THE LAW OF LITERATURE

REVIEWING

THE LAWS OF LITERARY PROPERTY IN MANUSCRIPTS; BOOKS, LECTURES, DRAMATIC AND MUSICAL COMPOSITIONS; WORKS OF ART, NEWSPAPERS, PERIODICALS, &C.; COPYRIGHT TRANSFERS, AND COPYRIGHT AND PIRACY; LIBEL AND CONTEMPT OF COURT BY LITERARY MATTER, ETC.

WITH AN APPENDIX OF THE AMERICAN, ENGLISH, FRENCH, AND GERMAN STATUTES OF COPYRIGHT

BY

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IN TWO VOLUMES

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TO

A · W · O

IN LOVE

AND

GRATITUDE.

PREFACE.

FOR thirty-eight years, since Mr. Curtis's scholarly volume, published in 1837, no textual work on the American law of copyright has made its appearance in the United States. And although, since then, the importance of the subject has grown —as it must continue to grow—commensurately and parallel with the growth and importance of literature and the multiplication of books, the department of Copyright does not, even to-day, make a large appearance in our Digests.

The reason why this is so, doubtless lies in the fact that comparatively few Copyright cases, in our courts, get beyond a hearing, in the first instance, at a special term or in chambers—they either proceeding at once therefrom to settlement by the parties themselves, or being abandoned by the pursuers. If the manager of a theater, for example, who has expended large sums to mount a dramatic production upon his stage, should be served—upon the threshold of its production—with a temporary injunction, and an order to show cause why such injunction should not be made final, he will hardly keep his properties unemployed and his actors idle, to carry the case to the Court of Appeals, or to Washington, before presenting his play. If he cannot raise the injunction

at special term, the next day, he must settle the difficulty the best way he can; and if he does raise it, the pursuit is generally withdrawn. So, likewise, the publisher of a book, whose first sale is interrupted, is generally very loath to abide the dignified and long-drawn leisure of the Law. As chamber and special term hearings, therefore, are reported but rarely, the great majority of these cases do not get into the volumes of reports, and thence into the Digests. Many of them do not even find their way into the newspapers. But all the more, instead of all the less, does this seem to demonstrate the importance of interests too vital for courts beyond, and which must be settled at first hand, by a single judge; and to prove that there is room for a work like the present.

I am aware that the style I have chosen for this inquiry is an innovation, upon this side of the Atlantic. In the preface to an English work, edited by me, some time ago, I ventured to remark that "there is a wide dissimilarity between the American and the English systems of legal text-writing. While the plan of the American writer has invariably been to consider, in his text, only principles and rules,—connecting them with the cases in which they have been enunciated by foot-note reference,—the English method is to give, in the body of the text, a sort of running history of the cases themselves, their dicta, rulings, and progress—not unfrequently, even, of the argument, objections, and strategy of counsel,—trusting to the detailed and discursive report itself, to develop the principles and rules for which he is seeking. Neither plan is without its excellences, nor quite without its faults. The American un-

doubtedly produces, from a literary point of view, the more rounded and finished essay. But the student is possibly in danger of being led along by the author's own reasoning or learning, or by his own ideas as to what the law is or ought to be. The English method, though prolix and inartificial, is, at all events, accurate and reliable, since the student is safe to find out, therefrom, exactly what the law is, and what the precedents which courts are likely to follow." At the risk, then, of being "prolix and inartificial," I have, in the following pages, followed the English plan. It is at least a question whether literary merit is any merit at all in a legal work—whether, even, it is not a positive demerit; at all events, if it be accurate and reliable, the lawyer and the student will pardon a lack of unity and style.

There is a vast temptation to the writer of a work upon Literary Property, to allow himself to be led aside by the fascination of the subject; to be dazzled by the great names that glow and sparkle under his pen. The first great case of copyright involved the proprietorship of the assigns of the poet Thompson in his own poems; in its discussion sat Lords Mansfield, De Grey, Aston, Willes, and Yates, and therein Lord Camden delivered his famous argument. Greater than Thompson—Milton, Johnson, Byron, Shelley, Southey, Walter Scott, and Dickens—have been litigants, either personally or through their representatives, in like causes. The History of Clarendon, and the Letters of Chesterfield in England, and—in our own country—the letters of Washington and the Commentaries of Story, have come before the courts for protection; while for the last and most generous encouragement which the British parlia-

ment ever extended to its authors, Wordsworth was a petitioner, and Talford a debater.

I have felt the temptation, and have so far yielded, that, in the pages which follow, much that is historical will be found commingled with the technical; but I have tried to remember that I was writing a practical book for a practical profession, and to limit myself to the usefulness of the subject.

A greater or less security in their literary property is now accorded to authors, by the laws of every civilized nation. Both in the United States and England, equity is now prompt to interfere in cases of infringement, while in France (and possibly elsewhere) piracy is a misdemeanor cognizable by the police, and the culprit who steals a poem or a drama, has his case attended to as briskly as his confrère who rifles a pocket; the consequence being, in that happy country, that authors—while they have fewer precedents in their favor than with us—have much more protection. It is remarkable that, of all these civilized nations, the United States is the only one which has not bestowed upon the author a proprietorship over his own productions for at least his own lifetime,—be that lifetime longer or shorter,—but has limited it, absolutely, to a certain term of years. The reason for this policy is not so evident. It is certainly difficult to see the justice of a measure which denies to one's old age the profits of the labor of his earlier years—which, in the noble words of Talford, "Gives a bounty to haste, and informs the laborious student—who would wear away his strength to complete some work which the world will not willingly let die—that the more of his life he devotes to its

perfection, the more limited shall be his interest in its fruits." Of a similar provision in the English law—one which, owing to his efforts, has long since disappeared—the sergeant continued: "It stops the progress of remuneration at the moment it is most needed; and when the benignity of nature would extract from her last calamity a means of support and comfort to the survivors—at the moment when his name is invested with the solemn interest of the grave—when his eccentricities or frailties excite a smile or a shrug no longer—when the last seal is set upon his earthly course, and his works assume their place among the classics of his country—your law declares that his works shall become your property, and you requite him by seizing the patrimony of his children." But the time of a wider appreciation and favor to authors is at hand. It is believed that the courts of the United States have gone further than those of any other country in securing to alien authors their common-law rights (such as they happened to be) in their own compositions. It is to be hoped she may yet—in her statutes—be as generous to her own.

I have expressed myself, in the second volume of this work, as unreservedly in favor of an International Copyright, and given some reasons why, as it seems to me, such a measure is demanded, not only by all justice—which scarcely anybody can be found to deny—but by all expediency, as well.

I am very far from wishing to be understood as saying that it is an expediency merely for the authors, or merely for the literature of the country. Years ago, Thomas Hood declared "that America, in the absence of an international Copyright, can never possess a native literature, has been

foretold by the second-sighted on either side of the Atlantic."* But that negative prophecy does not appear to be on its way to a fulfillment. It seems to me, rather, that—in a large sense—the interest of the consumers, of the readers—of the people—demand it, and that whatever is the interest of the people, must ultimately and triumphantly prevail. As it stands now, the public—the readers of Great Britain and the United States—are obliged, practically, to pay for the manufacture of a book twice before they can have the opportunity to read it once; a vast and unnecessary burden that is daily making itself felt and realized.

But it is perhaps superfluous to say more. As sure as it is that birds and bards will sing, that authors will write, and that readers will read, until the end of time, so sure is it that one day—come it soon or later—Statutes of Copyright will be as broad as the world.

May 1, 1875,

229 BROADWAY, NEW YORK.

* "Copy Right and Copy Wrong." Letter X. Hood's Choice Works (New York, 1856.) Vol. 1. p. 115. And see a similar remark quoted by Mr. Emerson in his "English Traits." "So long as you (America) deny us (England) copyright, we shall have the teaching of you."—p. 32.

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THE

LAW OF LITERATURE.

INTRODUCTORY.

INTELLECTUAL Property—that is, the property existing in Thought, Expression, Sentiment and Language,—in like manner with all other sorts and kinds of property,—must find its origin in Natural Law.

As to what is Natural Law, learned men have differed widely. Some have defined it to be the primal will of the Creator,[1] while others claim that it is nothing more than the tacit consent of mankind.[2] But as to its being the source of this right of property for which we are seeking, all appear to be finally agreed.

2. Property may be defined as anything which is not common to all mankind: which belongs to a less number of individuals than the whole human family, and which may be transmitted and set over at will by its owner or owners, to others, who would, in their turn, become its owners and possessors.

3. This property may exist in whatever is CAPABLE OF OCCUPATION; the surface of the globe, and everything upon it which it is possible to occupy, is, therefore, a

[1] 2 Kent Com. 320.

[2] Grotius Droit de la Guerre (ed. Basle, 1846), liv. 2, ch. 2, § 10, tom. 1. Puffendorf, i. 404; Vat. i. 1.

egitimate subject of property. That surface itself, consisting of solid earth, or rock, or mould, or shifting sands, may be divided up into parcels and become the property of individuals, together with such sheets or portions of water as are included in the boundaries thereof. But the ocean cannot be occupied. No boundaries other than its own can ever be given to it. No limits or marks of proprietorship can ever be fixed or impressed upon its surface. Neither are the air, or the light, or the warmth of the sun, capable of occupation (although the right to enjoy them by means of windows or apertures is often the subject of municipal or personal right or license, just as human life and liberty itself, is sometimes taken or restrained by the law of the land or the policy of States); and so the ocean, the air, the light, the warmth of the sun, can never be the subjects of property.

4. Up to this point, a definition of property has not been either difficult or obscure. When we encounter, however, a claim to a property in ideas, and sentiments, and expressions, clothed in language,—(which appears to be as much the common highway of the thoughts, as the ocean is the common highway of the commerce of nations),—it is necessary to pause and inquire whether that claim can be established under the rule that we have laid down. If it can be, then the right of Literary Property can be easily demonstrated. If it cannot be, then the right must fall.

"Occupancy," says Blackstone,[1] "is the taking possession of those things which before belonged to nobody. This is the true ground and foundation of all property, ... of holding those things in sever-

[1] Com. ii. 257.

alty, which by the law of nature, unqualified by that of society, were common to all mankind. But when once it was agreed that everything capable of ownership should have an owner, natural reason suggested that he who could first declare his intention of appropriating the thing to his own use, and—in consequence of such intention—actually took it into possession, should thereby gain the absolute property of it; according to that rule of the law of nations, recognized by the laws of Rome, *quod nullius est, id ratione naturali occupanti conceditur.*"[1] And, after proceeding to examine in detail the various kinds of title by occupancy, the great commentator arrives at the very species of property we are considering, and says:[2] "There is still another species of property which (if it subsists by the common law[3]), being grounded on labor and invention, is more properly reducible to the head of occupancy than any other; since the right of occupancy itself is supposed by Mr. Locke[4] and many others,[5] to be founded on the personal labor of the occupant. And this is the right

[1] Fl. xli. 1, 3. [2] Com. ii. 405.

[3] The doubt expressed by Blackstone, was in deference to the two great literary property discussions in the House of Lords and elsewhere, which at the time this lecture was written, agitated all England, embalmed in the two *causes celebres* of Millar *v.* Taylor and Donaldson *v.* Becket (to which we shall have occasion to make constant reference in these pages), and in the great learning and eminence of the judges therein concerned.

[4] On Govt. part 2, ch. 5. The labor of a man's body, and the work of his hands, we may say are properly his. Whatsoever, then, he removes out of the state that nature hath provided, and left in it, he hath mixed his labor with, and joined to it something that is his own, and thereby makes it his property. But see the force of this reasoning doubted by Christian, note to Blackstone, ii. p. 8.

[5] Bl. Com. ii. 8; Bl. Com. ii. 3–8, 258.

which an author may be supposed to have in his own original literary composition, so that no other person without his leave may publish or make profit of the copies. When a man, by the exertion of his rational powers, has produced an original work, he seems to have clearly a right to dispose of that identical work as he pleases, and any attempt to vary the disposition he has made of it, appears to be an invasion of that right."

What can be more emphatically a man's own than his own ideas? If anything is peculiarly and particularly his, it would seem that these must be. If there is anything in which others cannot, from the nature of things, share, would it not seem to be the creation of a man's own brain? "True," the answer to this might well be, "but to claim a property in anything, you have already stated that you must be able to set bounds to it; to occupy it, to set up distinguishable and proprietary marks. Now, ideas are not capable of visible possession. They have no visible corporeal surface upon which to erect landmarks and limits. Their existence is in the boundless mind of man. They are incapable of acquisition, possession, or enjoyment, save by mental apprehension and mental retention. And once communicated to others, how can you enforce, even if you had been able to subject them to, proprietary rights? How can you force those who receive them from you to forget them as fast as received? You may teach—you may force a man to remember. How will you teach or force him to forget?[1]

[1] When Simonicles offered to instruct Themistocles in an art to improve the memory: "I had rather," replied Themistocles, "be taught *how* to forget. Things I am most unwilling to remember, these I have no power to forget." Pl. 3.

To this, as we shall see further on, the rejoinder will most likely be, that as soon as the ideas are written down or printed in words, the words become the bounds, and the landmarks, and the warning to trespassers. If they are written upon a manuscript, the manuscript is the author's, and a property in him. If they are printed and published, the purchaser of a copy of the book, though he owns the corporeal thing which he has purchased, has no right to multiply copies of the ideas therein contained, to the injury of the author who wrote it.'

5. But conceding even to Blackstone's high authority, that ideas can be the subject of occupancy, a fresh difficulty arises. Admitting the right of a property in every individual in his own thoughts, while they continue and remain locked up in his own brain and in his own mind, does not the author, by imparting those ideas to his neighbors through the medium of the several forms of publication in his power, relinquish his own exclusive occupancy and give them the right (as he certainly does the means) to enter in and possess as tenants in common with himself? How can he expect, after he has induced them to read his sentiments in his book; to hear his opinions as he pronounces them from the rostrum, or to view his conceptions of beauty or of nature, as he spreads them upon canvas before their eyes, that he shall still be alone and single in the possession of his

[1] The questions as to the rights of owners of a manuscript as contradistinguised from the rights of the purchaser of a book, will be treated in their place, further on. It is only necessary to notice here, that while the purchaser of a manuscript is generally supposed to have the right to publish its contents, whether copyrighted or uncopyrighted, the purchaser of a published book if uncopyrighted, may print its contents, but if copyrighted he may not.

own sentiments, opinions, or conceptions? Has he not had his choice between abandoning them, and keeping them to himself? Is it consistent that a man should scatter coins among an eager and scrambling crowd, and at the same moment proclaim, with uplifted voice, that they are his, and a warning to those who touch them? It is the answer to these and the like questions that has been attempted in the following pages.

Without going into the nice and somewhat finical questions [1] suggested by Lord Camden in his famous argument against literary property: without asking whether if, when published, a purchaser can lend his

[1] "When published, can the purchaser lend his book to his friend? Can he let it out for hire, as the circulating libraries do? Can he enter it as common stock in a literary club, as is done in the country? May he transcribe it for charity? Then what part of the work is exempt from this desultory claim? Does it lie in the sentiments, the language and style, or the paper? If in the sentiments or language, no one can translate or abridge them. Locke's Essay might, perhaps, be put into other expressions, or newly methodized, and all the original system and ideas be retained. These questions show how the argument counteracts itself, how the subject of it shifts, and becomes public in one sense, and private in another; and they are all new to the common law, which leaves us perfectly in the dark about their solution."

"And how are the judges, without a rule or guide, to determine them when they arise, whose books and studies afford no more light upon the subject than the common understandings of the parties themselves? What diversity of judgments! what confusion in opinion must they fall into! without a trace or line of law to direct their determination! What a code of law yet remains for their ingenuity to furnish, and could they all agree in it, it would not be law at last, but legislation.

"But it is said that it would be contrary to the ideas of private justice, moral fitness, and public convenience, not to adopt this new system. But who has a right to decide these new cases, if there is no other rule to measure by but moral fitness and equitable right? Not the judges of the common

book to a friend,—can he let it out for hire? can he transcribe it for charity? is there any implied contract between the person who sells, and the person

law, I am sure. Their business is to tell the suitor how the law stands—not how it ought to be; otherwise each judge would have a distinct tribunal in his own breast, the decisions of which would be irregular and uncertain. and various as the minds and tempers of mankind. As it is, we find they do not always agree; but what would it be where the rule of right would always be the private opinion of the judge, as to the moral fitness and convenience of the claim? Caprice, self-interest, vanity, would by turns hold the scale of justice, and the law of property be indeed most vague and arbitrary. That excellent judge, Lord Chief Justice Lee, used always to ask the counsel, after his argument was over, 'Have you any case?' I hope judges will always copy the example, and never pretend to decide upon a claim of property without attending to the old black letter of our law, without founding their judgment upon some solid written authority, preserved in their books, or in judicial records. In this case I know there is none such to be produced."—17 Parl. Hist. 998, 999.

"No man has a right to give an author's thoughts to the world, or to propagate their publication beyond the point to which he has given consent. His reputation is concerned, and he has a right to defend it. This is natural justice, and dictated by reason; consequently, as *Lex est ratio summa, quæ jubet quæ sunt utilia et necessaria et contraria prohibit* (Co. Lit. 319, 6; Jenk. Cent. 117), we may obviously assume that, though copyright as a species of property, was, in a strictly accurate sense, known to the common-law, yet, "the novelty of the question did not bar it of the common-law remedy and protection" (4 Burr. 2345). *Nihil quod est contra rationem est licitum* (Co. Lit. 97, 6). *Son le ley donc chose la ces donc remedie a venir a ceo* (2 Roll. R. 17). *In nova casu, novum remedium apponendum est* (2 Inst. 3). Distinct properties were not adjusted at the same time and by one single act, but by successive degrecs, according as either the condition of things or the number and genius of men seemed to require. When once established, the same law which pointed out and settled the line of demarkation commands the observance of everything that may be conductive to the end for which these various boundaries were erected. "*Nequaquam antem omnes res*," says Puffendorf (De Jure nat. et gen., lib. iv., civ., s. 14, s. 6), "*statim ab initio humani generis, aut, ubique, locorum ex*

who buys a printed copy of a book? etc.,—it is apprehended that a clue to the whole difficulty will be found in the simple consideration — founded in the same natural law, or, at least, in (what we have seen has been considered by some to be the same thing) the common consent of mankind— that property is support, income, means of livelihood; that by a man's property he must subsist, and that from it he must produce his living, and the living of those for whom the law has decreed he must provide.

6. For property, again, is capital. One man's capital may be in a certain number of acres or feet of the earth's surface. Another's may be in houses, or ships, or shares of stock, or money. A blacksmith's capital may consist in the strength of his arm; a dancer's, in the lightness of his limbs and feet; a contortionist's, in the suppleness of his joints and frame; a scrivener's, in the nimbleness of his fingers; a musician's, in the acuteness of his ear. Would it not be unjust and a hardship to decree that because the capital of still another citizen was in brains, that therefore he should be deprived of the living which is to be earned by all of these?

Lord Camden, indeed, in the argument [1] to which

definito aliquo præcepto juris naturalis debuerunt proprietatem subire; sed hæc est introducta, prout par mortalium id requirere visa fuit."—Copinger on Copyright, p. 3.

[1] Delivered in the House of Lords, in answer to Lord Mansfield, in Millar *v.* Taylor: "If, then, there be no foundation of right for this perpetuity by the positive laws of the land, it will, I believe, find as little claim to encouragement, upon public principles of sound policy or good sense. If there be anything in the world common to all mankind, science and learning are, in their nature, *publici juris*, and they ought to be as free and general as air or water. They forget their Creator, as well as their fellow-creatures, who wish to monopolize his noblest gifts and greatest benefits Why did we enter into society at all but to enlighten one another's

allusion has been made, disclaimed, with aristocratic bitterness, the idea that any one worthy to write at all, should write for bread. "Glory," he exclaimed, minds, and improve our faculties for the common welfare of the species? Those great men, those favored mortals, those sublime spirits, who share that ray of divinity which we call genius, are intrusted by Providenee with the delegated power of imparting to their fellow-creatures that instruction which Heaven meant for universal benefit; they must not be niggards to the world, or hoard up for themselves the common stock. We know what was the punishment of him who hid his talent, and Providence has taken care that there shall not be wanting the noblest motives and incentives for men of genius to communicate to the world those truths and discoveries which are nothing if uncommunicated. Knowledge has no value or use for the solitary owner; to be enjoyed, it must be communicated. '*Scire tuum nihil est, nisi te scire hoc sciat alter.*' Glory is the reward of science, and those who deserve it scorn all meaner views. I speak not of the scribblers for bread, who tease the press with their wretched productions; fourteen years is too long a privilege for their perishable trash. It was not for gain, that Bacon, Newton, Milton, Locke instructed and delighted the world; it would be unworthy such men to traffic with a dirty bookseller for so much a sheet of a letter-press. When the bookseller offered Milton five pounds for his Paradise Lost, he did not reject it and commit his poem to the flames, nor did he accept the miserable pittance as the reward of his labor. He knew that the real price of his work was immortality, and that posterity would pay it. Some authors are as careless about profit as others are rapacious of it; and what a situation would the public be in with regard to literature, if there were no means of compelling a second impression of a useful work to be put forth, or wait till a wife or children are to be provided for by the sale of an edition! All our learning will be locked up in the hands of the Tonsons and the Lintons of the age, who will set what price upon it their avarice chooses to demand, till the public become as much their slaves, as their own hackney compilers are."—17 Parl. Hist. 999, 1000.

Lord Camden, however, seems to have been wrong in his facts. It seems that it was only for an *immediate* payment of five pounds (in those days not such a very inconsiderable sum, either), that Milton sold his copy to Samuel Simmons in 1667. The agreement with Simmons besides entitled him to

"is the reward of science, and those who deserve it, scorn all meaner views." But, unfortunately for Lord Camden, among the class whom he designated as

a payment of five pounds more when thirteen hundred copies should be sold of the first edition; of the like sum after the same number of the second edition; and of another five pounds after the same sale of the third edition. The number of each edition was not to exceed fifteen hundred copies. In two years, Milton appears to have signed a receipt on the 26th of April, 1669, for the second payment. The second edition was not printed till 1674, and Milton did not live to receive his third payment. The third edition was published in 1678; and his widow agreed with Simmons to receive eight pounds for her right, as appears by her receipt, dated December 21, 1680; and she gave him a general release, April 29, 1681. Simmons sold the copyright to one Brabason Aylner for twenty-five pounds, and Aylner sold it in 1633 to the publisher Johnson, who appears to have excited his Lordship's displeasure (Todd's Life of Milton, 193–195. London, 1826.). In commenting on these facts, Mr. Curtis, in his valuable work on Copyright (Boston, 1847, p. 63), remarks with great propriety, "It thus appears that the poet was very careful to assert his full right of property, as he and others understood it at the time, and to make it available to his family. The amount which he chose to receive, compared with the real value of the poem, measured by a modern standard, seems very trifling. But as such rights were estimated then, and considering that the poem gained slowly upon the attention of his own age, it was not a grossly inadequate price. When it had been published fourteen years and upwards, the copyright between one bookseller and another brought only twenty-five pounds. Yet its value could not have been affected by any apprehension at the time of this sale that it was not protected by common law. Such a notion had not then arisen: and long after, viz., in 1739, Lord Hardwicke protected by injunction, the title of Tonson, derived under the assignment made by the poet in 1667. Doubtless Milton did not write his grand poem for money; but we have seen that he supposed the right of exclusive property in authors was acknowledged by the law of his country, and he took pains practically to assert the right in his own case. It seems to me by no means a wild conjecture that he did this for the sake of example, as well as in order to preserve his reputation, by keeping the control of his own poem."

"scribblers for bread," the greatest names in literature, and the profoundest benefactors of their race, have been numbered. The literature of the world has been written in garrets, no doubt; but to a noble mind, the poverty of a man of letters would seem an argument the more, instead of an argument the less, for protecting him in the possession of his own, however small and meager. Lord Camden appears to have been one of those who would have given more abundantly to him that had already, and from him that had not, have taken away even that he had![1]

7. Assuming, then, that the author's means of support is in the employment of the capital which he possesses in his own brain, we purpose devoting the following pages to a consideration of the means by which the law will permit him to make that capital available for the purpose. For it is the policy of the law to encourage every man to provide his own livelihood, and not to become a burden upon his neighbors, or upon the State.[2]

[1] If any author does write "for glory," it probably is the writer of a legal text book, since, it seems, that a law writer is not to be considered an authority in his own lifetime. (Reg. v. Son, 2 Den. C. C. 475; 6 Cox's. C. C. 1; 16 Jur. 746; 14 Eng. Law & Eq. R. 556; 1 Ben. & H. Lead Cas. 400; 3 Bing. 259; Reg. v. Drury, 3 Cox's C. C. 1st Rep. Eng. Com. Law Commissioners.) So, unless he write for purely literary purposes, he may be supposed to speak to posterity alone!

[2] General convenience is a principle of legal judgment. (4 Durn. & E. 243, 245; 1 Taunt. 366; 1 Eden, 230; 1 W. Bl. 166; 3 Barn. & Cr. 156.) *Non solœm quod licet, sed quid est conveniens est considerandum.* (Co. Lit. 66o.) Convenience may be used, "not indeed so as to control the law, but as a guide in doubtful cases, and upon untrodden ground." (King v. St. Catherine's Hall, 4 Durn. & E. 233. Sadgrove v. Kirby, 6 Id. 483.) *Argumentum ab in convenienti plurimum valet in lege.* (Co. Lit. 66a.) The argument of inconvenience is, under

8. The right of property is a right dual in its nature. It is the right of the owner of possessions—first, to use and enjoy the thing possessed, unrestrictedly and indefinitely (subject only to the maxim *sic utere*[2]), and secondly, to prevent and exclude others from the use of it without his license;[3] and this dual right continues in the owner, until he shall voluntarily alienate and part with his possession.

The possessor of literary property[4] enjoys this two-fold right in common with the possessor of each and every other sort of property. Nor will the law attempt any discrimination between his case, and the case of any other owner of chattels. It does, indeed —as seems necessary from the peculiar nature of the thing to be protected—ordain distinct and particular methods to be observed in securing it; but the right

many circumstances, allowed to avail to this extent, that the law will sooner suffer a private mischief than a public inconvenience. *Lex cetius tolerare vælt privatum damnum quam publicum malum.* (Co. Lit. 152, c., and see Ram's Science of Legal Judgment, pp. 111–117.)

[1] Traites de Legislation (Dumont), 95.

[2] *Sic utere tuo ut alienum non lædas* (9 Rep. 59; Broom. Log. Max. 328). See, however, this maxim doubted in Bonomi v. Backhouse (27 L. J., N. S.; 388 Q. B).

[3] Austin Jur. iii. 19.

[4] "There is still another species of property which (if it subsists by the common law), being grounded on labor and invention, is more properly reducible to the head of occupancy than any other; since the right of occupancy itself is supposed by Mr. Locke (on Govt., part 2, ch. 5) to be founded on the personal labor of the occupant. And this is the right which an author may be supposed to have in his own original literary composition; so that no other person, without his leave, may publish or make profit out of the copies. When a man, by the exertion of his rational powers, has produced an original work, he seems to have clearly a right to dispose of that identical work as he pleases, and any attempt to vary the disposition he has made of it, appears to be an invasion of that right."—1 Black. Com. p. 405.

to own and to dispose of literary property for value, seems never to have been doubted or denied.

9. The first recorded sale of intellectual property was by Homer, who delivered his Iliad at feasts and celebrations, for his own support; receiving, probably, in those early days, not money, but food and presents.

This right of authors to the profit arising from the sale of their original labor, is of frequent mention by the classic writers. Juvenal, lamenting at the same time the impecuniosity of his craft, and the non-lucrative character of literary fame, alludes to it:

"Sed, quum fregit subsellia versu
Esurit, intactum Paridi; Nisi vendat Agave."[1]

So Martial,

"Sunt quidam, qui me dicunt non esse Poetam
Sed, que me vendit, bibliopola putat."[2]

So also,

"Constabit nummis quatuor emta tibi
Quatuor est nimium; poterit constare duobus
Et faciet lucrum bibliopola Tryphon."[3]

And again,

"Exigis, ut donem nostros tibi, Quincte, libellos
Non habeo, sed habet bibliopola Tryphon.
Æs dabo pro nugis, et emam tua carmina sanus?
Non, inquis, faciam tam fatue: nec ego!"[4]

[1] Juvenal, Sat. vii. 86. "But, while the very benches groan under the applause with which his verses are received, he will starve unless he sells to Paris his as yet unpublished Agave."

[2] Martial, Epig. xiv. 194 [192 in Ed. Paris, 1754, and see Id. lib. i. 117 (118)]. "There are some who say that I am not a poet; but the bookseller who sells me, thinks I am."

[3] Martial, Epig. xiii. 3. "The whole multitude of presents contained in this little book will cost you, if you purchase it, four small coins. If four is too much, perhaps you may get it for two; and the bookseller, Trypho, will even then make a profit."

[4] Martial, Epig. iv. 72. "You beg me, Quintus, to present

But the songs of Homer were written only in his memory; while those published works to which Martial and Juvenal allude so much later, were only themselves neatly-copied manuscripts, written upon one side[1] of slips of parchment, and wound upon smooth sticks for preservation.

While literary matter was preserved by such methods as these, copyright acts were unnecessary. It was only when the invention of printing made a multiplication of copies of the author's work practicable and profitable, that statutory forms and observances became necessary. Such statutes coming to aid the unwritten law, in protecting—not a peculiar right—but a peculiar kind of thing possessed.

Literary property is a property in ideas; and the sole right of their author to their use and enjoyment, it was the intent and spirit of the Roman Law,[2] as well as it is of the common and statute law, to recognize not only, but to make absolute and secure.

10. "*Si in chartis membranisse tuis carmen vel historiam, vel orationem Titius scripserit, hujus corporis non Titius sed tu dominus esse videris*," said the Institutes,[2] and ever since, all arguments in support of the rights of learned men in their works, have been heard, as Lord Kenyon said they always must be heard, "with great favor by men of liberal minds."

To make the laws of recognition of literary prop-

you my works. I have not a copy; but the bookseller, Trypho, has. Am I going to give money for trifles, and buy your verses while in my sober senses? I shall not do anything so ridiculous. Nor shall I."

[1] Hor. Sat. i. 10, 72.

[2] Inst. 2, 1 . . And so by decreeing *to whom* sentiments should belong, the Institutes recognized a property in such sentiments. 27 I. R. 627.

erty available, then, it becomes necessary, from the nature of things, that these ideas should be put into some tangible and material form.[1]

The law can not deal with purely invisible matters. It can enforce, indeed, the subject's right to walk in the public streets, or over the King's highway; but only inasmuch as—though the franchise is immaterial—the street and the highway are material and tangible, so that the law can exercise its jurisdiction over them *in rem*, if necessary, in enforcing that franchise. And so, when an author's ideas are written down upon a substantial substance, or a visible, tangible surface, the law will, from that instant, recognize and protect them, and whether the idea so written down be in the form of a manuscript, a drawing, a book, a plan, or a picture, it will equally decree that its author and originator shall thenceforth deal with it as he pleases, to the exclusion of all others, until he voluntarily parts with his title so to do.

11. It seems, on the other hand, that the law will make no effort to take cognizance of any ownership in ideas not written down, or otherwise embodied in material form.[2] Were the blind father of poetry wandering in our streets to-day, chanting his divine songs,

[1] It is a well known and established maxim, which I apprehend holds as true now as it did two thousand years ago, that nothing can be the object of property which has not a corporeal existence. *Per* YATES, J., in Millar v. Taylor, 4 Burr. 2631.

[2] Among the many intricate and interesting questions which a student of the law of literature can foresee in the future dealing of courts therewith, is the right—if any—of an *ex tempore* speaker (for instance) to restrain the publication of his efforts. Such protection would be, indeed, but a step in advance of the present position of courts, which have latterly, as will been further on in these pages, gone to great lengths to protect authors in their properties.

the law could not secure any by-stander who had listened to them, from chanting them over again himself, for hire. Nay, more, it has been held that the law will not protect ideas or sentiments, even after they have once been written down, from being carried and conveyed—so that they be not carried and conveyed in some material form—to the use of others not their proprietors. Thus, it has been said that the law will not interfere to prevent an author's ideas from being transported in the memory of one who has heard them repeated; should their author, or another, have announced or repeated them in conversation or by natural speech.[1] It is not that the right of the individual to his own thoughts or conceptions is not the same in one case as in the other: the difference would appear to arise solely from the impossibility of protection, for the law is a practical science, and recognizes no right which it cannot enforce or protect. For it is one of its maxims that *ubi jus ubi remedium.*[2]

12. The twofold right of an author to his literary property,[3] consisting, 1. in his right to publish, and 2. in his right to enjoy, we have said is the same as his right to any other possible possession. There is, however, one difference; from grounds of public policy, which is the supremest law, it would appear that the right to enjoy has been limited by the statute as to duration and time.[4]

[1] Coleman v. Wathen, 5 T. R. 245. Wallack v. Williams, Sp. T. N. Y. Sup. Court, 1867 (unreported, but see *post* chapter on Dramatic Copyright); Palmer v. De Witt, 7 Amer. 480; 47 N. Y. 532.

[2] Broom. Leg. Max. 180.

[3] Copyright is not of a simple, but a complex nature, involving two conditions: one of publication, the other of exclusion. Prince Albert v. Strange, 2 DeG. & Sm. 674.

[4] *Vide* chapter on Copyright. Subject to certain copy-

For it would seem that, just as the owner of lands and houses pays to the state a certain percentage of their value, as his contribution to the wealth and power of the government whose protection he enjoys; so is it but fitting that after the author shall have enriched himself from the store of his own culture and thought, that culture and thought should pass into the general fund of the culture of the commonwealth and enrich the stores of art and learning of his mother land, to which, as the Greek poet said, he owes the whole honor of his rearing.[1]

For the writings of an author belong to the history of his race—to the history of the thought and culture and speculation of his country; and even though his own self-love or vanity might lead him to suppress what to his maturer judgment appears crude or feeble, or though time or circumstance may have led him to alter his views and opinions,[2] neither his contemporaries nor posterity will be interested other than in his work as a part of those common intellectual stores which they have inherited as citizens of the same soil.

right, deemed sufficient to encourage genius and learning, a published book is the heritage of the public, and can not be taken from them by the author himself. Letters on Literary Copyright, Hotten, p. 114.

[1] Euripides.

"Glory is the reward of science, and those who deserve it scorn all meaner views. . . . It was not for gain that Bacon, Newton, Milton, and Locke instructed and delighted the world. When the bookseller offered Milton five pounds for his Paradise Lost, he did not reject it and commit his poem to the flames, nor did he accept the miserable pittance as the reward of his labor; he knew that the real price of his work was immortality, and that posterity would pay it."—Lord Camden's Argument against Literary Property.

