lished, and partly anticipating the story of the novel, where the novel was not published. It was proved that, before the deposit by Mr. Benn of the title, Mr. Collins had gone very far in the completion of this drama. It is clear, then, that Mr. Benn cannot be the originator of the title of the drama complained of. It was not original with him as a product of his own mind, nor was it original as the title of a drama, for it was applied to an original drama by Mr. Collins, before Mr. Benn deposited it for copyright. The case, then, presents this simple question: Can a person who deposits in the copyright office the title of a drama not original with himself, secure to himself such title to the exclusion of others, who have applied such title to a dramatic composition founded on the same story, before the date of such deposit? The statement of the proposition is its refutation. In Osgood v. Allen[1] (the case on the proprietorship and use of the words 'Young Folks,' as a title or part of a title to a magazine or newspaper), this court held as follows, and it sees no reason to change or reverse the doctrine there affirmed. It must not be understood that the court will not protect a title in any case. Cases may occur in which a title would be protected, independently of the contents of the book. But they would not occur under the copyright laws. They would occur under the common-law provisions, which protect the stamp put on goods offered for sale, and the protection would be analagous to that granted in case of trade-marks. In that case it must be shown that the defendant has pirated an original title, original with the copyrighter, not a title taken from the composition of the same class or character to which another author had already

[1] 3 Official Gazette, Patent Office, 124; 4 Amer. Law Times, O. S. 20, reported *ante*, p. 309, *n.*

appropriated it. Now Mr. Collins cannot be charged with piracy of the title in this case, for he had used it as a title for a novel and a drama, before Mr. Benn conceived the idea of depositing it for copyright. No such state of facts as that under which the court would prohibit the use of title, exists here. The dramatic composition of plaintiff has not been represented. It follows from this, that the injunction must be denied."

308. It has been held that the copyright of a play will cover and include the music, the action, the letter-press, text, or speech, or any portion thereof. It cannot include the protection of the use of any mechanical contrivance, however, for facilitating the flow of the action, though, as it will appear further on, it will include the incident represented on the stage by the use of such contrivance. Thus in Freligh v. Thompson,[1] Thompson, one of the defendants, had been an actor in the employment of one Freligh, proprietor of the Bowery Theatre, in the city of New York. While there, he had been employed as the principal actor in a play called "On Hand," in which the action around which the interest of the play centres is as follows: the actor, Thompson, is represented to be the keeper of a drawbridge over a running stream, over which draw is laid a railway track. Among the passengers upon a train of cars which is approaching and about to run over this track are certain persons against whom the villain of the play is supposed to have an enmity, and whose lives he seeks. This villain contrives, in the absence of Thompson, to open this draw, and to leave it in this condition, in

[1] Unreported. First circuit and eastern district of N. Y., William B. Freeligh against John Thompson, Carroll and McCloskey, December, 1871.

order that the approaching train may be precipitated into the water. He then disappears. Meanwhile, the rumbling of the train is heard growing louder and louder, when Thompson appears in a boat, takes in the situation at a glance, climbs up on the bridge and turns the draw back into its place, just in time to allow the train to pass over it in safety.

This play had been copyrighted by the complainant, who sought to enjoin the defendant Thompson and the proprietor of another theatre from representing it, except in his (the complainant's) theatre. Upon argument, the court (Benedict, J.) held that the mechanical contrivance composing the drawbridge over the running water, and the train moving thereupon, could not be protected by the copyright of the play, but was a proper subject for a patent.

This case differs somewhat from the case of Daly v. Palmer,[1] though resembling it in many of its features, which we shall presently consider.

309. We have ventured, heretofore, certain suggestions as to what may be considered unconscious or legitimatized plagiarism, in examining the question of originality. The question comes up with much more regularity in the case of dramatic productions. There is scarcely a theatre in the land which does not employ one or more clever men who provide matter for its stage from whatever material in literature or real life they happen to light upon. And legitimately, too, for if, in the exact sciences, no man can copyright geometrical figures, such as a triangle, a circle, or a square, or numbers, or combinations or periods of numbers, it would seem, a fortiori, that they could not do so in the wide and untrammeled region of romantic incident.

[1] 6 Blatchf. 256. See *post*, p. 322.

Now Dr. Johnson appeared to believe that one might travel in the beaten path, so long as he did not tread precisely in his predecessor's foot-steps, without committing plagiarism. Let us suppose, however, for example, that A. writes a novel, in which the interest centres upon the machinations of a rich and influential personage in love with a lady who does not return his affection; who causes her brother to be apprehended (through the services of an informer), sentenced, and transported as a felon, and then procures his pardon in order to convince the lady of his magnanimity, and to merit her obligations. Subsequently B. publishes a romance containing a highly wrought scene where a great temptation is brought to bear upon a holy recluse, to tell a lie to save the life of one he loves very dearly. Subsequently still, C. composes a story in which, through the services of a good-natured vagabond and his faithful dog, a young gentleman (who has been foster-brother to the vagabond) is saved from hazardous perils, and ultimately married to a heroine. D. meanwhile produces a drama in which, while certain actors are speaking its dialogue on a stage representing the interior of a building—the scenes shift before the eyes of the audience so as to bring them upon its exterior, or where one actor is shown digging into a stone wall from the outside, while another is digging out of the same wall from the inside; while thereafter, E., a poet, writes a poem, wherein a young army officer, sent by his government to apprehend a rebel, falls deeply in love with the rebel's sister, and is compelled to struggle between love and duty.

Now let us further suppose that F. and G. are playrights, ever on the alert for a novelty. F., we will say, brings out at his theatre a drama comprising any

three of the above incidents, while G. mounts at his, a spectacle comprising any four of them.

The question then arises are F. and G. pirators upon A., B., C., D., and E., or upon any of them? If they had copied the story or drama or poem of any one of the five, would they have been infringers upon all, in such a sense as that an action would lie (A., B., C., D., and E. holding copyrights, let us say, in their compositions)? Again, supposing that F. discovers the similarity which exists between his production and G.'s, and sues G. for piracy? The question as to the beaten path, or as it has been termed "the romantic incident," as can be readily seen, becomes intricate and perplexing.[1]

310. The case of Emerson v. Davies[2] enunciated the doctrine of "literary equivalents;" the case of Daly v. Palmer[3] propounds a doctrine of "romantic equivalents," analogous to the doctrine of mechanical equivalents of the patent or mechanical law, and appears to be the first which recognizes and establishes a property in an incident. This latter came upon an application for a provisional injunction to restrain the defendant from the public performance and representation of a scene called "the railroad scene" in a play called "After Dark." The plaintiff alleged in his complaint, on or before the first day of August, 1867, had composed and written a dramatic composition

[1] As these pages are going to press, the case of Boucicault v. Hart, as to the originality of the Shaugraun, and therefore as to plaintiff's right to restrain the performances of the Skibbeah (which, it is admitted, is pretty much the same thing), is before the circuit court of the United States in this city (N. Y.). Meanwhile, a temporary injunction has been granted to the plaintiff Boucicault.

[2] 3 Story, 768.

[3] 6 Blatchf. 256.

called "Under the Gaslight," which he had duly copyrighted on that day, and publicly represented in the city of New York, for the first time, on the 12th of August of the same year. He alleged further that the drama became very popular and profitable, and that its popularity and profitableness were mainly due to what was known as the railroad scene, in which one of the characters is represented as secured by another, and laid helpless upon the rails of a railroad track in such manner and with intent that the train, which is represented to be momentarily expected, shall run over and kill him, and—just at the moment when the train approaches, and such a catastrophe seems inevitable—another of the characters contrives to reach the intended victim, and to drag him from the track, as the train rushes in and passes over the spot where he lies. The plaintiff further alleged that this scene and incident was entirely novel and new, and unlike any dramatic incident known to have been theretofore represented on any stage, or invented by any author previous to its invention by the plaintiff. That one Dion Boucicault, a dramatic author, and actor, and theatrical manager, a subject and resident of Great Britain, had procured a copy of the play, by some means, and prepared therefrom a play which is called "After Dark," introducing therein several scenes and incidents, and the attractive features of plaintiff's play but slightly and colorably only, and among others, the said railroad scene, only varying the same, by making the surface railroad of "Under the Gaslight" an underground railroad in "After Dark:" for the rescuer of the victim a man instead of a woman: for the railroad station in which the rescuer was confined, a cellar, and for the breaking down a door to escape and rescue the victim, the breaking down a wall or a door in the

wall, and that the said play of "After Dark" was advertised to be performed in New York, &c., &c.

The defense to the application was confined to showing, by affidavits that the following matters, namely, a representation on a stage of a train of cars drawn by a locomotive engine on a railroad, a like representation where the train appeared to run over a man lying on the track, and a like representation wherein the train appeared to run over a man lying on the track, who had been thrown thereon by another of the characters in order that he might be run over and killed, were known prior to the taking out by the plaintiff of his copyright. A story called "Captain Tom's Fright," published in the "Galaxy" magazine for April, 1867, was also produced by the plaintiff, in which the interest centres in the binding of a man to a railroad track, who sees in the distance the head-light of a locomotive rapidly approaching him. He screams for help. The train comes nearer and nearer; the track trembles at its approach; the light glares in his eyes; the hot breath of the engine is in his face; he swoons from terror; the wheels are within a foot of his head: but the engine and train passes on a side track temporarily laid down for repairs in the main track upon which the man was bound. The answer rested here, not denying any of its allegations of plagiarism or colorable imitation. This play of "After Dark" was printed by the author for his own private use, but never published. It was also contended that these contrivances, or what are called sensations or tableaux of the drama, were not of a literary, but of a mechanical order, and not subject to the protection of the statute of copyright, and that the scene, to be protected in any other form than the form laid down in the plaintiff's drama, with its exact set of stage directions,

and its series of incidents, and dialogue, and presence of characters, must be protected by patent for the machinery, and design patents for the scenery and properties. The opinions of classical English writers and essayists were read to show that, in their opinion, these mechanical adjuncts to the drama were a deteriorating literature, and therefore the copyright acts "to advance science and the useful arts"[1] did not apply.

The defendants also raised the technical point that the title of the book registered by the plaintiff, was "Under the Gas-light, a Romantic Panorama of the streets and houses of New York," whereas the title of the printed play filed as an exhibit to show what had been infringed, was "Under the Gaslight, a totally Original and Picturesque Drama of life and love in these Times," claiming that the protection of the statute had been lost by this change of title.

The court (Blatchford, J.) granted the injunction, thus appearing to hold that a dramatic incident or situation is a subject of copyright, independent of the language of the characters, surroundings of the stage, or method of literary treatment. That, in the dramatic copyright act of 1856, the word "acting" imports representing by countenance, voice, or gesture as real, that which is not real; and that, therefore, a pantomime is subject of copyright; and hence, that to merely change the method of indicating the process of events on the stage from pantomime to narrative does not evade the statute; and that the dramatic copyright act of 1856 protected the representation of a copyright play in whole or in part, and, under it, the representation of a single scene is an infringement.

The court further held, in this case, that the substance of a dramatic composition consists in the series

[1] Constitution U. S. art. 1, § 8.

of events, directed in writing, by the author; that therefore stage directions, and the movements of actors in conformity thereto, are protected by its copyright; and that if the events, even of a single scene, are copied by another, without variation or change of sequence in their constituent parts, it amounts to an infringement.

And lastly, the court held two other important points, namely, that the sale of a play for representation makes the vendor a participant in the representation, and an injunction will issue against the sale of a plagiarized scene as well as against its representation; and that the words of description added to the title filed in the clerk's office to secure copyright, may be changed in the published work, without loss of copyright.

311. The mere employment of an author to write a play, even where the subject is suggested by the employer, does not constitute the employer a joint author. To constitute joint authorship, the production must be the result of a preconcerted joint design. Mere alterations or improvements by another person, with or without the sanction of the author, will not constitute the other person a joint author.[1]

In Keene v. Wheatley, which was the case of the comedy, "Our American Cousin,"[2] originally com-

[1] Levi v. Rutey, L. R. 6; C. P. 523.

[2] No right of property is recognized in any of the above-mentioned works except what this act confers. Section 19 enacts, "that neither the author of any book, nor the author or composer of any dramatic piece or musical composition, nor the inventor, designer, or engraver of any print, nor the maker of any article of sculpture, or of such other work of art as aforesaid, which shall after the passing of this act be first published out of her majesty's dominions, shall have any copyright therein respectively, or any exclusive right to the

posed in England, for representation at a London theatre, difficulties of adoption preventing its performance there, its author, for value, sold and assigned the play to Miss Laura Keene, an American lady. She thereupon adopted measures for procuring a copyright, and, in so doing, performed all such acts prescribed by statutes of the United States as were necessary where the matter was not in print. She adapted the play to representation in her theatre in Philadelphia, with the assistance of one Joseph Jefferson, an actor of her company, to whom the principal character was assigned, and made sundry extensive and important alterations and additions, at his suggestion. Besides this, Jefferson, in the course of its performance, was in the habit of interpolating speeches and phrases, for the repetition of which he trusted to his memory alone. The defendants, also proprietor of a theatre in Philadelphia, managed, however, to possess themselves of a copy of the original manuscript in England, and performed the same. The court held, upon the above facts, that the writer's additions to the play were simply accessions, and belonged to the complainant, as the actor who was their author, and who furnished them, was in her

public representation or performance thereof, otherwise than such (if any) as he may become entitled to under this act."

This enactment applies equally to British and to foreign authors who first publish their books or publicly represent their dramatic compositions abroad. And though no convention has been made with the foreign country in which a dramatic piece has been performed, and so a compliance with the requisites of 7 & 8 Vict. c. 12, is impossible, the author, though a British subject, is not entitled in this country to any copyright in his drama if it has been first represented abroad. *Vid.* however, Routledge v. Low, L. Rep. 3 H. L. Cas. 100; 18 L. T. N. S. 874; 34 L. J. 454 Ch.

[1] 9 Am. Law Reg. pp. 23, 45.

employ; and if the proprietorship of the unwritten additions did not exist in the proprietor of the play itself, it could not exist in anybody.

312. IV. The earliest instance in which the intervention of law was implored for the purpose of restraining a rival performance, appears to have been in England, in 1387, when the Choristers of St. Pauls presented a petition to Richard II., praying "that certain ignorant persons be prohibited from acting the history of the Old Testament, to the prejudice of the clergy of the church, who had expended considerable sums upon a public representation projected for the Christmas holidays next ensuing, founded upon that portion of scripture."[1] The first reported case in which a dramatic composition came before a court for protection, occurred about four hundred years later, in Macklin v. Richardson, in 1770. In that case the plaintiff was author of a farce entitled "Love a la Mode," in two acts, which was performed by his permission several times at different theatres in successive years, but never printed or published by him. When the performance of the farce was over, he had been in the habit of taking the copy away from the prompter; and whenever it was played at benefits or on other particular occasions, plaintiff had been in the habit of charging a certain sum for its performance, to the beneficiaries on those occasions.

Meanwhile the defendants, who were proprietors and publishers of a magazine, employed a short-hand writer upon several occasions to proceed to the theatre and take down the words of this play, and thereupon published the first act of "Love a la Mode" entire, in an issue of their magazine; giving also, at the same time, notice that the second act would be contained in

[1] Collier, Annals of the Stage, vol. i. p. 17.

the succeeding number. Lord Commissioner Smythe consented to enjoin such publication, holding, very clearly, that the representation of a play is not such a publication, or such a dedication of it to the public, as will destroy the author's rights therein as to a purely literary composition; that is to say, that he would still possess the right, after such public representation, to publish and sell copies of his composition, should he desire to do so. And neither would it affect his right to its continued representation.

In this earliest case in the reports, was enunciated the doctrine which has been followed substantially ever since, namely, that the publication of a play by representation before an audience is not such a dedication of it to the public as would destroy, abridge, or in any wise affect the author's rights therein as to a purely literary composition, that is to say, his right to print, publish, and sell the same for his own benefit. Neither is it such a dedication, according to this precedent, as will destroy his further right to its continual representation, though there is a conflicting opinion upon this point in the case of Keene v. Wheatley, which will be noticed further on in this chapter.

313. In Coleman v. Wathen,[1] in 1793, which appears to have been the second case in the reports in which dramatic copyright came before the courts, it having been preceded only by Macklin v. Richardson,[2] in 1770, a new and elaborate question arose, for which they were entirely unprepared.

Plaintiff had purchased the copyright of a play or entertainment known as "The Agreeable Surprise," from its author, O'Keefe, the comedian, and proceeded

[1] 5 Term R. 245.
[2] Amb. 694.

to represent it upon the stage of his theatre, when it was unexpectedly and concurrently produced and represented by the defendant at a neighboring and rival theatre.

The name of the play itself seems to have been ominous, for, upon the case coming into court, an "agreeable surprise" was in store, not only for the plaintiff, but for the law and for equity itself. It appeared—how we are not told, but it seems to the satisfaction of the court—that the defendant had obtained his copy of the play by process, not of stenography, but of memory!

Upon this state of facts, and upon the ground, apparently, that it would be carrying the power of courts to an absurd and ridiculous degree, should they assume to enjoin exercise of a man's purely mental function, the court, Buller, J., held that no action could lie, saying, "Reporting anything from memory can never be a publication within the statute. Some instances of strength of memory are very surprising; but the mere act of repeating such a performance cannot be left as evidence to the jury that the defendant had pirated the work." The whole opinion upon this novel and hitherto unconsidered point, whose reasoning and conclusion has been implicitly followed by courts and legal writers for the better part of a century, is embraced in the few words above quoted.

It is to be regretted that such is the case. It would have interested the lawyer of the present day to have known from the reporter what points were raised by counsel, and to have learned by what ingenious and ingenuous arguments they were able to induce the learned and admirable Judge Buller to enunciate the one solitary case, in which stealing is not

stealing, in which piracy is not piracy, and in which theft is not theft.

The principle thus apparently occurring to the learned judge is undoubtedly a wise one,—(we say apparently, for the entire reported case[1] is contained in thirty lines, and no word is said about the evidence of the memorization, or as to the principles involved. Indeed, the word "memory" occurs but once, and then in the few concluding sentences pronounced as above, by Buller, J.) For, if courts of justice can enjoin the memory of man, there would seem to be nothing that they could not do. If one who, having witnessed a play, or having read a treatise or a story, by repeating the argument of the same to others can be obliged to respond in damages or in equity, to the author—who may fancy himself thereby deprived of the profits which might have accrued to him if those others had been obliged to witness or to read for themselves—there would scarcely be any limits to the investigation of courts. They would soon find themselves obliged to discriminate between absolute and partial repetitions, and between partial and temporary and absolute injunctions against the exercise of a man's purely mental faculties and processes, and to proceed to lengths of absurdity beyond all speculation.

But, on the other hand, if one, deliberately, for his own profit, and to the end that the legitimate property of another shall be destroyed or diminished, sets himself down to memorize that other's dramatic or other composition; and if, after the laborious exercise of his trained memory, and the attendance night after night at the performance have enabled him to possess himself completely of its whole—dialogue, actions,

[1] 5 Term R. 245.

properties, and all—he writes the same out for the use and benefit of himself and a troupe of his own, who thenceforward produce the same—if it be a play—with the same title, scenery, and effects, so that the real author or proprietor is deprived of the fruits of his own labor; it is difficult to see the difference—in effect at least—between this and other piracies, in which other channels of transportation have been employed.

There is scarcely any achievement of which the human memory is incapable. Nor is it, possibly, more wonderful that one should commit to memory a play, after a number of consecutive attendances at its representations, and more or less familiarity with its performance, than that he should be able to catch it so accurately from the mouths of the actors, and move his hand so nimbly to and fro across a page as to be enabled to carry away with him, in black and white, the words which he has heard uttered by actors upon a stage. Both processes would appear to be the result of training, the one of the ear and hand, two physical members limited in their action by certain physical laws; the other of a purely mental and incorporeal faculty, unrestrained by any laws, and as utterly limitless as thought itself. It is certainly hard to imagine a reason why—when both of these faculties are turned to purposes of wrongful appropriation of the lawful property of another—the more volatile and potent faculty should be allowed to be used at pleasure, while the other, and purely physical process, should be restrained.

It certainly cannot be the policy of the law to permit a spoliation merely because it happen to be accomplished with unusual skill, and by the exercise of a wonderful talent on the part of the spoiler. If it is,

then we must look contentedly upon the depredations of the experienced house-breaker, who enters our dwellings deftly and robs us neatly, and it is only of the clumsy thief that we can make an example.

And again, if the feat of memorization releases from responsibility for acts committed through its means, why should not the principle obtain in the law of defamation, as well as in the law of piracy? Why should not one who hears defamatory and slanderous words spoken of his neighbor, be allowed to repeat them at pleasure, so long as he repeats them from memory, and so long as he does not transcribe them, in the first instance, from paper?

And, moreover, what provision must the law of evidence make for the question? Is the presumption to be in favor of or against the memorization? And how is either presumption to be rebutted? The best evidence obtainable must, of necessity, be the defendant's own unsubstantiated and impossible-to-be-impeached testimony. Since who else but himself can swear that he does or does not repeat that which he repeats—from memory—or that he transcribes what he transcribes in the solitude of his closet from memory, or from stenographic or other notes?

"When a literary work," said Allen, J., in Palmer v. De Witt,[1] "is exhibited for a particular purpose, or to a limited number of persons, it will not be construed as a general gift or authority for any purpose of profit or publication by others."

In spite of the venerable precedent which, like an ancient landmark, has been so long left undisturbed, there would seem to be no satisfactory reason why the dramatic author, or proprietor, like every other, should not be permitted to retain his right in the productions

[1] 47 N. Y. 532.

of his own brain and his own pen, until he relinquish it by contract, or by some unequivocal act, indicating an intent to dedicate it to the public. Lectures are not, by their public delivery or performance in the presence of all who choose to listen to them, or to pay for the privilege of attending them, so dedicated to the public that they can be printed and published, without their author's permission, or diverted to objects for which he did not assign them.[1] The manuscript, and the right of the author therein, are still within the protection of the law, the same as if they had never been communicated to the public in any form. This principle is too well established in every other case than that of memorization to need any citations to support it, and has been expressly enacted by statute in Great Britain.[2]

If an author has any rights at all in his composition, or if courts have any power to protect him in those rights, it is difficult, we repeat, to see how the mere process employed in the piracy is to take away that right, or to cancel that power.

It is just possible that Buller, J., did not mean to say exactly what he has been understood as having said during all these years. The concluding words of his opinion, in five lines, are: "The mere act of repeating such a performance cannot be left as evidence to the jury that the defendant had pirated the work;" which is, perhaps, self-evident, as is also the statement that "some evidences of strength of memory are very surprising." The gist of the decision is, however, supposed to be included in the words: "Reporting anything from memory can never be a

[1] Bartlett v. Chittenden, 4 McLean, 301.
[2] 5 & 6 Will. 4, c. 65.

publication within the statute" (meaning the first statute of copyright, 8 Anne, c. 19).

But he does not say that repeating, or delivering, or acting the matter "reported from memory," is not such a publication. Clearly, courts cannot enjoin the memorization, nor, if they would, could they enforce their injunction. A man can cultivate his powers of remembering to almost any extent. We doubt if he can extend, or if any court on earth could compel him to extend, his powers of forgetting. As a rule, efforts to forget are always ineffectual, though efforts to remember are far from being always crowned with success. 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."

In general, the law will regard the element of deliberation as increasing, if anything, the responsibility for a wrongful or doubtful act; but in this respect, again, the instance before us seems to negative every rule and animus of the law. Surely that law cannot desire to fix such a premium upon the exercise of a man's memory as to render itself in that instance alone, oblivious of the rights of others not only, but of its own policy.

It is undoubtedly true that courts cannot enjoin a man's exercise of his powers of memorizing what he hears or sees. It is quite doubtful, even, if they would attempt to enjoin either the manual labor of writing out the play so memorized, or the parting with the manuscript for value. In Morris v. Coleman,[1] indeed, a court did enjoin the defendant from writing plays for a particular theatre, but upon the ground

[1] 18 Ves. 437.

that he was under a contract to write for another exclusively.

But most assuredly, equity could enjoin the production, upon the stage of a theatre, of the play purloined by the memorization, with as much consistency as it enjoined the production and representation in Macklin v. Richardson, and as it has been done in hundreds of cases since. Nay, more, it seems probable that equity could enjoin even the individual actors from performing a purloined play, since it has asserted the right to enjoin an actor from performing any play whatever. The superior court of the city of New York did not hesitate to enjoin an actress from acting for a particular manager, and that too, in a case where it was apparent that the plaintiff had an adequate remedy at law.[1]

Is it not barely possible that the above ruling of Buller, J., has escaped criticism on account of the rarity with which these cases of memorization occur; or, what is still more likely, from the fact that when they occur they scarcely ever reach a court where the principles they involve can be leisurely and carefully examined? Dramatic manuscripts, from the fact of their immediate availability, without tarrying for the expensive and laborious processes of printing and manufacture, no less than because of the attractiveness of the drama, which has been for three hundred years the favorite amusement of the civilized world, have become, perhaps, the most valuable of all literary compositions; and mainly, too, because their value depends upon a season or a "run," the cases in which the law is called upon to interfere in reference to them, make very little show in the reports or in the

[1] Daly v. Smith, Albany Law Journal, September 19th, 1874, p. 187.

digests, and very seldom get beyond a mere motion or two at a special term or in chambers. If the plaintiff obtains his preliminary injunction, defendants are usually permitted to settle, and the case ends.

There have been but few instances in which the question of memorization has come before an American court, and that case never was reported and never went beyond the single motion for an injunction argued at chambers in the city of New York. In Wallack v. Barney Williams,[1] the plaintiff had brought out the play of "Caste," at his theatre in the city of New York, when the defendant, the manager of a rival theatre in that city, also produced it. The plaintiff's motion for an injunction restraining this rival representation,—upon the affidavit of the principal actor, one Florence, in the employ of defendant, that he had obtained the version of the play used at defendant's theatre by process of memorization,—was refused, upon the strength of Coleman v. Wathen.

But the principle, for all its undisturbed antiquity, appears to us to be one vicious, and in contravention to well-known rules. It would seem to be a cardinal rule of the law that the parting with, by the individual, of his own property, or with the product of his own lawful labor, must be by his own voluntary act, either actually or constructively; and it is quite too late in the day to attempt a distinction between literary and any other property, so far as this principle goes. There certainly can be no valid reason why the crafty, skillful or unusual processes by which A. pirates B.'s property, should be construed, on account of its unusual or marvellous nature, into a voluntary alienation

[1] Unreported. N. Y. Sup. Ct. 1st Dist. S. C., 1867. But see Keene v. Kimball, 16 Gray (Mass.) 545.

of his property by A. Again, what would become of the maxim of the law, sic utere tuo ut alienum non lædas[1]—enjoy your own in such a way as not to injure that of another? And while the maxim undoubtedly refers to the use of another's property, the principle appears to be the same in regard to any right. "Where rights are such as, if exercised," says Broom,[2] "conflict with each other, we must consider whether the exercise of the right claimed by either party be not restrained by the exercise of some duty imposed on him toward the other. Whether such duty be or be not imposed must be determined by reference to abstract rules and principles of law."

