direct examination that you were a sort of a provisional partner of Mr. R. G. Dun. Just state to the Court and jury what you mean by that statement.

A I think I said I was a partner constructively; well, I believe Webster says that is "apparently."

Q Well, what is the actual relation between you and Mr. Dun?

A My actual status to Mr. Dun is that of a clerk—employee.

20 Q You are an employee of Mr. Dun, of New York?

A Yes, sir.

Q Have you any control over the property of R. G. Dun & Co.?

Question objected to. Admitted. Exception for plaintiffs.

A Well, I think you ought to put that question a little plainer.

Question withdrawn.

30 Q Who is the proprietor of the agency known as R. G. Dun & Co.'s Mercantile Agency Sheet?

Objected to. Question admitted. Exception for the plaintiffs.

A Robert Graham Dun.

Q Who is the owner of all the publications issued in the city of New York from that office of R. G. Dun & Co.?

A Robert Graham Dun.

40 Q Under whose authority are all publications from the office of R. G. Dun & Co. issued primarily? Under

whose authority primarily are all the publications of that concern issued?

*A* By Robert Graham Dun.

*Mr. McGee*: The Court will understand that I am objecting to all this.

*Q* What interest, if any, have you in the concern of R. G. Dun & Co., of New York city?

*A* I have a certain amount as guaranteed, and an interest furthermore in the profits; that is, if there happens to be any. 10

*Q* Is that paid to you as compensation for your services, or in what way?

*A* Paid as compensation for my services in lieu of direct salary.

*Q* From whom do you receive that salary and compensation?

*A* You don't mean that literally, do you?

*Q* I mean primarily; from what concern does the money come to you? 20

*A* From Robert Graham Dun.

*Q* You have stated in your direct examination that your department of the business is preparing, looking after the rating of merchants in New York city?

*A* Yes, sir.

*Q* Is that your exclusive province in that concern?

*A* Yes, sir.

*Q* Have you anything whatever to do with the Mercantile Agency Notification Sheet?

Objected to. 30

*A* Nothing.

*Mr. McGee*: I ought to have objected to the question before also.

*The Court*: I will admit the question.

Exception for plaintiffs.

*Mr. McGee*: Can I get the benefit of an exception to the prior question? The answer was given before I had time to speak.

*The Court*: Yes, sir. 40

Q Have you anything whatever to do with the Mercantile Agency Notification Sheet?

A Nothing whatever.

Q Have you anything to do with the publication of that sheet?

Objected to. Admitted.

Exception for plaintiffs.

A Nothing.

10 Q You have been asked on your direct examination as to whether you knew of the concern of Edward Russell & Co., whose name appear upon a sheet that was shown you; you have stated that they do business and are located at Boston; are they located elsewhere?

A Yes, sir.

Q In how many different places?

A Four or five other places.

Q Four or five other places there is a concern of E. Russell & Co.?

A Yes, sir.

20 Q All engaged in the mercantile agency business?

A All engaged in that.

*Re-direct examination;*

Q Just tell us the arrangement, or rather the interest you have in the firm of R. G. Dun & Co.—exactly what it is; I don't mean in dollars and cents, perhaps, but the percentage, or whatever your arrangement is?

A Do you mean to say what is my direct compensation?

30 Q I don't know what you mean by direct.

A I have already stated to you that I had a guaranteed salary and an interest in the profits, if there were any.

Q By that I understand you to mean that you receive from R. G. Dun & Co. so many dollars anyhow, and that if the profits of R. G. Dun & Co. exceed a certain amount, you get a percentage?

A I do.

Q Is that it?

40 A That is it.

Q If you fall below that, then no percentage?

A No percentage.

Q By percentage I understand you to mean a percentage of the net profits?

A Percentage of the net profits, if it exceeds my guarantee.

Q You mean to say that if, taking the whole profits and calculating a percentage, it doesn't amount to more than so much, then the concern makes it up to you to that extent? 10

A I told you I am guaranteed, under any circumstances, a certain amount of money; that is plain.

Q Now, then, if a certain percentage amounts to more than that, then you would get more than that?

A Then I get more money.

Q If that percentage amounts to less, then you get that anyhow?

A I get that anyhow.

Q Now, from what sources did the profits of that business come? 20

A Well, I suppose that when the revenue exceeds the disbursements—(interrupted by the Court.)

Q Now, what do you mean by an apparent partner?

A Well, I have told you my condition there, therefore I suppose that carries the theory of my being an apparent partner; that is to say that I am not a proprietary partner.

Q You were given out to the community as one of the members of the firm; your name is annexed to the list of members of the firm, is it not, whenever it is given out? 30

A Yes, sir.

Q This E. Russell & Co., of Boston and other places you speak of, as I understand you—I want to see if I am correct—this sheet is published jointly by R. G. Dun & Co., and E. Russell & Co.; is that it—the “Mercantile Agency Notification Sheet?”

A You say so.

Q I ask you if it is?

A I thought you said it was; I don't know what 40

sheet you are talking about ; you are talking about that sheet there ; I don't know the arrangement.

*Re-cross-examination :*

*Q* Some questions were asked you on re-direct examination with respect to the compensation which you received ; now, I don't know that the question is entirely clear, and I wish to ask one or two questions further in that same line ; I understand you to say that you receive  
10 from Mr. Dun a guaranteed salary—is that correct ?

*A* A certain amount.

*Q* Which was guaranteed to you as a salary ?

*A* Guaranteed—yes, sir.

*Q* Now, you say further, that you receive some further compensation ?

*A* In lieu of all other salary, I receive a certain percentage of the profits, when there are any.

*Q* Can you state what the agreement is in words between yourself and Mr. Dun ; what the words are as to  
20 exactly what you shall receive ; whether you shall receive so much of the profits, a sum equal to so much of the profits, or what the expression is ?

Objected to. Question withdrawn.

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30 **Robert Dun Douglas**, one of the defendants, called on the part of the plaintiffs, having been duly sworn according to law, deposeth and saith :

*Direct examination, by Mr. McGee :*

*Q* Where do you live ?

*A* Orange, New Jersey.

*Q* What is your business ?

*A* Mercantile agency.

*Q* What mercantile agency ?

40 *A* R. G. Dun & Co.

Q Is there more than one R. G. Dun & Co. in the United States in any business, that you know of?

A I don't know of any.

Q In any business?

A I don't know of any.

Q You are the Robert Dun Douglas mentioned by Mr. King in his testimony a little while ago?

A Yes, sir.

Q What branch of the business do you attend to and look after? 10

A The inside management of the business.

Q That doesn't mean much to me; won't you be more explicit?

A I look after the hiring of the help and one thing another.

Question objected to.

Q What branch of the business do you attend to—what other things?

A I look after the subscribers.

Q You are familiar with the subscription list? 20

A Not altogether—no.

Q How many subscribers are there to the Mercantile Agency Notification Sheet?

Objected to.

Q How many subscribers are there to the Mercantile Agency Notification Sheet?

Objected to.

A How many—I don't know.

Q Are there five thousand? 30

Objected to.

A I don't know.

Q Are there one thousand?

A I said I didn't know; that is enough.

Q Are there ten thousand?

A I don't know; that is enough.

Q No; that isn't enough.

A I didn't say I didn't know; I decline to answer.

Q On what ground? 40

Objected to.

*The Court:* The witness may answer as he has done before.

*Q* I want to know your ground?

*A* That it may tend to criminate.

*Mr. McGee:* Now, I ask the Court to direct the witness that he is compellable to answer the question.

*The Court:* I decline to do so.

Exception granted to plaintiffs.

10 *Q* Are the Mercantile Agency Notification Sheets sent to all the subscribers?

*A* No.

*Q* To what class of subscribers are they sent?

*A* I don't understand what you mean.

*Q* You say they are not sent to all the subscribers?

*A* No, sir.

*Q* Then how do you tell which subscribers to send it to and which not?

*A* We send it to those that subscribe for it.

20 *Q* That subscribe for it?

*A* Not subscribe for it; we have different arrangements with them; it isn't necessary to go into that.

*Q* Some subscribers are entitled to that sheet and some are not?

*A* Some get it and some do not—yes, sir.

*Q* Do one-half the subscribers get it?

Objected to.

*Witness:* I decline to go into all those details.

30 *Q* For the same reason?

*A* Yes, sir; for the same reason.

*Mr. McGee:* I ask the Court again to compel an answer.

*The Court:* No, sir.

Exception granted to plaintiffs.

*Q* Are there copies of the Mercantile Agency Notification Sheet issued to subscribers in the city of New York?

Objected to.

40 *A* I refuse to answer.

*Mr. McGee:* Again I ask the ruling of the Court.

*The Court:* No, sir.

Exception granted to plaintiffs.

*Q* Are there copies of the Mercantile Agency Notification Sheet delivered to subscribers in New York city?

*A* I don't know how they get them.

*Q* My question doesn't ask for the method of delivery, but whether they are sent there by mail or messenger or otherwise, to subscribers in New York? 10

*A* I decline.

*Q* You decline again?

*A* Yes, sir.

*Q* For the same reason?

*A* Yes, sir.

*Mr. McGee:* I ask the same ruling and the same exception.

*Q* Are copies of the Mercantile Agency Notification Sheet furnished to subscribers in Philadelphia? 20

Objected to.

*A* Decline to answer.

*Mr. McGee:* I ask the same ruling and exception.

*Q* What is the business of R. G. Dun & Co.; what do they do?

*A* Supply subscribers with information.

*Q* As to the business standing of business men?

*A* Yes, sir.

*Q* Throughout the United States? 30

*A* The subscribers.

*Q* Throughout the whole of the United States?

*A* Throughout the United States—I won't say the whole.

*Q* Do they supply information respecting the financial standing and acts of people in New Jersey?

*A* That is in the United States, I suppose.

*Q* Yes; I believe so; what publications are issued by that firm?

Objected to.

*A* How many issued? 40

Q No; tell us the names of the different things; are they books or papers, or what?

A Publish a reference book quarterly—four times a year.

Q And is a copy of that given to each subscriber?

A No.

Q Well, what proportion of the subscribers get it?

A Those who subscribe for it; they don't all subscribe for the same thing.

10 Q Do many of the subscribers subscribe for all the publications of the concern?

A Yes, sir.

Q Now, what other publications besides the reference book?

A I decline to answer that.

*Mr. McGee*: I submit to the Court that he is compellable to answer.

20 Q What other publications do the concern issue, besides the reference book?

Objected to. Objection sustained. Exception to plaintiffs.

Q (Witness shown book.) Have you ever seen this book, or a copy of the same?

A Yes, sir.

Q What is that.

A It purports to be a copartnership directory.

Q Of New York city?

30 A Yes, sir.

Q Have you ever seen that advertisement of R. G. Dun & Co. on its first page?

A Yes, sir.

Q Was that inserted at your instigation?

A Not mine.

Q You knew it was there?

A Yes, sir.

Q Do you know whether the firm of R. G. Dun & Co. were mentioned on the list here?

40 A I suppose so.

*Q* Is this book circulated pretty generally throughout the city of New York?

*A* Well, I don't know how large a circulation it has; it no doubt has—

*Q* And it is printed and sent to whoever will buy it?

*A* Yes, sir.

*Q* Is that it?

*A* Yes, sir.

*Q* Did you ever see the Mercantile Agency Notification Sheet of Wednesday, November 5th, 1884? 10

*A* Not that I recollect.

*Q* Did you not at any time look at that sheet before or after you were sued?

*A* No, not that I am aware of; I haven't seen it that I know of.

*Q* Did you purposely omit looking?

*A* I can't say that I had any reason to look.

*Q* You didn't look to see whether the allegation in the declaration was correct or not?

*A* No, sir. 20

Witness handed paper.

Defendants' counsel objects to handing the paper to witness as not having been identified or in any way connected with the defendants, and as having gone through precisely the same thing before.

*The Court:* Perhaps this witness may know more, and may choose to answer more.

*Q* (Witness shown Exhibit A in this case, marked 30 on the 26th day of December, 1885, before D. Applegate, a Master in Chancery, at the time of the examination of Emma Patterson, is asked), Have you ever seen that sheet, or any copy of it?

Defendants' counsel objects to the double form of the question.

*The Court:* Put it in the first place in one form.

*Q* Have you ever seen that sheet?

*A* This identical sheet? 40

*Q* Yes.

*A* No, sir.

*Q* Have you ever seen any copy of it—the printed part?

Objected to.

*The Court:* The question may be put, subject to exception.

*Q* Have you ever seen any copy of it—the printed part of it?

10 *A* Not that I am aware of.

*Q* Have you seen any copy of the Mercantile Agency Notification Sheet of that date?

*A* The first I have seen it that I can recollect.

*Q* Do you know who issued that?

*The Court:* That particular sheet, you mean?

*Mr. McGee:* The Mercantile Notification Agency Sheet of November 5th, 1884.

*A* It is a leading question, and I decline to answer.

20 *Q* On what ground?

*A* The regular ground.

*Q* The ground that you think it will criminate you?

*A* Yes, sir.

*Mr. McGee:* I ask the Court to rule that he be compelled to answer it.

The Court declined to compel the witness to answer, and also granted an exception to the plaintiffs.

30 Recess.

ROBERT DUN DOUGLAS, the last witness, resumed the stand.

Plaintiffs' counsel gave defendants' counsel notice to produce copy of the book that is issued by R. G. Dun & Co.; also copy of the Mercantile Agency Notification Sheet of November 5, 1884.

40 *Mr. Woodruff:* I have a copy of the sheet, but have not copies of the books.

Copy of the Mercantile Agency Notification Sheet produced by defendants' counsel, and marked No. 1, on the part of the plaintiffs.

*Q* (Showing witness paper.) Was that paper issued by R. G. Dun & Co.?

*A* I decline to answer.

*Q* On what ground?

*A* The same ground.

*Q* The ground that you fear it may criminate you?

*A* Yes, sir. 10

*Mr. McGee:* I ask for the ruling of the Court that he be compelled to answer, and for an exception.

*Q* You are familiar with the Mercantile Agency Notification Sheet issued by R. G. Dun & Co., are you? You often see them?

*A* I have seen them.

*Q* Will you tell me what this word on the second page of that paper means—the words "Record Items," near the top of the first column? 20

Objected to until it is shown that he has some knowledge of what the meaning of the word is, other than the ordinary signification which it bears.

*Q* What does that mean?

*A* It speaks for itself. What does "Record Items" mean?

*Q* Yes.

*A* I decline to answer. 30

Defendants' counsel asked the Court to compel the witness to answer, which request was declined, and an exception given to the plaintiffs.

*Q* What is the meaning of the words in the third column of the second page of the paper under the title of New Jersey; what is the meaning of the words "Red Bank, Patterson Emma, chtl. mtge., \$1,385, clothing"?

Objected to.

*A* I decline to answer. 40

*Mr. McGee:* Again I ask that he be compelled to do so.

The Court refused an exception to plaintiffs.

*Cross-examination, by Mr. Woodruff:*

*Q* You have testified that you are engaged in business in the city of New York—that you are in the office of R. G. Dun & Co. in that city; please state to the  
10 Court and jury what your position is in that establishment?

*A* I am a member of the firm; do you mean that? have an interest of a certain immediate salary, and a certain per cent. of the profits, if there are any.

*Q* When you say you are a member of the firm, what do you mean by that?

*A* Constructively, that I am a member of the firm in the sense that I have a certain interest in the profits, but not proprietary, in any sense of the word.

20 *Q* You are not the proprietor of that agency?

*A* No, sir.

*Q* Have you any ownership of any of its property?

*A* No; none, whatever.

*Q* Have you any control of its publications?

*A* None.

*Q* Your attention has been called to a sheet that has been produced here; have you anything to do with the publication of that sheet?

30 *A* I have not.

*Q* Have you anything to do with its circulation?

*A* Not directly.

*Q* Do you indirectly do anything in connection with that sheet?

*A* No.

*Q* You have stated that you received from that concern a salary and a certain portion of the profits, or something to that effect?

40 *A* Yes, sir; a certain percentage—a sum equal to a certain percentage.

Q For what purpose do you receive that salary and that sum equal to a certain percentage?

A I do that as compensation for my services.

Q As compensation for your services rendered to whom?

A Mr. R. G. Dun.

*Re-direct examination:*

Q Mr. Dun doesn't put his own name on any of these publications alone, does he? 10

A No.

Q He puts it on always, R. G. Dun & Co.?

A Yes, sir.

Q And R. G. Dun & Co. is composed of whom?

A Robert Graham Dun, Erastus Wyman, Arthur J. King and R. D. Douglas.

Q And you are that R. D. Douglas?

A Yes, sir.

Q And that name is printed on all publications of the firm, isn't it? 20

*The Court:* The firm name, you mean?

A I am not sure about that; I don't know whether it is on all or not.

Q Does it appear on their Mercantile Agency Notification Sheet?

A I decline to answer that.

Q You are the R. D. Douglas of that firm?

A Yes, sir.

Q And that name is printed on all the publications of the firm, is it not? 30

A I am not sure about that; I don't know whether it is on all or not.

Q Does it appear on the Mercantile Agency Notification Sheet?

Objected to.

*The Court:* I think I shall refuse to compel the witness to answer the question.

Exception allowed to plaintiffs.

*Q* Are any of the publications of the firm issued in the name of R. G. Dun, alone?

Objected to.

*A* I decline to answer.

Question overruled. Exception to plaintiffs.

*Q* When you say that you have an interest in the profits, what do you mean; you mean a similar arrangement to that testified to by Mr. King?

10 *A* The same arrangement.

*Q* That is, taking the whole net profits of the business, you receive a certain percentage thereof, provided it is not less than so much?

*A* Provided it is not less than so much.

*Q* And if it is less than so much, you get that much, any how?

*A* Yes, sir.

*Q* When you speak of the net profits, you mean the net results of the whole business, don't you; whatever  
20 sources of income R. G. Dun & Co. have, go into the consideration of what is that net profit?

*A* Yes, sir.

*Q* And the business of R. G. Dun & Co. is issuing information to its subscribers of the business standing and the business acts of people in the United States?

*A* Yes, sir.

*Q* Part of that business is the issuing of a book and a paper, isn't it?

30 *The Court:* You are getting back again where you started. It is not proper cross-examination.

To this ruling plaintiffs except.

*Q* When you say that you have no control of its publications, what do you mean?

*A* I mean to say that I have no—that it is not a branch of the business that I attend to.

*Q* Then you mean to say that each one of you—each member of the firm—has a distinct branch of the business, and the others don't interfere with it, is that it?

49 *A* Well, we have certain kinds of duties to perform.

Q Well, my question seems to be reasonably plain. Then you mean to say that each one of you—each member of the firm—has a distinct branch of the business, and the others do not interfere with it, is that it?

A No, I didn't say that; I don't admit that.

Q Then try and tell me what you did mean.

A I don't admit there is no one interferes with the business; I mean to say I have answered the question as far as I am concerned.

Q You mean to say, then, whether the others interfere with your branch, you don't interfere with theirs? 10

A I don't interfere with that particular branch.

Q That is, the publication of the paper and the book?

A I didn't say anything; I didn't admit any publication at all.

20

**Daniel Meyers**, a witness produced on the part of the plaintiffs, having been duly sworn, on his oath, according to law, deposeth and saith:

*Direct examination*, by Mr. Pintard:

Q Where do you live?

A Philadelphia.

Q What is your business there?

A Wholesale clothier.

Q How long have you been engaged in that business there? 30

A About sixteen years.

Q Are you in business alone or are you in partnership with anybody?

A I am at present alone.

Q How long since?

A Since the first of January.

Q Before that time who was with you?

A Charles Goodman, trading as the firm of Meyers, Goodman & Co. 40

Q Where is your place of business, what street?

A 43 North Third street, Philadelphia.

Q Do you know the plaintiff, Emma Patterson, in this suit?

A I do.

Q Do you know whether or not, and where, she has been doing business?

A Yes, sir.

Q Where?

10 A Red Bank.

Q What kind of business was she in there?

A Clothing business.

Q Retail?

A Retail; yes, sir.

Q Did you ever sell her goods—your firm?

A We did.

Q What kind of goods did you sell her?

A Ready-made clothing.

Q On credit or for cash?

20 A Mostly on credit.

Q About when did you commence to sell her goods in Red Bank?

A When they first moved there; I think it was in 1880, or before that; it might have been a year or so before; I couldn't say.

Q Well, now, about what amount of credit did you let her have?

30 A Well, I think, to the best of my knowledge, I guess as high as six thousand dollars at a time; five or six thousand, I am sure; I couldn't say the exact amount, but it was around that way; I aint a few hundred dollars out of the way.

Q Did she have that much of you nearly all the time she was there?

A No, sir; sometimes less, sometimes more.

Q What was the least amount, to the best of your recollection, that she ever owed you while she was in Red Bank?

40 A I can't tell exactly what it might be; as low as a thousand dollars; lower than that I couldn't say.

Q You have known higher than \$6,000?

A I don't think it was ever above \$6,000; that was not all for merchandise; it was some borrowed money, some of it.

Q What was your opinion of her integrity, her honesty, her ability to pay?

A Well, my opinion was that I would always get paid for it.

Q You always trusted her?

A Always. 10

Q Whenever she came for it?

A I never refused her.

Q You did refuse to trust her; haven't you ever refused to trust her?

A Only once.

Q When was that?

A Well, it must have been about a year or so ago.

Q What was the reason you refused to trust her?

A I kind of felt mistrustful on account that she had made a good bit of money, and I heard the report, and I seen something to that effect—seen the report—(interrupted.) 20

*Defendants' counsel:* We must object to any testimony as to reports.

Q Please tell what you saw that led you to refuse to trust her.

A I saw in Dun's Mercantile Agency Notification Sheet chattel mortgage for \$1,300 and some odd dollars.

Q (Witness shown paper.) Is that the sheet that you saw the report in which you speak of—was it a copy of that sheet? 30

A I couldn't say whether it is a copy.

Defendants' counsel objects to the sentence in its double form, and also to any testimony as to the witness seeing a printed paper.

A I can't say whether this is the sheet, or whether this is a copy; it was a sheet like this with Dun's name on it—Dun's mercantile report. 40

*Defendants' counsel:* Our objection is to any questions at the present state of the case, except identifying any particular papers which they may wish to make part of their case.

*The Court:* The witness may answer that question.

*Q* Is that the sheet that you saw the report in of which you have spoken, or a copy of that sheet?

The latter part of the question is objected to.

10 *A* I can't swear that this was exactly the same paper, but I seen one like it; it might be the same one, or it was one like it; there was a paper like this with the name and everything on.

*Q* Turn over to the second page of that paper. Did you see there on that paper about a year or so ago, as you say, under the heading of New Jersey, after the words "Red Bank," the words "Patterson Emma, chtl. mtg., \$1,385, clothing"?

*A* Yes, sir; exactly.

20 Objected to. Admitted. Exception for defendants.

*The Court:* I understand, gentlemen, you are objecting to all this.

(See Exception 2, for defendants, *post.*)

*Q* When did you see that?

*A* The same day it was given out.

*Q* Do you remember what day that was?

*A* I couldn't tell you the date, exactly.

30 *Q* About?

*A* About the same day when it was given out—about the 6th, or something around that way.

*Q* 6th of what?

*A* November 6th, I think, 1884.

*Q* What did you understand that to mean?

Objected to. Admitted. Exception to defendants.

(See Exception 3, for defendants, *post.*)

40 *A* Chattel mortgage.

Q Chattel mortgage on what?

A On personal property, for thirteen hundred and some odd dollars.

Q Whose personal property?

A Emma Patterson's.

Q Of what place?

A Of Red Bank.

All the last questions objected to, and exceptions taken.

10

Q Did you, in any way, mark the paper which you saw?

A I can't say whether I did or did not, but I know I had it in my possession.

Q (Being shown Exhibit "A.") Isn't that the paper which you saw?

A It looks very much like it, but I couldn't swear whether it is exactly the same one, because I didn't mark it; I didn't put my name on it; it looks much like it.

Q What did you do with the one you saw it in? 20

A I sent it to Red Bank to Mr. Patterson, to show it to him.

Q This is a copy of it, the one you hold in your hand, isn't it? (Referring to Exhibit No. 1.)

A Yes, sir.

Q They are both alike?

A I think so.

Q Now, after you saw that notice in there what did you do?

A I felt very much uneasy, and I went to Red Bank. 30

Q Then what happened—just state to the Court and jury.

A I went to see about this chattel mortgage.

Defendants' counsel objects to any evidence tending to show special damage.

At this point the Court allowed the declaration to be considered amended by the insertion of the names of Daniel Meyers, Max B. Brumer, Alexander M. Oppenheimer, Emanuel Katz and Charles 40

Lyons, who were creditors of the said Emma Patterson, as persons who refused her credit by reason of the alleged publication.

*Mr. Woodruff*: Right on that point we wish to claim, that unless that declaration be so amended as to state each particular creditor, each particular time, and the circumstances under which each particular creditor refused further credit, that the declaration will be insufficient.

10

Adjourned until to-morrow, at 10 o'clock.

January 8th, 1886.

20

Defendants' counsel, upon the amendment of the declaration, applied for an adjournment of the case on the ground of surprise, which application was denied by the Court, and the case continued.

DANIEL MEYERS, the last witness, resumed the stand, and testified as follows:

Q After you saw the notice in there what did you do?

A I felt very much uneasy, and I went to Red Bank.

Q Then what happened?

A I went to Red Bank to see about this chattel  
30 mortgage.

40

Mr. McGee offers in evidence the Mercantile Agency Notification Sheet, referred to yesterday, and marked Plaintiffs' Exhibit No. 1, for identification, or that portion of it which was alleged in the declaration. The title of the sheet, together with the names of the defendants, the firm of R. G. Dun & Co., and the date, Wednesday, November 5th, 1884, the title, "Record Items," and the words "New Jersey, Red Bank, Patterson Emma, chtl. mtge, \$1,385, clothing;" also the other copy

of the same one, which was marked Exhibit A, for plaintiffs, by the Master in taking the testimony of Mrs. Patterson.

*The Court:* Why do you offer it at this time?

*Mr. McGee:* I thought we had reached the point where it was proven.

*The Court:* I don't think you have got to that point yet, sir; at least I am not disposed to admit it yet.

*Mr. McGee:* I offer at this time the notice to produce the reference book of R. G. Dun & Co., and the mercantile agency sheet acknowledged by Mr. Woodruff. 10

At this point plaintiffs' counsel read portions of the deposition of Emma Patterson relating to the identification of the sheet offered in evidence.

*Q* What did you find out about it?

*A* I went to see Mrs. Patterson and Mr. Patterson, and I said, "What is it about the chattel mortgage?" they said, "What chattel mortgage?" I says, "It is no use your denying anything from me," I says, "as I know better; you gave a chattel mortgage." Well, they denied it; then I say, "I don't believe you, I got authority to show that you did, and I don't believe you, and I want the thing settled up now; I won't leave unless you settle the matter up with me." And they kept on denying it, and they told me to show him the authority; I said, "When I go home I can show you—I send you the sheet," and I did so; and I found afterwards, though after a long—I don't know how many days afterwards, that it was not the case. 20 30

*Q* Well, did you or did you not at that time make any demands upon her for the amount due you?

*A* I did, yes, sir.

*Q* How much was due you at that time from her?

*A* Something a little over \$4,000; I can't say exactly, but it was, I believe, over \$4,000.

*Q* Did you or did you not make those demands before you ascertained that the allegations were untrue?

*A* I did. 40

Q You did make those demands before?

A Yes, sir.

Q What did she do, if anything, towards the payment of that claim due?

A She gave me then—she gave me, I believe, a chattel mortgage; I wanted a chattel mortgage, and afterwards they gave me a bill of sale.

Q How much was the chattel mortgage?

A \$4,000 and some dollars—I can't say to the dollar unless I can see my book; it was over \$4,000, I think.

Q Well, after that?

A Afterwards they gave me the bill of sale for the stock.

Q For the whole of it?

A For the whole of it.

Q Did she herself ever make any application to you afterwards for credit?

*The Court:* In that connection I would like to know  
20 what was the estimated value of that stock at that time.

*Plaintiffs' counsel:* We have evidence here to show what the value of it was at that time. I cannot prove it by this witness on the stand; I can prove it by a witness we have here later in the case.

Q Did she herself ever make any application to you afterwards for credit?

A I think she did.

Q Did anybody make application to you for her for credit?  
30

A I can't remember that.

Q Didn't Mr. Patterson make application to you for credit in her name?

Objected to as leading.

*The Court:* The witness should be asked whether she made any application for credit, or any one on her behalf.

A I think she did.

Q What did you say or do?

40 A I refused.

Q Why did you refuse?

A I had my reasons for it.

Q Well, what were they?

A I didn't consider her good enough.

Q What do you mean by good enough?

A I didn't think she was any more responsible.

Q Did you think she was any more responsible before that time? Had you thought so?

*The Court:* Before what time?

10

*Plaintiff's counsel:* Before the time he refused.

A I always considered her responsible, or I wouldn't have trusted her with the amount.

*The Court:* Well, what time?

Q What time was that—before the publication?

A Before the publication.

Q Or before the time you refused her credit, which do you mean, or both? Which do you mean?

A I can't give it more explicit.

20

Q Would you have demanded payment of the amount of money due you from Mrs. Patterson at that time, had it not been for that publication you saw?

A Not at that time; no.

Q At that time?

A No.

Q When is the first time you ever remember having seen that publication? Not the date of November 5th, now, I don't mean, but I mean any publication of that Mercantile Agency Notification Sheet?

30

A The day before; how do you mean?

Q Any time; how long have you known the paper?

A Dun's paper?

Q Yes.

A Pretty nearly ever since I am in business.

Q Had you often seen it?

A Once every day I see the paper; most every few days, I might say.

Q Now, what was your means of knowing—

40

*A* Because I belong to several mercantile agencies ; I am a subscriber, but not to Dun's—but my neighbors—we fix it in such a manner that my neighbors, they come to me for reports of Bradstreet's, and I go to my neighbors for reports in Dun's ; you see, we change off ; help one another.

*Q* Well, your general knowledge as to the meaning, now, of those words as contained in that paper.

Objected to.

10 *The Court* : What knowledge has he ?

*Q* What is your knowledge in regard to it ?

*A* I think I know all about it ; it is printed in the—we get reports almost every day from Dun and Bradstreet.

*Q* Do you act upon those reports ?

*A* I do.

*Q* Do you know what those words mean in that publication ?

20 *A* I do.

*Q* Of November 5th ?

*A* I do.

*Q* Well, state what they do mean.

*A* They mean chattel mortgage—(interrupted.)

Objected to because there has been no ground of knowledge shown. Witness has not said he was a subscriber, or that he had any relations with Dun & Co.

30 *The Court* : Whether he is in the habit of reading the paper and whether he knows what meaning these parties give to it.

*Defendants' counsel* : His evidence to that point is that his reading was surreptitious, and there couldn't be much weight to that.

*Witness* : They only give it out, I think, twice a week.

40 *Q* For how long a time, I mean ; how many years back, as near as you can remember ?

A I think I can remember for ten years, anyhow.

Q How often have you seen that paper in that time, or that publication?

A Thousands of times.

Q I mean about how often a week or month?

A I think I seen it twice a week.

Q Right along?

A Right along; sometimes only once, sometimes twice.

Q What is your business? 10

A Wholesale clothing dealer.

Q How long have you been in that business?

A About between fifteen and sixteen years.

Q Why do you examine these Mercantile Agency Notification Sheets?

A To see about the credit condition of our customers; the standing and credit.

Q You say you see this paper; you see them twice a week?

A I see the Bradstreet twice a week, and I think that it was twice a week Dun's, but once I am sure; the most of the time I see it twice a week. 20

Q Now, these abbreviations that are used in the paper, have you acted on your understanding of what they mean all those years?

A Very often.

Q Have you always found out that they mean what you thought they did?

A Yes, sir. 30

Q Have you seen this abbreviation, "chtl. mtge." often?

A Very often.

Q What have you always found it to mean?

A Chattel mortgage.

Q The word "Record Items," what have you always found that to mean?

A Record items.

Q Under the head of record items, what have you

found that to mean up at the head of the column—what have you found those words to mean?

A Recorded in courts.

Q In the county offices?

A Yes, sir.

Q When you see such an item as this in these papers, when you have seen it heretofore, "Red Bank, Patterson Emma," or any other name, "chtl. mtge.," and giving the number of dollars, and "clothing"—what do you understand the whole thing to mean?

A I take it a chattel mortgage, recorded in Freehold, for so and so much.

Q Given by that person on that stock?

Objected to.

*The Court:* The question, it seems to me, should be limited as to this particular item.

Q Now, what did you understand this particular item in this paper to mean, "Red Bank, Patterson Emma, 20 chtl. mtge., \$1,385, clothing"?

A I mean that to be chattel mortgage for \$1,385, recorded at the office at Freehold.

Q And on what?

A On that day.

Q On what stuff?

A On the clothing.

Q By whom?

A By Emma Patterson.

Q That is, I don't mean recorded by whom, but 30 given by whom?

A Yes, sir.

Q And of what place?

A Red Bank.

Q When she insisted that item was not true—that she had not given the chattel mortgage to the other man—why did you insist upon her giving one to you?

A I didn't believe her; I believed more to the report than to her, because I hardly ever got deceived in that.

Q And, therefore, you wanted the security?

40 A Yes, sir.

*Q* Then why did you go to ask the bill of sale?

*A* Well, I found out afterwards that she owed other people besides me, and I wanted to get in ahead.

*Q* And at the time you asked for the chattel mortgage, you didn't know that she owed other people?

*A* I didn't know that.

*Q* If it had not been for this item in the paper would your suspicions have been aroused?

*A* No, sir.

Question objected to.

10

*Q* If it hadn't been for this publication would you have gone to Freehold?

*The Court:* Hasn't he answered that already?

*Witness:* Yes, sir.

*Q* Who has conducted that business since that time?

*A* I conducted it myself.

*Q* And Mrs. Patterson, so far as you know, has she any business at all?

*A* No, sir.

20

*Q* And Mr. Patterson, is he in your employ?

*A* He is; yes, sir.

*Q* If it hadn't been for this publication—perhaps this has been asked before—would you have demanded at that time any additional security?

Objected to.

*The Court:* I understand the witness says his motive for acting was this notification; he went there, and then he told us what he did in consequence of that.

30

*Q* By what firm is this paper you speak of published?

Objected to.

*A* R. G. Dun & Co.

*Q* Can any reputable merchant get hold of these sheets, whether he is a subscriber or not?

*A* Yes, sir.

Objected to unless he is connected with the agency, as a subscriber. Question overruled. Plaintiffs except.

40

*Cross-examination*, by Mr. Wagner :

Q You have known Mrs. Patterson a great while ?

A Yes, sir.

Q Had rather close business relations with her ?

A Sold her, I believe, from, I guess from \$40,000 to \$60,000 worth of goods ; I can't say how many thousand, but a good many thousand.

Q But your business relations were rather close ?

A The same as other customers.

10 Q Were rather close, were they not ; did you see her often ?

A Not any closer than any other merchant that I do business with.

Q But did you see her or her husband, or either of them, often ?

A As often as they come—they needed goods they come to the store.

Q Did they come to Philadelphia to buy goods ?

A Come to Philadelphia to buy goods.

20 Q Did you sometimes go to Red Bank ?

A I might have been there once before I was there before—I might.

Q Had you any interest in their business in the early stages of it ; did you loan Mrs. Patterson any money to help her along in their business ?

A I did.

Q To buy stock and so on—to keep going ?

30 A Yes, sir ; not to buy stock ; they come once and they said the business is dull, and they are short of money, and they didn't know what to do ; I said, "how much do you need to pay on what you owe ?" he says, "\$1,000 would be all ;" I says, "there is a thousand dollars—pay off what you owe."

Q You kept the mill going, didn't you ?

A I sold them ; I don't know whether I kept the mill going.

Q I mean to say, your establishment was the principal store of supply ?

40 A I believe I sold them the most of the goods in my line.

Q Without the goods you sold them their business wouldn't have amounted to much, would it?

A That I couldn't say.

Q You say you saw a paper—where did you see it?

A I seen it in my store and in other stores; I have seen this in my place of business, and in other places of business.

Q What other place—whose place of business?

A Well, this is a kind of a principle between some of our neighbors and merchants—I don't like to mention unless his Honor compels me to. 10

Q Whose place of business was it?

*The Court:* I don't think there is anything wrong; I think that is perfectly right among neighbors.

*Witness:* It is a confidential matter between us, that we merchants should keep this business private.

Q You can speak with entire confidence here, Mr. Meyers, though you are in court. I ask you in whose place of business it was? 20

A I have seen this in Lisberger & Weiss, and I think in Liebright, Grandwald & Co.

Q Where did you see it first?

A Lisberger & Weiss.

Q And Lisberger & Weiss; you know them well, I suppose?

A Yes, sir.

Q And they knew Mrs. Patterson, and they told you? I suppose she bought goods from them, didn't she?

A She bought goods from them. 30

Q Therefore, anything relating to her, any knowledge about her affairs, was a matter of interest to both of you?

Objected to so far as refers to Lisberger & Weiss. So far as refers to this gentleman.

*The Court:* They were dealers with Mrs. Patterson. That far, I suppose, it is clearly competent.

Q Well, it was a matter of interest to both of you?

A That I couldn't say; we were together every day as merchants. 40

Q Well, now, when you saw this what did Mr. Lisberger or Mr. Weiss—

A Mr. Lisberger brought the paper there to the store.

Q How long was that after? What date was that?

A That was the same day that this paper was sent around.

Q Do you remember the date?

A I think the same day when it was sent around.

10 Q That is to say, the day he got it he came there to you with it?

A Right away; yes, sir.

Q What did he say to you about it?

Objected to. Overruled.

Q What was the result of the talk about it?

A He came over; he says, "Does Patterson owe you anything at Red Bank?" I says, "Yes." That was about quarter before four o'clock. I says, "Yes." He says, "Here, you should look at this." And I didn't  
20 say a word; I went right off and took a train right for Red Bank in ten minutes.

Q Then when you got to Red Bank you told us what you did? You got there the day that paper was printed?

A I got there the same day I got the paper.

Q Then you had your interview there, and when did you come back? You were very quick in going, were you equally quick in coming?

A The next day I come back.

30 Q That was the day after the paper reached Lisberger & Weiss; when you came back what did you do?

A I investigated the matter.

Q Now, didn't Lisberger show you a paper relating to the affidavit, or something of that kind, by Mrs. Patterson, relating to this circumstance? Do you remember that paper?

A I don't remember any other paper.

Q Didn't he show it to you?

A It was only a week or so—something in the paper  
40 like it—that it was a mistake.

Q Now, you investigated it when you came back. When you came back did you see Mr. Lisberger about it?

A I don't think I did.

Q How did you investigate it?

A Well, I got reports from Bradstreet.

Q You got from Bradstreet reports; was it the same day?

A No, sir; very short time.

Q What was the substance of that? What did they 10 say about Mrs. Patterson?

A I can't tell the exact words, but I found out later on it was untrue.

Q You found out that day, didn't you?

A No, sir; I didn't believe Mrs. Patterson.

Q Do you mean to tell me that Bradstreet said it was true?

A I can't tell you exactly the words what was said, but I found out it was not so.

Q But you remember very well what this paper said. 20 What did the other paper say? What did Bradstreet say?

A They didn't mention nothing about chattel mortgage.

Q You got a report; what was the report? Did it say anything about it?

A Not that I know of.

Q Then you knew that day, so far as Bradstreet was concerned, it was not true, is that what you mean?

A No; I say as far as accounts were concerned it 30 was not true; I have learned it wasn't so.

Q Then when that time came after you came back, and you had inquired of Bradstreet, investigated and so on, then what was your belief on the subject as to its truth or falseness?

A As far as my knowledge, when I came back I sent to Bradstreet for a report, and they reported—didn't say anything about chattel mortgage or anything of that kind.

Q Then what was your belief on the subject? Did you believe it true then?

A In the meantime I believe I sent parties to investigate, and I was informed it was not so.

Q Then you believed it to be untrue, did you?

A Yes, sir; it was untrue.

Q Did you tell us—I didn't quite catch it—that you got that chattel mortgage the night you were in Red Bank, the day you came there?

10 A I can't tell until I look at my books, whether it was the same day or a few days after.

Q You didn't get a chattel mortgage the time you came there in a hurry and took the train?

A I couldn't tell you exactly until I look at my books whether it was the same day; it was either the same day or a few days afterwards.

Q You can certainly tell whether you brought it home with you when you got it?

20 A I couldn't tell you whether I brought it home or not; I can, if it is any satisfaction, show you exactly.

Q When was the chattel mortgage dated?

A I couldn't tell you the exact date; it was around on those dates.

Q Well, was it put on record about the time of its date?

A I think so.

Q Well, now, wasn't it a good while after the fifth?

A I couldn't tell you—it wasn't so very long.

30 Q It is very important, you know, and I just want to get at it; wasn't it—

*The Court:* You are after his recollection now. That will be shown by the record.

Q Well, the mortgage was for \$4,000—the chattel mortgage?

A Four thousand and some odd dollars.

Q Was that mortgage given for the amount of her indebtedness to you at the time—the exact amount?

40 A Yes, sir.

Q Or was it for something more?

A No more—no less.

Q It was just for the amount of it?

A Yes, sir.

Q And that indebtedness had been running up for how long?

A From season to season; she had been making payments on account, gradually, every year or so.

Q It had been running along for how long?

A Running account—maybe for only six months and 10 might be only nine months; we have got customers—sometimes we have running accounts.

Q When you came on there you saw the store, of course, of Mrs. Patterson and all that was in it; now, about what—you are a merchant, expert knowledge of this case—about what was the value of the stock that was in her store at that time?

A I didn't have any idea; but I thought it was sufficient to cover me.

Q You mean to say you thought it was worth 20 \$4,000?

A I did, and more.

Q What sort of stock was it?

A Clothing—gents' furnishing goods.

Q How much of it was goods that you had supplied; how large a proportion of it do you suppose was goods you had supplied?

A I presume about half of it—about half of it, I think.

Q Now, you said you found in conversation with 30 her that she had a lot of other creditors—that is what frightened you?

A Yes, sir.

Q Well, about half of this stock which you had not supplied—now, who were the creditors who had supplied the other half?

A I couldn't say.

Q Who were some of them?

A I only learned in the last few weeks, a short time, from the parties—

*Q* Never mind when you learned—I want to know who they were?

*A* I couldn't tell you; he told me who they were, but I forget who they are.

*Q* When you talked to Mrs. Patterson about it and you found out that there were other creditors, what did she tell you about it—to what extent were the other creditors, and who were they?

*A* I don't know; she told me that she had some  
10 other creditors.

*Q* To what amount?

*A* I couldn't say.

*Q* She didn't know?

*A* I wasn't inquisitive; it didn't concern me; I was only looking for my own; I wasn't looking for any other creditors.

*Q* You don't know what she said about any other creditors?

*A* No, sir.

20 *Q* Well, you told us your only reason for your looking was because you were frightened—because she had other creditors, and you couldn't tell to what extent?

*A* No, sir—I couldn't tell to what extent—not now.

*Q* She didn't tell you the names of the creditors, sufficient in amount, or any particular amount, as far as you remember?

*A* She might have told me so.

*Q* But you can't remember it.

*A* I can't remember who they were, exactly.

30 *Q* You can't remember that she gave you any figures as to other creditors, upon which you based your belief that you were in danger—am I right?

*A* Say that again.

*Q* You can't remember that she gave you any figures as to other creditors, upon which you based your belief that you were in danger?

*A* I can't remember, exactly.

*Q* Well, I want the best you can.

40 *A* I can't swear to it that I know anybody.

Q You can't remember one single creditor that she owed money to ?

A I have heard her mention one creditor, and I don't know the man.

Q Who were they—what was his name ?

A Mr. Samuels or Lyons, or something to that effect ; those I don't remember.

Q But you don't remember the amount—you don't remember any amount ; now, did you see her or Mr. Patterson, after that ? 10

A After what ?

Q Between the time of that interview and the time this suit was brought ?

A Yes, sir.

Q When did you see them—did you go on there again ?

A I have been on after that—at the store—to account the stock, looking at the stock, and they have been on ; Mr. Patterson has been to Philadelphia, also Mrs. Patterson been to Philadelphia. 20

Q Since that time you have owned the place ?