[2] See the case of Southey v. Sherwood, 2 Meriv. 434, where the poet sought to restrain the publication of one of his

13. In the examination of this right to literary property as affected or controlled by this public policy of limitation, it appears convenient to inquire first, in what and in whom the ownership of literary matter may exist at all, and, having settled that, to proceed to observe the simple division of the subject into—

I. Property in literary composition before publication; and

II. Property in literary composition after publication.

With the single exception which obtains in the case of literary productions whose sole value would seem to arise from the power of their author to prevent their appearance in print,—(as, for instance, lectures, plays, songs, &c.),—it will be found that the right to such property before and up to publication, mainly exists by common law; and that, upon and after publication there arises by virtue of statute, a new

earliest manuscripts upon the ground that his own opinions and tastes had changed since preparing it. And see Mr. Hotten's fourth letter to Earl Stanhope, "Lord Macauley and the Pirates," in which he concludes: "Lord Eldon, for example, in the case of Gee v. Pritchard, 'repudiated, and that most distinctly, any notion of interference by the court of chancery with a publication, simply because it might wound feelings,' and as Mr. Phillips says (Law of Copyright, p. 36): 'It seems abundantly clear that except upon the ground of property or of breach of contract or trust, an English court of law or equity will not give relief in the case of an unauthorized publication.' The reason of this, of course, is, that private feelings, however commendable in individuals, ought not to be permitted to interfere with public rights. With so many motives for suppression and modification of by-gone speeches, as every active statesman must experience in later years, it is indeed intelligible enough why so few of such publications are issued. It might even be argued that the author of such speeches is himself the worst person to be allowed to revise them, for the reason that the motives for tampering with their historical truth and accuracy are presumptively stronger in him than in any other person."

form of right, which, while neither extinguishing nor impairing the right *in rem* of the author in the unpublished book or manuscript, operates, when invoked, to protect his title in the sentiments, ideas, and expressions which they contain, in their circulation beyond his manual reach, after they have been given to the world.

The right by statute is called COPYRIGHT.

14. Statutes of copyright do not grant monopolies; they are only protectory legislation against trespass on the rights of authors. "Not that," as a layman[1] has well said, "writers are a more important body than many others, but because it gives the state more trouble to keep thieves off their productions than off those of other skilled laborers; and also because it

[1] It was held, formerly, in Millar v. Taylor (in R. B. Pasch, 1759), that an exclusive and permanent copyright, in authors, existed by the common law; but afterwards, in Donaldson v. Becket (before the House of Lords, 22d Feb., 1774), it was held to exist only by statute and during the statutory period (1 Bl. Com. 405, *vid.* Jeffreys v. Boosey, 44 L. Cas. 815; 3 C. L. R. 625; 1 Jur. N. S. 615; 24 L. J. Exch. 81). The right and property of an author or a composer of any work, whether of literature, art, or science, in such work, unpublished or kept for his private use or pleasure, entitle him to withhold the same altogether, or so far as he may please, from the knowledge of others, and the court of chancery will interfere to prevent the invasion of this right by the publication of a catalogue containing a description of such work (Prince Albert v. Strange, 1 Mac. & I. 25; 1 H. & S. 1; 13 Jur. 109; 18 L. J. Chanc. 120; *vid.* also, Broom. Leg. Max. 326).

The property of an author in an unpublished work exists independently of the statute (Southey v. Sherwood, 2 Mer. 435; S. P. Tonson v. Collins, 1 W. Bl. 301; Palmer v. De Witt, 7 Amer. 480; 47 N. Y. 532).

The right to own his (an author's) property is from common law; the right to multiply copies is conferred by statute. . . . The right of property in literary matter has never been and never can be impaired by the passage of copyright laws (Palmer v. DeWitt, 9 Amer. 480; 47 N. Y. 532).

needs a superior intelligence to see that ideas and woven words can be made property, and that they must be, or else their authors outlawed, degraded, and starved, and the community suffer in the end."[1]

[1] Mr. Charles Reade—"The Eighth Commandment," p. 7.

BOOK I.

IN WHAT AND IN WHOM PROPERTY IN LITERARY COMPOSITION MAY EXIST.

CHAPTER I.

OF INNOCENCE.

15. The great exception which arises to this right of property which we have been considering, is that it will not be protected by law, in things not innocent in their nature.

It is a cardinal principle of the common law that *nihil quod est inconveniens est licitum*,[1] or, as Lord Truro stated it, "No subject can lawfully do that which has a tendency to be injurious to the public good, which may be termed, as it sometimes has been, 'the policy of the law,'"[2] and therefore the law, ever solicitous for the moral as well as the physical safety of its subjects, will refuse its protection to a vicious, immoral, or otherwise harmful publication.

16. It seems particularly fitting that the author

[1] Co. Lit. 66 *a*; 97, 178 *a*; 258, 6; Broom Leg. Max. 328. This doctrine certainly needs some qualification, and a qualification, perhaps, receives from that learned writer (Coke) when he says: "*Quod est inconveniens non permissum est in lege.* An argument *ab inconvenienti* is forcible in law. *Argumentum ab inconvenienti est validum in lege, quia lex non permittet aliquod inconveniens.*" Id.; and see Ram's Science of Legal Judgment, Am. ed., p. 114, *ante*, p. 11, note 2.

[2] Egerton v. Brownlow (4 H. L. Cas. 196).

should regard with careful circumspection this policy and doctrine of the law. On its part that law has given him the power of speaking to an audience bounded only by the limits of the language itself; and, at the same time, of retaining his hold upon the words and thoughts which have floated so far beyond him. It asks on his part, in return, that he use not this vast power and influence to the injury and harm of his fellow-citizens.

By common law, then, there can be no literary property in compositions which are not innocent in their nature, and the first test, to be applied to the literary or scientific matter in inquiring whether or not it can be the subject of ownership is, is it innocent?

17. The discrimination between lawful and unlawful publications in respect to innocence, has never been made a statutory one. None of the English or American copyright statutes expressly enact anything of the sort, or make any allusion whatever to the moral character of the subject-matter of a book. But over and above them the doctrine of public policy and of common law prevails; and the courts of the land have power over works injurious or dangerous to the public good, after their copyright, as well as before; over the registered and copyrighted volume, as well as over the written manuscript. And this is one case, at least, in which statutes have not interfered with the conditions of literary ownership at common law.[1]

[1] The element of innocence is peculiar to common-law countries. Its consideration does not enter into the copyright jurisprudence of France. All works in that country are equal before the law, without reference to their character (Renouard Droits des Auteurs, tom. 2, p. 94). And yet, in no country is the censorship of the press so watchful and exacting, and nowhere does the punishment for seditious or *quasi* seditious utterance in print meet such swift and rigorous punishment as in France.

This doctrine of innocence is mainly a negative one, however, and its enforcement by courts will be mainly in the negative form of a refusal to recognize, and not of an absolute sequestration or condemnation of the improper composition. In the case, as we shall presently see, of works so bestial and obscene that there can be no possible doubt in the mind of a decent person as to their disgusting nature, the police regulation of the community will itself take cognizance to suppress and destroy; but such proceedings are statutory, and will not detain us here. Such matter cannot well be literary, and therefore cannot claim treatment in these pages.

18. Owing to this negative nature of its supervision, it may, and doubtless often does happen, that Equity stands by with folded hands and silently regards the publication of injurious and non-innocent matter, mischievous in its tendencies and dangerous to the public morals and the public peace. So, too, a man might build a nuisance upon his land, or circulate representations or statements which might induce two of his neighbors to quarrel. In either case the law might be blind and silent as to the irregularity from the necessity of the case, or the impossibility of interference, or in pursuance of a policy above the individual. But it would be very rash and unsafe to conclude from its silence that it would interfere positively to protect the wrong-doer in his wrong.

The effect of the attitude of courts of equity to matters of this nature is to throw the burden of proof—where the burden ought always to be, in cases of denial of any right of property presumably established by law—upon the party intruding; in this case, upon the party defending the piracy or denying his liability for the piracy of a composition. It

is for him to establish clearly that, notwithstanding a *prima facie* title by copyright in the complainant, there is no title in him, in reality, by reason of the dangerous character or tendencies of the book.

"The soundness of this general principle," says Mr. Justice STORY,[1] can hardly admit of question. The chief embarrassment and difficulty lie in the application of it to particular cases. If a court of equity, under color of its general authority, is to enter upon all the moral, theological, metaphysical, and political inquiries which in the past times have given rise to so many controversies, and in the future may well be supposed to provoke many heated discussions; and if it is to decide dogmatically upon the character and bearing of such discussions, and the rights of authors growing out of them; it is obvious that an absolute power is conferred over the subject of literary property, which may sap the very foundations on which it rests; and retard, if not entirely suppress, the means of arriving at physical as well as at metaphysical truths. Thus, for example, a judge who should happen to believe that the immateriality of the soul, as well as its immortality, was a doctrine clearly revealed in the scriptures (a point upon which very learned and pious minds have been greatly divided), would deem any work anti-christian which should profess to deny that point, and would refuse an injunction to protect it. So, while a judge who should be a Trinitarian, might most conscientiously decide against granting an injunction in favor of our author, enforcing Unitarian views, while another judge of opposite opinions might not hesitate to grant it."

Great care is, therefore, to be observed in the application of this rule of the law. "In equity," says

[1] 2 Eq. Jur. § 936, n. 2.

Curtis,[1] "The sounder rule would be to refuse no injunction when the book is not illegal 'upon the face of it.'" "And we think that both law and equity in this country would require the mischievous and harmful character of a book to be proved with unmistakable clearness, before they would refuse to interfere in cases of piracy or infringement. The burden of such proof will always be upon the infringer, and he cannot be relieved of it by any disposition on the part of the court to apply its own private opinions, doctrines, beliefs, or standards, to the publication before it." *Prima facie*, the copyright confers title, and the burden is on the other side to show clearly that, notwithstanding the copy, there is an intrinsic defect in the title.[2]

19. It is submitted, however, that this principle is to be applied only to published works. An immoral or dangerous manuscript in the hands of its author is not an instrument of evil to the state, and dangerous to its morals or its peace,[3] and its character cannot be pleaded as against the right of its owner to be protected in its possession. Where the famous Dr. Priestly brought an action for the loss of certain manuscripts, by the riotous proceedings of a mob at Birmingham, although it was alleged (but not proved) that the contents of these manuscripts were injurious to the government of the state, the court appears to have virtually held that the plaintiff was seeking damages only for what might have been a source of

[1] Curtis on Copyright, p. 165.

[2] Id., p. 166. And generally upon this subject see Am. Quarterly Review, April 1822; 6 Petersdorff's Abridg. 560, 561.

[3] Curtis on Copyright, p. 160. Southey v. Sherwood, 2 Meriv. 434. And see Dr. Priestly's Case, cited in Wolcott v. Walker, 7 Ves. 1, and Shortt. L. L. p. 4.

profit to him, like any other property. However, there is a difficulty in this case which the traditional reports do not help us in solving. It would seem that the owner of matter libellous to an individual, at least, will only be protected in his ownership by law, to the extent in which the matter contains innocent ingredients. So in the case where an artist exhibited to the public, for money, a picture, called "Beauty and the Beast," but which appeared to be a scandalous libel upon a gentleman and his wife, the defendant having destroyed the picture by cutting it in pieces, and plaintiff having brought suit thereupon for damages, Lord Ellenborough instructed the jury to award the plaintiff merely the value of the canvas and paint of the picture, and to disregard any other value which it might possess.[1]

20. Any public libel is a seditious publication, and, therefore, not innocent, and not entitled to the protection of courts. So a libel upon public justice, said Lord Ellenborough in Hine v. Dale.[2] "If the

[1] Wolcott Du Bost v. Beresford, 2 Camp. 511.

[2] Hine v. Dale, 2 Camp. 27 (note), was an action for pirating the words of a song called "Abraham Newland," published on a single sheet of paper. It appeared that the song, though pretending to be a panegyric upon money, was in reality a libel upon the administration of British justice, and its object and tendency, not to satirize folly, but to excite the people against the law, as was supposed to be apparent from a single verse:

"The world is inclined
To think justice blind;
Yet what of all that,
She will blink like a bat,
At the sight of friend Abraham Newland.
Oh, Abraham Newland, magical Abraham Newland!
Though justice 'tis known,
Can see through a stone,
She can't see through Abraham Newland!"

composition appeared upon the face of it to be a libel, so gross as to affect the public morals, I should advise the jury to give no damages. I know the court of chancery on such an occasion would grant no injunction.[1]

21. The rule in England is uniform, that the law will not class as innocent, works "contrary to religion and truth,"[2] and a court of equity refused an injunction to restrain infringement of the copyright of a work as to which it appeared doubtful as to whether it did or did "not intend to impugn the doctrine of the Scriptures."[3] But it does not seem probable that courts in the United States would carry the doctrine to this extent.

The test as to whether or not a work is innocent, was held by Lord Eldon to be "the possibility of making it the foundation of a successful action at law."[4] "If the doctrine," said his lordship, "of Chief Justice Eyre[5] is right,—and I think it is,—

[1] The author or publisher of a work of a libelous or of an immoral tendency can have no property in it. Stockdale v. Onwhyn, 7 D. & R. 625; 5 B. & C. 173; 2 C. & P. 163. No action can be maintained for pirating a work which professes to be an account of the amours of a courtesan; and it is no answer to the objection that the party is also a wrong-doer in publishing it, and that he ought not therefore to set up its immorality.—*Id.*

[2] Fisher's Digest of English Patent, Trademark, and Copyright Cases, art. Copyright.

[3] Lawrence v. Smith, Jacob. 471.

[4] Southey v. Sherwood, 1 Meriv. 437.

[5] In the case of Dr. Priestly (cited Walcott v. Walker, 7 Ves. 1), on the trial of an action brought by him against a hundred, to recover damages sustained by him in consequence of the riotous proceedings of a mob at Birmingham, amongst other property alleged by him to be destroyed, he asked for compensation for certain unpublished MSS. It was alleged, in defense, that the plaintiff was in the habit of publishing works injurious to the government of the state

that publications may be of such a nature that the author can maintain no action at law, it is not the business of this court, even upon the submission in the answer (defendants had admitted the piracy of one edition) to decree either an injunction or an account of the profit of works of such a nature, that the author can maintain no action at law for the invasion of that which he calls his property, but which the policy of the law will not suffer him to consider his property. If this publication is an innocent one, I apprehend that I am authorized by decided cases to say, that—whether the author did or did not intend to make a profit by its publication—he has a right to an injunction to prevent any other person from publishing it." "If, on the other hand, this is not an innocent publication, in such a sense that an action would not lie in case of its having been published by the author and subsequently pirated, I apprehend that this court will not grant an injunction." And the same learned judge observes elsewhere:[1] "This court interferes by injunction; but not in cases where an action cannot be maintained."

22. And not only will equity refuse protection to such works of harmful and immoral tendency, but it will go further, and decline to take any cognizance of them whatever, treating them precisely as if they did not exist. So, when one pirates and prints a book which should never have been printed at all, no protection will be given from, or action for, the piracy.[2]

[1] Lawrence v. Smith, 1 Jacob. 472.

[2] Walcott v. Walker, 7 Ves. 1; Southey v. Sherwood, 2

but no evidence was produced to that effect. The lord chief justice observed that, if such evidence had been produced, he should have held it fit to be received as against the claim made by the plaintiff.

The effect of chancery refusing an injunction, may be, indeed, to render still more unlimited the piracy; but, although such would probably be the case, it is clear that chancery is powerless in the matter.[1] "For," said Lord Eldon, "this court has no jurisdiction in matters of crime."[2] It has been said that, if

Meriv. 435; Clark v. Freeman, 11 Beav. 117, 119; and *vid.* remarks of Cairns, J., in Maxwell v. Hogg, L. R., 2 Ch., app. 310; 16 L. T. N. S. 130; 36 L. J., 438 Ch.; and of Malin, V. C., in Springhead Spinning Co. v. Riley, L. R., 6 Eq. 561; 19 L. T. N. S. 65; 37 L. J., 889 Ch.

[1] Lawrence v. Smith, Jacob, 471.

[2] Lord Chancellor Macclesfield, in Burnett v. Chetwood (cited from MS. in note to Southey v. Sherwood, 2 Meriv. 438), seems to have taken a different view of the province of courts of equity in dealing with books of this character, holding "that the court of chancery had a superintendence over all books, and might, in a summary way, restrain the printing or publishing of any that contained reflections on religion or morality," and granting an injunction to restrain the publication of the translations of two Latin works, "Archæologia Philosophica," and "De Statu Mortuorum et Resurgentium," written by Dr. Burnett, on the sole ground that "inasmuch as the book contained to his (the chancellor's) knowledge (he having read it in his study) strange notions, intended to be concealed from the vulgar in the Latin language—in which language it could not do much hurt, the learned being better able to judge of it—it was proper to grant an injunction to the printing and publishing it in English." Lord Ellenborough, in dealing with the case of a libelous picture, in Du Bost v. Beresford, 2 Camp. 511, said that, "upon an application to the lord chancellor, he would have granted an injunction against its exhibition." This dictum of Lord Ellenborough seems to have excited the editor of Howell's State Trials, who says (vol. xx., p. 799): "I have been informed, by very high authority, that the promulgation of this doctrine, relating to the lord chancellor's injunction, excited great astonishment in the minds of all the practitioners in the courts of equity; and I had apprehended that this must have happened, since, I believe, there is not to be found in the books any decision or any dictum posterior to the days of the star chamber, from which such doctrine can be deduced, either directly, or by inference or analogy; unless, indeed, we are

the injunction be refused, it has the effect of increasing the number of copies. The answer to that is, I have nothing to do with it as a crime. The question relates only to a civil right of property. If the one party has that right, the other must not invade it; if he has not that right, the court cannot give him the consequences that belong to it.

In the much quoted case of Southey v. Sherwood,[1] where the poet Southey sought tc restrain the publication of his poem, "Wat Tyler," which had lain for twenty-three years in manuscript in the printer's hands, until he himself had forgotten its existence, the same rule prevailed, and the poem being held of too libelous a nature to merit protection, an injunction was refused.[2]

23. There seems, however, to be one exception, if it be an exception, to this rule: and that is, if it appears that the publication will tend to the destruction

to except the proceedings of Lord Ellenborough's predecessors—Scroggs, and his associates—in the case of Henry Care, in which case '*ordinatum est quod liber intitulat*,' The Weekly Packet of Advice from Rome, or the History of Popery, '*non ulterius imprimatur vel publicatum per aliquam personam quamcunque.*'" The editor might have found another precedent for what so surprised him, in Burnett v. Chetwood, cited *ante*.

[1] 2 Meriv. 435.

[2] To the same effect was the ruling in Stockdale v. Onwhyn (7 D. & R. 625). In that case an action was brought in the court of king's bench, in 1826, to protect a certain volume, entitled, "Memoirs of Harriet Wilson," which, on examination, appeared to be a history of the life and amours of a courtesan, containing anecdotes either libeling or ridiculing the various persons with whom she professed to have communication. "The ground of this action," said Holroyd, J., "if any, must be that the defendant has worked an injury to the plaintiff's exclusive right of publishing the book in question. Now, it is criminal in him to publish such a book. Then he has no right to publish it; and having no right, he has sustained no injury, and has no ground of action."

or deterioration of other property, courts of equity will for the protection of such other property, take jurisdiction to restrain the publication.[1]

Neither will equity regard as innocent, and interfere to protect obscene books, or theatrical exhibitions, immoral and prurient in their character, even if copyrighted according to the prescribed formula.[2] And so where a spectacle styled the "Black Rook" was shown unmistakably to be an infringement upon a previously composed spectacle, "The Black Crook," it appearing that the latter was a notoriously immoral and prurient production, equity refused its protection.

So it will be seen further on, when we come to treat of personal libels by newspapers, and their right to comment upon matters of public interest, that the law will not regard as innocent an undue haste to publish or to comment upon charges made against a citizen before they are proved, though the editors or newspaper proprietors will be allowed every opportunity to show an absence of malice or a misinformation as to the authority of the proceeding.[3]

And so also a publication in a suit reflecting on a court engaged in trying a suit, or upon the witnesses, parties, or jurors, will be construed as non-innocent, or, as this particular form of non-innocence is called, "a contempt of court."[4]

[1] Springfield Spinning Co. v. Riley, L. R. 551; 19 L. T. N. S. 64; 37 L. J., 889 Ch.

[2] Martinetti v. Maguire, Deady's R. 216. See this case treated *supra* in the chapter on dramatic copyright.

[3] Ackerman v. Jones, 37 N. Y. Sup. Ct. (J. & S.) 42.

[4] Hollingsworth v. Duane, Wall. 77, 102; Bronson's Case, 12 Johns. (N. Y.) 460; S. P. Respublica v. Passmore, 3 Yeates (Pa.), 408; Same v. Oswald, 1 Dal. 319. But see *Exp.* Hickey, 12 Miss. (4 Sm. & M.) 751; Stuart v. People, 4 Ill. (3 Scam.) 395; Matter of Bergh, 16 Abb. Pr. N. S. *post*, "Contempt of court."

24. In England, works "subversive of religious truth," "hostile to natural and revealed religion," or "impugning the doctrine of the immateriality of the soul," have been declared to be the reverse of innocent.[1] To the latter extent it is hardly to be expected that the law of innocence would be carried in this country, where the largest liberty of thought and expression is supposed to obtain.

25. "To say religion is a cheat," said the court in one case,[2] "is to desolve all those obligations whereby civil societies are preserved. Christianity is parcel of the laws of England, and therefore, to reproach the

[1] The cases of Lawrence v. Smith (7 Jacob. 471), and of Murray v. Benlow (cited in Shortt L. Lit., p. 8), exhibit the extent to which the question of innocence in a work may be carried. In the former case, Lord Eldon dissolved an injunction to hinder the publication of a pirated edition of certain "Lectures on Physiology, Zoology, and the Natural History of Man," on the ground that the lectures could not be the subject of copyright, as they contained several passages hostile to natural and revealed religion, impugning the doctrines of the immateriality and immortality of the soul. "Looking," said he, "at the general tenor of the work, and at many particular parts of it; recollecting that the immortality of the soul is one of the doctrines of Scripture; considering that the law does not protect those who contradict the Scriptures; and entertaining a doubt—I think a rational doubt—whether this book does not violate that law, I cannot continue the injunction. The plaintiff may bring an action, and when that is decided he may apply again." In Murray v. Benlow (February, 1822), the same lord chancellor refused to enjoin the publication of a pirated edition of Lord Byron's "Cain," on the ground of a doubt whether the poem was not intended to bring into discredit that portion of Scripture to which it relates. In 1823, again, Leach, V. C., dissolved an injunction to prevent publication of pirated portions of Lord Byron's "Don Juan," on similar grounds.

[2] 1 Rex v. Taylor, Vent. 293; 3 Keb. Rep. 607; *vid.* 4 Bl. Com. 287. This view of the matter is put broadly by Michaelis, quoted 2 Stark. (2nd edit.) 131. He says: "On God's account, then, punishments for blasphemies are not necessary; but

Christian religion is to speak in subversion of the law."[1]

26. With regard to absolute blasphemy, however, the case is different, and the law in this country, equally with the English, recognizes blasphemy as an offense; not only against good manners and good morals, but against the public weal as well.

"Whether the principle," says Bishop,[2] "upon which this doctrine rests, is that they (blasphemy and profane swearing) tend to undermine Christianity, which is a part of our law,[3] or that they disturb the peace and corrupt the morals of the community, is a question not fully settled. Perhaps we may even take another view, namely, that reverence toward God and religion—Christianity being our form of religion—is essential to man, who is injured in his nature and being, when this reverence is impaired; or, still another view, that these offenses so shock his purer and higher sensibilities as to create an injury to him against which he needs protection, precisely as against an assault. Probably these several considerations, perhaps they are necessary for the sake of our neighbor, who, if he believes in a God, or holds his religion, whether true or false, to be true, always feels himself extremely scandalized by them. Nor is it only blasphemy against the true God that ought to be punished; but even that against false gods, supposed saints, and fictitious religion, whenever they happen to be the gods, saints, and religion of the people." Shortt. L. Lit. 298.

[1] *Vid.* Patterson's Case, 1 Brown, 627.

[2] 1 Crim. Law, vol. ii., § 87.

[3] Blackstone (4 Com. 287) describes the offense of blasphemy as consisting in a denial of the being or providence of the Almighty; or in contumelious reproaches of our Lord and Saviour, Christ; or in profane scoffing at the holy Scripture, or exposing it to contempt and ridicule, for Christianity is part of the laws of England. *Vid.*, also, Rex v. Taylor, 2 Vent. 293; 3 Kebl. R. 607.

and some others also, may each be deemed to enter more or less into the policy of the law."

27. The English law against blasphemy is very severe, and the makers and publishers of works construed to be blasphemous in their nature, are criminally dealt with.[1]

[1] In Rex v. Woolsten (Str. 834), relating to a book designed to show that the Christian miracles were not to be taken in a literal but an allegorical sense, the court would not suffer it to be debated whether to write against Christianity in general was not an offense punishable in the temporal courts at common law. They laid stress on the word "general," and stated that they did not intend to include disputes between learned men upon particular controverted points. Raymond, Ch. J., in delivering the judgment of the court, said: "I would have it taken notice of that we do not meddle with any differences of opinion, and that we interpose only where the very root of Christianity itself is struck at," which the court considered to be done in the book in question.

In Rex v. Williams, the defendant was convicted of having published a blasphemous libel, called "Paine's Age of Reason," which denied the authority of the Old and New Testaments, asserted that reason was the only guide by which the conduct of men ought to be directed, and ridiculed the prophets, Jesus Christ, his disciples, and the Scriptures. Ashurst, J., in that case remarked that, "although the Almighty did not require the aid of human tribunals to vindicate his precepts, it was nevertheless fit to show our abhorrence of such wicked doctrines, which were not only an offense against God, but against all law and government, from their direct tendency to dissolve all the bonds and obligations of civil society. It was upon this ground that the Christian religion constituted part of the law of the land. But if the name of our Redeemer was suffered to be traduced, and his holy religion treated with contempt, the solemnity of an oath, on which the due administration of justice depended, would be destroyed, and the law be stripped of one of its principal sanctions—the dread of future punishment;" which seems to be a very concise statement of the reason and policy of the law on this subject.

It is a blasphemous libel to represent by a published writing that Jesus Christ is an impostor, the Christian religion a mere fable, and those who believe in it infidels to God (Rex v.

"With us, however, the law is more tolerant," said Kent, J., in the case of The People v. Ruggles.[1] 'After conviction we must intend that the words Eaton, 31 Howell's St. Tr. 927. Eaton was sentenced, by Lord Ellenborough, to be imprisoned for eighteen months in Newgate, and to stand in the pillory between the hours of twelve and two, once within a month), or that Jesus Christ was an impostor, a murderer, and a fanatic (Rex v. Waddington, 1 B. & C. 26). It has been held to be a blasphemous libel to publish anything which tends to question or cast disgrace upon the Old Testament alone; for (as was said in Reg. v. Hetherington, 5 Jur. 529) the Old Testament is so connected with the New, that a reflection on the one is a reflection on the other also.

Vid., also, 17 D. & R. 629; Poplett v. Stockdale, Ry. & M. 337.

In addition to the doctrines of the common law relating to blasphemous libels, there are some express enactments of the legislature on the subject. Several of the old statutory provisions have been repealed, but the following still remain in force:

1 Edw. 6, ch. 1, enacts that persons reviling the sacrament of the Lord's Supper by contemptuous words or otherwise, shall be punished by fine and imprisonment.

1 Eliz. ch. 2, enacts that if any minister shall speak anything in derogation of the book of Common Prayer, he shall, if not beneficed, be imprisoned one year for the first offense, and for life for the second; and if he be beneficed, shall for the first offense be imprisoned six months, and forfeit a year's value of his benefice; for the second, shall be deprived and suffer one year's imprisonment; and for the third, shall in like manner be deprived and suffer imprisonment for life. And that if any person whatsoever shall in plays, songs, or other open words, speak anything in derogation, depraving, or despising of the said book, &c., he shall forfeit for the first offense, one hundred marks; for the second, four hundred; and for the third, shall forfeit all his goods and chattels, and suffer imprisonment for life.

The most important of the statutes now in force is the 9 & 10 Will. III., ch. 32. It enacts that if any person educated in or having made profession of the Christian religion, shall by writing, printing, teaching, or advised speaking, deny any

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[1] 8 Johns. 292.

were uttered in a wanton manner, and, as they evidently import, with a wicked and malicious disposition, and not in a serious discussion upon any controverted point in religion. The language was blasphemous, not only in a popular, but in a legal sense; for blasphemy, according to the most precise definitions, consists in maliciously reviling God or

one of the persons of the holy Trinity to be God (repealed by 53 Geo. III., ch. 160, § 2, "so far as the same relates to persons denying as therein mentioned respecting the holy Trinity"). or assert or maintain that there are more gods than one, or deny the Christian religion to be true, or the holy Scriptures to be of divine authority, he shall, upon the first offense, be rendered incapable to hold any office or place of trust; and for the second, be rendered incapable of bringing any action, being guardian, executor, legatee, or purchaser of lands, and shall suffer imprisonment without bail for three years. But the person convicted for a first offense is to be discharged from all penalties and disabilities for that offense, if he renounce his error in open court within four months after conviction. Information of an offense against the act must be given within four days after it has been committed, and the prosecution must be within three months after such information.

There is no recorded instance of a prosecution under this act.

This statute has not altered the common law on the subject of blasphemous libels, but has only introduced certain peculiar disabilities cumulative upon the penalties previously inflicted by the common law (Rex. v. Carlisle, 3 B. & Ald. 161; Rex. v. Williams, 26 How. St. Tr. 656; 2 Str. 884), for it is a general rule that, where an offense is already punishable by a common-law proceeding, a statute providing a particular punishment for it does not exclude the common-law punishment, but only supplies an alternative or a cumulative one (Rex v. Robinson, 1 Burr. 799).

Neither, it seems, does the 53 Geo. III., ch. 160, alter the common-law doctrine as to blasphemous libels; it only removes the penalties imposed by 9 & 10 Will. III., ch. 32, upon persons denying the Trinity, and extends to them the benefit of the Toleration Act of 1 Will. & M., sess. 1, ch. 18.—Shortt, L. Lit. 301, 302.

religion, and this was reviling Christianity through its author. The jury have passed upon the intent or *quo animo*, and if those words spoken, in any case, will amount to a misdemeanor the indictment is good. . . . . The free, equal, and undisturbed enjoyment of religious opinion, whatever it may be, and free and decent discussions on any religious subject, are granted and secured; but to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community, is an abuse of that right."[1]

[1] In Rex v. Waddington (1 B. & C. 26), where the libel stated that Jesus Christ was an impostor, and a murderer in principle, and a fanatic—the defendant, in moving for a new trial, urged that the lord chief justice had misdirected the jury by stating that any publication in which the divinity of Jesus Christ was denied was an unlawful libel; and he argued that, since the 53 Geo. III., ch. 160, the denying one of the persons of the Trinity to be God was no offense, and consequently that a publication in support of such a position was not a libel. The court of king's bench unanimously refused a rule for a new trial, and held that the publication was a blasphemous libel. Best, J., said: "The 53 Geo. III., ch. 160, has made no alteration in the common law relative to libel. If, previous to the passing of that statute, it would have been a libel to deny, in any printed work, the divinity of the second person in the Trinity, the same publication would be a libel now. The 53 Geo. III., ch. 160, as its title expresses, is an act to relieve persons, who impugn the doctrine of the Trinity, from certain penalties. If we look at the body of the act, to see from what penalties such persons are relieved, we find that they are the penalties from which the 1 Will. & M., sess. 1, ch. 18, exempted all Protestant Dissenters, except such as denied the Trinity, and the penalties or disabilities which the 9 & 10 Will. III., ch. 32, imposed on those who denied the Trinity. The 1 Will. & M., sess. 1, ch. 18, is, as it has been usually called, an act of toleration, or one which allows Dissenters to worship God in the mode that is agreeable to their religious opinions, and exempts them from punishment for non-attendance at the Established Church, and non-conformity to its rights. The legislature, in passing that act, only thought

The rule was laid down, as follows, by Duncan, J., in Updegarth v. Commonwealth :[1] "No author or printer who fairly and conscientiously promulgates opinions with whose truth he is impressed, for the benefit of others, is answerable as a criminal. A malicious and mischievous intention is, in such a case, the broad boundary between right and wrong; it is to be collected from the offensive levity, scurrilous and opprobrious language, and other circumstances, whether the act of the party was malicious."

of easing the consciences of Dissenters, and not of allowing them to attempt to weaken the faith of the members of the Church."

From the fact that a particular form of the Christian religion is established here by law, this consequence follows: that a person may, without being liable to prosecution for it, attack Judaism, or Mohammedanism, or even any sect of the Christian religion, except the established religion of the country; and the only reason, says Alderson, B. (Reg. v. Gathercole, 2 Lewin, 254), why the latter is in a different situation from the others is, "because it is the form established by law, and is therefore a part of the constitution of the country. In like manner, and for the same reason, any general attack on Christianity is the subject of criminal prosecution, because Christianity is the established religion of the country" (*vid.*, also, Cowan v. Milbourn, 16 L. T. N. S. 290; 36 Q. J. 124; L. Rep., 2 Ex. 233).

How far, then, is liberty of discussion allowed on questions relating to the fundamental doctrines of religion? or, is the expression of all views adverse to those now received, prohibited and punishable? Would the law now make no distinction in favor of the fair and temperate expression of opinions sincerely entertained? It is by no means easy to give an answer, for there is no reported English case in which the question has been fairly raised and broadly dealt with.

Malice is a necessary ingredient in the crime; and were it not that our law implies malice wherever anything unlawful is done willfully or intentionally, whatever the motive which prompted the action, this consideration might help us to a conclusion. As the law stands, it throws no light upon the subject.—Shortt, L. Lit. 302–304.

[1] 11 Serg. & R. 394.

"Still," says Bishop,[1] in commenting on the above, "one who should utter words or sentiments calculated, according to common judgment, to corrupt the public morals, or to shock the sensibilities of mankind in a Christian community, would, doubtless, not be permitted to excuse himself under the plea of conscientious conviction."

28. The doctrine that Christianity is parcel of the common law, began with the Dome-Book of Alfred, which sets forth at once, as the law of the realm, the ten commandments, accompanied by many Mosaic precepts. After quoting the canons of the apostolical council at Jerusalem, Alfred cites the injunction, "As ye would that men should do unto you, do ye also to them;" adding, "from this one doom, a man may remember that he judge every one righteously: he need heed no other doom book."[2] Lord Coke affirmed it, and Blackstone[3] and Lord Mansfield asserted it after him.[4] But in the United States,

[1] Crim. Law, 93. The proposed criminal code of the State of New York, art. 31, extracting a definition from existing common-law decisions, describes blasphemy as consisting in "wantonly uttering or publishing words, casting contumacious reproach or profane ridicule upon God, Jesus Christ, the Holy Ghost, the holy Scriptures, or the Christian religion;" and art. 32 adds: "If it appears, beyond reasonable doubt, that the words complained of were used in the course of serious discussion, and with intent to make known or recommend opinions entertained by the accused, such words are not blasphemy."

[2] Blackstone quotes the Dome-Book as extant so late as the reign of Edward IV.

[3] 4 Bl. Com. 63.

[4] See also Rex v. Taylor, Vent. 293; 3 Keble, 621; Tremayne's Pleas of the Crown, 226; East P. C., ch. 1, § 33; Rex v. Carlisle, 3 B. & Ald. 161; Rex v. Alwood, Cro. Jac. 421; Rex v. Williams, 26 Howell St. Tr. 654; Rex v. White, Leach, 430; Rex v. Webster, Fitzg. 64; 2 Str. 834; Reg. v. Gathercole, 2 Lewin C. C. 237; Reg. v. Hetherington, 5 Jur.

unless, perhaps, we except the colony of New England, which resolved at a "general court, October 25th, 1639, ... the worde of God shall be the onely rule to be attended vnto in ordering the affayres of government in this plantatio," no statute has expressly re-enacted the principle, though that it is part of the spirit of the written, as well as of the common law of this country we think, we shall be able to show.