The right to vociferate, and to exercise a man's lungs, may be a right inalienable, and yet, if it injure his neighbors in one of their substantial rights, as, for instance, the right to peaceably assemble for public religious worship,[3] or for the purpose of a sale at auction,[4] even that right may become a wrong. The case of State v. Linkhaw,[5] which seems to hold the contrary, is only to the effect that the intention to disturb and interfere must be apparent.[6]

Finally, if a play can be pirated by means of the eye, ear, and memory, why not a printed book? Why may not one (as any child can) commit to memory the poems of Longfellow one by one, or all together, and then write them down, print them in a volume—under the title of Longfellow's works—and obtain a copyright in them because he wrote them down from memory, and did not actually transcribe them by

[1] 9 R. 59.
[2] Leg. Max. 394.
[3] Kindred v. State, 33 Tex. 69.
[4] Furness v. Anderson, 1 Pa. Law Jour. R. 324, 569; N.C. 214.
[5] 69 N. Carolina, 214.
[6] American Law Register, vol. 14 (N. S.) p. 207.

means of his eye and hand alone? If there is any reason in the piracy by memorization rule, it would be hard to find a copyright registry that could not be violated with impunity, at will.

314. The idea of the means by which a version of a play was obtained, operating to defeat any right of its author therein, would seem to be held in disfavor by the learned judge (Allen), who delivered the decision in Palmer v. DeWitt.[1] "When a literary work is exhibited," said the court in that case, "for a particular purpose, or to a limited number of persons, it will not be construed as a general gift or authority for any purpose of profit or publication by others."

"The speech of the orator, the sermon of the preacher, lecture of the professor," said the court, in the leading case of Jeffreys v. Boosey,[2] "have no greater claim to protection, and to be the foundation of exclusive property and right, than the labors of the man of science, the invention of the mechanic, the discovery of the physician or empiric, or, indeed, the successful efforts of any one in any department of human knowledge or practice; and it is difficult to say where, in principle, this is to stop. Why is it to be confined to the larger and graver labors of the understanding? Why does it not apply to a well-told anecdote or a witty reply, so as to forbid the repetition without the permission of the author? And, carried to its utmost, it would at length descend to lower and meaner subjects, and include the trick of a conjurer, or the grimace of a clown. . . . . Let us observe that this question cannot be confined to the form, whether written or printed. . . . If it is clear that, before publication, the author has the right and may proceed

[1] 9 Amer. 480; 47 N. Y. 532.
[2] *Vid.* 4 H. L. Cas. 937, 964.

against those to whom he imparts his manuscript under conditions, it is equally clear that if he had the communication of some one authorized by him, although no condition had been imposed upon those who entered the place of recitation to listen; and if any such auditor, unknown to the author or his licensee, has recited it, the author, or his licensee, or assignee, may proceed against the party to whom that recital has been made, in case he repeats, without leave, what he has been told by the first hearer. This consequence, if not wholly absurd, yet assuredly somewhat startling, follows the title alleged."

The question is a very nice one, and the decisions hedge closely upon each other. In Keene v. Clark,[1] it was laid down that the production of an arrangement of words, whether by speech, by writing, or printing, so as to convey special ideas or thoughts, and forming any species of literary composition, gives its composer or producer, until he shall voluntarily part therewith, the exclusive right to its use and enjoyment. The learned chief justice in that case (Robertson), after carefully going over the authorities, seems to have come to the conclusion of Baron Pollock, above quoted, that it is very difficult to practically maintain this right, without prejudice to the community; that it can only be protected by preventive remedies, and then only when an express or implied reservation of it accompanies such communication, imposing upon the hearer or recipient a restraint from divulging it. So it seems the delivery of a manuscript or printed copy may be made confidential by a notice written or printed thereon that it is for private circulation only.[2] And a limited communication of literary composition,

[1] 5 Rob. 38.
[2] Keene v. Clark, 5 Rob. 38.

by means of lectures, recitation, or performance, would not be construed to be an abandonment,[1] because of the retention of ownership implied by the limited number of its recipients.

But when such communications are indefinitely multiplied; when an audience is unlimited, as in the case of a public theatrical representation, the public are unquestionably to be held entitled to make use of their natural faculties of memory and impression—which indeed are the very faculties to which the representation is addressed, and upon the possession of which by human beings, authors, and actors, and managers, and publishers are dependent for their profits. If it were possible to separate the two, and to assert that one should be admitted to receive impression, but not to remember; if the purchase or receipt of a card of admission to a place of public entertainment was an implied service with an injunction upon one's memory, the doctrine that every act in life is accompanied by the obligation of a contract[2] would be carried to its absurdity.

315. When the spectators at a public performance of a drama, have not, however, entered into some express or implied understanding with its proprietor, limiting the use they may make of their ordinary faculties, and of the impressions or knowledge they derive from their presence at such performance, we do not see how they can be restrained as to the use by them of so much of it as remains by them, or that they retain and carry away with them in their memory. It is very certain that no such understanding or contract can be implied to accompany the reception of the ticket or license of admission by the

[1] Bartlett v. Chittenden, 4 McLean, 300.
[2] Parsons on Contracts, 11.

spectator.[1] Nor need the proprietor of the theatre give public warning to his audience that they may not carry away in memory, or by short-hand, or by any other process, the performance that they have come to witness. Even should he go to that length, his rights in the case, whatever they were, would undergo no diminution or increase. Neither must a merchant, who exposes his wares for sale, so display upon them placards to the effect that "these goods must not be stolen, or carried away by the public, without paying for them."[2]

316. Following the case of Coleman v. Wathen, in 1820, came the case of Morris v. Kelly & Arnold,[3] where the author had sold, between the years 1781 and 1785, the copyright of a play called "The Young Quaker," to the proprietor of the Haymarket theatre, in London, and where the theatre and the above copyrights had been afterwards purchased by and vested in the plaintiffs. The defendant Kelly, an actress, had published an advertisement announcing that play as to be performed at her benefit at the play-house known as the English Opera House, of which the defendant Arnold was proprietor, and, it appearing by affidavit that the above play had been assigned to the Haymarket Theatre, by three several identures of assignment in writing, the lord chancellor granted the injunction.

The only important point passed upon in this case seems to have been the necessity of a written assignment of the copyright, and the lord chancellor appears to have been guided by the ruling in Power v. Walker,[4] decided six years before.

[1] Keene v. Clark, 5 Rob. 38.
[2] Crowe v. Aiken, 2 Bos. 208.
[3] 1 J. & W. 481.
[4] 3 Maule & Sel. 7.

Murray v. Elliston,[1] was the case of Lord Byron's tragedy, Marino Faliero, which, by deed dated April 14, 1821, its author had assigned to his publisher Murray. The defendant, being the manager of the Theatre Royal, Drury Lane, after the publication of the tragedy, printed and exposed to view at the entrance to his theatre, and at other conspicuous places in London and Westminster, an announcement of the representation of the tragedy, altered and abridged, for the stage, together with a notice as follows: "Those who have perused Marino Faliero, will have anticipated the necessity of considerable curtailments; aware that conversations or soliloquies, however beautiful and interesting in the closet, will frequently tire in public recital. This intimation is due to the ancient admirers of Lord Byron's eminent talents, and will, it is presumed, be a sufficient apology for the great freedom used in the representation of this tragedy on the stage at Drury Lane Theatre." On the evening of the 25th April, 1821, the same, altered and abridged, was publicly represented. The question was whether an action could be maintained for publicly acting and representing for profit the tragedy so abridged, without the consent of the owner of the copyright, and the lord chancellor on submission, the judges of the king's bench, held that an action could not so lie.

In commenting upon these cases, Mr. Justice Hoar, in a late case,[2] says: "The case of Morris v. Kelley[3] was heard ex parte by Lord Eldon, and the report does not show the grounds upon which the injunction was asked or granted. Unless it proceeded

[1] 5 B. & Ald. 657 (1822).
[2] Keene v. Kimball, 16 Gray, 545.
[3] 1 J. & W. 481.

upon an allegation of the use of a surreptitious copy of the work, it seems impossible to reconcile it with the earlier case of Coleman v. Wathen,[1] or with the subsequent decision in Murray v. Elliston.[2] In both of these cases the plaintiff was the owner of a copyright of the play, and yet its representation upon the stage was held to be no violation of his rights."

In the case of Boucicault v. Fox,[3] 1862, it was held, that a person who agrees to write a play to be acted at the theatre of another person, and to act in it himself as long as it will run, and receive a share of the profits as a compensation[4] does not thereby confer upon any one the legal or equitable title to the play, and is entitled to take out a copyright for it, even after it has been so acted at the theatre, and that such performance with his consent and for compensation does not amount to an abandonment or dedication of the play either to the public or to his profession.[5]

317. In an action for infringement of copyright in a play, the copyright and the fact of representation being established, the burden is on the defendant to show the author's consent to the representation.[6]

318. We shall have occasion to see further on[7] that the fact that an infringing publication was gratuitously distributed, would make no difference as to the piracy, and so it will make no difference in

[1] 5 T. R. 245.
[2] 5 B. & Ald. 65.
[3] 5 Blatchf. 87.
[4] Roberts v. Myers, 13 Mo. L. Rep. 400; cited Law's Digest of Patent, Trade-mark and Copyright Cases, p. 211.
[5] *Vid.* Boucicault v. Wood, 9 Am. Law Reg. N. S. 539; Roberts v. Myers, 13 Month. Law Rep. N. S. 396.
[6] Id.
[7] See Novello v. Sudlow (12 C. B.) 177, cited *post*, chapter on Piracy.

the act of infringement that the unlicensed and illegal representation was gratuitous.

If publicity and pecuniary profit are necessary to the piracy of a dramatic or delivered composition, interesting questions might be foreseen as to amateur or parlor theatricals, or readings. Such a case has never come up for adjudication; but, upon principle, it would appear that a dramatic property might be pirated, as well by amateur as by professional actors, and at amateur as well as regular theatres—the fact of admission being gratuitous, or complimentary, or limited, making no difference in the legal aspects or consequences of the act. The section of the act,[1] indeed, employs the word "publicly," and renders only liable for damages, as we have seen,[2] "any person publicly performing or representing any dramatic composition for which a copyright has been obtained, without the consent of the proprietor thereof." But it is apprehended that, as in derogation of an absolute right, the word "publicly" would be construed very strictly. Affirmative words, it has been said, do not take away the common law, a former custom, or a former statute, or general words, a particular benefit, or privilege.[3] "For the sure and true interpretation of all statutes in general, be they penal or beneficial, restrictive or enlarging, of the common law," says the same authority,[4] "four things are to be discerned and considered: 1. What was the common law before the making of the act? 2. What was the mischief and defect against which the common law did not provide?

[1] U. S. Rev. Stats., Revision of 1873–74, § 4966.

[2] *Ante*, this vol. p. 242.

[3] See Dwarris on Statutes, Am. ed. by Potter, p. 219.

[4] Id. p. 184; and see Hart v. Cleis, 8 Johns. 44; Waller v. Harris, 20 Wend. 561–2.

3. What remedy the parliament (legislature) both resolved and appointed to cure the disease, &c.? and, 4. The true reason of the remedy." And so since the proprietor of the play has his unquestioned right to control the representation of his play, the publicity of the infringement would be very carefully examined before a greater or less degree of such publicity would be allowed to interfere with it. The publicity of the performance, perhaps, might be a question of fact for the jury, though as a question of construction of a statute, it might equally well be a question of law for the court.

In the latter case, where a public rhetorician reads or recites from standard and well-known authors, the exact copying of his programme by another public reader might be an infringement upon his rights, if his programme was registered or copyrighted, but possibly not otherwise. In such an event, an interesting question would arise as to whether, in the first place, a programme could be legitimate subject of copyright, and in the second place, whether the protection would extend to the performance, or carrying out of the order of exercises.

319. It has been held that a dramatic, like any other literary composition, may be abridged or altered. In Murray v. Elliston,[1] where Lord Byron's tragedy of Marino Faliero was altered and abridged by the manager of Drury Lane Theatre and announced for representation, it was held by the King's Bench, in 1822, that the plaintiff could not prevent its representation. But we doubt if this case would be followed to-day. The favor with which the law has been said to regard abridgments, as we have seen, was on account of their aiding in the diffusion of knowledge, by cheapening

[1] 5 Barn. & Ald. 657.

and otherwise rendering learned and elaborate works accessible to the people. It is submitted that this spirit of the law, even if it were undoubted (as it is not), could not apply to a dramatic production exhibited to amuse, and not to instruct. We take the liberty, therefore, to question if the piracy of a dramatic work could be defended on the plea that it was an abridgment of the original.

320. In Roberts v. Myers,[1] one Boucicault, an actor then in the employ of one Stewart, proprietor of the Winter Garden Theatre, in the city of New York, wrote a play, "The Octoroon," which was to be produced by Stewart as long as it continued to draw audiences. It was held that the copyright was properly taken out in Boucicault's name, and that the proprietor of the Winter Garden Theatre, Stewart, had no other right or title to the play, except that of having it performed at his theatre.

321. In the case of piracy of a dramatic, as of any other species of composition, the application for an injunction should be made at once, as such an acquiescence might be inferred from the lapse of time as would disentitle the complainant thereto.[2] The bill for the injunction should carefully specify the infringement, and in case of infringement in part only, that part should be accurately and distinctly set forth.[3] The former practice in such cases was to refer the two works to a master for comparison, but courts not unfrequently will perform that labor themselves.[4]

[1] 13 Month. Law Rep. (N. S.) 396.

[2] Correspondent Co. v. Sanders, 12 L. J. (N. S.) 540; 11 Jur. (N. S.) 540; 13 W. R. 804; Platt v. Button, Cooper's Ch. Cas. 303.

[3] Page v. Wisden, 17 W. R. 483; 20 L. J. (N. S.) 435. See, however, Fradilla v. Weller, 2 R. & M. 247.

[4] Jeffreys v. Bowles, Dick. 429; Carman v. Bowles, 2 Bro. C. C. 80; Carman v. Ledbetter, 7 Ves. 681; Losh v. Hague, 2

322. V. By section one hundred and one of the present copyright law (4966), "any person publicly performing or representing any dramatic composition for which a copyright has been obtained, without the license of the proprietors, or his heirs or assigns, shall be liable for damages therefor, covered by action; such damages in all cases to be assessed at such sum, not less than one hundred dollars for the first, and fifty dollars for every subsequent performance, as to the court shall appear to be just." For the piracy of unpublished plays, there is no limitation as to the damages recoverable.[1]

323. The words "publicly performing or representing," or their equivalents in the English act,[2] are also to be construed. It appears[3] that no person can be made liable for a "representation" unless he himself, either personally or by his agent, takes part in the representation violating the copyright. Where the defendant had let a room in his tavern for the giving of a musical entertainment, and after the entertainment had been continued for some nights, the defendant received formal notice from the plaintiff that certain of the pieces performed in the room in question were the copyright property of the plaintiff, the defendant, notwithstanding this, permitted the entertainment to be continued, furnished the platform and lights for the performances, allowed bills of them to be put up in the tavern, and tickets of admission to be advertised to be sold at the bar, and himself sold one ticket, it was held that this conduct on the part of the defendant did not amount

Cooper C. C. 59 (n.); Moct v. Couston, 33 Beav. 578; 10 Jur. (N. S.) 1612.

[1] Boucicault v. Wood, 2 Biss. 34.

[2] 3 & 4 Will. 4, c. 15; 5 & 6 Vict. c. 45.

[3] Russell v. Briant, 6 C. B. 836.

to a "representing or causing to be represented" within the meaning of the acts. "If it were held," said the court, "that all those who supply some of the means of representation to him who actually represents are to be regarded as thereby constituting him their agent, and thus causing the representation within the meaning of the act, such a doctrine would, we think, embrace a class of persons not at all intended by the legislature."

This doctrine was carried a step further, in Lyons v. Knowles.[1] In Russell v. Briant it appeared that the defendant received a fixed sum per night for the room in which the performance took place, and derived no other profit from it. In Lyons v. Knowles the defendant, who was the licensed proprietor of a theatre, received, as his remuneration for the use of the theatre, one-half of the gross receipts, which were taken by his own servants at the doors, the remainder being handed to one Dillon, to whom the defendant let the use of the theatre for the purpose of dramatic entertainments. Dillon provided the company, and had the selection of the pieces to be represented, together with the entire management of their representation, and exclusive control over the persons employed in the theatre. The defendant, on his part, paid for printing and advertising, furnished the lighting, door-keepers, scene-shifters, and supernumeraries, and hired the band, music being a necessary part of the performance. Certain of the copyright pieces of the plaintiff having been performed without his consent, an action was brought against the defendant. It was held that the defendant was not liable, the court being of opinion that he was nothing more than

[1] 3 B. & S. 556; 10 L. T. N. S. 876; 12 W. R. 1083.

the proprietor of the theatre, who had transferred for the time the exercise of all his rights in it, as such, to Dillon, and that Dillon was the person who "represented, or caused to be represented" any pieces performed there while he had the sole possession. With regard to the scene-shifters, &c., supplied by the defendant, the court said: "Even apart from authority, I do not think that, by furnishing servants to another, a man can be said to do all that is done by those servants while under the command of that other." And with respect to the division of profits: "The question is whether, looking at the present case fairly, it amounts to more than this—that the rent of the theatre is to be paid by part of the profits. I do not think that the defendant's divesting himself of control over the theatre would divest him of liability, if he and Dillon were partners. Suppose there had been an agreement of partnership between the defendant and Dillon that each should contribute so much money, or that each should contribute so much capital, though of a different kind, and the theatre were taken between them. I should think the act of either was the act of both. But the authorities clearly show that two persons merely receiving payment out of the gross profits of a business does not make a partnership between them, even as against the world." "If the receipt of the money in this way was only a colorable pretense to escape the consequence of a partnership, I do not say that it would not have made a difference."

It seems, if the proprietor of the theatre were also the proprietor of the scenery, lights, &c., and the employer of the actors and actresses, he would be liable for an unauthorized representation of a dramatic piece, even although on the occasion of its representation he had, for a fixed sum, let his theatre to another per-

son who was to have all the profits and to select the pieces performed. Thus, in Marsh v. Conquest,[1] the defendant granted to his son, who was also his stage-manager and one of his actors, the use of the company of actors, with the scenery, &c., for a benefit night, in consideration of a fixed sum paid, the son to choose the pieces played. A piece belonging to the plaintiff having been played without his consent, the defendant was held liable to pay the statutory penalty. The Chief Justice (Erle) distinguished this case from Lyons v. Knowles: "There, Dillon, to whom the defendant in that case had let his theatre, brought his own company of actors and actresses; whereas here the defendant was the owner of the dramatic company, with whom the son performed the piece. The defendant, therefore, I think, in this case, caused such piece to be performed."

What is a representation within the act, is a question for the jury. In England, where a jury found that the singing of two or three songs of the plaintiff's libretto to Weber's opera of "Oberon," was a representation of part of the plaintiff's composition, the court refused to grant a new trial.[2] "It is difficult," said the court, "to say what is or is not a representation of part of a dramatic production: the subject patitur majus et minus, and it must be left to a jury to determine the fact."

324. One who, knowing the object for which it is desired, sells to another with a view to its public representation by him, a dramatic composition, is a participant in the causing of the same to be represented. And if the representation of it is an infringe-

[1] 10 Jur. N. S. 989; 33 L. J. 319, C. P.; 10 L. T. N. S. 717; 12 W. R. 309.

[2] Planchè v. Braham, 4 Bing. (N. C.) 17.

ment, the seller is a wrongdoer equally with the purchaser.[1]

One who, although as the agent of another, officiated as the manager of a theatre, paid certain actors, and discharged others, is a manager so far as to be liable for an unlawful representation.[2] And an assignee of the exclusive right of acting and representing a drama for a certain time,[3] and in certain localities,[4] may maintain an action in his own name against a mere wrongdoer.[5]

325. We have seen that courts of equity will decline to interfere by injunction to compel an author to compose. Agreements to write for the stage, likewise, are not enforceable. The only remedy for the party aggrieved is by his action for breach of contract. In Morris v. Coleman,[6] Coleman, who was partner with the plaintiff and others in the Haymarket Theatre, entered into an agreement, not indeed to write for that theatre, but that he would not write for any other, and the injunction in that case was a negative one, enjoining him against writing for the rival establishment. And, of course, no court could compel an author to act, though it seems courts have enjoined actors from performing for a rival when in the employment of a manager.[7] But we think that the principle is, to say the least, doubtful; for equity will rarely interfere where there is a remedy at law.

[1] Daly v. Palmer, 6 Blatchf. 256.

[2] Parsons v. Chapman, 5 C. & P. 33.

[3] In this case one year—Roberts v. Myers, 13 Month. Law Rep. (N. S.) 396.

[4] In this case throughout the United States, except in five designated cities.

[5] Roberts v. Myers, 13 Month. Law Rep. (N. S.) 396.

[6] 18 Ves. 437.

[7] 38 N. Y. Superior Court (J. & S.) 158.

In Daly v. Smith,[1] one Daly, proprietor of the Fifth Avenue Theatre, in the city of New York, sought to restrain an actress, Fanny Morant, from violating a contract made with him to act as a member of his stock company. By the contract the defendant bound herself for three seasons to perform at the Fifth Avenue Theatre, at a weekly salary of $130, payable on Monday of each week. This contract also contained a negative clause to the effect that if the defendant refused to fulfill the conditions thereof, and threatens to engage with any other theatre within the city of New York, the plaintiff should have the right, "by legal process or otherwise," to prevent her fulfillment of such threatened rival engagement. Reciting in his complaint the provisions of this contract, together with the further fact that the defendant was about to violate them by an appearance on the stage of a rival establishment, the Union Square Theatre, Daly obtained a temporary injunction, restraining her from such threatened act, together with an order to show cause why such injunction should not be continued in force until the final termination of the suit.

In opposition to the right to the injunction and its continuance in force it was urged that the contract itself was conceived in fraud on the part of plaintiff, his intention being, not to produce the defendant on the stage of his theatre, but to prevent her appearance on any stage in New York in any of those plays in which she had won professional renown, or any plays adapted to her eminent and mature histrionic talents; that his assignment of her, under a previous engagement (subsequent to the execution of the present con-

[1] Albany Law Journal, Sept. 19, 1874, 187.

tract), to parts comparatively unimportant and unworthy of her talents and reputation on the stage, and his failure to completely fulfill his pecuniary engagements to her under the previous contract, convinced her, not only of his intention to not merely repress her from appearing on the stage in this city, but of his inability to fulfill the pecuniary conditions of the contract at issue in the present suit, and that, in either aspect, he had invalidated such contract; that even if such contract was valid, he had not complied with that condition which bound him to pay her the one-fourth of her stipulated salary, before obtaining an injunction restraining her from appearing at any other theatre in this city; that, in any event, a remedy by injunction would not lie, but the plaintiff must be remitted to his remedy at law. In addition to relying on the terms of the contract itself, to overcome any weight which might be given by the court to the allegations of the defendant in avoidance of her contract, plaintiff set forth additional statements that he had not discriminated against the defendant in the assignment of parts to her, although that was by the terms of the contract left to his discretion; that so far from its being his intention to keep her off the stage in this city, he had announced her appearance under her new contract; had sent her a part to be studied which she had refused to receive or open, and that he had made the contract in good faith, with a view to secure for his theatre and pecuniary benefit the eclat of her popular name and eminent talents, and to deprive any rival theatre in this city of both.

The opinion devotes much space to the consideration of the question whether theatrical engagements, which contain a negative clause providing for non-performance at certain specified places, can be enforced

in equity, as similar provisions in relation to other trades and employments. Reviewing the decisions on this point, it comes to the conclusion that there is no reason why theatrical performances should stand upon any different footing from other contracts involving the exercise of intellectual faculties, or why actors and actresses, by the law of contracts, should be treated as a specially privileged class, or why theatrical managers, who have to rely upon their contracts with performers of attractive talents to carry on the business of their theatres, should, with a large capital necessarily invested in their business, be left completely at the mercy of their performers: that actors and actresses, like all other persons, should be held to a true and faithful performance of their engagements, and that, whenever the court has not proper jurisdiction to enforce the whole engagement, it should, as in all other cases, operate to bind their consciences, at least so far as they can be bound, to a true and faithful performance. As to the plea that the plaintiff was in arrears on the preceding contract, it holds that the defendant, knowing this fact, should have incorporated in the new contract a provision that while plaintiff remained in arrears under the old contract she should not be compelled to carry out the terms of the new one. It further held the allegation that plaintiff did not intend to carry out his engagement to put defendant on the stage, unsustained by the evidence, whereas, on the contrary, it appeared that plaintiff, in pursuance of the contract, had sent her a part for study and rehearsal which she had refused to receive or open.

As to her plea that plaintiff had discriminated against her in the assignment of parts, it holds that she had the opportunity to provide against such discrimination by providing in her contract how often she should

play, in what plays she should appear, and what parts she should assume.

The clause as to the payment of one-fourth of defendant's weekly salary, in consideration of her being restrained from playing elsewhere in said city, the judge left to be discussed at the close of his opinion, because, as he said, as the parties could not confer jurisdiction on the court by stipulation, it was necessary to first consider whether the court had jurisdiction. But having already concluded that the court had jurisdiction, the clause was one proper to enforce in order to prevent defendant acting at a rival establishment. Having such jurisdiction, it would not be equitable to remit the plaintiff to a suit at law for damages, a mode of redress which, as a general rule, would not prove a very effective remedy against breaches of contract by actors and actresses. He concludes by directing that the injunction restraining the defendant from acting in any other theatre in New York be continued in force until the termination of the suit, but on condition that plaintiff pay to her, or on her order, every Monday, during such restraint, the one-fourth of each week's salary, as provided for in the contract, and also that plaintiff pay defendant forthwith the sum which has accrued under such stipulation since the granting of the temporary injunction accompanying the order to show cause.

326. The cases of Keene v. Kimball,[1] Keene v. Wheatley,[2] and Keene v. Clark[3] were brought by Miss Keene after she became possessed by purchase of the comedy known as "Our American Cousin," which proved of great value to her, and was represented in

[1] 16 Gray (Mass.) 545.
[2] 5 Rob. 38.
[3] 29 Am. Law Reg. 33.