A I have owned the place.

Q That is, when you took that chattel mortgage ; is this the mortgage—(referring to the record and reading mortgage record, dated November 25th, Emma Patterson, to Meyers, Goodman & Co., sworn to second day of December, 1884, and recorded December 3d,) you took the bill of sale, therefore, on the 25th of November—am I right, when this mortgage was taken ?

A The bill of sale was after that mortgage. 30

Q It was then that you went on again and took possession of the stock ?

A Yes, sir.

Q And that is when you got your mortgage ; now, didn't you look into the books of Mrs. Patterson or Mr. Patterson, at that time you took that mortgage, or when you took the mortgage, or when you took charge of the business there—did you make any examination of their financial condition at all at that time ? 40

A I can't remember, exactly ; I might, and might not.

Q Well, to what extent and when was it?

A I don't know exactly ; I couldn't say.

Q You don't know whether you did or not ?

A I couldn't say whether I did or not at that time.

Q You had \$4,000 on the stock ?

A Yes, sir.

Q You thought they were going to break ?

10 A Yes, sir.

Q You went and got a chattel mortgage and you cannot tell us whether you looked into their financial condition ?

A That is all I looked at—was into the stock.

Q You cannot recall any examination into their financial condition whatever ?

A Not exactly.

Q Well, inexactly, or in any way.

A I know they were not worth a million dollars, and

20 I know they were not worth ten thousand.

Q That is all you looked into it ?

A Yes, sir.

Q You can't tell us anything further on that point ?

A No, sir.

Q Therefore you took this chattel mortgage without any examination of the financial condition of Emma Patterson and her husband at the time.

A I didn't examine any condition of Mrs. Patterson ; I haven't examined the financial condition or no other  
30 condition of her.

Q So you took that chattel mortgage, then, without any examination of their condition ?

A Yes, sir.

Q Now, didn't you prepare, or have prepared, or have something to do with an affidavit which was made by Mrs. Patterson about this chattel mortgage ? Can you remember that ?

A I can't remember that exactly ; it ought to be recorded, if I made such an affidavit ; I have my attorneys  
40 that attend to my matters.

Q Attorneys where?

A In Philadelphia.

Q They drew the affidavit?

A Yes, sir.

Q And that affidavit was taken to Mrs. Patterson—the affidavit made by Mr. or Mrs. Patterson, which was spoken of in this suit?

A Yes, sir, I did; yes, sir.

Q You remember that affidavit?

A I do remember.

10

Q Now, I want you to tell us about that—when was it?

A It is only what I said to her.

*Mr. McGee:* I don't know what this means, or what it is about; it seems to be illegal; if there is an affidavit it is the best evidence.

*The Court:* It is competent to put that in.

Q That was the first time you came over, wasn't it?

A I couldn't tell whether it was the first or second.

20

Q You came there twice, you know; the first time you came there was the day which you saw that date on that paper, which is the 5th of November; the second time you came was on the 25th, when you took your stock.

A I came to Red Bank before that day.

Q Now, you say that on the day you have told us—that on the day this sheet was printed, or dated—it was on the 6th of November, according to you?

A I think it was on the 6th.

30

Q That you brought the affidavit to Philadelphia, didn't you? Didn't you bring the affidavit of Mrs. Patterson to Philadelphia?

A No, sir, not that I know of.

Q Well, who did bring one?

A I didn't bring an affidavit from Red Bank, not that I know of, to Philadelphia.

Q You didn't?

A I didn't, I think—in fact I don't remember giving Mrs.—I took an affidavit in Philadelphia.

40

Q You don't remember taking one, or you say you did take one?

A I don't; I might.

Q Don't you remember that Mrs. Patterson made at the time an affidavit?

A If you show it to me I can remember.

Q You have no recollection about that?

A The same day that I was over there; oh, yes, I believe that Mrs. Patterson swore to it that she didn't  
10 give a chattel mortgage; yes, sir.

*The Court:* That paper ought to be produced. You are asking him now to prove the contents of some paper.

*Witness:* Yes, I can tell you; I remember it was Mrs. Patterson denied she gave the chattel mortgage, and I said, "Can you make an affidavit to that effect—that you didn't?" and she says yes; I says, "You make an affidavit," and she did.

Q And you brought it on to Philadelphia?

20 A I think I brought it on to Philadelphia.

Q Then you took it to Lisberger & Weiss, didn't you?

A I can't tell whether I did take it to Lisberger & Weiss; they had nothing to do with my affairs.

Q Didn't you give it to some one?

A I might have put it in my safe in my office; I don't know where it is; it might be there yet.

Q Well, that was the 6th of November, therefore, that you brought that affidavit on, and then it was that  
30 you began to investigate?

A I—

Q Yes; and from the result of your investigations you told us in a short time that you found the thing was not true; you found it wasn't true?

A My mind was not clear altogether on the subject.

Q Now, how does it come, upon that state of facts, after you had this positive statement from her, accompanied by an affidavit, and full investigation with the assistance of a mercantile agency, how did it happen that  
40 nineteen days afterwards you were so frightened that

you took a chattel mortgage for \$4,000? I wish you would explain that?

A I will tell you now how that is; after I got to be a little afraid I thought if it aint true she might do it, that is it, and I insisted on having security.

Q Then it was after it was very well settled in your mind that the thing was not true?

A It wasn't altogether clear to me yet.

Q But as far as your belief went, it was settled?

A I kind of did believe that it wasn't true, but I 10 thought it may get true.

Q The only reason, therefore, that you have about it in the matter is, that twenty days after this thing, after all investigation and so on, you still had a lingering doubt in your mind, and that was sufficient for you to go on and gobble up this stock, if I may use the language—get possession of this stock of goods?

A Certainly.

Q And you did that without making any investigation of the financial condition of Mrs. Patterson? 20

A I knowed she owed something to some people; I didn't know how much.

Q You told us that you hadn't made an investigation?

A She told me that she owed something to other people; I don't mind.

Q You said that she might have told you, or you thought she told you about Mr. Lyons?

A She did tell me that name; I think she told me other names, but I can't remember who they were. 30

Q And you have no recollection of any condition of the state of her financial affairs at that time?

A I couldn't say exactly the condition of her affairs.

Q Well, now you have told us something about your looking at reports, mercantile agencies—in other people's places.

A Very often.

Q You told us you were a subscriber of Bradstreet's Agency, didn't you?

A Yes, sir. 40

Q Don't you know that the subscribers to both those agencies are under contract?

A Yes, sir.

Q Written contract?

A Yes, sir.

Q That all communications made—

A Strictly private.

Q Are confidential?

Objected to.

10 A Yes, sir.

Q And they shall not be communicated to anybody else?

A Yes, sir.

Objected to.

Q And don't you know that subscribers of both those agencies are under written contract that all communications made are confidential—that they shall not be communicated to anybody else?

20 Objected to. Admitted. Exception to plaintiffs.

A Yes, sir.

Q You have such a contract with Bradstreet?

A I have such a contract, but it is done every day by every merchant; it is done by other merchants, that they give their neighbors information and reports daily.

Q That is, all merchants violate this contract, you mean?

A Yes, sir; I can go to any of my neighbors—dozens of them—and I can get reports.

30 Q Then all your friends in the mercantile agency are men who violate their contract?

Objected to. Admitted.

A Yes, sir.

Q When you say you go anywhere, you mean among your particular friends?

A I only go to such of my friends.

Q Do you mean to say you can go to an old, prominent dry goods house, such as Hood, Ponbright & Co.,  
40 and get such information?

*A* Very often; I wouldn't say that I could get it there, but I could get it in any commission house in New York—jobbing house—and in Philadelphia; I have done it frequently.

*Q* Then you have been able to get information through the subscribers of this agency, that is what you told us?

*A* Yes, sir.

*Q* But you also told us that the contract is that this information shall not be communicated to any one else? 10

*A* It is written so.

Objected to. Admitted. Exception to plaintiffs.

*Mr. McGee:* I have another objection, and that is that this contract ought to be here. It is the best evidence.

*The Court:* The witness upon his examination in chief said that he got this information from others, and upon this I suppose they want to show that it was gotten surreptitiously, as far as they were concerned. 20

Objection overruled. Exception to plaintiffs.

*Q* The only knowledge that you have, therefore, of Dun & Co.'s notification sheet, or any of its contents, is such as you acquired from your friends, Lisberger & Weiss?

*A* I didn't say that.

*Q* You have said something about your knowledge of the meaning of words on that paper. You are not a subscriber to Dun & Co., are you, or were you then?

*A* No, sir; I am not. 30

*Q* Don't you know that mercantile agencies in their notification sheet—that they have accompanying and place in the hands of the subscribers certain aids, keys, and so on, which enable them to understand certain things which might not be intelligible to everybody?

*A* Yes, sir.

*Q* You never had such a means of knowledge, had you, from Dun & Co.?

*A* Not from Dun & Co., but from subscribers; Bradstreet has the same. 40

Q Then the only way that you had for knowing what the words on their sheet meant, was such opportunity as you got by seeing it in the offices of your friends?

A And from Bradstreet.

Q Now, I want to ask you a question about Mr. Patterson, who is in your employ, you have told us. He went into your employ, I suppose, when this stock of goods were taken?

10 A Yes, sir.

Q Were there any books of account open then?

A They were opened for me.

Q What about the old debts—the debts of the old concern?

A I assumed them personally.

Q You assumed them?

A Yes, sir; I paid the firm—

Q That was part of the arrangement, was it?

A Yes, sir.

20 Q When you got the mortgage?

A Yes, sir.

Q What about the old debts of the concern?

A I assumed them personally.

Q That was part of the arrangement?

A Yes, sir.

Q When you got the mortgage?

A Yes, sir.

*Mr. McGee:* I want to know what he means by all the debts, and to whom.

30 Q You can't recollect what the amount of that was; try it again.

A The amount of what?

Q The debts.

A The amount of debts was four thousand and some odd dollars.

Q Besides your own?

A No, not besides my own; I had my own.

40 Q Then \$4,000 includes them all—the debts besides your own? There is no other debts, but Meyers, Good-

man & Co.—\$4,003—I believe. You assumed the debts, now, the debts of the old concern?

A When we went out of business?

Q Yes; what was the amount of the debts?

*The Court:* We are talking about Mrs. Patterson's debts.

*Witness:* Yes, sir; she didn't owe me anything after I had that bill of sale.

Q You took a chattel mortgage, and you took a bill 10 of sale, and there are all the old debts?

A Yes.

Q You assumed the old debts?

A Mrs. Patterson's?

Q Yes.

A No, sir; I didn't assume any such debts; I didn't assume any debts of Mrs. Patterson.

Q What did you assume?

A Mrs. Patterson gave us that bill of sale, and I took that bill of sale, and I paid the firm of Meyers, 20 Goodman & Co. the debts of Mrs. Patterson for the bill of sale and I took the goods, and the store is conducted now by D. Meyers, if you understand that; it used to be Meyers & Goodman; the chattel mortgage was given—yes, that is right—I paid Meyers & Goodman off for those goods.

Q Did any of the other creditors?

A I haven't got nothing to do with the other creditors at all.

Q Did they ever do anything in the matter, as far as 30 you know?

A I couldn't tell; I don't know whether they are paid or not paid.

Q Well, when did she ask you—when did Mrs. Patterson—you saw her on the 5th of November, according to your dates, and you got the bill of sale on the 25th?

A Yes, sir; the mortgage.

Q Did she come to you to buy goods in between those two dates?

A I don't think she did.

Q Didn't make any application for credit at that time?

A I believe she did ; I think so ; I believe they did order some goods ; I don't think I shipped them.

Q What amount?

A I couldn't tell ; if I had my books here I could tell you exactly.

Q You think she did order some goods ; you don't think you shipped them?

10 A Because I found just in what position I was after I got there.

Q When you took this bill of sale you say you thought the stock of goods was sufficient to pay your debts?

A To cover my claim.

Q Well, then, as you knew there were other debts, as you have told us, you took that, did you not, because you didn't think that her assets were sufficient to pay all her debts—wasn't that your idea?

20 A Not at a judicious sale.

Q In other words, you thought at the time that her financial condition was such that you might lose your money if you didn't get security—wasn't that it?

A That I couldn't say, exactly, but what I thought was that she might go to work and give a chattel mortgage to one of her friends and I would be left in the cold, and I insisted—

Q You thought there wasn't enough meat to go all around, didn't you?

30 A I thought—I didn't think that—I thought there is sufficient goods to pay all around if it be sold at retail.

Q But you had a doubt?

A Not at a judicious sale ; I thought perhaps there wouldn't be enough.

Q You thought if there was going to be a judicial sale, you would be the one to sell ?

A I always looked for myself, first.

40 Q Didn't you believe at that time, and wasn't that the motive of your action, that there was a doubt of the ability of Mrs. Patterson to pay all her debts ?

A Not exactly.

Q Then what other motive did you have for taking that chattel mortgage—what other reason?

A I told you before, I thought she might get it in her mind—and that it might be bad misrated to somebody else—to give a chattel mortgage to somebody else.

Q You thought she was embarrassed?

A I didn't think she was exactly embarrassed—I thought she had enough to pay.

Q You thought she was on the verge of embarrassment? 10

A I didn't exactly think that, but I thought perhaps she might get such an idea that she would stop paying, or give it to somebody else.

Q You thought shaky—what might be called shaky?

A No; not exactly.

Q Then, am I right, that your main motive—that your principal motive in getting this chattel mortgage—was to protect your interest for fear there might be a collapse of that business by reason of there not being enough assets to pay all the creditors? 20

A Well, I have told you when I come there I seen there was other creditors there, and they demanded money, and I got a little frightened by reflecting—by refreshing my memory; yes, there was other creditors at the store demanding money, and I felt very much uneasy about it, and I insisted.

Q What other creditors were those?

A I believe it was a tall man; I don't remember his name; I met Mr. Lyons there, too. 30

Q How much was his debt?

A I can't say exactly; I don't know what it was; I wasn't inquisitive.

*By the Court:*

Q When was it that you say these men were there?

A It was the time that I was in Red Bank.

Q That was on the 6th?

A On the 6th. 40

Q Well, before the 5th of November, didn't you know a good deal about Mrs. Patterson's financial condition?

A Not so much as I did afterwards.

Q It was afterwards that you looked into it more closely?

A Yes, sir; when I seen other creditors at the store demanding money, then I got uneasy.

10 Q You have said something to intimate that the sheet—the question was asked whether you could get what reference you liked—could you get any communication from the mercantile agency without subscribing to it, unless you borrowed it from somebody else?

A I couldn't get it direct.

Q Could you get it unless you borrowed?

A Not direct.

Q Don't you know that you can't get it in any other way?

A Yes, sir—no, sir.

20 Q Don't you know that these communications are all confidential?

A Yes, sir.

Q The only way that any one could get it, that was not a subscriber, would be by some one that was a subscriber letting him have access to it?

A Yes, sir.

Q You know they are not sold as newspapers?

Objected to. Objection sustained.

30

*Re-direct examination:*

Q Now, with regard to this matter of assuming the debts—you spoke of assuming the debts—you mean that you, as between you and your late firm, assumed the debt—paid them and became the creditor and took the goods in your own name?

A Yes, sir.

Q Not that you assumed any debt of hers?

40 A No, sir.

Q I understand you also to say that you thought she had assets enough to pay her debts if sold at retail?

A Yes, sir.

Q But you feared she might give a chattel mortgage and then a judicial sale intervene?

A Yes, sir.

Q You said that a key was furnished by R. G. Dun & Co. to some of their publications?

A It is furnished by Bradstreet; I am no member of 10 R. G. Dun.

Q Is any key necessary to this paper?

A No, sir.

Q This paper that that gentleman handed you, and which was sent to Red Bank—which made you go to Red Bank—you say you sent to Mrs. Patterson?

A I did.

Q At the time that you came on to Red Bank, were Lisberger & Weiss—the people who handed you that paper—were they creditors of Mrs. Patterson? 20

A I don't think they were.

Q When you speak of their having dealings with Mrs. Patterson you refer to a prior date?

A Yes, sir.

Q Now, can you give us the reason why the chattel mortgage was not taken until the 25th of November, or 2d of December?

A I had some trouble to get it out of Mrs. Patterson. 30

Q She wouldn't give it at first?

A It was some time.

Q Did you threaten her with any proceedings, or otherwise?

A I told her it had to be fixed up in some shape or other; I couldn't wait any longer.

Q What did you tell her you would do if she didn't give you the chattel mortgage?

A I can't exactly give you the words, but I know I kind of frightened her. 40

Q Did you frighten her with legal proceedings?

A I can't tell; there was some threats.

Q Do you remember whether you threatened her with arrest?

A I couldn't say now what I did.

Q Prior to that time, had her credit, as a merchant, been good?

A It had been good at my house; I don't know how it had been at others.

10 Q How many copies of these Mercantile Agency Notification Sheets are circulated in Philadelphia—do you know?

A I couldn't say; I presume some thousands.

Defendants' counsel objects, and moves to strike out the answer.

*The Court:* The witness ought not to speak of anything that he has no direct knowledge about—not to speak in general terms unless he has knowledge.

20 Q Do you know that there are fifty or one hundred houses that take them?

*The Court:* Of your own knowledge?

*Witness:* Yes; I believe I can tell over one hundred houses that take them in Philadelphia.

Q And how are they delivered—do you know?

A They are weekly sheets, I think—twice a week.

Q Well, do they come by mail or messenger?

A Messenger, most of the times.

30 Q Are they returned after they are used, or do the merchants keep them?

A The merchants keep them—lay them on their desk, a great many—and a great many throw them away when they see they are not interested in them.

Q When you said you couldn't get information of the agency or directly, what did you mean, that if you went to Dun himself and asked, you wouldn't get it if you were not a subscriber?

A I couldn't go to Dun, himself.

40 Q He asked you if you could get information, directly?

A I can go there to my neighbors and get him to make out a slip of R. G. Dun & Co., and send down and see how that party stands, and my neighbor sends down and gets a report on him and lets me have it.

Q But these papers—anybody that asks for them—any merchant can see them if they ask for them?

A Yes, sir; that is no secret—I never keep that secret.

*Defendants' counsel:* It is no secret with you, evidently? 10

A No, sir.

Q Did you know before the chattel mortgage was taken that a number of creditors had been down?

A I seen some, but I don't know how many.

Q All of those that were there, were they demanding payment?

A I heard them say they wanted their money.

Q Do you know whether suits were begun?

A I couldn't say.

Q Do you know the volume of business that was 20 being done prior to that time—whether it was much or little?

A I couldn't tell you.

*Re-cross examination:*

Q You told us you had some trouble in getting Mrs. Patterson to give this mortgage—did you see her in the interval, or did you write to her?

A I had been corresponding.

Q Done by letter, was it? 30

A Letter; yes, sir.

Q Did that continue for some time; that was the reason for the delay, was it?

A I don't know whether that was exactly the delay or not; I couldn't say.

Q That is the only reason you have?

A But I know I couldn't get it when I wanted it.

Q That is the only reason you have for delay?

A I don't know whether that was exactly the reason, but I presume so. 40

Q You say Lisberger & Weiss brought over to you the paper on which you saw something about Mrs. Patterson—did they give you the paper?

A They did.

Q Did you take it down to Red Bank with you?

A Not at that day.

Q Did you take it another day?

A Not another day—I only sent it down by mail.

Q Who did you send it to—Mr. Patterson or Mrs. 10 Patterson?

A The reason I sent it down, they say they couldn't believe such a thing was in the paper.

Q Mr. Patterson or Mrs. Patterson?

A Patterson's store.

Q Who did you address it to?

A I think it was Emma Patterson—E. Patterson.

Q Have you ever seen it since?

A I have seen it several times.

Q Did you ever get it back again?

20 A That paper?

Q Yes.

A Never got it back that I know of.

Q Then you were the first and only person—first person as far as you know—who communicated to Mrs. Patterson this fact, by sending her the paper with that on it?

A I don't know whether I was the first one or last one.

30 Q You sent it by mail to her.

A I told her; first I went down, as I said before.

Q You told her first that you had seen it?

A She afterwards deny it, and I made her make an affidavit that she didn't.

Q Now, didn't you telegraph down to this region, somewhere, to ascertain whether there was any truth or not in the report you had seen?

A I did.

Q Who did you telegraph to?

40 A Telegraphed to Patterson.

Q You got an answer ?

A Yes, sir.

Q What Patterson ?

A The county clerk.

Q Did you communicate in some other way by more recent invention than telegraph—didn't you telephone ?

A No, sir.

Q Didn't you telephone ?

A Not that I know of.

10

Q At all events, you telegraphed—what answer did you get ?

A I telegraphed, "Has this Emma Patterson, the clothier here in Red Bank, confessed a chattel mortgage—given a chattel mortgage?" The answer was, "Yes;" that was all; then I got very mad about it, about Mrs. Patterson.

Q Well, when you got that reply it was that you came on, or did you telegraph that afterwards ?

A Then I made her give me an affidavit that she 20 didn't confess the chattel mortgage.

Q Then the order of things was that this telegraphing was done after you had visited her ?

A No, the day I was down there.

Q You telegraphed first ?

A No, sir; I went to see her first, and she denied it, and I wouldn't take her word, and I went to work and telegraphed.

Q You did the telegraphing there ?

A Yes, sir.

30

Q Then when you telegraphed to the county clerk and you got the reply from him that that was true—

A He didn't say true; the only word was "yes."

Q Well, an affirmative answer—of course that frightened you more ?

A Frightened me more.

Q And then it was really that statement, was it not, which gave you the most alarm ?

A I couldnt say that; the most alarm given me was when I first heard it.

40

Q It entered very largely into the matter—it had a good deal to do with your fright ?

A I didn't feel right about it, but it didn't frighten me as much as when I first heard it; I was most used to it then.

Q Did you say that you identified in any way the paper you saw so that you could know it again—mark it in any way ?

A I couldn't say, sir, that it is exactly that paper, 10 but I could say that it is one like it.

Q But the paper that has been shown you ?

A I couldn't say, sir, that it is the identical paper.

Q You cannot swear that it is the identical paper that you got from Lisberger & Weiss ?

A No; I can't say what I don't know.

20

**Charles Lyons**, a witness produced on the part of the plaintiffs, having been duly sworn, according to law, deposeth and saith :

*Direct examination*, by Mr. McGee :

Q Where do you live ?

A In New York.

Q What is your business ?

A Manufacturing boys' and children's clothing.

30 Q What is the name of the firm to which you belong ?

A J. J. Samuels & Co.

Q Do you know Emma Patterson, of Red Bank ?

A Yes, sir.

Q And her husband ?

A Yes, sir.

Q Have you had any dealings with them ?

A Yes, sir.

Q In what way ?

40 A Selling them goods.

Q How long have you been dealing with them?

A About two years and a half.

Q Let us see—that would run back to 1883. At the time you commenced selling them goods—selling Mrs. Patterson goods—was her credit good, financially?

*Mr. Woodruff*: What credit did she have, if any?

*The Court*: Was her credit financially good, or bad, or indifferent?

*Witness*: Well, it was pretty good—fair.

10

Q Did you think it good enough to trust her?

A Well, we started with her at a certain limit, you know, and gradually we extended her a larger line of credit, sir; the dealings were pretty fair.

Q How long did you continue to sell her?

A I think it was November, 1884.

Q Then why did you cease to do so?

A Well, I saw this sheet one evening.

*By Mr. Woodruff*:

Q What sheet?

20

A This sheet of R. G. Dun & Co., of which I was formerly a subscriber of, and I knew all about it; just as soon as I saw that sheet with that thing on it, I rushed down the next morning.

Q Where?

A To Red Bank.

Q At that time how much did Mrs. Patterson owe your firm?

A About \$800.

Q And what was the item you saw, and in what sheet; do you know Dun's Mercantile Agency Notification Sheet?

30

A Yes, sir; that is, I subscribed to it for five years.

Q Is that one of them? (Showing witness paper.)

A Yes, sir; this is one of them.

Q Of the issue of November 5, 1884?

A Well, this is November 12th.

Q Well, here, are those two copies of the issue of November 5, 1884?

A Yes, sir.

40

Q Now, just turn to that—is that the one you saw it in?

A This is a similar paper.

Q You mean to say that is one copy of that sheet?

A Yes, sir.

Q Now, turn to the item which you saw and see if that is the item you saw?

A That is the very item.

Q Read it?

10 A "Red Bank, Patterson Emma, chtl. mtge., \$1,385, clothing."

Q What did you understand that to mean?

Objected to.

*The Court:* Let us have the introductory question; he was a subscriber for five years; now, whether in that time he gained information of their way of making these reports.

Q In that time how often did you see the paper?

20 A I suppose I saw the paper from 150 to 200 times.

Q How often a week?

A I never saw them every week, you know, because I was resident out of New York city, and the firm I was connected with was out of town, in Tennessee; and I would go down there three or four or five times a year; and I would then—papers accumulated for weeks, you know; and while I was there sometimes for five or six or eight weeks, papers would come in once or twice a week, and then I gained all the information about them.

30 Q And did you act on the information from time to time that you gained from the papers?

A My partners, generally, acted upon it, because they subscribed to that agency, and they generally took every means to investigate, and they generally went by it.

Q Since that time have you been in the habit of seeing them?

A Yes, sir.

Q Do you know when you look at them, or have you acted upon information gained from them in other  
40 cases?

A Well, this present firm I am connected with—we never subscribed for this thing.

Q I ask you if you have been in the habit at the times you did subscribe for them, or at other times when you saw them, of acting upon the information they contained?

A Yes, sir; I can just give you a little instance.

Q Well, I want to know if you have used it enough to know what it means?

A Yes, sir. 10

Q Do you know what those entries mean?

A Yes, sir; certainly.

Q What the words mean?

A Certainly.

Q Have you acted upon such knowledge in other cases?

A Yes, sir; the firm has.

Q Well, have you?

A Individually?

Q Yes. 20

A No, sir; I have not.

Q Have you, as a member of the firm, acted on knowledge you have gained?

A I am in the company of J. J. Samuels & Co.

*Defendants' counsel:* Well, were you at the time when you were subscribers—were you the company then?

*Mr. McGee:* I asked him whether he had, at any time, acted upon any of these matters—is that correct?

*Witness:* Yes, sir; several times, but not this present firm. 30

Q Well, at any time—any firm that you have been connected with—have you acted upon the information you obtained from the Dun paper, there—the notification sheet?

A Yes, sir.

*Mr. McGee:* Now, I wan't to ask him if he knows what that means—that item; I suppose I have laid foundation enough.

*The Court:* I suppose you have, sir. 40

Q Do you know what that item means?

A Yes, sir.

Q Just tell us what it means?

A It mean that Emma Patterson—(interrupted.)

Question objected to. Admitted. Exception for the defendants.

(See Exception 4, for defendants, *post.*)

10 *Witness:* It means that Emma Patterson has filed with the Court in which Red Bank is situated, in the county—has given to somebody a chattel mortgage of that amount on her stock of goods.

Q And what Emma Patterson—Emma Patterson of what place?

A Red Bank, New Jersey.

Q For that amount?

A Yes, sir.

Q Now, then, you saw that item, and then what did you say you did?

20 A Well, I felt pretty uncomfortable the balance of the evening.

Objected to.

*Witness:* I took the very first train the next morning to Red Bank; the first time I had ever been down there.

Q For what purpose?

A To see about this thing.

Q If you hadn't seen that item in the paper would you have gone to Red Bank?

A No; I never was there before.

30 Q If you hadn't seen that item would you have supposed there was any doubt about Mrs. Patterson's credit?

A No.

Q At that time did you regard her credit as good?

A Well, we regarded it as pretty fair, good enough for the line of credit they were getting here; yes, sir she was treating us very nicely.

40 Q Do you recollect about the amount of goods you sold to her during the time she was dealing with you—in dollars?

A You mean altogether?

Q During the whole time?

A I can't tell exactly, but I believe they bought some goods of us for cash, maybe four or five or six hundred dollars; I suppose they bought of us altogether, \$2,400, \$2,300—something like that.

Q About how much did they usually owe you?

A They owed us as high as \$600, \$650.

Q Did you sell them all the goods they came there to buy up to that time? 10

A No; I never sold them to them.

Q Well, did the firm, I mean, sell them whatever goods they asked for up to that time?

A Yes, sir; we never refused them.

Q Did the firm loan them any money?

A No, sir; I never loaned them a dollar.

Q But it gave them whatever line of credit they asked for?

A Yes, sir.

Q Now, then, when you reached Red Bank who did you see? 20

A I saw this Mr. Samuels was down; my partner was down to Red Bank, I think, in the latter part of August or beginning of September, 1884, and he came there on business.

Q He made an investigation, and on the strength of that investigation, what did the firm do?

Objected to.

A We were perfectly satisfied that Mrs. Patterson was all right. 30

Last question overruled, and exception allowed plaintiffs.

Q You went on trusting them up to this time?

A Yes, sir.

Q Up to this time had anything come to your knowledge to lead you to doubt her credit, to the extent you were trusting her?

A No, sir. 40

*Q* Had you yourself, personally, sold Mrs. Patterson goods, sometimes?

*A* Well, I sold her one book, I believe, of \$150; the salesman sold the balance, I believe; Mr. Samuels sold Mr. Patterson once a few dollars; I am not positive about that.

*Q* When you reached Red Bank who did you see?

*A* I saw Mr. Patterson—I saw his brother.

*Q* Did you see the wife?

10 *A* I saw the big, tall man there, with long whiskers; some clothing business, if I remember right; if I remember right, Steinricht & Doblin; while I was there another man by the name of Mr. Cheyley—

*Q* Was he another creditor?

*A* He was a creditor, also.

*Q* The first man you mentioned—was he a creditor?

*A* Yes, sir; and I got talking to him directly before I got speaking to Mr. Patterson—(interrupted.)

*Q* Then did you see Mrs. Patterson?

20 *A* No; I didn't see Mrs. Patterson, because Mr. Patterson told me she was not feeling very well, and he was very sorry he couldn't take me down to the house.

*Q* What did you say to Mr. Patterson?

*A* I says, "Mr. Patterson, I suppose you know what I came down here for;" well, he says, "I suppose you came down here about that chattel mortgage business;" I says, "that is just it, exactly;" well, I commenced to make a pretty big noise with the man, and he denied it.

*Q* What did he say in denying it?

30 *A* He said it wasn't so.

*Q* Did he say how he had heard it, or who had told him?

*A* He told me there had been other people down there getting him almost wild.

*Q* Did you tell him how you heard about it?

*A* Certainly.

*Q* Did you have a sheet with you?

*A* No, sir; I didn't take the sheet because it didn't belong to me.

40 *Q* You told him you had seen a sheet?

A I told him I had saw it; I didn't know whether he knew anything about this commercial agency business or not; I told him I saw it from pretty good authority; afterwards when we got talking I told him it was the agency sheet, Mercantile Agency Notification Sheet.

Q Had you any other information of it before you went down there, except what you gained from that sheet?

A No, sir.

Q Now, when he denied it, did you insist on being 10 paid?

A Yes, sir; he gave me some money, too.

Q How much?

A Fifty dollars.

Q Then what else did you demand?

A Well, even after I had the fifty dollars, or the check, I didn't want to make Mr. Patterson believe that I was going back on him; I tried to get into the bank to have the check certified and get the money onto it; I wasn't acquainted in Red Bank with anybody, and I 20 didn't know the bank would cash the check for me, not knowing me, and I took the check the first thing in the morning and deposited that check in the bank; I felt very uneasy about the thing; I went out again; let us see, when did I go out there? I went out there, I suppose, between the 20th and 25th of November, somewhere in that neighborhood; I had been in Freehold at the very time, and I went down to Red Bank and told Mr. Patterson to give me some more money; he said he didn't have it then; well, I met some other man there; I 30 don't remember who it was; I met some other creditor of Mr. Patterson's; he was a perfect stranger to me, and I asked Mr. Patterson to give me some money; he told me that he had none, and they were pressing the life out of him, boring him; his wife was sick; I told him that didn't do me any good; he owed us considerable money; so he says, you come down next week and I will try to straighten this matter out; he gave me an order for a few little goods there, and I didn't pay any more attention to it than that piece of paper after he had given me 40

the order ; well, I came down, I believe it was on the 9th of December, and I commenced to settle this matter up with Mr. Patterson, and he gave me three notes on my account ; I believe six, eight and ten months, endorsed by his brother, George W. Patterson ; well, I investigated—(interrupted.)

Q When you say he gave you notes signed by—

A By Einma Patterson, endorsed by his brother, George W. Patterson ; I thought the thing was pretty  
10 good, because I understood that George W. Patterson had some United States bonds in his own name, and while I was there, about an hour after I had received the notes, in comes Mr. Meyer and tells me that the place is his ; that is all I know about that second chattel mortgage.

Q Were those notes ever paid ?

A No, sir.

Q Did you threaten Mrs. Patterson with suit at the time when you were first down there, or any time before  
20 the notes were given ?

A Well, yes, sir ; Mr. Pintard and Mr. Nevius can say how wild I was at the time I was down there, to get the money.

Q Did you make an effort to get a warrant of arrest ?

A I did, sir.

Q Did you succeed ?

A Well, I believe Mr. Nevius told me if I did I would make myself liable.

30 Q After that did Mrs. Patterson ask credit of you ?

A Mr. Patterson give me a little order there at the time that I was down there, and I didn't send it to him ; I believe that we wrote back that we didn't have the goods on hand, or something of that kind ; we were out of it.

Q Well, is it a fact that you didn't have them on hand, or was that only an excuse for not sending ?

A It was only an excuse.

Q Why didn't you send them ?

40 A I didn't want to have any more dealings with the

parties until I got my money ; I had lost confidence ; I didn't know what was behind this chattel mortgage ; I couldn't make it out, head or tail ; I only saw Mrs. Patterson once more.

*Q* When they denied the fact of the chattel mortgage, did you believe them ?

*A* Well, just as I tell you ; I thought there was something behind this thing ; I didn't know how this thing should come out that way ; Mr. Patterson commenced to explain this thing ; I didn't believe half he was talking about ; he told me something about a carpenter, and different things. 10

*Q* Now, since this case has been under way, have you been seen by the defendants, either of them, in this case ?

*A* Who, R. G. Dun & Co. ?

*Q* Yes ?

*A* No, sir.

*Q* Or any one on their behalf ?

*A* No, sir. 20

*Q* Haven't any threats been made against you if you testified here ?

Objected to.

*A* Well, not to me individually.

*Q* Well, what has come to your ears ?

Objected to unless made to the witness.

*The Court:* That wouldn't do. You must bring it right to the witness himself.

*Q* Now, has anybody made any threats against you in case you testified in this case ? 30

Objected to.

*The Court:* That won't do. How can that be competent unless the threat was made direct from the parties to him ?

Recess.

CHARLES LYONS recalled for further

*Direct examination*, by Mr. McGee:

Q Has anybody made any threats against you if you testified in this case?

Question withdrawn.

Q Do you know to what extent these agency notification sheets of R. G. Dun & Co. are circulated in the city of New York?

10 Objected to.

*The Court*: Go on and enter an exception.

(See Exception 5, for defendants, *post.*)

A I don't know exactly, but I think it is a great many.

Q How many people do you know that take it?

A I think I know about from 100 to 200 people that take it, and more.

Q They get it semi-weekly?

A Well, they have the book given with it once or  
20 twice a year, and get the notification sheets twice a week, I believe it is.

*Cross-examination*, by Mr. Woodruff:

Q I understand you to say you are a member of the firm of J. J. Samuels & Co., of New York?

A Yes, sir.

Q That you saw a similar paper to the one that was shown you, the notification sheet?

30 A Yes, sir.

Q Now, please state to the Court and jury where you saw that paper?

Objected to as irrelevant, as not material to the issue.

*The Court*: To test the witness, whether he has actually seen it or not; where, when, and under what circumstances? Go on, you can test him in that way.

A I can't say exactly, that is, almost positively, where I saw that paper at, but I could go into a great  
40 many business houses.

*The Court:* No, the question is, where you saw that particular paper.

*Witness:* If I aint mistaken I think I saw that paper at Edward Simon & Bros.

*Q* Where?

*A* On Broadway, between Broome and Grand; they keep in Newark, N. J.—trunk manufacturers.

*Q* Do you know whether or not you saw it at their place of business? 10

*A* Yes, sir, I think I saw that paper there.

*Q* How did you come to see it there?

*A* Well, I saw it laying on the desk; I am pretty intimate there with those people, and picked it up and looked at it; there was no objection made to it.

*Q* Did you ask their consent?

*A* Well, I took up a great many papers there; they never objected.

*Q* Did you ask their consent?

*A* No, sir. 20

*Q* What time did you see it?

*A* I think it was about November 8 or 9.

*Q* Was that the first time you ever saw that paper?

*A* Yes, sir; that is, that particular one.

*Q* That sheet—the first copy of this sheet that you ever saw?

*A* No—of that date only.

*Q* That is what I want—this particular sheet?

*A* Yes, sir.

*Q* That was on the 8th or 9th of November? 30

*A* Something in that neighborhood.

*Q* Was that before or after you had been to Red Bank?

*A* Before.

*Q* Now, you stated that you were formerly connected with a firm in Tennessee?

*A* Yes, sir.

*Q* In what way were you connected?

*A* Well, I was one of three partners. 40

Q You were a copartner in that concern?

A Yes, sir.

Q What was the name of that concern?

A L. Rosenheim Bro. & Co.; I was the New York partner.

Q What part of Tennessee?

A Nashville; they are in existence there yet.

Q Did you, personally, subscribe while you were a member of that firm—for the publications; did you, yourself, make the subscription for the publication of the mercantile agency of R. G. Dun & Co., while you were with that concern?

Objected to as irrelevant.

A Yes, sir.

Q You subscribed to them?

A Yes, sir; they asked my consent.

Q Did you see the contract of subscription?

A I believed I signed one or two of them myself; I don't remember whether it was Bradstreet's or Dun's; I subscribed myself.

Q Do you know under what terms the subscribers to that agency receives those sheets?

A I believe I gave a check for \$100; I believe I gave another one a check for \$75, for the annual subscriptions; I signed the checks, I believe, myself, for those two.

Q Under what restrictions, if any, were you accustomed to receive those sheets?

Mr. McGee: The contract is the best evidence, and I object to testimony as to the contents of it.

The Court: You must account for the paper before you go into the contents of it.

Q Will you state to the Court and jury where that contract is.

A Well, I ain't a member of that firm any more.

Q Do you know where it is?

A No, sir.

Q Is it in your possession?

A I don't think it is in my possession; no, sir.

*Q* Now, you have stated that while you were a member of the Tennessee firm, you were accustomed to receive—the firm was accustomed to receive sheets and reference books?

*A* Yes, sir.

*Q* From R. G. Dun & Co.?

*A* Yes, sir; and from Bradstreet's, also.

*Q* Now, I ask you under what limitations you received those?

Objection renewed on the same ground. 10

*The Court:* Whether the limitations in this particular case were in writing. I suppose we can't go into the contents, unless we account for the loss of it; I suppose those limitations are in writing.

*Mr. Woodruff:* He says that he subscribed twice.

*Witness:* The firm subscribed a great many more times when I wasn't down there.

*Q* You have stated in your direct examination that this sheet, bearing date November 5, 1884, is similar to the sheets which you formerly received, when you were a member of the Tennessee firm? 20

*A* No; I didn't say that.

*Q* Similar to it?

*A* Yes, sir.

*Q* You did say so?

*A* Yes, sir; that is so.

*Q* Now, please state to the Court and jury whether the matter at the head of this sheet is the same as that which was on the sheets that you were accustomed to receive when you were a member of the Tennessee firm? 30

Objected to.

*A* I think this is the very same; it is four years now since I dissolved partnership with this Tennessee firm; well, now, you don't expect me to say that all these words there are the same as when I saw them last down there; I can't say, exactly, whether the wording is exactly the same, but it is the same form and style of that sheet. 40

Q Can you say whether the wording is substantially the same?

A I haven't read all there is there; I can't remember all there is there.

Q (Witness handed paper.) Just run over and see.

A I think the wording is something similar; I don't know as it is exactly the same; I don't know whether there is all the words there—whether there was more words on that one or in this one; you see it is over four  
10 years since I saw one of the agency sheets.

*The Court:* It is affirmatively proved on your defence that these sheets are confidential between the parties; that is part of your case; I believe it is not part of the plaintiffs' case.

Q Now, you have testified in relation to your action after seeing a paper similar to this one of November 5, 1884; you stated that you immediately proceeded the next morning to Red Bank to find out what it meant?

20 A Yes, sir.

Q That is it substantially?

A Yes, sir.

Q Now, what reply did Mr. Patterson or Mrs Patterson make to you when you asked them about what it meant?

A Well, he said that there was no chattel mortgage given; that was all a slander and all such stuff as that.

Q At that time he paid you \$50 on account?

A Yes, sir.

30 Q Gave you a check?

A Yes; that was towards—I think it was after 3 o'clock.

Q On that day; the next day?

A After a good deal of talking.

Q Did you make any inquiry as to the truth of this statement that you had seen other than from Mr. Patterson?

A I don't know whether I did in Red Bank, but I did in New York city, though.

40 Q When?

A Well, when I got back the next day.

Q What did you learn when you got back?

A Well, I learned that it wasn't so.

Q Then you knew that this statement wasn't true two days after you first heard of it?

A Yes, sir.

Q Where did you get that information?

A Well, this man Steinricht of Steinricht & Doblin, it is a pretty large clothing house in New York, and I believe this is the first time I ever met that man down at Mrs. Patterson's store, and he was making a terrible big noise down there, and telling Mr. Patterson he was going to sue, and damned if he would wait another minute, all such talk as that; Mr. Patterson then requested me, just before going to the train, if I wouldn't be kind enough to go up and see this man and tell him not to bring any suit, that he would pay him pretty soon, just as soon as he possibly could; I told Mr. Patterson I didn't care about doing that, because the man I seen was a very excitable man, and I didn't know the man at all, but still, when I went back to New York the next day, I went up there and seen this man and he said he was going to sue; so I says, "Why are you going to sue? has the man given this chattel mortgage?" but he didn't care, he said he was going to sue; he told me the name of the firm he gave the notes to here, in Freehold; he says to me, "You can do as you please, but I have sued."

Q State, please, when you next went to Red Bank?

A I think it was somewheres between the 20th and 25th of November. 30

Q Did you see Mrs. Patterson at that time?

A No, sir.

Q Did you make any further inquiries about this chattel mortgage that you first heard had been given?

A Well, I didn't make any more; no, because after this Mr. Steinricht told me that it wasn't so, that he has no chattel mortgage, and as he had given me the names of his attorneys here in Freehold, and I knew—I was informed in some other way, by these attorneys; I seen a letter that they wrote somebody, that they didn't give a

chattel mortgage; it might have been this very same firm; it might have been to them.

*Q* Were you perfectly satisfied that she hadn't given a chattel mortgage?

*A* Yes, sir; I was perfectly satisfied.

*Q* Now, why then did you insist upon her securing her claim when you had learned that she had not given a chattel mortgage?

*A* Well, I had lost my confidence in Mrs. Patterson  
 10 because I thought that even if there was an error on the part of the agency, there must be something behind this thing; then I met this man Steinricht and knew he was pushing them to the wall; and then I met another man named Koehler, also a creditor; he was bothering my partner to sue and he was going to take it to a man named Applegate at Red Bank; he never went into any suit; then I met another man by the name of f—— and he told me that Patterson owes him some money; he says he was going to sue, or did sue, or something  
 20 like that; well, he owed another man by the name of Mr. Brumer; he owed him something.

*Q* What Mr. Brumer?

*A* Max B. Brumer.

*Q* What was Mr. Koehler's name?

*A* As far as his first name was concerned I can't be exact about it; I have told you why; I believe he had failed a few years ago.

*Q* Where does he belong?

*A* Well, he was in New York city; I believe he was  
 30 doing business under his wife's name; I think he is doing business now in his own name; I am not sure about that; well, then, I went down to Red Bank and pressed Mr. Patterson for a settlement of my claim, and it was all right, you know, and ordered a little goods that I didn't ship, and told me if I would come down next week he would straighten the matter out; I ought to have been down the next week, but I went somewhere in Pennsylvania for another claim, so I didn't get  
 40 down there until December 8 or 9.

Q Now, you have stated that she had had considerable credit with you?

A Yes, sir.

Q How promptly had she been accustomed to pay?