29. In The People v. Ruggles,[1] Kent, J., declared that "blasphemy against God, and contumelious reproaches and profane ridicule of Christ or the holy scriptures, are offenses punishable at the common law, whether uttered by words or writings. . . . Such offenses have always been considered independent of any religious establishment or the rights of the church," continued the chancellor, "and why should not the language contained in the indictment be still an offense with us? There is nothing in our manners or institutions which has prevented the application or the necessity of this part of the common law. We stand equally in need now as formerly of all that moral discipline, and of those principles of virtue which help to bind society together. The people of this state, in common with the people of this country, profess the general doctrines of Christianity,

529, Q. B.; Rex v. Paine, 1 East P. C. 5; Bish. Cr. Law, §§ 945, 947; 2 Id. § 87; Holt on Libel, 32; Mence on Libel, i. 303.

[1] 3 Johns. 291. In this case it was held that wantonly, wickedly, and maliciously uttering the following words: "Jesus Christ was a bastard, and his mother must be a whore," was a public offense, punishable by the common law of the State of New York. See Emlyn's preface to the State Trials, 8; Whitlock's Speech, 2 State Trials, 273; Rex v. Woolston, Str. 834; Fitz. 64; Taylor's Case, 1 Vent. 293; 3 Keb. 607.

as the rule of their faith and practice; and to scandalize the author of these doctrines, is not only, in a religious point of view, extremely impious, but, even in respect to the obligations due to socicty, is a gross violation of decency and good order. Nothing could be more offensive to the virtuous part of the community, or more injurious to the tender morals of the young, than to declare such profanity lawful. It would go to confound all distinction between things sacred and profane; for, to use the words of one of the greatest oracles of common wisdom, 'Profane scoffing doth by little and little, deface the reverence for religion,'[1] things which corrupt moral sentiment, as obscene actions, prints, and words, . . . have upon the same principle been held indictable, and shall we form an exception in these particulars to the rest of the civilized world? No government among any of the polished nations of antiquity, and none of the institutions of modern Europe (a single and monitory case excepted) ever hazarded such a bold experiment upon the solidity of public morals, as to permit, with impunity and under the sanction of their tribunals, the general religion of the community to be openly insulted and defamed. The very idea of jurisprudence, with the ancient law-givers and philosophers, embraced the religion of the country, *jurisprudentia est divinarum atque humanarum rerum notitia.*"[2]

30. The principle as laid down on this high authority undoubtedly is, that while in the United States every shade of religious belief is protected, yet the spirit of the law will not permit, upon grounds of public policy, that Christianity should be scandalized openly

[1] Lord Bacon's Works, ii., 291, 503.
[2] Dig. 61, 10, 2; Civ. De Legibus, 62, *passim*.

and wantonly. For the Christian religion is one whose influence upon the public peace and security, and upon good order and commercial and municipal prosperity, is marked and salutary. One of its prime injunctions is a perfect allegiance and obedience to the state, and the only instance in history in which a premium upon its neglect not only, but upon its open and wanton insult and abuse, was followed by that carnival of blood and anarchy at which the world has not yet ceased to shudder—the first French Revolution. The morals and the manners of good society have come to be very deeply imbedded in religion, and while the law of the United States takes to itself no scrutiny as to things spiritual, prescribes no creed, and holds no theory of a life beyond the present, it will not discourage man in the belief of a religion which teaches morality, sobriety, patriotism and obedience to the law of the land. Nor can it be doubted that the same protection would be extended to any body of believers. And a man who should intrude upon a community of worshippers of any creed, and openly and wantonly attack their tenets, would undoubtedly be punished. Nearly every state in the Union has its statute making the Christian sabbath a day of rest from business cares and pursuits; which protect public worshippers from disturbance, and many go further and make profane swearing a misdemeanor.[1] And this, we may be assured, not from any wish to dictate to the conscience of the citizen, but to encourage order and to promote the public peace. To this extent it may well be said that Christianity is parcel of our common law.

The statutes of the United States certainly do not

[1] Laws of N Y. 2 R. S. (5th ed.), vol. ii., pp. 935, 936, 937.

discourage morality. "I suppose," says Deady, J.,[1] "that it is both proper and constitutional for congress so to legislate as to encourage virtue and to discourage immorality. Congress in exercising its powers to establish a uniform rule of naturalization,[2] has always discriminated in favor of morality, by providing that on the hearing of the application for citizenship, the applicant must prove that for five years prior to such application he has behaved as a man of good moral character."[3]

And the learned judge might have added that the same spirit is indicated by congress, in the statutes which enact, that any person who, within the jurisdiction of the United States, "sells, or lends, or gives away, or in any manner exhibits, or offers to sell, or to lend, or to give away, or in any manner to exhibit, or otherwise publishes or offers to publish in any manner, or has in his possession for any such purpose, any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, material, or any cast, instrument, or other article of an immoral nature, or any drug or medicine . . . . . or who causes to be written or printed any card, circular, book, pamphlet, advertisement, or notice of any kind, stating when, where, how, or of whom, or by what means" . . . such articles may be purchased, or who "manufactures, draws, or prints, or in anywise makes any of such articles, shall be imprisoned at hard labor in the penitentiary for not less than six months nor more than five years for each offense, or fined not less than one hundred dollars, nor more than two thousand dollars, &c.,[4] and further by

[1] Martinelli v. Maguire, 1 Deady, 216.
[2] Con. Art. 1, § 8, subd. 4.
[3] 2 Stat. 154.
[4] Revision of 1873–74, § 5389.

imposing a fine and imprisonment upon the aiding or abetting by any of its officers of the use of the general post office for circulating any obscene or indecent publications, representations, or articles of indecent or immoral use or tendency;[1] and prohibiting by the like penalties the importation[2] and deposit in the mail[3] of such and similar matter.

And, again, in every court of justice in the land oaths are administered upon the holy scriptures; either by kissing, or laying the hand upon the gospels or upon some other portion (as in the case of Hebrews). Are we not, then, at liberty to conclude that words, writings, and actions, which would tend to undermine the authority and vilify the sanctity of those pages, would attack the regard for the sacredness of an oath, without which no legal formality is complete, and so strike at the very root of our jurisprudence? Such acts, words, and writings it seems to us, are, and must be, inconsistent with public peace, order, and safety.

In so far, then, as Christianity in its popular sense, as contradistinguished from barbarism or heathenism,—in so far and in such sense as the United States is reckoned among Christian rather than among the heathen nations of the globe—we submit that Christianity is "parcel of our common law."

"Christianity, as it has been asserted, is now in a modified sense the religion of this state" (New York), said Duer, J.[4] "It is so, as a part of that common law

[1] Revision of 1873–74, § 1785; 3 March, 1873, ch. 258, § 4, vol. 17, p. 599.

[2] Id., §§ 2941, 2942.

[3] Id., § 3893.

[4] Andrew v. N. Y. Bible, &c., Society, 4 Sandf. 156; and see People v. Ruggles, 8 Johns. 290.

which our ancestors introduced, and we have retained the maxim that Christianity is part and parcel of the common law, has been frequently repeated by judges and text writers, but few have chosen to examine its truth or attempt to explain its meaning. We have, however, the high authority of Lord Mansfield and of his successor,[1] for stating as its true and only sense, that the law will not permit the essential truths of revealed religion to be ridiculed and reviled. In other words, that blasphemy is an indictible offense at common law. The truth of the maxim, in this very partial and limited sense, may be admitted. But if we attempt to extend its application, we shall find ourselves obliged to confess that it is unmeaning and untrue. If Christianity is a municipal law in the proper sense of the term, as it must be if a part of the common law, every person is liable to be punished by the civil law who refuses to embrace its doctrines and follow its precepts; and if it must be conceded that in this sense the maxim is untrue, it ceases to be intelligible. Since a law without a sanction is an absurdity to logic and a nullity in fact."

In concluding our examination of whether and to what extent "Christianity is parcel of the common law of the United States," we cannot do better than adopt and make our own the words of Chancellor Kent in the case we have been considering,[2] believing that what he finds in this case and in the contemplation of the constitution of the state of New York, will be found to be within the spirit of the unwritten law of the nation at large.

The free, equal, and undisturbed enjoyment of

[1] Lord Campbell. Judge Duer here refers to Campbell's Lives of Chief Justices, vol. 2, p. 513.

[2] People v. Ruggles, 8 Johns. 291.

religious opinion, whatever it may be, and free and decent discussions on any religious subject, is granted and secured; but to revile with malicious and blasphemous contempt, the religion professed by almost the whole community, is an abuse of that right. . . . . We are not to be restrained from animadversion upon offenses against public decency, merely because there may be barbarous nations whose sense of shame would not be affected by what we should consider the most audacious outrages upon decorum. It is sufficient that the common-law checks upon words and actions dangerous to the public welfare apply to our case, and are suited to the condition of this and every other people whose manners are refined, and whose morals have been elevated and inspired with a more enlarged benevolence by means of the Christian religion.[1]

31. The policy of the law is not to forcibly prevent one from owning property not innocent in its nature, but to refuse to encourage, by its protection, the circulation of that property. The law will not break open a man's private house and forcibly capture and destroy an obscene picture which he may happen to own; but if he keep a collection of obscene pictures for the purposes of trade, from which he sells to persons of depraved tastes, he is violating the laws of the United States, and the law will break up his

[1] The doctrine, however, has not commanded the full assent of many learned minds. It was disputed by Jefferson (letter to Cartwright, 9 Am. Jurist; Life and Letters of Joseph Story, vol. i., pp. 430–434; vol. ii., pp. 8, 462–464), and by Webster and Sergeant (see their arguments in the Girard Will Case). See, generally, as to the doctrine, Lindenmuller v. The People, 33 Barb. 548; Bedford Charity, 2 Swans. 527; Da Costa v. Paz, 2 Swans. 420 *n.*; Att'y-Gen'l v. Pearson, 3 Mer. 399; Andrew v. N. Y. Bible & Prayer Book Soc., 4 Sandf. 157.

business, seize his collection, and proceed to punish him by fine and imprisonment. There is a provision in the United States postal laws which forbids the circulation of such wares through the mails, and, besides making the property liable to confiscation, renders the party circulating the injurious matter liable to indictment.

So, again, while the law will not break open a man's doors and seize an obscene manuscript, known to be in his possession, it will not encourage him to print and circulate the contents of that manuscript. Neither, perhaps, will the law regard as innocent a picture not harmful in itself which its owner pretends to have been produced by a spiritual or supernatural process. In 1869, one William H. Mumler, in the city of New York, publicly advertised to the effect that he would take photographs which should not only be life-like representations of the sitter, but should contain in shadow the ghostly form of some departed friend or relative of the sitter, as it alleged that friend or relative was really beside him, only unseen to the carnal eye. The gist of the fraud here was, evidently, not the taking of the picture, or the production of the chemical or mechanical effect of a shadow upon the camera; nor perhaps the assertion that an actual spiritual presence accompanied the sitter (for that there are or are not spiritual presences about us continually, is a matter of fact concerning which men cannot reason from any data known to the law, and hence it cannot hear the opinion of experts upon the subject, nor form any conclusions of its own), but, it is submitted, the pretense that the operator and his camera were different from other operators and cameras, inasmuch as they had a connection with the spirit world. It was for obtaining

money under false pretenses, therefore, that the prosecution by the people against Mumler proceeded.[1]

[1] As the only case of the kind which is known to have arisen, it is remarkable that "The People v. Mumler" should never have been reported—the only record of it extant being the argument of Mr. Elbridge T. Gerry, for the People, from which we draw the facts as follows:

The prisoner, William H. Mumler, stood charged by the People—First: With having, by false pretenses, defrauded one Joseph H. Tooker out of, and of having obtained from him the sum of ten dollars, lawful money. Second: Of having, by means of gross frauds and cheats, practiced habitually upon the public for the purpose and with the result of obtaining sums of money from credulous persons. Third: With stealing, taking, and carrying away by trick or device, the sum aforesaid from said Tooker, and other similar sums from other persons.

The facts upon which the charge of false pretenses was based, were—

First: A statement made by the prisoner "that he was a spiritual medium; that he produced spirit likenesses; that no other person could take such wonderful pictures; that the pictures were not the result of a trick or deception;" coupled with the exhibition of a picture with a faint outline of another form than that of the sitter, and a further assertion by the prisoner "that he (Tooker) would come to recognize the face as that of some relative or friend." Second: A previous payment of two dollars, by Tooker, on the strength of a previous similar statement made by one Guay, who acted as agent for the prisoner; and a subsequent payment by him of eight dollars on the strength of the prisoner's statement, and on the furnishing of certain photographs purporting to be of spirit forms, and on receiving a printed book containing an additional statement by the prisoner, over his signature, and designed to further induce a belief that the indistinct form on the picture was not produced by mechanical or natural means. Third: A discovery by Tooker, after parting with his money, that the photographs were ordinary photographs, and that all the forms on them were produced by mechanical means.

Mumler's answer alleged:

I. That there is no trick, fraud, or deception in what are called spirit pictures by the accused.

II. That in order to produce those pictures, nothing more is done or used by him than by ordinary photographers in

32. In one of the latest English cases involving this doctrine of non-innocence, the question arose

producing their pictures, than mere resting his hand on the camera.

III. That the spirit-pictures coming or abstaining from coming is in no respect subject to his control or volition.

IV. That the process of taking them has been again and again carefully scrutinized and watched in its every step by men of intelligence, and by those skilled in the art of photography, whereby it has been ascertained, beyond doubt, that there is no deception or fraud about it.

V. That there has been produced, on the same plate with the picture of a living person, the picture or ghost-like image of persons who have died, which have been recognized as likenesses of such persons by those who knew them in life.

VI. That this has been done in cases where there was no likeness or picture in existence of such deceased person, and whom the operator had never seen or heard of.

VII. That it is now some twelve or fourteen years since these spirit-pictures were first heard of in this country; that within the last four or five years the taking of these pictures has been publicly heard of and known in Boston, and there frequently investigated with the utmost care and scrutiny; and that, simultaneously with their production in New York, they have been produced in Paris, and in Poughkeepsie, Waterville, and Buffalo, in this State.

VIII. That in the various attempts to imitate these pictures, and which some photographers claim are the same thing, there are essential points of difference, plainly to be discovered by the practical or the discerning eye, and which distinguish the genuine from the false, and which cannot be produced by the imitator.

IX. That the accused does not know and never has pretended to know by what power or process, other than that of producing an ordinary photograph, these spirit-pictures are produced. That he has often solicited and obtained the closest scrutiny by men more capable than himself of understanding the process, and he is now at all times ready and willing to have his work scrutinized and watched in the most critical manner. And to that end he invites an investigation by a delegation of the most expert and experienced photographers in town, and pledges himself to afford the fullest opportunity therefor.

X. That there are a great many intelligent men and women, who, after a careful investigation, are firm believers that the

whether a breach of contract to let rooms for the purpose of delivering lectures could be justified on

pictures are truly likenesses of the spirits of the departed, and that he and such believers are of opinion that the taking of these pictures is a new feature in photography, yet in its infancy, surely but gradually and slowly progressing to greater perfection in the future, requiring for such perfection time and a scientific knowledge of the power that is operating.

William P. Slee, who watched the camera during Mumler's operations, testified that he looked into the camera, and observed that Mumler kept his hand on it while the process was going on, and that he put the cloth over his head before he put the slide in with the plate. He proved exhibits Nos. 1 to 9 for the People, and admitted they could all be done by mechanical means.

William Guay, a partner of Mumler's, proved that a great many persons called to have their photographs taken with these "spirit" forms, and paid their money for that purpose; admitted that the ghost might have been produced by means within the camera; that Mrs. Mumler was always present on these occasions; and that he was allotted by Mumler "to stay on the second floor to carry on the business on systematic rules and principles generally."

Hon. John W. Edmonds, ex-judge of the N. Y. supreme court, and all during his life a firm believer in and advocate of spiritualism, testified that he went to this gallery of Mumler's on a preconcerted notice. He knew nothing of photography; that he paid ten dollars for the first, and five dollars for the second sitting, and went away satisfied; but said, "I do not say that they (the shadowy forms alleged) are produced by spiritual means."

William Gurney, a photographer, testified that he saw Mumler have his hand on the camera, but could not discover the trick; that he has been a photographer for twenty-eight years; and that it was not possible to produce such an object except from outside the instrument.

Mr. Snodgrass—or *alias* James R. Gilmore, *alias* "Edmund Kirke"—testified that he called on the prisoner; that he sat twice, but the pictures were not distinct. Rockwood, a photographer of large experience, testified that he had produced similar "ghosts" in different ways; and that although not exactly a "spiritual" process, there was certainly something remarkable about it.

the ground that the lectures to be delivered were of a blasphemous and illegal nature, some of them being

Elmer Terry testified that he went there expressly to get a picture of the spirit of a deceased friend. He paid his money in advance, on the statement that he would be furnished with such a picture, and he paid afterwards when he thought he had it. He recognized the "spirit" of a four-year-old boy, who died twenty years ago, and he recognized the picture of Miss Frances Catlin, whose portrait he had seen only four days before this photograph was taken.

Jacob Kingsland testified that he recognized the likeness of Miss Catlin, but could not speak positively of the children.

Paul Bremond testified that he was a believer in "spirits," and was so fifteen years ago, when he used to hear the voices, and that he recognized the "ghosts" that Mumler photographed as likenesses of the departed. He particularly recognized "Elizabeth Trapp."

David A. Hopkins testified that he paid his money and watched the prisoner. He went to Mumler for a "spirit" photograph, and identified one of the "ghosts" as that of a lady deceased.

William W. Silver testified that he was a believer in the supernatural; that Mumler closed the slide on every occasion when a spirit appeared; and that he watched Mumler's process without detecting any trick.

Mrs. Luthera C. Reeves testified that she went with her nephew, Mr. Welling; sat for a portrait; that she identified a "spirit" apparition thereupon as her son, by the length of his ears!

Samuel R. Fanshawe testified that he went there and saw Mrs. Mumler, and announced that he was a skeptic. After having notified them in advance that he meant to find out the trick, he sat for a picture, upon which the shadowy forms appeared, and recognized the ghosts of his mother and son, although they were so indistinct that it was almost impossible to recognize any shade at all.

Charles F. Livermore testified that he sat five times, and a ghostly picture, which he recognized as his wife's picture, finally appeared. Three different pictures were produced by him in evidence.

Mrs. Ann F. Ingalls recognized in a photograph her mother, son, and brother, all of whom died long before.

A pamphlet issued by Mumler was produced and read in evidence, as follows:

advertised as follows: "The Character and Teachings of Christ: the former defective, the latter misleading:

"My object in placing this little pamphlet before the public, is to give to those who have not heard, a few of the incidents and investigations on the advent of this new and beautiful phase of spiritual manifestations. It is now some eight years since I commenced to take these remarkable pictures; and thousands, embracing as they do scientific men, photographers, judges, lawyers, doctors, ministers, and in fact all grades of society, can bear testimony to the truthful likeness of their spirit friends they have received through my mediumistic power. What joy to the troubled heart! What balm to the aching breast! What peace and comfort to the weary soul! to know that our friends who have passed away can return and give us unmistakable evidence of a life hereafter—that they are with us, and seize with avidity every opportunity to make themselves known; but alas! in many instances, that old door of sectarianism has closed against them, and prevents their entering once more the portals of their loved ones and be identified. But, thank God, the old door is fast going to decay; it begins to squeak on its rusty and time-worn hinges; its panels are penetrated by the worm-holes of many ages, through which the bright, effulgent rays of the spiritual sun begin to shine; and in a short time it will totter and tumble to the earth. Boston has been the field of my labors, most of the time, since I commenced taking these wonderful pictures, where I have been visited by people from all parts of the Union; but at the earnest solicitation of many friends, I have concluded to make a tour through the principal cities of the United States, that all may avail themselves of this opportunity to obtain a likeness of their loved ones. I am often asked, 'Are there no other mediums for this phase of spiritual manifestations?' I answer, there are a number, now, in the United States and Europe, that are taking them with more or less success, and there are hundreds of photographers who have taken what I call an approximation to the spirit form. If they will but look carefully at some of their cards or negatives, they will see a semi-indefinite form. To those who find these forms on their negatives, no matter how vague or indistinct, let me assure you that you are capable of becoming a medium for this beautiful manifestation, if you will but give the proper time and attention to your own development. Let me entreat you to persevere, throw aside all skepticism, sit as often as you can with some good medium for development, and I hope the time is not far distant when I

The Bible shown to be no more inspired than any other book," &c.; the court of exchequer, without any reference to the motives which prompted the delivery of the lectures, held that a publication of the doctrines stated in the advertisements referred to, was blasphemy, and, therefore, the breach of contract was justifiable.[1] An indictment setting forth certain passages from the poem of "Queen Mab," and a passage in prose from the notes thereto; a work described in the indictment as a "scandalous, impious, profane, and malicious libel of and concerning the Christian religion, and of and concerning the holy scriptures, and of and concerning almighty God, in which were contained certain passages charged as blasphemous;" Sergeant (afterwards Mr. Justice) Talfourd, himself a poet, addressed the jury for the defense, in a noble speech, in which he asked, whether it could be blasphemy in the publisher to present to the world, or rather to the calm, the laborious, the patient searchers after wisdom and beauty, who alone would peruse the volume, the awful mistakes, the mighty struggles, the strange depressions, and the imperfect victories of such a spirit as Shelley's, because the picture has some passages of frightful gloom? "In the wise and just dispensations of providence," said the accomplished advocate, in a passage which we may be excused for quoting, "great powers are often found associated with

shall have hundreds of co-workers in this beautiful spirit photography. Yours, truly,

"WM. H. MUMLER."

Mr. Gerry appeared for the prosecution; but the defendant, Mumler, was ultimately discharged, upon other grounds than those taken by the learned counsel.

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[1] Cowan v. Milbourn, L. R., 2 Eq. 230; 36 L. J. 124; 1 L. T. N. S. 230.

weakness or with sorrow; but when these are not blended with the intellectual greatness they counter-vail, but merely affect the personal fortunes of their possessors, as when a sanguine temperament leads into vicious excesses, there is no more propriety in unveiling the truth, because it is truth, than in exhibiting the details of some physical disease. But when the greatness of the poet's intellect contains within itself the elements of tumult and disorder; when the appreciation of the genius in all its divine relations and all its human lapses depends on a view of the entire picture, must it be withheld? It is not sinful elysium, full of lascivious blandishments, but a heaving chaos of mighty elements, that the publisher of the early productions of Shelley unveils. In such a case, the more awful the alienation, the more pregnant with good will be the lesson. Shall this life, fevered with beauty, restless with inspiration, be hidden? or, wanting its first blind but gigantic efforts, be falsely because partially revealed? If to trace back the stream of genius, from its greatest and most unearthly breadth to its remotest fountain, is one of the most interesting and instructive objects of philosophic research; shall we—when we have followed that of Shelley through its majestic windings, beneath the solemn gloom of 'The Cenci,' through the glory-tinged expanses of 'The Revolt of Islam,' amidst the dream-like haziness of 'Prometheus'—be forbidden to ascend with painful steps its narrowing course to its farthest spring, because black rocks may encircle the spot whence it rushes into day, and demon shapes, frightful but powerless for harm, may gleam and frown on us beside it?" It was urged also that the poem of "Queen Mab" was presented with the distinct statement that Shelley himself, in

mature life, departed from its offensive dogmas; that it was accompanied by his own letter, in which he expresses his wish for its suppression; that, therefore, it was not given as containing his deliberate assertions, but only as a feature in the development of his intellectual character. Was it not "antidote enough to the poison of a pretended atheism, that the poet, who is supposed to-day to deny Deity, finds Deity in all things?"

Lord Denman, however, told the jury that he and they "were bound to take the law as it had been handed down to them. The only question for their consideration was, whether, in their opinion, the work, which had been made the subject of prosecution, deserved the imputations that were cast upon it by the indictment, and whether the publisher had sent it forth deliberately into the world, knowing its character to be such. The purpose of the passage cited in 'Queen Mab' was, he thought, to cast reproach and insult upon what, in christian minds, were the peculiar objects of veneration; it was not, however, sufficient that mere passages of an offensive character should exist in a work, in order to render the publication of it an act of criminality; it must appear that no condemnation of such passages appeared in the context. It had been said that the extraordinary poem in question was the production of a mere youth. Were the lines indicted calculated to shock the feelings of any christian reader? Were their points of offense explained, or was their virus neutralized by any remarks in the margin, by any note of explanation or apology? If not, they were libels on God, and indictable."[1]

[1] The jury returned a verdict of guilty; but the prosecutor abandoned all further proceedings on payment of his costs.

Still another class of works esteemed not innocent at common law were publications seditiously libelous

Rex v. Moxon, 2 Mod. State Trials, 362. Blackburn, J., alluding to this case in Reg. v. Hicklin (L. Rep., 3 Q. B. 374), says: "I hope I may not be understood to agree with what the jury found, that the publication of 'Queen Mab' was sufficient to make it an indictable offense." For Lord Lyndhurst's view of the prosecution, see Debates in the House of Lords, for 13th July, 1857. The prosecutor was Hetherington, who had, a short time before, been found guilty of publishing certain libels on the Old Testament (see Reg. v. Hetherington, 5 Jur. 529), and his object in instituting the prosecution against Mr. Moxon is not very clear. His counsel concluded his opening speech by expressing the satisfaction he should feel if the result of the trial were to establish that no publication on religion should be a subject for prosecutions in future (2 Mod. State Trials, 365); but Mr. Moxon's counsel treated the prosecution as one prompted solely by an indiscriminate desire, on the part of the prosecutor, of retaliating on some other person the punishment which he had himself suffered. And Blackburn, J., says of it: "I believe, as everybody knows, that it was a prosecution instituted merely for the purpose of vexation and annoyance" (Reg. v. Hicklin, L. Rep. 3 Q. B. 374; S. C. 37 L. J. 89, M. C.; 18 L. T. N. S. 395, *nom.* Reg. v. The Recorder of Wolverhampton. See also Patterson's Case, 1 Brown, 627).

Blasphemous publications are punishable either by indictment at common law or by criminal information. Persons convicted were formerly compelled to stand in the pillory, besides suffering other punishments. The act of 56 Geo. III., ch. 138, which abolished the punishment of the pillory in most cases, provides (sect. 2) that the court may, in all cases where it was formerly used, pass such sentence of fine or imprisonment, or of both, in lieu of the sentence of pillory, as to it shall seem most proper.

The punishment by banishment was abolished by 11 Geo. IV. & 1 Will. IV., ch. 73, § 1.

The Scotch law is not different from the English law on the subject of blasphemous libels. An act of 6 Geo. IV., ch. 47, after reciting the expediency of making the crime punishable in the same manner as if committed in England, enacted that any person convicted of blasphemy shall be liable to be punished only by fine or imprisonment, or both, at the discretion of the court; and that if any person, after being so con-

of the sovereign's royal person, of the parliament, or the constitution.

While the spirit of the law was to encourage a certain latitude of political discussion, or the disputations of learned men upon matters and shades of religious belief, it could not justify a wanton and gratuitous attack upon christianity in general,[1] or upon the king, the government, or the constitution in general. And so any man might, and still may

victed, shall offend a second time and be convicted, he may be adjudged, at the discretion of the court, either to suffer the punishment of fine or imprisonment, or both, or to be banished from the United Kingdom, and all other parts of the sovereign's dominions, for such term of years as the court in which such conviction shall take place shall order; and in case the person, so adjudged to be banished, shall not depart from the United Kingdom within thirty days after the pronouncing of such sentence, for the purpose of going into banishment, he may be conveyed to such parts out of the dominions of the sovereign, as the sovereign, by advice of the privy council, may direct. If the person sentenced to be banished, after the end of forty days from the time the sentence has been pronounced, is at large within any part of the United Kingdom, or any other part of the sovereign's dominions, without some lawful cause, before the expiration of the term for which the offender has been adjudged to be banished, every such offender being so at large and being thereof convicted, shall be transported to such place as the sovereign shall appoint, for any term not exceeding fourteen years. This statute still remains in force, with the exception of the provisions as to punishment by banishment, which are repealed by 7 Will. IV. & 1 Vict., ch. 5. Before the repeal of the acts of 1661, ch. 21, and 1695, ch. 11, by the 53 Geo. III., ch. 160, § 3, blasphemy was punishable, for the first offense, by public atonement in sackcloth to the parish where the scandal was committed; for the second offense, by payment of a fine of a year's rent of his real estate, and a twentieth part of his personal effects, and by imprisonment till the offender should again make satisfaction to the parish; for the third offense, with death.—Shortt, L. Lit., pp. 302–311.

[1] Rex. v. Waddington, 1 B. & C. 126.

fearlessly advance new doctrines of politics, religion, or morals, providing he does so with proper respect to the government of his country.

The old law of seditious libel contemplated, first, words spoken against the sovereign personally; second, libels on the administration; and, third, libels on the constitution generally. Libels upon parliament were ordinarily regarded as analogous to contempts, and will be hereafter treated;[1] but it may not be uninteresting to the student of the law of literature to follow briefly the progress of letters as hampered by the divine right of kings and the sacredness of the state.

That law on the subject of words spoken or written against the sovereign personally has undergone considerable alteration in more recent times. An Act of 3 Edw. I, c. 34, provides "that from henceforth none be so hardy to tell or publish any false news or tales whereby discord, or occasion of discord or slander may grow between the king and his people, or the great men of this realm." Section 1 of 6 Anne, c. 7, made it high treason for any person maliciously, advisedly, and directly, by writing or printing, to maintain and affirm that the then sovereign was not the lawful and rightful queen of the realm, or that the pretender had any right or title to the crown, or that any other person or persons has or have any right or title to the same, otherwise than according to the bill of rights, the act of settlement, and the acts for the union of England and Scotland; or that the kings or queens of the realm, with and by the authority of parliament, were not able to make laws and statutes of sufficient force and validity to limit and bind the crown, and the descent, limitation,

[1] *Post*, chapter on contempt of court.

inheritance, and government thereof. Words spoken against the king were, before the time of Charles I., held to be treasonable. To accuse the king of having committed murder,[1] or to say that a king *de facto* and not *de jure* was the rightful king,[2] was held to amount to high treason.[3] But in the case of Hugh Pine,[4] who was accused of having spoken several disparaging words concerning the king (Charles I.), the judges resolved "that the speaking of the words before mentioned, though they were as wicked as might be, were not treason; that, unless it were by some particular statute, no words will be treason."

To charge the king with a personal vice was held by the judges, upon debate of Peacham's case, not to be treason.[5] In that case the accused, a clergyman, was found guilty of treason, in the reign of Charles I., for certain passages in a sermon found in his study, which was never preached or intended to be preached. Many of the judges, however, were of opinion that this was not treason, and the prisoner was not executed.[6] In the case of Algernon Sidney, an unpublished paper, forming part of a theoretical work on government, found in his house, was given in evidence against him, and the Chief Justice (Jefferies) in his charge to the jury, insinuated that the doctrines contained in the paper were treasonable in themselves without reference to other evidence.[7]

[1] Juliana Quick's Case, 21 Hen. VI.
[2] Germaine's Case, 2 Edw. IV.
[3] Challercome's Case, cited Cro. Car. 125.
[4] Cro. Car. 117, 126.
[5] Ib. 126.
[6] First Discourse of High Treason, ch. 1, 199.
[7] 9 St. Tr. 889, 893.

The judgment in Sidney's case was reversed by act of parliament in 1689.

Though neither words spoken, nor an unpublished writing, was held in England to amount to an overt act of treason, to make good an indictment of compassing the death of the sovereign, under 25 Edw. 3, c. 2, yet a writing which imports such a compassing, if it be published, will amount to an overt act of treason under that statute.'

Apart from statute, all contempts against the sovereign's person or government, are, according to the text-books, very highly criminal, and punishable with fine and imprisonment, by the discretion of the judges, upon consideration of all the circumstances of the case. Under this head is ranked contemptuously speaking of the sovereign, as by cursing him, &c., or giving out that he wants wisdom, valor, or steadiness; or in general, doing anything which may lessen him in the esteem of his subjects, weaken his government, or raise jealousies between him and his people. Stating or insinuating that he acts from partial or corrupt motives, or with an intention to favor or oppress any individual, or class of men, would be a seditious libel; but not the imputation of honest error without moral blame.[2]

It is a criminal libel to publish falsely of the sovereign, as of any other person, that he is insane.[3]

In a leading case on the subject of seditious libels in England, defendants were printer and proprietor of a newspaper. The libel for the publication of which the criminal information was filed was the following: "What a crowd of blessings rush upon one's mind

[1] Williams' Case, 2 Roll. Rep. 88; 2 Inst. 12.
[2] Rex v. Lambert, 2 Camp. 402.
[3] Rex v. Harvey, 2 B. & C. 257.

that might be bestowed upon the country in the event of a total change of system! Of all monarchs, indeed, since the Revolution, the successor of George the Third will have the finest opportunity of becoming nobly popular."[1]

In 1729, an information was filed against John Clerk, charging him with printing and publishing an infamous libel called "Mist's Weekly Journal," wherein the king's title to the crown was openly struck at, his legitimacy called in question, and the persons of several of the royal family scandalously traduced under borrowed names; by representing the late king (George I.) under the name of Merewits, his present majesty under that of Esreff, the queen under that of Sultana; and at the same time drawing a beautiful character of the Pretender by the name of the Young Sophi, and setting forth the tyranny and subjection all Englishmen lay under, by representing them under the name of the Persians. The charge against the defendant was for maliciously and traitorously printing off one of these papers in particular; but the jury found the defendant guilty.[2]

A similar information was filed against a compositor named Knell, one of the two servants of Mist, for printing and publishing the same work. The evidence being that the defendant and his fellow-servant set up the type, and that one took one column of it downward and the other the other column upward, the chief justice directed the jury to acquit the defendant as to the publication; but, if they believed the evidence, to find him guilty of the printing; and the jury did so. An old bed-ridden woman was also indicted for publishing the same libel, she having kept a pamphlet

[1] Rex v. Lambert, 2 Camp. 398
[2] Barnardiston's Rep. 304.

shop at which the libel was sold, the shop being shown to be a mile distant from the house in which she had for a long time lain bed-ridden.[1]

In 1763, an information was filed against John Wilkes, for printing and publishing a certain malicious, seditious, and scandalous libel, intituled "The North Briton," number 45, tending to vilify and traduce the king and his government, to impeach and disparage his veracity and honor, and to represent and make it to be believed that his majesty's most gracious speech delivered from his throne to the parliament, on the 19th day of April, 1763, contained many falsities and gross impositions upon the public, and that his majesty had suffered the honor of his crown to be sunk and prostrated, and the interests of his subjects and allies to be treacherously betrayed; and also to render the king and his government contemptible and odious, and to excite tumults, commotions, and insurrections; and to violate and disturb the public tranquillity, good order, and peace of the kingdom. He was found guilty, and sentenced to be fined and imprisoned, George Kearsley was convicted of printing and publishing, and John Williams of publishing the same number of "The North Briton."[2]

In 1848 parliament made it treason to publish or utter such seditious writings or language as would incite the people to disaffection and rebellion.[3]

Everybody may, with impunity, criticise the conduct of the government, provided he does it fairly and honestly; but imputations of corrupt motives in the administration of affairs, or other writings calculated

[1] Rex v. Nutt, Id. 306. The attorney-general consented to withdraw a juror.