Philadelphia, New York, Boston, and other places in the United States, to very large audiences, which induced other managers to procure, by various means, and to produce the same play at their houses. The bills in the above cases set forth substantially the same facts of purchase, proprietorship, and production of the comedy as in the case against Wheatley, which we have already considered: that its value was very great to the complainant, and had been largely enhanced and increased by her own skill, care, and personal attention; and the skill and ability (as in the case of Keene v. Wheatley) of her employees.

In the case in Massachusetts,[1] the plaintiff, upon the above facts, asked an injunction to restrain the performance of the comedy by the defendant, who was proprietor of the Boston Museum. In this case it seems to have been admitted that the plaintiff had no copyright, and that nothing had been done by the defendant which was a violation of a copyright, had she possessed one. Neither did she invoke the protection of the United States statute of August 18, 1856,[2] known as the dramatic copyright act; but rested her case solely upon her common-law right of property in a literary production, as in the case in Pennsylvania.[3] Judge Hoar, in delivering the decision, held, that a play once published by its author, may be represented on the stage by any person without an infringement on the author's rights, "and no case has been cited," he continued, "nor are we aware that any exists in England or America in which the representation of a play has been restrained by injunction where no copyright has been acquired, and where

[1] Keene v. Kimball, 16 Gray, 545.
[2] 11 U. S. at L. 169.
[3] Keene v. Wheatley, 29 Am. Law Reg. 35.

the proprietor had permitted its public representation for money, except in the case of Morris v. Kelley,[1] which was heard ex parte by Lord Eldon, and where it does not appear upon what grounds the injunction was asked or granted." Unless it proceeded upon the allegation of the use of a surreptitious copy of the work, it seems to be impossible to reconcile it with the earlier case of Coleman v. Wathen,[2] or with the subsequent decision in Murray v. Elliston.[3] In both of these cases the plaintiff was the owner of a copyright of the play, and yet its representation upon the stage was held to be no violation of his rights.

This case, and that of Keene v. Wheatley,[4] which it follows, will be found to hold briefly as follows:

327. The sole proprietorship of an author's manuscript, and of its incorporeal contents wherever copies exist, is, independently of legislation, in himself and his assigns, until he publish it. Where a copyright under the statute exist, the publication cannot affect this right, but where a copyright does not exist, an unqualified publication, and one unrestricted by any condition, such as the making or sanctioning its literary or dramatic representation, is a dedication to the public, and its proprietor cannot thereafter maintain an objection to such representation or representations as others are enabled either directly or secondarily to make from its having been retained in the memory of any of the audience. "In other words, the public acquire a right to the extent of the dedication, whether complete or partial, which the proprietor has made of it to the public."

[1] J. & W. 481.
[2] 5 T. R. 245.
[3] 5 B. & Ald. 657.
[4] 9 Amer. Law Reg. 33

It is to be carefully observed, however, that the distinction between a general and a limited publication is not affected by this ruling. Said Judge Hoar, "There may be a limited publication by communication of the contents of the work by reading, representation, or restricted private circulation, which will not abridge the rights of the author to the control of his work any further than necessarily results from the nature and extent of this limited use which he has made or allowed to be made of it."

"These principles," continued the judge, "sustain the demurrer to the plaintiff's bill. She has publicly represented the play, 'Our American Cousin,' before audiences consisting of all persons who chose to pay the price charged for admission to her theatre. She has employed actors to commit the various parts to memory, and unless they are restrained by some contract, express or implied, we can perceive no legal reason why they might not repeat what they have learned, before different audiences, and in various places. If persons, by frequent attendance at her theatre, have committed to memory any part or the whole of the play, they have a right to repeat what they have heard to others. We know of no right of property in gestures, tones, or scenery which would forbid such reproduction of them by the spectators as their powers of imitation might enable them to accomplish."

"It should be perhaps added, to avoid misconstruction, that we do not intend in this decision to assert that there is any right to report, phonographically[1] or otherwise, a lecture or other written discourse, which its author delivers before a public audience, and which he desires again to use in like manner for his own

[1] *Vid.* Keene v. Clarke, 5 Rob. 38.

profit, and to publish it without his consent, or to make any use of a copy thus obtained. The student who attends a medical lecture may have a perfect right to remember as much as he can, and afterward to use the information thus acquired in his own medical practice, or to communicate it to students or classes of his own, without involving the right to commit the lecture to writing for the purpose of subsequent publication in print, or by oral delivery.[1] So any one of an audience at a concert or opera may play a tune which his ear has enabled him to catch, or sing a song which he may carry away in his memory, for his own entertainment or that of others, for compensation or gratuitously, while he would have no right to copy or publish the musical composition We found our opinion wholly upon the doctrine that there is nothing in the plaintiff's bill to show that the defendant has done anything beyond that which the dedication of the plaintiff's property to the public authorized him to do, and our decision goes no further than to hold that the representation by the defendant of a dramatic work of which the proprietor has no copyright, and which she had previously caused to be publicly represented and exhibited for money, is no violation of any right of property, although done without license from such proprietor, and, as it does not appear to have been done in violation of any contract or trust, cannot be restrained by injunction."

328. In this case the following features are to be carefully noticed: (1.) The play was originally composed in England for performance at a London theatre; its author, a non-resident alien, (2) for a valuable consideration, assigned and transferred his

[1] *Vid.* Bartlett v. Chittenden, 4 McLean.

proprietorship in it for the United States to Miss Keene, the complainant, who (3) immediately thereupon took all measures for securing a copyright performable without a publication in print. (4) The play, under her management and at her expense, was materially altered, and, as altered and adapted, was publicly represented at the complainant's theatre. (5) It was not printed, and (6) many of the alterations were never even written, but only pronounced by the actors employed in its representation on the stage. The defendants, proprietors and managers of a theatre at Philadelphia, performed the play (7) without the complainant's license, (8) closely imitating its general and particular performance under the complainant's management, (9) availing themselves besides of a copy of the English manuscript, which had been surreptitiously passed into their hands by an actor at the London theatre for which the play had been composed, and (10) the written and unwritten additions were, without the complainant's permission, communicated to the defendants by an actor in her (complainant's) employ. These points were all carefully considered and passed upon as follows:

1. The author not being a citizen of the United States, his production was not copyrightable within their limits, and, therefore, the complainant has no standing in court as a complainant, under and by virtue of the United States statutes of copyright. For her cause of action, however, she might sue, said the court, if the court had permission through the citizenship of the parties.

2. That having no property in his production in the United States, the foreign author's assignment was in law inoperative, except as a mere license, but, nevertheless, having been for a valuable consideration

it was in equity a valid assignment of whatever property the assignor had in his production.

3. The acts of copyright were superfluous, since whatever rights the complainant possessed in the uncopyrightable manuscript, she possessed by virtue of the common law.

4. The complainant, under the law of "literary accretions," was proprietor of the alterations made in the play by actors in her employment.

5. Never having been printed or published, the complainant was its literary proprietor, and as such, could have sustained her suit for the literary larceny of its contents, if she had not herself dedicated it to the public by representing it theatrically.

6. Such alterations in a written manuscript as exist only in the brain of an artist, are not a subject for litigation. A court cannot enjoin a man from altering the coinage of his brain. But, nevertheless, the complainant was entitled to be protected in the unwritten additions, on the ground that they were not independent compositions, but accessories to the principal play; that they were made for her by a person in her employ, and that she had priority in the employment of him, of which equity would not allow her to be deprived by unfair competition.

8. A publication, literary or dramatic, may be either limited or general. It is general when the communication affecting it is not restricted as to the persons to whom and the purpose for which it is made. When general it is a dedication to the public for such unlimited uses, including all modes of publishing and republishing, as it may be the means of directly or secondarily enabling any person to make. Complainant's prior performance of the play at her own theatre was a general publication. Therefore, if it had been the

means of directly or secondarily enabling the defendants to represent it through a retention of its words in their own memory, or in that of others of her audience, her literary proprietorship could not have been so asserted as to enable her to maintain her suit.

9. The surreptitious procurement of the manuscript from another source was a violation of the complainant's rights as literary proprietor, and had she not herself publicly represented the play upon the stage, she could have maintained an action for such violation.

329. Previously to the case of Crowe v. Aiken, it had been held by the same court[1] (Drummond, J.) that in order to entitle an alien to the benefit of the copyright laws he must prove himself a resident of the United States. And that such residence, within the meaning of the statute, is to be determined by his intention, accompanied by his acts, and not simply by lapse of time. That the fact that the alien left the country after going through the form of copyrighting the title of his manuscript does not necessarily deprive him of his rights; his change of interest does not avoid the copyright, although, if previous to the filing he had such intention, he will not be within the protection of the statute, and that a consent of the author to publication abroad places him in the position of a foreign author, and is an abandonment of his rights under the statute.[2] But, according to the later case, the alien author need not ask the protection of any statute on the subject, since his protection is more complete and perfect without it by common law, and since (to again quote the same decision) common-law rights can run

[1] U. S. Circuit Court for the Seventh Circuit, District of Illinois.

[2] Boucicault v. Wood, 2 Biss. 34.

only up to publication, and that thereafter the work is protected solely by statute.[1]

330. The case of Palmer v. Thorne[2] is a peculiar one, and illustrates a less familiar application of the principle we are considering. Upon a certain play, "Les Deux Orphelins," appearing in Paris, a correspondent of the New York Herald, resident in that city, wrote to that newspaper a synopsis of its scenery, plot, and incidents. Thereupon two playwrights, Johnson and Cheever, working in conjunction upon the basis of the correspondent's letter, produced a play called "The Two Orphans," which they agreed to allow the defendant, who was lessee and manager of Niblo's Garden Theatre in New York city, to represent upon his stage, upon terms. Meanwhile the plaintiff had purchased a translation of the original play, and notified defendant that they claimed the sole right to its representation.

The question would have doubtless turned upon one of two questions, namely, whether the translation was copyrightable, and copyrighted in the United States, and whether the play thus formed upon the basis of the letter of the newspaper correspondent by the two playwrights, who had never seen the French play, was a copy thereof. But while the plaintiff was held entitled to a preliminary injunction, the case itself never proceeded to a trial.

331. The contract which an actor makes with a manager for the performance of personal services, unlike other contracts, is unassignable, so as to vest in the assignee the right to give directions to and have control over the person having engaged to perform the services. So, where an actor has bound himself to give theatrical performances for A. at any place A. might direct, for a time certain, and not to perform for

[1] 2 Biss. 34.

[2] N. Y. Herald, Sept. 10, 1874.

any one else, it was held that A. could not assign his rights under the contract to plaintiff, so as to give him the right to prevent defendant from giving performances for other persons.[1]

In other respects the contract is like all others between employer and employed. Plaintiff was engaged to perform as an actor at a certain theatre for a definite time, and at a fixed salary, but was discharged before the period for which he was engaged had elapsed. He denied the defendant's right to discharge him, and offered performance on his part, which was not accepted. He then left the city and remained absent until the period for which he was engaged had expired, and did not, during that period, hold himself in readiness to render his services according to the contract, nor did he make any efforts to obtain other employment. Held, that he was not entitled to recover anything but the wages due him up to the time of his departure.[2]

An assignment of a dramatic composition, to be valid, must, like all other assignments of copyright, be in writing.

Where the assignees of the copyright in a comedy sought the aid of a court of equity, but did not state in their bill that the assignment to them was in writing, Lord Eldon refused to grant an injunction till that fact should be proved. The plaintiffs afterwards produced an affidavit stating that all the manuscripts of dramatic compositions belonging to the Haymarket Theatre, including the comedy in question, had been assigned to them by three several indentures in writing, dated in the years 1805, 1808, and 1819. Lord Eldon then said he would assume

[1] Hayes v. Willis, 4 Daly (N. Y.) 259. In this case the right of the plaintiff as assignee to a ne exeat was denied.

[2] Polk v. Daly, Id. 411.

the plaintiff's title to be regular, till the contrary were shown, and granted the injunction prayed for.[1]

332. The once leading case of Jeffreys v. Boosey,[2] held that a copyright was indivisible. and that the owner could not assign a part of the right, as to print in a particular place or country, or do anything less than assign the whole right given by the statute. But we doubt, at least in the case of dramatic copyright, if the rule would be so held to-day. An assignment of the right to represent a play does not include the right to print it.[3]

333. Toole v. Young[4] was a case where one Hollingshead wrote a novel called "Not Above His Business," which was published in a periodical called "Good Words," and about two months afterwards a drama called "Shop," which was, in effect, a dramatization of the novel. Two years afterward Hollingshead assigned this drama of "Shop" to the plaintiff, who, however, did not cause it to be produced or represented on any stage, nor to be published or printed. Four years after the assignment, one Grattan, being ignorant that the novel, "Not Above His Business," had been dramatized, himself dramatized it, calling his play "Glory," and assigning it to the defendant, who represented it on a stage of which he was proprietor. Held, that Hollingshead having published his novel, anyone might dramatize it, and that although the two dramas, "Glory" and "Shop," were founded upon Hollingshead's novel,

[1] Morris v. Kelly, 1 J. & W. 481. *Vid.*, however, *post.*, (chapter on Contracts, &c., and cases cited); also, Kyle v. Jeffreys, 21 Scotch Sess. Cas. N. S. 8; 18 Id. 906, which holds that the assignment may be by parol, if it be registered at Stationers' Hall. Such an assignment need not be attested by witnesses in England. Shortt, L. Lit. p. 153, and cases cited.

[2] 4 H. L. C. 978.

[3] Stage Right, by John Coryton, Barrister: London, 1873.

[4] L. R. 9 Q. B. 523.

the representation by Grattan of the play of "Glory," was not a representation of the drama of "Shop" written by Hollingshead, and that the plaintiff was not entitled to the statutory penalties for an infringement.

334. The English statutes of dramatic copyright, by using the words "place of dramatic entertainment," introduce an additional element into the inquiry, namely, as to what will constitute a place of dramatic entertainment.[1] But in the construction of the United States statute on the subject, a similar question does not arise.

In copyrighting manuscripts, the title filed must be printed, and not written, and the time elapsing between copyright of the title and the completion of the manuscript will not affect the copyright. In case of every variation in the title, a new copyright must be taken out, and the exact and precise words must be copyrighted in order to make the registration valid. The particular form or style of type in which the title is printed, is of course immaterial. In the case of dramatic manuscripts, it appears that the notice of copyright required by the law to be printed in the words, "entered according to act of congress, &c.," need not appear. Neither need two copies of the manuscript be filed.[2]

[1] But see *ante*, vol. 1, p. 470.

[2] The answer to the question, What is a place of dramatic entertainment within the statutes 3 & 4 Will. 4, c. 15, and 5 & 6 Vict. c. 45? is given by the court of king's bench, in Russell v. Smith. Any place in which a piece of a dramatic character is represented is, for the time being, a place of dramatic entertainment within the meaning of those statutes. "The use for the time in question," says Lord Denman, C. J., in that case, "and not for a former time, is the essential fact. As a regular theatre may be a lecture-room, dining-room, ball-room, and concert-room on successive days, so a room used ordinarily for either of those purposes would become for the time being a theatre, if used for the representation of a regular stage play."—Shortt, L. Lit. p.

335. IV. The section of the act of congress of July, 1870, revising, consolidating, and amending the statutes relating to copyrights and patents, and repealing all previous enactments on the subject, which enacted that "any person who shall print or publish any manuscripts whatever, without the consent of the author or proprietor first obtained (if such author or proprietor be a citizen of the United States, or resident therein), shall be liable to said author or proprietor for all damages occasioned by such injury, to be recovered by action in the case in any court of competent jurisdiction," it would appear, following decisions under the 9th section of the act of 3d February, 1831 (which was to a similar effect), will not be construed to give redress for an unauthorized representation of the contents of a dramatic manuscript, the publication intended by the statute being a publication in print.[1]

336. In the absence of an International Copyright law between Great Britain and the United States, and in view of the large and increasing demand for English plays, managers and dramatic authors have resorted to many and ingenious expedients to secure a monopoly of the representation of their plays while performing them or causing them to be performed in the United States. The transient nature of these productions, however, whose lucrative character can continue only during a limited season, or "run," while affecting in no degree the frequency with which courts are called upon to interfere between rival managers and actors, has the effect to render the law upon this subject, if possible, more unsettled than ever, since the particular case in question very rarely reaches a court of last resort for a careful enunciation

[1] Keene v. Wheatley, 9 Am. Law Reg. pp. 23, 45.

of the principles involved, but, after a temporary injunction at a special term (which in most cases is the only relief sought by the complainant), it is usually settled by the litigants themselves, as we have before remarked. If an English dramatic writer refrain from himself multiplying copies of his production, and send the original manuscript to the United States, the practical difficulties of procuring it, will in themselves, obviate much of the necessity of a stringent law. His manuscript is in the hands of its proprietor by common law, and against one surreptitiously copying its contents, either by actual access to the manuscript, or from the lips of the actors engaged in its representation on the stage, his remedy lies under no copyright laws of this country, but at common law. If he cause his play to be printed, in order that every actor may be in possession of a copy, and one of these copies finds its way into the hands of a rival manager, the question then arises as to whether the play has been published so far as to make the printed play, in the absence of a copyright, a legitimate dedication to the public, and therefore at the legitimate service of whoever desires to make use of it. The better opinion would seem to be that the mere fact of privately printing a manuscript does not change its essential character of an unpublished production, but, in the present state of the law, a wise author will refrain from printing, and so save the occurrence of the question at all.

The difficulties arising in this case from the nonexistence of an international copyright law, have been attempted to be obviated by a not unusual resource of authors, namely, of joint authorship. If a citizen of the United States in good faith associate with himself a citizen of a foreign country, and they jointly produce a literary work the result of their own

"preconcerted joint design,"[1] there is nothing to prevent each of them from copyrighting the production in the country of which he is a citizen.[2]

337. The important inquiry arising in the case of the dramatization of romances, tales, novels, poems, or other works not originally published in a dramatic form, by others than the one so dramatizing it, now, as we have seen, expressly reserved to the author of the original work by statute,[3] will be found examined in the chapter on Piracy. In all questions involving the common-law rights of authors, the state courts have jurisdiction. Said Curtis, J., in Isaacs v. Daly:[4] "It is objected that the action should have been commenced in the federal courts. This court (the Superior Court of the city of New York) has long exercised a jurisdiction to protect literary property; and the act of congress of 1870, conferring jurisdiction in that class of suits upon the federal courts, appears to afford an additional remedy, without affecting the pre-existing jurisdiction in respect to the rights the plaintiff has in the play by common law, independently of all statutes."

[1] Levi v. Rutey, L. R. 6; C. P. 522.

[2] In the case of the comedy of "Ours," its author, Mr. T. W. Robertson, an Englishman, procured several immaterial portions thereof to be written by the late Charles F. Browne (Artemus Ward), and the production was jointly copyrighted both in England and America. In cases where a fraud is intended for the sole purpose (as above) of avoiding the copyright-laws of the two countries, the difficulty of arriving at due legal proof thereof might be its immunity, though equity would of course annul such a transaction, if once clearly spread before it. Levi v. Rutey.

[3] Laws of 1870, § 106, Revision of 1873–4, § 4970.

[4] New York Times, March 5, 1874. See Palmer v. De Witt, 47 N. Y.

CHAPTER IV.

OF NEWSPAPERS AND PERIODICALS.

338. There is no more important branch of the law of literature than that relating to newspapers. The interests and the capital involved in them have come, in these days, to be immense. They afford support to thousands of editors, compositors, publishers, correspondents, and literary men; their circulation has grown commensurate with the civilized world, while the modern newspaper is in itself a volume of opinions, chronicles, records, and suggestions from every corner of the globe, prepared not by one author, but by hundreds.

It is believed that we are indebted to the Italians for the idea of newspapers. The title of their gazettas was perhaps derived from gazzera, a magpie or chatterer; or more probably from a farthing coin, peculiar to the city of Venice, called gazetta, which was the common price of the newspapers. Other etymologists derive it from the Latin *gaza*, which would colloquially lengthen into gazetta, and signify "a little treasury of news." The Spanish so derive it from the Latin gaza, as likewise, their *gazatero* and our "gazetteer," for a writer of the gazette, and—what is peculiar to themselves—"gazetista," for a lover of the gazette.

"Newspapers, then, took their birth in that principal land of modern politicians, Italy, and under the government of that aristocratical republic, Venice. The first paper was a Venetian one, and only monthly; but it was merely the newspaper of the government.

Other governments afterwards adopted the Venetian plan of a newspaper, with the Venetian name; from a solitary government gazette, an inundation of newspapers has burst upon us."

Chalmers, in his life of Ruddiman, gives a curious particular of these Venetian gazettes: "A jealous government did not allow a printed newspaper; and the Venetian gazetta continued long after the invention of printing to the close of the sixteenth century, and even to our own days, to be distributed in manuscript." In the Magliabechian library at Florence are thirty volumes of Venetian gazettas, all in manuscript."[1]

Those who first wrote newspapers were called by the Italians "menanti"; because, says Vossius, they intended commonly, by these loose papers, to spread about defamatory reflections, and were therefore prohibited in Italy, by Gregory XIII., by a particular bull, under the name of menantes, from the Latin minantes, threatening. Menage, however, derives it from the Italian menare, which signifies to lead at large, or spread afar.

Mr. Chalmers discovers in England the first newspaper. "It may gratify national pride," says he, "to be told that mankind are indebted to the wisdom of Elizabeth and the prudence of Burleigh for the first newspaper. The epoch of the Spanish Armada is also the epoch of a genuine newspaper. In the British Museum are several newspapers which were printed while the Spanish fleet was in the English Channel, during the year 1588."[2] It was a wise policy to prevent, during a

[1] Disraeli.

[2] In this obscure origin they were skillfully directed by the policy of that great statesman, Burleigh, who, to inflame the national feeling, gives an extract of a letter from Madrid,

moment of general anxiety, the danger of false reports, by publishing real information. The earliest newspapet is entitled "The English Mercurie," which, by authority, "was imprinted at London by her highnesses printer, 1588." These were, however, but extraordinary gazettes, not regularly published.[1]

which speaks of putting the queen to death, and the instruments of torture on board the Spanish fleet.—Curiosities of Literature, p. 58.

[1] The first newspaper in the collection of the British museum is marked No. 50, and is in Roman, not in black letter. It contains the usual articles of news, like the London gazette of the present day. In that curious paper there is news dated from Whitehall, on the 23rd July, 1588. Under the date of July 26 there is the following notice: "Yesterday the Scots ambassador being introduced to Sir Francis Walsingham, had a private audience of her majesty, to whom he delivered a letter from the king, his master, containing the most cordial assurances of his resolution to adhere to her majesty's interests, and to those of the Protestant religion. And it may not here be improper to take notice of a wise and spiritual saying of this young prince (he was twenty-two) to the queen's minister at his court, viz., that all the favor he did expect from the Spaniards was the courtesy of Polypheme to Ulysses, to be the last devoured." Mr. Chalmers defies the gazetteer of the present day to give a more decorous account of the introduction of a foreign minister. The aptness of King James's classical saying carried it from the newspaper into history. I must add, that in respect to his wit no man has been more injured than this monarch. More pointed sentences are recorded of James I. than perhaps of any prince, and yet such is the delusion of that medium by which the popular eye sees things in this world, that he is usually considered as a mere royal pedant. I have entered more largely on this subject in an "Inquiry of the Literary and Political Character of James I."

From one of these "mercuries" Mr. Chalmers has given some advertisements of books, which run much like those of the present times, and exhibit a picture of the literature of those days. All these publications were "imprinted and sold" by the queen's printers, Field & Baker.

1st. An admonition to the people of England, wherein are answered the slanderous untruths reproachfully uttered by

Periodical papers appear to have become prevalent to a considerable extent, in England, during the civil wars of the cavaliers and the roundheads, each party having its particular organ.[1]

Mar-prelate, and others of his brood, against the bishops and chief of the clergy.

2ndly. The copy of a letter sent to Don Bernardin Mendoza, ambassador in France, for the king of Spain, declaring the state of England, &c., the second edition.

3rdly. An exact journal of all passages at the siege of Bergen-op-Zoom, by an eye-witness.

4thly. Father Parson's Coat well Dusted; or short and pithy animadversions on that infamous fardle of abuse and falsities, entitled Leicester's Commonwealth.

5thly. Elizabetha Triumphans, an heroic poem by James Aske, with a declaration how her excellence was entertained at the royal course at Tilbury, and of the overthrow of the Spanish fleet.

[1] Says Disraeli, speaking of the writers of these "newspapers": "They form a race of authors unknown to most readers of these times. The names of some of their chiefs, however, have just reached us, and in the minor chronicle of domestic literature I rank these notable heroes—Marchamont Needham, Sir John Birkenhead, and Sir Roger L'Estrange.

"Marchamont Needham, the great patriarch of newspaper writers, was a man of versatile talents, and more versatile politics; a bold adventurer, and most successful, because the most profligate of his tribe. We find an ample account of him in Anthony Wood. From college he came to London; was an usher in Merchant Taylor's school; then an under clerk in Gray's Inn; at length studied physic, and practiced chemistry; and finally he was a captain; and, in the words of honest Anthony, 'siding with the rout and scum of the people, he made them weekly sport by railing at all that was noble, in his Intelligence, called Mercurius Britannicus, wherein his endeavors were to sacrifice the fame of some lord, or of any person of quality, and of the king himself, to the beast with many heads.' He soon became popular, and was known under the name of Captain Needham, of Gray's Inn; and whatever he now wrote was deemed oracular. But whether from a slight imprisonment for aspersing Charles I., or some pique with his own party, he requested an audience on his knees with the king, reconciled himself to his majesty, and

Peter Heylin, in the preface to his "Cosmography," mentions that "the affairs of each town or war were better presented to the reader in the 'Weekly News-

showed himself a violent royalist, in his 'Mercurius Pragmaticus,' and galled the Presbyterians with his wit and quips. Some time after, when the popular party prevailed, he was still further enlightened, and was got over by President Bradshaw as easily as by Charles I. Our mercurial writer became once more a violent Presbyterian, and lashed the royalists outrageously in his 'Mercurius Politicus.' At length, on the return of Charles I., being now conscious, says our friend Anthony, that he might be in danger of the halter, once more he is said to have fled into Holland, waiting for an act of oblivion. For money given to a hungry courtier, Needham obtained his pardon under the great seal. He latterly practiced as a physician among his party, but lived universally hated by the royalists; and now only committed harmless treasons with the college of physicians, on whom he poured all that gall and vinegar which the government had suppressed from flowing through its natural channel.