A Well, in the spring of the year she sent us, I believe, one month \$350, which is pretty good.

Q Well?

A Well, she was pretty prompt.

Q What do you mean by pretty prompt?

A Well, she bought of us an open account; she sent us money faster in the spring than we anticipated. 10

Q How was it the rest of the year?

A Well, it was pretty fair.

Q Faster or slower than the bills came due?

A This last \$800 she paid was paid all since the latter part of August; I think it was the latter part of August when our salesman, I believe, dated the bill, if I remember right; either October 1 or October 15; I don't know; he told us something about it, and I was very busy; I don't know exactly, except I would refer to my books. 20

Q You haven't got your books here?

A No, sir.

Q I don't know that I asked you this question—are you a subscriber to the mercantile agency at the present time?

A No, sir.

Q You are not?

A No, sir.

Q Were you on November 5, 1884? 30

A No, sir.

*Re direct examination :*

Q If you had not seen that publication, would you have gone to Red Bank?

A No, sir.

Q Or been frightened about your claim?

A No, sir.

Q Or made any attempt to collect it at that time?

A No, sir. 40

Q Had you, up to that time, seen or heard anything to shake your faith in Mrs. Patterson's credit?

A No, sir.

Q After that time would you have sold her goods if she had asked you, after the 5th of November?

Former question objected to.

*The Court:* The witness says there was an order came which they didn't fill.

A I took that myself.

10 Q I have asked with regard to that particular order—you didn't fill it; why didn't you fill it?

A I had no more confidence in the people, and I came down there to get the money and urge this settlement, and I didn't feel like shipping them any more goods.

Q If she had sent other orders after that time, would you have filled them?

A No, sir.

Q For what reason?

A Well, I lost my confidence, that is about all.

20 Q Where is R. G. Dun & Co.'s office?

A In New York?

Q Yes.

A It is on Broadway, between Pearl and Duane; I think so.

30

**Bernard Brumer**, a witness called on the part of the aforesaid plaintiff, being duly sworn, according to law, on his oath deposeth and saith:

*Direct examination*, by Mr. Pintard:

Q Where do you do business?

A 680 Broadway, New York.

Q What business are you engaged in?

A I transact business in the absence of Max Brumer  
40 in New York city.

Q What is the name of the firm you are connected with?

A Max B. Brumer.

Q What business did you say you were engaged in, clothing?

A Yes, sir.

Q What kinds of goods do you manufacture?

A Specialty in pantaloons.

Q Do you know the plaintiff in this suit, Emma Patterson?

10

A Yes, sir.

Q Do you know where she did or does business?

A Yes, sir.

Q Where?

A Red Bank.

Q Did you ever sell her any goods?

A Yes, sir.

Q When, how often?

A Since May, 1883.

Q For yourself or for your son?

20

A My son.

Q How often did you sell her goods for your son, and for what amounts?

Defendants' counsel objects to the examination of the witness on the stand because he is not one of the persons named in the bill of particulars by whom they propose to prove loss of credit, Max Brumer being the name in the bill of particulars and not the witness.

*Mr. McGee:* We offer to prove by this witness that publication of the libelous matter set forth in the declaration in this case was made to Max B. Brumer, one of the persons whose names is set out in the bill of particulars.

30

*The Court:* I understand you object to this, sir.

*Defendants' counsel:* Unquestionably, sir; yes, sir,

The offer overruled and exception taken.

*Mr. McGee:* We also offer to prove by this witness that in consequence of this publication set forth in the declaration that Max B. Brumer, who was a creditor at

40

that time of the plaintiff, Emma Patterson, at once or shortly after demanded payment of his debt, and there-  
after refused further credit to the plaintiff, and that prior  
to that time he had extended credit to her.

Objected to. Offer overruled. Exception  
allowed.

10 *Mr. McGee:* We also offer to prove by this witness  
that Max B. Brumer resides and does business in the  
city of New York, and is not within the jurisdiction of  
this Court.

*The Court:* He is where you can take his testimony ;  
you know where he is.

Offer overruled. Exception allowed.

*Mr. McGee:* We also offer to call the witness on the  
general grounds, on the general subject of the effect upon  
the credit of the plaintiff, of this publication.

Objected to. Overruled. Exception.

20 *Mr. McGee:* We also offer to prove by this witness  
that in behalf of Max B. Brumer, who was a creditor at  
that time of the plaintiff, that this witness went to Red  
Bank in order to demand payment of that debt, and that  
while there he saw other creditors of the plaintiff there  
also engaged in demanding payment of their debts.

Objected to on the same grounds.

30 *The Court:* That fact, I think, is an independent fact  
and may tend to corroborate the testimony of the wit-  
nesses who were there; Mr. Meyers and these gentlemen  
having sworn that they were there, and other creditors  
there pressing their claims at or about this time.

Offer admitted. Exception to defendants.

(See Exception 6, for defendants, *post.*)

Q Did you go to Red Bank in November, 1884?

A Yes, sir.

Q To visit Mrs. Patterson's place of business?

A Yes, sir.

Q What was your business there at that time?

40 A I went there to collect some money.

Q Who did you find there?

A I went about the 8th or 9th of November. Charley Lyons came up to me and asked me if I heard the news—(interrupted.)

Q What did you do?

A I asked Mr. Patterson if he could pay me what he owes—\$150; he says, “no, not just now;” he is in trouble just now, and they want to ruin him; and I asked him, “what is the matter?” and he says, “there;” Mr. Patterson showed me a sheet—a notification sheet— 10  
a paper from the mercantile agency, the report that Emma Patterson made a chattel mortgage for \$1,385 and that they tried to ruin him—(interrupted.)

Q (Witness shown Exhibit A, for plaintiffs.)

A Yes, sir; it was a sheet like this; I don't know whether it is the same identical one.

Q Did you see upon that sheet those words that appear there upon that portion of that?

*Defendants' counsel:* He doesn't identify that sheet; 20  
it seems to me the question ought to be asked—did you see certain words?

*The Court:* He can look at it and see whether he saw that on the sheet. You may have your objection and exception.

Q Did you see upon that sheet those words that appear there?

A Yes, sir; “Red Bank, Patterson Emma, chtl. mtge., \$1,385, clothing.”

Q Those words that you just read, you saw upon the sheet that Mrs. Patterson showed you that time in Red Bank? 30

A Yes, sir.

Q Were those words that appear upon the top of that sheet, also upon the sheet that Mrs. Patterson showed you?

A Yes, sir.

Q What are they; read them out so the jury can hear?

*The Court:* No, no; don't read them before the witness says he identifies them.

*Q* Did you see that title—the Mercantile Agency Notification Sheet?

*A* Yes, sir.

*Q* And the words "R. G. Dun & Co."?

*A* Yes, sir.

*Q* E. Russell & Co.?

*A* Yes, sir.

10 *Q* Did you see any Red Bank upon the sheet?

*A* Yes, sir.

*Q* Did you also see those words, "Wednesday, Nov. 5, 1884"?

*A* Yes, sir.

*Q* Did you also see upon that sheet the words, "Record Items," upon the second page?

*A* Yes, sir.

20 *Q* I understood you to read the word "New Jersey;" you saw that word New Jersey then, over that list in which the words, "Red Bank, Patterson Emma, chtl mtge., clothing," appeared?

*A* Yes, sir.

*Q* You say when you arrived at Red Bank she showed you the paper—were there any other persons there at that time, talking with her about her business?

*A* I think there were.

*Q* Who were they?

*A* I don't know their names—they were from Philadelphia.

30 *Q* Was Mr. Meyers there?

*A* No, sir; not at that time.

*Q* Was Mr. Lyons there?

*A* No, sir.

*Q* Was Mr. Steinricht there?

*A* I don't know what his name was; there was two gentlemen there; I don't know their names; I don't remember their names.

*Q* Well, what were these people doing there?

40 *A* They were fussing about.

Q What were those people doing there?

Objected to. Question overruled. Exception for plaintiffs.

Q What had been, so far as your knowledge was concerned, Mrs. Patterson's credit up to that time—the time you went there?

Objected to on the ground that it tends to prove special damages, as did the other question.

Q What knowledge had you of the credibility, or the 10 credit, I mean, of Mrs. Patterson?

A I transacted the entire business.

Q With your house—the house with which you are connected?

A I attend to the whole credit business and to the selling of the goods; I acted as—I transacted all the business in the absence of my son; he was traveling continually, and I acted for him in that capacity as salesman, and give credit to people for myself.

Q Now, please go on and state what Mrs. Patterson's 20 credit was?

A I sold her as high as \$500 or \$600.

Q Prior to the publication of November 5th?

A Yes, sir.

Q With your house?

A Yes, sir.

Q State what it was?

A I have sold her as high as \$600.

Q What was it after November 5th, with that house?

Objected to as specifically going to the loss of 30 credit which this witness is not competent to prove, he not being the creditor.

*The Court:* I think this witness is fully competent to show the loss of credit with that house, because he says he was the man who gave the credit in the absence of his son; had entire control of it.

Exception to defendants.

Q How was her credit after the date of November 5, with that house?

40

*The Court:* I allow this man to speak because I think he knows more than his son.

*A* I refused them further credit.

*Q* Now, why did you refuse them further credit?

*A* On account of this rumor coming out in this notification sheet that she gave a chattel mortgage for \$1,385.

*Q* Previous to that date, how often did you sell her goods?

10 *A* Quite often; two weeks, three weeks, four weeks.

*Q* How often did she pay her bills?

*A* Very often; sometimes in 30 days, sometimes 60 days, sometimes in 10 days.

*Q* Has she made, or any one for her made application since that time, for credit, to your house?

*A* When I came out to Red Bank on the 10th of November, Mr. Patterson asked me—

*The Court:* He has refused credit; that is his own act.

20 *Mr. Woodruff:* It doesn't appear that his son has—

*The Court:* I want it distinctly understood under the evidence, that this man stands in the place of his son; that he is there and acts as his salesman and credits, and probably knows more than his son.

*Q* Has she or any one for her made application since that time for credit to your house?

*A* Yes, sir; Mr. Patterson himself.

*Q* For himself or for her?

30 *A* For her; Mr. Patterson himself for Mrs. Patterson.

*Q* What did you do?

*A* I came out on the 9th or 10th.

*Q* What did you do—I mean when he made the application for credit?

*A* He gave me an order for several hundred dollars of goods and I didn't ship the goods after that rumor.

*Q* If it hadn't been for the rumor, would you have done so?

Objected to.

40 Objection sustained on the ground that witness has already stated what his motive was.

*Cross-examination*, by Mr. Woodruff :

Q You went to Red Bank in November, 1884, after the 5th or 6th, to collect a bill for—

A I didn't say the 6th.

Q For the purpose of seeing Mrs. Patterson ?

A I couldn't say 5th or 6th.

Q 8th or 9th—I mean the question, to see Mrs. Patterson ?

A Yes, sir.

Q Did you see her ?

10

A No, sir.

Q You did see Mr. Patterson ?

A Yes, sir ; she was sick.

Q And Mr. Patterson, you testified, showed you a sheet that has been identified here as a copy of the sheet that you then saw ?

A Yes, sir ; similar sheet.

Q After seeing that sheet, did you make any inquiry of Mr. Patterson about that chattel mortgage ?

A Yes, sir.

20

Q What did you ask him about it ?

A Whether it was true that he gave the chattel mortgage ; he said no.

Q Well, what else did you ask him about it ?

A I asked him then whether he can pay what he owes ; he said no ; that he is in trouble just now, and he will fix it up in a short time.

Q Did you ask him anything about the chattel mortgage ?

A No, sir ; the amount was so small that it wasn't worth while ; it was only \$150 that he owed me, and I knowed Mrs. Patterson for a good many years, and I had full confidence in the man ; I thought it wasn't worth while to make further inquiry.

Q After leaving Red Bank, did you make any further inquiry in this direction ?

A No, sir.

Q When was that order, that you have referred to, presented to you—the \$700 order ?

A Not seven ; several hundred dollars.

40

Q When was that order given?

A The last of October.

Q The last of October?

A Yes, sir.

Q Then that order was sent to you before this notice of the chattel mortgage appeared?

A Yes, sir.

Q Do you recall what time in the latter part of October you received that order?

10 A Yes, sir; the latter part of October; I don't know the date exactly; we generally make the goods to order; we don't carry goods in stock.

Q You don't carry goods in stock?

A No, sir; it takes some time to execute an order.

Q You have the entire charge of the credit business of your concern as well as the selling of the goods?

A Yes, sir; so long as my son isn't in New York.

Q Where was your son in the month of October, 1884?

20 A He was traveling.

Q Where was he in November?

A He was traveling also.

Q Didn't he return between—

A He comes back to-day and goes away the next day on the road.

Q He was back between those dates?

A Yes, sir.

Q Did you consult with him about this?

A Yes, sir; he left it all with me.

30 Q He left it all to you?

A Yes, sir.

*Re direct examination:*

Q Were you making up the order that Mr. or Mrs. Patterson had sent you at the time you saw the notification sheet?

A Yes, sir; I had it ready to ship.

Q You had it nearly ready to ship?

40 A Yes, sir.

Q And was that the reason why you didn't send it?

A Yes, sir.

Q Because you saw this report?

A Yes, sir.

*Re-cross examination :*

Q You say you were making up that order for shipment at the time you saw that notice, is that correct?

A Before.

Q You were making it up before that notice?

10

A Yes, sir.

Q You didn't ship it because you saw that notice?

A I didn't ship it because when I was there I asked them for that money, and he didn't pay me, and he showed me at the same time this sheet, and I thought if I shipped them goods somebody might bounce on him and I lose by money, and I didn't ship it.

Q Then the reason you didn't ship the goods was not because the notice was in the notification sheet, but because you were afraid somebody else might levy on the goods?

20

A No, sir; on the very account of this; if this didn't appear in the notification sheet I would have shipped them \$500 or \$600 more.

Q Do you mean to say you refused to send the goods after you learned a chattel mortgage had been given, because it was on that sheet?

A Yes, sir; I wasn't afraid with her only; I was afraid somebody else would attach her store and I might lose the money.

30

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**Alexander M. Oppenheimer**, a witness called on the part of the aforesaid plaintiffs, having been duly sworn according to law, on his oath deposeth and saith :

*Direct examination*, by Mr. McGee :

Q Where do you live?

A 619 North Tenth street, Philadelphia.

40

Q Where is your place of business?

A South Fourth street.

Q What is your business?

A Manufacturing men's clothing.

Q Do you know Emma Patterson and her husband?

A Yes, sir.

Q Of Red Bank, N. J.?

A Yes, sir.

Q Did you deal with them?

10 A Yes, sir.

Q For how long; what year?

A Three or four years.

Q Beginning with what year?

A 1880.

Q Were you dealing with them up to the month of November, 1884?

A Yes, sir.

Q At that time was Mrs. Patterson a debtor of yours?

A Yes, sir.

20 Q For what; out of what did it arise, goods sold?

A Goods sold.

Q And had you been selling them goods during all the time you mentioned?

A Yes, sir.

Q About how often?

A Well, I suppose not less than half-a-dozen times a year.

Q To what extent had you sold them goods; what line of credit had you given her?

30 A About \$200.

Q At that time how much was she in your debt?

A At what time?

Q In November, 1884.

A The last bill sent to them was November 15; at that time they owed us \$96.35; last delivery of goods was November 15, 1884.

Q When did the order for those goods come in, do you know?

40 A I can't state; probably a day or two before.

- Q Well, have you since that time sold her any goods?
- A No, sir.
- Q Tell us what, if anything, stopped the transactions between you?
- A Well, because of the information received.
- Q From what?
- A That they had given a chattel mortgage.
- Q Where did you get the information?
- A From the salesman who was in the habit of selling them goods. 10
- Q What did he tell you about it; or did you see some paper?
- A I didn't see any paper; he told me about it.
- Q What did he tell you? Who told you?
- A The salesman who was in the habit of selling them goods.
- Q You say that the information he communicated to you was that he had given a chattel mortgage?
- A Yes, sir.
- Q What did you do about it? 20
- A I didn't do anything; merely gave him orders not to sell them any more goods.
- Q That was the first, then, that you had heard there was any trouble?
- A Yes, sir.
- Q Since then have you ever sold any more goods to her?
- A No, sir.
- Q Do you know whether she has made application for other goods? 30
- A Well, the salesman wouldn't make any attempt to sell them after I had given him those orders.
- Q In other words, your directions to him were not to give any more credit there?
- A Yes, sir.
- Q Your direction was, not to give any more credit there?
- A Yes, sir.
- Q If application had been made by Mrs. Patterson after that would you have granted it? 40
- Question withdrawn.

*Q* Are you acquainted with the publications of R. G. Dun & Co.? Their Mercantile Agency Notification Sheets?

*A* I have seen them.

*Q* Frequently?

*A* Well, not of late; some years ago I did.

*Q* Do you know their Mercantile Agency Notification Sheet when you see it?

*A* I think I would.

10           Objected to.

*Q* Are you familiar with the Mercantile Agency Notification Sheet for 1884?

Objected to unless a paper is produced and made the subject of examination.

*Q* Did you see the Mercantile Agency Sheet of R. G. Dun & Co. in 1884?

*A* No, sir.

*Q* Has that bill ever been paid?

20    *A* What bill?

*Q* The bill that Mrs. Patterson owed in November, 1884?

*A* No, sir.

---

**Bernard Brumer** recalled and

*Examined* by Mr. McGee:

*Q* Has your bill ever been paid?

30    *A* No, sir.

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**Adolph Eschelbacher**, a witness called on the part of the aforesaid plaintiffs, having been duly sworn according to law, on his oath deposes and saith:

*Direct examination*, by Mr. McGee:

*Q* Where do you live?

40    *A* In New York city.

- Q What is your business?  
 A Gents' neck wear business.  
 Q Manufacturer?  
 A Yes, sir.  
 Q Are you alone in business or have you a firm?  
 A At present time I sold goods it was A. Eschelbacher at that time; now it is Eschelbacher & Co.  
 Q You were alone then?  
 A Yes, sir.  
 Q Do you know Mrs. Emma Patterson and her husband, the plaintiffs?  
 A Yes, sir.  
 Q Of Red Bank, New Jersey?  
 A Yes, sir.  
 Q Did you have dealings with them?  
 A Yes, sir.  
 Q Had you sold them goods prior to that time?  
 A I did.  
 Q For how long?  
 A For three or four years. 20  
 Q To what extent had you sold goods to them?  
 A In the neighborhood of \$100.  
 Q Do you mean \$100 altogether, or \$100 at a time?  
 A \$100 at a time  
 Q What did the extent of your sales to them, altogether, amount to?  
 A Do you mean during the year?  
 Q No; during the time you dealt with them.  
 A I should say about a thousand dollars.  
 Q At the time of the failure, or perhaps I should say, in November, 1884, how much did Emma Patterson owe you? 30  
 A I believe it was \$65 or \$66.  
 Q Did you cease giving her credit?

Objected to, as this is not one of the five who are specified by whom they propose to prove loss of credit.

(See Exception 7, for defendants, *post.*)

Plaintiffs' counsel asks leave to amend by adding the name of this witness, which amendment was allowed by the Court.

Q Did you cease to give her credit after that time?

A Yes, sir.

Q Now, then, will you tell us what happened which induced you to do that, and what you did and what was done?

A I was west at that time and when I came home my  
10 bookkeeper told me that she seen in the sheet of R. G. Dun & Co. that Emma Patterson gave a chattel mortgage, and I should see about it and try to collect it; and I went there and tried to collect, but I couldn't get it.

Q When you got there who did you see?

A Mr. Patterson.

Q What passed between you?

A I asked him for money; he told me he couldn't pay me now.

Q Did you say anything to him about the sheet you  
20 had seen or heard about?

A I did not.

Q Did he say anything about it to you; you didn't get it?

A No.

Q What was the reason that caused you to refuse credit after that time?

A I seen other people, one of them told me—met them on the train and I heard he was in trouble—and it is dangerous to sell the man goods.

Q If it hadn't been for this rumor would you have  
30 refused the credit?

Objected to.

Q Are you a subscriber to this R. G. Dun & Co.'s paper?

A No, sir.

Q Do you frequently see it?

A Once in a while.

Q Have you ever acted upon it?

40 A No, sir.

Q You never have acted upon its information?

Objected to.

Q Has your debt ever been paid?

A No, sir.

*Cross-examination*, by defendants' counsel:

Q Why did you refuse credit?

A On account of the rumor; I met some people that had been there that day, but I couldn't mention the name; they were strangers to me, but I know they had been down there and tried to collect money from Patterson, as well as I did. 10

Q Some strangers that you didn't know, you heard talking about it?

A I met them in the train; they tried to collect money there.

Q Do you know any of them now?

A I don't think I would.

Q When was it you first refused credit—what time in the year? 20

A It was in the fall; it was my fall trip that I had been west?

Q You can't tell exactly what time?

A No, sir.

Q Do you know whether it was the early or latter part of the fall?

A I think it was the latter part of the fall.

Q Was it before Christmas?

A Yes, sir.

Q How long before Christmas? 30

A I don't know; I couldn't tell exactly.

Q Couple of weeks?

A I think it was longer.

Q You can't tell to a certainty when it was, can you?

A No, sir; I can't.

Q Did you make any inquiry about this rumor to find out what the truth was?

A I did.

Q Who of?

A. Well, different parties; I can't say; I meet 40

people once in a while that is selling goods on the road and inquire about different parties, and so did I, and he was in trouble on account of giving a chattel mortgage; it was reported chattel mortgage and some people went there; I was told even that he was closed up, and so on.

*Q* Did they say whether it was chattel mortgage for \$1,385 or one for \$4,000?

*A* That I can't say.

*Q* That you don't know?

10 *A* I can't say; I don't know; I can't state that.

*Mr. McGee*: We renew our offer of these Mercantile Agency Notification Sheets.

*The Court*: Have you any further testimony to identify that particular sheet, sir?

*Mr. McGee*: We have Mrs. Patterson's testimony that this sheet was sent to her by Mr. Meyers, and Mr. Patterson says he will swear it is the identical sheet.

20 *The Court*: You had better put in your parole proof before you renew your offer.

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**Joseph Patterson**, one of the plaintiffs, sworn on his own behalf:

*Direct examination*, by Mr. McGee:

30 *Q* Where do you live?

*A* Red Bank?

*Q* Are you one of the plaintiffs in this case?

*A* Yes, sir.

*Q* What relation is Emma Patterson to you?

*A* My wife.

*Q* Was business conducted in Red Bank in the year 1884 by her?

*A* Yes, sir.

*Q* What business?

40 *A* Clothing and gents' furnishing goods.

Q What did you do in connection with the business?

A I had charge of the business.

Q Who did the buying?

A I did, and she has bought herself.

Q Both of you, then?

A Yes, sir.

Q And the selling?

A I had done selling, and she has too.

Q And the general details of that business did both of you take part in?

10

A Yes, sir.

Q Did she fail?

A No, sir.

Q Stop business?

A She stopped business.

Q About what time?

A December 12, 1884.

Q Now, will you give us the reasons, or the facts rather, which led to that stoppage? Give us the circumstances in detail without being specifically questioned.

20

A Well, as near as I remember, November 6, Mr. Meyers, the first one, came down to Red Bank.

Q What Mr. Meyers do you mean, the witness that has been on the stand?

A Yes, sir. Mr. Daniel Meyers came down to Red Bank, walked in the store, and he called me one side, and he says, what have you been placing a chattel mortgage on your stock for, or what has your wife? I says, we haven't done any such thing; but he says, I know better, but I told him I hadn't; I says, I don't care what you say, says I, I haven't. Well, he says, I want you to settle my claim or we will push you to the wall. Well, I says, Mr. Meyers, I have given no chattel mortgage. Oh, well, he says, I have Dun's mercantile sheet, which business men go by, and they couldn't certainly make a mistake. I am sure, I says, you have never lost confidence in us before, have you? He went up to the house to see my wife; he wanted her to come to Freehold to see upon the records about this mortgage, and it had got her in such a state of nervousness that she

40

couldn't come ; she came back to the store again, and that time there was another man came in, Mr. Koehler, and I left Mr. Meyers in the store to take care of the store, and I went to Senator Applegate's office and got him to draw a sworn affidavit that we knew nothing about such a mortgage ; then he went down to the Second National Bank, and the cashier of the bank says, if he says he has not given it, he has not. Well, Mr. Meyers went back to Philadelphia, and by that other creditors  
 10 came down ; some of them tried—I can show you letters where they were going to bring me before the Grand Jury—lock me up for fraud ; I have letters from lawyers here in Freehold writing to my wife that they were going to take me before the Grand Jury ; they were going to try me criminally ; that I had committed fraud by placing this mortgage ; and when the other creditors came down on her one went to Mr. Pintard there to get a warrant to lock me up for fraud as having charge of the business. Then Mr. Meyers came down again ; he de-  
 20 manded to be secured, as being the biggest creditor. Well, through our trouble we gave the chattel mortgage.

*Q* What do you mean by through our—who did the business—who advised it ?

*A* He advised it ; he says, that is the best thing to do ; he says, all these creditors coming in, if I cannot get rid of these creditors they will close you out ; he says, I will advise you to secure your biggest creditor ; give me a chattel mortgage ; and I did so.

*Q* That is the mortgage that has been spoken of by  
 30 Mr. Meyers on the stand ?

*A* Yes, sir.

*Q* And that was about when ?

*A* November 25th that mortgage was given ; and then they began to press, and began all to come in, and the attorney advised my wife to make him a bill of sale of the stock to save a slaughter of it ; because they would press that mortgage ; they would sell that entire stock out, and there would be nothing left for any of the creditors, or anybody else, after his mortgage would be paid ;  
 40

and by the advice through the attorney she had given this mortgage.

*Q* Well, did Mr. Meyers send you the sheet?

*A* He did.

*Q* Have you had it in your possession ever since?

*A* Me and my attorney has.

*Q* Do you know the sheet when you see it?

*A* Yes, sir.

*Q* (Witness shown sheet.) Is that the one?

*A* Yes, sir.

10

*Q* That is the sheet you received from Mr. Meyers?

*A* That is the identical sheet—yes, sir; because it has not been out of my possession and my attorneys since that sheet came.

*Mr. McGee:* Now, I renew my offer of the sheet; it is the one that is marked Exhibit "A."

*The Court:* Why, now, sir. Let the witness be cross-examined.

*Mr. McGee:* I want to be understood on the record 20 as having offered it.

*The Court:* We will not admit it until the witness has been cross-examined as to the identity of the paper.

*Defendants' counsel:* Your Honor understands we object to the offer on other grounds.

*The Court:* Yes, sir.

*Q* Now, then, prior to the 5th of November, 1884, had Mrs. Patterson had good credit?

*A* Yes, sir.

30

*Q* She had been dealing with New York and Philadelphia houses?

*A* Yes, sir.

*Q* And buying goods, and bought what amount per year?

*A* Well, we would buy on an average, I suppose, of \$8,000 to \$10,000 a year.

*Q* And had anybody refused to sell her goods up to that?

*A* Never had refused.

40

*Q* Now, after that time, was she able to secure credit, after the 5th of November?

*A* No, sir.

*Q* Now, tell us to whom you applied, or she applied, or you on her behalf, rather—now, tell us to whom, after the 5th of November, she or you on her behalf, applied for credit?

*A* Well, we applied to all of the creditors that we had been dealing with.

10 *Q* Give us the names?

*A* Well, one, Emanuel Katz, there.

*Q* And did he refuse?

*A* He did.

*Q* Did he give any reason?

*A* He gave reason; he said he heard that we were—through the reports—that we were bankrupt, and had been giving chattel mortgages.

*Q* Well, who else?

*A* Mr. Lyons.

20 *Q* That is the witness that has been here—Charles Lyons?

*A* Yes, sir.

*Q* Well, that is the firm of Samuels & Co.?

*A* J. J. Samuels & Co.

*Q* Was credit refused there?

*A* Credit was refused—yes, sir.

*Q* What reason was given?

*A* Well, reasons given—said that he heard that we had placed chattel mortgage upon the stock of goods.

30 *Defendants' counsel:* Is the door to be opened to admit any testimony as to any loss of credit from any source or any person?

Objected to on the ground that such testimony can only be given by such persons as refused credit, that they are the only ones that can explain the motives for which they did so refuse it.

*The Court:* The only objection now is, the counsel on the other side makes the objection to this testimony  
40 and states his ground. I shall rule, if you desire, that

the question may stay in, and take an exception. I will explain why I permit it to stand. As corroborative of the witnesses who have already spoken as to their motive, to show that they actually did what they did. Standing alone it would not be sufficient; I shall overrule it.

Exception granted to defendants.

(See Exception 8, for defendants, *post.*)

Q Who else?

A Mr. Brumer refused; I gave him an order, and he 10  
wouldn't ship on account of it.

Q Then that is Bernard Brumer?

A Bernard Brumer that I did the transaction with.

Q When you speak of Bernard Brumer, you mean  
Max B. Brumer?

A Yes, sir; Bernard Brumer was the person I bought  
the goods of.

Q You mean the person's house you bought the  
goods of?

A Yes, sir. 20

Q What is the name of the house?

A Max B. Brumer.

Q How about Eschelbacher?

A Eschelbacher said he couldn't conscientiously give  
us any more credit, because he couldn't see any way that  
he could collect his bill; he heard that they were all  
pushing us, and he didn't want to sell us any more goods.

Q Now, then, is Oppenheimer's name in there?

A I bought a bill of him since that, and he laid them  
away and wouldn't ship them. 30

Q Did he give any reason?

A Well, he said he heard we were compelled to se-  
cure our biggest creditor through that report, and he could  
see no way he could collect the bill.

Q Daniel Meyers?

A Daniel Meyers told us he wouldn't give us any  
more credit; he wanted what we owed him; I can give  
you a great many more, and in fact there are number—a  
lot of other houses in New York city and Philadelphia  
refused. 40

*Q* Was Mrs. Patterson able after that time to obtain credit with dealers anywhere?

*A* No, sir; never but one bill bought; that was bought from Mr. Oppenheimer, and I hadn't mentioned that to his agent, and he sold me this bill of goods; I don't remember the exact amount; when he came around again his agent said to me, he said to me, why didn't you tell me that this trouble was going on?

10 *The Court*: Is it necessary to have all that?

*Mr. McGee*: Just as the Court thinks.

*Witness*: That was the only bill.

*Q* After that time?

*A* Yes, sir.

*Q* Now, then, you say that after that time Mrs. Patterson went out of business?

*A* Yes, sir.

20 *Q* Now, give us the reason that she went out of business?

*A* Well, at the time of course she gave the chattel mortgage to Mr. Meyers for \$1,000, and previous to that, after the first mortgage was entered upon us, the creditors were fighting us all the time, and we couldn't get no credit whatever, and he compelled her, through this report, to give him a chattel mortgage to secure him, and then certainly we couldn't get any credit; and then the creditors came down there upon us—they were like a lot of wild men almost, and her attorney said to her, says  
30 he, I would advise you to give a bill of sale—(interrupted.)

*Q* You did give a bill of sale?

*A* Yes, sir.

*Q* Now, I want to know if that was what put you out of business?

*A* Yes, sir.

*Q* Now, if it hadn't been for this descent of creditors would there have been a necessity—(interrupted.)

*The Court*: Again you are hypothetical. What did  
40 they do, is the point.

*Mr. McGee:* Well, I suppose that one of the most important parts of this case is the reason why this was done, the reason why she went out of business; the fact that she went out of business might have a dozen—

*Q* Have you stated what creditors came there after the 5th?

*A* I haven't stated all of them.

*Q* Mention what creditors came there and demanded payment of their bills?

*A* Mr. Steinricht himself, of the firm of Steinricht & Doblin; these were creditors; they came there and demanded their money. Do you want the names? 10

*Q* Yes, all the creditors that came.

*A* Joseph Lockheimer & Co., of Philadelphia, thought we were good enough, and sold us a bill of goods.

*The Court:* You were asked the question what creditors came there.

*Witness:* They sent their agent down there. So many names I can't remember. 20

*Q* If you have got any books that will refresh you, or anything, I would like to know how many creditors came. Give us the number. How many came?

*A* I should judge seven or eight.

*Q* Pretty much all the creditors there were?

*A* Yes, sir.

*Q* You say they all threatened?

*A* Yes, sir.

*Q* Did any of them bring suit?

*A* Yes, sir. 30

*Q* How many?

*A* Steinricht & Doblin brought suit, and a great many claims sent to Mr. Applegate and Hope.

*Q* Their lawyers?

*A* Their lawyers pressed me, and Mr. Applegate wrote to them and told them the condition I was in; it couldn't be collected.

*Q* Since that time, has Mrs. Patterson done business?

*A* No, sir. 40

*Q* Or has any business been carried on for her?

*A* No, sir.

*Q* By anybody?

*A* No, sir.

*Q* What did Mrs. Patterson owe on the 5th of November, 1884—how much?

*A* \$6,007.

*Q* And up to that time had she been able to pay her debts as they accrued?

10 *A* Yes, sir.

*Q* What was the value of her stock of goods, at that time?

*A* Well, I should think about \$9,500.

*Q* What book accounts—the amount of her book accounts?

*A* Well, the book accounts didn't amount to anything much, because we never did any credit business worth mentioning—very trifling.

20 *Q* Would Mrs. Patterson have been able to pay her debts as they matured if there had been no unusual press by the creditors?

*A* Yes, sir.

Objected to.

*The Court:* The answer is overruled.

Exception for plaintiffs.

*Q* Well, was Mrs. Patterson doing a good business at that time?

30 *A* Yes, sir.

*Q* A good line of custom at the store?

*A* Yes, sir.

*Q* Prior to that time, can you tell what was the average annual net profits of the business?

*A* Do you want the sales and profits?

*Q* I would like to get at the average, year by year, of the net profits?

*A* That is, after the expenses of the store?

40 *The Court:* After your expenses are paid, of the store?

*Witness:* Well, the first year the net profits was over \$1,600.

*Q* That was what year?

*A* The year 1881 and 1882; the business started December 5, 1881.

*Q* Now, 1882 to 1883, she started when, November?

*A* December 5th.

*Q* Now, then, the next year, 1882 and 1883?

*A* Was \$2,339.

*Defendants' counsel:* It seems to us the witness was testifying from a memoranda in his hand. 10

*Witness:* The books are there to show.

Witness laid down book which he had had in his hand.

*Defendants' counsel:* The evidence should be shown by the books themselves, and not from memoranda.

*Witness:* I am not afraid to show the books at all.

*The Court:* The books, of course, must go in evidence. The witness is here explaining from his own knowledge, or from a memoranda made from the books. The testimony is taken in connection with the books, which will be offered in evidence. 20

*Defendants' counsel:* My objection goes to the testimony, unless the books are produced, because we wish to have the opportunity to cross-examine upon the books.

*The Court:* Certainly; that is right.

*Q* Are you able to testify to these things without the books? 30

*A* Yes, sir; I am perfectly willing they should examine the books; I would prefer they would do it.

*Q* These statements you have made you know yourself, notwithstanding the books?

*A* Yes, sir.

*The Court:* I suppose this witness kept the books himself?

*Witness:* Yes, sir. 40

*Q* Now, the year 1883 and 1884, net profits?

*The Court:* What books do you produce here now?

*Witness:* Produce all the books that I kept in my store.

*The Court:* That is, the books that will show the whole business, your sales, and cash, and balance, and show the profits?

*Witness:* Sales-books.

10 *Q* Now, the year 1883 and 1884?

*A* I think it was about a thousand dollars.

*By the Court:*

*Q* That will be 1883 and 1884, up to the time you stopped—December?

*A* That will be up to the time—if you notice, the books run from November 5th to November 30th—and I wound up my books in order to start on the 1st of the month of the coming year, January 1st.

20 *Q* That is what—a little more than eleven months of the last year?

*A* No; the last year is a full year—they were not—if you notice—the sales—they are up until November 3d, because the bill of sale was not given until December.

*Q* Then the net profits of the year were about \$1,000?

*A* Yes, sir.

Adjourned until Monday, January 11, 1886.

30

January 12th, 1886.

JOSEPH PATTERSON recalled for

*Further direct examination, by Mr. McGee:*

*Q* Now, the profits for the year succeeding November 5th, 1884—you say you closed the books November 30th?

40 *A* Yes, sir.

*Q* Now, after that time was there any more business done by Mrs. Patterson?

*A* The business stopped December 12th.

*Q* In ordinary years what were the sales of the business during the month of November?

*A* Am I permitted to look?

Objected to.

*The Court:* I think we have proof of the actual sales, and the books will show.

10

*Mr. McGee:* I want to show by the books or other wise that the sales were heavier in November and December than any other month of the year, so as to account for the falling off of the profits of the last year.

*Q* What months of the year were your sales usually the largest?

*A* November and December, usually.

*Mr. McGee:* May I not ask him the amounts of the sales generally in those months?

20

*The Court:* He has given it, has he not?

*Mr. McGee:* My object is to show that there was nearly enough sales in those two months to have paid the debts if the business had not been interrupted.

*The Court:* I think we must take the statement from the books, gentlemen; they are here; instead of that it is uncertain testimony, speculative; what there was in the past we can get, perhaps, but the others would be speculative.

30

*Q* Now, do you say there was no business done after the 12th of December?

*A* No, sir.

*Q* Then from that time on the business was conducted by Meyers?

*A* Yes, sir.

*Q* And you represented him?

*A* Yes, sir.

*Q* Has Mrs. Patterson done any business since then?

*A* No, sir.

40

Q Now, you spoke of suits were begun—have you with you the summonses in these cases?

A I can show you the letters here.

Q I haven't got quite as far as that yet. Can you give us the names of the suits that were—the names of the people that sued, so that I can get them from the Court here?

A Yes, sir.

Q Just give me the names of the people that sued.

10 A Steinricht & Doblin, of New York.

Objected to on the ground if there is to be any evidence of that kind it should be produced by the records themselves; an inquiry should not be made of the witness.

*The Court:* The proceedings in Court are primary evidence.

*Mr. McGee:* I suppose I may ask him what people sued.

20 Q Now, you spoke yesterday of lawyers writing threatening letters?

A Yes, sir.

Q Have you those letters with you?

A I have some.

Q Just produce them.

A (Witness did so.)

Q This letter—when was this received? (showing witness letter.)

A This was received December 8th.

30 Q Well, that is the day it is dated; was it received that day?

A Received that evening.

Q By whom was that written?

A Robbins & Hartshorn.

Q And came regularly through the post office?

A Yes, sir.

*Mr. McGee:* I offer this letter in evidence and ask permission to read it to the jury.

40 Objected to.

*Q* Do you know their signature? Whose signature is that?

*The Court:* Ever seen them write, or know anything about it?

*Witness:* I have another letter that has the same signature.

*Q* How many of these have you from Robbins & Hartshorn? Here is one January 3d, 1885. Have you any more? 10

*A* No.

*Mr. McGee:* I ask the Court that these may be marked for identification—the letters signed by Robbins & Hartshorn and addressed to Mrs. E. Patterson, dated December 8th, 1884; another letter sent by Robbins & Hartshorn, addressed “Jos. Patterson, Esq., Red Bank,” dated January 3d, 1885.

*Q* Now, what other letters have you?

*A* I have several letters here in regard to—by parties offering to sell us goods previous to this time. 20

*Q* Those I don't care about. I want the letters threatening suit, or threatening arrest.

*A* Well, the letters—I haven't got the one suit was brought through him—

Contents of letters objected to.

*Q* Have you the letters that you spoke of with you?

*A* No, sir; I have not.

*Q* What became of them?

*A* I don't know. 30

*Q* Did you save them?

*A* I didn't; I don't think I have; I haven't got them.

*Q* Have you looked for them?

*A* Yes, sir; I looked for them but I haven't got them any more; it is on the record where the judgment is.

*Q* You haven't those letters with you?

*A* No, sir.

*Q* Now, then, this difficulty, this coming down of the creditors upon you; what effect had these letters that 40

you received—what effect did they produce upon Mrs. Patterson's mental condition as to anxiety?

The evidence as to the mental condition of Mrs. Patterson objected to.

*The Court:* In order to shorten the case, gentlemen, I would say I have looked at this question as far as I have been able to do, and I am satisfied that we can receive no proof.

Question overruled. Exception to plaintiffs.

10

*Q* What salary have you received since the stoppage of the business?

Objected to.

*Mr. McGee:* I offer now to prove that by reason of this publication, illness followed which necessitated the employment of physicians, and I offer to prove the extent of the expense for physicians.

*The Court:* That is overruled. If you cannot prove any illness at all you cannot prove the expense incident  
20 to it.

Exception granted to plaintiffs.

*Mr. McGee:* I also offer to prove that by virtue of the same cause and the illness which followed as a consequence, that bills for medicines were incurred and moneys expended for medicines, and the amount.

*The Court:* That is also overruled as incident to the other.

Exception granted to plaintiffs.

30

*Mr. McGee:* I also offer to prove by reason of this publication the plaintiffs' commercial standing was injured.

*The Court:* That is too remote, sir.

Exception for plaintiffs.

*Mr. McGee:* I offer, first, to prove that by reason of this publication the rumor got abroad in the community that Mrs. Patterson had failed and had been guilty of fraudulent conduct in connection with the failure, and  
40 that the rumor injured her social standing with her

neighbors. Then the next offer after that will be that by virtue thereof customers fell off from the store—ceased to trade with her.

*The Court:* I think the whole offer should be rejected. We are getting into a region of speculations and probabilities, gossips and rumors, and all that kind of thing; we want to come down to the direct loss, if there was any inflicted by this libel, or whatever it was—direct loss occasioned by it. What the women might say in the neighborhood about it, we don't want to get into those 10 matters here. I shall overrule the offer.

Exception to each one.

*Defendants' counsel:* You have already ruled that such testimony could not be given by this witness. Of course we have no objection to the production of a creditor who has refused credit.

*The Court:* I have ruled that the loss of credit must be shown by the persons who refused the credit.

Exception to plaintiffs.

20

*Q* After this publication and the coming down of the creditors to demand payment of their claims, which you have sworn, was there any falling off in the custom at the store?

Objected to.

(See Exception 9, for the defendants, *post.*)

*A* Yes, sir.

*The Court:* That is, up to the time of selling out on the 12th of December.

30

*Q* Prior to that time and after the creditors came down, I mean?

*A* Yes, sir.

*Q* Was that falling off considerable?

*A* Yes, sir.

*Q* Can you tell how much?

*A* I can.

*Q* Well, how much?

*Defendants' counsel:* I would like to have our objection entered to that question. It is in the nature of an 40

effort to prove special damage, of course, and there is no averment of it in the original declaration, and no averment and no leave to amend averring it. It is entirely new matter not within the issue which is before the Court.

*The Court:* The Court rule it is within the averments of the declaration, and if not the plaintiff may amend.

Question allowed and exception for defendants.

10 *Defendants' counsel:* We would ask your Honor whether these amendments should not go upon the record. This is the third amendment the plaintiffs have made.

*The Court:* The defendant will be entitled to them before he commences his defence.

20 *Defendants' counsel:* We object to the question unless the particular customers be specified from which loss was suffered, and that the proof be made by them in the regular way.

Question admitted and exception for defendants.

*Q* How much falling off was there after these parties came there and interfered, and before the 12th of December?

*A* That is, for the usual November trade?

*Q* Yes.

30 *A* Well, somewheres about \$700 less that month than the previous month before that in November.

*Q* In sales?

*A* Yes, sir.

*Q* Now, as to the first twelve days in December, can you tell about that?

*A* I think I can. Am I allowed to look at the books?

*Q* Certainly, look at your books.

*A* December 1st to December 11th the sales were \$140.32.

40 *Q* Now, what had they been in December previous?

A Between four and five hundred dollars. The December previous to that the same dates, between \$400 and \$500. If you will allow me to figure it here I can give you the exact amount.

Q I did prove, I think, by Mr. Patterson; that this Mercantile Agency Notification Sheet, Exhibit "A," before Mr. Applegate, was the one that Mr. Meyers sent him.

A If you will allow me to see it. Yes, sir; that is the identical sheet that I got from Mr. Meyers. 10

Q The witness who was sworn on Friday or Thursday last?

A Yes, sir.

*Mr. Woodruff:* Are the books offered in evidence?

*Mr. McGee:* I haven't offered them, but I have no objections to do so. I am willing they should go in evidence.

Q What books have you there?