[2] Dig. L. T. 69, K. B. MSS.

[3] 11 & 12 Vict., ch. 12.

to alienate the affections of the people by bringing the government into disesteem,[1] or likely to excite sedition, whether such be the writer's intention or not, come within the denomination of seditious libels, and are punished as such.

"It is certain," says Hawkins,[2] "that it is a very high aggravation of a libel that it tends to scandalize the government by reflecting on those who are entrusted with the administration of public affairs, which doth not only endanger the public peace, as all other libels do, by stirring up the parties immediately concerned in it to acts of revenge, but also has a direct tendency to breed in the people a dislike of their governors, and incline them to faction and sedition."

"It has been observed," said Lord Ellenborough,[3] "that it is the right of the British subject to exhibit the folly or imbecility of the members of the government. . . . If, in so doing, individual feelings are violated, there the line of introduction begins, and the offense becomes the subject of penal legislation."

"A writer," says Fitzgerald, J.,[4] "may criticise or censure the conduct of the servants of the crown or the acts of the government; he can do it freely and liberally, but it must be without malignity, and not imputing corrupt or malicious motives. With the same motives a writer may freely criticise the proceedings of courts of justice and of individual judges —nay, he is invited to do so, and to do so in a free and fair and liberal spirit. The law does not seek to put any narrow construction on the expressions used

[1] Rex v. Burdett, 4 B. & Ald. 131; Rex v. Cobbett, 29 How. St. Tr. 49.

[2] P. C., Book 1, ch. 28., "Libels," § 7.

[3] Rex v. Cobbett, *ubi supra*.

[4] Cox. Crim. Cas. 49.

and only interferes when, plainly and deliberately, the limits are passed of frank and candid and honest discussion. . . . . There is no sedition in censuring the servants of the crown, or in just criticism on the administration of the law, or in seeking redress of grievances, or in the fair discussion of all party questions."

Many cases have been decided under this head of the law of libel, but no finer test of what constitutes the offense can be deduced from them than that the plain intrinsic tendency of the particular publication to produce public disorder, and the malicious intention of its author must be considered.

In Rex v. Tutchin,[1] the defendant was charged with having falsely, seditiously, and scandalously written, composed, and published a certain false, malicious, seditious, and scandalous libel, intituled "The Observator." The information set forth several passages from "The Observator," some of which lamented the sad state of the country owing to the influence of French gold on those who had the conduct of affairs; while others complained of the mismanagement of the navy, attributing ignorance and incapacity to those who had the management of it. It having been contended on behalf of the defendant that the publications could not be libels, because they did not reflect upon particular persons, Lord Holt, C. J., said to the jury: "This is a very strange doctrine, to say it is not a libel reflecting on the government, endeavoring to possess the people that the government is maladministered by corrupt persons that are employed in such or such stations either in the navy or army. To say that corrupt officers are appointed to administer affairs, is certainly a

[1] 14 St. Tr. 1095.

reflection on the government. If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist; for it is very necessary for all governments that the people should have a good opinion of it. And nothing can be worse to any government than to endeavor to procure animosities as to the mismanagement of it; this has been always looked upon as a crime, and no government can be safe without it be punished. Now you are to consider whether these words I have read to you do not tend to beget an ill opinion of the administration of the government."

Richard Francklin was tried and convicted in 1731 for printing and publishing in "The Craftsman" a seditious libel, intituled "A Letter from the Hague,"[1] wickedly, maliciously, and seditiously contriving and intending to disturb and disquiet the public peace and tranquillity of the kingdom, and to bring the treaty of peace into contempt and disgrace, and also to detract, scandalize, traduce, and vilify the administration of his majesty's present government of this kingdom and his principal officers and ministers of state, and to represent his said officers and ministers of state as persons of no integrity and ability, and as enemies to the public good of this kingdom, and to cause it to be believed that his majesty by the advice of his said principal officers and ministers intended to break and violate the said treaty last mentioned, &c. "Even a private man's character," said Lord Raymond, C. J., "is not to be scandalized, either directly or indirectly, because there are remedies appointed by the law in case he has injured any person, without maliciously scandalizing him in his character; and

[1] 9 St. Tr. 626.

much less is a magistrate's, minister of state, or other public person's character to be stained, either directly or indirectly, because the law hath pointed out another remedy than publishing libels, if they have injured any person, either in a public or private capacity. And the law always punishes libels, even among private persons, because they flow from malice and tend to create disturbance, quarrels, and revenge between them, their families and kindred, and disturb the public peace; and the law reckons it a greater offense when the libel is pointed at persons in a public capacity, as it is a reproach to the government to have corrupt magistrates, &c., substituted by his majesty, and tends to sow sedition and disturb the peace of the kingdom." And his Lordship refused to allow the admission of any evidence to prove that the matters charged in the libels were true.

In 1777 an information was filed against John Horne, charging that the defendant wickedly, maliciously, and seditiously intending, devising, and contriving to stir up and excite discontents and seditions amongst his majesty's subjects, and to alienate and withdraw the affection, fidelity, and allegiance of his majesty's subjects from his said majesty, and to insinuate and cause it to be believed that divers of his majesty's innocent and deserving subjects had been inhumanly murdered by his said majesty's troops in the province, colony, or plantation of the Massachusetts Bay, in New England, in America, belonging to the crown of Great Britain, and unlawfully and wickedly to seduce and encourage his said majesty's subjects in the said province, colony, or plantation to resist and oppose his majesty's government, &c., did wickedly, maliciously, and seditiously write and publish a certain false, wicked, malicious, scandalous, and seditious libel

of and concerning his said majesty's government and the employment of his troops. The information was tried before the Earl of Mansfield by a special jury, and the defendant was found guilty and sentenced to pay a fine of £200 to the king, to be imprisoned for twelve months and until the fine should be paid, and to find sureties for his good behavior for three years.[1]

In 1804 an information was filed against William Cobbett, for a libel upon the administration of the Irish government, and upon the public conduct and charac ter of the lord-lieutenant and lord-chancellor of Ire land. The libel was contained in a letter signed "Juverna," published in "The Weekly Register," and the information charged that the defendant, unlawfully and maliciously devising and intending to move and incite the liege subjects of the king to hatred and dislike of his majesty's administration and government of this kingdom, and to insinuate and cause it to be believed that the people of that part of the United Kingdom of Great Britain and Ireland called Ireland were oppressed, aggrieved, and injured by our said lord the king's government of the said part of the United Kingdom, and to traduce, defame, and vilify the persons employed by our said lord the king, in the administration of the government of the said part of the said United Kingdom, &c., did unlawfully and mali ciously print and publish the said libel. Mr. Cobbett was not the author, but only the publisher of the letter.

An information was filed in 1811 against John Hunt and John Leigh Hunt for printing and publishing in "The Examiner" a libel tending to create disaffection in the army.[2]

[1] 11 St. Tr. 651; Cowp. Rep. 676.
[2] 31 How. St. Tr. 408.

In 1820 an information was filed against Sir Francis Burdett, for writing and publishing a certain scandalous, malicious, and seditious libel of and concerning the government of this realm, and of and concerning the troops of our lord the king, unlawfully and maliciously devising and intending to raise and excite discontent, disaffection, and sedition among the liege subjects of the king, and among the soldiers of our said lord the king, and to move and excite the liege subjects of our said lord the king to hatred and dislike of the government of this realm, and to insinuate and cause it to be believed by the liege subjects of our said lord the king that divers of the liege subjects of our said lord the king had been inhumanly cut down, maimed, and killed by certain troops of our said lord the king at Loughborough, in the county of Leicester, on the 16th of August, 1819; the libel being contained in an address to the electors of Westminster.' Best, J., told the jury that if the address was published with the intention alleged in the information, such intention was to be collected from the paper itself; unless the import of the paper were explained by the mode of publication or any other circumstances, the paper was a libel. The jury found the defendant guilty.

A body of police having dispersed an assembly of people at Birmingham, an indictment for seditious libel was preferred against the writer and publisher of certain resolutions agreed to by a body called the General Convention, condemning the act of the police as "a wanton, flagrant, and unjust outrage upon the people of Birmingham by a bloodthirsty and unconstitutional force from London, acting under the authority of men who, when out of office, sanc-

[1] 4 B. & Ald. 95.

tioned and took part in the meetings of the people, and now, when they share in the public plunder, seek to keep the people in social slavery and political degradation;" asserting that the people of Birmingham were "the best judges of their own right to meet in the 'Bullring' or elsewhere, have their own feelings to consult respecting the outrage given, and are the best judges of their own power and resources to obtain justice;" and that the arrest of a particular individual "affords another convincing proof of the absence of all justice in England, and clearly shows that there is no security for life, liberty, or property, till the people have some control over the laws they are called upon to obey."[1]

"With respect to the intent of the defendant," said the learned judge, "a man must be taken to intend the natural consequences of what he has done; and if this paper has a direct tendency to cause unlawful meetings and disturbances, and to lead to a violation of the laws, that is sufficient to bring it within the terms of this indictment, and it is a seditious libel.

"If it be the highest crime known to our laws to attempt to subvert by force the constitution and state, it is certainly a crime, though of inferior magnitude, yet of great enormity, to endeavor to despoil it of its best support—the veneration, esteem, and affection of the people. It is, therefore, a maxim of the law of England, flowing by natural consequence and easy deduction from the great principle of self-defense, to consider as libels and misdemeanors every species of attack by speaking or writing, the object of which is wantonly to defame or indecorously to calumniate that economy, order, and constitution of

[1] Rex v. Collins; Rex v. Lovett, 9 Car. & P. 456.

things which make up the general system of the law and government of the country."[1]

"That to accomplish treasonable purposes, and to delude the weak, the unwary, and the ignorant, no means can be more effectual than a seditious press. With such machinery the preachers of sedition can sow widecast those poisonous doctrines, which, if unchecked, culminate in insurrection and rebellion. . . . . Words may be of a seditious character, but they might arise from sudden heat, be heard only by a few, create no lasting impression, and differ in malignity and permanent effect from writings."

Criticism on any part of the constitution, made with a view to bring about improvements in it, are not interdicted; but attacks calculated to promote insurrection, and circulate discontent, to degrade and vilify the constitution, to asperse its justice and anywise impair the exercise of its functions, are termed seditious libels, and punished as such.

The state of the country and of the public mind when the publication takes place are material to be considered in determining whether the libel was published with a seditious intention.

A particular passage in a work may constitute a seditious libel; but although the jury are to form their judgment upon the particular passage charged as such, they may compare it with the whole book, and see how it is qualified by it. So with regard to newspaper articles: the jury are to consider, not isolated passages, but the whole of the articles complained of.

Whether a newspaper article is original or not, may, however, be a material consideration in

[1] 11 Cox Crim. Cas. 46.

determining the intention with which it was published.

Williams, a barrister of the Middle Temple, was, in the seventeenth year of James I., indicted, convicted, and executed for high treason, in writing two books, the one called "Balaam's Ass," and the other called "Speculum Regale," in which he predicted that the king would die in the year 1621.[1]

One Brewster was indicted and convicted in the 15th Chas. II., for printing and publishing a libel called "The Phœnix, or the Solemn League and Covenant," in which it was declared that a king abusing his power to the overthrow of religion, laws, and liberties, may be controlled and opposed; and if he sets himself to overthrow all these by arms, then they who have the power, as the estates of the land, may and ought to resist by arms.[2]

In the 29th Chas. II. an information was filed against one Harrison, charging that he, maliciously and traitorously intending to stir up sedition and to create a disturbance between the king and his people, had published, uttered, and proclaimed of and concerning the government and rule of England, and of and concerning the traitors who adjudged King Charles I. to death, that the government of the kingdom consists of three estates, and that if a rebellion should happen in the kingdom, unless that rebellion was against the three estates, it was no rebellion. The court, supposing that the words did tend to set on foot that position upon which the war levied in 1641 by the two Houses against the king, was grounded, were much displeased that the counsel for the defendant would pretend to defend

[1] 2 Roll. Rep. 88.
[2] Rex v. Brewster, Dig. L. L. 76.

them, or to put any tolerable sense upon them, and gave judgment for the king.[1]

In the 5th Anne, Dr. Brown was convicted, on an information, of having published a libel, entitled "Mercurius Politicus," reflecting on the state and constitution, as settled at the Revolution, which he represented as the "destruction of the laws of England."[2]

A treatise on hereditary right, by Bedford, was held to be a libel, though it contained no reflection upon any part of the then government, in the 12th Anne.

An information was filed in 1754 against Richard Nutt, for printing and publishing a certain false, wicked, scandalous, seditious, and malicious libel, entitled "The London Evening Post," tending to represent this kingdom as in a miserable and wretched state and condition, and with a view to traduce the "late happy revolution," and to suggest that it was an unjustifiable and unconstitutional proceeding; and also to dispute and call in question the settlement and limitation of the succession of the crown of this realm in the present most illustrious family; and to represent the same as illegal and unwarrantable, and to make it be believed that the said late most happy revolution and the settlement of the crown of this realm as now by law established, had been attended with fatal and pernicious consequences to the subjects of this realm. He was found guilty, and sentenced to the pillory, a fine of five hundred pounds, and imprisonment in the King's Bench for two years.

Dr. John Shebbeare was convicted in 1758 of

[1] Rex v. Harrison, 3 Keb. 842; Vent. 324.
[2] Rex v. Brown, 11 Mod. 86.

printing and publishing a certain false, wicked, scandalous, seditious, and malicious libel, entitled: "A sixth letter to the people of England, on the progress of national ruin, in which it is shown that the present grandeur of France and the calamities of this nation are owing to the influence of Hanover on the councils of England;" tending to traduce the Revolution, and to represent it as the foundation of all those imaginary evils and calamities which the defendant would falsely insinuate the subjects of this kingdom did labor under; and also to asperse the memory of King William III. and of King George I.; and to represent the public measures which were taken and pursued during the course of their respective reigns as wicked, corrupt, and fatal measures to this kingdom; and also to asperse, scandalize, and vilify the late king and his administration of the government of this kingdom; and to make it thought that the public affairs of this kingdom were in a most unhappy and declining state; and that the subjects of this kingdom were unnecessarily and most intolerably loaded and oppressed with taxes, debts, and subsidies; and also to insinuate that the late king had no concern for the people of England, nor any regard for the interest, honor, or welfare of this kingdom, but that the treasure and riches of this kingdom were misapplied, wasted, and dissipated in support of the electorate of Hanover and his German dominions.[1]

Thomas Paine was convicted in 1792 upon an information charging him with being the author and publisher of a seditious libel, the tendency of which was "to traduce and vilify the late happy Revolution, the settlement of the crown and regal government, as by law established, and also the bill of rights, the leg-

[1] Rex v. Shebbeare, Hil. Term, 31 Geo. II., K. B. MSS.

islature, government, laws, and parliament of this kingdom."[1]

John Cuthell, a bookseller, was found guilty in 1799, of publishing a seditious libel written by the Rev. G. Wakefield, but, on filing an affidavit that he had no knowledge whatever of the contents or nature of the book, he was discharged on payment or a fine of thirty marks.[2]

33. For many years the history of the English law is a history of the censorship of the press, exercised by the Star Chamber, and, in a less degree, by statutes and by courts ever since.[3]

"On the abolition," says Shortt,[4] "of the Star Chamber, in 1641, the Long Parliament assumed to itself the jurisdiction exercised by that court, in matters relating to the press, and passed many severe ordinances in restraint of printing. The restraints of the press were continued after the Restoration by the Licensing Act of 13 & 14 Car. 2, c. 33 ("An act for preventing the frequent abuses in printing seditious, treasonable, and unlicensed books and pamphlets, and for regulating of printing and printing presses"). This act interdicted the printing of pamphlets and books except in London, York, and the Universities; limited the number of master printers to twenty; regulated the number of their presses and apprentices; appointed licensers, and imposed severe penalties on offenders

[1] Rex v. Paine, 32 Geo. III., K. B. MSS. The defendant, not appearing to receive the judgment of the court, was outlawed.

[2] Rex v. Cuthell, 27 St. Tr. 642.

[3] The foregoing account of the common-law decisions as to seditious libel, is epitomized from Mr. Shortt's work, pp. 322–344.

[4] Law Lit., p. 319. In 1680, when the licensing act had ceased,

against its provisions, and many cruel and ingenious punishments were inflicted under it. It continued in force till 1679, and in 1685 was revived (by 1 Jac. 2, c. 17) for seven years. In 1692 it was continued (by 4 Will. & M. c. 24) until the end of the session of 1693, when its operation ceased, notwithstanding several attempts to revive it.[1] The liberty of the press dates from that year.

for a time, to operate, the opinion of the judges on the subject of unlicensed printing was expressed by Chief Justice Scroggs, in the following manner. At the trial of Benjamin Harris, a bookseller, for the publication of a libel entitled, "An Appeal from the Country to the City, for the Preservation of his Majesty's Person, Liberty, Property, and the Protestant Religion," the chief justice said: "It is not long since that all the judges met by the king's command—as they did some time before, too—and they both times declared unanimously that all persons that do write or print or sell any pamphlet that is either scandalous to public or private persons, such books may be seized, and the person punished by law; that all books which are scandalous to the government may be seized, and all persons so exposing them may be punished; and, further, that all writers of news, though not scandalous, seditious, or reflective upon the government or the State, yet if they are writers (as there are few others) of false news, they are indictable and punishable upon that account" (7 St. Tr. 929).

[1] "While the abbey was hanging with black for the funeral of the queen, the Commons came to a vote which, at the time, attracted little attention, which produced no excitement, which has been left unnoticed by voluminous annalists, and of which the history can be but imperfectly traced in the archives of Parliament, but which has done more for liberty and for civilization than the great charter or the bill of rights. Early in the session a select committee had been appointed to ascertain what temporary statutes were about to expire, and to consider which of those statutes it might be expedient to continue. The report was made; and all the recommendations contained in that report were adopted, with one exception. Among the laws which the committee advised the House to renew was the law which subjected the press to a censorship. The question was put 'that the House do agree with the committee in the

"The liberty of the press, when rightly understood," says Blackstone,[1] "consists in laying no previous restraints upon publications, not in freedom from censure for criminal matter when published."[2]

That liberty in the United States is practically unlimited and absolute. Such a thing as a prosecution for seditious libel, at least so far as our knowledge goes, is, and always appears to have been, utterly unknown. The right of the government, however, to restrain or punish utterances calculated to diminish its power or weaken its authority, cannot be supposed, from the fact of its never having been asserted (except, perhaps, in time of war, when arrests were made by force of martial law and as a military measure[3]) not to exist. Not only does such right inhere in the government by virtue of the common law, but an act of congress of July 14, 1798, makes it an indictable offense to libel the government, congress, or president of the United States.

34. It is apprehended, as we have said already, that the prevention of injurious publications in this country will be directed rather to their sale when published, than to a forbidding of their publication, and so would fall under the police jurisdiction of the states themselves, rather than under the copyright jurisdiction of congress. There can be no property,

resolution that the act entitled an act for preventing abuses in printing seditious, treasonable, and unlicensed pamphlets, and for regulating of printing and printing presses, be continued.' The Speaker pronounced that the 'noes' had it; and the 'ayes' did not think fit to divide" (Macaulay, Hist. of Eng., vol. 4, p. 540). As to the reasons which induced Parliament to discontinue the licensing act, see p. 541 of the volume last referred to.

[1] 4 Com. (Steph.) 346.

[2] *Vid.* Hallam Const. Hist., vol 3, p. 227 (ed. 1832).

[3] *e. g.*, the case of Vallandigham, 1863.

either literary or otherwise, in such matter. No action at law would lie for its recovery if withheld, or if lost by a carrier—and we have already seen that it is a misdemeanor to deposit it in the post-office. Statutes forbidding the sale of such productions will probably be found in most if not all of the states; but even in their absence, the dealing in this class of publications would be indictable,[1] for the circulating of obscene matter to deprave and corrupt the public morals, is, indeed, as Lord Campbell characterized it, "an abominable offense,"[2] and the jurisdiction of such offenses having come down from the star chamber through the ecclesiastical courts,[3] has finally settled upon the civil courts as the custodians of the morals of the realm[4] or commonwealth.

In treating of obscenity the law encounted a difficulty at the very outset. It was difficult to draw a

[1] "Preserving and keeping in one's possession" obscene works for the purpose of selling them, is not an indictable offense. But "obtaining and procuring" them for that purpose is an indictable misdemeanor at common law (Sugdale's Case, 1 Dears. C. C. 64). "And this because"—said Campbell, Ch. J., in that case—"the plaintiff in error may have had the pictures in his possession with an innocent intention; and there is no act shown to be done which can be considered as the first step in the prosecution of a misdemeanor. . . . . Procuring is an overt act, an unlawful step taken in pursuance of the abominable offense of circulating obscene prints to deprave and corrupt the public morals.

[2] Ibid.

[3] Hill's Case, 2 Str. 790; Dig. L. L. 60.

[4] Rex v. Curl, 2 Str. 789. One of the members of the court, when this case first came before it—Fortesque, J.—was of opinion that the offense (of having published a base and obscure libel, entitled, "Venus in the Cloister, or the Nun in her Smock"), though great, was not punishable by law (Ib. 790). The court, however, upheld the temporal jurisdiction, and Curl was pilloried for his offense. Since this decision, the temporal character of the offense has not been doubted.—Shortt, L. L. 312.

line between works wholly and designedly obscene and those obscene only in portions. The question arose how large or how small a portion of a work must be worthy and moral in its character to make it proper to be promiscuously circulated. The labors of the great masters of art, and the writings of the fathers and masters of poetry and the drama, might readily be brought under a too general and comprehensive definition, and thus works good in themselves, and standard and elevating in their nature, might be interdicted; while, under a more specific and narrower one, compositions designedly vicious and corrupting in all their tendencies might avoid the injunction of the law.[1]

35. Again, a work written with the laudable intention of reforming abuses, and to expose errors, may be, from the very nature of the abuses and errors sought to be reformed, liable to the charge of obscenity.

It is indeed a delicate question, and one that jurists, legislators, and sociologists have constantly encountered. The offense is rank, but it would seem as if any attempt to abate it became, almost at the outset, ranker than the offense itself. It is an offense of which the world has not yet learned even to speak, without danger to the very interests it strives to protect.

[1] Hill's Case, 2 Str. 790. The defendant, in this case, was indicted for publishing some poems of Lord Rochester's. In 1857, pending the passage of a bill in the English House of Lords, relating to obscene productions, Lord Lyndhurst pointed out this difficulty. "The magistrate," said he, "must also be satished that the case is a proper one for a prosecution; so that if indecent passages were taken out of such authors as Dryden or Pope, he would say: 'Although these are very indecent passages, and ought never to have been inserted in these works, yet this is not a case for a prosecution' (Parliamentary Debates, July 13, 1857), and accordingly the words, 'proper to be prosecuted as such' (obscene), were inserted."—Rex v. Hicklin, L. Rep. 32, B. 371.

In a recent case,[1] the test of obscenity was said to be "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of the sort may fall."

This latter was a case where a pamphlet, called "The Confessional Unmasked; professing to show the depravity of the Romish priesthood, the iniquity of the confessional, and the questions put to females in confession"—containing extracts in Latin, with translations of the same, from various writers, half the pamphlet relating to controversial matters, and the other half being grossly obscene as relating to impure and filthy acts, words, and deeds—was circulated by the appellant, a member of "The Protestant Electoral Union," not for profit or gain, but for the purpose of exposing what he deemed to be the errors of the Church of Rome, and particularly the immorality of the confessional; the pamphlet, in fact, containing a preface and notes condemnatory of the tenets and principles of the writers cited from.

The court of queen's bench held that the justices were right in ordering a number of copies of the pamphlet to be seized in the appellant's house, and destroyed as obscene books under the law.

"I take it," said Cockburn, Ch. J., "that, apart from the ulterior object which the publisher of this work had in view, the work itself is, in every sense of the term, an obscene publication, and that consequently, as the law of England does not allow of any obscene publication, such publication is indictable. We have it, therefore, that the publication itself is a breach of the law. But then it is said for the appel-

[1] Rex v. Hicklin, L. Rep. 32, B. 371; 18 L. T. N. S. 398; 36 L. J. 9; 8 M. C.

lant: 'Yes, but his purpose was not to deprave the public mind; his purpose was to expose the errors of the Roman Catholic religion, especially in the matter of the confessional.' Be it so. The question then presents itself in this simple form: May you commit an offense against the law, in order that thereby you may effect some ulterior object which you have in view, which may be an honest and even a laudable one? My answer is, emphatically, no. The law says you shall not publish an obscene work. An obscene work is here published; and a work, the obscenity of which is so clear and decided, that it is impossible to suppose that the man who published it must not have known and seen that the effect upon the minds of many of those into whose hands it would come, would be of a mischievous and demoralizing character. .... I think the old sound and honest maxim, that you shall not do evil that good may come, is applicable in law as well as in morals; and here we have a certain and positive evil produced for the purpose of effecting an uncertain, remote, and very doubtful good. I think, therefore, the case for the order is made out; and although I quite concur in thinking that the motive of the parties who published this work, however mistaken, was an honest one, yet I cannot suppose but what they had that intention which constitutes the criminality of the act; at any rate, that they knew perfectly well that this work must have the tendency which, in point of law, makes it an obscene publication, namely, the tendency to corrupt the minds and morals of those into whose hands it might come. The mischief of it, I think, cannot be exaggerated. But it is not upon that I take my stand in the judgment I pronounce. I am of opinion, as the learned recorder has found, that this is an obscene

publication. I hold that where a man publishes a work manifestly obscene, he must be taken to have had the intention which is implied from that act; and that, as soon as you have an illegal act thus established, *quoad* the intention and *quoad* the act, it does not lie in the mouth of the man who does it, to say, 'Well, I was breaking the law, but I was breaking it for some wholesome aud salutary purpose.' The law does not allow that. You must abide by the law, and if you would accomplish your object, you must do it in a legal manner, or let it alone; you must not do it in a manner which is illegal."

36. We apprehend the rule will be in general somewhat as follows: Standard works of great literary value, like the plays of Shakespeare, Jonson, Beaumont and Fletcher, Congreve or Wycherley, the poems of Chaucer, Dryden, or Byron, or the prose fiction of DeFoe, Smollett, or Fielding, manifestly will not be construed to be obscene productions, although, whether designedly, or by the fault, the fashions, and follies of the days when they were composed, all the works of these writers contain passages which are in these times—without question, perhaps—grossly immoral and obscene. It is not upon such episodes that their immortality rests; such passages are the tares which grow with the wheat, which are to be forgiven for the sake of the sublime, or brilliant, or epigrammatic character of the composition, ascribing them only to the manners of his times and to the humanity of the author. Neither will we prosecute the successful editors and publishers of these works, nor class the works themselves as falling under the interdiction of the law.

37. If, however, an editor or publisher should undertake and publish a volume of selections from the above or like authors, which should contain ex-

clusively their obscene passages and nothing else, so that every passage or sentiment of literary or epigrammatic merit which has made those writers famous should be carefully banished, and only the grossly sensuous or filthy thoughts and sentiments included; such a volume—we think it cannot be doubted—would be clearly an obscene publication. A publication might be even made grossly obscene by culling passages wholly from the sacred scriptures, which passages, standing alone and unrelieved by their natural context, might constitute a work indictable by law.[1] It might be objected that such a work would harm nobody; but, on the other hand, there might be many persons ignorant enough to suppose that the lofty authority of the source attached itself to garbled extracts isolated therefrom.[2]

38. The circulation of grossly obscene and filthy engravings, prints, cuts, photographs, or pictures of any kind, is generally prohibited by statute, whether by passing through the mails, or by selling and vending, or exposing or procuring them to be so sold or vended. And even if it were not, we think, undoubtedly, that an authority to check such offenses *contra bones mores* exists by common law in all the courts of criminal jurisdiction. Undoubtedly no copyright[3] or other property can exist in such productions, for the law will not protect in one form what it punishes in another.

39. With regard to photographs, prints, or engravings, the of the works old masters, antiques and classical fragments, a more careful discrimination might be necessary. There must be here, as in the case of the stan-

[1] Matter of Train, N. Y. General Sessions, 1873.

[2] Ibid.

[3] Du Bois v. Beresford, 2 Camp. 511; 4 Bl. Com. (Steph.) 545; Fores v. Johnes, 4 Esp. 97.

dard writers, a careful discrimination between what is merely sensual and suggestive (from which, perhaps, equity might withhold its protection) and that which is grossly obscene and filthy, the circulation of which the law might follow with punishment.[1]

40. There is another character of publications which the law will not consider as innocent, namely, those which in their pretensions, titles, or advertisements, deceive, or are calculated to deceive, the public.

In such cases the publisher of the matter will be held to obtain, or as seeking to obtain money under false pretenses, not only in the publication of the work, but every time a single copy is sold. And he cannot, therefore, have any copyright in the publication nor any standing in court to ask protection in the possession of what he has no right to possess.[2]

This rule was laid down in Wright v. Tallis, by Tindal, C. J., and as carrying the principle, perhaps, to its limit, it may be well to examine that case somewhat in detail. The declaration alleged that before and at the time of committing the grievances, &c., there was a subsisting copyright in a certain book entitled, "Evening Devotions; or the worship of God in spirit and in truth, for every day in the year," from the German, by C. C. Sturm, author of the "Morning Devotions"; and that the plaintiff was the proprietor of such copy-

[1] Thus the paintings of "Leda and the Swan," and "Io and Jupiter," in the Royal Museum at Berlin, and the innumerable Danaes, and other renderings of classical fictions, while assuredly not modest in their tone, could scarcely be called obscene. The selection of paintings from the "chamber of the nymphs," in Pompeii, and the bronzes and statuary from that city, preserved in the secret chamber of the Royal Museum at Naples, however, are unquestionably obscene, and seem to illustrate the distinction endeavored to be indicated above.

[2] Wright v. Tallis, 1 C. B. Rep. 893.

right, and had printed divers, to wit, twenty thousand copies of the said book, to his own great profit and advantage. The defendant, however, was enabled to establish in defense, that the book in question was procured by the complainant to be written by one Robert Huish, and was not a translation from the German of C. C. Sturm, whose works were well known and highly valued. And, on demurrer, it was held that the work, being a palpable attempt to deceive the public, no copyright could exist therein, and the plaintiff could not maintain his action for piracy. The learned chief justice, however, was careful to discriminate between this case and the others examined in this chapter, saying: "The cases in which a copyright has been held not to subject where the work is subversive of good order, morality, or religion, do not, indeed, bear directly on the case before us; but they have this analogy with the present inquiry, that they prove that the rule which denies the existence of copyright in those cases, is a rule established for the benefit and protection of the public, and we think the best protection that the law can afford to the public against such a fraud as that laid open by this plea, is to make the practice of it unprofitable to its author."

The case of Lord Byron v. Johnston [1] is a peculiar one. In that case an injunction was continued by Lord Eldon, restraining the defendant from publishing a poem as the work of Lord Byron, who was then abroad, on an affidavit of Lord Byron's agents of circumstances rendering it highly probable that it was not his work, and the defendant declining to swear that he believed it was.

41. There may be, and are, however, innumerable

[1] 2 Meriv. 29. (See this case, and Harte v. De Witt, treated *post*, in the chapter on Piracy.)

cases of misrepresentation in the authorship of literary productions, which are entirely innocent, harmless, and permissible, as not only deceiving nobody, but adding—as a sort of coup d'eclat—to the interest or the success of the work. Notable instances of the like are frequent in literature, and should be carefully discriminated from the rule just laid down.

As where the author of a fiction, for instance, pretends to be the editor of a manuscript that he has discovered in a hidden spot—in an old garret or chest of drawers, or in a cave or the trunk of a tree. Or where the fiction holds itself out to be a translation, as did Walpole's Castle of Otranto; or where the form of letters, passing between imaginary correspondents, or of statements or affidavits made by them is chosen; or where the author's name is concealed under a fanciful or invented nom de plume. There is no serious design, in any one of these cases, to deceive the purchaser, or to make gain or profit from him on the false representation. The purchaser probably would not have been deterred from purchasing at the same price, had he known or been informed, by the bookseller, that the name of the author was assumed, and not genuine; or had known that the work was original, and not translated.[1]

If Chatterton had invoked the protection of a

[1] Wright v. Tallis, 1 C. B. Rep. 893. There is no more common device of authors than this—certainly none more harmless, or, we may add, delightful. (See the interesting treatise of M. Delepierre: "Supercheries Litteraires, Pastiches, Suppositions d'auteur, dans les Lettres et dans les Arts. Londres: N. Trubner et cie. 1872;" and also, "Questions de Litterature Legale,"—Ch. Nodier; "Pastiches et Imitations, Libres du style de quelques Ecrevains de 17^me^ et du 18^me^ Siecles,"—L. Chatelaine; "Reflexions sur le Style Original,"—Marquis de Roure; and "Supercheries Litteraires," by Querard.

court of equity for a copyright in his published works, who could doubt that it would have been extended him, since the antique and the literary charm of the work was his, to whomsoever among imaginary beings he chose to assign it. Imagine a purchaser, of that day, bringing back a volume of the "Rowlie Poems" to his bookseller, and asking a return of his money, on the ground that it was not a transcription from old manuscripts of the monk, Thomas Rowlie, but the original work of a boy—one Thomas Chatterton; or the "Tales of a Grandfather," because they were written by Walter Scott, and not by Jedediah Cleishbotham; or "Knickerbocker's History of New York," because there was no such man as Deidrich Knickerbocker, but that the whole was a burlesque and absurdity, proceeding from the brain of one Washington Irving!

42. By the common law, there is still another class of works not innocent. It was laid down by Lord Ellenborough, in the trial of Jean Peltier for a libel upon Napoleon Bonaparte, first consul of the French republic, in 1803,[1] that any publication which tends to degrade, revile, and defame persons in considerable situations of power and dignity in foreign countries, may be taken to be and treated as a seditious libel, particularly where it has a tendency to interrupt pacific relations between the two countries.[2] If the publication contains a plain and manifest incitement and persuasion, addressed to others, to assassinate and destroy the persons of such magistrates, as its tendency is to interrupt the public peace, the libel becomes subversive of government, and assumes

[1] Rex v. Peltier, 28 Howell's St. Tr., 617; and London, M Peltier, 1803.

[2] The same appears to be the law in Scotland—*vid.* Borthwick's Law of Libel, pp. 74, 75.

a still more criminal complexion. It is difficult to conceive of such a case occurring in the United States. It would certainly be an interesting spectacle, if a foreign power should complain of a libel through the press of a government which permits herself, her own rulers, statesmen, and machinery of state, to be criticised, characterized, caricatured, and maligned, without limit and without protest. Still, it has not been thought inappropriate, in this connection, to examine the few instances in which this kind of publication has been condemned.

The information, in 1808, against Jean Peltier, was for publishing matter defamatory of the first consul of France—a country with whom England was then at peace—and containing passages inciting to his assassination.[1]

[1] Two of these passages were as follows:

"De la France, ô honte éternelle!
César, au bord du Rubicon,
A contre lui, dans sa querelle,
Le Sénat, Pompée, et Caton;
Et, dans les plaines de Pharsale,
Si la fortune est inégale—
S'il te faut céder aux destins;
Rome, dans ce revers funeste—
Pour te venger, au moins il reste
Un poignard aux derniers Romains."

. . . . . .