"The royalists were not without their Needham, in the prompt activity of Sir John Birkenhead. In buffoonery, keenness, and boldness, having been frequently imprisoned, he was not inferior, nor was he at times less an adventurer. His 'Mercurius Anglicus" was devoted to the court, then at Oxford. But he was the fertile parent of numerous political pamphlets, which appear to abound in banter, wit, and satire. He had a promptness to seize on every temporary circumstance, and a facility in execution. His 'Paul's Church Yard' is a bantering pamphlet, containing fictitious titles of books and acts of parliament, reflecting on the reformers of these times. One of the poems was entitled 'The Jolt,' being written on the Protector having fallen off his own coach-box. Cromwell had received a present from the German count, Oldenburgh, of six German horses, and attempted to drive them himself in Hyde Park, when the great political phaëton met the accident, of which Sir John Birkenhead was not slow to comprehend the benefit, and hints how unfortunately for the country it turned out! Sir John was, during the dominion of Cromwell, an author by profession. 'After various imprisonments for his majesty's cause,' says the venerable historian of English literature, already quoted, 'he lived by his wits, in helping young gentlemen out at dead lifts in making poems, songs, and epistles, on and to their mistresses: as also

books.' Hence we find some papers entitled News from Hull, Truths from York, Warranted Tidings from Ireland, &c. We find, also, 'The Scot's Dove' opposed to 'The Parliament Kite,' or 'The Secret Owl.' Keener animosities produced keener titles: 'Heraclitus Ridens' found an antagonist in 'Democritus Ridens,' and 'The Weekly Discoverer' was shortly met by 'The Discoverer Stript Naked.' 'Mercurius Britannicus' was grappled by Mercurius Mastix, Faithfully Lashing all Scouts, Mercuries, Posts, Spies, and others." Under all these names, papers had appeared, but a Mercury was the prevailing title of these 'News-Books,' and the principles of the writers were generally shown by an additional epithet. We find an alarming number of these Mercuries, which, were the story not too long to tell, might excite some laughter; they present us with a very curious picture of those singular times."

At the Restoration the proceedings of parliament were interdicted to be published, unless by authority; and the first daily paper after the Revolution took the popular title of "The Orange Intelligencer."

In the reign of Queen Anne, there was but one daily paper; the others were weekly. Some attempted

in translating, and other petite employments.' He lived, however, after the Restoration, to become one of the masters of requests, with a salary of three thousand pounds a year. But he showed the baseness of his spirit (says Anthony), by slighting those who had been his benefactors in his necessities.

"Sir Roger L'Estrange among his rivals was esteemed as the most perfect model of political writing. The temper of the man was factious, and the compositions of the author seem to us coarse, yet I suspect they contain much idiomatic expression. His Æsop's Fables are a curious specimen of familiar style. Queen Mary showed a due contempt of him after the Revolution, by this anagram:

'Roger L'Estrange.
Lie strange Roger!'

"Such were the three patriarchs of newspapers.

to introduce literary subjects, and others topics of a more general speculation. Sir Richard Steele formed the plan of his "Tatler." He designed it to embrace the three provinces of manners and morals, of literature, and of politics. The public were to be conducted insensibly into so different a tract from that to which they had been hitherto accustomed. Hence politics were admitted into his paper. It remained for the chaster genius of Addison to banish this painful topic from his elegant pages. The writer in polite letters felt himself degraded by sinking into the diurnal narrator of political events, which so frequently originate in rumors and party fiction. From this time, newspapers and periodical literature became distinct works. De Saint Foix, in his curious Essais Historiques sur Paris, gives the origin of newspapers in France. Renaudot, a physician at Paris, to amuse his patients, was a great collector of news; and he found, by these means, that he was more sought after than his more learned brethren. But, as the seasons were not always sickly, and he had many hours not occupied by his patients, he reflected, after several years of assiduity given up to this singular employment, that he might turn it to a better account by giving every week to his patients, who in this case were the public at large, some fugitive sheets, which should contain the news of various countries, and obtained a royal privilege for this purpose in 1632.

The invention of reviews is ascribed to Denis de Sallo, a counsellor in the parliament of Paris, who in 1665 published his "Journal des Sçavans," in the name of the Sieur de Hedonville, his footman.[1] The

[1] The animadversions of Salio were given with such asperity of criticism, and such malignity of wit, that this new journal excited loud murmurs, and the most heart-moving complaints.

character of his work was speedily imitated throughout Europe. In 1684 appeared the "Nouvelles de la Republique des Lettres," of Bayle; and his contemporary and antagonist, Le Clerc,[1] produced three

The learned had their plagiarisms detected, and the wit had his claims disputed. Sarasin called the gazettes of this new Aristarchus, Hebdomadary Flams! Billevezees Hebdomadaries! and Menage, having published a law-book, which Sallo had treated with severe raillery, he entered into a long argument to prove, according to Justinian, that a lawyer is not allowed to defame another lawyer, &c. Senatori malidicere non licet, remaledicere jus fasque est. Others loudly declaimed against this new species of imperial tyranny, and this attempt to regulate the public opinion by that of an individual. Sallo, after having published only his third volume, felt the irritated wasps of literature thronging so thick about him that he very gladly abdicated the throne of criticism. The journal is said to have suffered a short interruption by a remonstrance from the nuncio of the pope, for the energy with which Sallo had defended the liberties of the Gallican church.

An index to the Journal des Sçavans has been arranged on a critical plan, occupying ten volumes in quarto, which may be considered as a most useful instrument to obtain the science and literature of the entire century.—Curiosities of Literature.

[1] Intimidated by the fate of Sallo, his successor, Abbé Gallois, flourished in a milder reign. He contented himself with giving the titles of books, accompanied with extracts; and he was more useful than interesting. The public, who had been so much amused by the raillery and severity of the founder of this dynasty of new critics, now murmured at the want of that salt and acidity by which they had relished the fugitive collation. They were not satisfied in having the most beautiful, or the most curious parts of a new work brought together; they wished for the unreasonable entertainment of railing and raillery. At length another objection was conjured up against the review; mathematicians complained they were neglected to make room for experiments in natural philosophy; the historian sickened over the works of natural history; the antiquaries would have nothing but discoveries of MSS., or fragments of antiquity. Medical works were called for by one party and reprobated by another. In a word, each reader wished only to have accounts of books which were interesting to his profession or his taste. But a review is a work presented to the public at large, and written for more than one country. In

bibliothèques—"Universelle et Historique," "Choisie," and "Ancienne et Moderne"—forming in all eighty-two volumes.'

Other reviews are, the "Memoires de Trevoux," written by the Jesuits. Their caustic censure and vivacity of style made them redoubtable in their day; spite of all these difficulties, this work was carried to a vast extent.—Id.

' Inferior to Bayle in the more pleasing talents, he is, perhaps, superior in erudition, and shows great skill in analysis; but his hand drops no flowers! Apostolo Zeno's Giornale de' Litterati d'Italia, from 1710 to 1733 is valuable. Gibbon resorted to Le Clerc's volumes at his leisure, "as an inexhaustible source of amusement and instruction."

Beausobre and L'Enfant, two learned Protestants, wrote a Bibliotheque Germanique, from 1720 to 1740, in 50 vols.; our own literature is interested by the Bibliotheque Britannique, written by some literary Frenchman, noticed by La Croze in his "Voyage Litteraire," who designates the writers in this most tantalizing manner: "Les auteurs sont gens de merite et que entendent tous parfaitement l'Anglois; Messrs. S. B. le M. D. et le savant Mr. D." Posterity has been partially let into the secret; De Missy was one of the contributors, and Warburton communicated his project of an edition of Gelleius Paterculus. This useful account of only English books begins in 1733, and closes in 1747, Hague, 23 vols.; to this we must add the Journal Britannique, in 18 volumes, by Dr. Maty, a foreign physician residing in London; this journal exhibits a view of the state of English literature from 1750 to 1755. Gibbon bestows a high character on the journalist, who sometimes "aspires to the character of a poet and a philosopher; one of the last disciples of the school of Fontenelle."

Maty's son produced here a review known to the curious, his style and decisions often discover haste and heat, with some striking observations: alluding to his father, Maty, in his motto, applies Virgil's description of the young Ascanius, "Sequitur patrem non passibus æquis." He says he only holds a monthly conversation with the public; but criticism demands more maturity of reflection and more terseness of style. In his obstinate resolution of carrying on this review without an associate, he has shown its folly and its danger; for a fatal illness produced a cessation, at once, of his periodical labors and his life.—Id.

they did not even spare their brothers. The "Journal Literaire," printed at the Hague, and chiefly composed by Prosper Marchand, Sallengre, and Van Effen, who were then young writers. This list may be augmented by other journals, which sometimes merit preservation in the history of modern literature.

In England, "The Memoirs of Literature," and "Present State of the Republic of Letters," were the titles of early publications of this character, while "The Monthly Review," the first regular publication answering to our present idea of a critical journal, appeared in 1749.

339. The principles of the law of literature, as suggested in the preceding pages, apply with equal force to newspapers,[1] except in so far as from their nature and circumstances it is abridged or qualified.

[1] In England, for a long time, the government regarded the press with jealousy, and many enactments were made to facilitate the proof of the publication of newspapers as well as to secure to government the heavy duties with which they were charged. Even the size of newspapers was to a late period regulated by statute. An act of the 6 Geo. 4, c. 119, first allowed them to be printed on paper of any size.

Amongst the provisions swept away by the act of 32 & 33 Vict. c. 24 (called "The Newspapers, Printers, and Reading Rooms' Act"), were enactments requiring, before the publication of any newspaper, the delivery at the stamp office of a declaration containing the title of the paper, description of the house where it was to be published, and the names and places of abode of the printer, publisher, and proprietor, certified copies of which declarations were to be received as conclusive evidence of everything contained in them relating to the newspapers. Copies of all newspapers published had to be delivered to the commissioners of stamps and taxes, and might be produced in evidence. Every supplement to a newspaper must have had the word "supplement" printed on it, and have had the same title and date as the newspaper, and a penalty was incurred by publishing supplements without the newspapers.

Every person who prints any paper for hire, reward, gain,

340. The impracticability of copyrighting under the statutes each succeeding issue of a newspaper, renders them somewhat independent of the laws of copyright, though there is no reason why each successive issue should not be duly entered according to act of congress, if the proprietor should desire to do so.

The bulk of the contents of a newspaper, whether consisting of advertisements, news items, editorials, or miscellaneous matter, is generally, by a comity and custom of the newspaper fraternity, considered, when once published, at the service of any newspaper or other publisher who chooses to quote or appropriate it—the esprit du corps of each being considered as completely satisfied, if "credit" is given to the first source. If any particular matter be published in a newspaper, which it is especially desired, however, to protect, there appears to be no objection to its being copyrighted, though, in that case each succeeding issue of the newspaper containing the matter must be deposited with the librarian of congress, in the prescribed and usual way.

In Platt v. Walter,[1] the court doubted strongly whether a copyright can exist in the case of news-

or profit, must still carefully preserve and keep one copy (at least) of every paper so printed by him or her, on which he or she must write, or cause to be written or printed, in fair and legible characters, the name and place of abode of the person or persons by whom he or she is employed to print the same. Every person so printing, who neglects to have written or printed the name of the employer, or to keep or preserve it for the space of six calendar months next after the printing thereof, or to produce and show the same to any justice of the peace who within the said space of six calendar months may require to see the same, is, for every such omission, neglect, or refusal, to forfeit and lose the sum of twenty pounds.—Shortt, L. Lit., p. 256.

[1] 17 L. T. N. S. 159; *vid.* Clayton v. Stone, 2 Paine, 383–391.

papers, and referred to Ex parte Foss,[1] as seeming to imply a doubt whether there was such a thing as copyright in a newspaper. One of the justices spoke of the right to publish newspapers bearing a particular name as "that which has been called the copyright of a newspaper," but his colleague in the same case, considers copyright in a newspaper as a right "which undoubtedly exists."

341. The fact that the greater portions of their contents have no permanent value, and perhaps no value at all, except to the journal which is enabled to first spread them before those who will pay in money to be possessed of them, is another reason why newspapers are very rarely found invoking the statutes of copyright; and similarly the extracts, anecdotes, facetiæ, and gossip, with which columns of more valuable matter are daily brought down to the required length, every editor or editor's assistant feels at perfect liberty to clip from the exchanges on his table.

That the fact is not otherwise, is due only to the circumstances. There can be no logical reason why literary matter in which property may exist, should lose that literary character from being first published in a newspaper, whether its proprietor has or has not paid value for the matter, or why it should not be copyrighted either by the author or the publisher, like any other lawful composition.

Where the contributor to a newspaper has furnished a composition to its columns, however, there seems, as a rule, to be no further steps taken on the part of the publisher to secure it. It may thenceforth be copied into another newspaper or other published work, or the author himself may publish it singly, or

[1] 2 DeG. & J. 230.

together with other matter, in a volume. And it seems that it makes no difference whether the newspaper has paid for the contributed matter or not. It must not be forgotten, however, that this state of things arises from the comity and the toleration of the fraternity, and does not even have the authority of a custom of trade, to prevent any matter so printed, which has been copyrighted, from becoming entitled to all the protection which the act affords.

342. The principal property which the proprietor has in his newspaper, is in its title. The right to the title of a newspaper is one analogous to the right in a trade-mark, and the proprietor has a right to prevent any other person from adopting the same name for any other similar publication.[1]

343. But, by merely going through the statutory form of copyrighting a title to a periodical or newspaper which he intends to publish at a future day, a right to that particular word or form of words, constituting such title, cannot be obtained as against any who may bona fide and actually use the same; the principle being that where two persons, in good faith and without collusion, happen to copyright the same thing, the one who first makes that thing useful to the public, and available, will have the protection of the law.[2]

The same protection afforded by statutes of copyright is not in this sense prospective.[3]

[1] Clayton v. Stone, 2 Paine, 383–391; Kelly v. Hutton, L. Rep. 3 ch. App. 708; 19 L. T. N. S. 231; 38 L. J. 917, ch.; Keene v. Harris, referred to 17 Ves. 338; Longman v. Tripp, 2 Bos. & P. 67; Ex parte Foss, 3 DeG. & S. 230; Platt v. Walter, 17 L. T. N. S. 159; Shortt, L. Lit. p. 255. And see the case of Osgood v. Allen, reported *ante*, this vol. p. 308, note.

[2] See *ante*, this vol. p. 308.

[3] Shortt, L. Lit. p. 100.

Hogg v. Maxwell[1] was a suit brought by the Messrs. Hogg, who, in October, 1863, three years before the commencement of a periodical publication, called "Belgravia," had copyrighted that word as a title, to restrain the use of that word as a title by the defendants.

Said the court (Cairns, L. J.) in that case: "It is said that the word 'Belgravia,' being used upon the title-page of the magazine, was part of a volume. But at the time of making the entry in the register at Stationers' Hall, there was no volume, no part of a volume, no sheet, no separate fraction of a publication of any kind or description. There was nothing in existence, except that very entry itself, as the entry of the name of a future publication. It is quite absurd to suppose that the legislature, in providing for the registration of that which was to be the indicium of something outside the registry, in the shape of a volume or part of a volume, meant that by the registration of one word, copyright in that one word could be obtained, even although that one word should be registered as what was to be the title of a book or of a magazine. . . . I apprehend that if it were necessary to decide the point, it must be held that there cannot be what is termed copyright in a single word, although the word should be used as a fitting title for a book.[2] The copyright contemplated by the act must be not in a single word, but in some words in the shape of a volume or part of a volume, which is communicated to the public, by which the public are benefited, and in return for which a certain protection is given to the author of the work."

And in The Correspondent Newspaper Company

[1] L. Rep. 2, ch. App. 316; 16 L. T. N. S. 133; 36 L. J. 433, ch.
[2] *Vid.* also Jollie v. Jaques, 1 Blatch. 627.

v. Saunders,[1] it was doubted whether the title of a periodical formed part of the copyright, the object of the act, as to that class of publications, being to regulate the rights as between the contributors and the proprietors.

And if the work be not in esse, but only contemplated at the time of the copyright, no amount of outlay or expenditure will give a right to an injunction to restrain another from using its proposed title. "That expenditure upon a work not given to the world," said the court, in Maxwell v. Hogg, just cited, "can create, as against the world, an exclusive right to carry on a work of this nature, seems to me a proposition quite incapable of being maintained. It never, so far as I am aware, has been thought that any such equity exists. Then, if the expenditure alone will not confer such a right, will the advertisements do so? . . . He, the plaintiff, does not, by his advertisements, come under any obligation to the public to publish the work, and therefore the effect of holding the advertisements to give him a title would be, that, without having given any undertaking or done anything in favor of the public, he would be acquiring a right against every member of the public to prevent their doing that which he himself is under no obligation to do, and may never do. . . . There is a great distinction between the case of advertisement followed by publication, and a case resting upon advertisement only. In the case of advertisement followed by publication, the party publishing has given something to the world, and there is some consideration for the world's giving him a right; but in the case of mere advertisement, he has neither given, nor come under any obligation to give, anything to the world, so that

[1] 11 Jur. N. S. 541; 12 L. T. N. S. 540; 13 W. R. 804.

there is a total want of consideration for the right which he claims."[1]

But a case may occur, even where the statutory requisites as to copyrighting have been duly observed, where the conduct of the proprietor of a periodical may be of such a nature as to disentitle him to aid from a court of equity, by means of interlocutory injunction. If, for example, he lie by and knowingly allow another person to incur expense in bringing out a work, which is an infringement of his strict legal right. Thus in The Correspondent Newspaper Company v. Saunders,[2] a company was formed to establish and carry on a weekly paper called 'The Correspondent,' but, although the proprietors duly proceeded to copyright the title, the paper was not brought out until after the appearance of advertisements of the intended publication, by the defendants, of a paper bearing the same title. The defendants registered the same title, in ignorance of the intended publication by the company, and incurred considerable expense in advertisements. Said the court: "It is no doubt true that a title may be acquired, as in a trade-mark. The question is this: there being two persons equally honest, and one of them having given notice that he is about to produce an article with a certain name, and the other contemplating the same thing, whether or not the first, by bringing out his article a day or two sooner than the other, acquires a right by way of trade-mark. The plaintiffs' position is this: The defendants in perfect good faith, and not knowing of this rather dormant company, bring out their advertisements. It was incumbent on the plaintiffs then to

[1] *Vid.* Hogg v. Kirby, 8 Ves. 115, and comments thereon in chapter on Piracy.

[2] 12 L. T. N. S. 540; 11 Jur. N. S. 540; 12 W. R. 804.

communicate with them as quickly as possible, because the defendants were incurring great expense, and, by their advertisements, really playing into the hands of the plaintiffs. The plaintiffs, however, laid by for eight days, and did not give the defendants notice till after they had brought out their own paper, and, as it is to be observed, on a Wednesday, either for the purpose of gaining priority, or else having changed their day of publication, thus supplying one of the ingredients of mistake [it was said that the papers were mistaken for each other, and that the plaintiffs were thereby damnified]." An interlocutory injunction was refused, and the motion was ordered to stand over till the hearing.

Nothing in these cases, however, will be construed to overrule the right to enjoin colorable or other piracies, or imitations of the titles of newspapers or periodicals which tend to deceive the public.[1]

344. The right to a title is a chattel interest, capable of assignment and transfer, like any other.[2] The title of a periodical or newspaper has been repeatedly held to be a proper subject of copyright, as characterizing the particular publication.[3] Such title cannot, therefore, be assumed without injury, although a similar title distinguishable may be assumed.[4]

[1] Hogg v. Kirby, 8 Ves. 215.

[2] Clayton v. Stone, 2 Paine, 383–391; Kelly v. Hatton, L. Rep. 3 ch. App. 708; 19 L. T. N. S. 231; 38 L. J. 917; Keene v. Harris, referred to 17 Ves. 328; Longman v. Tripp, 2 Bos. & P. 67; Ex parte Foss, 3 DeG. & J. 230; Platt v. Walter, 17 L. T. N. S. 159. In England as in America this right is considered a chattel for the purpose of the Bankrupt Law (Longmann v. Tripp, 2 Bos. & P. 69), but is not seizable by a sheriff upon execution (Ex parte Foss, 2 DeG. & J. 230).

[3] Hogg v. Kirby, 8 Ves. 338; Constable v. Brewster, 3 Sess. Cas. 215 (N. E. 152); Copinger's Law of Copyright, p. 41; Keene v. Harris, cited 17 Ves. Jr. 338. [4] Id.

Though there is nothing analogous to copyright in the name of a newspaper, the proprietor has a right to prevent any other person from adopting the same for any other similar publication; and this right is a chattel interest, capable of transfer by purchase and sale.[1] What stress is to be laid upon the words "similar publication," may be inferred from the fact that the cases all appear to be cases of intentional violation. If the violation were unintentional, and the publications dissimilar, there would probably be a difference.

In the suit of Bradbury & Evans (his publishers) against Charles Dickens,[2] the title "Household Words," as applied to a newspaper, was held to be a part of the plaintiff's partnership assets. In this case Mr. Dickens, when withdrawing from the editorship of "Household Words," advertised that that periodical would be thereupon "discontinued." Held, that this was an unlawful tampering with a valuable property and consideration.

Where such title, name, or style is assumed for the sake of deceiving the public, the general rules governing trade-marks would, in all probability, be applied; and the right of the party aggrieved to his remedy in chancery, by injunction and accounting, is undoubted.[3]

In the United States, the decisions upon the right to a mere title or name of a newspaper, where no colorable imitation or piracy is intended, seem to lean toward the protection of the title and name.[4] But in Snowden v. Noah, and in Bell v.

[1] Kelly v. Hutton, L. Rep. 3 ch. App. 708; Shortt, L. Lit. 253.

[2] Bradbury v. Dickens, 27 Beav. 53.

[3] Cruttwell v. Lye, 17 Ves. Jr. 335; Bell v. Locke, 8 Paige, 74.

[4] Snowden v. Noah, Hopkins' Ch. Rep. 347; Bell v. Locke, *ubi supra*; and see Matsell v. Flanagan, 2 Abb. N. S. 459.

Locke,[1] where no colorable imitation was intended, and the public were not deceived, the injunction was denied.

In the later cases of Jollie v. Jacques,[2] and in Osgood v. Allen,[3] the circumstances were otherwise, the court saying in the latter case, that "the title of a periodical publication, separate and apart from the work which it is used to designate, is not protected by the copyright law;" and in the former, that "a copyright is given for the contents of a work, not for its mere title. There need be no novelty in the title."[4]

345. The question as to what extent equity will interfere to protect a title, must be examined by light of the principles of equity alone. In the case of Keene v. Harris, the trustee of a newspaper published another newspaper under the same title. The relief was granted on the ground that the second publication was a breach of trust. In Hogg v. Kirby,[5] the ground was, the false representations, but the principal ground upon which the protection will be extended will be undoubtedly the principle, as we have already stated, of the good-will of trades.

There may be at least two distinct cases in which the question will arise: 1. Where the title taken has been a long time in use. 2. Where the title is new, and but just copyrighted for a new and prospective work. There may also be two distinct classes of titles (a)—characteristic titles—such as either descriptive of

[1] Bell v. Locke, 8 Paige, 75.

[2] 1 Blatch. 618. And the same rule was laid down in Matsell v. Flanagan, 2 Abb. (Pr.) N. S. 459.

[3] 6 Am. L. T. Rep. 20, reported *ante*, p. 308.

[4] Note also the recent case of Isaacs v. Daly, *ante*, pp. 219, 306, wherein the plaintiff sought to enjoin the use of the word "charity," as a title to a dramatic composition, and the opinion of Curtis, J., denying such injunction.

[5] Cited in Cruttwell v. Lye, 17 Ves. 335, 342.

the peculiar contents of the work,[1] or of its author, or as mark its individuality, beyond the reasonable probability of coincidence; as for instance, "Mliss,"[2] for the name of a novel. "Le Constitutionel,"[3] or "Gazette de Sante,"[4] "Dictionnairie de l'Academie Française;"[5] "The Bath Chronicle;[6] "History of the Conquest of Mexico, with a preliminary view of the Ancient Mexican Civilization;" and the "Life of the Conqueror Hernando Cortez;"[7] and (6) titles so generic and natural in their wording as to be ordinarily selectable; such as a "Dictionary of the English Language;" "A History of the United States;" "A Treatise on Copyright;" "A Life of Washington;" "Railway Guide;" "A Guide to Germany," &c. In the latter cases courts would probably hesitate to grant exclusive copyrights. So, although the question has been decided both ways, the better opinion seems to be that there can be no exclusive trademark in a geographical name. In a leading case in the United States the name of a town near which a commodity was manufactured was protected as a trademark,[8] but still later decisions seem to tend the other way.[9]

346. As to the first case, where the title has been a long time in use, the main grounds of protection will be

[1] 8 Ves. 215.

[2] Harte v. De Witte, *post*, this chapter, and see chapter on Piracy.

[3] Reonouard, tom. 2, p. 125.

[4] Id. p. 128. But see Benn v. Cheeney, XVIII. Int. Rev. Record, p. 94 (No. 12); Osgood v. Allen, 6 Amer. L. T. (O. S.) 20.

[5] Merlin Questions de Droit—Properties Litteraire, § 1.

[6] Keene v. Harris, 8 Ves. 215.

[7] See Spottiswoode v. Clarke, 2 Phillips Ch. R. 154.

[8] Newman v. Alvord, 51 N. Y. 189.

[9] See Glendon, &c. Co. v. Uhler. Supreme court of Pennsylvania; U. S. Official Gazette of the patent office, vol. vi. p. 154.

the title to the periodical or regular returns which the publication, under that title, produced, which would enable the court to see and to compute at once the probable damage caused by the copying of the name;[1] or again, that the copying is a fraud upon the public. As in the case of Spottiswoode v. Clarke,[2] which was the case of such a colorable imitation of the title of a long-established almanac, as could reasonably be supposed to mislead. The title of a periodical work, such as a newspaper, by which it has been known for a long period of time, is evidently its own, and valuable; and the longer it is worn, of course the more valuable it becomes.[3] Nor can the title of a well-known work, which marks its individuality, be used for another work of a totally different character, even if used with slight modifications, if there is any chance of confusing the one work with the other.[4] In this latter case, both of the elements of a piracy were present, and a court could not withhold its protection.

The second case would be one more difficult to construe, as, in the event of a new publication, where the title had been copyrighted as a preliminary to its publication, neither of these elements of damage could arise. Being as yet an untried venture, the court could not presume that it would be pecuniarily profitable, and the title, being as yet unknown to the public, the public could not be said to be deceived by a second use of that title.