A My sales book, expense book, ledger, the way I keep it with my creditors and those with whom I bought goods. That is the way I keep my ledger; here is this ledger just as I bought it. For instance, here, December 11th, \$2.25; December 28th, merchandise, \$6 50, and so on. 20

Q Now, this column, what does that mean?

A Cash paid.

Q Cash paid to Meyers?

A Yes, sir.

Q And the column the inside to the right? 30

A Is goods bought.

Q And so on the other page are goods bought, and that side payments,—(indicating on book.)

A Yes, sir.

Q How far down does that book come?

A December 24th was the last purchase—the last purchase November 10th.

Q That is in Meyers and Goodman's account?

A Yes, sir.

*Q* Now, then, you run over here on the fourth page, December 24th, you mean that is payments ?

*A* Yes, payments.

*Q* Now, are there other accounts in that book ?

*A* Yes, sir.

*Q* What book is that, sales book ?

*A* No, account of my invoices ; bills bought and cash paid to the parties whom I traded with.

*Q* You told me last night something about an account  
10 after Mr. Meyers took possession going right on in the same books. Is this one of the books ?

*A* Yes, sir ; the same books.

*Q* You didn't start any new account ?

*A* No, sir ; I just kept the account right in the same.

*Q* Then these items here that are gotten in 1885 from the beginning and after the 12th of December ?

*A* Those are Mr. Meyers'.

*Q* The business was going right along and the account kept with him of the goods furnished and payments  
20 made just the same ?

*A* Yes, sir.

*Q* Now, the other books ; what other books have you there ?

*A* Expense books, freight bills, clerk hire, postage stamps.

*Q* Those are petty expenses ?

*A* Yes, sir.

*Mr. McGee* : By the bye, I offer that invoice book in  
30 evidence, and this expense book.

Said books marked Exhibits Nos. 3 and 4.

*Witness* : This was the ledger where I kept the day book and all ; I kept no book—I done no credit to amount to anything ; " Levi Dugi, pair pants, \$4,00 " ; I used to write down the name of it.

*Q* You call this, then—what then ?

*A* I call this a sort of ledger and day book combined.

*Q* The word ledger is on the outside ?

40 *A* Yes, sir.

*By the Court :*

*Q* Are there any balances on those books showing profit and loss ?

*A* Yes, sir.

*Defendants' counsel :* We object to these being admitted in evidence unless there is a complete set of books. There is wanting the cash book and check book, and journal, if any.

*Mr. McGee :* It is quite for the counsel to say whether the books come in ; I don't care. We will produce them if you want them. 10

*The Court :* The question seems to me is, whether they will show a balance of profit and loss.

*Mr. McGee :* They will show the whole business. All that was bought and all that was sold, and prices.

*Witness :* Yes, sir.

*Defendants' counsel :* Where is the cash book and check book ?

*Mr. McGee :* We cannot offer them all at once. 20

*Q* Now, what is this book ?

*A* This is a book of sales of Mr. Meyers.

*The Court :* We don't want Mr. Meyers' matters.

*Q* Now, what is next ?

*A* Well, there is the bank book.

*Q* Here are two bank books.

*A* Here is the sales book.

*By defendants' counsel :*

*Q* Is the check book there ? 30

*A* No, but here is the checks.

*Q* For the year 1884 ?

*A* Well, I suppose they are all here.

*Q* Just look and see ?

*A* They are all here.

*Mr. McGee :* I will offer these two bank books.

*Defendants' counsel :* Without the check book ?

*Mr. McGee :* No ; we will give you the checks. We haven't got the check book. 40

Bank books marked Exhibits 6 and 7.

*Mr. McGee*: Now, we will offer in evidence five bundles of checks, one for the years 1881 and 1882, and 1883; and two bundles for the year 1884.

*Defendants' counsel*: Where is the check book?

*Mr. McGee*: Haven't got the check book here.

*Defendants' counsel*: Nor the cash book?

*Witness*: Got my ledger there that we paid the cash from; I am not a practical bookkeeper; my book will  
10 correspond all through now, in buying goods and keeping the ledger; if I bought a bill of goods, I entered the bill of goods; if I sent him money, I entered the cash down on that book; that is all the cash book I kept, with my bank book, and that ledger will correspond with all the money that I have paid out.

*The Court*: That will show it?

*Witness*: Yes, sir.

*Q* By the ledger you mean that gray book that you called the invoice book?

20 *A* Yes, sir; and here is my expense book—that is Mr. Meyers'.

*By the Court*:

*Q* Were they all the books you kept in your business?

*A* Yes, sir.

*By defendants' counsel*:

*Q* Didn't you keep a check book—do I understand  
30 you to say you didn't keep a check book?

*A* No, sir.

*Q* You say you didn't?

*A* No, sir.

*Mr. McGee*: Here are three more bundles of checks; one bundle of 1882 and two in 1883. That makes seven bundles of checks.

*Q* What are these?

*A* Books from December 5, 1881, up until December  
40 when the business stopped, 1884; here is the beginning of Mr. Meyers.

Q Mr. Meyers all after December 12th here, is Mr. Meyers'?

A Yes, sir; so I kept separate books, not to get it mixed up.

Q This runs over to 1885—this book?

A That is another transaction; that has nothing to do with this; that is not the sales; you see where the sales stop.

Mr. McGee: Then I offer this book in evidence, so far as it applies to that business. 10

The Court: What book is that?

Witness: Sales book.

Mr. McGee: Two sales books?

Witness: And those check books, where the money is checked out, correspond with those where I have paid to my creditors at the banks.

Q When you speak of your creditors you mean creditors of the business? 20

A Yes, sir; you will see where I sent \$100 to Mr. Meyers.

The book marked Philip Sheldon on the fly leaf, is marked Exhibit 16, and the one which has lock box 78, marked 17.

Last two books offered in evidence.

Q Now, here are some sheets—here are some balance sheets—papers entitled balance sheets. There is one balance sheet of 1882? 30

A Yes, sir.

Q It shows the total sales is \$14,090.87?

A Yes, sir.

Q Total expenses, \$12,484.98?

A Yes, sir.

Q Balance 1882, \$1,682.85. Now, what is that—whence did you make it?

A That is made from—this is the first year's sales.

Q Well, what is it made up from?

A It is made from the sales. 40

Q Is it made up from the books?

A From my books—yes, sir.

Objected to as not being a balance sheet.

*By the Court:*

Q The books kept by you?

A Yes, sir.

Q That statement made by you from the books?

A Yes, sir.

10 Q Now, I understand you made this statement from the books yourself?

A Yes, sir.

Q That shows, does it, a summary of the business of 1882?

A Yes, sir.

*Mr. McGee:* I now offer that with the books.

Q Now, here is another one for 1883?

A Yes, sir.

20 Q Now, that shows a net profit of the year of \$2,339.75?

A Yes, sir.

Q Here is another one, just look at it, for the year ending November 30th, 1884?

A Yes, sir.

Q The same as the last?

A Yes, sir.

*Mr. McGee:* Offer that in evidence.

30 Q Now, here is another one. You say the net profit for eleven days, from December 1st to and including December 11th?

A Yes, sir.

Q That comes up to the time you say the business closed?

A Yes, sir.

Q Made up the same as the other?

A Yes, sir.

*Mr. McGee:* I offer that in evidence.

40 Said last mentioned papers marked Exhibits, 18, 19 and 20.

Q There are no more statements you have made from the books, are there?

A No, sir.

*By the Court :*

Q What do you mean by the word there, cost of sales?

*Witness :* That is the cost of the goods.

*Cross-examination, by Mr. Woodruff :*

10

Q I understand these books were all kept by you?

A Yes, sir.

Q The entries there in them were made by yourself?

A Yes, sir.

Q Counsel have presented four balance sheets showing, or purporting to show, the profits made during the time that the business has been carried on in your wife's name at Red Bank?

A Yes, sir.

Q I notice at the head of each of these sheets the first item is "Total sales." That, I presume, means the total sales of your business during that year?

A Yes, sir.

Q During the period shown on the sheet?

A Yes, sir.

Q The next item is "cost of sales"?

A Yes, sir.

Q What does that indicate?

A That is the cost of the goods that were sold.

Q Now, will you be kind enough to state to the Court and jury when these balance sheets were prepared?

30

A They were prepared each year.

Q In this form?

A Yes, sir.

Q Are these the originals that were prepared each year?

A Those are the originals.

Q Will you state whether or not any inventory was taken, prior to the preparation of each of these sheets, of your stock?

40

A The first two years they were not.

Q There were no inventories taken the first two years?

A No; because we could always tell about how much stock there was on hand, the way we kept the books.

Q How about the year 1883 and 1884?

A From 1883 to 1884?

Q Yes.

A There was an inventory, sir.

10 Q When was that inventory made?

A That inventory was taken, not in 1884, at the close of the year 1884, but the inventory was taken in February, 1885.

Q The inventory that is dated as of November 30th, 1884, was actually taken in February, 1885?

A The year closes November 30th, 1884. Why the inventory was not taken at the close of the year, it is right in the busiest part of the season, and usually in the clothing business it has run over December and January,  
20 to close out heavy goods in order not to get in the inventory, we generally took the inventory about February.

Q Then, are we to understand that these balance sheets, or two of them, at least, are founded on the inventories that were taken in the month of February and not at the close of the year?

A Those are inventories taken at the close of each year of the business in all instances; yes, sir.

Q I think I understood you that the last inventory was taken in February, 1885?

30 A Those are not inventories.

Q I understand your statements. I am asking about—

A Those are statements of the business.

*The Court:* What is the difference between inventories and statements? These are balance statements. Now, he is asking about the inventories of stock on hand.

*Witness:* The inventories of stock on hand were  
40 taken in February, always done in February.

Q Now, in the preparation of these statements, how did you reach the figures which are here adduced, if you didn't take your inventories until February, or later in the season?

A We took those statements, those balance sheets, from the books; the amount of business that was done; we know the amount of the expenses up to that date, and, as a rule, the way the books are kept in the clothing business it is hardly worth while to take an inventory at all, because you can always tell the amount of stock on hand from the books; I would simply take—the only object I have at all in taking an inventory in the clothing business is to know the light weight goods on hand and the heavy weight goods on hand, so they are packed. 10

Q Now, in taking these inventories, upon what basis of valuation are the inventories made—have they been made—have they been made in view of the value of the goods at the time you took the inventory, or have they been made in view of the profits which you expected to realize from the sale of the goods, or have they been made in view of the price which the goods cost? 20

A Made in view of the price which the goods cost, because we couldn't tell what we were going to get for them, because we don't know.

Q Then, in taking the inventories, you have made no allowance at all for any depreciation in the value of the stock from the time you started in business up to the time that the business closed?

A No, sir; because the stock was worth the money; it hadn't been old enough to depreciate; it hadn't become old enough. 30

Q Hadn't any of the stock become old?

A The oldest of it wasn't over three years; the stock was worth the money.

Q There is no question about that?

A No, sir.

Q Now, I understand you to have testified in your direct examination that Mr. Meyers was one of the first creditors who called upon you in the month of November to demand payment of his bill? 40

A He was.

Q Mr. Meyers you have been dealing with from the beginning of the time; I notice his account is the first one in the book?

A Yes, sir.

Q From the beginning to the time the store was closed Meyers & Goodman, or Meyers?

A Yes, sir; you will find, November I think it was, when the goods were bought, when the store wasn't ready, and I didn't get it open until December.

10 Q Just refer to the account of Meyers & Goodman as it appears on your book here, and state how it is that the chattel mortgage was given for the sum of \$4,003, when the account upon your book doesn't show that amount to have been due?

A The account here doesn't show now, of course; it doesn't show now, he took the business and the whole account in general has been reduced.

Q Well, this account up to the 26th of November?

20 A The account does show; take the book and figure up the amount of goods bought and the amount of money paid and you will see exactly what the amount was.

Q It doesn't appear on this account as it is here?

A I think it does; I think I can show it to you.

Q I see you haven't completed the account; the account hasn't been completed by the addition of the goods bought subsequent to July?

A No, sir.

30 Q Now, when Mr. Meyers came to see you, you have stated that he threatened to close you up?

A Yes, sir.

Q To drive you to the wall?

A Yes, sir.

Q You had bought goods from him from the very beginning, had you?

A I had.

Q When he came to you and asked you this question and you denied that any chattel mortgage had been given?

40 A I denied it.

Q Were you present when the affidavit was prepared of which you speak ?

A Yes, sir.

Q Have you got that affidavit ; do you know where it is ?

A No, I do not ; he took it with him.

Q Do you know what it was in substance ?

A I do.

Q What was it ?

A Well he came in there—do you want me to tell ? 10

Q Just tell the story ; yes, sir.

A He came in the store, I think it was about 11 o'clock in the morning, and he says, says he: "I see you have placed a chattel mortgage upon your stock of goods." I said, "We have not;" he says, "Is your wife at home;" I said "She is." "Well," he says, "I am satisfied, and I can prove you have placed a chattel mortgage upon your goods, and I demand my money." "Well," I said, "Mr. Meyers, it is all false, there has been no chattel mortgage given by any of us ; we know nothing of it whatever." He went up to the house to see my wife and she denied—she knew nothing of the chattel mortgage ; he came back to the store and he went down to the bank, and they said they didn't know anything about it, and he came back to me again, and he says, "I want my money or I'll close this place up before I leave town;" says I, "We can't give it to you ; there is enough here to pay you and all the rest, but we can't give it to you right away;" I went to Senator Applegate and asked him if he wouldn't please draw me a sworn affidavit for my wife, that we knew nothing whatever of the chattel mortgage ; well, when I gave him that that partially satisfied him that we hadn't given it ; then he came down again ; he says, "look here," he says, "it is talked all around Philadelphia, amongst your creditors, that you gave the chattel mortgage," he says, "they will get it in ahead, unless he was, and I am the biggest creditor;" I asked Charles Trafford, and he said, "If he shuts you up, he will slaughter you, and you will 40

have nothing; the best thing to do is to secure Mr. Meyers;" then we gave him the chattel mortgage.

Q That was some time later that chattel mortgage was given?

A It was on November 26th.

Q That is the date it bears, 25th or 26th?

A I don't know the exact date.

Q He came to see you about the 6th or 7th of November?

10 A On the 6th, I think.

Q Did he come to see you between the 6th and 25th?

A No—yes, sir; I think he did.

Q Well, now, I see upon the account of Meyers & Goodman, of the 10th of November, memorandum \$120.75, merchandise?

A Yes, sir.

Q Did he sell you that merchandise after that time?

A You will see about there there was cash sent in to  
20 pay for those goods.

Q This is the merchandise accounts, then—that on November 19th, \$137.50?

A Yes, sir; and you will see the pay for it; he wouldn't extend any more credit; you will notice there where there was \$300 sent—\$230 worth of goods got.

Q He sent you all you asked for?

A No, sir; there were orders that I had to fill, I had  
30 taken from customers; I couldn't get the goods anywhere to fill these orders, and we sent the money, and he sent the goods.

Q Well, before you made a chattel mortgage to him, did you take an inventory of the stock?

A I did not.

Q You have testified that the value of that stock was \$9,500?

A I said about \$9,500.

Q Is that as near as you can come?

40 A Yes, sir.

Q Are you satisfied there was that much there?

A Yes, sir.

Q It isn't an over valuation in any way?

A No, sir; it is not.

Q You are sure there was that much goods in his place that time?

A Yes, sir.

Q You are also sure that the total indebtedness of the concern is as you have stated, \$6,007?

A About that; the books will show that 10

Q It doesn't exceed \$6,050?

A No, sir.

*Mr. McGee:* Mr. Patterson has it, he can give the exact amount.

*Witness:* I can give you the figures, the exact amount as if they were there.

Q Had you any other assets besides the stock at that time, in connection with the business?

A No, sir. 20

Q Did you know at the time that you gave that chattel mortgage that the stock in that place was worth the sum of \$9,500?

A I did.

Q Did your wife know it?

A She did.

Q Was that present in your mind; did you know that thing at the time you gave the bill of sale to Mr. Meyers?

A I did. 30

Q Of that whole stock of \$9,500?

A I did, sir.

Q To pay a debt of \$4,003?

A Yes, sir; if you will let me explain I will tell you why.

Q Well, go ahead.

A Through my attorney; we didn't want our creditors to lose a dollar. Mr. Meyers demanded the chattel mortgage and we gave it to him. Mr. Trafford, the lawyer, says: "Now, if you make a bill of sale to Mey- 40

ers, that will save a slaughter of goods," and when Mr. Meyers was paid up his amount he was to return the business back in order to let us pay our creditors in full; that is why the bill of sale was made.

Q Then I understand you to say that the bill of sale that has been testified to and made to Mr. Meyers is not, after all, an absolute bill of sale?

A It is a bill of sale to protect the other creditors, to keep the goods from being slaughtered.

10 Q To protect the other creditors?

A Yes, sir; if the goods were sold there was no means of paying the other creditors; my wife was determined to pay every dollar she owed. She wouldn't owe a dollar if she—

Q Mr. Meyers had loaned you a part of the capital in that business?

A No, he had not, sir.

Q I thought he testified to that?

A He loaned \$1,000, but it was not part of the capi-  
20 tal.

Q You were formerly in Mr. Meyers' employ, were you not?

A I was not, sir. I never was in his employ.

Q Now, is there any place in your books where monthly sales are added up each month; in your set of books anywhere?

A Yes, sir.

Q Can you refer to it easily?

A Yes, sir.

30 Q Before I refer to that I would like to ask you a question further as to whether this bill of sale to which you have referred was made by the consent of your other creditors, with their knowledge?

A No, I don't know as they knew anything about it.

Q They didn't know anything about it before it was made, did they?

A No, sir.

Q They didn't know that you were doing that for their benefit, did they?

40 A No, sir; I told them of it afterwards, though.

Q Now please refer to your books for 1883 and 1884 and state the monthly sales each month during those two years, stating for January, 1883, and then for January, 1884.

A	January,	1883.....	\$733 88	
	"	1884.....	355 17	
	February	1883.....	540 75	
	"	1884... ..	294 00	
	March,	1883.....	685 71	
	"	1884.....	664 40	
	April,	1883.....	1,115 51	10
	"	1884.....	473 40	
	May,	1883.....	1,524 00	
	"	1884.....	945 07	
	June,	1883.....	1,739 65	
	"	1884.....	1,041 31	
	July,	1883.....	1,550 53	
	"	1884.....	1,006 68	
	August,	1883.....	1,075 83	
	"	1884.....	8 39 32	
	September,	1883.....	1,000 87	
	"	1884.....	689 80	
	October,	1883.....	1,288 02	20
	"	1884.....	962 88	
	November,	1883.....	1,514 66	
	"	1884.....	769 00	
	December,	1883.....	1,053 98	
	"	1884.....		

Q Let him add the sales—his sales and the sales of the store.

Objected to.

Q Give us the first eleven days of December, that will make it right?

A Eleven days of December, 1884, \$166.81.

30

Q Now you have given testimony in this case, Mr. Patterson, tending to show—attempting to show that by reason of the publication made in November, 1884, by somebody, your wife's business was very much injured, and that your customers failed to trade with you, left you and didn't come to your store as they had done theretofore; great falling off in business. Now, will you state to this Court and jury what reason, if any, you can assign for the fact that every month during the year 40

1884 your sales were from \$300 to \$600 less than they were in the corresponding months of the year 1883 ?

A Well, I guess you will find anybody done the business those two years didn't do as much in 1884 as they did in 1883 ; pretty general depreciation in business.

Q Is that the only reason you can give ?

A I don't know any other reason.

Q You had the same set of customers in each year ?

A Yes, sir ; we did ; we had as many customers ;  
 10 you take some customers in Red Bank there, when the hard times come they buy cheaper goods ; some might pay \$25 for a suit and then buy one for \$15 ; you have just as many customers ; don't buy as expensive goods, and of course it makes the business less.

Q Now, were the goods in that business mostly bought of a few houses or of a number ?

A Number of houses.

Q A large number ?

A Yes, sir ; quite a large number.

20 Q How many ?

A The ledger there will show.

Q The only customers we have to deal with now are those heretofore named in the declaration and bill of particulars.

A I don't believe there are any.

Q Those are the only ones we have to do with in this investigation. Now, you have testified as to the actions of others besides Mr. Brumer in coming to your place of business, what they did and said ; now, you  
 30 have also testified that you satisfied Mr. Brumer as to the condition of affairs ?

A Yes, sir.

Q Did you also satisfy these other creditors ?

A No, they all took sides with the mercantile agency reports ; they said they didn't believe it was a concern that could make a mistake ; they paid for their information there and they were satisfied it was true.

Q All these men told you that they paid for their information ?

40 A They didn't say that they paid it ; I supposed

they were subscribers; I suppose paid somebody else; like Mr. Meyers, I supposed they were subscribers with somebody else.

Q You didn't understand Mr. Meyers to say that—

A I did understand him to say that he exchanged with Lisberger & Weiss; exchanged in that way, and I suppose that is the way they found it out.

Q You told these gentlemen what the condition of affairs was?

A Certainly. 10

Q You informed them just as quick as they came to you, that it wasn't so?

A Yes, sir.

Q Did you inform them as to this affidavit?

A I did.

Q You told them that you had made an affidavit in this matter?

A I told them I did, but they all got crazy, and one said, "Now, it will start them all pushing you; this one will want to be secured, and that one will want to be secured;" previous to this there never had been a reflection against us, or a protest in the bank; we can prove that satisfactorily; we could borrow money in the bank when we wanted it, and it shut that all off; the report started or else it wouldn't have occurred; we were not insolvent. 20

Q How many of these people did you seek credit from for your wife after they had been to see you?

A Did I try to get credit? 30

Q How many of them whose names have been specified here?

A To get credit for my wife, do I understand you?

Q Yes, to get credit—goods?

A I did, all of them.

Q To all of them?

A Yes, sir.

Q Personally yourself, and she too, herself? Your wife went personally to see them?

A Yes, sir; she did. 40

Q You were not with her when she did it ?

A No, sir.

Q Now, in regard to this stock that you had on hand, did you keep it insured ?

A Yes, sir.

Q What insurance did you carry on it ?

A I think I can tell you pretty near, probably ; here is a list of the insurance—sometimes \$3,000 and sometimes \$4,000.

10 Q Kept from \$3,000 to \$4,000, insurance as near as you can tell ?

A Yes, sir.

Q And what amount—on what stock did you pay taxes ? What was the value of the stock for taxation purposes ?

A Well, that I think, when they taxed that—I don't know.

Objected to.

20 *The Court:* If the objection is made the Court will have to say it isn't proper evidence of valuation.

Q Can you tell from your books how much was expended for merchandise and expenses each year ?

A For merchandise ?

Q And expenses during each year ?

A Yes, sir.

Q How long will it take you to do that from the books which you have here ?

30 A Well, we would have to figure out each account separately, the amount of goods we bought, and expenses are easily stated here.

Q You can't tell by any summing up of the two years' business ?

A Yes, sir ; we can tell.

Q Well, just do that ; state how much.

A Well, it is on the ledger.

Q How much for 1883 and 1884 ?

A It will take some time to do it ; I couldn't do it without going through the books.

Q You have got to go through all the books to tell, have you?

A Yes, sir; I can't call it to memory.

Q Don't you keep any profit and loss account in your books?

A No, sir.

Q Do you keep any merchandise account in your books?

A I kept no book only that book and my sales book and my expense book. 10

Q There is no merchandise account, as near as you can tell. It doesn't appear by the books themselves as to whether the accounts are balanced, each account, for the years 1883 and 1884?

A No, it doesn't, because the goods are all bought monthly on running accounts.

Q Now, can you tell from your books the amount of stock you had on hand at the end of the different business years, November 30, 1883 and 1884?

A From the books you can't get it exact; you can 20 get it pretty near.

Q How near? Do the books show?

A Yes, I think the books show.

Q Just refer and see?

A As I say, you will have to go through the books to see the amount of goods bought and amount sold.

Q You can't tell, then, from your books as to the amount of merchandise you had on hand on the 30th of November in these years?

A My book is kept that way there is no one to a 30 positive fact could do that; I have a sketch of the inventory of the goods taken; I know how much stock there was there.

Q Do you know the value of it?

A Do I know the value? Yes, sir.

Q Can't you state, then?

A I told you about \$9,500.

Q That is 1884; now can you tell 1883?

A Well, I don't think it was any less; probably a little more. 40

Q Well, do the books show ?

A Yes, sir.

Q Well, just refer to it and see.

A You will have to bring that book and we will have to go over the account and take the sales ; I can't do it in any other way.

Q I supposed you had your books in such a shape that a business man could find out about your business.

*The Court :* He says he kept a running account right  
10 through from beginning to end.

*Witness :* Yes, sir.

Mr. Woodruff stated that he had had no opportunity to examine the books, and couldn't proceed with the examination on this line until he had so examined them, to which the Court replied that it would allow an examination to be made.

Q What length of time had a customer to buy  
20 goods on in the trade, in your branch of business ?

A What time did I buy on ?

Q Yes ; thirty or sixty days ?

A Sometimes thirty days ; some sixty days ; some four months.

Q Is it possible to tell from your books the times you bought the different goods on ?

A No.

Q Are they entered so we can tell ?

A No ; or it isn't entered—most all of them bought  
30 on running account.

*By the Court :*

Q Are there any books at all showing bills receivable ?

A No, sir.

Q No charge against customers kept ?

A Where I have trusted customers ?

Q Yes.

A Yes, sir.

40 Q What book does that appear in ?

A What I call the ledger and day book combined ;  
that small book.

Q Is there any account of bills payable ?

A No.

Q There is nothing to show when your bills due  
became payable ?

A No, sir ; because they were on a running account.

Q When you would buy a bill of goods, would you  
enter it in that book to the credit of—

A Yes, sir ; and whenever I sent them money I sent 10  
it—

Q To the credit of the person from whom you bought  
it at the time ?

A Yes, sir.

Q And there was nothing to show on there what the  
length of credit was ?

A No ; because we had no particular statement ; as  
I told you, like this, when I would buy a bill of goods  
that I would sometimes send it in within ten days ; some-  
times thirty days ; sometimes sixty days ; just as it hap- 20  
pened.

Q Then, cash you put directly into the bank ?

A Yes, sir.

Q Without any regard to where it came from ?

A Here is the book that shows.

Q What book does show it ?

A Here is my sales book.

Q I asked you where you got the cash from ; as I  
understand you, it shows—there is an item \$1,062 ; now,  
where do we find where that comes from ? 30

A \$1,000 I borrowed from Mr. Meyers.

Q But we want to know from the books.

A I didn't keep any book on it ; I simply made a  
deposit and took it out.

*By the Court :*

Q Doesn't that \$1,000 account appear on Mr. Meyers'  
ledger ?

A No, sir ; we couldn't find it. It was paid back  
\$100 at a time, and \$200. 40

Q I simply took that as an illustration because the amount being large it struck my eye. September, \$956; now, where can we tell where that came from; from what source that money was derived?

A It came from the sales of the business.

Q I mean, how can we point out where it came from, you didn't keep any cash book or check book?

A No, sir.

Q In charging the expenses of that business, were  
10 your services charged as part of the expenses?

A No.

Q No allowance made for your expenses at all, as clerk hire?

A No, sir.

Q Anything allowed for the services of your wife, at all; any allowance made or credit entered on that for the services of your wife in the business, at all?

A No, sir.

Q She took no active part in the business, did she?

20 A Yes, sir; she did.

Q Did you keep any capital account; is there any account on the ledger showing the capital account from time to time?

A No; there is, I think, the first deposit she made in the bank, was something over \$1,600; some goods bought for cash, probably wasn't checked from the bank; money she had on hand.

Q Is there anything to show what was taken from the business for the living expenses of your family?

30 A She paid the living expenses.

Q Anything to show what you withdrew from the business?

A No, sir.

Q Can't tell what you took out of the business at all, can you?

A No, sir; not exactly.

*Re-direct examination:*

Q You said during your examination that you were  
40 not in Meyers' employ; what do you mean by that?

A That I wasn't in his employ.

Q I understood you—

A I understood that was overruled ; it had reference to after the bill of sale.

*Mr. Woodruff.* I asked before the bill of sale.

Q That was before the bill of sale you were not in his employ ?

A Yes, sir.

Q Now, you stated that you gave the bill of sale to 10 Meyers by the advice of Trafford, for the purpose of protecting your creditors ?

A Yes, sir.

Q And you further stated that Trafford said that when Meyers got paid back what was coming to him he would then give you back the business ?

A Yes, sir.

Q Explain what you mean by that—about being paid back ?

A When Mr. Meyers got the amount that was due 20 him.

Q That is, when the profits of the business paid his bill he was then to re-convey it ?

A Yes, sir.

Q That was it, then ?

A Yes, sir.

Q So that he was to take all the profits of the business until his bill was paid, and then he was to re-convey to you ?

A Yes, sir.

30

*Re-cross-examination :*

Q I don't exactly understand the condition of affairs yet. You say that Mr. Meyers was to retain the business until the profits of the business paid him the money that was due from your wife to him ?

A Until the profits of the business ?

Q Yes ; I understood you to have said that ; is that correct ?

A When Mr. Meyers had received his amount of 40

money that we owed him he would then return the business back to my wife.

*Q* How was he to receive it; how was he to get the money from you?

*A* Yes, sir.

*Q* From the sales of the business made by you in the business and the profits of the business?

*A* No, about profits of the business, it wasn't—the thing wasn't mentioned that way; when he got his money, 10 it didn't make any difference at all, if we could borrow it or any way, and pay it, Mr. Meyers, he would release that bill of sale.

*By Mr. McGee:*

*Q* It didn't matter how he got it back, then?

*A* No matter how he got it back, as long as he got his money; we had to secure him with that.

*By the Court:*

*Q* And he was to send you goods and keep up your 20 stock?

*A* Yes, sir.

*By Mr. McGee:*

*Q* And the business is still being conducted by him?

*A* Yes, sir.

*Q* He hasn't yet been paid?

*A* No, sir.

*By the Court:*

*Q* In his own name?

30 *A* Yes, sir.

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**Charles T. Flemming**, a witness called on the part of the aforesaid plaintiffs, having been duly sworn according to law, on his oath deposeth and saith:

*Direct examination*, by Mr. McGee:

*Q* Where do you live?

40 *A* Freehold, sir.

- Q What is your business ?
- A Well, a variety of businesses ; nothing permanent.
- Q Well, give us the name of one of them ?
- A Auctioneer ; collection of debts.
- Q Are you in the employ of R. G. Dun & Co. ?
- A Partially, sir.
- Q You make reports to them of the business standing of the people in the neighborhood and in Freehold ?
- A Yes, sir.
- Q And they pay you for it ? 10
- A Yes, sir.
- Q Are you familiar with their publications ?
- A No, sir.
- Q Do you know whether they publish a paper called the Mercantile Agency Notification Sheet ?
- A No, sir.
- Q Did you ever see one ?
- A No, sir ; except I have seen it throwing around here in Court, sir.
- Q Did you see the issue of November 5, 1884 ? 20
- A No, sir.
- Q Were you, at that time, an employe of R. G. Dun & Co. ?
- A Yes, sir.
- Q Did you send to them a report on November 5, 1884, of anything connected with Emma Patterson ?
- A Yes, sir.
- Q Did you send them a report of the chattel mortgage filed by Emma Patterson ? 30
- A Yes, sir.
- Q Do you remember what that report said ?
- A Yes, sir.
- Q What was it ?
- A "Emma Patterson, Red Bank, clothing, Samuel Ludlow, \$1,385."
- Q Chattel mortgage ?
- A Chattel mortgage.
- Objected to as leading.

Q What did you say in addition to that ?

A Nothing at all.

Q State what it was—what kind of encumbrance ?

A No, sir ; no report of that kind.

Q Didn't you say whether it was judgment or chattel mortgage, or what it was ?

Objected to, as leading.

A Those are the only words that I reported, which I have already stated.

10 Q Now, just repeat them ?

A " Emma Patterson, Red Bank, clothing, Samuel Ludlow, \$1,385 ;" that is the only words, and the manner in which they were reported ; I understand the question exactly ; that is the way I reported it, and no other way ; those were the only words.

Q You didn't state to them what the encumbrance was—what she had given to Ludlow ?

A No, sir ; I didn't say what it was.

Q You didn't say what it was ?

20 A I made no further statement ; I can get witnesses to testify here in Court, that the chattel mortgage was on clothing, but the word clothing, as I reported it, was not the property upon which the party—the word clothing isn't intended to be upon the property which it is given ; it is only intended to show the business that the party is engaged in.

Q Was there any understanding, or any arrangement between R. G. Dun & Co. and yourself, as to what such words should mean when you sent them ?

30 A No, sir.

Q How were they to know from your report what kind of encumbrance you meant to report ?

Objected to, as immaterial.

Objection withdrawn.

Q How were they to know from your report what kind of an encumbrance you meant to report ; how did you expect them to know—(to the Court)—whether he had any knowledge himself how they were to understand it ?

40

A Of what knowledge of what kind of encumbrances I reported, is that the question?

Q Yes; that is it.

A Well, I reported upon a sheet which gives them information without my making a report.

Q Was the word printed on the sheet?

A Yes, sir.

Q Was that sheet in columns?

A Yes, sir.

Q You haven't one of those sheets with you? 10

A No, sir; I have not.

Q What was printed at the top of the first column?

*The Court:* We can't prove the contents in that way.

*Mr. McGee:* We will give these gentlemen notice to produce that sheet.

*The Court:* That might have been done a good while ago.

Q Have you such a sheet in your possession?

A No, sir. 20

Q You have none now?

A Not one.

Q Now, you say the sheet you reported on gave them information without your saying so?

A Yes, sir.

Q What information did it give them?

A It gave them the information which you just spoke of.

Q What did it inform them that this was?

A It informed them that it was a chattel mortgage. 30

Q Chattel mortgage—now, what then was the report which you made to them, not only the written words, but what did you report to them?

A I just made a statement; do you want me to repeat it?

Q I want you to tell me what you reported to them?

A I reported that a chattel mortgage—

Q Made by whom?

A Emma Patterson. 40

Q To whom ?

A Samuel Ludlow.

Q For what amount ?

A \$1,385.

Q And what else did you say about her business ?

A I said clothing.

Q And you meant by that that she was a clothier ?

A Yes, sir ; not the goods that she gave the chattel mortgage on.

10 Q And you also informed them that she lived at Red Bank ?

A Yes, sir.

Q Do you know what issue of their Mercantile Agency Notification Sheet that appears in ?

A No, sir ; I don't know ; I never knowed there was such a sheet until this litigation ; I didn't know there was such a sheet published.

Q You sent this to R. G. Dun & Co., where ?

A Newark.

20 Q To whom ?

A The letter I sent to box 137, Newark.

*Cross-examination, by defendants' counsel :*

Q How was it addressed ; you addressed it to box 137 ?

A Yes, sir.

*By the Court :*

Q Do you mean to say you didn't put any name on it, R. G. Dun & Co ?

30 A No, sir.

Q The address was only to the box, not the name ?

A The box was 137, Newark, N. J.

*By Mr. McGee :*

Q You were in the employ of R. G. Dun & Co. ?

A Yes, sir.

Q And you made the report to them and addressed it in that way ?

A I made the report as I stated, to box 137 ; not to my knowledge, I don't know who got it nor what became  
40 of it.

Q Who did you expect would get it?

Objected to.

*The Court:* That won't do.

Q You have lived in Freehold a good while?

A I have lived in Freehold about twenty-nine years.

Q And formerly a justice of the peace, weren't you?

A Yes, sir.

Q And postmaster here?

A Yes, sir; I was born in the county of Monmouth; I have always resided here; I have held many positions of public trust. 10

Q You have held offices of responsibility and trust?

A I was postmaster four years; I have been four years in the custom house, and justice of the peace ten years, and in any kind of business you have a mind to mention.

Q You have been engaged for some time in supplying these items, what do you call those items from the records? 20

A Items from the record; taken from the record in the clerk's office.

Q And your occupation and pursuits in former years and during the period of years has made you familiar with records, has it not?

A It has, sir.

Q And your examination of them?

A Yes, sir.

Q That is, you have been a good deal about the records, have had a good deal to do with records? 30

A I have made a great many searches; I have been employed by this company eight years.

Q Well, in the course of those eight years you have continuously reported to them the items of record, published records in this county, have you?

A I have, sir.

Q In this district?

A County of Monmouth.

Q When you make a report, you keep a paper, I suppose; my understanding of your examination is, you 40

keep a paper with suitable headings; then you fill in each item under its proper heading so that the whole may go and they can analyze it when they get it?

A That is the idea.

Q In this particular paper you had this under the head of chattel mortgages?

A Under the head of chattel mortgages.

Q And was other information on the same sheet of paper?

10 A Yes, sir; liens and judgments.

Q That were sent as your report?

A Yes, sir.

Q And your duties involved sending reports of all recorded items, did they, in this district or county?

A No, sir; not entirely. All recorded items that has any reference to persons doing business in the county of Monmouth, such as require credit standing; that is, that buy goods.

20 Q How did it happen that you put this thing down that day; what led you to do it?

Objected to as irrelevant.

Q Tell us how it happened.

A It happened in consequence of Frank Patterson's wife being named Emma; being two persons of the same name; Frank Patterson's wife Emma and Joseph Patterson's wife named Emma; there is where the mistake occurred.

Mr. McGee asks to have the answer stricken out for the same reason.

30 *Witness:* I never knew the Emma Patterson in this case; I have no malice against her.

*The Court:* Let it stand.

Exception granted to plaintiffs.

Q I understand you to say that this mistake happened by reason of the fact that there were two Emma Pattersons of the same name?

A Yes, sir.

Q And both in this county?

40 A Yes, sir.

Q And you got it as it appeared on the record; you mistook the one for the other; thought one Emma Patterson was the other Emma Patterson; was that it?

A Yes, sir.

Q Then there was an Emma Patterson at some other part of the county that did make a chattel mortgage?

A I can't pretend whether there was any other Emma Patterson, but afterwards I found out that was a mistake.

Q That was on record?

A Yes, sir.

10

Objected to. Admitted. Exception taken.

Q When you found out your mistake what did you do?

A I reported—

Objected to. Objection sustained and answer stricken out.

Q This whole difficulty of getting the names mixed arose from you yourself, did it—from your own inadvertence or mistake, or oversight in taking this name from the record?

20

Objected to.

*The Court:* You may answer it.

A Yes, sir; it was a mistake, originated through me.

*Re-direct examination:*

Q This Frank Patterson's wife lived at Asbury Park, didn't she?

A Well, she had been living there, sir; I don't know where she lives now.

30

Q At that time?

A I think she did.

Q And she didn't keep a clothing store, did she?

A Well, there never was no report that—

Q That wasn't my question; you have told us what you reported; what I asked you was whether she kept a clothing store?

A I don't know, sir, whether she did or not.

Q You don't know now, do you?

A I don't know her name at all.

40

*Q* And this report was an error, was it—it was a mistake?

*A* It was wholly a mistake on my part.

*Q* Where did you get those blanks from that you made the report on?

*A* I received it in an envelope from somewhere, I don't know where it came from; it came in an envelope directed to me; it didn't state from whom. There is no statement on those blanks who they are from; I merely  
10 received them.

*Q* No word or comment?

*A* In an envelope; not a word, sir.

*Re-cross-examination:*

*Q* Only made for the convenience of enabling you to make out your report?

*A* Yes, sir; I never used any conversation, passed backwards and forwards between the parties, in any report that I made.

20 *Q* How often were you paid?

*A* Pay me whenever I want my money, sir.

*Q* In what way were you paid—by check?

*A* Yes, sir.

*Q* What name is signed to the check?

*A* Sometimes by check and sometimes by money.

*Q* When you are paid by check, what name is signed to the check?

*A* R. G. Dun & Co., per some gentleman or other, whoever is in charge of the business—whoever makes  
30 the check.

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**Henry E. Jepson**, a witness called on the part of the aforesaid plaintiffs, having been duly sworn according to law, on his oath deposeth and saith:

*Direct examination*, by Mr. McGee:

*Q* Where do you live?

40 *A* In East Orange, N. J

Q And what is your business?

A I am manager for R. G. Dun & Co.

Q In New Jersey?

A In part of New Jersey.

Q Does your part include the county of Monmouth?

A It does.

Q What is your post office box?

A 136, Newark.

Q What was it in the year 1884?

A 136, Newark, N. J. 10

Q Did you receive from Mr. Flemming a report in November, 1884?

A I received a good many of them.

Q Did you receive one regarding Emma Patterson?

A I did.

Q You have heard his testimony?

A I have.

Q Did you receive that or not?

A Yes, sir.

Q What did you do with it? 20

A With the report that he received?

Q That he sent you?

A I filed it away.

Q Where?

A Among the other papers in my office.

Q In Newark?

A Yes, sir.

Q Did you communicate its contents to the New York house, to R. G. Dun & Co.?

Objected to. 30

*The Court:* The witness must answer.

At this point the last witness, Mr. Flemming, desired to make a correction in his evidence and stated that the post office box to which he sent the report at Newark, was 136 instead of 137.

Q Did you communicate its contents to the New York house, to R. G. Dun & Co.?

A I decline to answer.

40

*Mr. McGee*: I submit that this witness is not entitled to the privilege that the defendants in this case have claimed.

Recess.

*Q* Did you communicate its contents to the New York house, to R. G. Dun & Co.?

*A* I decline to answer.

*The Court*: The witness must answer the question.

10 *Witness*: May I more clearly explain my position as manager of R. G. Dun & Co.? My position is precisely similar to that of Mr. King and Mr. Douglas.

*Q* You are not a member of the firm?

*A* I don't call myself a member of the firm.

*Q* Your name isn't put in amongst the members of the firm in the directories; they don't give you out to the public as a member of the firm?

*A* Still my position is the same.

*Q* That is to say your duties are the same?

20 *A* No, my arrangement is precisely the same.

*Mr. Woodruff*: I would like to have it before the Court, at least, if it is the witness' privilege to say so, what his position is with respect to that concern.

*Witness*: My position with that firm is that I am guaranteed a certain salary, and then I enjoy a portion of the profits, if there be any, over my salary.

*Q* You say you enjoy a portion of the profits; do you mean that or do you mean you enjoy an additional sum  
30 equal to the portion of the profits?

*A* No, sir; I have a certain guaranteed salary. Then, in addition to that, if there is any profit, I have a portion of it.

*Q* By way of salary?

*A* By way of compensation for my services.

*Q* But you don't become responsible for any part of the debts of the concern; don't claim to?

*A* I individually do not.

*Q* For instance, if R. G. Dun & Co. should be sued  
40 and an execution taken against them, and under that

execution your property should be levied upon, would you not set up as a defence to that levy, that you were not a member of that firm?

*A* My personal property?

*Q* Any property of yours; real or personal?

*A* If they levied upon the assets of my office, that would be my property, a portion of it would be my property.

*Q* Not speaking now of the assets of R. G. Dun & Co., but your assets; if they should levy on your individual assets to satisfy judgment against R. G. Dun & Co. would you not set up as a defence that that property was not liable for R. G. Dun & Co's. debts? 10

*A* No, sir; I could not.

*Q* You claim, then, to be a member of the firm of R. G. Dun & Co., do you?

*A* I don't so understand it; no, sir.

*Q* That is just what I want to get at.

*A* I don't understand that I am a member of the firm of R. G. Dun & Co., but the arrangement R. G. Dun & Co. has with us managers or employees, or many of them, is to induce them to give faithful service and save them as much money as they can, give them certain salary, then out of the business they give them a portion of the profits. 20

*Q* Did you communicate its contents to the New York office, to R. G. Dun & Co.?

*Mr. McGee:* I submit the testimony is legal

*The Court:* The question must be answered. 30

*A* I did.

Exception taken by defendants.

(See Exception 10, for defendants, *post*.)

*Q* What publications did R. G. Dun & Co. issue in the year 1884, the names of them?

*A* I don't know, sir.

*Q* Did they issue a publication called the Mercantile Agency Notification Sheet?

*A* They did. 40

Q How frequently ?

A Twice a week.

Q I show you a paper in print entitled " Mercantile Agency Notification Sheet," R. G. Dun & Co., E. Russell & Co., bearing date Wednesday, November 5, 1884 ; is that a copy of a publication issued by that firm ?

A It is.

Q Are those papers sent to all the subscribers of R. G. Dun & Co. ?