"Il est proclamé chef et consul pour la vie! . .
Pour moi, loin qu'à son sort je porte quelqu' envie,
Qu'il nomme, j'y consens, son digne successeur,
Sur le pavois porté qu'on l'elise Empereur!
Enfin, et Romulus nous rappelle la chose,
Je fais vœu—dés demain qu'il ait l'apothéose. Amen."

"Oh! eternal disgrace of France! Cæsar, on the banks of the Rubicon, has against him, in his quarrel, the Senate, Pompey, and Cato; and in the plains of Pharsalia, if fortune is unequal—if you must yield to the destinies, Rome, in this sad reverse—at least there remains to avenge you a poniard among the last Romans." "He is proclaimed chief and

Lord Ellenborough, having called the attention of the jury to these passages, said that it appeared to him that their aim and tendency was to degrade and vilify, to render odious and contemptible, the person of the first consul in the estimation of the people of England as well as France, and likewise to excite to his assassination and destruction. "That appearing to be the immediate and direct tendency of these publications, I cannot," said his lordship, "in the correct discharge of my duty, do otherwise than state, that they are, in point of law, libels. And in the correct discharge of your duty, I am sure no memory of past or expectation of future injury, will warp you from the straight and even course of justice; but your verdict will mark with reprobation all projects of assassination and murder. Consider, likewise, how dangerous projects of this sort may be, if not discountenanced and discouraged in this country. They may be retaliated on the head of all those whose safety is most dear to us."

Anterior to this, however, in 1764, an information had been filed against one D'Eon de Beaumont, a Frenchman, for a libel upon the then French ambassador, Count de Guerchy. The libel principally consisted of some angry reflections on the public conduct of the ambassador, charging him with ignorance in his special capacity, and of having used stratagem to supplant and depreciate the defendant at the court of

consul for life. As for me, far from envying his lot, let him name—I consent to it—his worthy successor. Carried on the shield, let him be elected! Finally (and Romulus recalls the thing to mind), I wish that on the morrow he may have his apotheosis. Amen." Palm of Nuremburg was court-martialed and sentenced to be shot, at Brenau, in 1807, for writing some echo verses on Napoleon I. And very poor ones they were, too; poor enough to have let the author crawl away—one would think.—Morgan's Macaronic Poetry, p. 98.

Versailles. After the defendant had been found guilty, Lord Mansfield observed to the Prussian and other foreign ambassadors then attending the court, that the law of England paid a high regard to the function of ambassadors, and would equally protect them from all insults, as well on their reputation as their persons or property.[1]

Lord George Gordon was convicted, in 1787, of publishing, in a newspaper known as "The Public Advertiser," certain false, scandalous, malicious, and defamatory libels on the queen of France, Marie Antoinette, and on the French ambassador in London, imputing to the former, tyranny and oppression, and charging the latter with being the tool employed in carrying them on;[2] and in 1799, John Vint, George Ross, and John Parry, were tried upon an information for publishing, in "The Courier" newspaper, the following libel upon the emperor Paul I., of Russia: "The emperor of Russia is rendering himself obnoxious to his subjects by various acts of tyranny, and ridiculous in the eyes of Europe by his inconsistency. He has now passed an edict prohibiting the exportation of timber, deals, &c. In consequence of that ill-

[1] Rex v. D'Eon, W. Black. Rep. 501, 517; Dig. L. L. 74, 75.

[2] 22 Howell's St. Tr. 175. For the above libel Lord George Gordon was sentenced to two years' imprisonment in Newgate (to be computed from the expiration of a three years imprisonment to which he was sentenced on the same day for a former libel, which has been noticed), and to a fine of £500; and at the expiration of his term of imprisonment, to find sureties for his good behavior for the space of fourteen years, himself in £10,000, and two sureties in £2,500. On the 18th of January, 1793, he was brought into court for the purpose of being admitted to bail; but being unable to provide the requisite security, he was remanded to prison, where he remained until his death on the 1st of November, 1793.—Shortt, p. 381.

timed law, upwards of one hundred sail of vessels are likely to return to this kingdom without freights." Lord Kenyon, Ch. J., told the jury that such a publication, holding up the sovereign of Russia as a tyrant, and ridiculous over Europe, might tend to his calling for satisfaction, as for a national affront, if it passed unreprobated by our government, and in our courts of justice.[1]

43. To recapitulate, then: Works not innocent in their nature—although they come into court and pray it—cannot receive the recognition of the law which will give no damages for their piracy, and consequently no protection, through equity, against such piracy. Works that, in addition to being not innocent, are absolutely and undeniably vicious, monstrous, and corrupting, by being either outrageously blasphemous, or filthy and obscene, will, as we have already seen, fall under the attention of the law without soliciting it, and be positively and criminally dealt with by the municipal or local authorities—they, and their authors and publishers and circulators.

44. There remain, still, two other classes of productions, namely, matters libelous (properly so called) of the individual, which are proceeded against both civilly and criminally, and matters contemptuous of courts of justice. These we propose to consider in a separate chapter.

[1] 27 Howell's St. Tr. 627, 643. The defendants were all found guilty, and the proprietor of the paper was sentenced to six months' imprisonment, to pay a fine of £100, and to give security for his good behavior for five years, himself in £500, and two sureties in £250 each. The printer and the publisher were sentenced to one month's imprisonment.—Ib.

CHAPTER II.

OF LIBEL.

45. It appears then, that the law, in return for the protection it extends to authors, requires that they shall not use their liberty to the hurt of the subject: and that the literary matter in which their rights are secured shall be—to begin with—Innocent. We have seen, so far, that this innocence must exist: I. in the Intention (*i.e.*, that it shall not prejudice or imperil the morals of the community), and II. in Representation (*i.e.*, that it shall not harmfully deceive the public as to its genuineness or its value).

There is besides a third class of publications so directly, absolutely, and often maliciously harmful, that the law will not merely express its disapprobation by withholding its protection from them, but will interfere directly to shield the party injured, and to punish the utterers and publishers; whether that party be an individual, the state, or the community at large.

This class consists of publications Libelous; and the wrong which they commit is known as libel.

To the Roman law of libel, as applied to literature, Horace makes allusion in one of his satires:

> Quinetiam lex
> Pœnaque lata, malo quæ nollet carmine quenquam
> Describi. Vertere modum formidine fustis.[1]

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[1] Hor. Sat. ii. "Moreover, it is an extensive law and punishment which will not permit a person to be described in dog-

The Institutes of Justinian defined a libeler to be "one who shall, to the infamy of another, write, compose, or publish a book, song, or fable, or maliciously procure any of those acts to be done;" and a distinction was very early taken in the Roman law, between slander spoken and written. The *injuria verbalis* was deemed a much lower degree of injury than the *malum carmen* and *famosus libellus.*

This distinction has survived the civil law, and is the one observed to-day;[1] slander being a defamation conveyed by speech, and libel a defamation conveyed by writing or effigy.[2] It follows, therefore, that what

gerel verse. To change the style for fear of a club!" The punishment at Rome, for slander, by means of defamatory verses (*si quis aliquem publice defamisset, eique adversos bonos moros convicium feicisset vel carmen famosum in eum condidisset*), was, beating with a club. Tiberias ordered one whom he had befriended, and who afterwards wrote defamatory verses against him, to be thrown from the Tarpeian rock (Dio. lvii., 22). There was no action for ingratitude among the Romans, as with the Persians; for, says Seneca, all the courts at Rome would scarcely have been sufficient for trying them.

There was something superstitious in the horror with which the Icelanders regarded a libel; and no offense among them was more surely or bloodily avenged than the publication of satirical verses, or the setting up of a "Nid"—that is, an insulting or indecent figure, or a horse's head on a pole on the lands of another. (See "The Story of Burnt Njal; or, Life in Iceland at the End of the Tenth Century." By George W. Dasent, D.C.S.) The Russian people "feel corporeal punishment less sensibly than a verbal insult. This idea has a religious foundation. A good Christian cannot admit that the punishment of fustigation, which has been inflicted on the Savicur of humanity, can be for a man a stain of infamy. He believes that a verbal insult affects the immortal part of man; whereas, a blow only produces suffering in the least noble part of his being" (Essai sur l'Histoire de la Civilization en Russie. Par Nicolas de Gerebtzoff. Paris, 1858, vol. ii., p. 575. Westminster Review, January, 1864—Art. Russia).

[1] Holt on Libel, p. 21.

[2] So, suspending a lamp before the plaintiff's house, intimat-

may be slanderous only, when spoken or uttered so as to reach the ear, upon being so published as to reach the eye, becomes libellous. These two wrongs are so intermixed that a knowledge of one is necessary to an understanding of the other, and we have, therefore, treated them together in this chapter. To one bearing the above simple distinction in view, no confusion can possibly arise from such a method, which, unless we presented a separate treatise upon each, appears to be unavoidable. It is to be noticed that while libel is, besides being actionable, an indictable offense,[1] slander is not criminally cognizable, the party injured being left to his civil remedy, which, as will be seen, is ample, and all that he could desire.[2]

The word defamation, when occurring in this chapter, is to be taken in its ordinary popular signification of matter tending to injure one's good name, charac ter, or occupation[3]: and not as intending any allu sion to the technical and now obsolete crime of defa mation, which was an ecclesiastical offense, cognizable only in the ecclesiastical courts,[4] such as laying violent hands on a clerk, or the like.

Satire is a form of speech, which is sometimes,

ing that it was a house of ill-fame, is a libel (Jefferies v. Duncombe, 2 Camp. 3; 11 East, 226).

[1] Bailey v. Dean, 5 Barb. 297.

[2] Except in cases of high treason; and we have seen (*ante*, p. 76) that, in the United States, in time of war, individuals may be proceeded against for words spoken, which tend to weaken the authority of government. In the reign of queen Anne, words reflecting on a magistrate in the discharge of his duties, as such, were held indictable; but on account of their seditious character as against the government, rather than as an offense against the individual (Reg. v. Langley, 2 Lo. Raym. 1060; Holt L. 654).

[3] Blackstone, adopted by Webster.

[4] Abolished by statutes 18 & 19 Vict., ch. 12.

perhaps, permitted to approach the verge of libel, but which, nevertheless, is to be carefully distinguished from it: "For," as said Pope, "there is not in the world a greater error than that into which fools are apt to fall into, and knaves with good reason, to encourage; the mistaking of a satirist for a libeler."[1] And in "Joseph Andrews,"[2] Fielding says: "The distinction between the satirist and the libeler is, that the one speaks of the species, the other of the individual; the one holds the glass to thousands in their closets, that they may contemplate the deformity, and thereby endeavor to reduce it, and thus, by private mortification, avoid public shame. Thus the satirist privately corrects the fault, like a parent, while the libeler mangles the individual like an executioner;" which perhaps is sufficiently exact to be adopted as the legal distinction.

46. We have alluded, further on, to the difficulties experienced in defining the word "libel." A similar difficulty did not seem to occur in the case of slander, that wrong being defined closely by common law. It consisted in the imputation of: 1. Some temporal offense for which the party might be indicted and punished in the temporal courts. 2. An existing contagious disorder, tending to exclude the party from society. 3. An unfitness to perform an office or employment of profit, or want of integrity in an office of honor. 4. Words prejudicing a person in his lu-

[1] Pope. Anon. Satires and Epistles. Advertisement. Other forms of speech were formerly brought under the scrutiny of the law. Thus, scolding often repeated, to the disturbance of a neighborhood, was indictable (Reg. v. Foxby, 6 Mod. 145). And so profanity, calumny, and perjury, are forms of offenses by words. As to brawling, see Stephen's Ecclesiastical Statutes, p. 336; Jacob's Law Dict., tit. Cuckinstool.

[2] Vol. ii., p. 5.

crative profession, calling, or trade. 5. Any untrue words occasioning actual damage.[1] It is only with this slander when written down, and thereby constituted a libel, that the author is concerned, in preparing his labors for publication.

47. The punishment for injuries done by means of words has at different times varied in severity. Pascal "charges the Jesuits of his day with sanctioning killing for slander, particularly for slander of one in

[1] Hilliard on Torts, ch. 7, § 3. The word slander, in former times, appears to have been synonymous with accused. "But because some are wrongfully slandered (accused), king Henry I. ordained that none should be arrested or imprisoned for a slander (accusation) of mortal offense, before he was thereof indicted by the oaths of honest men before those who had authority to take such indictments" (Mirror of Justices, ch. 11, § 22). "In this same year the mysseles (lepers) thorowoute Cristendom were slaundered that they had made covenant with Sarasenes for to poison all Christen men" (Capgrave's Chronicle of England, p. 186).

In an address by the dean and chapter of Aberdeen, to Bishop Gordon, dated January 5, 1558, is the following:

"*Imprimis*, that my lord bishop cause the kirkmen within his diocie to reform themselves in all their slanderous manner of living, and to remove their open concubines, as well great as small. *Secundo*, that his lordship will be so good as to show edificative example—in special, in removing and discharging himself of the company of the gentlewoman by whom he is greatly slandered; without the which be done, diverse that are partners say they cannot accept counsel and correction of him which will not correct himself," &c., &c.—Reg. Aberd. 61.

If any slanderously charge another with any false crime (Ridley's Civil Law, 31); and in the statute (3 Edw. I., ch. 34), none are to publish false news whereby slander may grow between the king and his people (Townshend on Libel and Slander, p. 60, note).

> "I would not . . . .
> Have you so slander any moment's leisure
> As to give words or talk with the Lord Hamlet."
>
> (Hamlet, i. 3.)

religious orders, but they held that the killing should be secret, and not open, to create scandal."[1] And in the "Ethica Christiana,"[2] published in 1789, "*cum permissu superiorum*" we read that a Christian may, to prevent a "*contumelia gravis certo provisa . . . . aut calumnia*" . . . murder the "*injusti aggresoris aut calumniatoris.*" "The necessity," says Borthwick,[3] "of protecting character by law could not obtrude itself till society had begun to assume a complicated form. The earlier days were distinguished by an undiplomatic coarseness of language. Henry III. (A. D. 1248) spoke of the aldermen of London as "London boors;" applied a like epithet to the Bishop of Ely, and dismissed Bishop Aymer by telling him to "go to the devil."[4] And the action for words, given by the common law, has necessarily varied its penalties with the customs and habits of men. At the present day: upon the theory that a man's reputation has a pecuniary value to him, the penalty inflicted by the law will be—principally, in the form of a mulcting in damages; or—in the case of a libel calculated to interfere with and provoke a breach of the public peace—a fine and not immoderate imprisonment.

48. There is but a single known example in history, of a libel being deliberately chosen as a means of promoting the public interest and weal. It seems that, in the eleventh century, there existed in Denmark a species of libel called "Bersöglisvisur," or free-speaking song. We are told that when king Magnus gave dissatisfaction to his subjects, a meeting was held, at which lots were drawn to see which of those

[1] Pascal's Provincial Letters, xiii.
[2] By Father Slattler. Paragraphs 1889, 1891, 1892.
[3] On Libel, p. 1.
[4] Townshend on Libel and Slander, p. 98.

assembled should address one of these songs to the king.[1]

49. The first difficulty which confronts us in dealing with the subject of this chapter, arises at the outset, as to a definition. As is the case with most words (as Dean Trench has pointed out), the tendency of the word "libel" has been to retrograde, and—from signifying something indifferent or trifling—come to mean a thing actually bad.

The first meaning of "libellus" or "libel" is evidently "a little book." At Rome the cards of the races, with the colors of the horses, were called *libelli*;[1] it was only the *libellus famosus* that signified "a little book giving an ill name."[2]

And in an early act of parliament[4] the word seems to be used in the sense of a book or pamphlet. The act reads: "That what person so ever shall make, write, print, publish, sell, or utter any book, pamphlet, treatise, ballad, libel, or sheet of news whatsoever, or cause so to be done, except the same be licensed by both or either house of parliament," &c.; the word cannot here mean a defamatory publication, as it is not to be supposed the parliament would, in any case, license a defamatory publication. Its present use, however, is in the sense in which we shall now proceed to its definition. Perhaps there is no single word in the language, in whose interpretation so many attempts have been made, and which is so generally conceded to be impossible of exhaustive and sententious definition. As the philosopher said of another

[1] "Det Norske Folkes Historie," Christiania, 1852–5; "Den Danske Erobring of England og Normandict," Copenhagen, 1863; "North British Review," Nov., 1863.

[2] Hor. ii., iv.

[3] Ainsworth.

[4] Of September 30, 1647.

matter, "these things do not sum themselves up in single sentences."[1] The nearest approach to a sententious definition seems to be found in Wasson v. Walter,[2] where the plaintiff, a barrister, defined it as "defa-

[1] Cousin, when asked to state, in a single sentence, the spirit of German philosophy.

[2] L. R., iv. Q. B. 93. It is to be observed that no correct, no logical definition of a libel has ever been given (George on Libel, 14). A noted peculiarity of the law of libel is its vagueness and uncertainty (Encyc. Brit., *voce* Libel). It is indeed in the very nature of the subject (the law of libel) that it is extremely difficult to clear it of those popular conceits, and of that vagueness of generality, which adhere to it as a question of political discussion (Holt on Libel, preface).

It is a subject to which I have paid considerable attention; but, I must freely own, without any success whatever. I hold it to be hardly possible to define libels by which guilt may be incurred as tending to a breach of the peace, to other proceedings of a violent nature, ... and to a variety of other heads. . . . . Any definitions that I have ever seen given had one or other of two faults, ... they were either so vague as not to specify or define anything, or . . . . they were only rendered particular and definite by omitting some species of libel . . . . which ought to have been comprehended. . . . . I have never yet seen, or been able myself to hit upon, anything like a definition of libel . . . . which possessed the requisites of a definition; and I cannot help thinking that the difficulty is not accidental, but essentially inherent in the nature of the subject. . . . . The Latin of libel is not *libellus*, but *libellus famosus*. . . . . Libel then means, in its original, not "little book," but "a defamatory little book." . . . . Libel is an offense of a somewhat vague description, but sufficiently known in law, and, perhaps, as well defined as assaults and some others; and I do not believe, from all the experience I have had, that in practice any considerable difficulty is felt on account of its indistinctness (Lord Lyndhurst's Report of House of Lords on Defamation and Libel, July, 1843).

A bad word in circulation—*Vox semel emissa nunquam revertit.* Obl. 4.

A libel is a malicious publication, tending to the disrepute of an individual, the breach of the peace, the seditious violation of the good order of government (Capel Loft's Essay on Libels, edit. 1785, p. 6).

mation without legal excuse;" while Jeremy Bentham appears to have defined it, simply as "anything

A libel is any published defamation (American Encyclopedia—Libel).

It is not infamous matter or words which make a libel; for, if a man speak such words, unless they are written, he is not guilty of the making of a libel; writing is of the essence of a libel (Ld. Raym. 416). The words most nearly synonymous to the word libeling, are defaming, disparaging, aspersing, slandering (George on Libel, pp. 35, 36, 41).

A libel is a contumely or reproach, published to the defamation of the government, of a magistrate, or of a private person (Comyn's Digest).

Everything written of another, holding him up to scorn and ridicule, and calculated to provoke a breach of the peace, is a libel (Torrance v. Hurst, Walker, 403; Newbraugh v. Curry, Wright, 47; White v. Nicholls, 3 How. U. S. 266; Armentrout v. Moranda, 8 Blackf. 426; Dexter v. Spear, 4 Mason, 115).

Defamatory words, written and published (Maunder).

A libel has been usually treated of as scandal, written or expressed by symbols. Libel may be said to be a technical word, deriving its meaning rather from its use than its etymology (Russell's Crimes, edit. 1819, p. 308).

In a strict sense it is taken for a malicious defamation, expressed either in printing or writing; in a larger sense, the notion of libel may be applied to any defamation whatsoever, expressed either by signs or pictures, as by affixing up a gallows at a man's door, or by painting him in a shameful and ignominious manner (Hawkins' Pl. Cr.).

Libel, a criminous report of any man cast abroad, or otherwise unlawfully published in writing; but then, for difference sake, it is called an infamous libel—*famosus libellus* (Minshœi: A Guide into the Tongues, &c. London, 1627).

Written or printed slanders are libels (Bouvier).

Libel, a word which has many different meanings, but is chiefly known in this country as the name of a department of the law, which, from incidental circumstances, has come to include the naturally distinct heads of written slander, sedition, and outrage against religion (Encyc. Brit.—Libel).

Everything, therefore, written of another, which holds him up to scorn and ridicule, that might reasonably—that is, according to our natural passions—be considered as provoking him to a breach of the peace, is a libel (Holt, Libel, 215, 233). This agrees with his (Holt's) two preceding defini-

of which one thinks proper to complain." But these, as will be seen, are neither exhaustive nor exclusive of the subject.

tions, and with the common acceptation of the term libel, by making it essential that the subject or object of the attack should be some person or persons; but it disagrees with them, by introducing the tendency to provoke a breach of the peace. It follows that, if this be a correct definition, the other two must be defective; because, in one of them, the tendency, or, as is there said, the intent, to provoke is required only in cases where the object of the slander is a deceased person, and in that from Lord Coke it is wholly omitted. On the other hand, if the two former definitions be correct, the third must necessarily be inaccurate; for an accurate definition is one which neither omits what is essential, nor admits what is superfluous. . . . And it is to be further observed that the third definition disagrees with the two former, and the common acceptation of the term libel, not only by introducing the intent or the tendency to provoke, but by leaving out the falsehood and malice. For libel, in common acceptation, signifies written slander; and the term slander, and all its synonyms, as defamation, detraction, calumny—even without the epithets malicious and injurious—imply falsehood and malice (Mence's Law of Libel, vol. 1, p. 120; Law Times, Rep. N. S. 604; Townshend on Slander and Libel, p. 74).

A censorious or ridiculing writing, picture, or sign, made with a mischievous and malicious intent towards government, magistrates, or individuals (*per* Hamilton, arg. People v. Crosswell, 3 Johns. C. 354; Steele v. Southwick, 9 Johns. 214; Cooper v. Greeley, 1 Den. 347).

A libel is a malicious publication in printing, writing, signs, or pictures, imputing to another something which has a tendency to injure his reputation; to disgrace or to degrade him in society, and lower him in the esteem and the opinion of the world; or to bring him into public hatred, contempt, or ridicule (State v. Jeandell, 5 Harring. [Del.] 475).

A malicious publication expressed either in printing or writing, or by signs and pictures, tending either to blacken the memory of one dead, or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule (Commonwealth v. Clapp, 4 Mass. 163, 168; *per* Ch. J. Parsons, Root v. King, 7 Cow. 613).

A libel is a censorious or ridiculing writing, picture, or

"The greater portion of all law business," says the late Dr. Lieber, in his admirable and invaluable treatise on "Civil Liberty," "arises from the impossibility of giving an absolute definition of things not absolute in themselves."[1] Without, however, attempting one that shall be exhaustive, and referring the student to the notes, where the attempts of various authorities have been quoted, we may state, generally, that a libel is any slanderous publication in writing or printing, or expressed by signs,[2] pictures, effigies, or other fixed representation to the eye, tending to asperse the repu-

sign, made with a mischievous intent (The State v. Farley, 4 M'Cord, 317).

That tends to injure one's reputation in the common estimation of mankind, to throw contumely or reflect shame and disgrace upon him, or hold him up as an object of hatred, scorn, ridicule, and contempt, although it imputes no crime liable to be punished with infamy, or to prejudice him in his employment (1 Hilliard on Torts, ch. 7, § 13).

We define slander and libel as wrongs occasioned by language or effigy; that is to say, slander is a wrong occasioned by speech, and libel is a wrong occasioned by writing or effigy (Townshend on Slander and Libel, p. 770).

[1] "Nothing," says Dean Trench, "is harder than a definition. While, on the one hand, there is, for the most part, no easier task than to detect a fault or a flaw in the definition of those who have gone before us, nothing, on the other hand, is more difficult than to propose one of our own which shall not also present a vulnerable side."

[2] A definition, in order to satisfy the requisites of a good logical definition, ought not only to be sufficiently precise, so that it should take in nothing except what was intended to be specified, but also sufficiently comprehensive to omit nothing which ought to be included. I have never yet seen, nor been able, myself, to hit upon anything like a definition of libel, or even of sedition, which possessed those requisites of a definition; and I cannot help thinking that the difficulty is not accidental, but essentially inherent in the nature of the subject-matter (Lord Lyndhurst; and see Burrill's Law Dict., *voce* Definition, and 2 Wooddes. Lect. 196).

tation of the living, or the memory of the dead,[1] that is published without lawful justification or excuse,[2] whatever the intention of the publisher may be.[3]

[1] Broom. Leg Max. The full definition of a libel includes defamation by signs (Fray v. Fray, 17 C. B. N. S. 603 [112 E. C. L. R.]; Cox v. Lee, L. R. 4, Ex. 284; Walker v. Brogden, 19 C. B. N. S. 65 [115 E. C. L. R.]).

Vid. Civil Code of the state of New York, § 29.

The intention of the writer or publisher of the defamatory matter is wholly immaterial, except so far as it may affect the amount of damages which a jury will award. "Everything printed or written," says Parke, B., "which reflects on the character of another, and is published without lawful justification or excuse, is a libel, whatever the intention may have been" (Bayliss v. Lawrence, 11 A. & El. 924).

A judge who, in an action of libel, left it to the jury to say whether the defendant intended by his publication to injure the plaintiff, was held to have wrongly directed them. "If the tendency of the publication," said Littledale, J., "was injurious to the plaintiff, then the law will presume that the defendant, by publishing it, intended to produce that injury which it was calculated to effect. If it had that tendency, there can be no doubt it was a libel." "The judge," said Lord Tenterden, Ch. J., "ought not to have left it as a question to the jury whether the defendant intended to injure the plaintiff; for every man must be presumed to intend the natural and ordinary consequences of his own act" (Haire v. Wilson, 9 B. & C. 643; Darby v. Ouseley, 1 H. & N. 9; 25 L. J. 230 Ex.; Fisher v. Clement, 10 B. & C. 472; Dubost v. Beresford, 2 Camp. N. P. C. 511).

Bacon's Abrdt., tit. Libel. "In a larger sense, the notion of a libel may be applied to any defamation whatever, as by fixing a gallows against a man's door, or by painting him in a shameful and obnoxious manner" (Pleas of the Crown, 8th ed., 542). "So where an artist, whose sitter had refused to pay for a portrait of himself, added asses' ears to the head, and exposed it to public view, it was held libel" (Mazzara's Case, N. Y. Sessions, 1817).

[2] Gathercole v. Miall, 15 M. & W. 321; Digby v. Thompson, 4 B. & Ald. 821 (24 E. C. L. R.); Bloodworth v. Gray, 8 Scott N. R. 9; Pemberton v. Calls, 10 Q. B. 461 (59 E. C. L. R.).

[3] O'Brien v. Clement, 15 M. & W. 437; O'Brien v. Bryant, 15 M. & W. 168; Darby v. Ouseley, 1 H. & N. 1.

50. Not only will the common law restrain the dissemination of such libellous matter by injunction, and allow to the party injured his action for damages sustained by reason thereof, but it may, and often does, also proceed criminally against the offender, for his offense against the state.[1]

Sampson was careful to inquire the law, before he committed himself:

"Abram.—Do you bite your thumb at us, sir?

"Sampson.—Is the law on our side if I say—ay?

"Gregory.—No.

"Sampson.—No, sir; I do not bite my thumb at you, sir, but I bite my thumb."[2]

And it is well that the writer should clearly comprehend the law and the definition of slander, before he sends his manuscript to his publisher. For libel is slander written or printed; and while the law sometimes hesitates to find premeditation and malice in the spoken word, it cannot forbear to recognize deliberation in the work printed and published and given to the world.[3]

[1] The action for slander was one of the inferior actions of which the early English courts of Piepoudre had jurisdiction (Jacobs' Law Dict., tit. Court of Piepoudres). Slander is not, like libel, an indictable offense (Bailey v. Dean, 5 Barb. 297). Nor is a single precedent of any criminal proceeding for unwritten imputations upon the characters of individuals, to be found, except in cases of high treason, ... and it must have been as constituting rather an offense against the government, than an injury to the individual, and being, therefore, seditious, that words reflecting on a magistrate in the immediate execution of his office were for the first time in the reign of Queen Anne held to be indictable (Reg. v. Langley, 2 Ld. Raym. 1060; Holt R. 654). But I am not aware that Mr. Starkie has adverted to this case, or to the doctrine which is laid down in it (1 Mence on Libel, 90).

[2] Romeo & Juliet, i. 1.

[3] It seems to have generally been—though perhaps questioned in later cases (see remarks of Mansfield, Ch. J., in

51. "There is nothing in nature," said a learned judge,[1] "but may be an instrument of mischief," and any vehicle in which thought may be expressed, if that thought be defamatory of an individual, may become a means of injury, and, therefore, libelous. Thus, words spoken, written,[2] printed, marked, or formed with pen or pencil, graver, stylus, or set up in type, or formed in or with any material or pigment, as lead,[3] chalk, ink, paint, or on any surface or substance such as parchment, paper, cloth, wood, or any metal, such as copper or steel, or on stone, or on a wall, or post, or tree, may become libelous. And so, too, may be any picture, statue, or any gesture, sound,[4] such as ringing bells, firing guns, beating drums, clapping hands, hooting,[5] or signs, which it is possible for human ingenuity to conceive of or express.[6]

The conceiving of a thought injurious to one's neighbor, the law cannot reach. The act of commu-

Thorley v. Lord Kerry, 4 Taunt. 364, and of Best, Ch. J., in Tuam v. Robinson, 5 Bing. 51; Holt's Law of Libel, p. 75; Penal Code of N. Y., § 309; Fisher v. Clement, 10 B. & C. 472)—the policy of the law to regard with much greater leniency slanderous and defamatory words spoken in the heat of passion, than slanderous and defamatory words which are written down in black and white; for the writing of such words implies deliberation and malice in the writer.

[1] Pratt, Ch. J., in Chapman v. Pickersgill; 2 Wils. 145.

[2] Sanderson v. Jackson, 2 Bos. & Pul. 238; Henshaw v. Foster, Pick. 318.

[3] Geary v. Physic, 5 B. & C. 238; Classon v. Bailey, 2 Johns. 484.

[4] Austin v. Culpepper, Skin. 123; Show. 314.

[5] Martin v. Nutkin, 2 P. Wms. 266; Soltan v. De Held, 2 Sim. N. S. 133; 16 Jur. 326; First Bap. Ch. v. Sch. R. R. Co., 5 Barb. 79; Tarleton v. McGawley, Peake's Cas. 205; Moshier v. Utica & Sch. R. R. Co., 8 Barb. 427; Cole v. Fisher, 11 Mass. 137; Loubz v. Hafner, 1 Dev. 185; Gregory v. Brunswick, 6 M. & G. 953; Trustees, &c., v. Utica, &c., 6 Barb. 313; Davidson v. Isham, 1 Stock. 186.

[6] Bouvier's Law Dict., title, Effigy.

nicating that thought, however, by any of the above means, the law can reach, and will punish.

On the trial of Algernon Sidney, the prisoner inquired, "And is writing an act?" to which Lord Jeffries replied: "Yes, it is *agere*."[1] So any representation, even if that representation be conveyed in the exercise of one's legitimate duty and calling, if its effect be to raise a presumption or create an impression injurious to another's reputation in his business or social relation, if the impression be erroneous in fact, will be defamatory and actionable. So where a banker, having sufficient funds in hand belonging to his customer, dishonors that customer's check, he is liable to an action for damages.[2] And where a notary protested a note for non-payment, without having previously presented the note to and demanded payment of the maker, he was held liable in an action for the damage thereby occasioned to the reputation of the maker.[3] Or any act otherwise legitimate or permissible under the circumstances, which happens to convey an erroneous impression as to the business or social standing of another. So where defendants, by causing plaintiff's goods to be seized on an unfounded claim for debt, occasioned his customers to think him insolvent,[4] and in trespass for breaking and entering plaintiff's dwelling, upon false charge of having stolen property concealed therein, *per quod* she was injured in her credit, it was held that the jury might give damages as aggravated by the false charge.[5]

[1] Townshend on Slander and Libel, p. 58; *Scribere est agere*. People v. Rathbun, 1 Wend. 509, 540; Robinson v. Marchant, 7 Q. B. 918; and see Marzetti v. Williams, 1 B. & A. 415.

[2] Robinson v. Merchant, 7 Q. B. 918; and see Marzetti v. Williams, 1 B. & A. 415.

[3] Townshend on Slander and Libel, p. 58.

[4] Brewer v. Day, 11 M. & W. 625.

[5] Bracegirdle v. Oxford, 2 Maule & Selw. 77. (See Jeffries

These are all acts which tend to raise scandal . . . by which one is affronted in public[1] as to his business standing. The law will also protect social standing. So where a woman, "maliciously intending to marry the plaintiff, did often affirm that she was sole and unmarried, and importuned *et strenue inquisivit* the plaintiff to marry her; to which affirmation he gave credit, and married her, when *in acto* she was wife of the defendant, so that the plaintiff was much troubled in mind, and put to great charges, and damnified in his reputation," an action against the woman and her real husband was held to lie.[2]

Words occasioning any particular loss by prefer-

v. Duncombe, 11 East, 226; Spall v. Massey, 2 Stark. Cas. 559.) Perhaps the most ingenious method by which a legitimate and ordinary transaction was ever employed to communicate a libel, is that mentioned by Hazlitt, in his "Essay on Wills" (see "London Quarterly Review," October, 1860): "A wealthy nobleman hit upon a still more culpable device for securing posthumous ignominy. He gave one lady of rank a legacy, 'by way of compensation for injury he feared he had done her fair fame'; a large sum to the daughter of another, a married woman, 'from a strong conviction that he was the father'; and so on, through half a dozen more items of the sort, each leveled at the reputation of some one from whom he had suffered a repulse—the whole being nullified (without being erased) by a codicil." A court of probate, however, would probably order the omission of such offensive matter from the record (Re Honywood, Law Rep. II., Prob. & Div. 251; Re Wartnaby, 1 Rob. Ecc. 423; Curtis v. Curtis, 3 Add. 33; Marsh v. Marsh, 1 Sw. & Tr. 528). And an attorney's bill may be so worded as to be libelous: Where defendant delivered a bill headed, "Relative to your defalcations," which phrase was repeated in several parts of the bill; in an action for libel thereby, it was claimed that the bill, having been delivered under a judge's order, was a legal proceeding, and privileged, but it was ruled otherwise, and plaintiff had a verdict (Bruton v. Downes, 1 Fost. & F. 668).

[1] Jacob's Law Dict., tit. Scandal.

[2] Beaumont v. Reeve, 8 Adol. & Ell. 483; 1 Siderfin, 375.

ment in marriage,[1] or service,[2] or by disinheritance,[3] will be especially actionable.[4] Formerly the condition in life of the person spoken of, materially affected the construction, and words concerning "great men of the realm" were actionable, which would not have been, if published concerning private persons. Such words constituted *scandalum magnatum.* In the United States no such distinction of persons exists.[5]

[1] But where the plaintiff alleged that in consequence of the words he (the plaintiff) refused to marry his betrothed, and so he lost his marriage—it was held that, under the circumstances, no special damage was shown (Carter v. Smith, Vin. abr. Act. for Words, D. a. 12; Reston v. Pomfreicht, Cro. Eliz. 639; Shepherd v. Wakeman, Sid. 79; Anon., Mar. 2, Wicks v. Shepherd, Cro. Car. 155; Nelson v. Stapz, Cro. Jac. 422; Southold v. Johnston, Cro. Car. 269; Moody v. Baker, 5 Cow. 351.