347. In the first case, of long-established publications, perhaps the distinction as to the two classes of titles might not so strictly arise, and the whole ques-

[1] 2 Story Eq. § 951; Curtis on Copyright, 295.
[2] 2 Phillip's Ch. R. 159.
[3] Renouard. tom. 2, p. 118–128, Merlin Questions de Droit, Proprietie Litteraire, § 1, Repertoire de Jurisprudence v. Livre.
[4] See Curtis on Copyright, 298.

tion resolves itself into the question whether the colorable imitation was such as to interfere with the goodwill of the publication, and as to mislead the public. For neither would be permitted or tolerated by law; and in the case of the ordinary title, the question would be rendered less generic by the circumstances, as to whether the color and design of the cover, the size, and shape, and bulk of the periodical, or possibly the day and method of its publication, were not all calculated to aid the interference, and show willfulness and bad faith. No one of these circumstances might be of itself sufficient, but all together might, as in the case of a trade-mark,[1] be taken as a cumulative infringement.

In the case of the "Dictionnaire de l'Academie Française," the French court of Cassation held that the title of "Dictionary of the French Academy" is an essential part of the dictionary itself; that to usurp it is to usurp a part of the work; that the law treats the usurpation of part of a literary work as an infringement (contre façon), and punishes it in a peculiar manner:—that if, under the title of "Theatre de Racine," a printer were to publish the plays of Bradon, and if Racine were living, and in the enjoyment of all his rights of property, it would be impossible to say that the printer had not committed a piracy (vol litteraire), and ought not to be visited with the penalties enacted for that offense. The court adopted this reasoning, and held that the object of the law of 1793 (the copyright law) was to secure to authors, their heirs and assigns, the exclusive right to print, sell, and distribute their own works, and consequently to prohibit the printing and distribution of every work which, by an

[1] See Washington Medallion Pen Co. v. Esterbrook Pen Co., cited *ante*, p. 252 this vol.

invasion, more or less extensive, could interfere with this exclusive right; and that the adoption of such a title as that in question was an offense against the law of 1793, inasmuch as it tended directly to injure the proprietors of the genuine work.[1]

The Cour Royal, however, sanctioned the publication of a journal styled the "Gazette de Santé," which another journal had formerly borne, but had abandoned, having seven months previously assumed the title "Gazette Medicale de Paris."[2]

348. The question as to the title of the (musical) composition was not regularly passed upon, however, in Jollie v. Jacques.[3] The court expressly said, in that case, "The question whether the court will interfere to prevent the use of the title in fraud of the plaintiff upon the good-will of trades is not before us, and cannot be entertained in this suit." The right secured (by the copyright) is the property in the piece of music, the production of the mind and genius of the author, and not in the mere name given to the work. That is indeed essential, as well in taking out the copyright as in identifying the composition protected, and is sometimes, doubtless, the source of as much profit as the intrinsic merits of the thing itself. But it is not the thing protected, or intended to be protected. There need be no novelty or originality in it, nor need it be even the production of the author, for anything contained in the act; it may be taken from the suggestion of a friend, or picked up from any source, as the author may desire. The title or name is an appendage to the

[1] Renouard, tom. 2, p. 128.

[2] Merlin, Questions de Droit, 1 Propertie Litteraire, § 1.

[3] Blatchf. 618. This was a bill filed to restrain the defendants from an infringement of the plaintiff's copyright in a musical composition know as "The Serious Family Polka, &c.," arranged by George Loder.

book or piece of music for which the copyright is taken out, and if the latter fails to be protected, the title goes with it, as certainly as the principle carries with it the incident.

349. A title, separated from the publication which it is used to designate, is not protected by the copyright law.[1] It is to be noticed that, therein, is an essential difference between a trade-mark and the name of a particular literary work; for a trade-mark is only infringeable by the production or sale of goods of the same kind as those protected by the first trade-mark, as, for instance, the trade-mark "Mason's Challenge Blacking," would not be infringed by the production of "Mason's" or of "Brown's" "Challenge Ink." A title, moreover, might fit any number of literary works, a poem, a play, or a novel. For example, it is very hard to imagine a literary work, especially an original work, which might not bear as its title "The Wide, Wide World," or a novel, or a play which might not be called "All's Well that Ends Well," since the business of novel or play writing is invariably to carry a hero or heroine through chances and perplexities, and bring them out well in the end. Therefore the law says you shall not copyright a title alone,[2] separated from the work itself. It takes very little penetration to perceive, that, otherwise, designing persons might support themselves by levying a sort of blackmail, under the protection of statutes of copyright, by making a business of copyrighting titles, words, and phrases in the office of the librarian of congress, thereafter waiting

[1] Osgood v. Allen, 6 American Law Times, O. S., 20. See *ante*, p. 308.

[2] Benn v. Cheney, xiii. Int. Rev. Rec. p. 94. See this case treated at length in the chapter on Dramatic Copyright.

until some laborious author had completed and published his work, when they might fall upon him, and extort damages for the use of what has cost them no labor, and very little ingenuity; or they might, with comparatively small trouble and no ingenuity whatever, ascertain what authors or playwrights were preparing certain works, to be entitled by certain names, and, by merely sending that name to the proper office, and paying the nominal fee, be enabled to prevent the author or playwright from enjoying the fruits of his legitimate labor, without paying them for their interference.

350. In the supposable case of two authors, each of whom in good faith should prepare a literary work, in themselves dissimilar, and copyrighting the same under precisely the same title, we are of opinion that the one first making his available to the public, without regard to the date of his copyright, would be entitled to protection. For, where each one came before equity "with clean hands," and with an equal claim to protection so far as his own labor and good faith was concerned, equity would be obliged to recognize a jus tertii, or third right, namely, the right of the people, which third right would most likely turn the scale. And this, as we understand it, was the case of Isaacs v. Daly, where the plaintiff had previously copyrighted a play under the name of "Charity." His play, however, had not been performed or otherwise published when the defendant produced at his theatre a play also called "Charity." It was not claimed that the plays were in any respect similar, or that the second was an infringement of the first, except as to the title. The court held that an injunction would not lie to prevent the defendant from representing the second play.[1]

[1] See *ante*, this vol. pp. 219, 305

351. The wrongful use of an author's name, as we have already seen in treating of Innocence, is a deception of the public, and will be enjoined by equity. Lord Eldon enjoined the publication of certain poems which were alleged to have been written by Lord Byron, and issued under his name, upon an affidavit of his agent that it was highly probable that they were not his, and upon the defendant's refusing to swear that he believed Lord Byron to be their author.[1] So in the case of a book purporting to be a translation of the devotions of C. C. Sturm,[2] and in the recent case of Harte v. DeWitt,[3] brought by Mr. Harte, to restrain the defendant, a publisher, from courting public patronage by attaching his (Mr. Harte's) name as author, to a book of which he was not the author. As claimed on the part of plaintiff in the suit, and not denied on the other side, on the trial, the cunning device of plaintiff was to publish and offer for sale a book purporting to be the story of "'Mliss," written by Mr. Harte, the first thirty pages of which was taken from Mr. Harte's book of the same title, while one hundred and ten succeeding pages were written by some one else. At the point where their plagiarism of Mr. Harte's book ends, and the unknown author's production begins, is inserted a brief note informing the reader that the remainder of the story is not the production of Mr. Harte. This act of defendant, it was claimed on behalf of Mr. Harte, was not only an infringement of Mr. Harte's copyright, but also of his right to his name as a trade-mark; was a fraud upon the public,

[1] Lord Byron v. Johnson, 2 Meriv. 29.

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

[3] N. Y. Supreme Court, 1st Dist. See N. Y. Times, March 24, 1875.

and, on all three grounds, a proper case for the exercise of the equitable powers of the court, in the form of an order of injunction.

The defendant admitted the facts as alleged by plaintiff, to be substantially true, but claimed that the story of 'Mliss had, by dedication to the public, become public property; that the plaintiff could not copyright his name, nor had he under the circumstances a trade-mark right in it; that in a religious point of view, his books contained characters of an immoral tendency, the right of authorship in which, a court of equity would not interfere to protect, and that the use of his name as author by defendant was legitimate and lawful, notwithstanding but a portion of the book to which it was so attached was the production of his pen.'

[1] Mr. Harte was placed on the stand and testified to the facts generally that he did not surrender his copyright of his stories which were published by him originally in monthly magazines; that he never authorized the use of his name by the defendant; that 110 pages of the book in question were not written by him, and that he considered his rights and fame as an author and his pecuniary interests to have been injured by defendant's acts.

Not disputing Mr. Harte's facts, counsel for defendant confined his cross-examination to the question of the irreligious tendency of his books. On this point he asked:

Q.—What was the design in your mind in drawing those characters, that is "Kentuck" and "'Mliss"? A.—In "Kentuck" I endeavored to draw the character of a great-hearted, good-natured, rough man, a man whose nature was fine but whose education was limited, and who had lived a good deal in rough life—whose tenderness was awakened by a helpless child, who became devoted to that child and his nature refined by it, and who eventually sacrificed his life for the sake of the child.

Q.—And the lesson to be drawn from that character is, in your judgment, what, as a literary man? A.—The lesson of sacrifice.

Q.—What was the character of "'Mliss"? A.—The char-

352. The question as to copyright in newspapers was examined in the case of Clayton v. Stone.[1]

Said Thompson, J., in that case, in 1821,[1] "The

acter of "'Mliss" was that of a bright, rather preternaturally smart child, with something of a man's intellect, who had been very ignorant and was put to school; who had before her certain problems in her school lessons, of which she had very little prior knowledge, and which she was endeavoring to understand. One of these ran counter to something that had been taught her in the Sunday-school class, and she found some difficulty in reconciling the two statements, and expressed herself that way.

In reply to further questions on this subject, Mr. Harte testified that he did not consider any of his characters as tending to discredit the doctrines of the Bible, and certainly were never so intended by him; he did not consider that anything in the story of "The Outcast of Poker Flats" or "The Luck of Roaring Camp" had any such tendency.

At the close of the testimony in the case, Mr. Warren, on the part of the defendant, asked a week to hand in points of law on the questions involved. He thought he would be able to satisfy the court as matter of law that plaintiff [Mr. Harte] had no right to prohibit the use of his name in the form in which the defendant had used it—that, in fact, he had no exclusive right to his name as an author.

Judge Van Brunt.—Do you mean to contend that a man has no right to his own name—that you can publish something under my name as author, and I cannot restrain you from the act?

Mr. Warren.—Yes, your Honor. I mean that we have a right to publish a book of which you may be the author, putting your name as author, and inserting the Lord's Prayer at back of it, and you cannot object.

Judge Van Brunt.—I can restrain you from publishing the Lord's Prayer as my production. This book, I find, as matter of fact, to be a fraud, and a court of equity has a right to interpose to prevent fraud. It is sold as "'Mliss," by Bret Harte, and the purchaser as such, after reading thirty pages, meets a note by the publisher informing him that the remainder of the book is not by Bret Harte. If that is not a fraud, I'd like to be told what can be.

Mr. Walker closed in by adding that the name of Bret

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[1] 2 Paine, 382–391.

copyright act was passed in the interests of and for the promotion of science, and it would certainly be a pretty extraordinary view of the sciences to consider Harte, coupled with "'Mliss," was clearly within the law of trade-mark, and as such to be protected by injunction. This closed the trial, except the submission of points by counsel, and the court reserved its decision. In the meantime the injunction against the publication of the book in controversy in the form of which Mr. Harte complains is restrained by injunction.

The findings in this case were as follows: "This action having been brought to trial before me, at a special term of this court, held at the city of New York on the 23rd day of March, 1875, after hearing the evidence produced by each of the said parties, and the arguments of their respective counsel, I find as matters of fact, first, that previous to the year 1863, and from thence to the present time, the plaintiff was and is an author by profession, having composed and written various books published in his name in the United States, which have been extensively sold and circulated therein. Second, that by such means the plaintiff has established a valuable literary reputation, and has been enabled to dispose of his literary productions on terms of pecuniary benefit and advantage to himself, and that during such period he was not engaged in any other business or occupation. Third, that for some time before the year 1873, and from thence to the present time, the defendant has been and is a bookseller and publisher of books, carrying on business in the city of New York. Fourth, that about the year 1863 the plaintiff composed and wrote a story entitled ''Mliss,' in four parts or chapters, which was published in a newspaper called the 'Golden Era,' published in California, under permission granted by him to the proprietors of said paper to publish said story therein, but not in any other way or manner. Fifth, that about the year 1865 he composed and wrote a continuation or extension of said story, containing five additional chapters, the right of the publication of which in said newspaper, but not otherwise, was also granted by him to said proprietors. That such story was afterwards published in the Sunday Mercury, in the city of New York. Sixth, that said original story, and the continuation or extension thereof, were published in said newspaper, and the same have been since, and continue to be published by one James R. Osgood & Co., publishers, together with other works written and composed by him, in one volume, under a contract between him

a daily or weekly publication of the state of the market as falling within any class of them. . . . . The term science, cannot, with any propriety, be ap-

and said James R. Osgood & Co., from which he has derived and is deriving considerable profit and income. Seventh, that all of the aforesaid publications were made under the name of the plaintiff as author thereof. Eighth, that before the year 1873 the following-named works (among others), written and composed by the plaintiff, had with his consent been published in the United States, under his name as author, and under the following titles, viz.: 'Condensed Novels,' 'Heathen Chinee,' 'Luck of Roaring Camp,' and 'Mrs. Skagg's Husbands.' Ninth, that in or subsequent to the year 1865, about fifty additional chapters, written and composed by one G. R. Densmore, and purporting to be an extension or continuation of said story of ''Mliss,' were published in said 'Golden Era' newspaper, under the name of said Densmore as author thereof. Tenth, that in or about the year 1873, without the knowledge or consent of the plaintiff, the defendant printed, published, and sold, in the city of New York, a volume containing one hundred and forty-eight pages of closely-printed matter, in double columns and small type, with paper covers, and which is designated on the title-page, and on the first page of the outside of the cover thereof, ''Mliss, an Idyl of the Red Mountains. A Story of California in 1863. By Bret Harte, author of "Condensed Novels," "Heathen Chinee," "Luck of Roaring Camp," "Mrs. Skagg's Husbands," &c.;' and on that part of the cover which forms the outer back of said volume is printed, in large and heavy type, the words, ''Mliss, an Idyl of the Red Mountains, by Bret Harte.' Eleventh, that the whole contents of the said volume consists of the nine chapters written by the plaintiff, and published in the Golden Era newspaper before mentioned, and the fifty chapters, or thereabouts, written by said G. R. Densmore, also published in said newspaper, as before stated. and that the part written by the plaintiff is in about thirty pages, being about one-fifth portion only of the contents of said volume. Twelfth, that the publication and sale of the said volume was continued by the defendant, without the consent of the plaintiff, down to the commencement of this action, and that he had no knowledge of such publication or sale until about a week before this action was commenced. Thirteenth, that at the end of the tenth chapter of said volume, in the body of the work, is inserted a printed note, in small type, purporting to inform the reader that the first ten chapters of the vol-

plied to a work of so fluctuating and fugitive a form as that of a newspaper or price current, the subject-matter of which is daily changing, and is of mere temporary use. Although great praise may be due to the plaintiffs for their industry and enterprise . . . yet the law does not contemplate their being rewarded in this way; it must seek patronage and protection from its utility to the public, and not as a work of science. The title of the act of congress[1] is "An Act for the Encouragement of Learning." It was not intended for the encouragement of mere

ume were written by Bret Harte, but that the residue of said volume was not written by him, but by some other person, which statement is untrue, as the tenth chapter was not written by the plaintiff, but was written by the said G. R. Densmore Fourteenth, that the statements contained in and printed on the said title page and cover, as stated in the above tenth finding, are calculated and designed falsely to represent and affirm the plaintiff to be author of the whole of the volume published by the defendant, and injure and defraud the plaintiff in his professional reputation, and in the profit and advantage to be derived by him from his literary works; and that the note printed at the end of said tenth chapter is calculated and designed to induce purchasers and readers of said volume to believe the plaintiff to be a consenting party to said false representations.

"And I conclude, as matter of law: First, that the plaintiff is entitled to judgment against the defendant, enjoining and restraining the defendant from printing, publishing, selling, giving away, or parting with, or in any way, by publication, notice, hand-bill, or otherwise advertising for sale, the said volume, or any book or volume containing the contents of said volume, or any part thereof, not written by the plaintiff, under the name or title of ''Mliss,' or ''Mliss, an Idyl of the Red Mountains,' and under the name of the plaintiff, in the publication, sale, or advertising of said volume, or any part thereof, without his consent first obtained. Second, and that the plaintiff is entitled to judgment for his costs of his action.

"(Signed) C. H. VAN BRUNT."

[1] *I. e.*, the act of 1819, 1 L. U. S. 104. The title of the present act (of 1870) is "an act to revise, consolidate and amend, &c."

industry, unconnected with learning and the sciences. The preliminary steps required by law cannot reasonably be applied to a work of so ephemeral a character as that of a newspaper, all the minutiæ of which would have to be done for every newspaper. The right cannot be secured for any given time, for the series of papers published from day to day, or week to week; and it is so improbable that any publisher of a newspaper would go through this form for every paper, it cannot be reasonably presumed that congress intended to include newspapers under the term "book." That no such pretense has ever been set up, either in England or in this country, affords a pretty strong argument that such publications were never considered as falling under the protection of the copyright laws. We are, accordingly, of opinion that the paper in question is not a book, the copyright to which can be secured under the act of congress."

353. This question came for the first time in England, according to Shortt,[1] "for express decision, in the recent case of Cox v. The Land and Water Journal Company,[2] where the plaintiff, the proprietor of the Field newspaper, sought to restrain the publication in the Land and Water Journal of a 'list of hounds,' alleged to be copied from a list printed in the former paper. It was contended, on behalf of the defendants, (1) that the plaintiff had no copyright in the article of the piracy of which he complained; (2) that if he had a copyright, he could not sue until his paper was registered under the copyright act. The court said: "The preliminary objection taken in this case raises a

[1] L. Lit. p. 250. This according to Shortt is the only case appearing upon the subject.

[2] L. Rep.; 9 Eq. 324; 21 L. T. N. S. 548; 18 W. R. 206.

point of vast importance to the proprietors of newspapers, and to the public at large, so important that it seems almost incredible that it should never have arisen before, whether the proprietor of a newspaper has or has not such a property in articles published in that newspaper, and paid for by the proprietor, as entitles him to prohibit the publication by any other newspaper in any other form whatever."

"For the purposes of the argument, it must be assumed that the article complained of was a copy of the article of the plaintiff, and upon that ground the defendant takes the objection that there can be no copyright in any article published in this newspaper, because it is not registered under the act 5 & 6 Vict. c. 45, commonly called the copyright act. Now suppose, for instance, the proprietor of a newspaper employs a correspondent abroad, and that correspondent, being employed and sent abroad at great expense, makes communications to a newspaper which are highly appreciated by the public, can it be said that another newspaper, published perhaps in the evening of the same day, may take and publish those communications in extenso, with or without acknowledgment? If the contention of the defendants is right, the paper which copied might say: 'But they are common property. True it is, I admit, that you have paid for them. I admit that you have given a great deal of money for them, and they are so very valuable that I desire to turn them to account by publishing them in my newspaper; but you have no property in them, although you pay for them; you cannot sue for your newspaper as a book, for then the copyright must be registered, and as you have not registered the book, nothing in the newspaper is protected.' If that is the law, it is a monstrous state of

the law—repugnant to common sense and common honesty—because that there is a property in these articles, there can be no shadow of doubt. Still, however clear the right of property may be, if the case falls within the act of parliament, I must follow the same course which I took in the Brighton Directory case, Mathieson v. Harrod.[1] . . . . Now, I have put the case of letters from correspondents abroad. With foreign papers, we all know, it is the practice to publish novels, and in some English newspapers it is also done. Supposing a newspaper proprietor were to engage the first novelist of the day to write for him a novel to be published in his newspaper, part every day, and pay him highly, is the proprietor of such a newspaper to lose all property, because the paper is not registered? What information would it give if it were registered? Would the registration of a paper called "The Field," registered twenty years ago, give information as to when the copyright would commence and end?—not the slightest; and, therefore, it is not within the policy of the act, and, I am of opinion, that it is not within the words of the act. The question depends first upon the second section of the act. What is a book? because every book must, by the twenty-fourth section, be registered. We find that 'book,' under the second section, 'shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, or dramatic piece,' and so forth. Now, certainly, a newspaper does not fall within any of those descrip-

[1] L. Rep. 7 Eq. 270; 19 L. T. N. S. 629; 38 L. J. 129, Ch. In this case a bill to restrain the piracy of the plaintiff's directory was dismissed with costs, because the entry at Stationers' Hall of the date of first publication contained only the month, and not the day of the month, on which it had first been published.—Shortt, L. Lit. p. 251.

tions, and if it was intended that this act should be applied to newspapers, it would have been inserted, as the word 'newspaper' is well understood ; and that word not being inserted, I must take it as advisedly omitted, because it was not the intention of the legislature that newspapers should be included within the act. Then comes the section which prescribes what is to be done with regard to periodical publications. Sect. 19 provides 'that the proprietor of the copyright in any encyclopedia, review, magazine, periodical work, or other work published in a series of books or parts, shall be entitled to all the benefits of the registration at Stationers' Hall, under this act, on entering in the said book of registry the title of such encyclopedia, review, periodical work, or other work, published in a series of books or parts, the time of the first publication of the first volume, number, or part thereof, or of the first numbers or volume first published, after the passing of this act, in any such work which shall have been published heretofore, and the name and place of abode of the proprietor thereof, and of the publisher thereof, when such publisher shall not also be the proprietor thereof.' That, again, does not mention newspapers, and I must come to the same conclusion—that a newspaper was not mentioned, because it was not intended to be included. Then, can a person have any copyright or property in that which is not registered under the act? This depends, I apprehend, upon the construction of the 18th section, which enacts that when any publisher or other person shall . . . have projected, conducted, and carried on . . . any encyclopedia, review, magazine, periodical, work, or work published in a series of books or parts, or any book whatsoever, and shall have employed any person to compose the same, or any

volumes, parts, essays, articles, or portions thereof, for publication in, or as part of, the same, and such work, &c., shall be composed on the terms that the copyright shall belong to such proprietor, and be paid for by him; then the proprietor of such work shall be entitled to copyright (except that after the term of twenty-eight years the copyright shall revert to the author), and shall be entitled to sue upon registering the same at Stationers' Hall. Now, must every right included in this section be registered according to the act? The present Lord Chancellor decided that question in Mayhew v. Maxwell.[1] Mr. Mayhew wrote a certain article or series of articles, in a periodical called The Welcome Guest, and the proprietor proceeded to publish them in a separate form. The plaintiff filed his bill to restrain him from publishing in any other form than in that for which he wrote the work. The same point arose in Strahan v. Graham,[2] where Mr. Graham had sold the right of publishing photographs of the Holy Land in a publication called 'Good Words,' in which Dr. M'Leod was publishing a work with regard to the Holy Land, and the proprietors of 'Good Words' had given him permission to use the photographs; but Mr. Graham contended that Mr. Strahan had no right to give it to Dr. M'Leod. I decided in that case, and my decision was confirmed by Lord Chancellor Chelmsford, that there was no right to publish in a separate form that which he had authority only to use in 'Good Words,' and that Mr. Graham had a good right of action. But these are distinct authorities to show that there is a property in a publication, although it is not registered. That is the ground upon which Vice Chancellor Wood commented on the 24th section, in Mayhew v. Max-

[1] J. & H. 312. [2] 16 L. T. N. S. 87.

well. He says : 'The plaintiff has not registered under the 24th section.' Now, I have been referred to the case of Sweet v. Benning,[1] which was a case between Mr. Sweet, the proprietor of 'The Jurist,' and Mr. Benning, a bookseller. Sweet brings an action against Benning for copying the marginal notes of cases in a separate publication. This was the subject of the action. I suppose 'The Jurist' had been published before this act of 5 & 6 Vict., and therefore it was not registered at all. If so, the question whether these reports, published in 'The Jurist,' were subject to the provisions of the act, did not arise. Now, in deciding that case, Jervis, C. J., said:[2] 'I think that, under the circumstances stated, there is an implied condition, understanding, or arrangement between the proprietors of "The Jurist" and the gentlemen who furnished them with reports, that the former shall acquire a copyright in the articles so written.' Now, therefore, it appears to me that a 'newspaper,' (which is the best possible and only definition of such a publication as "The Field,") not being within any of the provisions of this act, I must infer that it was not the intention of the legislature to apply the act to newspapers (for it was absolutely impossible that it should have missed insertion in some of the sections), and that the circumstance of non-registration throws no difficulty in the way of the plaintiff maintaining his right in law or equity; and though it is seldom worth the while of proprietors to assert the copyright in articles in a newspaper, I am of opinion that, whether it be the letters of a correspondent abroad, or the publication of a tale or a treatise, or the review of a book, or whatever else, he acquires—I will not say as copyright, but as property—such a property in every

[1] 16 C. B. 459. [2] Ib. 480, 481.

article for which he pays under the 18th section of the act, or by the general rules of property, as will entitle him, if he thinks it worth while, to prohibit any other person from publishing the same thing in any other newspaper, or in any other form."[1]

[1] The effect, says Shortt (L. Lit. p. 254), "which cannot be considered a satisfactory one, is that the proprietor of a newspaper has a property in its published contents, entitling him to restrain the piracy of any portion thereof for which he has paid, under section 18 of this act, without the necessity of a preliminary registration at Stationers' Hall. This right, it is obvious, is exactly 'the sole and exclusive liberty of printing, or otherwise multiplying copies' which section 2 of 5 & 6 Vict. c. 45, calls 'copyright,' a term which the vice-chancellor is reluctant to apply to it, but which section 18 does expressly apply to it enacting that the proprietor who has paid for the articles shall have 'such term of copyright therein as is given to the authors of books by this act.' Now, it is settled by the decision of the House of Lords, in Donaldson v. Beckett (4 Burr. 2408), that that the common-law right of property in literary works, after publication, if such right ever existed, has been taken away by statute, and that copyright after publication is now altogether dependent on statutory enactment. It exists only in those works, and can be enforced only on the observance of those conditions which are mentioned and prescribed in the acts now in force. Considerations of the great hardship of allowing the unauthorized copying and publication of the copies of paintings, drawings, and photographs were not regarded as sufficient to justify the courts of law or equity in interfering for the protection of the owners of such works, and the intervention of the legislature was necessary to confer a copyright in them; so that the observation of the vice-chancellor on the hardship of denying a protection from piracy to the proprietor of newspaper articles, are by no means decisive as to the existence of a right to prevent such piracy independent of the statute. If it be thought only just, as everybody must think it, that the publisher of a newspaper should be able to restrain the wholesale piracy of its contents, there does not seem to be much difficulty in the way of interpreting a newspaper to be a 'book' within the meaniag of section 2 of the above act, there construed to mean and include "every volume, part, or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart,

354. The law of libel, which we have already examined at length, makes no exception, in principle, in favor of newspapers. Because a man is the editor of a newspaper, or a contributor to a newspaper, he has no peculiar rights touching the reputation of his neighbors. The peculiar exceptions which do arise to general rules in dealing with newspapers, and which are noticed in the present chapter, will be found, we imagine, to be exceptions in the application of rules by which courts are guided in judging of the element of malice which, more or less, affects every case of libel. From the fact that newspapers are servants of the public, and perhaps, too, from the consideration that it is essential to the safety of the state or the public that every man should be known, as he is, by his neighbors, and by the community at large, a certain latitude is allowed, which we shall endeavor to exemplify.