10            Objected to on the ground that the only evidence that is admissible here is as to whether this publication was made to the people whose names have been given.

*The Court:* The question may be put subject to your exception.

A They are not.

Q Are they sent to all the subscribers who subscribe for that sheet ?

20            Objected to. Admitted. Exception.

(See Exception 11, for defendants, *post.*)

A Yes, sir.

Q Without regard to persons to whom they are sent are interested in any person named in any particular sheet ?

A They are.

30 *Cross-examination, by Mr. Woodruff:*

Q You stated in your last answer that those sheets were sent to all persons who were subscribers to it without regard to whether they required that particular sheet or not ; now state how, if you know, those sheets come to be sent out, and under what circumstances they are sent out, and refer to any documents or papers that you have in your possession in order to refresh your memory in relation to it.

40            A They are sent out in accordance with a contract that is made by the party with R. G. Dun & Co.

*By Mr. McGee :*

*Q* Let me interrupt you one moment. The paper which I showed you is the one marked Exhibit A ?

*A* Yes, sir.

*Q* Let me show you another one ; there is one marked Plaintiffs' Exhibit No. 1 for identification, also another copy of the same sheet ?

Objected to.

*A* I decline to answer.

*Mr. McGee :* I don't withdraw the objection. I say 10  
nothing more.

*By Mr. Woodruff :*

*Q* In answer to the first question I put to you, you stated that this was sent out from the office under subscription. Now, what are the terms of that subscription ?

*A* The terms of the subscription are that the subscriber agrees to pay us—

*Mr. McGee :* If that is so the written subscription is 20  
the best evidence.

*The Court :* Let the witness produce it.

*Witness :* The contract is—

*Mr. McGee :* Don't read it.

*The Court :* He may after he has testified to it.

*Mr. McGee :* I object.

*Q* State whether or not all subscribers are compelled to enter into such a contract ?

*A* Every subscriber is compelled to enter into such 30  
a contract.

Objected to. Admitted. Exception to plaintiffs.

*Q* State whether or no all subscribers are compelled to enter into such a contract ?

*A* Every subscriber is compelled to make that contract.

Paper marked for identification, No. 1 for defendants.

*Q* I find upon this contract this form—

40

*Mr. McGee*: I object to counsel reading from the paper as yet.

Question admitted. Exception to plaintiffs.

Q I find upon this contract this form: "No. 3. The said R. G. Dun & Co. are hereby requested to place in our keeping for our exclusive use, a printed copy of a reference book containing ratings or markings of estimated capital and relative credit standing of such business men in such States as may be agreed upon, prepared by  
10 them or their servants, clerks, attorneys, employees aforesaid, together with the notification sheet of corrections; we further agree that upon the delivery to us of any subsequent edition of the reference book the one now placed in our hands shall be surrendered to them, and also, upon the termination of our relations as subscribers, the copy then remaining in our hands shall be given up to the said R. G. Dun & Co., it being clearly understood and agreed upon that the title of said reference book is  
20 vested and remains in said R. G. Dun & Co." Is that clause inserted in every contract of subscription where the publications of the agency are sent?

A In every one, sir.

Objected to. Objection overruled. Exception allowed.

Q I also call your attention to the first section, the section, paragraph No. 1: "All verbal, written or printed information communicated to us or to such confidential clerk as may be authorized by us to receive the same, and all use of the reference book hereinafter named, and  
30 notification sheet of corrections, said book shall be strictly confidential and shall never under any circumstances, be communicated to the persons reported, but shall be exclusively confined to the business of our establishment." Is that clause universally inserted in all subscriptions signed by subscribers to the Mercantile Agency?

Objected to. Objection overruled.  
Exception granted.

40 A In every one.

*Q* Is this paper, which is entitled "Terms of subscription to the Mercantile Agency," the form of contract, with the exception of the amount of money to be paid to the agency, and dates and other minor details, the same subscription which is signed by all subscribers to the mercantile agency ?

Objected to.

*A* All I know—yes, sir.

*The Court* : I suppose you mean by that, just the blank spaces are to be filled in ? 10

*Mr. Woodruff* : Leave out the minor details. With the exception of filling the blanks, the names, dates and the amounts.

*Witness* : It is.

*Q* Is this paper, which is entitled "Terms of subscription to the Mercantile Agency," the form of the contract, with the exception of the amount of money to be paid to the agency, dates and names, the same subscription which is signed by all subscribers to the mercantile agency ? 20

Objected to. Objection overruled.

Exception taken.

*A* It is, so far as I know.

*Q* How long have you been in the employ of the mercantile agency ?

*A* For the past sixteen years.

*Q* Do you know who is the owner of that agency ?

Objected to.

*A* I do. 30

Question withdrawn.

*Q* You have stated that you were the manager of R. G. Dun & Co.'s mercantile agency in a part of the State of New Jersey—what do you mean by that expression ?

*A* In a part ?

*Q* No ; the expression that you are manager for the agency in part of the State of New Jersey ?

*A* I have charge of the agency's business in twelve counties of the State of New Jersey. 40

Q Do you know whose agency ?

A I do.

Q Whose ?

A R. G. Dun's.

Objected to. Question overruled.

*Re-direct examination :*

Q What is the circulation of the Mercantile Agency Notification Sheet in New Jersey ?

10 A I don't know, sir.

Q Is it a thousand ?

A I don't know, sir.

Q Is it five hundred ?

A I don't know, sir.

Q Don't you know how many subscribers there are in New Jersey ?

A No, sir.

Q Doesn't that come under your supervision ?

A No, sir.

20

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**Acton C. Hartshorne**, a witness called on the part of the aforesaid plaintiffs, having been duly sworn according to law, on his oath deposeth and saith :

*Direct examination, by Mr. McGee :*

30 Q What is your business ?

A I am lawyer by profession.

Q How long have you been practicing ?

A Since 1870.

Q And where ?

A In Freehold.

Q Were you a member of the late firm of Robbins & Hartshorne ?

A Yes, sir.

Q Judge Robbins is now dead ?

40 A Yes, sir.

Q In 1884, in Decembér, and in 1885, in January, were you a member of the firm ?

A I was.

Q (I show you a letter on paper, which has Robbins & Hartshorne printed at the head of it, dated December 8, 1884, addressed to Mrs. Patterson, Red Bank, N. J., and signed Robbins & Hartshorne)—is that your signature ?

A Robbins & Hartshorne is my handwriting.

Q You wrote it ?

10

A Yes, sir.

Q Was that letter sent from your office addressed to Mrs. Patterson ?

A I believe it was.

Q Now, there is another also signed Robbins & Hartshorne, addressed to Joseph Patterson, Esq., Red Bank, N. J. Whose signature is that ?

A That is not my signature, but I think it is the handwriting of a clerk we had at that time.

Q Well, was it dictated by you ?

20

A I think it was dictated by me.

Q It was sent from your office ?

A It was sent from my office.

*Mr. McGee* : I offer the letters in evidence when they cross-examine upon them.

*The Court* : Not until Mr. Patterson has been re-called and swears he received them.

Objected to on the ground of special damages not alleged. Said papers marked 1 and 2.

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**Joseph Patterson, re-called.**

*Direct examination, by Mr. McGee* :

Q Did Mrs. Patterson see these letters ?

A She did.

Q When they first came ?

A When they first came.

40

Q You also read them ?

A Yes, sir.

Mr. McGee offers the two letters in evidence fully and they are marked 1 and 2 for plaintiffs.

*Defendants' counsel:* We haven't any objection to the letters going in except our general objection to the proof of special damages.

10

**Daniel D. Clark**, a witness called on the part of the aforesaid plaintiffs, having been duly sworn according to law, on his oath deposeth and saith :

*Direct examination*, by Mr. McGee :

Q Where do you live ?

A Jersey City.

Q What is your business ?

20 A Bookkeeper.

Q For whom ?

A Messrs. Vanderbeck & Sons.

Q How long have you been in their employ ?

A Eleven years last December.

Q Are they subscribers to R. G. Dun & Co.'s publications ?

Objected to on the ground that the proof must be by the subscribers themselves, if there is to be any proof.

30

*Mr. McGee:* I offer to prove by this witness that Vanderbeck & Sons were subscribers to the Mercantile Agency Notification Sheet; that as such subscribers they received a copy of each issue of that sheet during the year 1884; that they received a copy of the issue of November 5, 1884, and that the witness saw that copy in their possession November 5, 1884.

*The Court:* The Court answer to that, that a demand having been made for a bill of particulars of witnesses  
40 by whom the publication would be shown, and plaintiffs'

counsel having given the names of particular witnesses by whom proof would be made, this witness not being included, the question is overruled, or the evidence offered is overruled.

*Mr. McGee:* I wish to add to the offer these words: "And that the exhibits, plaintiffs' No. 1 for Id. and Exhibit A before Applegate, M. C. C., already spoken of in this case, are copies of the issue of November 5, 1884," just to be added to the offer.

Overruled. Exception for plaintiffs.

10

*Mr. McGee:* I offer in evidence in connection with your Honor's statement, if it is not already in evidence, the copy of the bill of particulars referred to by the Court; that has never been filed.

The rule of the Court and the answer offered.

*Mr. McGee:* I now offer to prove by Joseph Patterson, one of the plaintiffs, and by Dr. James H. Patterson—

*The Court:* Offer to prove Mrs. Patterson's illness since that time as a consequence of the publication of this libel? The Court overrules it.

20

*Mr. McGee:* And I offer as witnesses to prove it, the plaintiff, Joseph Patterson, and Dr. J. H. Patterson, the physician of the plaintiff, Emma Patterson. I offer in evidence these two sheets, one Exhibit "A" of plaintiffs' exhibit, before D. H. Applegate, M. C. C., the one which Mr. Patterson says he received from Mr. Meyers, and also Exhibit 1, which was produced by the counsel for the defendants in answer to our notice to produce.

30

*Defendants' counsel:* We object to the offer of Exhibits "A" and "1." One is produced upon our call, the other is one which came with Mrs. Patterson's deposition. We object to the offer of either of these papers or each of these papers in evidence. First, because there is no proof of publication of the paper by the defendants in this case, or either of them; and, second, that it has not been shown that the paper contains language regarding the plaintiff which is libelous *per se*. Third, that under the pleadings this paper cannot be given in evidence

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until it first be shown that it contains words which have the meaning placed upon them by the innuendo of the declaration. Fourth, that the language of the paper relating to the plaintiffs, if any there be, is a privileged communication in law; the paper being, on its face, a confidential communication of the Mercantile Agency to one of its subscribers in pursuance of a contract, and the plaintiffs' evidence showing that the firm of Lisberger & Weiss, from whom the witness obtained the paper marked

10 Exhibit "A," had business dealings with the plaintiff, and were in the habit of selling her goods, and were therefore interested in knowing all about her. Fifth, that under the declaration in the cause as amended on the trial by leave of the Court, this paper cannot be given in evidence until special damage be shown beyond a possibility of a doubt to the mind of the Court, the defendants having had no opportunity to cross-examine the plaintiff, Emma Patterson, on this point, or to rebut her testimony and that of the other witnesses produced,

20 or to attack their credibility. At the time the depositions were taken there was no amendment filed; no notice of special damage, therefore no opportunity of cross-examining her on that point, and no opportunity either to rebut her testimony or that of other witnesses produced on the trial, or, what is very important, to attack their credibility.

Adjourned.

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Wednesday, January 13, 1886.

At the opening of Court counsel finished their argument as to the admissibility of the papers in question, at the termination of which argument the Court admitted said papers in evidence and an exception was taken by defendants.

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(See Exception 12, for defendants, *post.*)

*Mr. McGee:* Mr. Patterson says that suits were commenced against him and judgments entered, and we supposed they were in the Circuit Court, but we find they were in the Supreme Court, and we are not able to offer them. We can procure them before the close of the case.

*The Court:* I think, to shorten matters, that those records may be produced and submitted to the other side before the case is given to the jury, and if they consent to them, they can go in evidence at that time; and if the Court say it is a proper matter to go in at that time, giving the other party an opportunity of meeting them by evidence, why, the Court may do it of its own motion. 10

*Mr. McGee:* Subject to the objection of relevancy, but not to the order of proof.

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**Joseph Patterson, re-called :**

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*Direct examination, by Mr. McGee:*

*Q* Were the firm of Lisberger & Weiss dealing with Mrs. Patterson, at the time of this publication?

*A* No; not at that time.

*Q* How long before that had the dealings ceased?

*A* Well, I should judge nearly two years, probably.

*Q* Were they at that time creditors of Mrs. Patterson?

*A* No, sir.

30

Defendants' counsel objects to the introduction of this testimony at this time.

*The Court:* It has been already testified that they were not at that time. This is merely to corroborate the testimony of Meyers.

*Witness:* It is in evidence when they ceased doing business with us.

Question admitted, and exception granted.

*The Court:* The witness ought not to be put on the stand to renew his examination. 40

*Mr. McGee:* I make a distinct offer to prove a letter written by Saller & Newman, wholesale clothiers, creditors of Mrs. Patterson, dated November 18, 1884, addressed to Mrs. Patterson, in which they refer to this report, which is offered in evidence, and demand settlement of their account. I offer to prove the letter, and offer the letter in evidence, proved by the witness, Joseph Patterson, now on the stand, the husband of Emma Patterson, one of the plaintiffs in the case; and I  
10 also offer to prove that the letter was received by Emma Patterson in due course of mail.

*The Court:* That is, to prove the signature?

*Mr. McGee:* I offer to prove that the letter is in the handwriting of one of the members of that firm, and that it was received by her in due course of mail, as soon after the 18th of November as it could reasonably reach Red Bank.

20 Objected to, as tending to prove special damages, which can only be proved by the creditors themselves.

*The Court:* I will overrule the offer and grant an exception.

*Mr. McGee:* I offer this book, "Wilson's Copartnership Directory," in evidence.

Objected to. Admitted. Exception taken.

(See Exception 13, for defendants, *post.*)

Plaintiffs rest, with the understanding that they may produce the records of the judgments above.

30 *The Court:* I don't say that. I say they will be regulated when the time comes.

*Mr. McGee:* We also offer those two letters.

*Mr. Woodruff:* At this stage of the case counsel deem it wise to move for a nonsuit in the case. Before making the points formally of that nonsuit, I wish to clear the case, if I can, of any questions which ought not to be presented at this time. It seems to me that, in consideration of this motion of a nonsuit, and in the fur-  
40 ther consideration of the case, if it should go on, that

express malice has not thus far been proven in the case. Whatever evidence has been adduced on the part of the plaintiffs, in that behalf, has been simply for the purpose of showing publications and special damage. The question of malice on the part of the defendants, I take it, may be considered as not having been at all presented up to the present time in the case.

*The Court*: I think there is no allegation and no proof to show express malice. 10

*Mr. Woodruff*: The next thing which we may consider as out of the case is, all questions in any way relating to the health of Mrs. Patterson, and in that connection I ask your Honor at this time, believing that this is now the proper time to present that question, to strike out from her testimony all evidence of every nature relating to her present condition of health, and all evidence intending to show that her present condition of health was caused by the publication, or by acts based upon the so-called publication. 20

The next question which should be eliminated from the case is that as to the meaning of the words as alleged in the declaration. Your Honor will bear with me in recalling the statement in the declaration that these words are alleged to mean that the plaintiff gave a chattel mortgage upon her stock of clothing for the purpose of defrauding her creditors. I respectfully ask the consideration of the Court to the fact that there has been no evidence tending to show that those words mean or ever bore any such signification as that. The defendants charged the plaintiff with having done this act for the purpose of defrauding her creditors. 30

Now, the questions which I wish to present on the motion for nonsuit after the elimination of the above, are as follows:

The only question for consideration is the question of special damage. There is no proof admissible as to any damage in this case other than special damage, unless the words be libelous, *per se*. 40

Now, I understand that the ruling of the Court has been, during the progress of this cause, that the words used or alleged to have been used, are not in themselves libelous, and can only become a ground of action by reason of special damage. Now, if that be so, if these words can only become actionable by reason of special damage, then no evidence that has been admitted or that has appeared in the cause can be considered, except so far as it bears upon the proof of special damage. Now, if that be conceded, and I presume there is no question connected with it, then there must be evidence before this Court that some creditor, by reason of the alleged publication, refused credit to the plaintiffs in this case, and in that connection I wish to refer to the testimony of all the witnesses that appear here to-day, that have appeared in the Court up to the present time. And after careful consideration of that evidence I say with confidence to the Court that there is no evidence in this case to show that their action was based upon the publication by the defendants in this case. I go further, and I say, and I am prepared to cite cases to support it, that whatever damage has been done in this case has been done by the act of Lisberger and Weiss, and not by the act of our clients in this case, or by the carelessness of Edward Simon & Bro., of New York, who permitted one of the witnesses, Mr. Lyons, to see the sheet upon their table.

(Counsel read reports and text books.)

Now, your Honor, we contend in this case that whatever publication has been made to any man who refused these people credit, was a publication not made by our clients, not made with their authority or privity, not made under any consideration extended to them in any way, but publications which were made by Lisberger or by Edward Simon.

Now, we contend further in this case, that it is the duty of the plaintiffs in this case to have laid before the jury at the present time, evidences to show that the breaking down of the credit of these people was due to the act of these defendants. Now, we insist that has not been done. We claim that they have not offered any

competent evidence to show that that is the actual cause. What evidence have they offered? They have presented evidence to show that this person had a business in which there was \$9,500 assets, and that there were but \$6,000 debts. The evidence also appearing on their side of the case is that they gave a chattel mortgage but a few days following this publication—twenty days after the publication alleged to have been made by the defendants in this case, a chattel mortgage of \$4,000 was executed upon this stock. 10

Now, suppose it be conceded that evidence has come before this Court that this business has been injured. Whose act caused that injury? In so small a space of time is it possible to say from the evidence which has been laid before this Court what has broken down the credit of these people, or that it is by reason of anything done by the defendants whom we represent? We take it that a good name, a business character, a standing in the community is not thus lightly laid aside, and we contend that from the evidence in this cause it is not clear whether the credit of these parties was broken down by the publication of the defendants, or whether it was broken down by the subsequent giving of the chattel mortgage. 20

But further, may it please the Court, it appears clearly in evidence at the present time that during the year 1883, leaving out of consideration the month of December, in that year, from January to November, inclusive, the sales of this business were \$12,779, nearly \$13,000, and that on the following year, the year in which this alleged publication is said to have been made, the sales amount during those same months to but \$7,656.72. Now, that being true, and that is the proof of the plaintiffs in the case, it is evidence before your Honor that the business of these people had depreciated at the time the publication is alleged to have been made to the extent of over one third. Now, is it possible from the evidence that has been laid before the jury up to this time, for the jury to tell where the injury to credit came from? Did it come because people ceased to buy as 30 40

many goods as they formerly had done? Did it cease because they gave a chattel mortgage for \$4,003, or did it cease on account of the publication?

I don't think there is any competent evidence before the Court at the present time to show which was the actual cause. To say that this loss of credit is due to this publication is simply one of the old-fashioned *post hoc* arguments,—it is, because it comes after it.

10 We cannot tell what was the cause, and I submit that the evidence before the jury is not sufficient to establish the cause of the injury at this time.

Now, another thing, it does seem to me that in this case the plaintiffs are in a position which requires them to produce before this Court competent evidence to establish the fact that they had a prosperous business; they say credit had never been refused to them before. Now, all the testimony that Mr. Patterson has given upon this point is based upon something that he calls books.

20 *The Court:* You say there is no evidence of damages at all to go to the jury?

*Mr. Woodruff:* I think not.

*The Court:* That must be the weight of your argument on the motion to nonsuit, that there is no evidence at all of damages, or any legal damages shown.

30 *Mr. Woodruff:* I undertake to say that Mr. Patterson's evidence as to the prosperous business is based upon the books, and that those books are of not sufficient account to base any such judgment upon. It is in evidence before the Court that he has kept no account of his capital; he has kept no account of the money drawn from the business for his living expenses; that he has kept no account of the bills receivable or bills payable, nor any account of the terms of credit; no inventories or any balance sheets, nor any cash book or cash account, or check book. They are just such books, we submit, as would be thrown out of consideration in any court of justice if an action was based upon them, because it is  
40 impossible to tell—there is no book of original entries,

so to speak, in the case. You cannot make up from what is submitted here a state of accounts and show what the true condition of the business is—nor is his own testimony based upon what those books are supposed to show, competent in this case.

The next point which I wish to call your attention to is the question as to copartnership with Robert G. Dun. We respectfully submit that it has not been proven in this case that Mr. King or Mr. Douglas is a copartner in this concern. Certainly, a mercantile directory is not sufficient proof of copartnership; and both Mr. King and Mr. Douglas, who are, as the case now stands, the defendants' witnesses, have testified that their names were not inserted in that Mercantile Directory by any act or with any knowledge of themselves. Not only so, your Honor, but the testimony of Mr. King and Mr. Douglas is both to the effect that they are simply employees of Mr. Robert G. Dun. Both of them testify that Mr. Robert Graham Dun is the sole owner and proprietor of that business, that he owns all the books and papers and offices of the company throughout this country,—that they have no proprietary interest of any nature in them; and they testify further that they receive from him—now, here is what I distinctly want to present before your Honor—that they receive for him for their services each year a certain definite sum; whether the profits of the business reach any amount or not that sum is guaranteed to them, and they receive it for their services. They also testified that they received from Mr. Dun—not from themselves—not a payment which they make to themselves, but they receive from Mr. Dun for their services, in addition to the guaranteed amount, a conditional sum which is measured by the profits of the business. I think that that question has been so firmly settled by the decisions in our State that I need only to refer to them at the present time.

*The Court:* It is hardly worth while to refer to the authorities. It is a matter perfectly familiar to the Court. Salary and percentage do not make a man

a partner, if it is shown to be compensation for his services.

*Mr. Woodruff:* The next question is the question of publication. We claim that evidence is necessary in this case to show that the defendants in this case caused a publication to Meyers, Brumer, Lyons, Katz, or Oppenheimer, that it was their act.

10 The bill of particulars in this case specifies that they will prove on the trial of the cause that the publication was made by R. G. Dun & Co. to some of these people. We submit that any publication, which has been made to these people, has been by persons other than the defendants in this case. Not one of these people, who have been put on the witness stand, testified that he was a subscriber to the agency; that he received any information from the agency. They were not entitled to any information from the agency, and if they got any information, they had it surreptitiously and in fraud of the rights of the defendants in this case.

20 *The Court:* Isn't your argument based upon the idea that this is a privileged communication?

*Mr. Woodruff:* Not upon that point, now. The evidence is not to be directed to the point as to whether the Newark Daily Advertiser or the Sentinel of Freedom, or some other paper, is published, or that this is a copy of it. But I take it, that in all libel cases that have been before the Court, it has been held to be necessary to go to the extent of showing that a copy was procured from  
30 that office, or from some employe, and that copy, so obtained, should be produced in Court, unless it is lost, or its destruction is accounted for. Now, there is no evidence before this Court that Lisberger & Weiss obtained that sheet from R. G. Dun & Co. Mr. Meyers obtained it from Lisberger, and Lisberger doesn't tell where it came from. Mr. Meyer says that Mr. Lisberger is a subscriber to R. G. Dun & Co., but he doesn't say that he saw Mr. Lisberger go there and get that sheet. He doesn't say who put that sheet in Lisberger's hands. There is no evi-  
40 dence upon that point as to who put that sheet in Mr.

Lisberger's hands—no competent evidence in this Court, I should say. Because Mr. Meyers says Mr. Lisberger is a subscriber that does not establish it; he doesn't produce any evidence of Mr. Lisberger, who is the subscriber himself. So, I say, there is no evidence in this Court to show that there is any copy of the sheet of November 5, 1884, which emanated from the office of R. G. Dun & Co. by the act of these defendants, or anybody.

We claim that it not only should be proven in this 10 case that that sheet was sent from the office of the agency of R. G. Dun & Co., but we claim it should be shown that it was sent from the office of R. G. Dun & Co. to one of the five people whose names have been given to us; names specified on that bill of particulars should be the controlling element in this case, so far as publication is concerned, and I submit that there is not one scintilla of evidence to show that R. G. Dun & Co. ever caused a single copy of that sheet to be given to Brumer or Meyers, or any witness who took the stand in 20 this case.

There is another point to be considered in this case. The question is this: Suppose it to be absolutely proven to the satisfaction of every one, taking that, as a supposition, it is proven to the satisfaction of every one that that publication was made to Meyers, and all the rest of these people who came here—presuming that to be true; yet, we say, that the communication to them, whether it was made by the defendants, or whether it was made by Lisberger, or whether it was made by Simon 30 & Co., it makes no difference by whom it was made, it was made in every instance to a man who had an interest in knowing, and is a privileged communication, and on that ground cannot be the subject of an action at this time.

(Counsel read from decisions.)

Now, your Honor, I might read any number of cases bearing upon this subject, and I contend that the law as it now is, permitted the communication as a privileged communication from the parties in Philadelphia, Lis- 40

berger & Weiss, to Meyers, and every other man who received any information so far as the evidence in this case is concerned, they were one and all creditors of the plaintiffs in this case—each one was a creditor, each one was interested in knowing, and each communication made to that person, it makes no difference by whom, was a privileged communication and cannot be made a ground of action.

10 There is another question which is presented here at this time. It was not, perhaps, properly arguable in the motion that was made last evening and this morning, perhaps it should be referred to now—and that is this contract which is entered into between the parties. Now, I assume to say that that contract has not yet been construed by any—(interrupted.)

*Mr. McGee:* I do not understand that that contract has been received in evidence in this case.

20 *The Court:* Oh, yes, if you show it to the witness and examine upon it.

*Mr. McGee:* I didn't produce it and show it to the witness. It is a contract which we objected to, and we are not parties, and which we do not offer, and it is not in evidence.

*The Court:* If it has not been offered it is not in evidence. I had forgotten for the moment how it came before the Court.

*Mr. McGee:* He tried to offer it, but I objected.

30 *The Court:* They can do it. If you produce it and examine the witness upon its contents, the other side may then offer it, but if it comes from the other side for identification they cannot offer it until their time comes to put in testimony.

*Mr. Woodruff:* I will say at this time that whether the contract was marked for identification or whether it was offered in evidence, or whatever position it was in, yet, nevertheless, the clauses which compose that contract were read and testimony given upon them by the  
40 witness on the stand produced by the plaintiffs, who

testified to the terms of that contract, which were produced and read, and which were the terms upon which every subscriber of the agency obtained any information. That brings the terms of that contract within the consideration of the Court at any rate. Now, I would respectfully state in regard to the contract, which it becomes necessary for your Honor to consider, that it has been—

*Mr. McGee*: I object to argument on that. I take it that in the argument counsel must be confined to the evidence that has been admitted, not evidence that may be admitted when he comes to open his case; that is another matter. 10

*Mr. Woodruff*: I respectfully submit that on its face it shows that it has been prepared in view of the existing state of the law.

People placed in the position of a mercantile agency are compelled to see that their contracts are drawn so as to be within the law, and if your Honor will refer to the contract in this case you will find that the publications are sent only to people who, over their own signature, request that it be sent. The words speak for themselves. It is a special request that it be sent. Now, if your Honor desires authorities to be cited upon that point, they can be referred to. The contract itself shows on its face just what it is. It requires no explanation. It is either a special request, or it is not. There is certainly in this contract, language as plain as language can be made, asking the Mercantile Agency to furnish this sheet to its subscribers, and being furnished in pursuance of a special request to its subscribers—and it is not contended that it is furnished to anybody else—there is no evidence of that here—being furnished to its subscribers under a special request as that has been furnished, we contend that it cannot be made the subject of a prosecution for libel unless evidence be adduced to show that there was malice in publication. If there be malice shown that would take it outside the rule that we lay down, but that unless malice be shown, it comes 40 30

within that rule and we are entitled to the privilege which the contract provides we shall have. We, therefore, respectfully submit to the Court, both under the law and by reason of the deficiency of facts, the case has not been proven and that we are entitled to a nonsuit.<sup>a</sup>

Motion for nonsuit denied, and exception taken by defendants.

(See Exception 14, for defendants, *post.*)

10

MR. WOODRUFF opens for defendants.

**Arthur J. King**, recalled in his own behalf, deposeseth and saith further as follows :

*Direct examination*, by Mr. Wagner :

20 Q You have already testified in this case somewhat as to your relations with Mr. Dun in the Mercantile Agency. Will you please tell the Court and jury more specifically what that exact relation is; and if your contract with him is in writing, produce the written contract and explain it.

30 Plaintiffs' counsel objects to this question and to this line of evidence, on the ground that it already appears by this witness as to what his relationship was with the company. It is not competent to enlarge upon that testimony in the defence.

Objection overruled. Evidence admitted subject to exception.

A You mean as to the compensation I have or the position I hold ?

40 Q I don't want you to go into the particulars, but if your agreement with them is in writing—if your agreement with Mr. Dun is in writing, I want you to produce it.

*A* Yes, sir, the agreement is in writing; I have it here.

*Q* In order that it may be in evidence in the case?  
Witness produced paper.

*Q* Is that the paper?

*A* Yes, sir.

Paper offered for identification, and marked 2 for defendants.

*Mr. McGee*: Not as to contents, but as to execution. There is a subscribing witness, and I therefore object to 10 the paper.

*The Court*: Where does he reside?

*Mr. Woodruff*: I don't know, sir; New York; I think it is New York, sir.

*The Court*: If the subscribing witness resides outside of the process of the Court, account for his absence.

*By the Court*:

*Q* Where does this gentleman live?

*A* He is our bookkeeper. 20

*Q* Where does he live?

*A* In New York, sir, I think.

*Q* His residence in New York?

*A* That I can't say.

*Q* Does he reside in New Jersey?

*A* I think it is possible he does. I don't know where his residence is.

*The Court*: I think it is better to have the subscribing witness. If Mr. Patterson resides in the State he ought to be here. 30

*Witness*: I will guarantee to have him here as soon as he can be brought here.

*The Court*: Does the other side require the production of the subscribing witness to this contract?

*Mr. McGee*: We very much regret to be compelled to be technical. At the same time we think, in view of the way the case is tried, that it is our duty to take advantage of whatever rights we may have, and we deem this to be quite an important right at this time. 40

*Q* You have told us when you gave your testimony before that you were employed by Mr. Dun in his mercantile agency. Have you been engaged for some time in his employment?

*A* Yes, sir.

*Q* In connection with that business?

*A* Yes, sir.

*Q* For how long a space of time?

*A* About thirty-five years.

10 *Q* And in more than one part of the country?

*A* In more than one part; yes, sir.

*Q* Are you familiar with the details of the business, and are you familiar with the purposes of that agency, that mercantile agency, the object of it—of Mr. Dun?

*A* I think I ought to be.

*Q* Now, tell the Court and jury, please, just what that mercantile agency is; what its object is in the community; what it does, and what sphere of work it covers; tell it in your own way.

20 *A* You mean to say what we have to offer customers, is that it?

*Q* I mean to say, tell them what you have to offer customers, and the method in which you collect the material you sell them.

*A* My historical ability is not very good.

*Q* What the purposes of the agency are—what is the purpose, the object of the mercantile agency?

30 *A* The object of the mercantile agency is to keep on record, for the benefit of its subscribers, information concerning all the credit buyers at various distributing points; that is the primary object of the mercantile agency, so that granters of credit and askers for credit may each be accommodated without delay—the one deciding as to the claims of the would-be debtor, and the other in deciding as to the amount of credit to be given; to advance the status of the buyer without the delay consequent upon a direct examination at the time of making the credit; therefore it is a benefit to the party who comes into the market, as well as to the party  
40 employing us to gather this information for direct use.

*Q* Then I understand you to say the work of the agency is primarily to assist those who employ you to gather it, and to give them such information as can be obtained of people in the mercantile community who are apt to buy goods, for instance?

*A* Yes, sir.

*Q* And at the same time, incidentally, that assists the buyers themselves, or those who might be within the class called buyers, to a certain extent, giving them a definite status, which entitles them and puts them in a position—

*A* Of course—yes, sir.

Objected to.

*The Court:* The objection Mr. McGee makes is, that you are telling it, and not the witness.

*Witness:* I told you my historical abilities were not good, and I require to be set right.

*Mr. McGee:* I want the benefit of an exception.

*Q* How long has this business been in operation? 20

*A* Well, to my personal knowledge, it has been in operation since 1851.

*Q* Since 1851?

*A* Yes, sir.

*Q* For how long a time has it been in operation by Mr. Robert Graham Dun?

*A* I think Mr. Dun came into the firm about 1854.

*Q* Well, now, tell us more specifically as to some of the details of the manner of carrying on the business; you have told us that the agency is employed by certain merchants whom you call—what do you call those who employ you? 30

*A* Wholesale dealers, dispensers of credit; they are parties interested in dispensing credit.

*Q* And they are called, what?

*A* Wholesale merchants.

*Q* The merchants who employ your agency to obtain information for you?

*A* They are dealers at wholesale.

*Q* They make an arrangement with you—if they 40

make an arrangement with you that you shall supply them with information from time to time, what shape does that arrangement take?

A Do you mean for the special inquiry?

Q I mean where some merchant wishes to employ the agency for business within the scope of the agency's work, in what way is that arrangement made?

10                    Objected to, on the ground that it appears already in the case that there was a written contract between the agency and its subscribers.

Q When somebody comes, do you, or do you not make a contract with them?

A Always make a contract with them.

Q And that contract is in writing, or not, or print?

A The contract is in this form—(witness producing paper.)

Q That is the form, is it?

A Yes, sir.

20                    Q That is, every contract is made on a printed blank, like that?

A That is the form of the contract.

Q The blanks that are filled up, are filled up with what?

A With the written dates and signature.

Q Then the names and amounts that they would pay?

A Amounts.

30                    Paper offered in evidence, marked Exhibit No. 1, for defence.

(Objected to on the ground, first, that this paper appears to be unsigned, entirely unexecuted; and in the second place it appears to be a contract between R. G. Dun & Co. and people who are unknown to the plaintiffs, and that the plaintiffs are not parties to the paper nor bound by its contents; third, that it is irrelevant.)

Offer admitted and exception granted to plaintiffs.

40                    Recess.

The same witness resumed the stand.

*Q* Now, Mr. King, I observed in this paper, this subscription paper, that there are the words, "The said R. G. Dun & Co. are hereby requested to place in our keeping for our exclusive use, a printed copy of a reference book containing the ratings or markings of estimated capital," &c. (Counsel read paragraph No. 3.) Now, it is plain to the Court and jury what this notification sheet referred to in an agreement is, what relation it bears to the reference book referred to in that article. 10

*A* It is part and parcel of the reference book, a supplementary part of the reference book.

*Q* Supplementary to the reference book? What is the nature of the reference—(interrupted.)

Objected to on the ground that this witness has already stated that he never saw one of these notification sheets.

*Witness:* I didn't say I haven't seen our notification sheets. I couldn't identify that particular one. 20

*Q* What is it about, that reference book; what is the nature of the book? I don't want you to go into the description of its contents, but what is the description of the reference book in your business? I want the Court and jury to understand fully the nature of this business and these particular papers in regard to it.

Objected to on the ground that the reference book itself would be the best evidence.

*Defendants' counsel:* Our inquiry is limited to this— What is the nature of the book referred to in this paragraph? 30

Objected to. Admitted. Exception taken.

*Witness:* What is the purpose of the book?

*Q* Certainly. The nature of the book?

*A* The purpose of the book is to put in the hands of our subscribers, according to that agreement, the names of traders throughout the country, with the ratings, according to an understandable key.

*Q* Now, tell us what you mean by a rating. 40

A Well, I can tell it by another name, perhaps that would make it plainer. By rating in insurance parlance is understood to be the reflex of the risk. This is the reflex, as I understand it, as I try to make it plain to you, and the jury, of the risk incurred in granting this credit, you know, the ratings being the reflex of a written report or detailed statement.

Q Tell me, then, whether I am right or not when I ask if I understand you that the rating which you give  
10 to each name which may be entered in the books, is your estimate or conclusion as to the credit value of that person in the mercantile community—credit and standing of that person in the community?

A Yes, sir, exactly, from what you may term individual estimate, or an estimate formed from data.

Q That is what I mean, an estimate formed of the data. I am going on to ask you about the data from which that is formed. Tell us in a general way how that is, and how far that is available to the subscribers?

20 A It is available to the subscribers upon application for a detail. If he is not satisfied with the ratings he sees in his reference book he comes to us and says: "What do you base this on?"

Q Then you have a detailed report of people, do I understand you rightly, a detailed report which is available to a subscriber if he wishes to see it?

A If he wishes to see it.

Q And you have also a summary, as I term it, or conclusion formed in your own mind as to the rating  
30 placed in the reference book?

A Based upon these details before us,

Q Now, I want you to tell us whether any of the information which the agency has in regard to a person is ever communicated to any one except to the subscribers of the agency?

The form of the question objected to.

Question admitted. Exception granted.

A Perhaps I had better qualify that answer a little. This may be given away by our clerks without our  
40 knowledge, but not with our knowledge or consent.

Q Now, is any information which you have or have obtained for your subscribers, or have in your possession about the credit or standing of merchants, traders, or others in the community, ever communicated by you, or is it ever communicated by the mercantile agency to its subscribers except upon the subscribers' special request?

Objected to.

Q This sheet is prepared and furnished to your yearly subscribers only at their own request? 10

Objected to on the ground that they have offered in evidence a printed agreement which they say they made with their customers, and they cannot give evidence to contradict or vary the terms of that subscription.

Question admitted. Exception to plaintiffs.

Q Does or does not the mercantile agency insist, in dealing with its subscribers, that every information given to them, whether by means of detailed reports or by means of a reference book, or by means of a notification sheet supplementary to that reference book, shall be given only upon special request, either by that request being expressed in writing over their signature in an agreement of this form filled up, or else by a special inquiry at the office for the detailed report? 20

Objected to on the ground that it is secondary evidence and irrelevant.

Objection overruled. Question admitted. Exception. 30

A Why, the agency has no dealings except with subscribers, and all subscribers sign that contract. I suppose that covers it. Is that what you mean?

Q Then I understand they will not give information to any one who has not signed that contract?

A I say the agency holds no terms with any body but subscribers.

Q That is, you mean they give no information?

A No, sir, they give no information or sell it. The 40

subscription is the condition, and we collect the money, too, before they get it. We don't do business for fun.

Q There was a New York directory produced, and it has since been offered in evidence.

*The Court:* To show the publication of their names by their authority in that book?

*Defendants' counsel:* I suppose so. I cannot conceive it would be of any value without that, but I suppose it  
10 was admitted in evidence subject to the question of its value.

Q At the top of page 50 are these words, "Dun, R. G. & Co., Robert G. Dun, Erastus Wyman, Arthur J. King, Robert Dun Douglas, 314 Broadway." State whether or not you ever authorized—see that they are there—whether or not you ever authorized in any way, directly or indirectly, the insertion of your name in that connection in this book?

A No, sir, I never did.

20 Q Did you ever authorize the insertion of any of those names?

A No, sir; it doesn't come within my province at all to deal with that.

Q Now, one word as to the history of this agency. Who was the owner of the Mercantile Agency and all its properties?

Objected to.

*The Court:* Haven't we that already?

30 *Witness:* I think we have. I don't want to travel over the same ground, but I want to have it as part of our case, that there may be no doubt about it.

Q Who is the owner of the agency and all its properties and assets?

Objected to.

*The Court:* As a repetition it may be objectionable. I think it is a repetition. Mr. King has already said that Mr. Dun had a proprietary interest.

40 Question withdrawn.

Q You said—did I understand you—suppose you state now, clearly to the Court and jury, just what the province of the notification sheet is—what the object of it is. What do you mean by supplementary to it?

A Well, you can call it corrective if you like. It is supplementary as a supplement to any other edition of any other book, I suppose. It is additional information.

Q Then it would be a bulletin. Would it or not be in the nature of a bulletin containing other additional matter, or changed matter from the reference book? 10

A If your name is in that reference book, which I presume it would be, and I found out afterwards, or the agency found out afterwards, that you were bad—that you had been represented good in that book to the parties who got it, I think there would be an obligation on us, if we found out that you were bad instead of good; that, I think, is one of the objects of the sheet; I think we should be bound to do that if we sold you this book for the price we should ask you for it; to keep you posted in it. 20

Q That explains it fully, better than, perhaps, in any other way, by an illustration. The agency, therefore—does or does not the agency communicate, at the request of subscribers, changes in ratings, or difference, to names rated, when requested, as requested—by means of this notification sheet, but requested by contract?

A Why, sir, we do nothing, except upon request; it is all upon request; the contract states explicitly that it is not to—that they ask us to do these things, if I get your meaning right; I don't know whether I do, or not. 30

*Cross-examined, by Mr. McGee:*

Q This book, as I understand it, contains the name of each business man whom you report, together with some sign which gives what you regard as his business rating—proper business rating?

A Yes, sir.

Q That is all there is in the book? 40

A Well, there may be some other matters in the book; I think there is something relative to the collection laws of the various States.

Q I mean about each man?

A Yes, sir.

Q You do not state the source of your information?

A No, sir.

Q Nor how you reached that opinion?

10 A Well, I think that is pretty well understood—explained.

Q But you don't state it in the book?

A I think not.

Q You simply give the name, and then the abbreviation, which means what you regard as his rating?

A Yes, sir.

Q It is your judgment?

A Indicated by key.

Q It is your judgment?

20 A It is our judgment from the data that we make the rating from.

Q Those data are collected by your employes?

A Yes, sir; they are collected by the employes of the subscribers.

Q I don't mean you personally. I am not trying to catch you—but the employes of R. G. Dun & Co.?

A Yes, sir; certainly.

Q You don't tell the customers who collect this information—what men or what women?

30 A No, sir.

Q Now, then, the Mercantile Agency Notification Sheet you publish, how often—I don't use the word "you," personally?

40 A I know; I have told you personally before that that is not within my department; I am speaking within my knowledge and belief; I really have no absolute conduct or control of that sheet, and I might be betrayed into saying something that was not exactly true, but I believe they publish it semi-weekly?

Q You see these sheets sometimes ?

A I see them occasionally—yes, sir.

Q Now, in that you publish, amongst other things, anything you find on the record of any Court or public office which, in your judgment, affects the credit of the person reported, is that so—in the judgment of R. G. Dun & Co. ?

A Yes, sir ; there is a portion of the sheet which is devoted, I think, to what is called " Record Items."

Q Those " Record Items" mean that the things stated 10  
in that are found on some public record ?

A I presume that is the meaning, sir.

Q Is there any doubt about it ?

A There is no particular doubt in my mind about it.

Q Then, what you mean the subscriber to understand is this, that some employe of R. G. Dun & Co., or R. G. Dun & Co. themselves, have seen upon a public record the fact stated under that head, is that so ?

A That would be the inference, sir, I think.

Q Well, then, if a person should read in that paper 20  
an item such as this, he would, if he should see it under the head of " Record Items," an item such as this, which is now in evidence—your customer would be justified in believing that you meant to report, or R. G. Dun & Co. meant to report, that such record was to be found in the public office—some public office of the county named, or the city named ?

A I think that would be the inference, sir.

Q What is the price per year charged to subscribers for the information given him where he asks for no 30  
more information than his first subscription entitles him to ?

*The Court:* Is that important, the amount received ?

*Defendants' counsel:* It seems to me it is inquiring into the private affairs.

*The Court:* I shall overrule it as irrelevant.

Exception granted to plaintiffs.

Q Is any more charge made to the subscriber who 40

takes the notification sheet than is made to one who gets only the book ?

*A* The notification sheet is a part of the book.

*Q* Then the one subscription covers both ?

*A* Yes, sir.

*Q* Then all subscribers are entitled to the book and the notification sheet ?

*A* Well, all that class of subscribers certainly are.

*Q* I have not been able, Mr. King, in this case to find  
10 out the different classes of subscribers there are. I don't find it in your contract.

*A* I think, as far as I know, that there may be a certain class of subscribers who don't take the book who do not get the notification sheet, but all subscribers to the book get the notification sheet.

*Q* Then you think there are some who only have the right to take memoranda and get oral information or private information ?

*A* Yes, sir ; that is so.

20 *Q* And then another class who get your publications ?

*A* Yes, sir.

*Q* And there are different rates charged to those different classes of people ?

*A* I don't know anything about the different rates. I don't think there is very much difference about it

*Q* And the subscribers who get all the publications pay by the year ?