[2] Swadling v. Tarpley, app. to Townshend on Slander and Libel, 2d ed.; Knight v. Gibbs, 3 Nev. & M. 461; 1 Adol. & L. 43.

[3] See, however, a case where the plaintiff alleged that, by reason of the publication, he had incurred the ill-will of his mother-in-law, who had previously promised him £100, and it was held that no cause of action was shown (Harris v. Porter, Curt. 1).

Where plaintiff alleged that she was a single woman, and chaste, and that her mother meant to give her £150, and her brother £100, and that, by reason of the defendant's charging her with incontinence, they did not give her these sums, it was doubted if the action was maintainable (Bracebridge v. Watson, Lily. Ent. 61; and see Townshend on Slander and Libel, §§ 198–205).

[4] Or which occasion any particular damage (Introduction to the Law Relative to Trials at *Nisi Prius.* By a Learned Judge [Lord Bathurst]. Vol. I., p. 3).

[5] Townshend on Slander and Libel, § 138; Barrington on Penal Statutes;. 3 Reeve's Hist. of the Common Law. (See note to § 182). *Secundem gradum dignitatis*, &c., was the rule of the Roman law, and is the rule in Scotland and France (Borthwick on Libel, 176, 177 n., Inst. Lib. IV., tit. 4; Code Criminel, tit. 111, art. 1; Black. Com., bk. iii. ch. 7, § 5; Selwy's N. P. 1155.

No man has a prerogative right to the protection[1] of his standing, but all must show damage thereto alike.

52. It is the tendency of a law, however simple in its spirit and nature, and however easily recognized its principles and rules, to become, through long and constant interpretation, complex and unwieldy. In no case is this more thoroughly exemplified than in the law of slander and libel, or as it might be very properly styled, "the law of words." Starting with the simple rule, which we shall have occasion many times to reiterate in this chapter, that a man's reputation for a general fitness to move in the society to which his birth, or fortune, or manners, or education may entitle him, or for skill, reliability, knowledge, or proficiency in his profession (if a professional man), or for capital and resources in his business (if, for instance, a banker or merchant), or for chastity, sobriety, and good moral character (if a clergyman),[2] or for experience in any of these walks of life, is his property as much as his estates, or his family, or his chattels: that law has become in time so embarrassed and overburdened, with interpretation and illustration, as to be cumbersome, awkward, and troublesome almost beyond expression.

53. From the necessities of its nature and existence, the law lets no reported case perish from its memory, but keeps each one as a precedent; meanwhile, the world moves. New civilizations engraft themselves upon the old. New standards of conduct and intercourse arise. Religion, politics, social and municipal regulations, the mutations of art and

[1] See Townshend on Slander and Libel, §§ 391–417.

[2] But see Gallevey v. Marshall, 9 Ex. 294; Breeze v. Sarls, 23 Up. Can. Q. B. 94, which appear to hold that continence and chastity may not be a *sine qua non* to the standing of a minister of the gospel.

traffic, all combine to render what was proper, improper; and what was lawful, infamous. With all this change the law advances. While she clings to what she has said, she never fetters herself by her own utterances to do wrong or injustice,[1] and so if we were to attempt to draw the law of libel from the books of cases, we should, after an almost interminable and laborious investigation, be forced to the conclusion that every case was "a law unto itself." This confusion will be found to arise from three great causes: first, from the delicate nature of the thing to be protected; secondly, from the mutations of society and the dilemma of courts, who, clinging to the maxim of *stare decisis*,—let the decision stand,—and striving ing, as they are bound to do, rather to reconcile than to overrule, find themselves, while obliged to recognize the precedent, obliged, as well, to do justice between man and man; and thirdly, from the wonderfully rapid changes in the meaning of words and phrases, which imposes upon courts the necessity of being not only expounders of the law, of society, of religion, of trade, of domestic relations, and of all human contracts, but actually of grammar, rhetoric, philology, and of the exact significances of dialect, patois, argots, and vernacular speech. It is not impossible to imagine, that from these complications may have arisen the difficulties experienced in defining the term "libel," to which allusion has been made.

Reputation is only a bubble at best, and often the

[1] To accommodate the law to the altered state of society is laid down as one of the obligations of judges (Dwarris on Statutes, 792; Raun's Legal Judgment, 22). The rule *stare decisis* is one of the most sacred of the law (Per Buller, J., 1 East, 495; Ram's Legal Judgment, 234). But while it is dangerous to depart from it, the rule will generally be that given in the text. Id. 197, 202, 231, 234, 235, 413, 423.

over-sensitive party who fancies himself libeled, is put in the position of him—as the old maxim hath it—"*qui excusat*, and—at the same time—*accusat*," for, as Iago says in the play, "You have lost no reputation at all, unless you repute yourself such a loser."[1]

54. This *jus et norma loquendi* of which courts will take judicial cognizance, impose upon it a finer discrimination than may, perhaps, be looked for in so ponderous a digest as the law of libel. It was held in some of the older cases that "adjective words," or "words spoken adjectively," would not be actionable, but Lord Coke expressed himself as of the opinion that "sometimes adjectives will maintain an action;"[2] (the distinction possibly being that words imputing mere inclination or intention are not actionable, but only those imputing an act.[3]) So, again: a distinction was made between the conjunctions "and" and "for": thus, to say "thou art a thief, for thou hast stolen" (such a thing, as a tree, which could not be felony), and the saying, "thou art a thief, and hast stolen" such a thing—in the former case, the subsequent words show the reason of calling the plaintiff a thief, and that no felonious imputation was meant; but in the latter, the action lies for calling him a thief; and the addition, "thou hast stolen," is another distinct sentence by itself, and not the reason of the former speech, nor any diminution thereof.

[1] Othello, ii. 3.

[2] 4 Coke, 19. And see Killick v. Barnes, 2 Bullst. 138; Ld. Raym. 236; Gulford's Case, 2 Rolle R. 71; Ward v. Thorne, Cro. Eliz. 171; Booth v. Leach, Lev. 90; Selby v. Carryer, 2 Bullst. 260; Vin. Abr. Act for Words, 1 a. 4.

[3] Townshend on Slander & Libel, § 165; 3 Id. § 186; Cro. Jac. 114; Bull. N. P. 5; Hob. 77, 196; Cro. Eliz. 857; Browl. 2; Godb. 241; Hard. 7; All. 31; Sty. 66; 1 Starkie on Slander, 99. This distinction was questioned by Holt, Ch. J.,

In one case[1] it is said that to call a man "cuckold" is not an ecclesiastical slander, but to call him "wittol" is, for "wittol" imports his knowledge and consent; but as it readily appears, these decisions are more curious than valuable at the present day.

55. The profession of the law, then, more than any other possible profession, necessitates a wide and vastly liberal education; and while the physician studies chemistry and medicine, the engineer mechanics, and the writer philology; the lawyer, who does not study all of these, if not in bulk at the outset, at least more or less in the course of his experience at the bar, will be a practitioner of very little value to his clients.

One who will examine thoroughly the law of libel, as laid down in the books, cannot fail to be impressed with the vast and incredible number of words and phrases which, in the course of six hundred years, courts have been called upon to interpret, either by taking judicial cognizance of their meaning, and pronouncing them to be "English": or by summoning testimony and hearing argument, thereupon fixing their meaning definitely and beyond dispute.

The utter inadequacy, therefore, of a single chapter to satisfactorily treat of "the law of words," will be readily appreciated. A library would be adequate to the task: nor is such a task necessary to our purpose. One who would sit down, patiently, to com-

Baker v. Pierce, 6 Mod, 23, where it is said *and* and *for* have the same meaning. And see Lewis v. Acton, Yelv. 34; Vin. Abr. Act for Words, P. a. 2.

[1] Smith v. Wood, 2 Salk. 692. A cuckold was a man whose wife was false to his bed (Swift). A wittol was a man who knew of his wife's infidelity, and submitted to it—a tame cuckold (Shakespeare). "Wittol-cuckold. The devil himself hath not such a name" (Merry Wives of Windsor, ii. 2).

pile à dictionary, drawn from the reports since the Year Books, of words passed upon by courts, would find, at the close of his labors, that his unabridged folios were, after all, more curious than valuable; teeming, indeed, with whimsicalities, but of very little practical value. What will be attempted in this chapter is, therefore, to proceed, by means of comment and illustration, to spread before the writer who would produce a work that shall be entitled to a copyright at the hands of the law—and to the protection of the law for that copyright after it shall have been secured—the general body of the law, regulating the doing of injury by the use of words.

56. The law, then, regards a man's reputation as a sort of capital to be employed by him in earning his living, and as a resource for enjoying the social intercourse of his peers. In the enjoyment of his good name, therefore, the law will protect him. "Men's reputations," said Lord Bacon, "are tender things, and ought to be like Christ's coat, without seam,[1] . . . who can see worse days than he that, yet living, doth follow the funeral of his reputation?" But, in order to protect this reputation (the law, being as we have seen, a practical science, recognizing nothing which it cannot guard[a] and protect[2]), it is necessary that what some have called "a fiction"[3] should be raised: namely,

[1] Charge against Lumsden.

[2] *Ante*, p. 15.

[3] Townshend on Slander and Libel, p. 105. "I am not certain," says Lord Kames, "that in England any verbal injury is actionable, except such as may be attended with pecuniary loss or damage. If not, we in Scotland are more delicate. Scandal, or any imputation upon a man's good name, may be sued before the commissaries, even when the scandal is of such a nature that it cannot be the occasion of any pecuniary loss. It is sufficient to say, I am hurt in my character" (Historical Law Tracts, p. 225).

that the value of a man's reputation can be estimated in dollars and cents. Pecuniary damages, therefore, becomes the gist of the civil action for libel and slander.

The Roman law made personal contumely and insult the essence of the offense of slander: thus a most essential and characteristic distinction between the law of England and that of Rome, and of those countries which have adopted the civil law, arises: . . . "For the law of England has from very distant times considered the temporal injury to a man's estate, and not the contumely or insult of the agent as the ground of compelling reparation in damages."[1] "There must be some certain or probable temporal loss or damage, to make words actionable."[2] "The principle on which this species of action (action for saying orally plaintiff, an innkeeper, was a bankrupt) is, that the slander has the effect of producing temporal damage to the party complaining." To maintain the action there must be injury to the plaintiff.[3]

"Reputation or fame is under the protection of the law, because all persons have an interest in their good name, and scandal and defamation are injurious to it, though defamatory words are not actionable otherwise than as they are a damage to the estate of the person injured."[4] Reputation is property.[5]

57. It was laid down in Onslow v. Horne,[6] "that words are actionable when spoken of one in an office

[1] Starkie on Slander, Am. ed., vii.

[2] Onslow v. Horne, 3 Wils. 177; Holt v. Scholefield, 6 T R. 691.

[3] Whittaker v. Bradley, 7 D. & R. 649.

[4] Maitland v. Goldney, 2 East, 426; Lowe v. Harwood, Cro Car. 140 S. C.; Palmer, 520; Ley, 82.

[5] Townshend on Slander and Libel, 104; 2 Wood's Inst. 927; Foulger v. Newcomb, 2 L. R. Ex. 330.

[6] Dixon v. Holden, 7 L. R. Eq. 492.

of profit, which may probably occasion the loss of his office, or when spoken of persons touching their respective professions, trades, and business, and do or may probably tend to their damage;" or, again:[1] "if the words may be of probable ill consequence to a person in a trade, a profession, or an office."

The rule, as thus expressed, is, according to Bayley, B., objectionable, the words "probably" and "probable" being too indefinite and loose, and—unless considered as equivalent to "having a natural tendency to," and confined within the limits of showing the want of some necessary qualification, or some misconduct in the office—not warranted by the authorities. "Every authority," he says, "which I have been able to find, either shows the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business."[2]

The law is the same in the case of imputations made against a member of any of the professions, having a tendency to injure him in respect thereof, whether the imputation be want of integrity or want of ability, unless, indeed, it be held that want of integrity cannot injure him in his business, or profession.[3] And, as with one holding an office, so with one practicing or exercising any lawful profession, occupation, trade, or business, however humble.[4] It was once held

[1] W. Black. 753.

[2] Lumby v. Allday, 1 Cr. & Jer. 305.

[3] Pecuniary damage is the gist of the actions of libel or of slander (Townshend on Libel and Slander, ch. iv.—"Gist of the action").

[4] Bellamy v. Burch, 16 M. & W. 590; Sellars v. Killew, 7 Dowl. & R. 121; 4 B. & C. 55; Morris v. Langdale, 2 Bos. & Pul. 284; Whitaker v. Bradley, 7 D. & R. 649; S. C., Whittington v. Gladwin, 5 B. & C. 180; 2 Car. & P. 146; Gates v. Bowker, 8 Vt. (3 Wash.) 23; Ostrom v. Calkins, 5 Wend. 264; Carpenter v. Dennis, 3 Sandf. 305; Jones v. Joice, Vin. Abr.

that "a tinker or a peddler was a rogue by statute,"[1] but the rule has disappeared, and every man has a right to earn his bread by honest labor.[2] So it is actionable to accuse an auctioneer of dishonesty,[3] or a merchant with swindling,[4] or to insinuate that he is[5] or was[6] a bankrupt, or that he is "in trouble" in such a way as to effect his commercial standing;[7] or that his cheques were dishonored,[8] or that a banker has suspended.[9]

And an action will lie for saying of a schoolmaster, "He has no knowledge in grammar or in the Latin tongue, nor knows how to educate his scholars in the Latin tongue" (with an allegation of loss of scholars[10]), or "put not your son to him, for he will come away as very a dunce[11] as he went;" or, of a shoemaker, that

Act. for Words, U. a 7; Southam v. Allen, Raym. 231; Alexander v. Angle, 1 Cr. & J. 143; 1 Starkie on Slander, 128; Cooke on Defam. 21; Terry v. Hooper, Lev. 115; Rex v. Ld. Cochrane, 3 Maule & S. 10; Sinclair v. Charles Phillipe, 2 B. & P. 363; Morris v. Langdale, 2 Bos. & Pul. 284.

[1] Cockaine v. Hopkins, 2 Lev. 214.

[2] Thomas v. Jackson, 3 Bing. 104; 10 Moore, 425; Odiorne v. Bacon, 6 Cush. 185; Gay v. Horner, 13 Pick. 535; Ludwell v. Hole, 2 Ld. Raym. 1417; Davis v. Miller, 2 Strange, 1169; Obaugh v. Finn, 4 Pike, 110; Boydell v. Jones, 4 M. & W. 446; 7 Dowl. (P. C.) 210; Baboneau v. Farrell, 15 C. B. 360; Bryant v. Loxton, 11 Moore, 344; Davis v. Davis, 1 Nott & McCord, 290; Chipman v. Cook, 2 Tyler, 456; Rush v. Cavenaugh, 2 Barr. 187; Brown v. Mims, 2 Rep. Con. Ct. 235; Foot v. Brown, 8 Johns. 64; Riggs v. Deniston, 3 Johns. Cas. 198; Sempsey v. Levy, 2 Jur. 776; Fowles v. Bowen, 30 N. Y. 24; Greenfield's Case, Mar. 82; 1 Vin. Abr. 465, pl. 19.

[3] Ramsdale v. Greenacre, 1 F. & F. 61; Bryant v. Loxton, 11 Moore, 344.

[4] Herr v. Bamburg, 10 How. Pr. 128.

[5] Stanley v. Obarton, Cro. Eliz. 268.

[6] Hull v. Smith, 1 M. & S. 287.

[7] Sewall v. Catlin, 3 Wend. 291.

[8] Rollin v. Steward, 14 C. B. 595.

[9] Semble, in Foster v. Lawson, 3 Bing. 452

[10] London v. Eastgate, 2 Roll. R. 72.

[11] Hetley, 71.

he is a "cobbler;"[1] or of a watchmaker that he "does not know how to make a good watch;"[2] and so it was held actionable to say of a bishop that he is bankrupt[3] or a wicked man,[4] or to charge a clergyman with having come into his pulpit in a towering passion;[5] or with having, by personal invectives from the pulpit against a young lady of spotless reputation, caused a misunderstanding in his congregation;[6] that he preaches lies in the pulpit;[7] he made a seditious sermon,[8] he hath two wives,[9] he is a drunkard,[10] or incontinent,[11] or guilty of incest,[12] or he has a bastard,[13] or he is a perjured priest,[14] or that he has desecrated his church;[15] but in all cases there must appear to be some special damage; the law will not give a remedy for mere sensitive or outraged feeling.[16]

[1] 1 Mod 19; Vin. Abr. Act for Words (Va.), 16.

[2] Redman v. Pyne, 1 Mod. 19.

[3] Holt on Libel, 233, note. This appears to be an exception to the general principle, for that a bishop were bankrupt would not injure him in his calling, as if he were a banker; but the word "bankrupt" appears always to have been a word of reproach; Hull v. Smith, 1 M. & S. 287.

"Bas.—Why dost thou whet thy knife so earnestly?
"Shy.—To cut the forfeiture from that bankrupt there."
(Merchant of Venice, iv. 1.)

[4] Holt on Libel. Id.

[5] Walker v. Brogden, 19 C. B. N. 3, 65.

[6] Edwards v. Bell, 8 Moore, 467.

[7] Drake v. Drake, Sty. 363; Crandel v. Walden, 3 Lev. 17.

[8] Phillips v. Badley, 4 Rep. 19 (*a*).

[9] Nicholson v. Lynes, Cro. Eliz. 94.

[10] McMillan v. Birch, 1 Binn, 178; Chaddock v. Briggs, 13 Mass. 248.

[11] Demarest v. Haring, 6 Cow. (N. Y.) 76; but see Gallewey v. Marshall, 9 Ex. 294.

[12] Staers v. Gardner, 6 Up. Can. Q. B. R. O. S. 512.

[13] Payne v. Beaumorris, Lev. 248.

[14] Hogg. v. Vaughan, Sty. 6.

[15] Kelly v. Sherlock, L. R. 1, Q. B. 686.

[16] Terwilliger v. Wands, 17 N. Y. 54; Wilson v. Goit, 17

58. There was an old maxim, born of the star chamber, and of the days when men were punished for libels contained in sealed letters, that "the greater the truth the greater the libel." That maxim, as it has been said, "disappeared very reluctantly from the statute books."[1] Prior to the statute of Anne in 1706, there is no record of a plea of truth in an action for slander or libel,[2] though, until 1835, the truth was admitted in mitigation under the general issue of not guilty.[3] But it is now generally conceded that in civil actions the truth of the alleged libel is a defense.[4]

N. Y. 442; Alsop v. Alsop, 5 Hurl. & Nor. 534; Bedell v. Powell, 13 Barb. 183. These decisions overrule Brandt v. Towsley, 13 Wend. 253; Fuller v. Fenner, 16 Barb. 333; Olmstead v. Brown, 12 Barb. 657; Underhill v. Welton, 32 Verm. (3 Shaw) 40.

[1] "I am quite clear that the truth ought not to be made decisive (as a defense) either in civil or criminal proceedings; for cases may be put where the truth, instead of being a justification, would not even be any mitigation; nay, where it would be an aggravation (Lord Brougham, Evidence, Rep. of House of Lords on Libel, &c., July, 1843); and in the same report see the opinions of other lawyers and judges to the same effect; and see 2 Kent's Com. 25; Borthwick on Libel 252; 29 Parl. Hist. 575; Preliminary Discourse to Starkie on Slander, xliv.

[2] Townshend on Slander and Libel, § 211.

[3] Ib.

[4] Townshend on Slander and Libel, § 73; 1 Starkie on Libel, 9; Maitland v. Goldney, 2 East, 426; Perry v. Mann, 1 Rhode Island, 263; Root v. King, 7 Cow. 613, and 4 Wend. 113; 1 Stark. on Sland. 229; Lake v. Hutton, Hob. 253; I'Anson v. Stuart, 1 T. R. 748; Underwood v. Parkes, Str. 1200; Manning v. Clement, 7 Bing. 367; 2 Greenl. Ev. § 424; Andrews v. Van Deuser, 11 Johns. 38; Van Ankin v. Westfall, 14 Johns. 233; Shephard v. Merrill, 13 Johns. 475; Snyder v. Andrews, 6 Barb. 23; Wagner v. Holbrunner, 7 Gill, 296; Smith v. Smith, 8 Ired. 29; Kelly v. Dillon, 5 Porter [Ind.], 426; Else v. Evans, Anthon N. P. 23; Burns v. Webb, 1 Tyler, 17; Samuel v. Bond, Litt. Sel. Cas. 158; Treat v. Browning, 4 Conn. 408; Bisbey v. Shaw, 12 N. Y. 67; Sheahan v. Collins,

The truth of an alleged libel is a complete defense to an action therefor,[1] "not," said Littleton, "because it negatives the charged malice, for a person may wrongfully or maliciously utter slanderous matter, though true (and thereby subject himself to an indictment), but because it shows that the plaintiff is not entitled to recover damages; for the law will not permit a man to recover damages in respect of an injury to a character which he either does not or ought not to possess.[2]

If the libel be false, however, it will be no justification that the writer believed *bona fide* in its truth, though the fact may be taken in mitigation of damages.[3]

59. The question of variance is one which properly arises in considering the pleadings in an action for libel, or the proof upon the trial. The purposes of this chapter are to consider the means of avoiding, rather than of conducting a lawsuit upon the subject; but its scope might well include a few illustrations of what will and what will not justify certain spoken and written statements.

In the case of Spencer v. Southwick,[4] the declaration charged that, by hypocritical cant, etc., plaintiff

20 Ill. 325; Haws v. Stanford, 4 Sneed, 520; Arrington v. Jones. 9 Port. 139; Douge v. Pearce, 13 Ala. 127; Kay v. Fredrigal, 3 Barr, 221; Thompson v. Bowers, 1 Doug. 321; Taylor v. Robinson, 29 Maine [16 Shep.], 323; Teagle v. Deboy, 8 Blackf. 134; Wagstaff v. Ashton, 1 Harring. 503; Bodwell v. Swan, 3 Pick. 376; Alderman v. French, 1 Pick. 1; Updegrove v. Zimmerman, 13 Penn. 619; Scott v. McKinnish, 15 Ala. 662; Eagan v. Gantt, 1 McMullan, 468; Rumsey v. Webb, 1 Car. & M. 104; Sidgreaves v. Myatt, 22 Ala. 617).

[1] Bl. Com. 342 *vid.* Borthwick 190–195.

[2] McPherson v. Daniel, 10 B. & C.272, *vid.* Anon, 11 Mod. 99; Cockayne v. Hodgkisson, 5 C. & P. 548; Weaver v. Lloyd, 2 B. & C. 678; Tighe v. Cooker, 7 El. & B. 639; Beggs v. Great Eastern Ry. Co. 18 L. T. N. S. 482.

[3] Campbell v. Spottiswoode, 8 B. & S. 769, 8 L. T. N. S. 201; 32 L. J. 185; Reade v. Sweetzer, 6 Abb. (Pr.) N. S. p. 9 (note)

[4] 11 Johns. 573, reversing 10 Johns. 259.

and his associates effected the incorporation of the Manhattan Bank, in the city of New York, in which plaintiff was interested to the extent of several thousand dollars; that plaintiff, as a member of the senate, advocated the bill entitled "an act for supplying the city of New York with pure and wholesome water," knowing that it contained a clause authorizing the company to carry on banking business, and that the other members of the legislature were ignorant of that fact, &c. It was held in justification that the plaintiff was a senator on 2nd April, 1798; that such a law was passed: that—at the time of passing said law (1st April, 1798)—plaintiff, as senator, advocated the bill, knowing at the time that it contained such clause, &c.; and that a large majority of the members of the legislature were ignorant of that fact, &c.; and that, at the time and place first above mentioned, plaintiff held, and was owner of a large portion of the stock created by the said law, to wit, five thousand dollars.

A charge of stealing a pot and waiter, is not justified by proof of stealing a waistcoat pattern.[1] Nor of stealing a dollar from A., by proof of stealing a dollar from B.[2] Proof of a forgery amounting to $80 is not a justification of a charge of forgery to the amount of $250.[3] Nor is a charge that the plaintiff carried on smuggling as a business, justified by proof of a single act of smuggling;[4] nor of smuggling during the war by showing a smuggling before the war.[5] A charge that plaintiff, a counsellor-at-law, had

[1] Eastland v. Caldwell, 2 Bibb. 21.
[2] Self v. Gardner, 15 Miss 480.
[3] Stiles v. Comstock, 9 How. Pr. 44.
[4] Andrews v. Van Deuzer, 11 Johns. 38.
[5] Id.

offered himself as a witness to divulge secrets of his client, is not justified by the fact that, in a private conversation out of court, the plaintiff disclosed a secret of his client, nor by the fact that plaintiff offered himself as a witness to divulge matters not privileged, communicated to him by his client;[1] or that an attorney had been struck from the rolls, by showing that he was suspended for two years.[2] A charge that a minister of the gospel has asserted that the blood of Christ had no more to do with our salvation than the blood of a hog, is not justified by the fact that plaintiff had denied the divinity of Christ and the doctrine of the atonement; and asserted that Christ was a creature, a perfect man, but that there was no more virtue in his blood than that of any creature.[3] A charge that a diplomatic minister had traitorously betrayed the secrets of his own government, is not justified by the fact that the plaintiff disclosed the instructions given to him as such minister, although coupled with the fact that he was censured by his government for making such disclosures.[4] The charge must be accurate in all its details; thus, where the libel charged that the plaintiff had been tried for murder in a duel, and that "he spent nearly the whole of the night preceding the duel in practicing pistol firing," held, that, to justify, it must be shown not only that the plaintiff had been tried for murder, but that he spent nearly the whole of the night preceding the duel in practicing pistol firing.[5] And a charge of stealing "hogs" is not justified by proof that plaintiff stole one "hog."[6]

[1] Riggs v. Denniston, 3 John. Cas. 198.
[2] Blake v. Stevens, 4 Fost & F. 432.
Skinner v. Grant, 12 Vt. 456.
[4] Ginet v. Mitchell, 7 Johns. 120.
[5] Clarkson v. Lawson, 6 Bing. 206, 587.
[6] Swan v. Rary, 3 Blackf. 298. And see generally as to

"I recollect," said Crompton, J.,[1] "being satisfied, early in my professional life, that I could justify calling a man a 'rugged Russian bear,' by showing that his manners were rough." But when the charge is that a plaintiff "bolted" it is not a justification to show that he "quitted,"[2] and the charge must be directly met and not argumentatively or by inference.[3]

what will or will not justify an injurious statement. Fidler v. Delavan, 20 Wend. 57; Riggs v. Denniston, 3 Johns. Cas. 198; McNally v. Oldham, 16 Ir. Com. Law, 298; 8 Law Times, N. S. 604; Sanford v. Gaddis, 13 Ill. 329; Clarke v. Taylor, 4 Bing. N. C. 654; Wilson v. Nations, 5 Yerg. 211; Morrison v. Harmer, 3 Bing. N. C. 758; 5 S. C. 410; Edwards v. Bell, 1 Bing. 403; Moore v. Terrell, 1 N. & M. 559; Cooper v. Lawson, 1 Per. & D. 15; Clark v. Taylor, 2 Bing. N. C. 654; Morrison v. Harmer, 3 Bing. N. C. 759; 5 Scott, 410; Barrows v. Carpenter, 1 Cliff, 204; Cook v. Tribune Asso. 5 Bl. C. C. 352.

[1] Tighe v. Cooper, 21 Jur. 716; 7 Ell. & Bl. 619.

[2] O'Brien v. Bryant, 16 M. & W. 168; 4 D. & L. 341; 16 Law Jour. Rep. 77, Ex. And see Wachter v. Quenzer, 29 N. Y. 547; Ede v. Scott, 7 Ir. L. R. N. S. 607; Watkin v. Hall, Law Rep. III. Q. B. 396.

[3] Fidler v. Delavan, 20 Wend. 57; Mountney v. Watton, 2 B. & Ad. 673; Weaver v. Lloyd, 2 B. & C. 678; 4 D. & R. 230; Bissell v. Cornell, 24 Wend. 354; Stillwell v. Barter, 19 Wend. 478; Torrey v. Field, 10 Vt. 353; Crump v. Adney, 1 Cr. & M. 362; Burford v. Wible, 32 Penn. 95; Wilson v. Beighler, 4 Iowa, 427; Van Derveer v. Sutphin, 5 Ohio N. S. 293; Morrow v. McGaver, 1 Ir. C. L. 569; Powers v. Skinner, 1 Wend. 451; Cooper v. Barber, 24 Wend. 105; McKinly v. Rob. 20 Johns. 351; Skinner v. Grant, 12 Vt. 466; Gregory v. Atkins, 42 Id. 237; Ormsby v. Douglass, 2 Abb. Pr. 407; 37 N. Y. 377. Fero v. Ruscoe, 4 N. Y. 165; Wakley v. Cooke, 4 Exch. 511; Odiorne v. Bacon, 6 Cush. 185; Holton v. Muzzy, 30 Vt. 365; Ricke v. Stanley, 6 Blackf. 169; Sharp v. Stephenson, 12 Ired. 348; Walters v. Smoot, 11 Ired. 315; Pallet u. Sargent, 36 N. H. 496; Randall v. Holsenbake, 3 Hill, So. Car. 175; Ridley v. Perry, 4 Shepl. 21; Smithies v. Harrison, 1 Ld. Raym. 727; Talmadge v. Baker, 22 Wis. 624; Stow v. Converse, 4 Conn. 17; Torrey v. Field, 10 Vt. 353; Andrews v. Van Deuzer, 11 Johns. 38; Smith v. Buckecker, 4 Rawle, 295.

60. And if the libelous words impute a felony, it will be no justification of the libel to prove facts sufficient to raise a suspicion merely.[1]

61. If any material part of the defamatory matter fails to be proved, the publication is a libel.[2]

[1] Where the declaration stated that the defendant, intending to cause it to be believed that the plaintiff was guilty of feloniously stealing a horse, published a libel concerning him, which was headed "Horse-stealer," and alleged that the plaintiff had been taken up, on suspicion of having stolen a horse, by a constable who was informed that "such a character" was at a certain public-house; the libel then going on to state the circumstances of suspicion against the plaintiff, and alleging finally that having obtained permission to go out of the constable's sight, he had made his escape, but was retaken and confined in jail for examination; innuendo that the plaintiff was guily of stealing a horse: it was held that a plea setting out the several circumstances related in the libel, and justifying all the parts of it, except the words "Horse-stealer," was not a sufficient justification of the libel—Mountney v. Walton, 2 B. & Ad. 673. *Vid.* also Chalmers v. Shackell, 6 C. & P. 475.

Compare, however, a case where the alleged libel, contained in a letter addressed to a person who employed the plaintiff as cashier, was, "I conceive there is nothing too base for him to be guilty of;" a plea alleging that the plaintiff signed and delivered to the defendant an I. O. U., and afterwards, on having sight thereof, falsely and fraudulently asserted that the signature was not his, and averring that the alleged libel was written and published solely in reference to this transaction, was held to be a sufficient justification. Tighe v. Cooper, 7 E. & B. 639, 26 L. J. 215 Q. B.

[2] Thus, if a libel imputes to a person that he has been guilty of murder in killing his opponent in a duel, and alleges further that the duel was supposed to have been fought under circumstances revolting to the ordinary notions of honor (it being suggested that the plaintiff had spent the whole of the night preceding the duel in practicing pistol firing), it is not a sufficient defense to prove merely that the plaintiff had killed his antagonist, and had been tried for murder and acquitted. "When an action is brought for a libel," said Maule, J., in this case, "to make a good plea to the whole charge, the defendant must justify everything that the libel contains which

62. Nor is it a justification of a libel that it is only a repetition of one already and previously published.

In the Earl of Northampton case, in the star chamber,[1] A. D. 1613, it was laid down that it would be a defense to an action for words, to show that the defendant repeated them, and that they were not original with him. The rule was allowed to stand in this condition until in 1769. Lord Kenyon, in a case before him,[2] added the qualification that, to justify the publication, the defendant must, at the time thereof, have mentioned the name of the previous publisher, and that it would not be sufficient to mention it for the first time in his plea. In 1805, this was further qualified[3] by asserting that, if the prior publisher had retracted the slander to the knowledge of the defendant, the latter would not be excused by mentioning his authority.

In this country, in certain States, the mention of the authority was never considered a defense, but only

is injurious to the plaintiff. If the libel charges the commission of several crimes, or the commission of a crime in a particular manner, the plea must justify the charge as to the number of crimes, or the manner of committing the crime. If the crime is charged with circumstances of aggravation as here, the plea is clearly bad if it omit to justify that. . . . If the libel had imputed murder *simpliciter*, it would have been enough to show in the plea that the plaintiff had committed murder. But if the libel goes further, and states something besides, which is injurious to the plaintiff's character, it is clear upon every principle of the law of libel, that that must be justified as well as the rest, or the defense fails." Helsham v. Blackwood, 11 C. B. 128, 20 L. J. 187 C. P. *Vide* also Clarkson v. Lawson, 6 Bing. 266; Clark v. Taylor, 2 Bing. N. C. 654; 3 Scott, 95.

[1] 2 Rep. 132; Moore, 821. See Crawford v. Middleton, 1 Lev. 82.

[2] Davis v. Lewis, 7 T. R. 17.

[3] In Woodnoth v. Meadows, 5 East, 463.

as going in mitigation[1] or as rebutting an inference of malice;[2] while in others it has been held to be a justification.[3]

But giving the name of an authority appears never to have been considered a justification of a libel,[4] even though the first publisher were the plaintiff himself.[5]

[1] As in Connecticut, Leister v. Smith, 2 Root, 24. But see Austin v. Hanchett, Id. 148; Treat v. Browning, 4 Conn. 408. In Pennsylvania, Kennedy v. Gregory, 1 Ben. 90, (n). New Jersey, Cook v. Barkley, 1 Penn. N. J. R. 169. Mississippi, Jarnigan v. Fleming, 43 Mis. 711.

[2] Benns v. McCorcle, 2 P. A. Brown, 79; Hirsh v. Ringwalt, 3 Yeates, 508.

[3] Abrams v. Smith, 8 Blackf. 95; Haynes v. Leland, 29 Me. 233; Jones v. Chapman, 5 Blackf. 88; Crane v. Douglass, 2 Id. 85. See generally, Mapes v. Weeks, 4 Wend. 659; Austin v. Hanchett, 2 Root, 148; Skinner v. Grant, 12 Vt. 456; Scott v. Peebles, 2 Sme. & M. 546; Gilman v. Lowell, 1 Amer. Mead. Cas. 202, n.; 2 Greenl. Ev. § 424, n.; Cummerford v. McAvoy, 15 Ill. 311; Johnston v. Lance, 7 Iredell, 448; Kelly v. Dillon, 5 Ind. (Porter), 426; Trabue v. Mayo, 3 Dana, 138; Robinson v. Harvey, 5 Monr. 519; Parker v. McQueen, 8 B. Monr. 16. Miller v. Kerr, 2 McCord, 285; Church v. Bridgeman, 6 Miss. 190. And see Easterwood v. Quin, 2 Brevard, 64; Smith v. Stewart, 5 Barr. 372; Sexton v. Todd, Wright (Ohio), 317; Haine v. Welling, 7 Ham. 253; Farr v. Roscoe, 9 Mich. 353; Brooks v. Bryan, Wright, 760.