355. The questions of Innocence and of Libel, as applied to literary composition in general, in consideration of the vast interests which accrue to the public from the close and searching supervision of the newspaper press over matters of public or general interest, and its criticisms on the conduct of servants of the public, will be found to undergo in their behalf some relaxation of the strict rules which it has been found necessary to apply in other cases, for the purpose of preserving the reputation of individuals from defamatory attacks. The duty which the public expects from the Press, of watching and making generally known the acts of all

or plan separately published," or in holding it to be a "periodical work, or other work published in a series of books or parts," within the meaning of section 19 of the same act; in either of which cases, however, registration would be necessary before the proprietor could sue in respect of an infringement of his copyright."

public servants, and censuring them when deserving of censure, of commenting freely on all matters which touch the public welfare, of fearlessly exposing whatever is corrupt, oppressive, or otherwise deserving of reprobation,—of being, as it should be, and is when rightly conducted, a censor of the public morals, and a keeper of the public virtue, entitle it to a latitude and a leniency where its functions are exercised, bona fide, in that regard.

It must not be supposed, however, than an individual, from the mere circumstance of his being a writer for a newspaper, is entitled to any immunity from the laws of his country, or from the consequences of his own acts.[1] He stands in the same light precisely as other men; he is in no way privileged. He cannot, on account of his employment, be allowed to indulge in malicious attacks upon the acts or the reputation of his fellow-men.

Every person has a right to discuss all matters of public interest, and to comment favorably or unfavorably thereon, either by attack upon or ridicule of their official acts. And the freedom of the press is, when rightly understood, commensurate and identical with the freedom of the individual, and nothing more. In Parmiter v. Coupland, it was held[2] that a much greater latitude will be extended to criticisms on persons occupying a public capacity than to criticisms on private individuals; and publications which would be clearly libellous if levelled against the latter may be innocent, and even commendable, when directed against the former. "That criticism may reasonably be applied

[1] Shortt, p. 433; Davidson v. Duncan, 7 El. & B. 231; Campbell v. Spottiswoode, 8 Law Times Rep. N. S. 201; 3 Fost. & F. 421; Sheckell v. Jackson. 10 Cush. 25; Kane v. Mulvany, 2 Ir. C. L. 402.

[2] Per Alderson, B., Parmiter v. Coupland, 6 M. & W. 108.

to a public man in a public capacity which might not be applied to a private individual. The same thing might be no libel on one which might be a very grievous and injurious libel on another."

But there is a rational limit beyond which neither the newspaper writer nor anybody else may go; and that limit appears to be this: "The writer must not make the occasion one for the gratification of personal malice and vindictiveness; in commenting on public matters he must not make imputations of base, sordid, or corrupt motives, or dishonest conduct; though he is not called upon to justify to the very letter everything that he writes, his erroneous inferences must not be reckless; nor will he go beyond the limits of fair and honest, though it may be hostile or severe, or even, in some respects, inaccurate criticism. If he does, even though he may bona fide believe in the truth of his imputations, the publication is a libel."[1]

"There is a difference," said the court, in Parmiter v. Coupland,[2] "between publications relating to public and private individuals. Every subject has a right to comment on those acts of public men which concern him as a subject of the realm, if he do not make his commentary a cloak for malice and slander; but any imputation of wicked or corrupt motives is unquestionably libellous."

"The right of public discussion on matters of public interest is important, and it requires for its beneficial exercise that it should be exercised fully and freely, without being subject to too harsh or strict a limitation. So long as it is exercised fairly and honestly, it will be protected, even although it may incidentally involve the publication of defamatory matter. But

[1] Shortt, p. 434.
[2] 6 M. & W. 108.

the comments must be fair, that is, conceived in a fair spirit—in the spirit of fair discussion—and not in a spirit of reckless or inconsiderate imputation. That which is recklessly defamatory can hardly be deemed fair."[1]

An honest and bona fide belief in the truth of the comments, as we have seen, will not itself justify a defamatory statement in a newspaper, any more than elsewhere.

In the case of Campbell v. Spottiswoode,[2] where a newspaper article insinuated that the editor of another newspaper, in putting forth to the public the sacred cause of the dissemination of religious truth among the heathen, he was acting as an impostor, and that his purpose was to put money into his own pocket by obtaining contributions to his newspaper; and that he had not only published in his newspaper the name of a fictitious person as the authority for his statements, but also, with a view to induce people to contribute, published a fictitious subscription list, the article was held to be libellous, although the jury found that the writer believed the imputations contained in it to be well founded.

One who assumes to publicly criticise and condemn the conduct or motives of another, must bring to the task not only an honest sense of justice, but also a reasonable degree of judgment and moderation. A fair and legitimate criticism on the conduct and motives of the party who is the object of censure, is all that can be allowed.[3]

[1] Per Cockburn, J., in Hedley v. Barlow, 4 F. & F. 230.

[2] 3 B. & S. 769; 8 L. T. N. S. 201; 32 L. J. 185, Q. B.

[3] Wason v. Walter, L. Rep. 4 Q. B. 96; 19 L. T. N. S. 409; 38 L. J. 34 Q. B.

If the self-constituted critic of public morals addresses himself to the public in a matter which nearly interests and concerns them, it constitutes no reason why he himself should escape without responsibility. The law will not fail to distinguish between criticism upon public conduct and the imputation of motives by which that conduct may be supposed to be actuated. One man has no right to impute to another, whose conduct may be fairly open to ridicule or disapprobation, base, sordid, and wicked motives, unless there is so much ground for the imputation that a jury shall find, not only that he had an honest belief in the truth of his statements, but that his belief was not without foundation.[1] . . . . It is for the interests of society that the public conduct of men should be criticised without any other limit than that the writer should have an honest belief that what he writes is true. But the public have an equal interest in the maintenance of the public character of public men; and public affairs could not be conducted by men of honor with a view to the welfare of the country, if attacks upon them, destructive of their honor and character, and without foundation, could be made with impunity. Because a public writer fancies that the conduct of a public man is open to the suspicion of dishonesty, he is not, therefore, justified in assailing his character as dishonest." "I should be unwilling," said the court, in a late English case,[2] "to limit the right of a writer in a newspaper, or any other individual, to canvass any scheme, even though it be a scheme of public benevolence. But, giving full latitude to fair comment, so soon as a writer imputes that the

[1] Short, L. Lit. p. 436.

[2] Turnbull v. Bird, 2 F. & F. 524; *vid.* also Paris v. Levy, 2 F. & F. 74.

person proposing the scheme is doing it from a base and sordid motive, and is putting forth a list of fictitious subscribers, in order to delude others to subscribe, it cannot be said to be within the limits of fair criticism."

356. The question as to what is fair and candid criticism, and as to whether the writer had a bona fide honest and justifiable belief in the statement made by him, is a question of fact for the jury.[1]

Cockburn, J., in a late case,[2] laid down the rule somewhat equivocally, as follows: "I think the fair position in which the law may be settled is this, that where the public conduct of a public man is open to animadversion, and the writer, who is commenting upon it, makes imputations on his motives, which arise fairly and legitimately out of his conduct, so that a jury shall say that the criticism was not only honest, but also well founded, an action is not maintainable."

This seems to us equivalent only to saying, If you wish to know whether an action is maintainable or not, try it and see. There is certainly no means of knowing whether "a jury shall say that the criticism was not only honest, but also well founded," without bringing an issue before it; and therefore, according to Cockburn, J., a plaintiff could only be sure that he had no action of libel until he had been non-suited or beaten by a verdict against him. If, then, we deny that good faith and honest belief in the truth of the criticism constitute no defense to an action of libel in newspaper comments upon matters of public interest, we open a wide and limitless field of discussion.

[1] Shortt, L. Lit. p. 436.
[2] *Vid.* 1 Shortt, p. 436.

It seems to us, however, that a simple rule might be enunciated somewhat as follows, which would cover the cases which we shall cite in this chapter, namely: All charges which are in the nature of libelous communications to the public press, are to be construed as made by the newspaper publishing them. But where these are honestly made matters of public interest and concern, and not of mere public curiosity,[1] with a view only to the public good, and where the maker believes them to be just and true, they are deemed privileged upon grounds of public policy; but where any one of these elements is wanting, an action will lie.[2]

So in a case[3] where the alleged libel consisted of a newspaper article commenting, in the severest manner, upon certain advertisements of a medical practitioner, and representing him as an impostor and scoundrel, the court directed the jury, on the second ground of defense relied on by the defendant, viz., that the publication was justifiable as a fair comment on a matter of public interest, as follows: "Under that head of defense he (the defendant) says that it was a matter of public interest and public concern; that the plaintiff by his advertisements invited people to submit to his

[1] *Vid.* Harle v. Catherall, 14 L. T. N. S. 801.

[2] Or perhaps the rule might be laid down thus: that bona fide comments not in every respect justifiable, and honest inferences not altogether correct as to conduct or motives, may be excused, provided the matter be one of public interest, that the circumstances of the case render comments and inferences of such a character not unnatural, and that there is no considerable margin of unsubstantiated defamatory imputation; whilst, on the other hand, as expressly decided in Campbell v. Spottiswoode, unfounded imputations of base and sordid motives are unjustifiable, however honestly their truth may be believed in by the writer who publishes them.—Shortt, L. Lit. p. 439.

[3] 4 F. & F. 1005.

system of treatment; and that if he (the defendant) really believed it to be a delusion, then he had a right to maintain that it was so; and that even if, in drawing inferences of imposture and bad intention, he fell into error, yet, if he wrote honestly and with the intention of exercising his vocation as a public writer, fairly and with reasonable moderation and judgment, he is entitled to the verdict. And I entirely agree in that view. Here is a man challenging public criticism by bringing forward what professes to be a new system of treatment, and inviting the public to adopt it as the only means of curing the most destructive disease known among us. In doing this he challenges public criticism; and if a public writer, using a reasonable degree of temper and moderation, as behoves any one who makes imputations upon others—if a public writer, thus discussing the subject in the exercise of his vocation, falls into error as to the facts or the inferences, and goes beyond the limits of strict truth, he is, nevertheless, privileged. The occasion is a privileged one, and if the privilege is exercised honestly, faithfully, and with reasonable regard to what truth and justice require, then, though he may exceed the limits of what he can legally prove to be the truth, he is protected from liability. It is not, therefore, necessary that the justification should appear to you to be made out, if you think that the defendant or the writer was in the reasonable and honest exercise of his vocation as a public writer, even although he was not fully warranted in drawing the inferences he did as to the conduct of the plaintiff, and although it may be that he was not entirely justified by the absolute truth.'

' The court (Cockburn, J.) seems in this instance to have gone quite as far as he did in the opposite direction in the equivocal judgment before quoted.

Much more epigramatic and to the point, however, is the language of Pollock, C. B., in Gathercote v. Miall:[1] "All bona fide and honest remarks upon persons occupying public positions may be freely made, without being questioned too nicely for either truth or justice."

The rule we have laid down will not authorize the speaking of the truth even of another without a privilege to do so. The old doctrine of the star chamber, that a libel could be carried in a sealed letter, and that "the greater the truth the greater the libel," is superseded, indeed, but it is sometimes best to refrain from bringing charges that are true against one's neighbors.

The rule of privileges is ably stated by Blackburn, J., in the recent English case of Campbell v. Spottiswoode.[2] "The word privilege," said he, "is often used loosely and in a popular sense, when applied to matters which are not, properly speaking, privileged. But, for the present purpose, the meaning of the word is, that a person stands in such a relation to the facts of the case that he is justified in saying or writing what would be slanderous or libelous in any one else. For instance, a master giving a character of a servant, stands in a privileged relation; and the cases of a memorial to the lord chancellor or the home secretary on the conduct of a justice of the peace,[3] and of a statement to a public functionary reflecting upon some public officer,[4] rank themselves under that class. In Maitland v. Bramwell,[5] the bona fides of the defendant was left to the jury, because she was privileged by her

[1] 15 M. & W. 332.
[2] 3 B. & S. 769; 8 L. T. N S. 201; 32 L. J. 185 Q. B.
[3] Harrison v. Bush. 5 E. & B. 344.
[4] Beatson v. Skene, 5 H. & N. 838.
[5] 2 F. & F. 623.

position to say what she believed to be true. So in Eastwood v. Holmes,[1] when properly understood, Willes, J., must have considered that there was a privilege of this kind when he non-suited the plaintiff in an action against the publisher of a report of the proceedings of "The British Archæological Association," in which it was stated that some supposed antiquities, offered for sale by the plaintiff, were of recent fabrication. In these cases no action lies, unless there is proof of express malice. If it could be shown that the editor or publisher of a newspaper stands in a privileged position, it would be necessary to prove actual malice. But no authority has been cited for that proposition; and I take it to be certain that he has only the general right, which belongs to the public, to comment upon public matters; for example, the acts of a minister of state; or, according to modern authorities somewhat extending the doctrine, where a person has done or published anything which may fairly be said to invite comment, as in the case of a handbill or advertisement.[2] In such cases every one has a right to make fair and proper comment; and so long as it is within that limit it is no libel." "It is necessary," said Crompton, J., in the same case, "to confine privilege, as the law has always confined it, to cases of real necessity or duty, as that of a master giving a servant a character, or of a person who has been robbed charging another with robbing him."[3]

[1] 1 F. & F. 347.

[2] Paris v. Levy, 9 C. B. N. S. 342; 30 L. J. 11 C. P.

[3] The case of Campbell v. Spottiswoode must be regarded as an express and distinct authority for the proposition that there is no privilege, in the strict sense of that term, in the case of comments by public writers on matters of public interest, and on persons occupying public positions, though the expression "privileged publication" has been frequently ap-

357. Not only must the commentary be made without malice, not recklessly,[1] but bona fide, and with the honest belief of its truth, but the matter must be one of legitimate public interest.

In the case of public officers this public interest will be supposed, for there is a presumption of law that every good citizen is interested in the affairs of the state, and in their virtuous administration.

Where a petition was presented to the house of lords, charging a high judicial officer with having been guilty of dishonorable conduct many years before, and praying for an inquiry, and that he should be removed from his high office if the charge were proved true, and a debate took place on the subject, when the charge was utterly refuted, it was held by the court of

plied by eminent judges to such writings. For privilege, where it exists, excuses, in the absence of actual malice, every statement, however false in itself, or injurious to the person respecting whom it is made. Thus, a letter written by a master giving the character of a servant, is privileged, though it may contain a specific charge of fraud against the servant which is utterly false. To enable the servant to maintain an action of libel in respect of it, he must prove the existence of actual malice on the part of the master (Weatherston v. Hawkins, 1 T. R. 110; Edmondson v. Stephenson, Bull. N. P. 8; and see Rex v. Cator, 4 Esp. 117; Dunman v. Bigg, 1 Camp. 269), whereas the case of Campbell v. Spottiswoode has distinctly decided that neither the absence of actual malice nor the bona fide belief of the public writer in the truth of the imputations which he makes, will justify him in making such imputations as there complained of, if they are not true in point of fact. In this strict sense, then, of the term privileged, the public writer, when dealing with matters and characters of public interest, is not privileged. He is, however, treated with more indulgence than a private individual who publishes defamatory matter of another, in that slight errors will in his case be excused, where he writes honestly in the interest of the public, and not with a malicious design of doing a personal injury. —Shortt, L. Lit. p. 439.

[1] Morrison v. Belcher, 3 F. & F. 619.

Queen's Bench, that this was a matter of great public concern, on which a newspaper writer had a full right to comment, and that his comments, though reflecting strongly on the person who presented the petition, were not actionable in absence of proof of malice.[1]

The working of any public institution, such as a college or a hospital, is a matter of public interest, which may freely be discussed by and through the medium of the press.[2]

An inspector, sent to institute inquiry into the working of a medical college, made a report of the results of his inquiry, in which was set forth a letter addressed to the bishop of the diocese, and complaining of "the arbitrary, tyrannical, and overbearing conduct" of the plaintiff, a professor in the college, as well as of "his complete inefficiency in every office" which he held in the college. The college still continuing in an unsatisfactory state, the defendant, about three years after the report was made, published the whole of it in a newspaper, of which he was the proprietor, and the plaintiff brought an action for the libel contained in the letter. The publication of the report was introduced by an article in the newspaper, stating that appeals on behalf of the college had been frequently made in its columns, and that the institution was known to be in an unsatisfactory state. Held, that the questions for the jury were (1) whether the matter was one which it interested the public to know, and (2) whether the defendant published it with the honest desire to afford the public information, and not with a sinister motive to injure the

[1] Wason v. Walter, L. Rep. 4 Q. B. 73; 19 L. T. N. S. 409.

[2] Cox v. Feeney, 4 F. & F. 13.

plaintiff; and that if they found both of these in the affirmative, they must find for the defendant.[1]

But the doctrine of public interest cannot be

[1] As to the former question, his lordship said, "There can be no doubt whatever that this institution, with reference to which these questions have arisen, is one of public concern. Although it may have been founded, in the first place, by private contributions, it has also been founded for public purposes; so far as the hospital is concerned, with a view to the assistance of the poor inhabitants of Birmingham who may stand in need of medical or surgical aid; so far as the college is concerned, for the instruction of the students in the important branches of knowledge there taught. It appeals to the public, and holds out expectations with reference to the students whom their parents or guardians send there. It is, therefore, a public concern to the inhabitants of Birmingham and its district. That being so, the public have an interest in its government, its management, its discipline, and, what is essential, the management of its financial concerns. What is said with reference to its discipline, to its means of imparting instruction, to its means of fulfilling the objects for which it exists, have all of them great interest in the eyes of the people of the great town in which it exists. Has it been well-conducted or ill-conducted? Has it been prudently and well managed, or has it been suffered to fall into a state of decay and comparative uselessness in consequence of defective management? You have before you abundant materials for forming your judgment upon this question. You find from the report of the commissioner sent down to inquire and report—the accuracy and fidelity of which Mr. Cox (the plaintiff) himself has been constrained to admit—that the finances of the college have become embarrassed, and its authorities, to whom its management is committed, careless. . . . . I take it that at that time the report made by the commissioner, and which seems to have embodied the result, at all events, of the whole inquiry and proceedings which had been carried on,—I take it that if that report had been published at the time, no man could say that it was beyond the province of a public journalist whose business—aye, and whose duty—it is to bring before the public information which may be useful to them. It would be his duty to publish the report from beginning to end for the information of the general public and inhabitants of Birmingham, who are so deeply interested in this hospital and college, which are two of the principal institutions of the

carried so far as to to extend to the administration of the private charity of a parish. It was held by the court of exchequer that the conduct and management. by the clergyman of a parish, of a clothing charity in the parish, from the benefits of which dissenters were, by his sanction, excluded, was not a matter of public interest, so as to justify, under the plea of not guilty, the publication in a newspaper, of defamatory matter respecting the clergyman in relation to the charity.'

town." His lordship then, referring to the argument founded on the lapse of time, said to the jury: "The system of bad management which appears to have been the origin of the whole, seems to be perpetuated; and in addition, when we find that the warden and the professor and tutor in the theological department have filed a bill and taken the whole body into chancery does it seem to you that the people of Birmingham ought to have before them the whole history of the system whereby the present condition of the hospital has been brought about! This is a matter for you. If you can see a sufficient reason why a public journalist should, in the honest discharge of his duty, feel it incumbent on him to bring before the public this information, it will be for you to find for the defendant. . . . . If you can see no public duty, no matter of public interest or moment which can have properly influenced the defendant in publishing this, you ought to say so by your verdict. Or if you can see your way to the conclusion that he has been acting under the influence of some sinister motive, with a desire of doing personal injury to the plaintiff, your verdict ought to be for the plaintiff. But if you see nothing more than what a journalist in the discharge of his duty might have done, even with a view to what took place five years ago, then look only at the actuating motive. If the defendant had singled out the letter and published it alone, I should have thought there was good ground for the complaint. If he had given garbled passages, then also I should have thought so; but he professed the intention of bringing the whole report before the public for the purpose of enabling them to see what had been the radical and inherent defects in the constitution and management of this institution, and he did so."—Shortt, L. Lit. p. 441.

[1] Gathercote v. Miall, 15 M. & W. 319. "I think," said Pollock, C. B., in that case, "that a parochial charity, with the

358. The due administration of justice is a matter of the very highest possible concern to the public, and in its interest, as we have seen in the chapter on Contempt of Court, the widest latitude will be accorded to the press and public in commenting thereupon.

It is only when such comments actually impair or impede such due administration of justice by the courts, that they will be summarily dealt with.

"The direction of a judge, the verdict of a jury, the decree of a court, may be all made subjects of free comment. It is the interest of all of us that it should be so. But, in commenting on such matters, a public writer as much as a private writer is bound to attend to the truth, and to put forward the truth honestly and in good faith, and to the best of his knowledge and ability. It is not to be expected that,

vicar at the head of it, among other persons in the parish, not for parochial purposes, but for some exclusive purpose, with reference either to religious opinion or to anything else, is a private matter, and is not open to what may be called licentious comment, as opposed to a comment that must be based in truth. It really seems to me that licentious comments cannot be applied to a case of this sort, without extending such comments to almost every transaction in society." And Alderson, B., said: "It is no part of his peculiar ministerial duty to have a clothing club, though it is a very proper thing for him or any other charitable man to do. I am at a loss to see how his case differs from that of any other individual who chooses to institute a private charity within particular limits. If so, then the criticism and observations that are to be made upon him are the criticism and observations which are to be made upon any other private individual, and are to be judged by the same rules and subject to the same limits." Rolfe, B., added: "It seems to me preposterous to say that the act of a clergyman in sanctioning some individuals in his parish, in giving relief to some, and excluding a large class of others who are not to partake of it, can be considered in the light of a public act. The act does not become a public act because half a dozen or a dozen join in it. It is essentially private; they may manage it as they please."

in discharging this duty of a public journalist, he will always be infallible. His judgment may be biassed one way or the other, without the slightest reflection upon his good faith; and, therefore, if his comments are fair, no one has a right to complain. The law imposes no undue restraint upon the freest and fullest comments upon all that passes in public courts of justice; for, that the administration of justice should be made a subject for the exercise of public discussion is a matter of the most essential importance. But, on the other hand, it behoves those who pass judgment, and call upon the public to pass judgment, on those who are suitors to or witnesses in courts of justice, not to give reckless vent to harsh and uncharitable views of the conduct of others; but to remember that they are bound to exercise a fair and honest and an impartial judgment upon those whom they hold up to public obloquy."[1]

Lord Ellenborough lays down the rule broadly,[2] that all publications of preliminary proceedings before magistrates are illegal. "The publication," he said, "of proceedings in courts of justice, where both sides are heard and matters are finally determined, is salutary, and therefore permitted. The publication of these preliminary examinations has a tendency to pervert the public mind, and to disturb the course of justice; and it is therefore illegal. . . . Trials at law, fairly reported, although they may occasionally

[1] Woodgate v. Riot, 4 S. & T. 223; Seymour v. Butterworth, 3 F. & F. 385.

[2] Rex v. Fisher, 2 Camp. 571. So in Dickens's Great Expectations—when Mr. Wopsle has read with great effect to the villagers an account of a murder, giving great stress to the enormity of the prisoner's crime, Mr. Jaggers takes him severely to task for encouraging public sentiment against a man who has not yet been heard in his own defense.

prove injurious to individuals, have been held to be privileged. Let them continue so privileged. But these preliminary examinations have no such privilege. Their only tendency is to prejudge those whom the law still presumes to be innocent, and to poison the sources of justice. But," added his lordship, "what defense can be made for a publication which, besides containing an ex parte statement of evidence before a magistrate, against a man who has had no opportunity to defend himself, actually denominates him a criminal, and describes him as a monster?" But the change in the manners and customs of his day, the wider diffusion of literature and education, and the consequent increase of liberal influences, have wrought a change in the law, and Lord Ellenborough's rule, perhaps, might not now be implicitly followed.

A newspaper reporter of the proceedings at a trial, cannot be expected to discriminate nicely between what is strictly relevant and what is irrelevant to the issue; and a fair and full report would be held protected, though it contained some defamatory matter not relevant to the issue; at any rate, where it is not wholly and palpably irrelevant.

"There are cases where an individual must suffer for the public good, and it is difficult to draw the line between relevancy and irrelevancy. Wherever the report is of something not wholly irrelevant, the fact that it contains reflections on a third person does not prevent the reporter from being protected."[1]

The report of judicial proceedings, whatever the tribunal before which they take place, must, in order to be protected, be free from comments injurious to the character of the parties concerned, and must be

[1] Ryalls v. Leader, L. Rep. 1 Ex. 300; 14 L. T. N. S. 563; 35 L J. 185, Ex

accurate as well as fair. The moment comments are made, the immunity is gone.[1]

As in all cases of libel, malice is the gist of the action.[2] By legal malice is meant no more than the wrongful intention which the law always presumes as accompanying a wrongful act. This presumption of law may be rebutted, indeed, by the circumstances under which the defamatory matter has been uttered or published; and if successfully rebutted, though the character of the party concerned may have suffered, no right of action will arise. If the occasion be such as repels the presumption of malice, the communication is privileged, and the plaintiff must then, if he can, give evidence of malice.[3] It is thus that, in the case of reports of proceedings of courts of justice, though individuals may occasionally suffer from them, yet, as they are published without any reference to the individuals concerned, but solely to afford information to the public, and for the benefit of society, the presumption of malice is rebutted, and such publications are held to be privileged. The other, and the broader principle on which this exception to the general law of libel is founded is, that the advantage to the community, from publicity being given to the proceedings of courts of justice, is so great, that the occasional inconvenience to individuals arising from it must yield to the general good."[4]

It is the presumption that the publication of a fair account of what passes in a court of justice, not ex parte, is justifiable. "It is a good defense to an action

[1] Lewis v. Levy, El. Bl. & El. 544. *Vid.* Behrens v. Allen, 3 F. & F. 135.