*A* They all pay by the year.

30 *Q* So much a year ?

*A* So much a year.

*Q* Now, then, if they get more than a certain number of special pieces of information, do they get pay additional for those ?

*A* They pay additional.

*Q* They pay so much, then, for each special piece of information ?

*A* Over and above the agreed number.

*Q* Do you remember what the agreed number is ?

40 *A* No, sir, I don't know.

Q Now, do you know how many subscribers there are to the publications of this company concern?

A Do you mean in New York office?

Q Anywhere; yes, in the New York office.

A Taking all the branches?

Q Yes.

A I haven't the slightest idea.

Q Can you tell me whether the number is large?

A The offices are very numerous, and I suppose the aggregate number must be pretty large. 10

Q Does it run into the thousands?

A That I can't say.

Q In the United States?

A I can't say.

Q You must know; you must be able to form a judgment from it.

A You don't want my judgment; you want my knowledge, don't you?

Q You must have knowledge of this. You know what the net receipts of the concern are, do you not? 20

A What, the whole association, sir?

Q In that part of it in which you are interested?

A I know what my dividend amounts to when I get it.

Q You know what percentage you are paid?

A Yes, sir; I know perfectly well what percentage I get after they declare profits, if there are any.

Q Can't you tell with reasonable certainty the minimum copies of the publication subscribed for from the results in money? 30

A No, sir, I couldn't. I couldn't tell you what our expenses are. I would have to know what the expenses would be.

Q Supposing there were no expenses at all. Supposing there was no income whatever except the net profits which you get a percentage of, how many yearly subscriptions would that account for?

A I don't know.

Q Would that amount of money account for a thousand subscribers? 40

A The amount that I get?

Q Well, yes, if you please.

A Well, now, I think I have already told you that the amount paid by the subscribers might vary according to the extent of the use; therefore, there might be one subscriber pay all I was entitled to, for anything I know to the contrary. I can't answer your question, sir; I don't know.

Q You have stated in your direct examination that  
10 your publications might be given away without your knowledge by your clerks. Is there anything that you know of to prevent your subscribers from giving it away?

Objected to.

*The Court:* Do you mean physically or morally?

*Mr. McGee:* Physically.

A There was a qualification to the answer. I couldn't be answerable for what they might do surreptitiously or dishonestly. I don't know. I couldn't gauge the moral  
20 —there is a class of people, I suppose, would give almost everything away; we have got no physical restraint upon them. It is an obligation in writing to observe the contract.

Q There is nothing in your agreement that I have been able to discover—have you been able to discover anything which requires them to return the notification sheet to the firm?

A The book is returnable.

Q This, as I understand it, contains your whole  
30 agreement with the customers?

A That is the contract.

Mr. Woodruff offers in evidence and reads the deposition of Robert G. Dun.

The sixth interrogatory thereof, and the answer, is objected to.

Objection overruled and exception for plaintiff.

Mr. McGee asks that the answer to the second  
40 cross-interrogatory be stricken out.

*The Court:* It is your own cross interrogatory. Certainly there can be no objection to that.

*Mr. McGee:* The objection is that he states that the arrangement with them is by a written contract. And then without producing the contract he gives his opinion of the substance of it.

Objection overruled. Exception granted to plaintiffs.

Mr. McGee moves to strike out the answer to the twelfth cross-interrogatory, the last part of the answer, as not responsive. 10

Motion denied and exception to plaintiffs.

Mr. Woodruff reads a deposition of John Walsh, and also the deposition of Moses P. Stacy; also the deposition of Charles Palmer; and also the deposition of Robert Martin Fisher.

20

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**Robert G. Dun**, a witness produced on the part of the defendants, being duly sworn, and the annexed interrogatories being severally proposed to him, deposes and says:

1st Interrogatory: State your residence and occupation?

A I reside in the city of New York; I am the proprietor of the Mercantile Agency. 30

2d Interrogatory: Had you any interest in or ownership of a certain printed paper known as the "Mercantile Agency Notification Sheet" on November 5th, 1884; if so, state fully and particularly what your interest therein was?

A I was sole proprietor of it. It is a part of the mercantile agency.

3d Interrogatory: If you have answered the second interrogatory affirmatively, state in what way said notifi- 40

cation sheet was used in your business and in what way, if any, the contents of said sheet were then communicated to any person or persons?

A The notification sheet is used to communicate information to subscribers who are entitled to receive it, under a written agreement. It furnishes information to them about the condition and changes of rating in the reference book, published by the mercantile agency. The sheet is sent to each subscriber entitled to it by his  
10 subscription, partly by mail and partly by messenger.

4th Interrogatory: If you have stated in what manner its contents were communicated, state whether or no such communication was made to any person or persons who were not subscribers to the mercantile agency carried on under the name of R. G. Dun & Co.?

A It was not, to my knowledge. It should not have been.

5th Interrogatory: State whether or no Daniel Meyers, of the firm Meyers, Goodman & Co., of Philadelphia, Pa.,  
20 Max B. Brumer, of New York city, Alexander M. Oppenheimer, of Philadelphia, aforesaid, Emanuel Katz, of the same place, or Charles Lyons, of New York city, or any of them, were subscribers to the mercantile agency, on November 5th, 1884, or prior thereto?

A None of the parties named were subscribers at the date mentioned or since. I don't think any of them ever have been subscribers.

6th Interrogatory: Had any of the persons employed  
30 by you in the delivery of said sheet at that time, authority to sell the same or in any way to publish it or to deliver it to any person other than a subscriber?

A They had not.

7th Interrogatory: Who had charge of the delivery of the notification sheet to subscribers to the mercantile agency in New York city, and in whose charge was such delivery in Philadelphia, Pa., if it were delivered to the subscribers of the mercantile agency in either of said cities?

40 A John Walsh in New York city, and M. P. Stacy

in Philadelphia, had charge of delivering the notification sheet.

8th Interrogatory: Do you know any other matter or thing touching the matter for which this action is brought that may tend to the benefit or advantage of the defendants; if yes, state the same fully and at large, as if you had been particularly interrogated thereto?

A Nothing further except as I have stated, that communications to subscribers were entirely confidential and under a written agreement. 10

1st Cross-Interrogatory: Are you one of the members of the firm known as R. G. Dun & Co?

A Yes.

2d Cross-Interrogatory: Who are the other members of that firm?

A In one sense I can hardly say there are members, in the strict sense of the term. But I have a written agreement with Erastus Wiman, A. J. King and Robert D. Douglas, by which they are employed on a salary, and we term it in New York, "salaried partners." They have no proprietary interest in the business. 20

3d Cross-Interrogatory: Is Arthur J. King a member of that concern?

A He is a partner in the terms above mentioned.

4th Cross-Interrogatory: Is Robert Dun Douglas a member of that concern?

A He is a partner in the terms above mentioned. 30

5th Cross Interrogatory: Is the Mercantile Agency Notification Sheet issued by that firm or concern?

A It is.

6th Cross-Interrogatory: Was the issue of the Mercantile Agency Notification Sheet, of the date of November 5th, 1884, issued by that firm or concern?

A It was.

7th Cross-Interrogatory: Is that sheet printed or written, and especially was the issue thereof of the 5th of November, 1884, printed or written? 40

A It was printed. All notification sheets are printed.

8th Cross-Interrogatory: How many copies of the the Mercantile Agency Notification Sheet of November 5th, 1884, were issued?

A It would be impossible for me to say, as there are a number of branch offices, and the number of their subscribers I have no personal knowledge.

10 9th Cross-Interrogatory: How many subscribers to the publications of which the Mercantile Agency Notification Sheet is one, are there?

A That is impossible for me to say, for the same reason.

10th Cross-Interrogatory: Was the Mercantile Agency Notification Sheet of November 5th, 1884, sent to all the subscribers thereto?

A No, not to all the subscribers; only to those who are entitled to receive it by the terms of the contract.

20 11th Cross-Interrogatory: Are the copies of the Mercantile Agency Notification Sheet delivered to subscribers by mail or by messenger; or if neither, then how?

A They are delivered partly by mail and partly by messenger.

12th Cross-Interrogatory: Are the copies of the Mercantile Agency Notification Sheet returned to you by the subscribers after they have read them, or is each subscriber at liberty to retain the same?

30 A The subscribers by their contract are entitled to retain the same for their own use in business—exclusively for their own use.

13th Cross-Interrogatory: How many subscribers to your publications, including the Mercantile Agency Notification Sheet, are there in the State of New Jersey?

A It is impossible for me to say for the reasons given in my answer to a former interrogatory.

14th Cross-Interrogatory: How many in the State of New York?

40 A As we have a number of branch offices it is impossible for me to say.

15th Cross-Interrogatory: How many in the State of Pennsylvania?

A. As we have a number of branch offices it is impossible for me to say.

16th Cross-Interrogatory: Was a copy of the issue of November 5th, 1884, mailed to each subscriber in the States of New York and Pennsylvania?

A. It was to all subscribers entitled to receive it by their contract, or it should have been.

17th Cross-Interrogatory: What position did the defendants, Arthur J. King and Robert Dun Douglas, respectively hold in the firm or concern of which the Mercantile Agency Notification Sheet is a publication? 10

A. Their specific duties was that Mr. King is and was reporting New York city merchants and their ratings; Mr. Douglas attends to making contracts with subscribers, making renewals, etc.

18th Cross-Interrogatory: How frequently is the Mercantile Agency Notification Sheet published? 20

A. Twice a week.

19th Cross-Interrogatory: If to the interrogatories above you answer that a copy of each issue of the Mercantile Agency Notification Sheet is not sent to every subscriber, then state to what class of subscribers each copy is sent and on what principle you distinguish?

A. We have no distinguishment. The notification sheet is sent to all who are entitled by the terms of their subscription to receive it. The other subscribers do not receive it. 30

20th Cross-Interrogatory: Where the present tense is used in any of the cross-interrogatories above put, you are to understand that it refers to the time immediately preceding and succeeding, and at the issue of November 5th, 1884. above mentioned?

A. I so understand.

Examination taken, reduced to writing, sworn to and subscribed this }  
17th day of December, 1885, } R. G. DUN.

EDWARD G. BLACK, *Commissioner.* 40

**John Walsh**, a witness produced on the part of the defendants, being duly sworn, and the annexed interrogatories being severally propounded to him, deposes and says :

1st Interrogatory : State your residence and occupation ?

A 304 East Thirty-seventh street, New York city. I am a clerk.

10 2d Interrogatory : If employed in the office of the mercantile agency, carried on under the name of R. G. Dun & Co. in New York city, state whether or no you had anything to do with what was known in the month of November, 1884, as the Mercantile Agency Notification Sheet, and if so, what ?

A I am employed in the mercantile agency office. I had sole charge of that sheet. I prepare copy for the printing office and mailing to subscribers.

20 3d Interrogatory : State whether or no said sheet of the date of November 5th, 1884, was delivered or the contents thereof in any way communicated to Charles Lyons or Max B. Brumer, of New York city, or to Alexander M. Oppenheimer, Daniel Meyers, of the firm of Meyers, Goodman & Co., or Emanuel Katz, of the city of Philadelphia, or any of them, to your knowledge, and what opportunity, if any, you have of knowing ?

30 A The sheet was not delivered to the parties named in New York by the mercantile agency. As to the Philadelphia parties, the sheets are all expressed to Mr. Stacy, who has charge of our office in Philadelphia; and regarding the Philadelphia parties I have no knowledge. My opportunities consist of, or in supplying, the sheets from the New York office. I send them out.

1st Cross-Interrogatory : In what capacity are you employed in the office of R. G. Dun & Co. in New York city ?

A In charge of the notification sheets and reference books.

40 2d Cross-Interrogatory : Who are the members of the firm known as R. G. Dun & Co. ?

A That I don't know.

3d Cross-Interrogatory: Is Arthur J. King a member of that concern?

A I have no knowledge about that.

4th Cross-Interrogatory: Is Robert Dun Douglas a member of that firm or concern?

A I have no knowledge about that; I cannot say.

5th Cross-Interrogatory: Is the Mercantile Agency Notification Sheet issued by that firm or concern? 10

A By R. G. Dun & Co.

6th Cross-Interrogatory: Was the issue of the Mercantile Agency Notification Sheet of the date of November 5th, 1884, issued by that firm or concern?

A By R. G. Dun & Co.

7th Cross-Interrogatory: Is that sheet printed or written, and especially was the issue thereof of the 5th of November, 1884, printed or written?

A Always printed.

8th Cross-Interrogatory: How many copies of the Mercantile Agency Notification Sheet of November 5th, 1884, were issued? 20

A I could not tell you that; I don't know.

9th Cross-Interrogatory: How many subscribers to the publications, of which the Mercantile Agency Notification Sheet is one, are there?

A I don't know.

10th Cross-Interrogatory: Was the Mercantile Agency Notification Sheet of November 5th, 1884, sent to all the subscribers thereto? 30

A To all those whose terms of subscription entitled them to it.

11th Cross-Interrogatory: Are the copies of the Mercantile Agency Notification Sheet delivered to subscribers by mail or by messenger, or, if neither, how?

A Partly by mail and partly by messenger.

12th Cross-Interrogatory: Are the copies of the Mercantile Agency Notification Sheet returned to R. G. Dun

40

& Co. by the subscribers after they have read them, or is each subscriber at liberty to retain the same.

A They are allowed to retain the same.

13th Cross-Interrogatory: How many subscribers to your publications, including the Mercantile Agency Notification Sheet, are there in the State of New Jersey?

A I don't know.

14th Cross-Interrogatory: How many in the State of New York?

10 A I don't know.

15th Cross-Interrogatory: How many in the State of Pennsylvania?

A I don't know.

16th Cross-Interrogatory: Was a copy of the Mercantile Agency Notification Sheet of the issue of November 5th, 1884, mailed to each subscriber in the State of New York and Pennsylvania?

A I don't know.

20 17th Cross-Interrogatory: What position did the defendants, Arthur J. King and Robert Dun Douglas, respectively hold in the firm or concern of which the Mercantile Agency Notification Sheet is a publication?

A I have no knowledge to enable me to answer that question.

18th Cross-Interrogatory: How frequently is the Mercantile Agency Notification Sheet published?

A Twice a week.

30 19th Cross-Interrogatory: Have you charge, or are you the person who mails or sends out the Mercantile Agency Notification Sheets from the office of R. G. Dun & Co. in New York city?

A Yes.

20th Cross-Interrogatory: If to the cross-interrogatories above you answered that a copy of each issue of the Mercantile Agency Notification Sheet is not sent to every subscriber, then state to what class of subscribers each copy is sent, and on what principle you distinguish?

40 A They are sent according to the terms of their sub-

scription. They are sent only to those parties who are entitled to them by the terms of the subscription they sign.

21st Cross-Interrogatory : Where the present tense is used in any of the cross-interrogatories above put, you are to understand that it refers to the time immediately preceding and succeeding, and at the issue of November 5th, 1884, above mentioned ?

A I understand.

JNO. WALSH. 10

Examination taken, reduced to writing, }  
sworn to, and subscribed, this 17th }  
day of December, 1885, }

EDWARD G. BLACK, *Commissioner*.

**Moses P. Stacy**, one of the said witnesses for the defendants, appearing before me, and being by me duly sworn that the answers he should give to the said interrogatories should be the truth, the whole truth, and nothing but the truth : 20

1st Interrogatory : What is your residence and occupation ?

A My residence is Philadelphia, Pa., and my occupation is manager of the mercantile agency of R. G. Dun & Co.

2d Interrogatory : If engaged in the business of the mercantile agency, carried on under the name of R. G. Dun & C., state whether you were so engaged in the month of November, 1884 ? 30

A I was.

3d Interrogatory : State whether Alexander M. Oppenheimer, Daniel Meyers, of the firm Meyers, Goodman & Co., or Emanuel Katz, or any of them, were subscribers on November 5, 1884, or prior thereto, to such agency ?

A They were not.

40

4th Interrogatory : State whether or no you had anything to do with the delivery or distribution of the Mercantile Agency Notification Sheet, at that time, and if so, what and to and among whom such delivery or distribution was made ?

A I had the direction of that duty at that time ; the distribution was made by mail and by messengers to some of our subscribers.

10 5th Interrogatory : Was such sheet delivered, or its contents delivered by you, or so far as you know, by any one in the employ of said agency at any time to said Oppenheimer, Meyers or Katz, or either of them ?

A No.

6th Interrogatory : State if you know who had charge of the delivery of said notification sheets to the subscribers of the mercantile agency, in Philadelphia, at that time ?

20 A Charles Palmer and Robert Fisher were the two messenger boys ; Charles Palmer delivered that portion which was sent by mail at the post office.

1st Cross-Interrogatory : In what capacity were you engaged in the employ of the mercantile agency of R. G. Dun & Co., in the month of November, 1884 ?

A As manager.

2d Cross-Interrogatory : Who are the members of that firm ?

30 A I don't know ; R. G. Dun individually ; R. G. Dun, Erastus Wiman, A. J. King and R. D. Douglas, are the heads of the agency in New York ; R. G. Dun is the only proprietor of the agency known to me ; what relations the others have with him I do not know.

3d Cross-Interrogatory : Is Arthur J. King a member of that firm ?

A I do not know that he is.

4th Cross-Interrogatory : Is Robert Dun Douglas a member of that concern ?

40 A I do not know that he is.

5th Cross-Interrogatory : Is the Mercantile Agency Notification Sheet issued by that firm or concern ?

A It is.

6th Cross-Interrogatory : Was the issue of the Mercantile Agency Notification Sheet of the date of November 5, 1884, issued by that firm or concern ?

A I cannot say whether or not there was a sheet issued on that day.

7th Cross-Interrogatory : Is that sheet printed or written, and especially was the issue thereof of the 5th of November, 1884, printed or written ? 10

A I cannot answer as to the date of the 5th of November, 1884 ; I do not remember whether it was issued on that day or not ; the sheet is printed.

8th Cross-Interrogatory : How many copies of the Mercantile Agency Notification Sheet of November 5, 1884, were issued ?

A I don't know.

9th Cross-Interrogatory : How many subscribers to the publications of which the Mercantile Agency Notification Sheet is one, are there ? 20

A I don't know.

10th Cross-Interrogatory : Was the Mercantile Agency Notification Sheet of November 5, 1884, sent to all the subscribers thereto ?

A I don't know.

11th Cross-Interrogatory : Are the copies of the Mercantile Agency Notification Sheet delivered to subscribers by mail, or by messenger, or if neither, how ? 30

A Both by mail and messengers.

12th Cross Interrogatory : Are the copies of the Mercantile Agency Notification Sheet returned to R. G. Dun & Co. by the subscribers after they have read them, or is each subscriber at liberty to retain the same ?

A They are not returned immediately, and frequently not at all ; by the terms of the contract the reference books must be returned at the end of the term, and the sheets are simply supplements to the book ; the subscribers do not always return them. 40

13th Cross-Interrogatory : How many subscribers to your publication, including the Mercantile Agency Notification Sheet, are there in the State of New Jersey ?

A I don't know.

14th Cross-Interrogatory : How many in the State of New York ?

A That I don't know.

15th Cross-Interrogatory : How many in the State of Pennsylvania ?

10 A I don't know.

16th Cross-Interrogatory : Was a copy of the Mercantile Agency Notification Sheet, of the issue of November 5, 1884, mailed to each subscriber in the States of New York and Pennsylvania ?

A I think not ; I think we have subscribers to whom it was not sent ; I don't know.

17th Cross-Interrogatory : What position did the defendants, Arthur J. King and Robert Dun Douglas, respectively hold in the firm, or concern, of which the Mercantile Agency Notification Sheet is a publication ?

20 A I can't answer that question ; I don't know what their relations are with Mr. Dun.

18th Cross-Interrogatory : How frequently is the Mercantile Agency Notification Sheet published ?

A I don't know ; the sheet is issued from this office twice a week ; I receive it from New York by express, and I distribute it here.

30 19th Cross-Interrogatory : Have you charge, or are you the person, who mails or sends out the Mercantile Agency Notification Sheet from the office of R. G. Dun & Co. in New York city ?

A No, sir.

20th Cross-Interrogatory : If to the cross-interrogatories above you answer that a copy of each issue of the Mercantile Agency Notification Sheet is not sent to every subscriber, then state to what class of subscribers each copy is sent, and on what principle you distinguish ?

40

A The sheet is sent to that class of subscribers who take the reference book ; those whom we call office subscribers for detailed reports alone, are not entitled to the sheet.

21st Cross-Interrogatory : Where the present tense is used in any of the cross-interrogatories above put, you are to understand that it refers to the time immediately preceding and succeeding, and at the issue of November 5, 1884, above mentioned ?

A My answers apply to the state of things existing 10  
in November, 1884, and at the present time.

M. P. STACY.

Examination taken, reduced to writing, sworn to and subscribed before me, this 28th day of December, A.D. 1885, }

THOS. J. HUNT,

*Commissioner for New Jersey.*

20

**Charles M. Palmer**, one of the said witnesses, appearing before me, and being by me duly sworn that the answers he should give to the said interrogatories should be the truth, the whole truth, and nothing but the truth :

1st Interrogatory : State your residence and occupation, and what your occupation was during the month of November, 1884 ? 30

A I reside at No. 1124 Milton street, in the city of Philadelphia, Pa., and my occupation is that of messenger in the employ of Messrs. R. G. Dun & Co. in this city, and was the same in the month of November, 1884.

2d Interrogatory : State if you know what person had, during the month of November, 1884, charge of the distribution and delivery of the paper known as the Mercantile Agency Notification Sheet in the city of Philadelphia ? 40

A I had, under the direction of the manager, Mr. Stacy.

3d Interrogatory: If you had charge of the distribution and delivery of such sheet at that time, state whether any copy of said notification sheet, dated November 5th, 1884, was delivered, or the contents thereof communicated by you to any of the following named persons in the city of Philadelphia, or elsewhere, to wit, Alexander M. Oppenheimer, Daniel Meyers, of the firm of Meyers,  
10 Goodman & Co., or Emanuel Katz?

A No such copy was delivered by me or the contents thereof communicated by me to the persons named in this interrogatory, nor to any of them.

4th Interrogatory: State if you know whether any of said persons were subscribers to the mercantile agency carried on under the name of R. G. Dun & Co., in Philadelphia, at that time?

A I don't know, sir.

20 1st Cross-Interrogatory: If to the third interrogatory you answer that you had charge of the distribution and delivery of R. G. Dun & Co.'s Mercantile Agency Notification Sheet of the date of November 5th, 1844, state whether said sheet was delivered to Alexander M. Oppenheimer, Emanuel Katz, or Daniel Meyers, where delivered, and how delivered, whether the same was written or printed, whether the same was delivered to the subscribers themselves, whether delivered at their  
30 places of business or at their residences, or to the subscribers personally, or to the bookkeeper, agents or employes of such subscribers, or any of them?

A There was no such sheets delivered to these parties, nor any of them, or to any one else for them by me, at or during the time named in the interrogatory.

2d Cross-Interrogatory: State if you know how many copies of the Mercantile Agency Notification Sheet of the date of November 5th, 1884, were delivered to subscribers, individuals or firms, in the city of Philadelphia?

40 A I don't know.

3d Cross-Interrogatory : How many in the city of New York ?

A I don't know.

CHAS. M. PALMER.

Examination taken, reduced to }  
writing, sworn to and subscribed }  
before me, this 29th day of De- }  
cember, 1885. }

THOS. J. HUNT,

*Commissioner for New Jersey.*

10

**Robert Martin Fisher**, of the said witnesses, appearing before me, and being by me duly sworn that the answers he should give to the said interrogatories should be the truth, the whole truth, and nothing but the truth :

20

1st Interrogatory : State your age and occupation ?

A I am fourteen years of age, and my occupation is that of messenger for Messrs. R. G. Dun & Co. in this city.

2d Interrogatory : If engaged in the office of a mercantile agency carried on in Philadelphia under the name of R. G. Dun & Co., state whether you had anything to do with delivering copies of the paper known as the Mercantile Agency Notification Sheet in the month of November, 1884, and if so, what ?

30

A I delivered these notification sheets at that time.

3d Interrogatory : Did any person other than yourself then deliver in said city said sheet to your knowledge ?

A Oscar Chambers, Charles Palmer, the last witness. I don't know that Oscar Chambers delivered these sheets in 1884.

4th Interrogatory : Did you then deliver a copy of said sheet dated November 5th, 1884, to Alexander M.

40

Oppenheimer, Emanuel Katz, or Daniel Meyers, of the firm of Meyers, Goodman & Co., or any of them, in that city, or not?

A I did not.

10 1st Cross-Interrogatory: If to the second interrogatory you say you are engaged in the office of the mercantile agency in Philadelphia, carried on under the name of R. G. Dun & Co., and that you delivered copies of the papers known as the Mercantile Agency Notification Sheet in the month of November, 1884, state how many copies you so delivered?

A I don't know.

2d Cross-Interrogatory: Were said copies delivered to Daniel Meyers, Alexander M. Oppenheimer, or Emanuel Katz?

20 A I don't know; I didn't deliver any to them.

3d Cross-Interrogatory: Were said copies printed or written?

A The notification sheets are printed.

4th Cross-Interrogatory: Were the copies so delivered delivered personally to said persons themselves, or were they delivered to their bookkeepers, agents or employes?

A I don't know. I did not deliver any of them to any of those persons, nor to anyone else for them?

30 5th Cross-Interrogatory: Were any copies sent by mail?

A I know that some of these notifications were sent by mail, but I do not know to whom, as that is attended to by Charles Palmer. Those that I attended to are delivered personally.

6th Cross-Interrogatory: Were any copies of said publication placed in the hands of any person in any

manner, not a subscriber of R. G. Dun & Co.'s said Mercantile Agency Notification Sheet?

A No, sir, not to my knowledge.

ROBERT MARTIN FISHER.

Examination taken, reduced to writing, sworn to and subscribed before me, this 29th day of December, A. D. 1885.

THOS. J. HUNT,

*Commissioner for New Jersey.*

10

**Henry E. Jepson**, recalled on behalf of the defendants.

*Direct examination*, by Mr. Wagner :

Q You have told us in your previous examination that you were employed or engaged at Newark as manager of the mercantile agency of R. G. Dun & Co. How long have you been so employed?

20

A As manager?

Q Yes, sir, as manager.

A Since January 1st, 1882.

Q How long before that had you been in their employ in that capacity?

A Twelve years previous to that.

Q Are you familiar with the purpose and objects of the mercantile agency and its modes of conducting this business?

A Quite so; yes, sir.

30

Q Now, there has been some testimony in this case in regard to the transmission to you of some information about a chattel mortgage. Will you tell us, please, all about that, so far as you have any knowledge of the chattel mortgage against Emma Patterson?

A I received a form that we have, on which was contained the words—(interrupted.)

*Mr. McGee:* If he is going to testify from a written paper I suppose the paper ought to be produced. I object to it as secondary evidence.

40

Q Then avoid reference to the contents of any paper unless you have it with you. Have you that blank?

A I have not, sir.

Q What was the nature of the blank. Don't speak of its contents. What was its purpose?

A It was a blank that we furnish to our correspondents. Sometimes the county clerk and sometimes our correspondent at the county clerk's may report. They copy for us the items that appear from week to week at  
10 the record office, and every week those items are sent to us on that blank.

Q Is it a part of your duty as manager of the agency at Newark to gather together the items of record of this particular county of Monmouth?

A Yes, sir.

Q Who did you employ, if anybody, for the purpose of making the examination and procuring that information for you?

A In this county?

20 Q In this county?

A Mr. Charles T. Fleming.

Q How long have you known Mr. Fleming?

A I have known Mr. Fleming for the past eight years.

Q Has he acted for you for a considerable length of time? If so, how long?

A He has acted for me directly for the past four years; and the four years previous while I had charge of it under the then manager—while I was assistant.

30 Q Then you were at Newark four years prior to that?

A Yes, sir.

Q So that you know that Mr. Fleming, as I understand you to say, has acted in that capacity for a period of eight years at least?

A Yes, sir.

Q Have you had occasion to come in contact with Mr. Fleming and to judge of his capacity and intelligence and honesty?

40 A I did, some years ago.

Q In the course of his business for you, as acting for you, did you find or did you not find Mr. Fleming to be a man of honesty and carefulness, and reliable?

Objected to.

Q In the course of his business for you and acting for you, did you or not find Mr. Fleming to be a man of honesty, carefulness and reliability?

A I believe I said that I had known Mr. Fleming for eight years. Upon reflection I think it is ten years. I believe it was in 1876 that the county of Monmouth 10 was joined to the Newark office—that is, added to its jurisdiction, and at that time I came down here to select and appoint correspondents, and Mr. Fleming was recommended to me very highly—I believe principally by Mr. Robbins, and I went away entirely satisfied with his capacity, ability and reliability and honesty, and he was appointed at that time.

Q *Mr. McGee*: You appointed him?

A No, sir; not I personally; my predecessor ap- 20 pointed him.

Q Has he always shown himself to be a man—a careful and intelligent man, so far as you have had occasion—been able to observe?

A So far as it came under my observation he has.

Q Did you or did you not hear anything from Mr. Fleming afterwards, on the subject of this statement he made—this report he made to you; and if so, what did you hear from him?

Objected to as irrelevant.

*Defendants' counsel*: I propose to show that Mr. Jeps- 30 sons as soon as he heard that a mistake had been made, did everything he could to correct it. That is the object of my question.

Question admitted. Exception to plaintiffs.

A As soon as I was informed that there was a possibility of a mistake in the matter I telegraphed to Mr. Fleming asking him to make examination, and on the next morning, by the mail, I received a letter from him stating that he had made a mistake; that it was the first 40

one he had made whilst he had been with us, and explaining to me how the mistake occurred through the similarity of the names Emma Patterson, wife of Frank Patterson, and Emma Patterson of Red Bank; Emma Patterson, wife of Frank Patterson of Asbury Park, and Emma Patterson, wife of Joseph Patterson of Red Bank.

Q His explanation, as I understand you to say, there was a mortgage on record against Emma Patterson, but  
10 that it was another Emma Patterson in the same county, but living in a different town?

A Precisely.

Q Well, did you or did you not communicate that fact to your employers in New York?

A I did—immediately.

Q And did they send you, or have you seen before or can you identify that as a paper, the item there which I read? (Witness being shown paper.)

A Yes, sir.

20 Q Under the head of "Record Items," I hand to witness a paper headed the Mercantile Agency Notification Sheet, dated Wednesday, November 12, 1884, and under the head of "Record Items," read to him the words, "New Jersey, Red Bank, Patterson Emma, chtl. mtge., sheet of November 5th doesn't refer to her—clothing;" did they send you that sheet or a copy of it containing those words.

A They sent me a copy of this sheet containing those words.

30 *Mr. McGee:* I meant to put an objection to that question, but the ringing of the bell interfered.

*The Court:* Of course I will receive it subject to your objection.

Exception granted to plaintiffs.

Said last mentioned paper marked Exhibit 3, for defendants.

40 Defendants' counsel also offers in evidence the record of the county, showing that such chattel

mortgage was made—Chattel Mortgage Book 9, page 372. (Portions of the chattel mortgage read.) The amount of the mortgage is \$1,385, dated 14th day of October, 1884, sworn to on the 18th and recorded October 21, 1884.

*Mr. McGee:* This is taken also subject to objection.

*The Court:* Yes, sir.

Admitted. Exception to plaintiffs.

10

*Q* You have told us now about communicating this to New York, and then their sending you this paper in which that correction was made; tell us, if you please, what else, if anything else, you did to remove any misapprehension which might have been caused by the mistaken information you got, if there was any; if you did anything further in the matter, please tell us all about it?

*A* The next thing I did was what I did myself—was to go to Red Bank for the purpose of seeing Mr. Patterson and explaining to him how the matter had occurred. 20

*Q* When did you go?

*A* Well, the gentlemen here can fix the date, probably, but I can't; but it was the day of the unvailing of the battle monument here; it was somewhere in the neighborhood of the 11th, 12th or 13th of November.

*Q* Let me ask you—did you go as soon as you heard from Mr. Fleming, or shortly after?

*A* No, sir; I sent as soon as I heard; I didn't go myself; I sent; I didn't get away, but I sent one of my 30 men immediately after I heard of it.

*Q* Did you meet anybody there; I mean to say any of his creditors or anybody?

*By the Court:*

*Q* Did you go there yourself?

*A* Yes, sir; I went myself; I sent one of my men just as soon as I heard from Mr. Fleming; then I afterwards went myself.

40

Q When you went yourself did you meet any of these—any creditors or others?

A No, sir; when I reached his store I think there were but two persons there, and one represented himself to be his brother.

Q Was his business going on as usual?

A As usual—yes, sir.

10 *Mr. McGee:* I don't want to be misunderstood. I am not objecting to every question here in detail, but I want to be understood as objecting to all this line of examination as irrelevant, and that it is taken subject to my objection.

Q Just give us the substance of your conversation with Mrs. Patterson?

*By the Court:*

Q Did you see Mrs. Patterson?

20 A No, sir; I didn't see Mrs. Patterson; I saw Mr. Patterson's brother; the way I knew it was the unvail-  
ing of the monument was, that Mr. Patterson was here attending that celebration; I was so informed when I called at his store; they told me he was here at Freehold.

Q Then you didn't see him that time?

A No, sir.

Q You didn't see Mrs. Patterson, either?

A No, sir.

Q Well, what else did you do, either there or elsewhere, in regard to it?

30 A Well, his brother took me to see some legal gentleman.

Q It was with his brother that you had the interview?

A Yes, sir.

Q Who did the lawyer represent?

A Mr. Patterson.

Q And then the brother of Mr. Patterson was—

A Yes, sir.

40 Q Did he ask you to go and see Mr. Patterson's lawyer?

A He did.

Q And did you go?

A I did.

*By the Court:*

Q What is his name?

A Messrs. Applegate & Hope.

*By Mr. McGee:*

Q Do you mean to say that Applegate & Hope represented Patterson?

10

A Yes, sir.

Q Now, then, what was the substance of your conversation with the lawyers?

Objected to.

*The Court:* That won't do.

Q I only want to get at what the witness did. I suppose it doesn't matter who was present, or where it was done, but the plaintiff wasn't there?

A No, sir; neither were their lawyers there.

20

Q Did you do anything else besides this, or was there anything else to be done, and if so, what did you do to remove any impression which may have been caused by this mistake of Mr. Fleming—do you recall anything else?

A I went to the bank and explained the matter there to an intimate friend of mine—(interrupted.)

Plaintiffs' counsel objects to what witness told somebody else, that is not a party to this case.

*The Court:* He don't give any testimony at all as to what he said to this person. He merely went to the bank and explained.

30

*Witness:* I went to the bank and explained to a gentleman, that is employed there, who is a friend of mine; my purpose in the explanation was to have him inform me later on what word Messrs. Applegate & Hope would send me; that is, I failed to see Applegate & Hope, but I saw a gentleman in their office, who had charge during their absence, and he told me—(interrupted.)

40

Q Well, did you do everything in your power?

A I did, sir.

Q To remove any impression which may have been caused by this mistake?

A I did everything I could, so far as was in my power.

Q Does your office at Newark include a certain district of territory?

A Yes, sir.

10 Q Is the business of the agency governed, so far as you know, by uniform rules at all points as to the management of its business?

Objected to, unless it appears that the rules are unwritten. If they have written rules we ought to have them.

Question withdrawn.

Q You have heard the testimony of Mr. King in regard to the conduct of the business of the agency?

20 Adjourned until to-morrow morning.

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Thursday, January 14, 1886.

Mr. Woodruff: We would like to interrupt the examination with the consent of Mr. McGee, simply for  
30 the purpose of proving the contract.

**James Patterson**, a witness called on the part of the aforesaid defendants, having been duly sworn according to law, on his oath deposeth and saith:

*Direct examination*, by Mr. Woodruff:

Q Please state where you are engaged in business?

A At the mercantile agency of R. G. Dun & Co., 314 Broadway, in New York.

Q You have been with them a good many years?

40 A Sixteen years, sir.

Q (Witness shown paper.) Will you please look at this paper and state whether that is your signature?

A That is my signature, sir.

Q Do you know the other signatures that appear there?

A Yes, sir; they are correct, I know.

Q Do you know these that are added at the bottom?

A Yes, sir; distinctly.

Q You are acquainted with the signatures?

A All; every one of them.

10

*Cross-examination, by Mr. McGee:*

Q Were you present when they signed this paper?

A Yes, sir.

Q Saw them sign it?

A Saw them sign it.

Q Did they say anything when they signed it; was it read over?

20

A I saw it before they signed it.

Q But was it read over at the time?

A Not to me; it wasn't read over.

Q Did they make any specific acknowledgment of it, or did they just sign it and hand it to you and you signed it?

A I signed it; seen their names put to it.

Q They didn't say anything?

A They didn't say anything to me; no.

30

*By defendants' counsel:*

Q They asked you to witness it?

A They asked me to witness it, which I did, and I knew what was in the document before.

Q But they didn't say anything more than that?

A No; they never do.

*Mr. Woodruff:* I now offer this document in evidence in this case. It is the contract between Robert Graham

40

Dun, Erastus Wiman, Arthur J. King, and Robert Dun Douglas.

Objected to because there doesn't appear to have been any acknowledgment of it by these parties at all. Objected to further because it purports to be an agreement between these people to which we are not parties and therefore irrelevant as to us.

Objections overruled. Exception to plaintiffs.

10

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**Henry E. Jepson**, recalled for

*Further direct examination*, by Mr. Woodruff:

Q Please state to the Court and jury whether you have any means of knowing, and if so, what the circulation of the sheet is, offered in evidence in this case?

A I have no means of knowing.

20 Q Now please explain why; you have stated that you are connected with the agency, and had been for a number of years; please explain why that is so?

A Well, the policy of the business of the agency is to divide the United States into as many small compact parcels as possible and put them in districts, over which a manager is located—placed, and each manager has his business himself; no one else knows about it, except by the annual returns that are made to the office, to the main office in New York; each district is a separate and  
30 distinct thing; each manager is allowed to carry on the business to the best of his skill and knowledge; if he doesn't do it successfully why, of course, there is a different arrangement, and therefore there isn't any one, to my knowledge, who is acquainted with how many subscribers there are in the agency; the only way to find that out would be to have each branch office manager tell how many he has.

Q Well, now, you were asked the question as to how many subscribers there were in New Jersey; you stated  
40 that you could not tell; now, explain why that is?

A Because New Jersey is controlled by three branch offices—Jersey City office, Newark office, and the Philadelphia office; the Jersey City office has control of Hudson county now; I have no knowledge of how many subscribers there are to the Jersey City office. The Philadelphia office has control of the southern counties—Atlantic, Mercer and Burlington counties; they are nearer than they are to Newark, therefore the business can be more properly handled from Philadelphia than it can from Newark, therefore the Philadelphia office has the 10 revenue from that district; they take the subscriptions from there, and I, of course, have no knowledge of how many subscriptions there are at the Philadelphia office.

Q Inquiry has also been made as to the States of New York and Pennsylvania?

A Yes, sir.

Q State how they are divided?

A They are divided in the same way; there is the New York office, Albany office, Troy, Buffalo, Erie, Syracuse, Elmira, Utica, Rochester, Binghamton; I 20 think that is all in New York. In Pennsylvania there is Philadelphia, Allentown, Reading, Pittsburg. I don't know that there are any more in Pennsylvania; there may be but I can't think of any—and Scranton; yes, there is one at Scranton.

Q Then do you mean the Court and jury to understand that the accounts of the subscribers and everything of that sort, is kept at the branch offices of the agency and not at the central office?

A They are kept at the branch offices of the agency 30 and not at the central office.

Q Is that the reason why it is impossible to state as to the circulation of the paper?

A That is the only reason—it is impossible to state.

Q How is it in regard to the printing; would the printer know as to the circulation?

A No, sir; he could not.

Q Why not?

A Because we always have to order more than we want; we always have to anticipate our lots; for in- 40

stance, if the agent—I order so many books—I order more than I require, because I anticipate that I am going to do a certain amount of business in January and February that will require those books, and therefore I get from 10 to 20, and sometimes 30 more than I want, so that it is impossible for him to have any guide as to the actual number in use.

Q Would Mr. Dun know?

A No, sir.

10 Q For what reason?

A Because he entrusts that to his employes, and he would have no other knowledge except to require a report from them.

*Cross-examination, by Mr. McGee:*

Q The printer would know how many copies he prints, wouldn't he?

A I suppose so.

20 Q You know you can ascertain how many subscriptions are taken in the New York office, can't you?

A Yes, sir.

Q Have you done so?

A I anticipated your question and attempted to do so last night, but I was interrupted by legal gentlemen calling on me to give some evidence in a case of fraud, where a man had made a statement to us and had bought goods and it was fraudulent, and they wanted to use us as a witness in the matter, and he detained me so long that I went away without doing it.

30 Q You don't know how many subscribers were taken through your office in 1884, but you know approximately, don't you?

A How many were taken that year?

Q Yes; through your office; how many subscriptions were taken through your office that year?

A I don't understand you; taken through our—

40 Q As I understand you the subscriptions in the 12 counties which you represent, are made through your office?

A Not through, but to my office; during that year how many were taken?

Q You know, approximately?

A Yes; but it would be mere guess work.

Q You know it is not less than so many; not less, for instance, than 500?

A I am sorry to say it is very much less than 500.

Q Not less than 100?

A Very much less than 100.

Q Less than 50?

10

A Less than 50.

Q Less than 25?

A I should think in the neighborhood of 25; during that one year you speak of, that is, I understand you, new subscriptions that came that year.

Q I don't mean that; I mean, as I understand you, the printer for this concern prints all the numbers of any issue that are printed?

A I don't know about that, but I suppose so; of course I have no knowledge of that.

20

Q Those for the subscribers in your district he sends to you?

A Yes, sir.

Q Now, in the year 1884, how many copies of each issue of the notification sheet came to your office for distribution?

A It would be utterly impossible for me to tell you.

Q Precisely; but can't you tell me approximately?

A I could not.

Q Was it as many as 100?

30

A Yes, sir; it was more than 100.

Q Then you circulated more than 100 to the subscribers?

A I did.

Q That would be in the 12 counties of New Jersey of which Monmouth county was one?

A Yes, sir.

Q Now, all these agents report to the central office in New York, do they not, the names of their subscribers?

40

A No, sir.

Q Well, they report to the central office or to somebody, the number of copies they want of each issue, do they not?

A No, sir; they do not; they simply send in the order to have the printer send them so many.

Q Is it not possible for you to tell approximately how many copies of each issue of these notification sheets were circulated in the year 1884?

10 A No, sir; I don't know even approximately.

Q Were there as many as 5,000?

A I have no idea.

Q There was circulated through each agency at least as many as one copy, was there not, that year?

Objected to; witness ought to speak of his knowledge.

A I haven't; no, sir; I have no knowledge at all.

Q Well, the business of the agency is large, isn't it?

A Well, I have no real knowledge of that; I suppose  
20 that it is.

Q You produced here a notification sheet dated Nov. 12, 1884. You understand the meaning of these items in these sheets, don't you; you produced that, I believe, November 12, under the head of "Record Items" there?

A You say that I produced this?

*Mr. Woodruff:* I produced it.

*Mr. McGee:* It is the issue of November 12.

Q I think you said you published a correction, did  
30 you not?

A I have nothing to with publishing.

Q Didn't you prepare it or have it prepared?

A Yes, sir; I prepared the correction.

Q And it was published in the issue of November 12?

A Yes, sir.

Q Now, what is the meaning of that sentence there which you call a correction; just read it as it is there and then tell me what it means?

A "Red Bank, Patterson Emma, chattel mortgage  
40 on sheet November 5, does not refer to her, clothing."

Q That is, you mean by that, that that item does not refer to Emma Patterson, of Red Bank?

A Yes, sir.

Q Now, I want you to explain the meaning of the item in the issue of November 5; it is the same in both these sheets. Now, for instance, what does this "Record Items" mean?

A That means items that are gathered up from the various record offices throughout the State or States.

Q Now, then, turn to the New Jersey head; what 10 does that word "New Jersey," mean?

A State of New Jersey.

Q Does it mean that they are record items recorded somewhere in New Jersey?

A Yes, sir.

Q Now, under the head of "Record Items," under that head, read that?

A "Red Bank, Patterson Emma, chattel mortgage, \$1,385, clothing."