[4] Runkle v. Meyers, 3 Yeates, 518; Dole v. Lyon, 10 Johns. 447; Larkins v. Tarter, 3 Sneed, 681; Miles v. Spencer, 1 Holt, N. P. 533; Lewis v. Walter, 4 B. & Ald. 605; Chevalier v. Brush, Anthon's Law Student, 186; Mapes v. Weeks, 4 Wend. 659; Inman v. Foster, 8 Id. 602; Hotchkiss v. Oliphant, 2 Hill, 510. And see Johnston v. Laud, 7 Iredell, 448; Dole v. Lyon, 10 Johns. 447; Clarkson v. McCarty, 5 Blackf. 574; Moberly v. Preston, 8 Mis. 462; Romayne v. Duane, 3 Wash. C. C. 246; State v. Butman, 15 La. An. 166; McGregor v. Thwaites, 3 B. & C. 24; 4 D. & R. 695; De Crespigny v. Wellesly, 5 Bing. 392; Bennett v. Bennett, 6 C. & P. 588; Fidman v. Linslie, 10 Exch. 63; Saus v. Joerris, 14 Wis. 663; Cook v. Ward, 6 Bing. 409; Abshire v. Cline, 3 Ind. 115.

[5] Abshire v. Cline, 3 Ind. 115; Cook v. Ward, 6 Bing. 409.

63. A defamatory publication, true in part and false in part, will be held libelous as to the part which is false.[1]

So where the libel alleged that the plaintiff, a proctor, had been suspended from practice three times for extortion, a plea in justification which alleged only one suspension, was held bad. It was urged on behalf of the defendant in this case, that it was sufficient if the sting and substance of the libel were answered by the plea, and that the discredit attaching to a single suspension from office, was not substantially aggravated by a repetion of similar reproof; but the court did not agree that a man's character would not fall into lower discredit by the imputation of repeated offenses, than by the imputation of one only; and held that the plea fell within that class which, professing to justify the whole of the libel, in effect justifying only a part, are therefore bad.[2]

[1] Mountney v. Walton, 2 B. & Ad. 673. *Vid.* also Chalmers v. Shackell, 6 C. & P. 475.

[2] Shortt, L. Lit., p. 393; Campbell v. Spottiswoode, 3 B. & S. 769.

And where the libel consisted of a paragraph published in a newspaper, stating, in substance, that the plaintiff was a confederate of blacklegs; that he had sought admission into a yacht club; that he gave an entertainment in the expectation of being elected, but was blackballed, and the next morning bolted, and some of the tradesmen of the town had to lament the fashionable character of his entertainment—a plea of justification, which, after alleging facts to show that the plaintiff was the confederate of persons who had been guilty of cheating at cards, and the facts of his giving an entertainment, and being blackballed, &c., stated "that on the following morning he quitted the town and neighborhood, leaving divers of the tradesmen, to whom he owed money, unpaid," was held bad, because the quitting might be innocent and without any intention to defraud. "The libel, as stated in the declaration," said Parke, B., "imputes to the plaintiff a fraudulent evasion of his creditors, he being unable to pay them. The plea does

64. But on the other hand, if the truth of the substantial imputation contained in the libel be proved, the justification need not extend also to every epithet or term of general abuse which may be found in the description or statement of the imputation, and which contains no ground of charge substantially distinct in its nature or character, from that which forms the main charge or gist of the libel.[1]

not meet that; for the plaintiff might be unable to pay without being guilty of fraud, as imputed by the word 'bolting,' used in the libel. That expression charged the plaintiff with going away suddenly from Plymouth, leaving debts unpaid, and under such circumstances that the creditors could not find him, and therefore means more than the mere 'quitting,' which is stated in the plea. That would be an innocent departure, and consistent with proof that he went out of town for a day, but afterwards returned and paid his debts" (O'Brien v. Bryant, 16 M. & W. 168).

See also Wadsworth v. Bentley (23 L. J. 3 Q. B.), where the declaration in an action of slander alleged that the defendant spoke of the plaintiff, in the way of his trade, the words, "He cheated me"; "He is a thief, and robbed me of £100"; and contained an averment of special damage, and the defendant pleaded a former judgment recovered for the same grievances. The record of the previous action showed the slanderous words to have been: "That thief is a villain, a scoundrel, and a rascal, and I can prove him a thief at any moment"; and it neither alleged that the words were spoken of the plaintiff in the way of his trade, nor contained an averment of special damage. This was held to be no bar to the action. "I cannot think," said Crompton, J., "that the cause of action in that record, which contains words charging the plaintiff with felony, is the same cause of action as that in the present declaration, which imputes a charge against the plaintiff as a trader."

[1] Morrison v. Harmer, 3 Bing. N. C. 76; 4 Scott, 933. So, in an action for libeling the plaintiffs in their business of sellers of medicine, by publishing that the defendants claimed "the merit of having crushed the self-styled hygeist system of wholesale poisoning, since they commenced exposing the homicidal tricks of those impudent and ignorant scamps who had the audacity to pretend to cure all diseases with one kind

65. "Our laws," said the court in a late case,[1] "allow a man to speak the truth, even if it be done ma-

of pill;" and that "several of the rot-gut rascals had been convicted of manslaughter, and fined and imprisoned for killing people with enormous doses of their universal vegetable boluses," &c.; the defendants pleaded a justification of the libel on the ground of truth, but did not justify the expressions "scamps" and "rascals;" and they proved at the trial that two persons had died in consequence of taking large quantities of the plaintiff's pills, and that the parties who had administered the pills were tried, convicted, and imprisoned for manslaughter. The defense, after verdict, was held sufficient, though the plea contained no justification of the expressions "scamps" and "rascals," and though it had not been proved that the defendants had "completely crushed the self-styled hygeist system of wholesale poisoning."

As to the objection grounded on the non-justification of the words "scamps" and "rascals," the court said: "It must be admitted that if these terms of invective and reproach contain any ground of charge or imputation against the plaintiffs, substantially distinct in its nature or character from that which forms the main charge or gist of the libel, and the truth of which has been justified by the plea, the consequence contended for on the part of the plaintiffs would justly follow, for the plea upon that supposition would not contain an answer to so much of the declaration as by the commencement of the plea it expressly undertakes to justify. The main charge against the plaintiffs in the libel is, that they were the compounders and sellers of pills of a poisonous and deleterious nature; and the main and principal allegation in the plea of justification is, 'that the pills sold by the plaintiffs, when administered and taken in the doses and quantities suggested and recommended by them, were of a highly dangerous, deadly, and poisonous nature, and in the highest degree injurious to the stomachs and bowels of persons using and taking the same.' The question therefore

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[1] Baum v. Clause, 5 Hill, 199, and see Foss v. Hildreth, 9 Allen, 76.

By the Code Napoleon, in cases of libel, the defendant was not allowed to adduce proof of his asseverations. This law was repeated by the National Assembly in 1781, but only so far as libels against Government functionaries are concerned. A writer libeling a private person is still denied the privilege of proving that his libel is truth.

liciously." "But that truth" (says Mr. Townshend, in his valuable essay), "which is admitted as a defense, is the truth of the defamatory matter, in substance and in fact; and in the sense in which it was used, and was intended to be understood. If A. says of X. that he is a thief, and C. publishes that A. said X. was a thief, in a certain sense C. would publish the truth, but not in the sense which would constitute a defense; C.'s publication would, in fact, be but a repetition of A.'s words, which, as we have seen, would not be a defense. The truth, which in such a case would amount to a defense, would be that X. was a thief. Again: if A., speaking ironically, says of X. that he is an honest man, meaning and conveying the idea that X. is a dishonest man, it would not be a justification of these

is, whether the terms of abuse which have been above referred to, carry the matter any further than this, the main charge. The words themselves, in their vulgar use, convey no other meaning than that of general reproach and invective; and we can only discover whether they have any particular meaning in this libel by referring to the context of the libel and to the allegations on the record. As to the word 'scamps,' the plaintiffs themselves have given the meaning to it; for they allege in their declaration that it is intended to be applied to them 'in the way of their aforesaid trade, business, and occupation;' that is, as vendors of the pills, the making and selling of which by the plaintiffs is the main imputation against them. And the word 'rascals' is associated with an epithet or adjunct which appears to confine its general abusive quality to a description and designation of the persons who have been occupied in administering the pills spoken of in the libel, of whom two have been convicted of manslaughter. We cannot, therefore, understand these words, however offensive, as containing any charge different and distinct from that of which the truth has been justified in the first plea; and we are not aware of any authority by which it is determined that the justification of the truth of the substantial imputation contained in a libel is not sufficient, unless it extends also to every epithet or term of general abuse which may be found in the description or statement of such imputation."

words to allege that it was true X. was an honest man; but, to constitute a defense, the allegation required would be, that it was true X. was a dishonest man."[1]

66. A mere belief in the truth of the matter published, however honestly that belief may be entertained, will not, of itself, constitute any defense.[2] The question of belief, it is evident, will mainly present itself in considering the intent with which a publication is made, as to whether that intent be or be not malicious; and the principles which will govern courts are most safely drawn from the reported cases.

The question as to how far a belief in the truth of statements made, relieves the publisher from the re-

[1] Essay upon Slander and Libel, 7 § 211.

[2] Townshend on Slander and Libel, § 216. A defendant can not justify a charge of theft by showing that he has just grounds for believing the plaintiff dishonest. (Woodruff v. Richardson, 20 Conn. 238.) The publication in a newspaper of rumors is not justified, but may be mitigated, by the fact that such rumors existed. (Skinner v. Powers, 1 Wend. 451, § 411, *post.*) In mitigation of damages, in an action for libel, defendant was allowed to show that he copied the statement from another newspaper (Saunders v. Mills, 6 Bing. 213; 3 M. & P. 520). And that he had omitted many of its parts reflecting on the plaintiff (Creevy v. Carr, 7 C. & P. 64. And see Darbey v. Ousely, 1 Hurl & N. 1; Campbell v. Spottiswoode, 3 Best & Smith, 769; 8 Law Times Rep. N. S. 201; and see Moore v. Stevenson, 27 Conn. 14; Woodruff v. Richardson, 20 Conn. 238; Fry v. Bennett, 3 Bosw. 200; Smart v. Blanchard, 42 N. Hamp. 137; Kerr v. Force, 3 Cr. C. C. 8; Watson v. Moore, 2 Cush. 133; Hotchkiss v. Porter, 30 Conn. 314; Gilmer v. Ewbank, 13 Ill. 271; Duncan v. Brown, 15 B. Monr. 186; Grimes v. Coyle, 6 Monr. 301; Huson v. Dale, 19 Mich. 35; Farr v. Rusco, 9 Mich. 353; Long v. Brougher, 5 Watts, 399; Smith v. Luckecker, 4 Rawle, 295; Powell v. Plunkett, Cro. Car. 52; Moyer v. Pine, 4 Mich. 409; Hutt. 13; Bridg. 62; Brownlow, 2; Holt v. Parsons, 23 Tex. 9).

[3] As—it is submitted—will also the nice and accurate questions as to what will constitute publication of a libel. See Townshend on Slander and Libel p. 78, *et seq.*

sponsibility for making them; a question intricate in itself, but rendered still more involved by considerations as to how far the persons to whom the statements are uttered, believe in the truth, we are forced to admit, after all the years during which the law has been engaged in its discussion, must be solved anew with and according to the circumstances of each recurring case.[1] The law has never been able to lay down an infallible or invariable rule. While an action of slander would perhaps be influenced by the fact that the slanderous words were not credited by any one hearing them—the main question will nevertheless be—the intent of the person speaking them.

Nor is it necessary to be finical as to the exact legal meaning of the word intent. The law generally will construe it in its popular sense of intention, motive, animus. As to the word malice, however, there may be a legal significance, not recognized in the popular definition; though Daly, Ch. J., in a late case seemed to hold that there was none. "I apprehend," said he, "that there is no ground for distinguishing between the legal and the popular sense of the word, and that it means, in its legal sense, exactly what it means in its popular sense, namely, a mischievous design or intent to do an injury to an individual, or to the public."[2] The law presumes, from the act, an intent to bring about its consequences; "to denominate this intent malice, or malice in law, when it may have arisen from a good motive, the defendant believing what he alleges to be true, is to employ the word malice in a

[1] Knight v. Gibbs, 3 Nev. & M. 467; 1 Adol. & El. 43; Gillett v. Bullivant, 7 L T. 490; Wilson v. Galt, 17 N. Y. 445.

[2] Viele v. Gray, 10 Abb. Pr. R. 5; 18 How Pr. R. 550.

sense neither justified by its etymology, its ordinary meaning, nor its previous legal signification."[1]

But a difference is made by Sir Thomas Moore between *malitia* and *malevolentia*.[2]

However honestly the party who publishes a libel believes it to be true, if it is untrue in fact, the law implies malice, unless the occasion justifies the act; and whether the occasion justifies the act, is a question of law for the court.[3]

No suspicion, however strong, will justify a man in aspersing his neighbor,[4] nor can a defendant show that the aspersion had been for years generally credited,[5] or that a near relative (*e.g.* a sister) of the plaintiff believed her guilty.[6] Common fame even will not justify an extra judicial charge.[7] Though a *bona fide* belief in the truth of statements made will sometimes be allowed to mitigate damages.[8] Recantation also is sometimes allowed to go in mitigation of damages.[9]

[1] In Viele v. Gray, 10 Abb. Pr. 5; 18 How. Pr. 550.

[2] 17 Howell's St. Tr. 43, 63. (See also his remarks upon the introduction of the words *Falso et malitiose* into indictments for libel [1 Id. 30; 6 Id. 1113]).

[3] Darby v. Ouseley, 1 Hurl & N. 1.

[4] Powell v. Plunkett, Cro. Car. 52; Moyer v. Pine, 4 Mich. 409.

[5] Long v. Brougher, 5 Watts, 437.

[6] Smith v. Buckecker, 4 Rawle, 295.

[7] Hutt, 13; Brownlow, 2; Bridg. 62.

[8] Farr v. Rusco, 9 Mich. 353; Huson v. Dale, 19 Mich. 35, overruling Thompson v. Bowers, 1 Douglass, 321.

[9] Perret v. New Orleans Times Newspaper, 25 La. An. 170. (See this question discussed *post*, in chapter on newspapers.)

"In Dicas v. Lawson" (Id.), says Alderson, B., "I directed the jury to look to the whole of the publication, to see whether it was calculated to injure the plaintiff's character. The publication there complained of, was the report of a trial in which there were strong observations on the character of the plaintiff, but in which the plaintiff had recovered a verdict for £30. It was said that the report was libelous, because it set

It was formerly the policy of the law to construe all words *in mitiori sensu*.[1] The old judges abounded in such maxims as "where words are ambiguous, so as they may be expounded in good or ill part, no action lies, for they shall be expounded in the best sense."[2] "The law strains not to hurt but to heal."[3] 'Where words are indifferent and discouraged the action of slander by all sorts of evasions, and the like."[4]

67. But the rule, *mitiori sensu*, was held by Lord Ellenborough[5] in 1807, to have been long superseded, and courts will now construe words in the

forth the charge made on the trial against the plaintiff. I left it to the jury to say whether, taking the whole of the publication together, they thought it likely to depreciate his character. The jury thought not; and on application for a new trial, this court (exchequer) approved of my direction."

[1] King v. Bagg. Cro. Jac. 331; Holland v. Stoner, Id. 315.

[2] Anon. Cro. Eliz. 672.

[3] Coote v. Gilbert Hob, 77 pl. 100.

[4] Per Gibson, J., Bash v. Sommer, 20 Pa. St. 159. See Harrison v. Thornborough, 10 Mod. 196. "We will not give more favor unto actions on the case for words than of necessity we ought to do, where the words are not apparently scandalous, these actions being now too frequent." (Coke, C. J., Crofts v. Brown, 3 Bulst. 167.) In Aslop v. Aslop (5 Hurl. & N. 534), the court says actions for slander are not to be encouraged; nor is the spirit wanting in the later decisions in this country; see Bennett v. Williamson (4 Sandf. 67), where it is said: "The law of libel ought to be considered and is in its spirit a benevolent and salutary provision for the peace and security of the community, but it can not redress every injury sustained by a breach of morals or of good manners. We may not approve of the taste of publications such as is set forth in the declaration in this case. We may lament the existence of a disposition to make private character too much the subject of comment and abuse without having it in our power through the instrumentality of the law to arrest the evil;" and in Dollaway v. Turrell (26 Wend. 397), the action for libel is designated as a sordid action.

[5] Roberts v. Camden, 9 East, 96; Cf. Woolnoth v. Meadows, 5 East. 463; Somers v. House, Holt Rep. 39.

plain and popular sense in which the rest of the world naturally understands them.[1] The language will be equally libelous if grammatical or ungrammatical;[2] whether positive or insinuating;[3] whether mispelled,[4] ironical,[5] figurative,[6] or allegorical, or if expressed in the form of a question.

68. Truth being a defense, it follows that a greater or less degree of truth in the alleged libel, may be pleaded in mitigation of damages. Thus, it would be a mitigation of the offense, to show such facts as establish a ground of suspicion, not amounting to actual proof of the charge,[7] or as tend to a proof of the charge, although falling short of it.[8] Not only

[1] Button v. Hayward, 8 Mod. 24; Rex v. Horne, 2 Cowp. 672; Rex v. Watson, 2 T. R. 206; Fisher v. Clement, 10 B. & C. 472; Roberts v. Camden, 9 East, 93; Wakley v. Healey, 7 Com. B. 591; Ogden v. Riley, 2 Green, 186; Duncan v. Brown, 15 B. Monr. 186; Fallenstein v. Boothe, 13 Mo. R. 427; Demarest v. Haring, 6 Cow. 76; Pike v. Van Wormer, 6 How. Pr. R. 99; Backus v. Richardson, 5 Johns. 476; Gibson, J., Bash v. Sommer, 20 Penn. St. R. 159; Harrison v. Thornborough, 10 Mod. 196; Le Fance v. Malcomson, 1 H. L. Cas. 664.

[2] Shortt, L. Lit. 385.

[3] Rex v. Edgar, 2 Sess. Cas. 29; 5 Bac. Abr. tit. Libel, 199.

[4] Hob. 215; 11 Mod. 86; Boydell v. Jones, 4 M. & W. 446.

[5] Hoar v. Silverlock, 12 Q. B. 624, 632; Woodgate v. Rideout, 4 F. & F. 202.

[6] Guthercole's Case, 2 Lew. C. C. 255; Cf. Hunt v. Thimblethorpe, Moo. 418; 1 Vin. Ab. 429; Earl of Northampton's Case, 12 Rep. 134; Delany v. Jones, 4 Esp. C. 191; Woolnoth v. Meadows, 5 East, 463; Hemming v. Power, 10 M. & W. 564.

[7] Wagner v. Holbrunner, 7 Gill, 296. That is, a suspicion of the truth; for if the matter is false, no suspicion, however strong, will avail, as will be presently seen.

[8] Snyder v. Andrews, 6 Barb. 43; Scott v. McKinnish, 15 Ala. 662; Bisbey v. Shaw, 12 N. Y. 67. Evidence of general bad character may be admitted under the general issue (Smith

against actual words, but against implications and innuendoes, it behoves the writer to guard. It is not at all unfrequent, that one uttering words innocent in themselves, might be able, by implication, to make them really injurious, and against this innuendo, as well as against the words themselves, the law will protect the citizen. As, for instance, where the defendant wrote in a letter: "I have reason to suppose that many of the flowers of which I have been robbed, are growing upon your premises" (thereby meaning that the plaintiff had been guilty of larceny, and had stolen from the defendant certain plants, roots, and flowers of the defendant, and had unlawfully disposed of them to P., and unlawfully placed them in P.'s garden). The previous part of the letter stated that the plaintiff, whom P. had taken into his employ as a gardener, had been in the defendant's employ in the same capacity, and had been discharged for dishonesty; held, on error,

v. Smith, 8 Ired. 29; Taylor v. Richardson, 29 Maine, 323). An action of slander for charging a man with having the venereal disease, and, with that disease upon him, contracting marriage, and communicating that disease to his wife, cannot be maintained, if the plaintiff immediately after his marriage had the disease in fact, even by proof that his wife, whom he married without knowing that she had the disease, communicated it to him (Golderman v. Stearns, 7 Gray, 181). In slander for calling plaintiff a whore, the words were laid to have been spoken in 1842; plea, that plaintiff, while unmarried, in 1834, had carnal connection with one A. Replication, that plaintiff, at the time mentioned in the plea, was betrothed to said A.; that afterwards she was lawfully married to him; that she lived with him a virtuous life until August, 1836, when he died; and that she had ever since continued to live in innocent and virtuous widowhood. Held, on general demurrer, that the replication was insufficient (Alcorn v. Hooker, 7 Blackf. 58). Where the charge is of a crime of which the plaintiff was convicted, it is no answer to a plea of the truth of the charge, that the plaintiff was pardoned (Baum v. Clause, 5 Hill, 196; Townshend on Slander and Libel, note, p. 328).

that the innuendo was not too large. Of course, the innuendo, like the word, or act, or effigy, must be construed by the circumstances of each particular case, but against it the writer will do well to guard.

69. The word "innuendo," in its legal sense, signifies something which avers the intendment or meaning of language published.[1] That is to say: that, while ordinarily, as we have seen, words will be construed

[1] And as to innuendo generally, and example, see Gardner v. Williams, 2 Cr. M. & R. 78; 3 Dowl. Pra. Cas. 796; 1 M. & W. 245; Rex v. Horne, 2 Cowper, 688; Reg. v. Virrier, 4 Per. & D. 161; 1 Stark. Sland. 418; Rex v. Greepe, 2 Salk. 513; 1 Ld. Raym. 256; 12 Mod. 139; 1 Saund. 243; Van Vechten v. Hopkins, 5 Johns. 220; McClaughry v. Wetmore, 6 Id. 83; Thomas v. Croswell, 1 Id. 271; Weed v. Bibbins, 32 Barb. 315; Parham v. Nethersole, Yelv. 21; Cramer v. Noonan, 4 Wis. 231; Stevens v. Handley, Wright (Ohio), 123. Where the charge was that plaintiff was a "bunter," without any innuendo to explain the meaning of that term, the court on the trial refused to receive evidence of the meaning, and plaintiff was nonsuited (Rawlings v. Norbury, 1 Fost. & F. 174; Worth v. Butler, 7 Blackf. 251; Watson v. Nicholas, 6 Humph. 174). The office of the innuendo is to explain doubtful words or phrases, and annex to them their proper meaning. It can not extend their sense beyond their usual and natural import, unless something is put upon the record by way of introductory matter with which they can be connected. In such case, words which are equivocal or ambiguous, or fall short, in their natural sense, of importing any libelous charge, may have fixed to them a meaning, certain and defamatory, extending beyond their ordinary import (Beardley v. Tappan, 1 Blatchf. C. C. 588). And to the like effect, see Dorsey v. Whipps, 8 Gill, 457; Nichols v. Packard, 16 Vt. 83; Patterson v. Edwards, 2 Gilman, 720; Andrews v. Woodmansee, 15 Wend. 232; Taylor v. Kneeland, 1 Douglass, 67; Gosling v. Morgan, 32 Penn. St. R. 273; State v. Henderson, 1 Richardson, 179; Caverley v. Caverley, 3 Up. Can. Rep. 338, O. S.; Van Vechten v. Hopkins, 5 Johns. 211; Caldwell v. Abbey, Hardin, 529; McCuen v. Ludlam, 2 Harr. 12; Beswick v. Chappel, 8 Monr. 486; Penaway v. Coyne, Chand. (Wis.) 214; Vaughan v. Havens, 8 Johns. 109; Gompertz v. Levy, 1 Perr. & Dav. 214; Dodge v. Lacey, 2 Carter (Ind.) 212.

by courts in the plain and popular sense in which the rest of the world naturally understand them,[1] in that natural and ordinary meaning and acceptation which the world gives them. However general the language of a defamatory publication may be, if its application

"An innuendo means nothing more than the words '*id est*,' '*scilicet*,' or 'meaning,' or 'aforesaid,' as explanatory of a matter sufficiently expressed before. It is in the nature of a *prædict*. It may serve for an explanation, to point a meaning where there is precedent matter, expressed or necessarily understood or known, but never to establish a new charge. It may apply what is already expressed, but cannot add to, nor enlarge, nor change, the sense of the previous words. If the words before the innuendo do not sound in slander, no meaning produced by the innuendo will make the action maintainable, for it is not the nature of an innuendo to beget an action. An innuendo helps nothing, unless the words precedent have a violent presumption of the innuendo. The business of an innuendo is, by a reference to preceding matter to fix more precisely the meaning. The office of an innuendo is to explain, not to extend, what has gone before; and it cannot enlarge the meaning of words, unless it be connected with some matter of fact expressly averred." The innuendo "is only a link to attach together facts already known to the court" (Townshend on Slander and Libel, p. 527).

[1] Roberts v. Camden, 7 East, 93; Tenterden, Ch. J., Harvey v. French, 1 Cr. & M. 11; Bonyon v. Trotter, Sty. 231; Woolnoth v. Meadows, 5 East, 463; Spencer v. Southwick, 11 Johns. 579; Pratt, Ch. J., Button v. Heyward, 8 Mod. 24; Fallenstein v. Boothe, 13 Mis. 427; Ogden v. Riley, 2 Green, 186; Duncan v. Brown, 15 B. Monr. 186; Hancock v. Stephens, 11 Humph. 507; their most obvious meaning, Hogg v. Wilson, 1 N. & M. 216; or Thirman v. Mathews, 1 Stew. 384; Hogg v. Dorrah, 2 Port. 212; Dorland v. Patterson, 23 Wend. 422; Butterfield v. Buffam, 9 N. Hamp. 156; McGowan v. Manifee, 7 Monr. 314; Demarest v. Haring, 6 Cow. 76; Truman v. Taylor, 4 Iowa, 424; Wright v. Paige, 36 Barb. 438; S. C., on appeal, 3 Trans. App. 134; 1 Starkie on Slander, 60; Pike v. Van Wormer, 6 How. Pr. R. 99; Dias v. Short, 16 Id. 322; Walrath v. Nellis, 17 Id. 72; Hughley v. Hughley, 2 Bailey, 592; Tuttle v. Bishop, 30 Conn. 80; Carroll v. White, 33 Barb. 618; Somers v. House, Holt, 39.

to a particular individual or individuals can be generally recognized or perceived, it is a libel on him or them. It is not necessary that its object be described in any express form of words, but only so that it is known whom they are, "and if those who must be acquainted with the circumstances connected with the party described, may also come to the same conclusion, and may have no doubt that the writer of the libel intended to mean those individuals; it would be opening a very wide door to defamation, if parties suffering all the inconvenience of being libeled, were not permitted to have that protection which the law affords. If they are so described that they are known to all their neighbors as being the parties alluded to; and if they are able to prove, to the satisfaction of a jury, that the party writing the libel did intend to allude to them, it would be unfortunate to find the law in a state which would prevent the party being protected against such libels." "Whether a man," said Lord Campbell, "is called by one name, or whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on know well who is aimed at, the very same injury is inflicted; the very same thing is in fact done, as would be done if his name and Christian name were ten times repeated."[1]

Neither is the rule as to malice an inflexible one. When malice is said to be the gist of an action for libel, the legal import of the word must be borne in mind.

"Malice," said Lord Campbell,[2] "in the legal acceptation of the word, is not confined to personal spite

[1] Le Fann v. Malcomson, 1 H. L. Cas. 664.
[2] In Ferguson v. Earl of Kinnoul, 9 Cl. & Fin. 32.

against individuals, but consists in a conscious violation of the law to the prejudice of another." "Malice," says another learned Judge,[1] "in common acceptation, means ill-will against a person; but in its legal sense it means a wrongful act done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally, and without just cause or excuse. If I maim cattle without knowing whose they are; if I poison a fishery without knowing the owner, I do it of malice, because it is a wrongful act, and done intentionally. If I am arraigned of felony, and wilfully stand mute, I am said to do it of malice, because it is intentional, and without just cause or excuse. And if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not, and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces?" "If a person writes defamatory matter of another," says Bramwell, B.,[2] "however honestly he may believe it to be true, if it be in fact untrue, the law implies malice." And "the law implies malice from the publication of a libel, except where the occasion justifies the publication." And a man may wilfully publish a mischievous libel without intent to injure the party, and may yet be responsible.[3]

By the Scotch law, it is not necessary, in the case of a civil action for libel, that malice should be either proved or presumed; but it is necessary in the case of

[1] Bayley, J., in Bromage v. Prosser, 4 B. & C. 255.
[2] Darby v. Ousley, 1 H. & N. 9; 25 L. J. 330, Ex.
[3] Bayliss v. Lawrence, 11 A. & El. 924.

a criminal proceeding. "In general," says Hume, "the criminal is herein distinguished from the civil process; that to warrant the inflicting of any punishment the *animus injuriandi*, or special malice of the act, must be shown; whereas mere petulance or indiscretion may be the just ground of an award for the reparation of damage, though the parties are not even known to each other, if the things said are naturally and in themselves of an injurious tendency."

The whole publication, however, is to be looked at; and if the jury think that the effect of one part of it, which if taken alone would be injurious to the plaintiff's character, is removed by the other part of it, they should find for the defendant.[1] The jury will take the whole together and say whether the result of the whole is calculated to injure the plaintiff's character; if, in one part of the publication, something disreputable to the plaintiff is stated, but is removed by the conclusion, the bane and antidote must be taken together.[2]

This presumption of malice can sometimes be overturned by proof of belief, such as we have already considered. Evidence of recantation of a libel, also, will be evidence to overburden such presumption.

"Malice: the doing any act without a just cause."[3] Malice in its legal sense always excludes a just cause.[4] It is a technical expression, and means the absence of any excuse;[5] and is implied in every [wrongful] act for which there is no legal justification, excuse, or extenuation.[6] Malice is the deliberate disregard of the

[1] Chalmers v. Payne, 2 C. M. & R. 156; 5 Tyrw. 66.
[2] Id.
[3] Chitty Genl. Pr. 46.
[4] Jones v. Given, Gill. Cas. 185.
[5] Penn v. Lewis, Add. 282.
[6] Penn v. Honeyman, Id. 149; Bromage v. Prosser, 4 B. &

rights of others;[1] the doing of any act injurious to another without just cause.[2]

In criminal law and general practice, malice signifies a wickedness of purpose; a spiteful or malevolent design against another; a settled purpose to injure or destroy another. Any formed or evil disposition or design of doing mischief.[3] General wickedness of heart; inhuman or reckless disregard of the lives or safety of others; as when one coolly discharges a gun, or throws any dangerous missile among a multitude of people, or strikes, even upon provocation, with a weapon that must produce death.[4] Deliberate disregard of the rights of others, as when one carries on the trade of melting tallow, to the annoyance of the neighboring dwellings.[5] All these will constitute malice.

Malice, again, will be either express, or implied from the circumstances given to the jury. Or, it has again been divided into legal malice or malice in law, and actual malice or malice in fact. This latter distinction, however, is not in the malice itself, but rather in the evidence by which it is established. "If the charge complained of is injurious, and no justifiable motive for making it is apparent, malice is inferred from the falsity of the charge. The law,

C. 247; 1 Russ. Cr. 483; 1 Starkie on Libel, 3, 213; Bouvier's Law Dict. tit. Malice. See York's Case, 9 Metc. 93; Darry v. People, 10 N. Y. 122; Mitchell v. Jenkins, 5 B. & A. 500; Hilliard on Torts, ch. vii. § 106.

[1] Per Abbott, Ch. J., 3 B. & C. 584.

[2] Id. And see Townshend on Slander & Libel, notes to pp. 122, *et seq.*, where numerous definitions of malice are collected.

[3] Hale's P. C. 455; 2 Stra. 766; 4 Bl. Com. 198; 2 Roll. R. 461.

[4] 4 Bl. Com. 199.

[5] 3 B. & C. 584.

in such cases, does not impute malice not appearing in fact, but presumes a malicious motive for making a false and injurious charge, if no innocent motive appears. If, from the circumstances, however, the defendant may be reasonably supposed to have had a worthy motive for making the charge, the law ceases to infer malice from the mere falsity of the charge, and requires from the plaintiff other proof of its existence. It is actual malice in either case, only the proof is different."[1] "The jury may infer malice from want of probable cause, but they are not bound to make this inference. And if malice is deduced from want of probable cause, it is as much malice in fact, within the meaning of the law, as though shown or deduced from any other fact or facts."[2]

70. The various decisions upon the subject of defamation may seem finical, over-nice, and even ludicrous to the layman; and many, perhaps a majority of them, may be such as would no longer govern. But the principles controlling them are still law, and it is matter of marvel that in the reported cases the old judges were able to look beyond the annoyance of the petty, trivial, and absurd details which encumbered them, and lay down rules with a reasoning so clear and forcible, that from their conclusions, even to-day, there can be no escape.

71. Words which sound in disability only, are not actionable, unless spoken of one who gains his livelihood by that thing, profession, or business wherein the words disable him.[3] "An action," it has been said,

[1] Selden, J., Lewis v. Chapman, 16 N. Y. 372.

[2] Smith v. Howard, 28. Iowa, 51. And see the brief of Nicholas Hill, in Darry v. People, 10 N. Y. 123, which cites a large number of authorities.

[3] Bill v. Neal, 1 Lev. 52. *Vid.* How v. Prin, Holt, 652; 3 Salk. 694.

"lies for speaking scandalous words of any man of any trade or profession, be it never so base, if they are spoken with reference to his profession."[1] Thus: it has been held actionable to say of a servant in husbandry and bailiff, "Thou art a cozening knave, and hast cozened thy master of a bushel of barley;"[2] or of a tradesman, "Thou art a rogue, and thou hast cheated me of several pounds;"[3] of a person carrying on the business of a butcher, that she had used false weights in her trade;[4] of a cornseller, "You are a rogue and a swindling rascal; you delivered me one hundred bushels of oats, worse by sixpence a bushel, than I bargained for;"[5] of an auctioneer and appraiser, employed by the defendant to value certain goods, "He is a damned rascal; he has cheated me out of a hundred pounds on the valuation;"[6] of an asphalte manufacturer, "The old materials have been relaid by your company in the asphalte work executed in front of the ordinance office, and I have seen the work done;" innuendo, that the plaintiff "had been guilty of dishonesty in the conduct of his said trade, by laying down again the old asphalte materials which had before been used at the entrance of the said ordinance office instead of new asphalte, according to his contract;"[7] or of a certificated master mariner, that "during his stay at N. he was frequently drunk, and in that state had to be carried to his boat to reach his vessel, &c."[8] So it was held slanderous to say of a

[1] Terry v. Hooper, Lev. 115.
[2] Seaman v. Bigg, Cro. Car. 480.
[3] Surman v. Shelleto, Burr. 1688.
[4] Griffith v. Lewis, 7 Q. B. 61.
[5] Thomas v. Jackson, 3 Bing. 104.
[6] Bryant v. Loxton, 4 Moore, 344.
[7] Baboneau v. Farrell, 13 C. B. 360.
[8] Irwin v. Brandwood, 2 H. & C. 960; 9 L. T. N. S. 772; 33.

gamekeeper that he had trapped foxes; the declaration stating that it was his duty as such gamekeeper not to kill foxes, and that he was employed on the terms of his not doing so, as the defendant knew.[1] Any unfounded imputation against a person who is in the enjoyment of an office, either public or private, whether of honor, profit, or trust, which imports a charge of unfitness to administer the duties of that office, is actionable.[2]

Thus, it is slanderous to say of a lawyer, "He is a dunce, and will get little by the law;"[3] or "Thou art no lawyer; thou canst not draw a lease; thou hast that degree without desert; they are fools that come to thee for law,"[4] or "Thou art a false knave, a cozening knave, and hast got all that thou hast by cozenage; and thou hast cozened all those that have dealt with thee;"[5] or that "he is no lawyer,"[6] or that he is a "common barrator;"[7] or if one say to a counsel, "Thou didst disclose my counsel;" or to a counsel or attorney, "Thou didst deliver my evidence to my adversary;"[8] or to style him in a tone of irony—an "honest lawyer."[9]

But it has been held to be not actionable to charge one in a business or profession to have exhibited, in some particular case, bad management or unskillful

L. J. 257, Ex. *Vid.* Coxhead v. Richards, 2 C. V. 569; 15 L. J. 278, C. P.; Harwood v. Green, 2 C. & P. 141.

[1] Foulger v. Newcome, L. Rep. 2 Ex. 327; 16 L. T. N. S. 596; 36 L. J. 169, Ex.