[2] Weson v. Walter, L. Rep. 4 Q. B. 87,

[3] Bromage v. Prosser, 4 B. & C. 255.

[4] Taylor v. Hawkins, 16 Q. B. 321; 20 L. J. 314, Q. B.

of libel," says Campbell, C. J., "that it consists of a fair and impartial (though not verbatim) report of a trial in a court of justice."[1]

The law will, however, infer malice from the act of uttering or publishing slanderous matter actionable in itself, and not justified by sufficient cause; but the question whether slanderous matter has or has not been published, is for the jury.[2]

"It may now be considered," says a late English writer, "as established, beyond possibility of doubt, that an impartial, correct, and bona fide, even though not a verbatim report, and though published from day to day, of any proceedings of a court of justice, which are not merely ex parte, is privileged, unless the publication be prohibited by the court itself, or the nature of the trial unfits it for publication; and the privilege is not confined to reports of the proceedings of the superior courts."[3]

359. Criticisms on things, contained in an adver-

[1] In England the same protection has been extended to a fair report, published in a newspaper, of the proceedings held in jail before a registrar in bankruptcy, under sects. 101 and 102 of the Bankruptcy Act, 1861, upon the examination of a debtor in custody (Ryalls v. Leader, L. Rep. 1 Ex. 296; 14 L. T. N. S. 563; 35 L. J. 185 Ex.). "The only question," said Pollock, C. J., "is whether the registrar's court was, under the circumstances, a public court. I think that it was. We ought, in my opinion, to make as wide as possible the right of the public to know what takes place in any court of justice, and to protect a fair, bona fide statement of proceedings there."

The proceedings before examiners appointed under 9 Geo. 4, c. 22, s. 7, to examine into the sufficiency of the sureties on the trial of an election petition, were also held to be proceedings before a legal court, of which a fair and accurate report might be published. Cooper v. Lawson, 18 A. & El. 746.

[2] Dicas v. Lawson, cited in Chalmers v. Payne, 2 C. M. & R. 156; 5 Tyrw. 766.

[3] Shortt, 457.

tisement (exceptions to the rule laid down)[1] are not libelous. It was held not to be a libel upon a dealer in coal in L., who had advertised "genuine Franklin coal" for sale, to publish the following advertisement:

"Caution.—The subscribers, the only shippers of the true and original Franklin coal, notice that other coal-dealers in L. than our agent, J. S., advertises Franklin coal. We take this method of cautioning the public against buying of other parties than our agent, J. S., if they hope to get the genuine article, as we have neither sold nor shipped any Franklin coal to any party in L., except our agent, J. S."[2]

From the earliest times it seems to have been generally understood that a man may laud his own wares to any extent,[3] even if he depreciates his neighbor's by so doing. And so an application for an information was refused against one for publishing that "Ward's Pill and Drop had done great mischief in twelve different cases, and that they were a compound of poison and antimony, &c."[4]

If an advertisement, however, attacks personal character, the rule will be different. In Perret v. New Orleans Times newspaper,[5] certain irresponsible per-

[1] *Ante*, vol. 1, p. 176.

[2] Boynton v. Remington, 3 Allen, 397. This was an action not against the newspaper, but against the advertiser.

[3] See a curious advertisement in the London "General Advertiser," January 9, 1750:

"Given Gratis. By J. Newberry, at the Bible and Sun in St. Paul's Church-yard, over against the North Door of the Church (only paying One Penny for the Binding), Nurse Truelove's Christmas-Box; or, The Golden Plaything for little Children, by which they may learn the Letters as soon as they can speak; and know how to behave so as to make every Body love them; adorn'd with thirty Cuts."

[4] Rex v. Roberts, 3 Bac. Abr. tit. Libel, 492.

[5] 25 La. Ann. 170.

sons, whose residence was unknown, and whose names were fictitious, published an advertisement, as follows:

"New Orleans, February 19, 1869.

"We, the undersigned, most respectfully lay before the public the following very astonishing facts that took place last night near the Carrollton depot: While we were on our way home from Carrollton to New Orleans, three police-officers of the above place assailed us with revolvers pointed to us, to deliver every cent we had about us. All the money that we had was five dollars, and on delivering the same they left off. What sounds more horrible is that these so-called officers were accompanied by his honor Judge Perret, of Carrollton and Canal-avenue.

"Signed, JOHN BRIANT,
D. L. THOMPSON,
W. B. SAVORY,
H. B. DELORD,
JAMES B. RUBB,
No. 413 Frenchman Street."

The defendant admitted the publication, but said it was published as an advertisement; that it was received by one of the employés of the establishment at a late hour of the night, and during the absence and without the knowledge of the proprietors of the newspaper; he denied that the advertisement contained any libelous or slanderous charges or imputations that could damage plaintiff; and specially denied that it was made with any malicious intent on the part of the respondent; that when complaint was made to him by the plaintiff that the advertisement was false, and injurious to him, he caused to be inserted in an editorial article in the "Times" newspaper, an explanation, which the plaintiff accepted as satisfactory, in these words: "An advertisement appeared in the

"Times" yesterday, in which Judge Perret, of Jefferson, and the police officers of Carrollton are charged with certain very improper conduct toward five persons, whose names were attached to the advertisement. We are assured by Judge Perret that there is not a word of truth in this card; that he and the police officers of Carrollton were engaged in the performance of their duties in preserving peace and order in the cars, where the advertisers were creating a disturbance, and violating the ordinances of the city and the laws of the state. If Judge Perret's statements are correct, the advertisers in question have assumed a responsibility by their publication which they have no right to expect us to share with them."

Said the court: "The plaintiff, by the publication in question, is charged with complicity in the commission of a high crime. The terms used admit of no other construction. This charge is shown to be false and defamatory. Malice is, therefore, implied as arising from the needless and reckless publication of the advertisement, in wanton disregard of the rights of others. The facts certainly show the culpable want of a prudent respect for the character and feelings of others, which should be shielded from falsehood and defamation. On the first presentation of the libelous card, the managing editor, as he states himself, advised the parties not to have it published. This clearly shows that he saw the impropriety of its publication, and yet he yielded to the importunities of those men, and permitted its insertion—an act which his first impression and better judgment did not approve. In the defense of this case much has been said of the liberty of the press, and of the right of persons to make known to the public their wrongs and grievances; and it is asserted as a duty, to publish pleas

addressed to public opinion, asking that justice be rendered, and a wrong like that complained of by the parties, who presented their card to the defendant, be condemned by the popular censure and disfavor. The press is set up as a tribunal for the redress of wrongs. The liberty of the press, we concede, is the palladium of civil liberty. It is one of the essentials of a free government. It is a sacred right secured by our organic law; but, with the grant of the right, is imposed the obligation to refrain from its abuse. Public journalists, like everybody else, are held to an observance of the proprieties of social life. While the utmost latitude is accorded to them in the discussion of all subjects, and they may freely comment upon the acts and conduct of men as individuals, to say nothing of the wide expanse of authority to speak faithfully and boldly in the interests of the people regarding public measures and questions of all kinds that concern the community at large, still there is a limit beyond which this freedom becomes license. It is upon the confines of these that responsibility begins. The law which shields the private character and reputation of an inoffensive person from the assaults of calumny and falsehood, is founded upon a public sentiment of greater power even than that of the free press. It forbids the wanton violation of the sacredness of personal character and good name. In this case no public need required the publication of the offensive card. No public interest was subserved by it. No private wrong was redressed by it, and no good reason existed to suppose there would be. But, as the result shows, a wrong was inflicted. A man of respectable character and good report in the community was falsely charged with the crime of robbery; the charge went forth to the world in the columns of

a newspaper having an extensive circulation, and the defendant must respond therefor."

360. As to how far newspapers are privileged to indulge in comments on the private characters of public individuals, there might be some difficulty in laying down one universal rule. The circumstances of the case would probably have much to do with deciding such a question. There is no other possible means of judging of the fitness of a man for the service of the public, than the record of his private life. He who is unjust or immoral in the private relations and duties of life, cannot be fitted for stations of public trust. The state needs the services of her best citizens, and it is in proportion as they are illustrious in virtue and honor and bravery, that she rises in the estimation of nations, and takes her place among the powers of the world.

But the law recognizes the possibility of reformation in individuals and institutions, and will not encourage a malicious and scandalous raking up, from private sources, of old and perhaps atoned-for offenses and errors, to gratify mere personal and political envy or hatred, in the case of a faithful, or even of a new and untried public servant.

Such a doctrine would be cruel and unjust. The law which, as we have seen, ever regards with solicitude the reputation of her subjects, will rather encourage and favor the opportunity for reformation and repentance, than throw obstacles in its way.

Least of all will it sanction the criticism of motives; that is one thing of which she will never seek to judge. It is only when the necessity—as in the case of crimes—is forced upon her that she will undertake their scrutiny.

It was held, in a recent English case,[1] to be a fair subject for discussion by the press (in dealing with a

[1] Seymour v. Butterworth, 3 F. & F. 376.

particular appointment to a recordership of a barrister who was also a member of parliament) whether it is desirable that members of the bar, being also in the house of commons, should receive appointments to subordinate offices, as the reward of parliamentary adhesion, from one or other of the political parties of the state; although an unfounded imputation of corruption in the particular case would be libelous. The independence of the bar, the independence of parliament, and the independence of the representatives of the people, the court held, were matters of public interest, and if the writer goes beyond that, and asserts that a member of parliament had bargained to sell his vote upon a corrupt contract, or that a member would not have voted or spoken as he did, but for a corrupt understanding that he should receive a reward, it becomes a serious charge, and one actionable. "At the same time," added the court, "those who filled a public position must not be too thin-skinned in reference to comments made upon them. It would often happen that observations would be made upon public men, which they knew, from the bottom of their hearts, were undeserved and unjust; yet they must bear with them and submit to be misunderstood for a time, because all knew that the criticism of the press was the best security for the proper discharge of public duties."[1]

The principle of privileged communications made by an individual, or by individuals, who honestly suppose or believe that they have a peculiar interest in a certain matter of useful inquiry made to others, who also believe in their peculiar and useful interest in such matters, will not always be extended to a self-constituted organization, setting itself up to attempt the reformation of society.

[1] Shortt, L. L. 447.

In a recent English case,[1] the committee of a reform union published in a newspaper a report stating: "The first exposures of the union having failed to produce any improvement in the mode of conducting elections in Berwick, and the persons there who traffic in votes being utterly impervious to public opinion, we have submitted the evidence to the best legal advice we could obtain, and, in accordance with that advice, have issued writs against the following persons," mentioning the plaintiff amongst others, and adding, amongst the comments, "In a few days writs will be issued against another list of offenders." An action of libel having been brought, the court, after stating to the jury that, as a general rule, "it is lawful to discuss in the columns of a public journal matters of public interest, provided it be done bona fide, without actual malice or the unnecessary making of personal imputations on any individual," added, that the defendants had no right, in doing so, to make a personal imputation on an individual. "I suggest to you," continued the learned judge, "that any self-constituted body which sets itself up for the reform of the public, whether in religious, in commercial, or in political points of view, must be extremely cautious, in all their publications and writings concerning private individuals, not to reflect on private character. A man stands at fearful odds when he has to contend with a public body. If they publish that which reflects on the private character of individuals, they should be very careful of the truth of what they say.

In the case of public discussions by individuals in the newspapers, each is at his own peril. So, in an action for libel, first of the plaintiff generally, and secondly of him as a clergyman, it appeared that de-

[1] Wilson v. Reed, 2 F. & F. 151.

fendant had published a pamphlet entitled "Truth Vindicated," and the alleged libels were contained in a review of that pamphlet published in a newspaper. Said Erle, C. J.: "Where the plaintiff and defendant have both had recourse to the press, and the libel has been published in the course of a discussion in which both parties have been before the public, and in which the plaintiff first had recourse to the press, and made the matter public, it is important to see if malice has been made out against the party sued, or if he has published only what he believed was required for the interests of truth."[1]

361. The personal quarrels or misunderstandings of individuals, are not matters of public interest in the sense of our definition.[2] But if a quarrel or misunderstanding involve a matter of general

[1] Hibbs v. Wilkinson, 1 F. & F. 608.

[2] Per contra, however, see the decision of Erle, C. J., in Hibbs v. Wilkinson, 1 F. & F. 608. In that case the plaintiff, a clergyman, in the course of a public controversy with another clergyman, published a document purporting to be a collection of "Opinions of the Press" on a pamphlet written by the plaintiff, and, amongst others, an incorrect extract from an article published in the defendant's newspaper; and the defendant published another article in his paper, stating that the concoctor of the paragraph, purporting to be extracted from it, had been guilty of adding to the article offensive and insulting expressions which it never did and never should have suffered to appear, and of suppressing other passages so as to alter the sense, changing one passage "with a malice which evidently overcame his sense of truth and honesty." On the trial of an action of libel, the jury were told by Erle, C. J., that if they were of opinion that the defendant wrote what he did for the purpose of maintaining the truth, sincerely having that object in view, without any corrupt motive, and that the language he used, even although it might be exaggerated, was prompted by the desire to maintain the truth, and that the exaggerated language was provoked by similar language on the other side, which might well have accounted for the use of strong expressions, they might find a verdict for the defendant.

interest or solicitude to the public, it might become so.

A correspondence between a churchwarden and the incumbent of a parish on the subject of an alleged desecration of the church, by allowing books to be sold in it during service and turning the vestry-room into a cooking apartment, is a matter of public interest, and may be commented upon in the press, provided the language made use of be not stronger than the occasion will justify. "The maintenance of decency and propriety in conducting public worship, and of the sanctity of the sacred edifice and all connected with it," said Cockburn, C. J., "is surely a matter of the greatest public concern. The very use of the term 'public worship' shows this."[1]

362. In the case of public advertisements, pretensions, or performances, the law will regard the health, safety, and reputation of its subjects. So, the publication in a newspaper, by a medical practitioner, of an advertisement of a new mode of treating and curing consumption,[2] has been held to be a matter of public interest. The alleged libel in this case was contained in a leading article, and represented the advertiser as a quack and impostor, comparing him—by reason of his describing himself as an M.D., on account of a diploma obtained in America—to "scoundrels" who pass bad coin. The libel having been justified on the ground of its being true in substance and effect, the jury were instructed "that even if the plea of justification were not made out, the defendant would still be entitled to their verdict if he had written honestly, and with the intention of exercising his vocation as a public writer

[1] Kelley v. Tinling, L. Rep. 1 Q. B. 699; 13 L. T. N. S. 255; 35 L. J. 231, Q. B.

[2] Hunter v. Sharke, 14 F. & F. 983

fairly, and with reasonable moderation and judgment."

So again, a newspaper paragraph giving an account of some proceedings at the British Archæological Association, and describing certain leaden figures reported to have been found in the Thames, and sold by the plaintiff as antiquities, the sale of which it stigmatized as an attempt at extortion and fraud, was held to be, in the absence of malice, protected by the privilege of fair discussion on a matter of public interest.[1]

Where the writer of a letter published in a newspaper, replying to a question asking "who was Zadkiel," gave the name of the plaintiff, who was the proprietor and editor of "Zadkiel's Almanac," and stated that Zadkiel's mischievous propensities were "not solely involved in that foolish publication, 'Zadkiel's Almanac,'" but that he had "gulled" many of the nobility by means of a magic ball of crystal, by which he pretended to tell what was going on in the other world, and that he took money for "these profane acts, and made a good thing of it"—the court directed the jury, that the privilege accorded to public writers would extend to a denunciation of the almanac, and the use of the ball, as an imposture, but not to an unfounded statement that the plaintiff had made money by a conscious and fraudulent imposture by the use of the magic ball. "If the system was mischievous, and calculated to delude the unwary and the credulous, it was, no doubt, fit subject for indignant denunciation. But it was another thing to say that, because a man put forward such a publication or such a system, a public writer could go back into his past history and make statements which were not true, and calculated to

[1] Eastwood v. Holmes, 1 F. & F. 347.

do him injury. His system might be described as an imposture, but facts must not be invented or misstated as to his past life, with a view to destroy his credit. In order to find a verdict for the defendant, they must be satisfied, not only that he honestly believed that the plaintiff had taken money for a fraudulent exhibition, but that he had such fair grounds for his imputation that his inference was not so unfair as to be reckless."[1]

And similarly, where a newspaper published of an exhibitor of flowers at a horticultural show, that "the name of G. is to be rendered famous in all sorts of dirty work; the tricks by which he and a few like him used to secure prizes, seem to have been broken in upon by some judges more honest than usual. If G. be the same man who wrote an impudent letter to the Metropolitan Society, he is too worthless to notice; if he be not the same man, it is a pity two such beggarly souls could not be crammed into the same carcass"—the court held that such observations did not fall within the limits of fair criticism on G.'s floral exhibition.[2]

363. Performances at theatres, or other places of public amusement, are, by their own seeking and profession, places of public interest; and it would be unreasonable to allow them to complain of the publicity they seek for, and upon which they thrive, if it should happen to provoke unfavorable criticism. The members of the theatrical profession, and proprietors of places of public amusement, as a rule, recognize this; and it is very rarely that we find them coming into courts for protection against criticism, wisely choosing, by taking

[1] Morrison v. Belcher, 3 F. & F. 614.
[2] Green v. Chapman, 4 Bing. N. C. 92.

advantage of its suggestions, to avoid awakening its repetition.

In an action for libel, however, brought by Charles Dibdin, the poet and song-writer (who was also the proprietor of a place of public entertainment, where he sung songs supposed to be written and composed by himself), against the editor and printer of a newspaper, for a paragraph insinuating that the songs were not in fact written by him; that on the first night of the performance there had been a very thin audience, and composed of persons admitted by orders; and that they alone had applauded the music of the songs, which was of a very inferior kind; Lord Kenyon said, "that the editor of a public newspaper may fairly and candidly comment on any place or species of public entertainment, but it must be done fairly, and without malice, or view to injure or prejudice the proprietor in the eyes of the public; that if so done, however severe the censure, the justice of it screens the editor from legal animadversion; but if it can be proved that the comment is unjust, is malevolent, or exceeding the bounds of fair opinion, that such is a libel, and therefore actionable."[1]

364. As to the limits to which theatrical criticism may go, in the case of Fry v. Bennett[2] it was held to be beyond the limits of ordinary and legitimate criticism, to publish in a newspaper, statements that it "was part of plaintiff's system of management to get his critics to abuse and defame the females of his company, in ignorant and blackmail newspapers—in the purchased and corrupt newspapers under his control; that he began this system on Madame Pico, and was carrying out the same game with Truffi; that

[1] Dibdin v. Swan. 1 Esp. 28.
[2] 5 Sand. 54; 2 Bosw. 200; affirmed, 28 N. Y. 324.

Madame Pico was insulted and summarily set adrift, and had sued the plaintiff; that plaintiff's pet journals in Philadelphia came out and abused Madame Truffi in the grossest terms; that, last year, the subscribers were cheated out of one-third of the subscription money, &c.; that plaintiff packed his opera-house, from parquette to amphitheatre, with loafers and hirelings, to hiss Benedetti off the stage; that at least three hundred persons, by special permit of the plaintiff, were allowed to grace the opera for the first time in their lives; that plaintiff appeared before the audience and sustained his favorite character of an ape, by no means for the first time, &c.; that the opera season was a history of ridiculous blunders, violent contentions, supercilious ignorance, laughable rows and riots, and nothing but disgraceful brawling, and broken promises, &c.; that but for the patronage of public gamblers at the opera, the plaintiff could not sustain himself a week," &c., &c.[1]

It has been pronounced in England, that the public at a theatre have a right to express their free and unbiassed opinion of the merits of the performers, but that certain persons have no right, by a preconcerted plan, to make such a noise that an actor, without any judgment being formed as to his performance, should be driven from the stage. However, the decision of the case in which this was said,[2] gives the above little more than the force of a mere dicta. In that case the

[1] See, as to the rights of actors, Gregory v. Duke of Brunswick, 6 M. & G. 950, where the plaintiff, an actor, sued the defendant for hooting and hissing him off the stage. The court, however, held that the public had a right to express their diapproval of theatrical performances, and found against the plaintiff. It seems in this case that the disapprobation was of the private character of the plaintiff, and not of the merits of his acting.

[2] Gregory v. Duke of Brunswick, 6 M. & G. 950.

defendants appeared to have expressed their disapprobation at the private character of the actor, and not at the merits of his acting, and a verdict in their favor was found by the jury.

365. The published productions of authors are also performances of public interest, which the press may freely discuss and criticise. The first limit which the law places to the exercise of this right is, that it be not made the occasion for the indulgence of private spite or malice, or a defamatory attack on the personal character of the author whose work is criticised. Bona fide strictures, however unsparing their character—ridicule, however poignant—may be employed, provided his ignorance, or unfitness for authorship justify it. And under certain circumstances—as if, for instance, the author is a charlatan and a pretender—criticisms and ridicule which affect him personally, but only in his character of author, and are not directed against his private life, are not libelous.[1]

"Liberty of criticism," says Lord Ellenborough,[2] "must be allowed, or we should have neither purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication, therefore, I shall never consider as a libel which has for its object, not to injure the reputation of any individual, but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality."

"Every man," says the same learned judge, in another case,[3] "who publishes a book commits him-

[1] Shortt, L. Lit. 449. *Vid.* also, Fraser v. Berkeley, 17 C. & P. 625; Carr v. Hood, 1 Camp. ; Reede v. Sweetser, *ante*, vol. i. p. 179.

[2] Tabart v. Tipper, 1 Camp. N. P. 351.

[3] Carr v. Hood, 1 Camp. N. P. 358. The plaintiff in this

self to the judgment of the public, and any one may comment upon his performance. If the commentator does not step aside from the work, or introduce fiction

case, Sir John Carr, had written, amongst other books, one called "The Stranger in Ireland;" and the alleged libel consisted of a book entitled "My Pocket-Book, or Hints for a Ryghte merrie and conceited Tour, in quarto, to be called The Stranger in Ireland in 1805, by a Knight Errant," and contained a frontispiece entitled "The Knight leaving Ireland with Regret." The declaration alleged that this frontispiece contained a false, scandalous, malicious, defamatory, and ridiculous representation of the said Sir John, in the form of a man of ludicrous and ridiculous appearance, holding a pocket-handkerchief to his face and appearing to be weeping; and also containing therein a certain false, malicious, and ridiculous representation of a man of ludicous and ridiculous appearance, following the said representation of the said Sir John, and representing a man loaded with and bending under the weight of three large books, &c., and a pocket-handkerchief in one of his hands, the corners thereof appearing to be held or tied together, as if containing something therein, with the printed word "wardrobe" depending therefrom, thereby falsely, scandalously, and maliciously meaning and intending to represent, for the purpose of rendering the said Sir John ridiculous, and exposing him to laughter, ridicule, and contempt; that one copy of the said first-mentioned book, and two copies of the said book of the said Sir John, secondly mentioned, were so heavy as to cause a man to bend under the weight thereof; and that his the said Sir John's wardrobe was very small, and capable of being contained in a pocket-handkerchief, &c. The declaration laid, as special damage, that Sir John had lost the sale of the copyright of a book of his, giving an account of a tour through part of Scotland, owing to the publication of the alleged libel. Lord Ellenborough said, in reference to the special damage laid: "If the reputation or pecuniary interests of the person ridiculed suffer, it is damnum absque injuria. Where is the liberty of the press, if an action can be maintained on such principles? Perhaps the plaintiff's 'Tour through Scotland' is now unsaleable; but is he to be indemnified by receiving a compensation in damages from the person who may have opened the eyes of the public to the bad taste and inanity of his compositions? Who would have bought the works of Sir Robert Filmer after he had been refuted by Mr. Locke? But shall it be said that he might have

for the purpose of condemnation, he exercises a fair and legitimate right. . . . . The critic does a great service to the public who writes down any vapid or useless publication, such as ought never to have appeared. He checks the dissemination of bad taste, and prevents people from wasting both their time and money upon trash. I speak of fair and candid criticism; and this every one has a right to publish, although the author may suffer a loss from it. Such a loss the law does not consider an injury, because it is a loss which the party ought to sustain. It is, in short, the loss of fame and profits to which he was never entitled." "Ridicule is often the fittest weapon that can be employed for such a purpose. If the reputation or pecuniary interests of the person ridiculed suffer, it is damnum absque injuria. Where is the liberty of the press, if an action can be maintained on such principles? . . . . We really must not cramp observations upon authors and their works. They should be liable to criticism, to exposure, and even to ridicule, if their compositions be ridiculous; otherwise, the first who writes a book on any subject, will maintain a monopoly of sentiment and opinion respecting it. This would tend to the perpetuity of error. Reflection on personal character is another thing. Show me an

sustained an action for defamation against that great philosopher, who was laboring to enlighten and ameliorate mankind? We really must not cramp observations upon authors and their works." And his lordship concluded, after laying down the general principles above cited, by directing the jury that if the writer of the publication complained of had not traveled out of the work he criticised, for the purpose of slander, the action would not lie; but if they could discover in it anything personally slanderous against the plaintiff, unconnected with the works he had given to the public, in that case he had a good cause of action. The jury returned a verdict for the defendants."

attack on the moral character of the plaintiff, or any attack upon his character unconnected with his authorship, and I shall be as ready as any judge who ever sat here to protect him; but I cannot hear of malice on account of turning his works into ridicule." His lordship added, that if, in the case before him, the party writing the criticism followed the plaintiff into domestic life, for the purposes of slander, that would have been libelous.

And in another case[1] Tenterden, C. J., stated the rule as follows: "Whatever is fair and can be reasonably said of the authors of works, or of themselves as connected with their works, is not actionable, unless it appear that, under the pretext of criticising the works, the defendant takes an opportunity of attacking the character of the author; and then it will be a libel. That there is in this publication a great deal of ridicule must be admitted by every one; and I think that there appears also to be some rancor; still, if the jury think that what is said here was fairly called for by what the plaintiff had done as the editor of another publication, the defendant is entitled to a verdict; but if the jury think the remarks were not fairly called for, you must find for the plaintiff."

In the two recent English cases of Strauss v. Francis,[2] the question of what is a legitimate criticism of a literary work was very fully reviewed. In the first case, where the alleged libel was contained in a critique (in the Athenæum) on a novel, describing the work as "characterized by vulgarity, profanity, and indelicacy, bad French, bad German, and bad English, and abuse of persons living and dead," the court charged the jury,

[1] Macleod v. Wakeley, 3 C. & P. 313.

[2] 4 F. & F. 1113, and Id. 1116. *Vid.* also, the case of Reade v. Sweetzer, *ante*, vol. i. p. 179, and 6 Abb. Pr. N. S. 9.