Q What does that mean; translate it? 20

A I decline to answer.

*The Court:* I haven't heard that objection.

*Mr. Woodruff:* If he knows of his own knowledge what those word mean he can answer the question.

*The Court:* If he don't, I think it is very likely the jury can tell him, or the Court or anybody else.

*Witness:* It means, to my understanding, that there has been an item recorded against Emma Patterson, and 30 that that item was a chattel mortgage for \$1,385.

Q Emma Patterson of what place?

A Red Bank.

Q And what does the word "clothing" mean?

A It means her—the business.

Q The items of this Merchantile Agency Notification Sheet of November 5, 1884, for the twelve counties in New Jersey, which you represent, were distributed from your office, were they not?

A The sheet—the items? 40

*Q* The sheets of November 5, 1884, for your twelve counties were distributed from your office?

*A* Yes, sir.

*Q* You saw them at that time, did you not?

*A* No, sir.

*Q* Didn't they come to you, addressed to you, through the mail?

*A* Yes, sir.

*Q* Who opened them?

10 *A* One of my clerks.

*Q* And didn't you see them at all?

*A* Not to my knowledge; I couldn't swear that I did or didn't, I don't know; many of them I don't see because I am out attending to something else.

*Q* You don't look over them to see that they are properly mailed?

*A* That I know at the time.

*Q* You don't know, then, as to that special time?

*A* No, sir.

20 *Q* Don't you do it every time?

*A* Don't I look over those papers?

*Q* No, don't you every time attend to the mailing?

*A* Yes, sir.

*Q* Then you must have attended to the mailing of the sheets on November 5, 1884, must you not?

*A* No, sir; I have got to know from time to time—

*Q* And attend to the mailing of these reports or items you speak of?

30 *A* After I have once done that I have no further care about that.

*Q* Now, you say they are sent from the printer to you for the twelve counties?

*A* Yes, sir.

*Q* The printer don't know who is going to get them?

*A* No, sir.

*Q* Then you do the mailing?

*A* I do not.

*Q* They are mailed in your office?

40 *A* Yes, sir.

Q You don't look over each one to see that it has been properly filled?

A No, sir.

Q You don't look at the sheets when they come in?

A Only occasionally; not regularly.

Q Do you know whether you looked at this date, November 5?

A Not until my attention was subsequently called to it.

Q Now, when was your attention called to it? 10

A My attention was called to it, I think, possibly two days after the issue of the sheet.

Q In what way was it called to it?

A It was called to it first by a lawyer in Philadelphia by the name of Moyer, writing to R. G. Dun & Co. that Mr. Patterson had been to him and made this complaint, and requiring the sheet to make a retraction, otherwise he would sue us.

Q Then did you look at the paper to see what the item was? 20

A I did.

Q Then you did see that item in that paper?

A Yes, sir.

Q You did within a week of its publication?

A Yes, sir.

Q Then upon the strength of that you made the correction in the next issue?

A Not on the strength of that; no, sir.

Q But on the strength of Mr. Fleming's investigation you investigated to see if it was true; when you found the mistake you made the correction a week afterwards? 30

A Correct.

Q You are, I think you said, in the employ of R. G. Dun & Co. as the manager?

A Yes, sir.

Q You spoke of Mr. Fleming having been appointed by your predecessor; he was continued by you?

A Yes, sir.

Q He is paid by R. G. Dun & Co. ?

A Yes, sir.

*Re-direct examination :*

Q You refer to a letter of Mr. Moyer's ; have you that letter with you ?

A Yes, sir.

Q Please produce it ?

A (Witness produced letter, which was marked Exhibit 4 for identification.)

10 Q That letter was received in the regular course of mail ?

A Yes, sir ; that letter was received. Mr. Moyer is a lawyer in Philadelphia, and he wrote to R. G. Dun & Co. of Philadelphia, and they transmitted it to me.

Q In pursuance of that did you cause any action to be taken ?

A I immediately telegraphed to Mr. Fleming to make an investigation.

20 Q After you ascertained that an error had been made you sent the report to New York as corrected, I understand ?

A Yes, sir.

Letter offered in evidence.

30 Defendants' counsel offers in evidence interrogatories addressed to William Pintard, Esq., requiring plaintiff to answer ; paper dated October 1, 4885. The other paper is the answers under oath of the plaintiffs to those interrogatories.

It is agreed by all parties that the deposition has been and is an exhibit in the case.

Defendants rest.

Case closed.

## CHARGE OF COURT.

GENTLEMEN OF THE JURY : I shall ask your patient attention while I endeavor to give you my views of this case. I cannot promise to be as interesting to you as the very able counsel, who have addressed you. The duty of a Judge is very different, and he must be confined more strictly to the bare expression of the rules of law, as applicable to the evidence.

10

The plaintiffs, Emma Patterson, and Joseph Patterson, her husband, have brought this action of trespass on the case against the defendants, Arthur J. King and Robert Dun Douglas, for libel. The husband is joined with the wife as a nominal party. The defendants are sued because it appears in the testimony they reside in this State, and are within the reach of the process of our Courts, while two other persons, Robert G. Dun, and Erastus Wiman, who are said to be copartners in that mercantile agency business, live in the State of New York. There is no legal difficulty in this severance of defendants in an action of tort, for one or all may be charged with the liability for trespass in which all have participated. If partners, the acts or assumptions of one in relation to any of the partnership dealings, bind him and his copartners; they are, in law, agents for each other, both in the commission of torts and in the making of contracts, while acting within the scope of their partnership business. It is not attempted to be proved in this case that these two defendants charged in this suit did the wrong complained of directly, but that as partners of the firm of R. G. Dun & Co., they are liable for tortious acts of that firm in the transaction of its business. It is not necessary, to fix them with such liability, to prove that they are partners by any agreement between themselves, but if they permit themselves to be held out to the world as partners they may be charged with liability as such, both in contract and in tort.

20

30

(See Exception 15, for defendants, *post.*)

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- Proof is offered before you of such holding out. The defendants called themselves salaried partners in their evidence, and in their contract which has been presented; that is, they have a salary and a commission of the net profits of the business. They testify that R. G. Dun is the proprietor, and that the other alleged partner, Erastus Wiman, holds a like position with themselves. Whether this evidence constitutes them copartners between themselves is not now material; if they are associated in the business of a mercantile agency and advertise themselves to the world as such, they may be liable. They testify that they are members of this firm, with the qualification which they give, known as R. G. Dun & Co., and in that name and by that firm the Mercantile Agency Reference Book and Notification Sheet are published and distributed to certain subscribers. If this be so, then they may be held liable equally with Mr. Dun for any wrong done by the publication of such notification sheet.
- 20 The next point of inquiry is, whether the notification sheet of November 5, 1884, which did the mischief complained of in this suit, as is contended, was published by that firm, or by its authority. There can hardly be a question raised, I think, gentlemen, under the evidence, that this paper was printed by the authority of the firm in the course of its business, and sent by mail or messenger to those subscribers who were entitled to it by their arrangement with them, and that one of these notification sheets came in this way to Lisberger & Weiss, of
- 30 the city of Philadelphia. Lyons, one of the witnesses, also testifies that he saw one at Simon & Co.'s in New York city; and Bernard Brumer says that he saw it, and heard the rumor of this chattel mortgage, which is said to have been given for \$1,385 by Mrs. Patterson. It is necessary that this be shown; that is, this publication be shown to your satisfaction to make due proof against these defendants; for if no publication was made by them, there can be no responsibility; for the publication must be intentionally done by them; but it is said by
- 40 the defendants that if this sheet was sent by them to Lis-

berger & Weiss, it was not a publication as to others, because it was a privileged communication under the terms of their contract with their subscribers. 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 may contain criminatory matter, which, without a privilege, would be slanderous or libelous and actionable. Had, then, Lisberger & Weiss an interest in knowing the financial condition and solvency of the plaintiff, Emma Patterson; or had Simon & Co., in New York, such interest; or had either party, the defendants, or Lisberger & Weiss, or Simon & Co., a duty with reference to the condition of the business affairs as between themselves? If they had, then such communication, made *bona fide*, with the guard by contract and other stipulation between the parties, appearing in evidence, would be privileged. If there was no such interest or duty between the defendants and these subscribers, then they may be liable, as the publication was not privileged as to them or others who obtained it through them. If a request were made, either express or implied, by Lisberger & Weiss, or by Simon & Co., for such communication as to the plaintiff—then, if they had no interest in the matter, the book or sheet sent to them, or either of them, affecting her credit, would not be privileged. If made without such request, then the communication voluntarily sent by them must be at their risk as to the harm that may be done thereby. I think it is enough to hold in this case that the agency has the protection of privilege in every case where the subscriber has a direct and personal interest in the person who is the subject matter of inquiry, and that in all other cases they must stand as others, on the truthfulness of their report, and their protection under the contracts with subscribers not to divulge the secrets of their business.

(See Exception 16, for defendants, *post.*)

If Lisberger & Weiss' notification sheet were a privileged communication to them and they were bound by their contract with R. G. Dun to keep it secret and confidential, then their wrongful acts in delivering or sending it to Daniel Meyers will not charge the defendants with the injury that ensued ; but if they were not persons interested in the credit of the plaintiff there was no privilege in the information conveyed to them by the defendants, and the defendants may be held liable for

10 the damage that ensued by sending the same to Meyers. A like result will follow from any such sheet of November 5 sent to Simon & Co. if Lyons obtained information there, as he testified. If the defendants sent this sheet broadcast to subscribers who had no interest in the publication of Mrs. Patterson's acts relating to her business, they must answer for all damages resulting from such unprivileged communication. It does not appear, that Simon & Co. were creditors at the time, or expectant creditors, of Mrs. Patterson ; and it further appears that

20 Lisberger & Weiss had had no dealings with her for about two years, and there is no evidence that they expected to give her credit or made any request for information concerning her responsibility for that purpose. I do not see how, in law, or under the evidence, this notification sheet and its contents affecting Mrs. Patterson can be called a privileged communication as to any of these parties who have been named in the testimony or in the notice by whom publication was to be proven. If, then, this paper be proven to have been issued by these

30 defendants, or by their associates in New York, or through their agency in the course of their business, and it be not privileged, you must next consider whether the publication is libelous. I will read what is charged in the declaration to have been published, and the inuendo showing what, in the contemplation of the plaintiff, it means. Under the head "Record Items," you will remember, upon this business sheet of the defendants of November 5, 1884, is found this : "Red Bank"—this is the charge made in the declaration—"Red Bank"—this

40 is the meaning which was given to it by the plaintiff :

"Meaning the said Red Bank of Monmouth county  
 aforesaid." "Patterson Emma," (meaning the said  
 plaintiff, Emma Patterson) "chtl. mtge.," meaning chattel  
 mortgage, "\$1,385,"—figures with a dollar mark before  
 it—"meaning the sum of thirteen hundred and eighty-  
 five dollars;" "clothing," meaning the clothing business  
 carried on by the said plaintiff, Emma Patterson. That  
 is the manner in which this publication is set forth in  
 the declaration, and the meaning which the plaintiff,  
 through her counsel, has attached to it. Further than 10  
 that follows the continuation of what is called the  
 inuendo, the said "Red Bank, Patterson Emma, chtl.  
 mtge. \$1,385, clothing," meaning that the said plaintiff,  
 Emma Patterson, had placed a chattel mortgage upon  
 her stock of clothing in her place of business in Red  
 Bank, Monmouth county, New Jersey aforesaid, for the  
 sum of thirteen hundred and eighty-five dollars. The  
 inuendo continues, "And the said plaintiffs say that said  
 words were used in a defamatory sense, meaning thereby 20  
 to charge that the said plaintiff, Emma Patterson, with  
 having placed a chattel mortgage upon her stock of  
 clothing in her place of business in Red Bank, Monmouth  
 county aforesaid, and to bring said plaintiff, Emma Pat-  
 terson, into public ridicule and contempt, and to charge  
 her, the said plaintiff, Emma Patterson, with having  
 placed said chattel mortgage on her stock of clothing as  
 aforesaid for the purpose of defrauding the creditors of  
 her, the said plaintiff, Emma Patterson, and for the pur-  
 pose of weakening, injuring and completely destroying 30  
 the good name, fame and credit of the said plaintiff,  
 Emma Patterson, which she had theretofore enjoyed in  
 carrying on her business as a retail clothing dealer afore-  
 said at Red Bank, to wit, at Freehold, in the county of  
 Monmouth aforesaid." What I have read, in addition to  
 the direct charge of the words used and their meaning, is  
 called the inuendo which is spoken of in the section of  
 the statute in our Practice Act, which has been read in  
 your hearing. The second count of the declaration  
 charging the same words, after setting out the words as  
 being published in this notification sheet which has been 40

before you, they say the whole of said paragraph—this is the inuendo now, this is the second count—“the whole of said paragraph, meaning that the said plaintiff, Emma Patterson, of Red Bank, New Jersey, had placed upon her chattels at that place a chattel mortgage for the amount of thirteen hundred and eighty-five dollars, and that the said plaintiff, Emma Patterson, was a dealer in clothing, whereas in truth and in fact, the said Emma Patterson had not at that time, or any other time, placed  
 10 upon her chattels at Red Bank or elsewhere a mortgage for thirteen hundred and eighty-five dollars, or any other sum, and said statement was wholly and utterly and completely false and untrue in every respect.” These are what are called the inuendos ; the words charged and the inuendo accompanying them, by which the plaintiff undertakes to set out the meaning intended by these defendants in this case, and that the meaning which would be conveyed to the minds of ordinary readers in reading that notification sheet with the heading and accompany-  
 20 ing remarks, or whatever there may be on it. The first question then, gentlemen, after having read this to you, is this, are these words proved to have been published as laid in this declaration? In taking up the notification sheet I think, gentlemen, you will find the words that I set out in the declaration are the exact words which will be found on that sheet under date of November 5.

The next question, if satisfied that the words are proven as laid, is whether they were used in the sense imputed to them by the declaration? Has the plaintiff properly  
 30 set out what those words would convey to the minds of others, and what the defendants must have intended when they published it? That is a question of fact to be determined by the jury. The next question that will be considered, is this, if these words were so published, if they bear and will bear the sense which is imputed to them by the plaintiff in the declaration, were they libelous—the subject of an action of libel? Whether the the writing is a libel or not is a question for the jury, and the judge is not bound to give any opinion on it. The  
 40 law has sometimes been held differently, but that I be-

lieve is the recognized law. It is the judge's duty to define the libel to the jury and they must apply the facts to such definition themselves. A libel may be defined to be a publication without justification or lawful excuse, calculated to injure the reputation of another by exposing him or her to hatred, contempt, or ridicule. It is also a libel to attack a person in relation to his trade or calling, and so subject him to ridicule, hatred or contempt, or subject him to loss in his business or calling, whether it be loss of credit, direct pecuniary loss, or other injury to his business. The publication must be without justification or lawful excuse. Let me repeat that. It must be, as you have heard me read this careful definition—it must be without justification or lawful excuse. I have already explained privileged communications which are excused by law. The truth is also a justification in civil suits, however injurious defamatory words may be, the defendants may always plead and prove in a civil action their truthfulness as a complete bar and justification. If the defendants in this action had pleaded and proved that Mrs. Patterson had given a chattel mortgage on her property, they could not be held liable for the effects of this publication upon her business, because it was true. The truth in law holds no man in a civil action. It will always, as I have said, justify words spoken or written, however slanderous or libelous they may be. There is no pleading of the truth in this case; there is no justification attempted under it. It is admitted here and proved by the testimony that it is untrue, and according to the position of the defendants, it was an unfortunate mistake made by one of their agents living in this county. They do not, therefore, stand upon this excuse or justification of the truth, which would completely shield them, but admit that they were mistaken.

It is a main ingredient in all alleged libelous publications that they should be malicious. If libelous *per se*—in themselves—malice will be inferred; if not libelous *per se*, malice must be shown and special damages ensuing therefrom. Malice, in common acceptance, means

illwill against a person, but in legal sense it means a wrongful act done intentionally without just cause or excuse. Taking the words charged in this case, the printing that a person has put a mortgage on her property, real or personal, is not, *per se*, a libel; but when connected with proper inuendos and proof showing that she is a trader having creditors to a large amount, with a small capital and stock of goods, not more than enough to pay all her debts at a forced sale, and requiring credit  
 10 to continue her business, and where the mortgage is of sufficient amount to impair the security of existing claims, then they are libelous, or may be libelous, so that the person aggrieved may recover both general and special damages if the latter be charged with the proper averment in the declaration.

(See Exception 17, for defendants, *post.*)

Where special damages are not essential to the action, as in the case where the words are actionable, *per*  
 20 *se*, special damages, if claimed in the declaration, may be proved at the time to aggravate the damages. In considering whether these words are libelous or not, the jury must read them as I have already indicated, with the inuendo, to determine whether the latter is true or not, that is, the inuendo as applied to these words. This is the province of what is called an inuendo in our practice. An inuendo cannot be used to enlarge or add to the words, but to give meaning, force and effect to the words used, and whether it truly interprets them is a  
 30 question for the jury to decide. An inuendo cannot be used to give stronger expression or to aggravate the meaning of the words; it must state truly and exactly what those words mean; what was the intention of the person who published them, and what was in their mind, and what meaning they will have to others. They must truly interpret the words that are used, and this interpretation, whether correct or not, is a question to be decided by the jury. If the words used are ambiguous, or in the sense in which they are used, uncertain, and they are capable of a  
 40 construction which would make them actionable, although

at the same time an innocent sense may be attributed to them, it is for the jury to determine upon all the circumstances, whether they are applied to the plaintiff, and in what sense they are used; and whether the sense is truly expressed in the inuendo. If what the plaintiff has charged in her declaration is true, she must prove it to your satisfaction to be so, and the burden of proof is upon her, and she must show it so that you can see it and understand it.

The question of the amount of damages, if you should 10 reach that question in this case, in an action for libel, is largely in the discretion of the jury, but that discretion must be a judicial exercise of judgment on the facts proven, and not an arbitrary exercise of the power of a jury to decide upon it, and they must be the natural and approximate consequences of the wrongful act complained of in the action. Every person who does a wrong to another without justification or excuse, is at least responsible for all the mischievous consequences 20 that may reasonably be expected to result under ordinary circumstances from such misconduct. In an action by a trader, as in this case, if the words written or printed of her in the way of her trade, or affecting it injuriously, if such be proved, she may recover for loss thereby ensuing to her business, whether it be diminished or destroyed, and for the loss of her credit in general, if they have been a natural and approximate result; but if it be charged that in special instances, credit has been refused to her as a consequence of the publication, these must be specifically stated and the 30 persons named who refused, and proof by them offered as the best evidence showing that their motive for such refusal was the libelous publication of which they had knowledge. Upon this charge thus predicated and proved, special damages may be recovered; but these words, as I have already said, are not actionable, *per se*, but need the inuendo to make them so. I have held that proof of mental distress and illness, which are alleged to have followed this publication, do not constitute and are not admissible in evidence as special 40

damages ; they are too remote, in my judgment, and should not be allowed in actions of this kind where no express malice is shown. To charge a person, for instance, with an indictable crime, or with something exposing her to hatred, ridicule or contempt, or as a trader with bankruptcy or insolvency, would be libelous, *per se* ; upon their very face they carry the evidence of malice and intention to do wrong, and such damages might be proved. But to say that this lady has put a

10 mortgage on her property, or that any other person has done so, is, under the circumstances, a perfectly lawful act, injuring no one. The mere fact itself that a person has put a mortgage upon property may be said without being libelous, *per se*, and it is only made libelous by sufficient inuendo and proof showing how it was libelous in its effect as to the trade or position of the person against whom it is stated. This question, gentlemen, of a proper measure of amount of damages, if you should

20 find for the plaintiff, I have regarded as the most difficult question in this case ; not because of the business in which these defendants are engaged, and possible prejudice in the minds of this jury because of its character or the wealth they have acquired by it. I consider this too unworthy to be addressed to intelligent men, and I am very glad that the counsel upon the other side have not pressed it with any earnestness. It is a lawful and commendable business. Its benefits conferred on the business men of the country who are buying and selling, depending on the credit which must be given and asked,

30 is most important and desirable. It appears to be guarded by care in the selection of its agents, and its means of doing business requiring under most carefully drawn contracts, and by warning to its subscribers as to the information given, that inquiries must in all cases be made respecting it at their office, and that the statements to them are confidential in their nature by what appears on the face of the reference books and notification sheets, which are sent at intervals of twice a week, I believe, as supplements to these reference books, to correct and

40 add to them any errors and mistakes that may possibly

have crept into them. All this, gentlemen, will appear upon the papers which are offered here in evidence, and these gentlemen, who appear to be honorable men, engaged in a lawful business, appear to have thrown all possible safeguards about this business which may possibly injure others, wittingly or unwittingly. Nor, gentlemen, have I fear that the jury would overlook the fact that this statement concerning the plaintiff, if it be shown to have done her any injury, was an involuntary wrong—not intended by them at the time it was inserted 10  
 —a mere error of their agent, Mr. Fleming, who mistook the plaintiff for another person of the same name in the county who had given a chattel mortgage for the amount named; the effort made to correct this error as soon as it was discovered, as testified by Mr. Jepson, the agent for this district, by his visit to Red Bank, and the notification to their subscribers in the notification sheet of November 12, just one week after the publication, which stated clearly and distinctly the error which had been made. These all appear, gentlemen, as in some 20  
 degree a mitigation of damages in this case, and I have no fear you will overlook their significance. These are not, however, a justification of the act done by them through mistake, for the effect could not be fully counteracted. It goes, then, I have said, only in mitigation of damages. Nor do I fear that the jury will, under this statement of facts, taking all the facts together and weighing them properly, be disposed to give large exemplary damages as claimed by the plaintiff in this cause, for they should only be given in cases where 30  
 express malice is shown, and involuntary wrong is not usually, in courts of law, punished by punitive or exemplary damages. Mild damages in actions of libel, as has been already stated, are said to be in the discretion of the jury, and so I must submit it to you. They must always be graded and controlled by the circumstances of each case intelligently considered and weighed. A wilful, malicious libel, should always be severely punished, but the mistaken accuser should be more leniently dealt with. 40

The difficult subject in this question to determine is, how far has this plaintiff contributed to bring the damages of which she complains, upon herself, by her ill-advised conduct, when, after the publication, and when her creditors came to her with their importunities, she herself took part in it. Meyers was her largest creditor for the sum of \$4,003.04. By his own and Mrs. Patterson's evidence, when he came to Red Bank on November 6, the day after the publication appeared, he behaved in  
10 a rude, importunate and threatening manner, and no doubt terrified this lady and her husband; but she convinced him, or her husband for her, as Meyers himself testifies, of the falsity of the statement by her affidavit, by some certification or notification obtained from the record office of the county, and she apparently satisfied the other creditors who have testified, that this statement was untrue.

She certainly had the means of satisfying them upon that point, because the records of the county could be  
20 instantly searched, and the mistake was there apparent upon the books; and on November 12—remember this was on the 6th—six days after, all the subscribers of the notification sheet were advised by a correction in it of the mistake. According to the testimony of her husband, Mr. Patterson, they had goods to the amount of \$9,500 in the store, and owed \$6,007, an excess of assets of nearly \$3,500 over her liabilities, and having a prosperous business, according to her evidence; she was  
30 solvent, therefore, and had the means of satisfying all her creditors of that fact, and she might, by continuance in the business, have paid them all up. If they still urged her and were disposed to press against their own interest, and against hers, to her loss, her legal right and duty were to make an assignment for the equal benefit of all her creditors. If she had so stated to them it is not probable that she would have been disturbed. She was ill-advised, that I think is apparent to all, and yielded to the threats and importunities of Meyers, who, on November 25, 1884, received from her a chattel mortgage for  
40

the full amount of his debt, in preference to all other creditors.

He says that he took it and she gave it to prevent the sacrifice of her property; that he was her principal creditor, her preferred creditor, and if the goods had been sold by immediate suit—actions brought by creditors, these goods might have been sold—I believe the word “slaughtered” is used; but whether this was a justification, or whether she can claim the full benefit of that act, is a very serious and doubtful question in my 10  
mind in this case. Threatening letters from her creditors came, and suits were begun as a consequence, in part, at least, of the preferred mortgage given to Meyers for over \$4,000; this appears in one of the letters, I think perhaps in both, and their dates are significant, and for the jury to look at them. But much worse than this, gentlemen—because this was only the security of a creditor in preference to others, which every man has a legal right to do, although it would not be advisable under all circumstances to do so in considering the 20  
rights of others, but worse than this, by the advice, as she testifies, she, on December 12th, 1884, gave an absolute bill of sale of all her store goods, valued by Mr. Patterson at \$9,500, to Meyers, for the consideration of his debt, \$4,003.04, and made by that, or with it, a secret trust that Meyers should carry on the store with the husband as salesman, on a salary, and when the debts were paid the store should be returned to her. That, gentlemen, in law, is a secret trust, by which a 30  
man conveys a larger amount of property than the consideration to another to dispose of, manage under his ostensible control for the benefit of the party who makes the conveyance. This bill of sale was, in law, a fraud on her creditors. An absolute bill of sale, under these facts, was a fraud, in law, on her creditors, as its effect was to hinder and delay all her creditors in the recovery of their debts, excepting Meyers, and to put herself and her creditors completely in the power of this man Meyers. Now, is this an act with which she can charge these 40  
defendants, because all her property has been divested 40

by her own act, and put in the hands of a preferred creditor by an absolute bill of sale, which the law says is a fraud? Can she come in a court of justice and say, you have ruined my business; you have taken away all my property; you have compelled me to do this fraudulent act in order to protect myself from my creditors? Can she come in a court of justice and ask the defendants to respond in damages to the full amount of that wrong which she says she has suffered by her contributory act?

10 This arrangement between these parties, if honestly carried out by Meyers, supposing Meyers does all that is said he has promised to do, and that this benefit comes to this lady eventually by the ownership of Meyers, put her stock in the store, leaving her husband there in control of it, under the salary to be paid by him for his work—suppose it is all honestly carried out by Meyers, it is yet, in the eye of the law, a secret and a fraudulent trust for her benefit, because to the public it is held out as an absolute sale of that property for

20 a fair compensation, and without any such purpose. If it is carried out it will result in the payment of her debts and the subsequent transfer of the property back to her, and she now asks that these defendants, who have involuntarily done her an injury by their publication, shall pay her for breaking up her business and injuring her credit, when, as I have already said, she has, by her own act, contributed at least, in some degree, to put herself in this position. If she had been firm, well-

30 advised, asserted her intention to do what the law says she may do, and what justice to her other creditors says she ought to do, is it probable that she would have been disturbed by Meyers and others of her creditors, or suffered more than a temporary loss of credit for which the defendants might have compensated without any great oppression? For this loss they have sustained, the whole loss—because they claim everything—the loss sustained with this secret trust in her favor and the employment of her husband with a salary, she asks by her counsel that the jury shall give her \$10,000 damages, and esti-

40 mates these damages by the profits of the business,

yielding an average of about \$1,500 a year for the past three years, and also her prospective damages for the years to come, up to this amount, \$10,000; but the law does not ordinarily speculate on probable profits in the future; there may be none; one year may be prosperous, and another may not yield profits; it is so in all business; it is so in a country clothing store, or any other; these profits might never be earned, and the business might be a loss rather than a gain. In assessing general damages, which it has already been said may be given by the jury in this case, if the facts be proved, as alleged in the declaration, the rule is, that the damages should be assessed once for all, for another action cannot be brought, and should further damages follow the injury of which complaint is made, in estimating the profits as an element of damage, probable profits cannot be recovered, nor those which are uncertain and contingent; but such only can be allowed where they can be reasonably ascertained by some certainty in the evidence. There are cases in which they are allowed where there appears to be that degree of certainty which amounts in law to evidence; not mere speculation and guess. There is no difficulty, gentlemen, I think, under this rule, in estimating, approximately, at least, what would have been gained between November 6th, when this publication became known to the creditors, and December 12th, when the bill of sale was made to Meyers. These may be reasonably certain, judging from what in the past year was the current business up to that time, and the immediate approach to the trade, which was said to be best in the fall, there are perhaps very few circumstances which would be likely to disturb the usual ordinary ascertained profits of the business for that time, but after that they become more difficult to determine, and all uncertain. In considering and weighing the question of damage the jury must be careful, therefore, to discriminate between such as are the results of the wrongful acts of these defendants and their coadjutors in New York, and such as have been caused by the act of the

plaintiff in contributing to the injury which she claims she has sustained.

This, gentlemen, I think, covers all the material points in this case as briefly as I have been able to state them to you, and I thank you, in conclusion, for your patient attention to this very interesting and somewhat troublesome case, and I leave it now for you to decide, upon its merits, and upon the facts and the law as I have been able to present them to you.

10

*Mr. McGee:* Your Honor has covered most of the points that I have desired to make. I wanted the Court to charge the jury that any words falsely spoken of a trader earning his living by his trade or business—I use the word trade as covering the mercantile business—the natural consequence of which would be an injury to that business, are actionable, and may be recovered under a declaration of this kind, whether they are libelous or

20 not.

*The Court:* I have already charged upon that matter, sir, and decline to make any further charge.

*Mr. McGee:* I think your Honor did find that in such case damages might be both general and special.

Also, that if in such case general damages be alleged, but not proved, the jury may still find special damage, and that if in such case special damages be alleged, but not proved, the jury still find general damage.

30 *The Court:* That is undoubtedly a general proposition, and I will so charge.

(See Exception 18, for defendants, *post.*)

*Mr. McGee:* If the jury find that the libelous words were printed and sent by the defendants or by the firm of R. G. Dun & Co., to all their subscribers, without regard to the interest of such subscribers in the persons reported, then no matter what may have been the relations between those subscribers and other persons not connected with

40 them as members of their firms, and if the publication

was afterwards disseminated by those other people, still the defendants are liable.

(See Exception 19, for defendants, *post.*)

*The Court:* I will qualify that by stating if it is proven that it resulted in injury to the plaintiff. A publication which was not seen and does no harm in any way, however it was disseminated, does no harm.

*Mr. McGee:* That if a firm print a paper containing libelous matter and distribute the same to its subscribers, and one or more copies of the paper are circulated by the subscribers and come into the hands of other parties not subscribers, such publication relates back to and becomes the act of the original publishers as between them and third parties. 10

*The Court:* If it be an unprivileged communication it is right.

(See Exception 20, for defendants, *post.*) 20

*Mr. McGee:* Anyhow, whether it is privileged as between them and their subscribers or not.

*The Court:* If they circulated it. This will not apply in the case of a privileged communication. The unlawful publication begins from the person who publishes it when he has received it under a privilege.

*Mr. McGee:* That a private agreement between R. G. Co. and their subscribers, with reference to considering the publication in question in this suit confidential, will not relieve the members of the firm from the consequences of the publication between them and third parties. 30

*The Court:* In general terms that is correct; I so charged.

*Mr. McGee:* If the jury find that the alleged libelous words justify damages only so far as special damages are proven, then the jury may find damages to the amount that the plaintiff, Emma Patterson, is shown to have actually sustained. 40

*The Court:* They have the legal right to assess damages, I suppose, in their discretion; whether they have the moral right to do it is matter I do not think it necessary to discuss further than I have already in my charge.

*Mr. McGee:* Your Honor has charged that loss of credit is a legitimate subject of damage. I ask also, that the Court charge that loss of customers by her is a legitimate item of damage.

10 *The Court:* Yes, if legally proved.

*Mr. McGee:* I think your Honor has charged that the destruction of her business would be a legitimate item of damage, and I also ask that threats by creditors and their lawyers, and suits against the plaintiff, Emma Patterson, and threats of arrest and indictment against her husband, Joseph Patterson, are legitimate subjects of damage.

*The Court:* Yes, sir.

20 (See Exception 21, for defendants, *post.*)

*Mr. McGee:* That injury to the financial standing of the plaintiff, Emma Patterson, as a merchant, is a legitimate subject for damage.

*The Court:* Yes, if properly proved.

*Mr. McGee:* That injury to her good name as a merchant is a legitimate subject of damage.

*The Court:* That is included in the former charge as it affects her credit as a trader.

30 *Mr. McGee:* I think your Honor did charge that loss of income would be a legitimate subject of damage.

*The Court:* Any loss resulting from the wrongful act complained of, if shown.

*Mr. McGee:* Now, I ask the Court to charge further, that, if the jury find that by virtue of this publication the credit of the plaintiff was injured and she was, as a result of that publication, harassed by creditors and subjected to their demands for payment and for security

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of their debt, and that if under those circumstances she, in the best exercise of her judgment, and under the best light that she could then obtain, made the chattel mortgage and bill of sale to Meyers, that that fact, even although it was a mistake on her part, will not excuse the defendants from damage resulting thereby.

*The Court:* I have fully charged the jury on that point, and I decline to make any further charge.

*Mr. Woodruff:* We request the Court to charge that if the jury believe, from the evidence, the business of the mercantile agency being a lawful and proper business and of value to the mercantile community, and that by the terms of its contracts with its subscribers it was its duty to communicate to them such information as it might be able to procure relating to the business standing and credit of merchants and traders, and that its subscribers were interested in obtaining such information, and entitled to receive it under their agreement, and that by the terms of said contract it was requested by the subscribers to furnish them with such information by means of a notification sheet, then every communication made about Emma Patterson by the mercantile agency through said sheet to its subscribers who had business transactions with her, and were therefore interested in knowing all about her, was a privileged communication, and no express malice being proven, the verdict should be for the defendants.

*The Court:* I have already charged that if a communication be made to a person upon request, express or implied, and that the person has an interest in the question propounded, that it is a privileged communication. I decline to charge any other way.

*Mr. Woodruff:* That even if the jury believe from the evidence that the business and credit of the plaintiff, Emma Patterson, suffered any loss, the verdict should be for the defendants, unless they believe that such loss arose wholly from the words contained in the notification sheet and was the immediate effect of such words, and that it arose from no other and independent cause.

*The Court:* If I understand that request, sir, I will so charge; that is, the resulting damage must be the usual and natural result of the publication complained of, as I understand to be the rule of law. I charge so if I have not already done so.

10 *Mr. Woodruff:* If the jury believe from the evidence that the cause of injury to the plaintiff's business, if there was any such injury, was the action of her creditor, Meyers, or Meyers, Goodman & Co., and the other creditors who have testified, and if the jury believe from the evidence of said Meyers that his firm, Meyers, Goodman & Co., and such other creditors, knew that Emma Patterson had not given a chattel mortgage as stated in the notification sheet, and did not believe that she had done so, then the verdict should be for the defendants. That is, if they acted against knowledge.

20 *The Court:* I hardly think that request in accordance with the law as we have understood it, since Shepherd's case and other principles of law applicable. I think I shall decline to charge as requested, sir, leaving my charge to speak upon what I have said upon that matter.

(See Exception 22, for defendants, *post.*)

30 *Mr. Woodruff:* If the jury believe from the evidence that the business of Emma Patterson had been steadily declining for a year or more prior to November 4, 1884, and that her creditors, Daniel Meyers, or Meyers, Goodman & Co., were aware of that fact and knew that the statement in the notification sheet was a mistake and not believing it to be true, took advantage of the mistake to secure possession of the whole stock of goods of the plaintiff worth \$9,500 to secure their claim for \$4,000, then the verdict should be for the defendants.

*The Court:* That is a proper subject of consideration for the jury in estimating the damages; I do not now see that it has any other relevancy.

40 *Mr. Woodruff:* If the jury believe that proof of publication has been made, and if they believe from the

evidence that the statements about Emma Patterson on the notification sheet arose from a mistake of the witness, Fleming, in reporting to the office of the mercantile agency at Newark that a chattel mortgage given by Emma Patterson appeared upon the records of Monmouth county, and that such mistake arose from the fact that a chattel mortgage given by a woman of exactly the same name and living in the same county, did actually appear on the records of the said county, and that such information was communicated by said Fleming in good faith, and honestly believing that it related to the plaintiff, and was in like good faith and honestly communicated by the witness, Jepson, to the office of the mercantile agency in New York, and that such communication was made both by Fleming and Jepson, without any malicious intent or illwill towards the plaintiff, the verdict should be for the defendants. 10

*The Court:* I decline to so charge; I say that such evidence is proper to be considered by the jury in mitigation of any damage suffered by the plaintiff. 20

*Mr. Woodruff:* Also, if the jury believe that the defendants are not copartners with Robert G. Dun their verdict must be in their favor, provided they are satisfied that the defendants did not publish the notification sheet except in their connection with him as employes.

*The Court:* I have spoken fully of the relations of these parties and their liabilities growing out of that, and I decline to make a further charge upon that subject. 30

(See Exception 23, for defendants, *post*.)

*Mr. Woodruff:* We request the Court to charge that in actions of tort it matters not how the defendants have been held out to the world as partners, but the fact of copartnership must be proved, and that the defendants are not estopped from alleging that they are not partners by reason of any notification to the contrary.

*The Court:* I decline to charge otherwise than I have already charged upon that subject. 40

*Mr. Woodruff:* Also that the contract between the defendants and R. G. Dun in evidence in the cause does not show any copartnership under the laws of New Jersey between the defendants or between them or either of them and R. G. Dun; that it is properly a question of law for the Court in the construction of the contract.

10 *The Court:* I have held that that is not material in the case to decide; it is for them to decide whether there was an actual partnership between these parties or not. They call themselves salaried partners.

(See Exception 24, for defendants, *post.*)

*Mr. Woodruff:* Also that there is no damages other than those caused by the withdrawal of the plaintiff's credit by Meyers, Lyons, Oppenheimer, Brumer, and Eschelbacher, which can be considered by the jury.

20 *The Court:* A general loss of credit, I have already said, may be a cause of action in this case for damages.

(See Exception 25, for defendants, *post.*)

*Mr. Woodruff:* Also that the defendants are not liable for the acts of their subscribers in circulating the notification sheets, and if the plaintiffs have failed to prove that some subscriber or subscribers withdrew his or their credit theretofore extended to the plaintiff on account of such publication, the defendants are entitled to a verdict.

30 *The Court:* If the communication is privileged under the rule which I have defined there would be no liability; if not privileged they may be held.

(See Exception 26, for defendants, *post.*)

40 *Mr. Woodruff,* Also in the same line, if the words are not libelous in themselves and the communication of the words by Lisberger & Weiss was without authority of the defendants, then the defendants are not liable in this action.

*The Court:* I decline to charge as I understand that request, sir.

(See Exception 27, for defendants, *post.*)

It was agreed between counsel that the charge of the Court should be written out, and that each should be permitted to take exceptions to such parts thereof as if done in open Court. 10

Plaintiffs' Exhibit, Robbins & Hartshorne's  
Letter, No. 1.

CHILLION ROBBINS,                      ACTON C. HARTSHORNE.  
ROBBINS & HARTSHORNE,  
*Attorneys and Counsellors at Law,*  
Lock Box 348.

FREEHOLD, N. J., Dec. 8th, 1884.

10 MRS. E. PATTERSON, Red Bank, N. J.,

DEAR MADAM :—Messrs. Steinrich & Doblin, of New York, have placed in our hands for collection, a claim against you, upon which there is a balance due of \$112.80, with interest due thereon from September 5, 1884.

The parties inform us that before the purchase of these goods your husband made false representations to them, by stating that you had made last year in your business over \$1,000, net, and the year previous \$800, net, and  
20 that at that time you were worth \$1,800 over and above your debts; and, on the strength of those false representations, they sold you the goods, which makes your husband liable to arrest and indictment. We see by the records that you have given a chattel mortgage for over \$4,000, on your stock, which is a positive contradiction of the truth of your husband's statement.

We have no desire to commence criminal proceedings against your husband, and if you will settle the bill or secure it in some way, we will let the matter drop.

30 But Messrs. Steinrich & Doblin say that if the claim is not paid somebody must suffer.

Our orders are, if this claim is not settled forthwith, to commence suit upon the claim, get judgment, and have an officer seize your goods, and close your store, and try and make the money therefrom, and if he does not succeed, then they will take criminal proceedings against your husband.

Please let us hear from you at once what you will do.

Yours truly,

ROBBINS & HARTSHORNE.

**Plaintiffs' Exhibit, Robbins & Hartshorne's  
Letter, No. 2.**

CHILLION ROBBINS.

ACTON C. HARTSHORNE.

ROBBINS & HARTSHORNE,

*Attorneys and Counsellors at Law,*

Lock Box 348.

FREEHOLD, N. J., Jan. 3d, 1885.

JOS. PATTERSON, ESQ., Red Bank, N. J.

10

DEAR SIR:—Steinrich & Doblin, of New York, through us, have heard that your wife has made a bill of sale of all her store goods, and you are now in possession as agent. They seem determined to put you through, criminally, for obtaining goods under false pretences, and have requested us to inform you that if their claim is not settled by you, they will appear before the Grand Jury, and have you indicted.

In order to save you that disgrace, and all the consequences attending the same, we will receive the claim from you by installments. 20

Please let us hear from you by return mail.

Yours very truly,

ROBBINS & HARTSHORNE.

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**Plaintiffs' Exhibits 1 and A.**

Exhibits 1 and A, for plaintiffs, are identical, and are as follows: 30

“THE MERCANTILE AGENCY NOTIFICATION SHEET,”


R. G. DUN & CO.,

E. RUSSELL & CO.

The attention of subscribers is requested to the following conditions: This sheet is a strictly confidential communication, and is prepared and furnished at a price agreed upon to our yearly subscribers only, at their own request and for their guidance and protection in business. It is not to be shown, or its contents made known 40

to any other persons, but it is subject, in all respects, to the provisions of the contract or "Terms of Subscription," signed by subscribers and in our possession.

The words, "If interested, inquire at the Office," inserted opposite names on this Sheet, do not imply that the information we have is unfavorable. On the contrary, it may not infrequently happen that our last report is of a favorable character; but subscribers are referred to our office because, in justice to them, the parties reported, and to ourselves, the information can only  
 10 be properly conveyed to those entitled to receive it, by the full report as we have it on our records.

 When inquiring for any of the under-mentioned, please note on the Inquiry Ticket that the name was on the Sheet.

Wednesday, November 5, 1884.

(List of Names.)

Reverse of Exhibit.

20 "Record Items."  
 "These items do not necessarily affect the credit or safety of parties mentioned. They are given just as we find them on the Public Records and suggest further investigation or explanation."

Then follow names of persons in various States, including New Jersey, as follows:

"New Jersey."

"Red Bank, Patterson Emma, Cht'l Mtge, \$1,385, Clothing."

30 With other names and data affecting other persons.

### Defendants' Exhibit, No. 1.

#### TERMS OF SUBSCRIPTION TO THE MERCANTILE AGENCY.

Memorandum of the Agreement between R. G. Dun & Co., proprietors of the Mercantile Agency, on the one part, and the undersigned, subscribers to the said agency, on the other part, viz. :

The said proprietors are to communicate to us, on request, for our use in our business, as an aid to us in determining the propriety of giving credit, such information as they may possess concerning the mercantile standing and credit of merchants, traders, manufacturers, etc., throughout the United States and in the Dominion of Canada. It is agreed that such information has mainly been, and shall mainly be obtained and communicated by servants, clerks, attorneys, and employes, appointed as our sub-agents, in our behalf, by the said R. G. Dun & Co. The said information to be communicated by the said R. G. Dun & Co. in accordance with the following rules and stipulations, with which we, subscribers to the agency as aforesaid, agree to comply faithfully, to wit :

1. All verbal, written or printed information communicated to us, or to such confidential clerk as may be authorized by us to receive the same, and all use of the reference book hereinafter named, and the notification sheet of corrections of said book, shall be strictly confidential, and shall never, under any circumstances, be communicated to the persons reported, but shall be exclusively confined to the business of our establishment.

2. The said R. G. Dun & Co. shall not be responsible for any loss caused by the neglect of any of the said servants, attorneys, clerks and employes, in procuring, collecting and communicating the said information, and the actual verity or correctness of the said information is in no manner guaranteed by the said R. G. Dun & Co. The action of said agency being of necessity almost entirely confidential in all its departments and details, the said R. G. Dun & Co. shall never, under any circumstances, be required by the subscriber to disclose the name of any such servant, clerk, attorney, or employe, or

any fact whatever concerning him or her, or concerning the means or sources by or from which any information so possessed or communicated was obtained.