[2] See Butler N. P. 45.

[3] Peard v. Jones, Cro. Cas. 382.

[4] Bankes v. Allen, Roll. Abr. 54.

[5] Jankins v. Smith, Cro. Jac. 586. *Vid.* also Berckley's Case, 4 Rep. 16.

[6] Day v. Buller, 3 Wils. 59.

[7] Taylor v. Starkey, Cro. Car. 192.

[8] Per Anderson and Grammond, JJ.; Wright v. Moorhouse, Bro. Eliz. 358. *Vid.* Brown v. Kennedy, 43 L. J. 342, ch. 342.

[9] Boydell v. Jones, 4 M. & W. 446; 7 Dowl. P. C. 210.

treatment.[1] Thus: for saying of an attorney in a particular suit, "he knows nothing about the suit; he will lead you on until he has undone you," no action lies.[2] It seems, however, that it would be actionable to charge such ignorance or unskillfulnes as would infer gross ignorance and unskillfulness in all cases.[3]

It is not easy to see the distinction between the case of the attorney and of the physician, on whom it was held libelous to say, "he was the death of J. P.[4]" J. P.'s case being a particular case, the distinction is somewhat finical and might not always be servilely followed.[5]

"It is actionable to call a counselor a "daffodowndilly," if there be an averment that the words signify an amidexter;[6] or to say of an attorney that he hath no more law than Master Cheyny's bull, even although Master Cheyny actually had no bull, for if that be the case, as Keeling, Ch. J., observed, 'the scandal is the greater.'[7] It is quite clear that to say that a lawyer 'hath no more law than a goose,' is actionable;[8] and the reporter adds a query whether it be not actionable to say a lawyer 'hath no more law than the man in the moon.'" In another case, it was held actionable to say of an attorney that "he is no more a lawyer than the devil."[9] But it is not actionable to say of a lawyer that he kept back his bill fifteen years, until his client was dead.[10] Very few clients, probably, would

[1] Garr. v Selden, 6 Barb. 416; Camp v. Martin, 23 Conn. 86; Southee v. Denny, 1 Ex. 196.
[2] Foot v. Brown, 8 Johns. 64.
[3] Townshend on Slander & Libel, § 194.
[4] Maires v. Thornton, 8 Term R. 303.
[5] And see Cawdrey v. Telley, Godb. 441.
[6] Pearce's Case, 1 Roll. Abr. 55, pl. 17.
[7] Baker v. Morfue, Sid. 327.
[8] Id.
[9] Day v. Buller, 3 Wils. 59.
[10] Reeves v. Templar, 2 Jur. Exc. 137.

be deterred from employing an attorney on that account. It is not slanderous to say that a clergyman "is a remarkably bad preacher;"[1] but it would be, to say of a church warden, "thou art a cheating knave, and hast cheated the parish of forty pounds;"[2] or of a town clerk, "he has taken forty shillings for a bribe;"[3] or of a constable, "he is not worthy the office of a constable, for he and his company, the last time he was constable, stole five of my swine and ate them."[4] An imputation of insanity to a governess would be actionable,[5] but to say of an alderman that "when he put on his gown Satan enters into it,[6] or to charge a member of Parliament with insincerity,"[7] would not be actionable.

Words of general or doubtful signification, standing alone, are not slanderous; and no action will lie for speaking the words "rogue," "rascal," "scoundrel," "swindler," or "blackleg," unless special damage can be proved. It seems, however, it would be otherwise if they were published.[8]

To say of a trader that he is "A sorry, pitiful fellow, and a rogue; he compounded his debts at five

[1] Gathercole v. Miall, 15 M. & W. 344.

[2] Strode v. Holmes. Sly. 338; 1 Vin. Abr. 468; Woodruff v. Wooley, Id. 463.

[3] Yelv. 142; 1 Vin. Abr. 463. *Vid.* 1 Roll. Abr. 56.

[4] Cro. Eliz. 861; 1 Vin. Abr. 464.

[5] Morgan v. Lingen, 8 L. T. N. S. 800.

[6] 2 Starkie on Slander, 314.

[7] Onslow v. Horne, 2 W. Black. 750.

[8] Anon. Lofft, 322; Dyer v. Morris, 4 Miss. 214; Lt. Anson v. Smith, 1 Tr. 748; Hayes v. Mitchell, 7 Blackf. 117. But if those words were written and published, I doubt not an action would lie (Gould, J., in Villers v. Monsley, 2 Wils. 403; Barnett v. Allen, 3 H. & N. 376; 27 L. J. 412, Ex.; Richardson v. Allen, 2 Chit. 657; Saville v. Jardine, 2 H. Bl. 331).

shillings in the pound;"[1] or, "If he does not come and make terms with me, I will make a bankrupt of him, and ruin him;"[2] of a brewer, "I will bet £5 to £1 that Mr. J. was in a sponging house for debt within the last fortnight, and I can produce the man who locked him up; the man told me so himself," &c.;[3] of a dyer, that "He is a bankrupt knave, and is not worth three half-pence;"[4] of a tailor, "I heard you were run away;"[5] of a husbandman, "He owes more money than he is worth; he is run away and is broke;"[6] of a carpenter, "He is broken and run away, and will never return again;"[7] and even in cases where an expectation or opinion only was expressed, as "I believe all is not well with Daniel Vivian: there are many merchants who have lately failed, and I expect no otherwise of Daniel Vivian."[8]

It was held actionable to say of an upholsterer, "You are a soldier; I saw you in your red coat doing duty; your word is not to be taken"—it having been a common practice for tradesmen to protect

[1] Stanton v. Smith, Ld. Raym. 1480. See case of a pawnbroker, Holt, 652.

[2] Brown v. Smith, 13 C. B. 596; 22 L. J. 151, C. P.

[3] Jones v. Littler, 1 M. & W. 423.

[4] Squire v. Johns, Cro. Jac. 585.

[5] Davis v. Lewis, 1 T. R. 17.

[6] Dobson v. Thornistone, 3 Mod. 112.

[7] Chapman v. Lampshire, 3 Mod. 155. In this case it was argued for the defendant that the plaintiff might be broken, and yet be as good a carpenter as before. "But," said the chief justice, "the credit which the plaintiff has in the world may be the means to support his skill, for he may not have an opportunity to show his workmanship without those materials with which he is intrusted."

[8] 3 Salk. 326; Raym. 207. *Vid.* Harrison v. Thornborough, 10 Mod. 196.

themselves against their creditors by a counterfeit enlisting.[1]

In one case, where it was said of a merchant, "He came a broken merchant from Hamburgh," the court[2] held that an action would lie, the charge being of having been "once broken, *Et qui semel malus semper presumitur esse malus eodem genere*, or at least may have an inclination thereto; and it being alleged to be spoken *falso et malitiosè*, and to scandalize him in his profession, it is a great cause of discrediting and impairing him in his trade; whereas their credit is the principal means of their gain."[3]

And it is libelous to impute untruly to any person, pecuniary embarrassment and inability to purchase a certain property without the aid of a loan from a third party; even although it be, at the same time, stated that the loan was afterwards honorably repaid.[4]

72. Defamatory attacks on persons in the way of their trade, profession, or calling must be distinguished from hostile criticisms, fairly and temperately expressed, on such of their works and performances as appeal to the public; for such criticisms, however severely they may condemn or effectually turn into ridicule the works of authors, painters, architects, actors, &c., or even the advertisements or handbills of a tradesman, may be justifiable, though not in all respects accurate; whereas publications which have for their object the private injury of the person attacked can only be justified by their substantial truth.

It is slanderous to remark of a physician that he

[1] Arne v. Johnson, 10 Mod. 111.
[2] Shortt, L. Litt. 406 (note).
[3] Leycroft v. Dunker, Cro. Car. 317.
[4] Cox v. Lee, L. Rep. 4, Ex. 284; 38 L. J. 219, Ex.; 21 L. T. N. S. 1, 8.

"killed six children in one year:"[1] "Thou art a drunken fool and an ass:" "Thou wert never a scholar, and are not worthy to speak to a scholar, and that I will prove and justify;"[2] or of a surgeon and accoucher, "I wonder you had him to attend you. Do you know him? He is not an apothecary; he has not passed any examination; he's a bad character; none of the medical men here meet him. Several have died that he has attended, and there have been inquests held on them;"[3] or of an apothecary, "It is a world of blood he has to answer for in this town, through his ignorance; he did kill a woman and two children at ——; he did kill —— at ——; he was the death of ——; he has killed his patient with his physic;"[4] or, of a midwife, "She is an ignorant woman and of small practice, and very unfortunate in her way; there are few that she goes to but lie desperately ill, or die under her hands;"[5] or, that "many have perished for her want of skill."[6]

There is no law, however, against calling an innkeeper "a caterpillar;"[7] neither is it actionable to say of a justice, "He is a logger-headed, a slouch-headed and a bursen-bellied hound;"[8] or, "He is a fool, an ass, a beetle-headed justice,"[9] or, "He is a debauched man,

[1] Carrol v. White, 33 Barb. 615.

[2] Cawdrey v. Highley, Cro. Car. 270; 1 Roll. Abr. 54.

[3] Southee v. Denny, 1 Exch. 196. But it was held to be no libel to publish in a medical journal of a physician that he had met homœopathists in consultation, though it was alleged that, in the opinion of the profession, meeting homœopathists in consultation was improper, and against etiquette (Clay v. Roberts, 8 L. T. N. S. 397; 9 Jur. N. S. 580; 11 W. R. 649).

[4] Tulty v. Alewin, 11 Mod. 221. *Vid.* also Edsall v. Russel, 4 M. & W. 1090.

[5] Wharton v. Brook, 1 Vent. 21.

[6] Flower's Case, Cro. Car. 211.

[7] Vin. Abr. Act. for Words, V. a. 34.

[8] 1 Keb. 629.

[9] Bill v. Neal, 1 Lev. 52.

and unfit to be a justice;"[1] or, "He is a base, rascally villain, and is neither nobleman, knight, nor gentleman, but a most villainous rascal, and by unjust means doth most villainously take other men's rights from them, and keeps a company of thieves and traitors to do mischief, and giveth them nothing for their labor, but base blue liveries;"[2] or, "He is half-eared;"[3] or, "He is a blackguard;" "There is a combined company here to cheat strangers, and Squire Van Tassel has a hand in it. I don't see why he did not tell me the execution had not been returned in time, so that I could sue the constable;"[4] or, "Squire Oakley is a damned rogue;"[5] so, to publish orally of a justice "He is a blood-sucker and seeketh after blood; if a man will give him a couple of capons he will take them;"[6] or, "You robbed the poor and are worse than a highwayman;" is not actionable. It does not follow, however that one might write down all this, even of a justice,[7] with impunity from an action for libel.

"Because," said Lord Holt,[8] "it is not a slander to call a justice of the peace blockhead, ass, &c., for

[1] Hammond v. Kingsmill, 7 Jac. 1.

[2] Hollis v. Briscow, Cro. Jac. 58.

[3] Markham v. Bridges, Cro. Car. 223. The justices, however, have some decisions in their favor: *e. g.*, it is actionable to say of a justice that he was a "Jacobite" (How v. Prin, Holt, 652; 3 Poulk, 694). "He is a rascal, a villain, and a liar" (Kerler v. Osgood, 1 Vent. 50). "He is not fit to be a justice of the peace" (Ib.). "When thou wert justice thou wert a bribing justice" (Aston v. Blagrave, Str. 617; Prudham v. Tucker, Yelv. 153; Herle v. Osgood, 1 Vent. 50). "He covereth and hideth felonies, and is not worthy to be a justice of the peace" (Stuckley v. Bulhead, 4 Rep. 16).

[4] Van Tassel v. Capron, 1 Den. 250.

[5] Oakley v. Farrington, 1 Johns. 129.

[6] Palmer v. Edwards, Rep. Cas. Prac. in C. B, 160.

[7] Hillard v. Constable, Mo. 418.

[8] How v Prin, Holt, 652.

which action lies, since he is not thereby accused of any corruption in his employment, nor any ill design or principle; and it was not his fault that he was a blockhead, for he cannot be otherwise than his Maker made him; but if he had been a wise man, and wicked principles were charged on him when he had them not, an action would have lain, for, though a man cannot be wiser, he may be honester than he is." "If a person," he continues, "be in a place of profit, and he is accused of insufficiency, he shall have remedy by action; 'tis otherwise if he be only in a place of honor; though, even there, if he is charged with ill principles, and as disaffected to the government, he shall have an action for such scandal to his reputation." To say of a judge that he was a corrupt judge,[1] or that a particular sentence delivered by him was corrupt,[2] is actionable. In Waldin v. Mitchell,[3] it was said that, where a man had been in an office of trust, to say that he behaved himself corruptly in it, as it imported great scandal, so it might prevent his coming into that or the like office again, and therefore was actionable.[4] But the authority of the two latter cases is much weakened by what DeGray, C. J., says in Onslow v. Horne,[5] "I know of no case where ever an action for words was grounded upon eventual damages which may possibly happen to a man in a future situation, notwithstanding what the Chief Justice throws out in 2 Vent. 266. . . . . I think the Chief Justice went too far." There

[1] Birchley's Case, 4 Rep. 16.

[2] Cæsar v. Carseny, Cro. Eliz. 305.

[3] 2 Vent. 306.

[4] Cramer v. Riggs, 17 Wend. 209; and see 7 Id. 204; Wilson v. Noonan, 23 Wis. 231; Littlejohn v. Greeley, 13 Abb. Pr. 41; Walden v. Mitchell, 2 Vent. 266.

[5] 3 Wils. 188; and see Hellard v. Constable, Mo. 418; 2 Palmer v. Edwards, Rep. Cas. Prac. in C. B. 160.

is no doubt, however, that an action of libel would lie, if such an imputation as the above were written or printed and published.

73. Language falsely imputing to one in office any malfeasance or want of integrity—such as would impair public confidence in him,[1] or with want of capacity for the duties of the office he holds,[2] or with having committed a breach of the public trust is actionable[3]—the language must clearly appear to affect him in his office. In the cases just cited, however much the personal character of the justice was aspersed, nothing was alluded to which would make him less useful as a justice; neither would it be actionable to declare that he had tried a case that was not within his jurisdiction.[4]

But if the charge be that he made the office of clerk of his court a matter of private negotiation,[5] or that he procured one to take false oaths;[6] or if it consist of words that necessarily imply corruption generally,[7] it would be actionable *per se*.[8] Charges that a judge took a bribe,[9] or is false,[10] or is forsworn, and not fit to sit upon a bench;[11] that he has acted unjustly in

[1] Lansing v. Carpenter, 9 Wis. 340.

[2] Townshend on Slander and Libel, § 196; Robbins v. Treadway, 2 J. J. Marsh. 540.

[3] Kinney v. Nash, 3 N. Y. 177, and cases cited.

[4] Oram v. Franklin, 6 Blackf. 42; but see Carter v. Andrews, 16 Pick. 1; Stone v. Clark, 21 Pick. 51.

[5] Robbins v. Treadway, 2 J. J. Marsh. 540.

[6] Chetwind v. Meeston, Cro. Jac. 308.

[7] Chaddock v. Briggs, 13 Mass. 253; Chipman v. Cook, 2 Tyler, 456; Aston v. Blagrave, 1 Strange, 617; 2 Ld. Raym. 1369; Kent v. Pocock, 2 Str. 1168.

[8] Townshend on Slander and Libel, § 196.

[9] Lindsey v. Smith, 7 Johns. 360; Colton's Case, Mo. 695.

[10] Wright v. Moorhouse, Cro. Eliz. 358.

[11] Carn v. Osgood, 1 Levinz, 280; S. C., Kerle v. Osgood, 1 Vent. 50; and see Pepper v. Gay, 2 Lutw. 1288; Stuckley v. Bulhead, 4 Rep. 16 a, 19 a; Lassels v. Lassels, Mo. 401; Hollis

his office,[1] or that he is partial,[2] or half-eared, and will hear but one side, or that he cannot hear of one ear,[3] or that he perverted justice,[4] or made use of his office to worry one out of his estate,[5] or to say that "he did seek my life, and offered ten shillings to the under-sheriff to impanel a jury that might find me guilty,"[6] would be actionable.

74. Words imputing an attempt to commit a felony, as "He sought to murder me, and I can prove it;"[7] or a hiring or solicitation of another to commit a crime, are actionable.[8]

The charge of a crime, in the vulgar language, is sufficient to ground an action. It is not necessary that the words should impute the crime in the technical terms known to the law; all that is requisite being, that the intention to charge the plaintiff with its commission, should plainly appear.[9]

Whether defamatory words are uttered or printed, the ordinary sense of them is to be taken to be the meaning of the person who uses them. However, if anything can be shown to have taken place which

v. Briscoe, Cro. Jac. 58; Burton v. Tokin, Cro. Jac. 143; Beamond v. Hastings, Cro. Jac. 240.

[1] Isham v. York, Cro. Car. 14.

[2] Kemp v. Housgoe, Cro. Jac. 90.

[3] Masham v. Bridges, Cro. Car. 223, and Alleston v. Moor, Het. 167.

[4] Delaware v. Pawlet, Mo. 409.

[5] Newton v. Stubbs, 3 Mod. 71.

[6] Bleverhassett v. Baspoole, Cro. Eliz. 313.

[7] Cro. Eliz. 308; Lewknor v. Cruchley, Cro. Car. 140.

[8] Tibbott v. Haynes, Cro. Eliz. 191; 4 Coke, 16; Cro. Eliz. 747; Lady Cockaine's Case, Cro. Eliz. 49; Id. 710.

[9] See Coleman v. Goodwin, 2 B. & Cr. 285, note; and Francis v. Roose, 3 M. & W. 191. See also Hankinson v. Bilby, 16 M. & W. 442; Woolnoth v. Meadows, 5 East, 463; Cf. Sweetapple v. Jesse, 5 B. & Ald. 31; see also Hob. 126; Cro. Eliz. 250, 496; 1 Roll. Abr. 74; and 4 Rep. 13.

may give a peculiar character to the expressions used, evidence of it may be given.[1]

Where slanderous words complained of—"Thou art a thievish rogue, for thou hast stolen my faggots"—were spoken by the defendant's wife, who, as a married woman, could not have possessed the property in the faggots, the court held the words to be actionable—understanding them, according to c mmon intendment—to mean a charge of having stolen her husband's faggots.[2]

On the same footing as an imputation of an indictable offense, stands the imputation of being, at the time the imputation is made, afflicted with an infectious or contagious disease, which would cause the person who had it to be shunned by society, such as leprosy, or the *lues venerea*.[3]

In the case of words spoken which would not otherwise be actionable, but which become so when they are, without justification, spoken of a person in respect of his profession, office, trade, or calling (provided it be not an unlawful one), and have a tendency to injure him in respect thereof, the law implies "actionable damage" without proof of any:[4] *à for-*.

[1] See *per* Pollock, C.B., Daines v. Hartley, 3 Exch. 200; 18 L. J. 81, Ex.; and cf. Hankinson v. Bilby, *ubi supra;* Tempest v. Chambers, 1 Stark. 68; Tomlinson v. Brittlebank 4 B. & Ad. 630; Harvey v. French, 1 C. & M. 17; Thompson v. Bernard, 1 Camp. 48; Christie v. Powell, Peake's Cas. 4; 4 Rep. 13.

[2] Stamp v. White, Cro. Jac. 600. See also Charnel's Case, Cro. Eliz. 279. The doctrine as to repugnancy, laid down in 7 Bac. Abr. 296, 1 Roll. Abr. 74, cannot now be considered law (see sect. 61 of the C. L. P. A., 1852).

[3] 7 Bac. Abr. 266; Holt. 653; Cro. Eliz. 214, 289, 648; Cro. Jac. 144, 430; 1 Vin. Abr. 488; Carslake v. Mapledorum, 2 T. R. 473; Str. 1189; Bloodworth v. Gray, 7 M. & G. 334.

[4] Foulger v. Newcomb, L. Rep., 2 Ex. 330; 16 L. T. N. S. 596; 36 L. J. Ex 169

tiori, if the injurious imputation is conveyed by writing or printing, the defamation being, in this case, punishable criminally as well as by action. So, also, in the case of any unfounded imputation against a person who is in the enjoyment of an office, either public or private, whether of honor, profit, or trust; which imports a charge of unfitness to administer the duties of that office, is a libel.[1]

If the office is merely one of honor—as that of justice of the peace—the oral imputation, according to the old authorities,[2] must be of want of integrity, or charge a criminal breach of duty: an allegation of incompetency or want of ability is not, of itself, sufficient to ground an action of slander.

It by no means follows, however, that in any of the cases mentioned, if the words had been written down, they would not be actionable as libelous.

The following additional cases, where words have been held to be slanderous, although no special damage was alleged, may be rapidly glanced at. Saying that the plaintiff had done an act for which the defendant could transport him:[3] saying, "If you had your deserts, you had been hanged before now:"[4] saying that the plaintiff had murdered his first wife by administering improper medicines to her for a certain complaint,[5] using the words, "I am thoroughly convinced that you (the plaintiff) are guilty (innuendo of the death of D.), and rather than you should go without a hangman, I will hang you:"[6] saying that the

[1] *Vid.* Buller, N. P. 4, 5.

[2] Bill v. Neal, 1 Lev. 52; How v. Prin, 652; 3 Saulk. 694.

[3] Curtis v. Curtis, 10 Bing. 477.

[4] Cro. Eliz. 62.

[5] Ford v. Primrose, 5 D. & R. 287.

[6] Peake v. Oldham, Cowp. 275, 2 W. Bl. 960; and see Button v. Hayward, 8 Mod. 24.

plaintiff was "a returned convict:"[1] that he had been "in gaol and tried for his life, and would have been hanged had it not been for L., for breaking open the granary of farmer A., and stealing his bacon:"[2] that he had been "in gaol, and burnt in the hand for coining;"[3] though in none of the three last mentioned cases was there any imputation of present or future liability to punishment; imputing bigamy to the plaintiff's wife,[4] saying either that the plaintiff or his wife kept a bawdy house;[5] saying any of the following things: "You robbed me, for I found the thing you have done it with."[6] "He (the plaintiff) is a thief, and robbed me of my bricks;"[7] "He robbed J. W.;"[8] "You are a rogue, and broke open a house at Oxford;"[9] "You are a rogue, and I will prove you a rogue, for you forged my name;"[10] charging the plaintiff with having committed embezzlement,[11] or receiving goods, knowing them to be stolen,[12] calling him a "pickpocket,"[13] "or

[1] Fowler v. Dowdney, 2 M. & Rob. 119.
[2] Carpenter v. Tarrant, Rep. Temp. Hardwicke, 339.
[3] Gainford v. Tuke, Cro. Jac. 536.
[4] Heming v. Power, 10 M. & W. 564; Delaney v. Jones, 4 Esp. 191.
[5] Cro. Eliz. 643; 1 Roll. Ab. 44; 1 Buls. 138; 7 C. B. N. S. 114.
[6] Rowcliffe v. Edmonds, 7 M. & W. 12; 4 Jur. 684.
[7] Slowman v. Dutton, 10 Bing. 402. See also Baker v. Pierce, Ld. Raym. 959; Holt, 654; 6 Mod. 23; Cro. Jac. 687.
[8] Tomlinson v. Brittlebank, 4 Barn. & A. 630; 1 N. & M. 455.
[9] Jones v. Herne, 2 Wils. 87.
[10] See Williams v. Stott, 3 Tyr. 688; 1 C. & M. 675.
[11] Alfred v. Farlow, 8 Q. B. 854; 15 L. J. 260, Q. B. See Briggs' Case, God. 157.
[12] Stebbing v. Warner, 11 Mod. 255; overruling 3 Salk. 326.
[13] Holt v. Scholefield, 6 T. R. 691. See also Ceeley v. Hoskins, Cro. Car. 509; Roberts v Camden, 9 East, 93.

accusing him of subornation of perjury;"[1] saying of the plaintiff, who was one of four Commissioners appointed by the Court of Chancery to examine witnesses and hear and determine a suit, "Sir G. M. (the plaintiff) is a corrupt man, and hath taken bribes of R. K." (one of the parties to the suit); "R. K. hath set Sir G. M. on horseback, with his bribes to pervert justice and equity,"[2] bribery having been an offense at common law punishable by indictment or information; saying at a Parliamentary election of the plaintiff, who was one of the candidates, "These guineas are Mr. B.'s (the plaintiff's) money, and were given me to vote for him; he has bought my vote, and he shall have it."[3]

To accuse a person of having committed fornication was also held to be actionable, whilst the statute making that a temporal offense was in force;[4] and so, it seems, was saying, "Thou art a witch and a sorcerer," whilst the statutes against witchcraft remained in operation.[5]

The law is the same if the imputation be made, not directly, but by means of words of suspicion, as (with reference to a crime of arson), "I cannot imagine who should do it but S.;"[6] or, "I do not doubt but within two days to arrest H. for suspicion of

[1] Harris v. Dixon, Cro. Jac. 158.

[2] Moor v. Foster, Cro. Jac. 65.

[3] Bendish v. Lindsay, 11 Mod. 194. See Purdy v. Stacey, Burr. 2699.

[4] Mo. 142; 1 Vin. Abr. 435. See also Smith v. Wisdome, Cro. Eliz. 348.

[5] Hext v. Yeomans, 4 Rep. 15; Poph. 210; 3 Bulst. 262.

[6] Web v. Poor, Cro. Eliz. 569. According to the old authorities, if the charge be of killing a person who is not really dead, an action cannot be maintained. See Snag v. Gee, 4 Rep. 16; Talbot v. Case, Cro. Eliz. 823; 1 Vent. 117.

felony;"[1] or, "I will call him in question for poisoning my aunt, and I make no doubt to prove it;"[2] or by repeating a story heard from another, as "A woman told me that she heard some one say that M., his wife, had poisoned G., her first husband, &c.;"[3] and though it should be only in alternative words, as that "either the plaintiff or somebody else" committed the offense;[4] or that A. or B. did it,"[5] or that a plaintiff was perjured.[6]

To say "Thou art as very a thief as any in Warwick goal," no thief then being in the goal, would not be actionable, but if a thief is in the goal at the time, the words would be actionable.[7] To call a man a "frozen snake" is slanderous, "For," says Coleridge, J.,[8] "we ought to attribute to a jury an acquaintance with ordinary terms and allusions, whether historical, figurative, or parabolical. If an expression, originally allegorical, has passed into such common use that it ceases to be figurative, and has obtained a signification almost literal, we must understand it as it is used. The term "frozen snake," has an application very generally known, which is calculated to bring into contempt a person against whom it is directed. If, therefore, a publication imputes to a person that his friends, who have been assisting him, have realized in him the fable of the frozen snake, it is for a jury to say whether these words do not convey an imputation of ingratitude to friends and benefactors, and if they do, they are action-

[1] Harrison v. Thornborough, 10 Mod. 196.
[2] Wiseman v. Wiseman, Cro. Jac. 107.
[3] Anon. 2 Sid. 21.
[4] Rogers v. Gravat, Cro. Eliz. 571.
[5] See Cro. Eliz. 645; Mo. 408.
[6] Somers v. House, Holt's Rep. 39.
[7] Fenn v. Dixe, Jo. 444, pl. 5.
[8] Hoare v. Silverlock, 12 Q. B. 624.

able." Similarly "lame duck,"[1] as applied to a broker; "black sheep,"[2] as applied to an attorney; "dirty slut,"[3] as applied to a school-mistress; and "hermaphrodite,"[4] as applied to a woman, are equally slanderous.

It is sometimes slanderous merely to repeat what one says of himself. A man is entitled to his own opinion of himself, and yet his neighbors may not repeat it. It is no defense to an action for libel to show that a ludicrous narrative in a newspaper concerning the plaintiff, was only a repetition of a story told by the plaintiff of himself; "for there is a great difference between a man's telling a ludicrous story of himself, to a circle of his own acquaintance, and a publication of it to all the world through the medium of a newspaper."[5] But while one may not use words tending to injure a man in his business reputation, it does not seem to be always scandalous to speak disparagingly of his wares.[6]

Calling a woman by lewd name, and thereby questioning her chastity, was formerly not actionable, except in the cities of London or Bristol, because of the custom which obtained there, to "cart" women of that description.[7] Neither, formerly, was it slanderous to say

[1] Morris v. Langdale, 2 B. & P. 284; Robinson v. Marchant, 72 B. 918.

[2] Barnet v. Allen, 3 H. & N. 381.

[3] Wilson v. Runyon, Wright, 651.

[4] Malone v. Stewart, 15 Ohio, 315. But it seems this was not slanderous in England in 1656. (*Vid.* Weatherhead v. Armitage, 2 Leving, 233.)

[5] Cook v. Ward, 6 Bing. 409, 415. And see Abshire v. Cline, 3 Ind. 115.

[6] Fenn v. Dixe, Jo. 444, pl. 5. And see *post*, as to libels of things.

[7] Robertson v. Powell, 2 Selw. N. P. 1224; Alsop v. Alsop, 5 Hurl. & N. 534; Power v. Shaw, 1 Wils. 62. "The common law is not very tender of women in respect to defamation. This is probably for the reason that women themselves are

of a spinster that she "was *enciente*," or that she had had a child, unless she was about to be married, and loses her marriage in consequence, or suffers other pecuniary damage.[1]

always uttering slanders, and are practically as irresponsible as children for the consequences" (Albany Law Journal, Feb. 21, 1874). By the Scotch law, however, the oral imputation of unchastity to a woman is actionable without proof of special damage (Borth ·ick's Law of Libel, p. 185); and such is the law in the state of New York. As to the charge of unchastity generally, see Ranger v. Goodrich, 17 Wis. 78; Rogers v. Lacey, 23 Ind. 507; Frisbie v. Fowler, 2 Conn. 707; 1811, McGee v. Wilson, Litt. Sel. Cas. 187; Smalley v. Anderson, 2 Monr. 56; Spencer v. M'Masters, 16 Ill. 405; Moberly v. Preston, 8 Mis. 462; Stieber v. Wensel, 19 Mis. 513; Malone v. Stewart, 15 Ohio, 319; Wilson v. Robbins, Wright, 40; Wilson v. Runyan, Id. 351; Sexton v. Todd, Id. 317; Terry v. Bright, 4 Md. 430; Sidgreaves v. Myatt, 22 Ala. 617; Berry v. Carter, 4 Stew. & Port. 387; Shields v. Cunningham, 1 Blackf. 86; Worth v. Butler, 7 Id. 251; Rodeburg v. Hollingsworth, 6 Ind. 639; Linck v. Kelley, 25 Ind. 278; Blinkenstaff v. Perrin, 27 Ind. 527; McBrayer v. Hill, 4 Ired. 136; Snow v. Witcher, 9 Id. 346; Watts v. Greenlee, 2 Dev. 115; Freeman v. Price, 2 Bailey, 115; Beardsley v. Bridgman, 17 Iowa, 290; Cleveland v. Detweiler, 18 Id. 299; Cox v. Bunker, Morris, 369; Dailey v. Reynolds, 4 G. Greene, 354; Freeman v. Taylor, 4 Iowa, 424; Smith v. Silence, Id. 321; Byron v. Elmes, 2 Salk. 693; W. v. L., 2 Nev. & M. 204; Eliot v. Ailsbury, 2 Bibb, 473; Keiler v. Lessford, 2 Cr. C. C. 190; Falkner v. Cooper, Carth. 55; Cavel v. Birket, Sid. 438; *contra*, Hicks v. Hollingshead, Cro. Car. 261; Buys v. Gillespie, 2 Johns. 115; Smalley v. Anderson, 2 Monr. 56; Rickett v. Stanley, 6 Blackf. 169; Joralemon v. Pomeroy, 2 N. Jersey, 271; Dailey v. Reynolds, 4 Greene, 354; Woodbury v. Thompson, 3 N. Hamp. 194; Stanfield v. Boyer, 6 Har. & J. 248; *contra*, Miller v. Parish, 8 Pick. 384; Walton v. Singleton, 7 S. & R. 449; Heard on Libel, p. 46; Ayre v. Craven, 2 Adol. & El. 2; 4 Nev. & M. 220; Evans v. Gwyn, 5 Q. B. 844; Lucas v. Nichols, 7 Jones' Law, No. Ca. 32; Brooker v. Coffin, 5 Johns. 188; Adecock v. Marsh, 8 ed. 360; Underhill v. Welton, 32 Verm. 40; Guard v. Risk, 11 Ind. 156.

[1] Davis v. Gardner, 4 Co. 166, p. 11.

Charging a woman with having a venereal disease is actionable, because it causes her to be shunned,[1] but charging her with having had such a disorder is not actionable, because it is no reason why her company should be avoided.[2] But to imply incontinence to a woman who held a copyhold *dum castra vixerit* is actionable.[3]

An action will lie for charging a person with being a returned convict.[4]

[1] Williams v. Holdridge, 22 Barb. 376.

[2] Eastlake v. Mapledoran, 2 T. R. 473; Bloodworth v. Gray 8 Scott, N. R. 9.

[3] Boys v. Boys, Sid. 214.

See also Robertson v. Powell, 2 Selw. N. P. 124, and Davis v. Gardiner, 4 Co. 16, 6, p. 11.

"Falstaff.—Go to—you are a woman—go!

"Dame Quickly.—Who, I? I defy thee. I was never called so in mine own house before!"

[4] Fowler v. Gardiner, Q. M. & Rob. 118. A writer in the "Albany Law Journal" (Feb. 21, 1874), discusses the inconsistency—as he says—of the law of defamation. Referring to Villiers v. Mansley, 2 Wils. 403, where it was held libelous to publish of a man "that he stank of brimstone, and had the itch," he says: "Now why this distinction between the convict and the man with the itch? The convict is not contagious; having once been apprehended, he cannot be caught again; and wherein, therefore, is the immorality of the latter charge greater than that of the former? The law tries to get around this by saying that slander 'is always for the loss of character, and not the danger of punishment' (Van Ankin v. Westfall, 11 Johns. 233). But is it, really? If it is, why make words charging a felony actionable, in themselves, while others, although imputing as deep moral degradation, are not? Old Coke had a more plausible explanation. Commend us to the ancients for ingenious injustice. He said: 'There is this difference of scandal in the past tense, when it touches the mind and when it touches the body. If it be a scandal to the mind and affections—as perjury, felony, &c.—then the mind that remains is slandered; but if it be of an accidental infirmity or disease of the body, it is otherwise, for none now will forbear his company, though he had the plague in times past' (Smith's Case, Noy. 127). We fear Coke was and is practically right;