3. The said R. G. Dun & Co. are hereby requested to place in our keeping, for our exclusive use, a printed copy of a reference book, containing ratings or markings of estimated capital and relative credit standing of such business men, in such States as may be agreed upon, prepared by them or the servants, clerks, attorneys, and  
10 employes aforesaid, together with notification sheet of corrections. We further agree that upon the delivery to us of any subsequent edition of the reference book, the one now placed in our hands shall be surrendered to them, and also that upon the termination of our relations as subscribers, the copy then remaining in our hands shall be given up to the said R. G. Dun & Co., it being clearly understood and agreed upon that the title to said reference book is vested and remains in said R. G. Dun & Co.

20 4. We will pay in advance..... dollars for one year's services, from the date hereof, of said R. G. Dun & Co., together with the use of the said reference book, pursuant to the foregoing conditions, and such other sum annually thereafter for the same as may be agreed upon between us, verbally or otherwise, subject always to the conditions and obligations above mentioned.

5. R. G. Dun & Co. are hereby permitted to reserve to themselves the right to terminate this subscription at any time, on the repayment of the amount for the unexpired  
30 portion thereof.

6. If the inquiries for detailed reports during the year shall exceed.....in number, the excess we agree to pay for at the rate of.....per hundred.

7. The subscriber agrees to accept as the aforesaid reference book.....\* edition issued in.....and  
.....  
.....day of.....188..

.....  
.....  
40 \* State herein the edition which the subscriber agrees to accept, whether General, Western, Eastern, Southern, Cities, etc.; also, whether January and July, or March and September.

### Defendants' Exhibit, No. 2.

This agreement, made the day of January, one thousand eight hundred and eighty-three, between Robert Graham Dun, Erastus Wiman, Arthur J. King and Robert D. Douglas, witnesseth, that the said Dun, who is the proprietor of the Mercantile Agency in the United States and British Provinces, as also in London, England, and other cities on the continent of Europe, in consideration of the sum of one dollar to him in hand paid by said Wiman, King and Douglas, the receipt whereof is hereby acknowledged, and on condition of the faithful performance as conditions precedent, by the said Wiman, King and Douglas, of all the covenants and agreements hereinafter contained, and by them jointly and severally undertaken, has agreed, and by these presents does agree, to take and receive the said Wiman, King and Douglas, into an association with him as salaried partners, under the firm name and style of R. G. Dun & Co., in the carrying on of the business of the said Mercantile Agency, for and during the term of three years, from and after the first day of January, one thousand eight hundred and eighty-three; and in consideration of the premises he hereby agrees to pay to the said Wiman, for his services and as a salary, a sum of money which shall be equal to twenty per centum of the net profits of the whole business of said Mercantile Agency for the term of this relation, according to the returns made and profits estimated at the principal office in the city of New York; and he further agrees to pay to the said King, for his services and as a salary, a sum of money which shall be equal to six per centum of the net profits of the whole business of said Mercantile Agency, for and during the continuance of this agreement, according to the returns made and profits determined at the principal office in the city of New York; and that he will pay to the said Douglas, for his services and as a salary, a sum of money which shall be equal to five per centum of the net profits of the whole business of the said Mercantile Agency, for and during the continuance of this agreement, according

to the returns made and profits determined at the principal office in the city of New York.

And it is expressly understood that the term net profits as used herein, shall be construed to mean and to include the whole revenues after the payment of all expenses and outlays necessary for the carrying on and extending the said agency and its business, and the opening and establishing of such new and additional branch offices as the said Dun may deem necessary, but that the sums of  
 10 money which are hereinafter mentioned as guaranteed salaries, to be paid to the said Wiman, King and Douglas, shall not be deducted or considered any part of the expenses or outlays of the said business.

And the said Dun further agrees and hereby expressly guarantees, in consideration of the premises, that the salary to be paid by him to the said Wiman shall be at least ten thousand dollars for each and every year of said term, and that the salary to be paid by him to the said  
 20 King shall be at least five thousand dollars for each and every year of said term, and that the salary to be paid by him to said Douglas shall be at least five thousand dollars for each and every year of said term.

And it is further agreed and understood that if the said Dun shall at any time become dissatisfied with the said Wiman, King and Douglas, or any of them, he shall be at liberty to dissolve the connection hereby made, and to dismiss from the agency the individual or individuals with whom he shall become dissatisfied, and discontinue  
 30 all further payments to him beyond such amount as shall be due him at the date of dismissal upon the principle or rule of compensation as hereinafter expressed, provided said Dun shall give to the party one month's notice in writing.

And it is further agreed that, in case the said Wiman, King and Douglas, or any or either of them, shall desire to withdraw from the said business, they or he shall be permitted to do so, provided, however, that three months' notice in writing of such intended withdrawal shall be  
 40 given to the other parties.

And that the said Dun further agrees that, on the happening of the death of the said Wiman, King or Douglas, or in case they or either of them, shall become incapacitated, by reason of bodily ailment, to give and devote the required time and attention to the business of said Mercantile Agency, or in case the physician of the said Wiman, King or Douglas shall decide that it is necessary, for a due preservation of health, that they or either of them abstain from business, then, and in that case, the association formed by this instrument shall 10  
cease and be terminated as to the members or member deceased or incapacitated.

And it is agreed and stipulated that, in case of the dissolution of the connection hereby formed, in any or either of the four modes herein above specified, to wit, by the said Dun giving to Wiman, King and Douglas, a notice of one month, or by said Wiman, King and Douglas giving to said Dun a notice of three months, or by the death or incapacity of either Wiman, King or Douglas, the interest of such deceased, incapacitated or retiring 20  
individual shall be estimated and determined by the net profits of the whole business of the agency for the year ending on the first day of January then next ensuing, without referring to the unexpired term of any subscription or the unearned price thereof, and his *pro rata* share of said profits shall be allowed and paid to the date of such dismissal, decease, incapacity or retirement, it being the meaning and intent of the parties that at the end of said year the interest of such dismissed, deceased, incapacitated or retiring individual shall be calculated for the 30  
period of the year prior to such dismissal, death, incapacity or retirement, upon the entire business of the year, so that such interest shall bear the same ratio to the year's business that the portion of the year which has elapsed before the dissolution of the connection bears to the whole year, and such interest shall be payable at the end of the said year or sooner, in said Dun's option.

It is mutually understood and agreed upon that all subscriptions to the agency dating between the twenty-fifth and thirty-first days of December inclusive, during 40

the term of this agreement, shall belong to the business of said agency, commencing on the first day of January then next ensuing.

And the said Wiman, King and Douglas, each for himself, covenants and agrees to and with the said Dun, that he will become a salaried partner with said Dun in manner and form, and upon the terms and conditions hereinbefore proposed and undertaken by said Dun, and that he will devote his whole time and best skill and  
10 exertions to the business of the said Mercantile Agency, in such manner and form as said Dun shall desire and direct.

And the said Wiman, King and Douglas, each for himself, further covenants and agrees that when the relations hereby formed with said Dun shall cease, he will surrender and deliver up to said Dun all books, chattels and property, and all documents, papers and writings of every kind and description which have any relation to or connection with the business of the said Mercantile  
20 Agency; nor shall any copy be taken or retained from said Dun, of anything connected with said business, nor will he at any time during the continuance of this agreement enter into any correspondence or intercourse with any person or party, in any way injurious to said Dun in his said business, nor communicate to any person or party not duly authorized to receive the same, any matter or thing in anywise related to or connected with said Mercantile Agency or its affairs; and furthermore, said  
30 Wiman, King and Douglas, each for himself, expressly covenants and agrees to and with said Dun, that he will not use the name of said firm in making, signing, drawing or indorsing any note or other obligation or evidence of debt, except as may be required in and about the usual and legitimate business of the firm and under the approval of said Dun; nor will he in his own name, make, sign or indorse any note, obligation or undertaking, or evidence of debt as sureties, except by and with the consent of said Dun.

And the parties hereto expressly agree that the said  
40 Dun shall have the right to take in more or other copart-

ners, and may change the firm name, and may have in all things absolute control of the said business, the same as though he had not formed this agreement, it being expressly understood that the said Wiman, King and Douglas are taken into a firm with said Dun, and the amount of their remuneration over and above their respective salaries hereinbefore provided for, is made contingent upon the net profits which the business may yield, simply and solely for the purpose of encouraging and stimulating in them a jealous pride and ambition in the character and repute of the firm, as well as to induce their extraordinary exertions in building up and extending the business and increasing its profits. 10

And that neither they have, nor has any of them any right, title or interest in or to the profits of said business, or any part thereof as such, (the amount of the profits only forming the basis of a calculation to ascertain the amount of their respective salaries,) nor have they, nor has any of them, any right, title or interest, proprietary or otherwise, in the assets, chattels, good will or other property of the said business or any part thereof, except as above stated. 20

In case of the decease of said Dun at any time before the expiration of the relations he hereby makes with said Wiman, King and Douglas, it is agreed that the relations hereby formed shall cease and be closed, and the business of the said agency shall thereupon be settled between said Wiman, King and Douglas as of the one part, and the legal representatives of said Dun as of the other part. 30

It witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

ROBERT GRAHAM DUN,  
ERASTUS WIMAN,  
A. J. KING,  
ROBERT D. DOUGLAS.

In presence of JAMES PATTERSON.

It is hereby agreed that the term of the association created by the foregoing agreement, be and the same is 40

hereby extended unto the first day of January, eighteen hundred and eighty-nine, subject as to the extended term to all the conditions and provisions contained in said agreement.

Signed and sealed at the city of New York, on this thirty-first day of December, eighteen hundred and eighty-five.

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ROBERT GRAHAM DUN,  
ERASTUS WIMAN,  
A. J. KING,  
ROBERT DUN DOUGLAS.

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**Defendants' Exhibit, No. 3.**

Same as A and 1 for plaintiffs, except that date should be Wednesday, November 12, 1884, and under the heading of "Record Items," and immediately under "New Jersey," there should appear "Red Bank, Patterson Emma, chtl. mtge., on sheet of November 5th, does not refer to her, clothing."

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**Defendants' Exhibit, No. 4.**

PHILA., Nov. 8, 1884.

R. G. DUN & Co.

GENTLEMEN: You have published in your sheet of Nov. 5, 1884, a notice that Emma Patterson of Red Bank, N. J., had given a chattel mortgage for \$1,385. This is all false, and serious damage has been the result. Unless satisfactory reparation is at once made, suit will be commenced to recover damages sustained. Call and see me, as I am authorized to bring suit.

30

Truly,

J. M. MOYER,  
R. B. M.

## [BILL OF EXCEPTIONS.]

## New Jersey Supreme Court.

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 ABTHUR J. KING, *et al.*,
*ads.*EMMA PATTERSON, *et al.*} *In Case.*

For plaintiffs, WM. PINTARD, Esq., FLAVEL MCGEE, Esq. 10

For defendants, SAMUEL WAGNER, Esq., PHILEMON WOODRUFF, Esq.

## [EXCEPTION 1.]

Be it remembered, that on this seventh day of January, A.D. eighteen hundred and eighty-six, at a Supreme Court Circuit, holden at Freehold, in and for the county of Monmouth, before EDWARD W. SCUDDER, Esq., one of the Justices of the Supreme Court of Judicature of the State of New Jersey, the issue joined in the above stated cause between the said parties in an action upon the case for libel, came on to be tried by a jury for that purpose duly impaneled; and thereupon the plaintiffs, for the purpose of proving that the defendants were copartners of one Robert G. Dun, offered in evidence a certain book known as Wilson's Copartnership and Corporation Directory of New York city, after the same had been identified as a copy of said book commonly in use; and thereupon the defendants' counsel objected to its being admitted, and prayed that it might be overruled, and the plaintiffs' counsel insisted that the same was lawful and admissible; whereupon his Honor, the said Justice, held and affirmed that the said evidence so offered was good and admissible in law, and thereupon the same was read and given in evidence to the jury, to which ruling of his Honor the defendants prayed a bill of exception, and his Honor, the said Justice, sealed the exception accordingly. 20 30

E. W. SCUDDER, [L.S.] 40

EXCEPTION 2. And the plaintiffs' counsel, for the purpose of proving the identity of the alleged libelous publication, asked their witness, Daniel Meyers, whether he had seen on a copy of the printed part of said alleged libelous publication the words, "Red Bank, Patterson Emma, chtl mtge, \$1,385, clothing;" whereupon the defendants' counsel objected, interposed and insisted that the said evidence, so offered to be given, was not good or admissible in law upon the issue, but his Honor, the said Justice, held and affirmed that the said question was good and admissible in law, and thereupon the same was answered by the witness, to which ruling of his Honor, the said Justice, the defendants prayed a bill of exception, and his Honor sealed the same accordingly.

E. W. SCUDDER. [L.S.]

EXCEPTION 3. And the plaintiffs' counsel, for the purpose of proving the meaning of the words of the alleged libelous publication, asked the question, "What do you understand that to mean?" (referring to the alleged libelous words) of said witness, Daniel Meyers, and continued to ask other questions of said witness as to the meaning of each of the terms used in such alleged libelous publication; whereupon the defendants' counsel objected, interposed and insisted that said questions and each and every of them were not good or admissible in law upon the issue, but his Honor, the said Justice, held and affirmed that the said questions and each and every of them were good and admissible in law; and thereupon the same were answered by the witness, to which rulings of his Honor, the said Justice, the defendants prayed a bill of exceptions, and his Honor, the said Justice, sealed the same accordingly.

E. W. SCUDDER. [L.S.]

EXCEPTION 4. And the plaintiffs' counsel, for the purpose of proving the meaning of the words of the alleged libelous publication, afterwards asked the ques-

tion, "Just tell us what it means," (referring to the alleged libelous publication) of their witness, Charles Lyons, and also continued to ask other questions of said witness as to the meaning of each of the terms used in such alleged libelous publication; whereupon the defendants' counsel objected, interposed and insisted that said questions and each and every of them were not good or admissible in law upon the issue, but his Honor, the said Justice, held and affirmed that the said questions and each and every of them were good and admissible in law, and thereupon the same were answered by the witness, to which rulings of his Honor, the said Justice, the defendants prayed a bill of exception, and his Honor, the said Justice, sealed the same accordingly.

E. W. SCUDDER. [L.s.]

EXCEPTION 5. And the plaintiffs' counsel, for the purpose of proving the extent of the circulation of a certain paper known as the R. G. Dun & Co. Mercantile Agency Notification Sheet, in the city of New York, in which the said alleged libelous publication was alleged to have been printed, asked the question of their witness, Charles Lyons, "Do you know to what extent the Agency Notification Sheets of R. G. Dun & Co. are circulated in the city of New York?" whereupon the defendants' counsel objected, interposed and insisted that said question was not good or admissible in law upon the issue, but his Honor, the said Justice, held and affirmed that said question was good and admissible in law, and thereupon the same was answered by the witness, to which ruling of his Honor, the said Justice, the defendants prayed a bill of exception, and his Honor, the said Justice, sealed the same accordingly.

E. W. SCUDDER. [L.s.]

EXCEPTION 6. And the plaintiffs' counsel offering to prove by their witness, Bernard Brumer, that he, in behalf of Max B. Brumer, went to Red Bank to demand payment of a debt due Max B. Brumer, asked said wit-

ness the question, "Did you go to Red Bank in November, 1884?" whereupon the defendants' counsel objected because he was not one of the persons named in the bill of particulars furnished by the plaintiffs, by whom they gave notice to defendants they would prove loss of credit, and interposed and insisted that said question was not good or admissible in law upon the issue, but his Honor, the said Justice, held and affirmed that the said question was good and admissible in law, and thereupon the same  
 10 was answered by the witness, to which ruling of his Honor, the said Justice, the defendants' prayed a bill of exception, and his Honor, the said Justice, sealed the same accordingly.

E. W. SCUDDER. [L.S.]

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20 EXCEPTION 7. And the plaintiffs' counsel, for the purpose of proving a withdrawal of credit occasioned by the alleged libelous publication, asked their witness, Adolph Eschelbacher, the question, "Did you cease giving her credit?" whereupon the defendants' counsel objected because the witness was not one of the persons whose names were specified in the plaintiffs' answer to the defendants' interrogatory as to the names of the persons by whom plaintiffs would prove loss of credit; whereupon the said Justice allowed plaintiffs' counsel  
 30 leave to amend by adding the name of the witness to such list of names; whereupon defendants' counsel objected, interposed and insisted that the said amendment was not according to law when made at the time of trial, but his Honor, the said Justice, held and affirmed that said amendment was according to law, to which ruling of his Honor, the said Justice, the defendants prayed a bill of exception, and his Honor, the said Justice, sealed the same accordingly.

E. W. SCUDDER. [L.S.]

EXCEPTION 8. And the plaintiffs' counsel thereupon asked the plaintiff, Joseph Patterson, their witness, what reasons were given by creditors of Emma Patterson for refusing to grant her credit; whereupon the defendants' counsel objected upon the ground that such testimony could only be given by such persons as refused credit; whereupon the said Justice permitted such question to be answered as corroborative of the testimony of other witnesses who had already testified as to their motives to show that they actually did what they did; whereupon 10 defendants' counsel interposed and insisted that the said question was not good or admissible in law upon the issue, but his Honor held that said question was good and admissible in law, to which ruling of his Honor, the said Justice, the defendants prayed a bill of exception, and his Honor, the said Justice, sealed the same accordingly.

E. W. SCUDDER. [L.S.]

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EXCEPTION 9. And the plaintiffs' counsel thereupon asked their witness, Joseph Patterson, as to "how much falling off there was in the customers at the plaintiffs' store after the alleged libelous publication?" Whereupon the defendants' counsel objected thereto as tending to prove special damage, when there was no special damage alleged in respect to loss of custom in the declaration or the declaration as amended, inasmuch as the names of the particular customers who had withdrawn 30 their custom had not been specified, whereupon the said Justice permitted said question to be answered, and defendants' counsel interposed and insisted that the said question was not good or admissible in law upon the issue, but his Honor, the said Justice, held and affirmed that it was good and admissible in law, to which ruling of his Honor the defendants prayed a bill of exception, and his Honor, the said Justice, sealed the same accordingly.

E. W. SCUDDER. [L.S.] 40

EXCEPTION 10. And the plaintiffs' counsel thereafter asked their witness, Henry E. Jepson, "whether he communicated the contents of a report (alleged libelous matter,) to the New York house of R. G. Dun & Co.?" To which the said witness declined an answer, upon the ground that it might tend to criminate him; whereupon the Court directed that the witness "must answer the question." Whereupon the defendants' counsel interposed and insisted that the said direction of the

10 Court was not good or admissible in law upon this question, but his Honor held and affirmed that said direction was good and admissible in law, to which ruling the defendants prayed a bill of exception, and his Honor, the said Justice, sealed the same accordingly.

E. W. SCUDDER. [L.S.]

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EXCEPTION 11. And the plaintiffs' counsel thereafter asked their witness, Henry E. Jepson, "whether the Mercantile Agency Notification Sheet, bearing date November 5, 1884, was sent to all the subscribers of R. G. Dun & Co. who subscribed therefor?" Whereupon defendants' counsel objected thereto, on the ground that the only evidence admissible upon that question was as to whether such sheet was sent to the persons named in the plaintiffs' bill of particulars; whereupon the said

30 Justice permitted said question to be answered, and defendants' counsel interposed and insisted that the said question was not good or admissible upon the issue in law, but his Honor, the said Justice, held and affirmed that it was good and admissible in the law, to which ruling of his Honor the defendants prayed a bill of exception, and his Honor, the said Justice, sealed the same accordingly.

E. W. SCUDDER. [L.S.]

EXCEPTION 12. And the plaintiffs' counsel thereafter offered in evidence two certain papers, known as the Mercantile Agency Notification Sheets, of November 5, 1884, marked Exhibit A, and Exhibit 1, whereupon defendants' counsel objected—

1st—Because there was no proof of publication of the papers by the defendants, or either of them.

2d—Because it had not been shown that the papers offered contained any language regarding the plaintiff which was libelous *per se*. 10

3d—Because, under the pleadings, these papers could not be given in evidence until it be first shown that they contain words which have the meaning placed upon them by the inuendo.

4th—Because the language of the paper relating to the plaintiff, if any, is privileged as a confidential communication of a mercantile agency to its subscribers.

5th—Because these papers could not be given in evidence until special damage be conclusively shown, as the defendants had had no opportunity to cross-examine the plaintiff, Emma Patterson, or to attack the credibility of her witnesses, by reason of the amendments to the declaration alleging special damage having been made during the trial. 20

Thereupon the said Justice admitted said papers in evidence, and defendants' counsel interposed and insisted that the said papers were not good or admissible upon the issue in law, but his Honor, the said Justice, held and affirmed that they were good and admissible in the law, to which ruling of his Honor the defendants prayed 30 a bill of exception, and his Honor, the said Justice, sealed the same accordingly.

E. W. SCUDDER. [L.S.]

EXCEPTION 13. And the plaintiffs' counsel thereafter again offered in evidence Wilson's Copartnership Directory, whereupon defendants' counsel objected thereto and interposed and insisted that the said book was not good or admissible upon the issue in the law, but his Honor 40

the said Justice, held and affirmed that it was good and admissible in the law, to which ruling of his Honor the defendants prayed a bill of exception, and his Honor, the said Justice, sealed the same accordingly.

E. W. SCUDDER. [L.s.]

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EXCEPTION 14. And the plaintiffs' counsel thereafter resting the cause, the defendants' counsel thereupon  
 10 moved his Honor, the said Justice, that he direct a non-suit to be entered in the cause, because both under the law and the evidence the plaintiffs had failed to establish the affirmative of the issue, but his Honor held and affirmed that the plaintiffs had sufficiently established the affirmative of the issue; to which ruling the defendants prayed a bill of exception, and his Honor sealed the same accordingly.

E. W. SCUDDER [L.s.]

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20 EXCEPTION 15. And his Honor, the said Justice, thereafter having charged the jury "that it is not necessary to fix them" (the defendants) "with such liability" (*i. e.*, liability for the alleged libel) "to prove that they are partners by any agreement between themselves, but if they permit themselves to be held out to the world as partners, they may be charged with liability as such, both in contract and in tort;" whereupon the defendants  
 30 excepted to such portion of said charge and interposed and insisted that such was not the law as applicable to the issue, but his Honor held and affirmed that such was the law as applicable to the issue, to which the defendants prayed a bill of exception, and his Honor sealed the same accordingly.

E. W. SCUDDER. [L.s.]

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EXCEPTION 16. And his Honor, the said Justice, having charged the jury that "if a request were made  
 40 either express or implied by Lisberger & Weiss, or by

Simon & Co., for such communication as to the plaintiff, then, if they had no interest in the matter, the book or sheet sent to them, or either of them, affecting her credit, would not be privileged if made without such request, then the communication voluntarily sent by them must be at their risk as to the harm that may be done thereby. I think it is enough to hold in this case, that the agency has the protection of privilege in every case when the subscriber has a direct and personal interest in the person who is the subject matter of inquiry, and that in all other cases they must stand as others on the truthfulness of their report and their protection under their contracts with subscribers not to divulge the secrets of their business ;" to which said portion of said charge the defendants interposed and insisted that such was not the law as applicable to the issue, and to which the defendants prayed a bill of exception, and his Honor sealed the same accordingly. 10

E. W. SCUDDER. [L.S.]

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EXCEPTION 17. And his Honor, the said Justice, having charged the jury "that, taking the words charged in this case, the printing that a person has put a mortgage on her property, real or personal, is not *per se* a libel, but when connected with proper inuendoes and proof showing that she is a trader having creditors to a large amount, with a small capital and stock of goods, not more than enough to pay all her debts at a forced sale, and requiring credit to continue her business, and when the mortgage is of sufficient amount to impair the security of existing claims, then they are libelous, or may be libelous so that the person aggrieved may recover both general and special damages, if the latter be charged with the proper averment in the declaration." To which said portion of said charge the defendants interposed and insisted that such was not the law as applicable to the issue, and to which the defendants prayed a bill of exception, and his Honor sealed the same accordingly. 30

E. W. SCUDDER. [L.S.] 40

EXCEPTION 18. And his Honor, the said Justice, in pursuance of a request of the plaintiffs' counsel, having charged "that if in such cases general damages be alleged but not proved, the jury may still find special damage, and if special damages be alleged but not proved, the jury may still find general damage;" the defendants interposed and insisted that such was not the law as applicable to the issue, and prayed a bill of exception, and his Honor sealed the same accordingly.

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E. W. SCUDDER. [L.S.]

EXCEPTION 19. And his Honor, the said Justice, in pursuance of a request of the plaintiffs' counsel, having charged "that if the jury find that the libelous words were printed and sent by the defendants, or by the firm of R. G. Dun & Co., to all their subscribers, without regard to the interest of such subscribers in the persons reported, then no matter what may have been the relations between those subscribers and other persons not connected with them as members of their firm, and if the publication was afterwards disseminated by those other people, still the defendants are liable if it is proven that it resulted in injury to the plaintiffs," the defendants interposed and insisted that such was not the law and prayed a bill of exception, and his Honor sealed the same accordingly.

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E. W. SCUDDER. [L.S.]

EXCEPTION 20. And his Honor, the said Justice, in pursuance of a request of the plaintiffs' counsel, having charged "that if a firm print a paper containing libelous matter and distribute the same to its subscribers, and one or more copies of the paper are circulated by the subscribers, and come into the hands of other parties, not subscribers, such publications relate back to and become the act of the original publishers, as between them and third parties, if it be an unprivileged communication," the defendants' counsel interposed and insisted that such

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was not the law, and prayed a bill of exception, and his Honor sealed the same accordingly.

E. W. SCUDDER. [L.S.]

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EXCEPTION 21. And his Honor, the said Justice, in pursuance of a request of the plaintiffs' counsel, having charged "that threats by creditors and their lawyers, and suits against the plaintiff, Emma Patterson, and threats of an arrest and indictment against her husband, Joseph Patterson, are legitimate subjects of damage," the defendants' counsel interposed and insisted that such was not the law, and prayed a bill of exception, and his Honor sealed the same accordingly. 10

E. W. SCUDDER. [L.S.]

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EXCEPTION 22. And his Honor, the said Justice, having been requested by defendants' counsel to charge the jury "that if the jury believe from the evidence that the cause of injury to the plaintiffs' business, if there was any such injury, was the action of her creditors, Meyers, or Meyers, Goodman & Co., and the other creditors, who have testified, and if the jury believe from the evidence of said Meyers that his firm, Meyers, Goodman & Co., and such other creditors, knew that Emma Patterson had not given a chattel mortgage, as stated in the notification sheet, and did not believe that she had done so, then the verdict should be for the defendants, that is, if they acted against knowledge;" and the said Justice having declined so to charge, the defendants' counsel excepted, and prayed a bill of exception, and his Honor sealed the same accordingly. 20 30

E. W. SCUDDER. [L.S.]

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EXCEPTION 23. And his Honor, the said Justice, having been requested by the defendants' counsel to charge the jury "that if the jury believe that the defendants are not copartners with Robert G. Dun, their verdict must be in their favor, provided they are satisfied

that the defendants did not publish the notification sheet, except in their connection with him as employes;" and the said Justice, having declined so to charge other than he had previously charged, the defendants excepted, and prayed a bill of exception, and his Honor sealed the same accordingly.

E. W. SCUDDER. [L.S.]

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EXCEPTION 24. And his Honor, the said Justice,  
 10 having been requested by the defendants' counsel to charge the jury "that the contract between the defendants, and R. G. Dun & Co., in evidence in the cause, does not show any copartnership under the laws of New Jersey between the defendants, or between them or either of them, and R. G. Dun & Co.," and the said Justice having declined so to charge, the defendants excepted, and prayed a bill of exception, and his Honor sealed the same accordingly.

E. W. SCUDDER. [L.S.]

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EXCEPTION 25. And his Honor, the said Justice, having been requested by the defendants' counsel to charge the jury "that there are no damages other than those caused by the withdrawal of the plaintiffs' credit by Meyers, Lyons, Oppenheimer, Brumer and Eschelbacher, which can be considered by the jury," and the said Justice having declined so to charge, the defendants excepted, and prayed a bill of exception, and his Honor sealed the same accordingly.

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E. W. SCUDDER. [L.S.]

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EXCEPTION 26. And his Honor, the said Justice, having been requested by the defendants' counsel to charge the jury "that the defendants are not liable for the acts of their subscribers in circulating the notification sheets, and if the plaintiffs have failed to prove that some subscriber or subscribers withdrew his or her credit therefore extended to the plaintiff on account of such publication, the defendants are entitled to a verdict." And the  
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said Justice having declined so to charge, the defendants excepted thereto and prayed a bill of exception, and his Honor sealed the same accordingly.

E. W. SCUDDER. [L.S.]

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EXCEPTION 27. And his Honor, the said Justice, having been requested to charge the jury by the defendants "that if the words are not libelous in themselves, and the communication of the words by Lisberger & Weiss was without authority of the defendants, then the defendants are not liable in this action;" and the said Justice having declined so to charge, the defendants excepted thereto and prayed a bill of exception, and his Honor sealed the same accordingly. 10

E. W. SCUDDER. [L.S.]

## N. J. Court of Errors and Appeals.

10	<p style="text-align: center;">EMMA PATTERSON, <i>et al.</i>,  <i>Defendants in Error,</i>  <i>ads.</i></p> <p style="text-align: center;">ARTHUR J. KING, <i>et al.</i>,  <i>Plaintiffs in Error.</i></p>	<p style="font-size: 3em; line-height: 1;">}</p> <p style="text-align: center;"><i>In Error to  New Jersey  Supreme Court</i></p> <p style="text-align: center;"><i>Joinder in  Error.</i></p>
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20 And hereupon, afterwards, to wit, on the twentieth day of May, A.D. eighteen hundred and eighty-six, the said Emma Patterson and Joseph Patterson, the defendants in error, by William Pintard, their attorney, came into Court and say—that there is no error, either in the record and proceedings aforesaid, or in the matters recited in said bill of exceptions or in the verdict, or in giving the judgment aforesaid, and they pray that the Court may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid, assigned for error, and that the judgment aforesaid, in manner aforesaid given, may in all things be affirmed, &c.

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WM. PINTARD,  
*Attorney for Def'ts in Error.*

FLAVEL MCGEE,  
*Of Counsel with Def'ts in Error.*

## N. J. Court of Errors and Appeals.

ARTHUR J. KING, <i>et al.</i> , <i>Plaintiffs in Error,</i> <i>vs.</i> EMMA PATTERSON, <i>et al.</i> , <i>Defendants in Error.</i>	}	<i>In Case.</i> <i>Assignment of</i> 10 <i>Errors.</i>
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Afterwards, that is to say, on the fourteenth day of May, A.D. eighteen hundred and eighty-six, in the Court of Errors and Appeals in the last resort in all causes, of the State of New Jersey, comes the said Arthur J. King and Robert Dun Douglas, by Philemon Woodruff, their attorney, and say that in the record and proceedings aforesaid, and also in the matters recited and contained in said bill of exceptions, and also in the verdict and judgment aforesaid, there is manifest error in this, to wit: 20

1. That at the trial of said cause the said plaintiffs, by their counsel, offered in evidence a book known as "Wilson's Copartnership and Corporation Directory of New York City," and being a book which purports, among other things, to contain the individual names of persons composing, as copartners in trade, the various business concerns doing business in New York city, for the purpose of proving the names of the persons who compose the firm of R. G. Dun & Co., of that city; whereupon the defendants, by their counsel, having first objected thereto, the Justice presiding at the trial admitted the same in evidence and permitted it to go to the jury as evidence that the defendants were members of that firm. 30

2. That there is also manifest error in this, to wit, that at the trial of said cause the plaintiffs, by their counsel, asked the witness, Daniel Meyers, whether he 40

had seen on a copy of the alleged libelous publication the words "Red Bank, Patterson Emma, chtl. mtge., \$1,385, clothing;" whereupon the defendants, by their counsel, having first objected thereto, the Justice presiding at the trial permitted the same to be answered, without first requiring evidence to be produced that the defendants had either published or caused to be published the same to said witness or to any other person.

10 3. That there is also manifest error in this, to wit, that at the trial of said cause the plaintiffs, by their counsel, asked said witness as to what he understood to be the meaning of the words, "Red Bank, Patterson Emma, chtl. mtge.; \$1,385, clothing;" whereupon the defendants, by their counsel, having first objected thereto because it had not been shown that said witness had any knowledge upon which to form a conclusion as to the meaning of such words, the said Justice permitted the same to be answered without requiring proof of such knowledge on the part of the witness to be first introduced.

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4. That there is also manifest error in this, to wit, that at the trial of said cause the plaintiffs, by their counsel, asked the witness, Charles Lyons, as to what the words "Red Bank, Patterson Emma, chtl. mtge., \$1,385, clothing," meant; whereupon the defendants, by their counsel, having first objected thereto because it had not been first shown that the witness had any knowledge from which to form a conclusion as to the meaning of such words, the said Justice permitted the same to be answered without requiring proof of such knowledge on the part of the witness to be first introduced.

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5. That there is also manifest error in this, to wit, that at the trial of said cause the plaintiffs, by their counsel, asked said witness, "if he knew to what extent the agency notification sheets of R. G. Dun & Co. were circulated in New York city;" whereupon the defendants, by their counsel, having first objected thereto because any proof showing or tending to show publication of said sheets to any persons except those speci-

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cally named in the plaintiffs' bill of particulars was incompetent, and also because it had not been first shown that the witness had any knowledge of the extent of such circulation, the said Justice permitted the same to be answered without requiring the witness to confine his answer to the persons mentioned in said bill of particulars, and without first requiring proof that the witness had knowledge of the extent of such circulation.

6. That there is also manifest error in this, to wit, 10  
that at the trial of said cause the plaintiffs, by their counsel, asked the witness, Joseph Patterson, "what reasons were given by the creditors of Emma Patterson for refusing to grant her credit?" Whereupon the defendants, by their counsel, having objected, because such question could only be answered by the persons who had refused to give credit, as they were the only persons who could explain their own motives, the said Justice permitted the same to be answered by said witness.

7. That there is also manifest error in this, to wit, 20  
that at the trial of said cause the plaintiffs, by their counsel, asked the witness, Joseph Patterson, as to "how much falling off there was in the customers at the plaintiffs' store after the alleged libelous publication?" Whereupon the defendants, by their counsel, having objected thereto as an attempt to prove special damage, when no special damage in respect to loss of custom had been alleged in the declaration, the said Justice permitted such question to be answered.

8. That there is also manifest error in this, to wit, 30  
that at the trial of said cause the plaintiffs, by their counsel, asked the witness, Henry E. Jepson, "whether he communicated its contents"—meaning the alleged libelous matter—"to the New York house of R. G. Dun & Co.?" Whereupon the witness having declined to answer the question upon the ground that he was interested in the business of R. G. Dun & Co., and that an answer to said question might tend to criminate him, the said Justice instructed the witness that he must 40

answer such question, and said question was answered, when by the law of the land the said Justice ought not to have given such instruction.

9. That there is also manifest error in this, to wit, that at the trial of said cause the plaintiffs, by their counsel, asked the said witness, "whether certain papers, entitled the Mercantile Agency Notification Sheet, R. G. Dun & Co., E. Russell & Co., bearing date Wednesday, November 5, 1884, were sent to all the subscribers of R. G. Dun & Co. who subscribe therefor?" Whereupon the defendants, by their counsel, having objected thereto, because the only evidence admissible upon the subject of the publishing of the alleged libelous matter must be confined to the publishing thereof to the persons whose names were mentioned in the plaintiffs' bill of particulars, the said Justice permitted the same to be answered, when by the law of the land he ought to have overruled the same.

10. That there is also manifest error in this, to wit, that at the trial of said cause the plaintiffs, by their counsel, having offered in evidence the sheet entitled "The Mercantile Agency Notification Sheet," of November 5, 1884, (Exhibits 1 and 2,) and the defendants having objected thereto, because, 1. There had been no proof of publication by the defendants or either of them. 2. Because it had not been shown that the sheet contained language regarding the plaintiff, Emma Patterson, which was libelous, *per se*. 3. Because the sheet ought not to be admitted in evidence until it had been first shown that it contained words which had the meaning placed upon them by the inuendo of the declaration. 4. Because the language of the sheet relating to the plaintiff, if it did relate to her, was in law a privileged communication. 5. Because no special damage had been alleged, either in the declaration or any amendment thereto, prior to the taking of the deposition of Emma Patterson, and no opportunity had been afforded to cross-examine her after the declaration had been amended in this respect, or to rebut the testimony of

other witnesses who had testified as to such special damage; whereupon the said Justice admitted said sheet in evidence, when by the law of the land he should have refused so to do.

11. That there is also manifest error in this, to wit, that at the trial of said cause, at the close of the evidence for the plaintiffs, counsel for the defendants having moved the Court for a judgment of nonsuit, because the evidence adduced in behalf of the plaintiffs was insufficient to establish a cause of action against the defendants, the said Justice refused to grant said nonsuit, when by the law of the land it was his duty to have granted the same 10

12. That there is also manifest error in this, to wit, that the said Justice in charging the jury, said "that it was not necessary to fix them (the defendants) with such liability (meaning a liability for publishing the alleged libel,) to prove that they were partners by any agreement between themselves, but if they permit themselves to be held out to the world as partners, they may be charged with liability, as such, both in contract and in tort;" whereas by the law of the land the said Justice should have charged that it was necessary for the plaintiffs to prove that the defendants were partners, by agreement between themselves, in order that they might be charged with liability in this cause. 20

13. That there is also manifest error in this, to wit, that said Justice in charging the jury, said "if a request were made, either expressed or implied, by Lisberger & Weiss, or by Simon & Co. for such communication, that is, matters relating to business standing of Emma Patterson as to the plaintiff, then, if they had no interest in the matter, the book or sheet sent to them, or either of them, affecting her credit, would not be privileged, if made without such request; then the communication voluntarily sent by them must be at their risk as to the harm that may be done thereby. I think it is enough to hold in this case, that the agency has the protection of privilege in every case where the subscriber has a direct 30 40

and personal interest in the person who is the subject matter of the inquiry, and that in all other cases they must stand as others on the truthfulness of their report and their protection under their contracts with subscribers, not to divulge the secrets of their business ;” whereas by the law of the land the said Justice should not have charged as he did charge in this respect, but should have said that the said communication was privileged if a request, express or implied, were made by

10 Lisberger & Weiss or Simon & Co., and that it was not incumbent upon a mercantile agency to ascertain whether its subscribers were interested in knowing about matters concerning which they have inquired ; and that when a subscriber to a mercantile agency asks that the publications of such agency be sent to him, and the agency, in good faith and without malice, sends the same, then, as between the agency and the subscriber such communications are privileged, if sent in pursuance of a contract like that which was proven to subsist between the concern of R. G. Dun & Co. and its subscribers.

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14. And that there is also manifest error in this, to wit, that the said Justice in charging the jury, said “ that, taking the words charged in this case, the printing that a person has put a mortgage upon her property, real or personal, is not, *per se*, a libel ; but when connected with proper innuendoes and proof showing that she is a trader having creditors to a large amount, with a small capital and stock of goods, not more than enough to pay all her debts at a forced sale, and requiring credit to continue

30 her business, and when the mortgage is of sufficient amount to impair the security of existing claims, then they are libelous, or may be libelous, so that the person aggrieved may recover both general and special damages, if the latter be charged with proper averment in the declaration ;” whereas, by the law of the land the said Justice should not have charged that general damages could, in such cases, be recovered.

15. And that there is also manifest error in this, to wit, that the said Justice, at the request of the plaintiffs,

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by their counsel, charged the jury "that, if in such case, general damages be alleged but not proved, the jury may still find special damages, and if special damages be alleged but not proved, the jury may still find general damages;" whereas, by the law of the land the said Justice should have refused so to charge, because special damages are alone recoverable where words are not actionable, *per se*.

16. And that there is also manifest error in this, to wit, that the said Justice, at the request of the plaintiffs, 10  
by their counsel, charged the jury "that if the jury find that the libelous words were printed and sent by the defendants, or by the firm of R. G. Dun & Co. to all their subscribers without regard to the interest of such subscribers in the persons reported them, no matter what may have been the relations between those subscribers and other persons not connected with them as members of their firm, and if the publication was afterwards disseminated by those other people, still the defendants 20  
are liable if it is proved that it resulted in injury to the plaintiffs;" whereas, by the law of the land the said Justice should have refused so to charge, because the defendants were not liable for the acts of the (so called) firm of R. G. Dun & Co., unless they were copartners therein, and further, because they were not liable for the acts of their subscribers in disseminating such printed matter.

17. And that there is also manifest error in this, to wit, that the said Justice, at the request of the plaintiffs, 30  
by their counsel, charged the jury "that if a firm print a paper containing libelous matter and distribute the same to their subscribers, and one or more copies of the paper are circulated by the subscribers and some in the hands of other parties not subscribers, such publications relate back to and become the act of the original publishers as between them and third parties, if it be an unprivileged communication;" whereas, by the law of the land the said Justice should have refused so to charge,

because by such charge the jury were instructed that the defendants were liable for the acts of others, who were not authorized by them to publish said paper to third parties.

18. And that there is also manifest error in this, to wit, that the said Justice refused to charge the jury when he was requested so to do by the defendants' counsel, "that if the jury believed from the evidence that the cause of injury to the plaintiffs' business, if there was any such injury, was the action of her creditors, Meyers, or Meyers, Goodman & Co., and the other creditors who have testified, and if the jury believe from the evidence of said Meyers that his firm, Meyers, Goodman & Co., and such other creditors knew that Emma Patterson had not given a chattel mortgage, as stated in the notification sheet, and did not believe she had done so, the verdict should be for the defendants, that is, if they acted against knowledge;" whereas, by the law of the land the said Justice ought to have so charged when requested so to do by the defendants' counsel.

19. And that there is also manifest error in this, to wit, that said Justice refused to charge the jury as he was requested by the defendants' counsel, "that if the jury believed that the defendants are not copartners with Robert G. Dun, their verdict must be in their favor, provided they are satisfied that the defendants did not publish the notification sheet, except in their connection with him as employes;" whereas, by the law of the land the said Justice ought to have so charged when requested so to do by the defendants' counsel.

20. That there is also manifest error in this, to wit, that the said Justice refused to charge the jury as he was requested to do by the defendants' counsel, "that the contract between the defendants and R. G. Dun in evidence in the cause, does not show any copartnership under the laws of New Jersey between the defendants, or between them or either of them and R. G. Dun;" whereas, by the law of the land the said Justice ought

to have so charged when requested so to do by the defendants' counsel.

21. That there is also manifest error in this, to wit, that the said Justice refused to charge the jury as he was requested by the defendants' counsel, "that there are no damages other than those caused by the withdrawal of the plaintiffs' credit by Meyers, Lyons, Oppenheimer, Brumer, and Eschelbacher, which can be considered by the jury;" whereas, by the law of the land the said Justice ought to have so charged when requested so to do by the defendants' counsel, as the plaintiffs' proof was limited to that extent by their bill of particulars. 10

22. That there is also manifest error in this, to wit, that the said Justice refused to charge the jury as he was requested by the defendants' counsel, "that the defendants are not liable for the acts of their subscribers in circulating the notification sheets, and if the plaintiffs have failed to prove that some subscriber or subscribers withdrew his or their credit theretofore extended to the plaintiff on account of such publication, the defendants are entitled to a verdict;" whereas, by the law of the land the said Justice ought to have so charged when requested so to do by the defendants' counsel. 20

23. That there is also manifest error in this, to wit, that the said Justice refused to charge the jury as he was requested by the defendants' counsel, "that if the words are not libelous in themselves, and the communication of the words by Lisberger and Weiss was without authority of the defendants, then the defendants are not liable in this action;" whereas, by the law of the land the said Justice ought to have so charged when requested so to do by the defendants' counsel. 30

24. That there is also manifest error in this, to wit, that by the record aforesaid, it appears that judgment in the plea aforesaid, was given for the plaintiffs, whereas, by the law of the land said judgment ought to have been given for the defendants. 40

Therefore, the said defendants pray that the said judgment, by reason of the aforesaid errors, and of other errors appearing on the record and proceedings aforesaid, be reversed, annulled and held for nothing; and that the said defendants may be restored to all things they have lost on occasion of the said judgment.

PHILEMON WOODRUFF,

*Attorney for and of Counsel  
with Plaintiffs in Error.*

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