"that the question was whether, severe as it was, it was not warranted by the nature of the work. It was of the last importance to literature, and, through literature, to good taste and good feeling, to morality and to religion, that works published, for general perusal, should be such as were calculated to improve, and not to demoralize, the public mind; and therefore, it was of vast importance that criticism, so long as it was fair and reasonable and just, should be allowed the utmost latitude, and that the most unsparing censure of works, which were fairly subject to it, should not be held libelous. A man who publishes a book challenges criticism; he rejoices in it if it tends to his praise, and if it is likely to increase the circulation of his work; and, therefore, he must submit to it if it is adverse, so long as it is not prompted by malice, or characterized by such reckless disregard of fairness as indicates malice towards the author. You must say whether, in this case, you think the critique was the fair and genuine result of the judgment of the critic upon the work, or whether it was prompted by reckless disregard of the author's feelings, for the sake of displaying the writer's powers of denunciation."

The defendants, having consented to the withdrawal of a juror, afterwards published an article commenting on the proceedings in the action, and suggesting, as a reason for assenting to the withdrawal of a juror, the inability of the plaintiff to pay costs if the verdict had been against him. Another action of libel having been brought for the publication of this article, the court told the jury, that if they thought that the allusion was brought in only to make an attack upon the circumstances or character of the plaintiff, it would be malicious and actionable.

366. Falsely to impute to a person the publication

of any immoral or absurd literary production would be libelous, in a newspaper or in an individual.' A tradesman's handbill, circular, or advertisement stands, in respect of the right of commenting upon it, on the same footing as a book, and may be made the subject of fair and reasonable criticism in the public press, or otherwise.[2]

[1] Tabart v. Tipper, 1 Camp. N. P. 350. "I can see no distinction," said Byles, J., in Paris v. Levy (9 C. B. N. S. 362; 3 L. T. N. S. 324; 30 L. J. 11 C. P.), "between a handbill or a circular or advertisement which is published to all the world, and a book: both are literary productions, and are addressed to the public, and both are subject to the same comment and criticism. The shape in which they are published makes no difference: many advertisements indeed are issued in the form of books. Two-thirds of the daily newspapers are usually taken up with advertisements of various sorts. It is plain, therefore, that the form in which the publication appears can make no difference." *Vid.* also Hunter v. Sharpe, 4 F. & F. 1005.

[2] The case of Paris v. Levy, above quoted, was where a marine store-dealer having published and extensively circulated a handbill setting forth the prices which he was prepared to give for a variety of articles, an alderman, sitting as a magistrate at Guildhall, called the attention of a newspaper reporter to it, and stigmatized the system as most pernicious in its effects, as offering great inducements to servants to rob their masters and mistresses. The observations of the alderman, together with the handbill itself, were published in the newspaper, with a heading "Encouraging Servants to Rob their Masters." A leading article was also published, commenting upon the handbill, and ending as follows: "Will Mr. P. (the plaintiff) allow us to put this simple question to him —are not these unheard-of high prices, these clamorous demands for rags, bones, kitchen stuff, plated metal, and old copper—are not these clap-trap announcements, that flare on the door-jambs of five hundred dolly-shopkeepers such as he, a premium offered to dishonesty? a direct incentive to servants to rob their masters and mistresses? The high prices which the Clapham rag-merchant vaunts his ability to give, the ready money he is so charmingly anxious to pay—these read very much like invitations to servants, when their

Whether a sermon delivered by a clergyman to his congregation is a performance of sufficiently public interest to bring it within the rule, does not seem to be settled.[1]

legitimate and allowed perquisites run short, to make perquisites for themselves. How many visits to Mr. P.'s *omnium gatherum* does it take for one to Wandsworth Police Court? Mr. P. may be a very upright man, and his business may be conducted in a perfectly legitimate manner; but it is the duty of all employers to warn their servants against the specious placards that throw out baits to the weak and ignorant, and tempt the most trustworthy to pilfering and malversation. The servant may begin with a surreptitious piece of fat or a few rags; she may end by rifling her mistresses wardrobe, and running away with her best moire antique dresses. The footpage may take an old buckle to the ragman to begin with; and end by breaking open the plate chest. The climax of Mr. P.'s unprecedentedly high prices may be penal servitude."

On the trial of an action of libel for the foregoing publication, Earle, C. J., told the jury that if the plaintiff put forward and drew public attention to a handbill which, in the opinion of the editor of the newspaper, was most dangerous to honesty, and held out a temptation to servants to depart from their duty, the editor might be able strictly to excuse, before a jury, the remarks which he made, if in their judgment those remarks were well founded and called for by the occasion; but had the defendant said one word against the plaintiff with reference to his private life or his mode of managing his business, he (the learned judge) would have felt bound to say that there was no pretense of justification. The jury having returned a verdict for the defendant, a rule *nisi* was obtained for a new trial on the ground of misdirection, but the rule was afterwards discharged. "The real question was," said Byles, J., "did the remarks exceed the fair license of criticism, and degenerate into reflections upon the private character of the plain-

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[1] There was a difference of opinion amongst the learned judges, in Gathercote v. Miall (15 M. & W. 319), as to whether sermons preached in a church, but not published, are the lawful subject of public comment; Alderson and Rolfe, BB., leaning to the opinion that they are, Pollock, C. B., and Parke, B., inclining the other way.—Shortt, p. 444.

The law is the same as to comments on works of other kinds which appeal to the public.

Thus, it has been held that a picture publicly exhibited may be criticised in the press; and, however strong the terms of censure—as, for instance, calling the painting "a mere daub"—no action for libel will lie, provided the work be fairly and honestly criticised, and the criticism be not made the vehicle of personal malignity towards the painter.[1]

So where an architect and professor of architecture in the Royal Academy, brought an action for an alleged libel upon him, contained in a publication which professed to give an account of the principles of a new order of architecture, called the Bœotian order, stating it to have been invented by the plaintiff, whom it termed the Bœotian professor, and setting forth several absurd principles as the rules of the new order, which it illustrated by examples of buildings, all of which were the works of the plaintiff, Lord Tenterden, C. J., thus directed the jury: "This publication professes, in substance, to be a criticism on the architectural works of the plaintiff. On such works as well as on literary productions, any man has a right to express his opinion; and, however mistaken in point of taste that opinion may be, or however unfavorable to the merits of the author or artist, the person entertaining it is not precluded, by law, from its fair, reasonable, and temperate expression. It may be

tiff." "I think," said Keating, J., "my lord was perfectly right in telling the jury that there was no distinction as to fair comment and criticism between a handbill and a book or any other publication; as also in telling them that if they thought that the language of the alleged libels was that of fair criticism, and free from personal imputation, the defendant was entitled to their verdict."—Shortt, L. L. p. 448.

[1] Thompson v. Schackell, 4 M. & Mal. 187.

fairly and reasonably expressed, although through the medium of ridicule. In the present case, the censure is certainly strong; nevertheless, if you think the criticism fair, reasonable, and temperate, although it may not be correct, the defendant will be entitled to your verdict. If you think it unfair and intemperate, and written with the intention and for the purpose of injuring the plaintiff in his profession, by imputing to him that he acts on absurd principles of art, you will find for the plaintiff.'

"A man who publishes a book challenges criticism; he rejoices in it if it tends to his praise, and if it be likely to lead to an increase in the circulation of his work, and therefore he must submit to it if it be adverse, so long as it is not prompted by malice, or characterized by such reckless disregard of fairness as indicates malice toward the author.[2] But, as respects the person, except in the instances and to the extent heretofore pointed out, there is no privilege of criticism. No man has a right to render the person or abilities of another ridiculous.[3] I think no personal ridicule of the author is justifiable.[4] If an author has made himself ridiculous by his writings, he may be ridiculed; if his works show him to be vicious, his reviewer may say so. But the latter has no right to violate the truth in either respect."[5]

Where the plaintiff being one of the proprietors of a newspaper, "The Courier," brought his action for libel against the defendant, the editor of "The Statesman" newspaper—Lord Ellenborough charged the

[1] Soane v. Knight, 1 M. & Mal. 75.

[2] Strauss v. Francis, 4 Fost. & F. 1114.

[3] Rex v. Tutchin, 2 L'd Raym. 1061, criticising Carr v. Hood, 1 Camp. N. P. 358.

[4] Thompson v. Schackell, 1 Mo. & Malk. 187.

[5] Cooper v. Stone, 24 Wend. 442; Carr v. Hood, 1 Camp. 358.

jury: "In the first place, the plaintiff was described as the 'prostituted Courier,' and his 'full-blown baseness and infamy' were represented as 'holding him fast to his present connections, and preventing him from forming new ones.' It was certainly competent in one public writer to criticise another, exerting his talents in all the latitude of free communication belonging to a public writer;[1] and so Lord Kenyon held, that the opinions and principles of a public writer were open to ridicule, in the same way as those of any other author, but that the privilege did not extend to calumnious remarks on the private character of the individual. In that respect, the editor of a newspaper enjoyed the rights of protection in common with every other subject. Since, then, the defendant in this case had stigmatized the defendant as the venerable apostle of tyranny and oppression, and as a man whose full-blown baseness and infamy held him fast to his present connection, because they left him without the power of forming new ones; in all this he had undoubtedly overstepped the limits which had been drawn, and by which his conduct ought to have been regulated."[2]

If the critic, however, go out of his way to attack the private character of the author, such an attack is a libel. It is important that a line should be drawn between fair discussion for the promotion of the truth, and publications for the aspersion of personal character. In all cases of criticism, "The question is one of good faith." "The question whether there is any excess in the comments, is matter entirely for the jury." If it be shown that the comment is unjust, is malevo-

[1] Stuart v. Lovell, 2 Stark. Cas. 73.

[2] Heriot v. Stuart, 1 Esp. Cas. 337; and see Latimer v. West. Morning News. Asso. 25 L. T. N. S. 44.

lent, and exceeding the bounds of fair opinion, it is actionable.[1]

Nor is it within the limits of criticism to write of the publisher of a magazine, that he had inserted in his magazine a series of articles, the greater part of which were false and of a gross character;[2] nor to write of a book publisher, that he published books of an immoral character, and ascribing to him the authorship of some silly rhymes;[3] nor to impute to an author false and dishonest or unworthy motives in the preparation of his book.[4]

Criticism of a literary work, being matter of pure opinion, it would be unfair, as well as perhaps impracticable, to apply the criterion of absolute truth, or the lawfulness of the occasion; the only question will be, Is it fair, proper, and in good faith?[5]

367. In the cases of works only privately printed, for circulation among friends, and which do not invite criticism, the element of public interest being wanting, the rule would not probably apply to save a hostile

[1] McLeod v. Wakely, 3 C. & P. 311; Hibbs v. Wilkinson, 1 F. & F. 610; Cooper v. Stone, 24 Wend. 422; Dibdin v. Swan, 1 Esp. 28; Heriot v. Stuart, 1 Esp. Cas. 437; Latimer v. West. Morning News Asso. 25 L. T. N. S. 44.

[2] Coburn v. Whiting, cited in Cooke on Defamation p. 58.

[3] Tabart v. Tipper, 1 Camp. 350, the rhymes were:

"There was a little maid,
And she was afraid
Her sweetheart would come to her;
She bound up her head,
When she went to bed,
And she fastened her door with a skewer."

And were followed by this line:

"Dixin ego vobis Atticam quandam inesse elegantiam."

[4] Cooper v. Stone, 4 Wend. 434.

[5] And so generally, as to all criticism. Fry v. Bennett, 1 Code, R. N. S. 239, 5 Sanf. 54; Buddington v. Davis, 6 How. Pr. 401; Reg. v. Hicklin, L. R. 3 Q. B. 376; and these ques-

criticism from the character of a libel.[1] Literary critics are as amendable to the law as any other class of persons. Because they see fit to choose the vocation of a critic, there appears to be no reason why an immunity from the law should be extended them which does not attach itself to any other of the vocations which men select. There cannot logically be one law of libel for a reviewer of books, and another for a reviewer of horses and stock and prices current. In the suit of an Edinburgh publishing firm of W. & A. K. Johnston against the "London Athenæum," a literary review of acknowledged superiority, a verdict of £1,275 was awarded against the paper for publishing a review which, while being generally unfavorable, stated besides that the work (an atlas) was not worthy of the reputation of the firm whose name was on its title-page; that it could not be the production of either the celebrated geographer, Sir William Johnston, or of his son, as the former had retired from the firm, and the latter had gone to Paraguay to seek his fortune. It was admitted that the maps were "nicely got up," but notwithstanding that merit, it was pronounced "scarcely a work likely to maintain the special character of the firm." The reputation thus alluded to being well known to all persons interested in geography, they would appreciate the full force of the following, which was the concluding sentence of the criticism: "On the whole, we miss in this atlas the presence of the master-mind which, in both father and son, gave to the house of W. & A. K. Johnston the character it has so long enjoyed, and which we fear it is now losing, in the world of science."[2]

tions of fairness and good faith are for the jury. Cooper v. Lawson, 8 Adol. & E. 746.

[1] Vid. the dictum in Gathercote v. Miall, 15 M. & N. 334.

[2] Since this has been printed, however, on June 16th, 1875,

This may seem going to considerable lengths against what has been, up to this time, the law regulating comments on matters of public interest; but, matter of opinion as criticism is, it must not be expressed too harshly and too unnecessarily. If the publisher of a literary review be unable to speak favorably of a volume submitted to him, he, at least, has his option to remain quiet and say nothing about it. Therefore, if he treat it too mercilessly, and an action be brought against him for libel, there is the element of the gratuity of the attack, at least, to be considered in searching for the malice which is more or less an element of every libel. True, a review is supposed to be fair and candid, to praise what is praiseworthy, and to excoriate what is pretentious, or ignorant, or dishonest. It has, perhaps, a right to expose a plagiarist, or to ridicule humbug or trash. But while there is safety in the utmost limit of flattery, or adulation, it must not go beyond reason in the opposite

in the Second Division of the Court of Sessions, Edinburgh, the question was discussed of granting a new trial in the case of Johnston v. Dilke, the recent libel suit against the "London Athenæum." The Lord Chief Clerk, without discussing the rule laid down, which was not before him, said he thought the damages excessive, and that it was impossible to avoid granting the new trial on that ground, but he thought a reasonable sum might be named for acceptance by the pursuers, instead of having the case reopened. Lord Neaves thought the amount of damages utterly unjustified by the evidence. In his opinion the sum was outrageous. Mr. Fraser, for the pursuers, said he was in the hands of the Court as to the amount of damages which ought to have been awarded in the former trial. The Court then assessed the damages at £100, and, on a motion by the defendant's counsel, allowed them half of their expenses in connection with the discussion of the motion for a new trial. On the part of the defendant it was proved that the atlas contained serious errors, and it was shown that the criticism was written by Dr. Beke, a geographer of unquestionably high reputation.

direction. The tendency of the day is to hold literary reviewers strictly to the same rules of law by which everybody else is judged; but it is to be remembered that the enormous production of books in our day and the vast capital invested in them, and consequent patronage by way of advertisement which they afford to newspapers, sometimes induces a sort of partisanship between certain of the press and certain publishers. If, then, it should come to be understood that books which, upon their first appearance, are sent to newspapers for review, are treated less upon their merits than according to the terms upon which the publisher may happen to stand with the newspaper, or according to the desirability and frequency of the advertisements which the house contracts for with the proprietors of the journal, it would follow that a publisher who invests his capital in a book, has a right to sue for any unmerited or damaging criticism of it, and that, if it be libelous, and cannot be justified, just as any other libel must be justified (if justified at all), by proving its truth, he can recover damages sufficient to recompense him for the profit he has lost through the influence of his rival.

Such libels can rarely be justified, since, at the most, they are matters of pure opinion, and can be offset by other opinions. And it is, perhaps, an advance towards justice that critics, like every other class in the community, must use words at their peril, and with full knowledge of their meaning. It must be remembered, however, that publishers, by sending their volumes for review, do, in effect, request the expression of an opinion upon their merits, and this will go far to modify the above strictures. The knowledge upon the publisher's part that the diversities in human opinions are very great, and that, upon the whole, the proba-

bilities are against a majority of unfavorable reviews, and the open question whether an unfavorable is not fully as profitable to him in dollars and cents as a favorable review, is doubtless the reason why fewer of these actions are not brought. If, however, a review goes out of its way to attack and malign a work, a copy of which is not sent to it for an expression of its opinion, the law would be different, and the malignant review would be undoubtedly libelous.

It is to be remembered, that it requires very little labor or reading to unfavorably criticise a book. It has come to be understood on all hands, that there is scarcely a newspaper attaché in the country who could not, in twenty minutes, demonstrate that a work which has cost its author twenty years of laborious study and research, is "vicious," a "farrago of nonsense," and "positively of no value whatever." And it is manifestly unjust, no less than impolitic, that a writer, merely because what he happens to write is printed in the form of a newspaper article, may be permitted, at his own whim or caprice, to libel a book which represents not only the capital of its publisher, but the livelihood of its author. In the case of a physician, or of a lawyer, his professional reputation is dependent upon a book he has himself written, even more than upon the estimation of his ability, and character entertained by his immediate neighbors. We have seen, in our consideration of the law of libel, that the law will allow neither the one nor the other to be tampered with. The principle, in the case of public criticism, appears to apply with all the greater force, and we believe that the tendency of the courts is to hold to a strict accountability, newspaper editors, as well as all other persons, before the law, for a strict regard for the law of words.

The doctrine of the law as to literary criticism (and which, after all, is only the doctrine of common sense) may be summed up thus: If a volume be sent to one learned in its subject-matter, to be reviewed on its merits, and that reviewer point out sufficient errors, misstatements, and inaccuracies to justify him in characterizing the work as an unsafe guide, or as unauthoritative, or vicious, this is nothing more than the risk its author and publisher incurred—the first, by writing upon subjects which he had not thoroughly examined; and the second, by publishing the work of such an unconscientious author.

But there are two sorts of persons who do book-reviewing for the press. One comes to his task qualified by a previous acquaintance with the subject of which the book to be reviewed treats—the other is a versatile and gifted gentleman, perhaps, who writes rapidly and well, possessing a large store of mother-wit, and a strong penchant for satire, but no especial knowledge of the subject of the volumes sent him. Such a gentleman would, undoubtedly, in the absence of instructions, follow his own humor, rather than the merits of the work before him. In the latter case, the risk is entirely with the proprietor of the newspaper who prints the review thus prepared. And if that review be unjust, or calculated to injure the sale of the book, he must assume the burden of proving its substantial truth.

A newspaper cannot always escape from the consequences of a libel, upon the plea that it was an accident; and it seems that an utter absence of malice in the publication will not relieve it. In a late case the plaintiffs were a firm trading under the name of "The British and Foreign Stationery Society." In 1873, one of the members was a person named Yeomans.

But some time in 1874 he retired, and became a traveling agent of the firm; and the dissolution of the partnership was duly registered, and published in the "Gazette." The defendant was the publisher of a newspaper called the "Bookseller," in which dissolutions of partnership, bankruptcies, and other matters of special interest to the trade were inserted. In January of that year the notice of this particular dissolution, so far as regards the man Yeomans, was copied verbatim from the "Gazette," and it so appeared in the "Bookseller;" but by a blunder of the printer in arranging his matter, it fell under the head of "First Meetings Under the New Bankruptcy Act," instead of that of "Dissolutions of Partnership." Directly the mistake was discovered, which was not till two or three days after, the defendant called upon the plaintiffs, and expressed his regret for the error. He also published the correction in his own paper, and in another trade-periodical called the "Stationer," besides circulating it far and wide, throughout the country, by means of printed circulars. The plaintiffs, however, were not satisfied with this, and brought their action; and although the defendant proved that the alleged libel was a printer's error, and enumerated the apology, and the various means taken to have it rectified; and although the judge summed up in his favor, even going so far as to declare that such actions only impeded the course of justice, and prevented the trial of others which were of real importance, the jury returned a verdict for the plaintiffs, with fifty pounds damages.[1]

[1] This case is not reported, and we are indebted for the above, which may be colored, to the newspapers, but as evincing the tendency of the times in regard to the regulation of the press, we feel justified in its insertion. Newspapers have become, in our day, so opulent and powerful that it is not necessary they

368. A newspaper, in its records of the news of the day, must be careful to publish the absolute and accurate truth, and no more, and if its reporters shall have inserted into their reports of daily occurrences, falsehoods or misstatements, the newspaper publishing them will be none the less liable because they happen to be given in the form of a rumor, a surmise, or a statement or extract from a contemporary, for which the paper disclaims any responsibility.

So, where a newspaper in Great Britain published an extract as follows: "Riot at Preston.—From the Liverpool Courier.—It appears that Hunt pointed out Counseller Seager to the mob, and said, 'There is one of the black sheep.' The mob fell upon him and murdered him. In the affray, Hunt had his nose cut off. The coroner's inquest have brought in a verdict of willful murder against Hunt, who is committed to jail.—Fudge."—The court held that if the paragraph, which was copied from another paper, stood without the word "fudge" it would be a libel. If they were of opinion that the object of the paragraph was to vindicate the plaintiff's character from an unfounded charge, the action could not be maintained; but if the word "fudge" were only added for the purpose of making an argument at a future day, then it would not take away the effect of the libel.[1]

Magazines, reviews, &c., are to all intents and purposes books, and there is no reason why they cannot be copyrighted as such in the usual way.

should any longer be especially favored by the law, or have any of its rules, to which all other citizens are amenable, relaxed in favor of their editors and proprietors. Almost this precise case arose in 1837, where, by the same negligence, the name of a solvent house was inserted by the "New York Herald" in its list of failures during a financial panic. This also appears tc be unreported.

[1] Hunt v. Algar, 6 C. & P. 247.

The publication of false and idle rumors, whether published with or without a definite purpose, if they produce a detriment to the public, is punishable by indictment; such as false rumors to raise the price of provisions or other necessaries of life.[1]

It appears from a case in the 43rd Edw. 3,[2] that the attempt, by words, to enhance the price of merchandise was punishable by law.

In 1814, one De Berenger, with seven other persons, were indicted for conspiring by false rumors to raise the price of the public government funds on a particular day, with intent to injure such of the subjects of the realm as should purchase on that day; but the crime here lay in the act of conspiracy and combination to effect the illegal purpose.[3] Or if such rumors and stories are defamatory in their nature, the same rule will apply.

And it will make no difference that the libel is not upon a single individual, but upon a number, or upon a class of persons. So, in 1732, the court of King's Bench made absolute a rule for an information against the publisher of a paper, entitled "A true and surprising revelation of a murder and cruelty that was committed by the Jews lately arrived from Portugal; showing how they burnt a woman and a new-born infant, the latter end of February, because the infant was begotten by a Christian."[4]

In France every journalist is obliged[5] to sign his

[1] 3 Inst. 196; Dig. T. L. 23. Rex v. Waddington, 1 East. 143.

[2] Lib. Ass. Pl. 38.

[3] Rex v. De Berenger (3 M. & S. 67). The false rumor was that Napoleon, with whom England was then at war, was dead.

[4] Rex v. Osborne, Kel. 30; 2 Barn. K. B. 138, 166; vid. also Reg v. Gathercote, 2 Lew. C. C. 237.

[5] By the "law Tinguy Laboulie," so nicknamed after its two originators.

name to every article written by him, appearing in the public press; which has a salutary effect in checking the publication of newspaper libels.

In Ackerman v. Jones,[1] an action was brought by a private detective, or police officer, to recover damages of the defendant for publishing an alleged libelous article in the New York "Times" newspaper.

The complaint alleges, that on October 21, 1871, the defendant maliciously composed, and published in said "Times," an article setting forth that one John T. Burleigh appeared before Judge Shandley, a police justice, at the Jefferson market police court, and stated that several important letters and a check of thirty dollars, were stolen from his safe by a detective named Ackerman, at the instance of Emil Justh; that Burleigh did not make any such statement in his said affidavit, and that, by reason of the publication, the plaintiff was injured in his reputation and credit as such detective, and otherwise injured. The article published was as follows:

"Singular Complications in a Divorce Case.—On Wednesday last, John T. Burleigh, of No. 23 Dey-street, appeared before Judge Shandley, at Jefferson market police court, and stated that several important letters and a check for thirty dollars were stolen from his safe by a private detective named A. A. Ackerman, at the instance of Emil Justh, a banker, residing at No. 63 Exchange Place. Yesterday Sergeant McComb proceeded to the residence of Mr. Justh, to arrest him on the charge, but the latter refused to accompany him to the station, and when force was about to be used, presented a revolver at the officer's head. Patrolman Tully witnessed the occurrence, and before the weapon could be discharged wrenched it

[1] 37 N. Y. Superior Ct. (J. & S.) 42.

from his hand. He was then conveyed to the station, where the letters were found in his possession. These letters, Justh alleges, afford proof of the seduction of his wife by Burleigh, and he desired to use them in proceedings for a divorce now pending. Justh was discharged from custody, and Judge Shandley retained the letters in his possession for the present."

It further appeared that a retraction of the publication was requested in writing, but never made by the defendant; and plaintiff offered to prove that he had never taken any money, &c.

The court (Speir, J.) held, that no action would lie against the editor or proprietors of a newspaper, for the publication of a fair and true report of a judicial proceeding, except on proof of malice in making such report, which is not to be implied from the fact of the publication. "That the fact that he who claims to be libeled by the report was not a party to the judicial proceeding, does not affect the privilege. That an ex parte affidavit presented to a police magistrate to obtain a search warrant, is within the statute. That where the affidavit states that affiant had probable cause to suspect and did suspect that letters written and addressed to him, and being his property, and also a check for thirty dollars, indorsed to his order, and being his property, had been feloniously taken, stolen, and carried away from his safe by one A., at the instigation and by the direction of B.; and then sets forth the reasons for the suspicion, a report, stating that the affiant appeared before a police magistrate, and stated that several important letters and a check for thirty dollars were taken from his safe by a private detective named A., at the instance of B., a banker; that B. was arrested and taken to the station-house, where the letters were found in his possession; and then he was

discharged from custody, and the police magistrate retained the letters in his possession for the present (there being no evidence that the letters were found in the possession of B., or that the magistrate retained them),—is a fair and true report; consequently privileged; and an action by A. for libel, founded thereon, cannot be sustained. That failing to notice a letter advising the editor of the falsity of the charge, and requesting him to communicate with plaintiff's attorney as to a retraction and redress of the grievance, is not evidence of malice. That where the report is privileged, and that constitutes the defense, evidence of the falsity of the charge is inadmissible. And that when the question whether a report is privileged depends wholly on a comparison of written judicial proceedings, and the report thereof, there being no ambiguity of language, it is a question of law."

369. In this country scarcely any restrictions seem to be imposed upon the publication by newspapers of the proceedings of legislative bodies. The custom of publishing reports of deliberative bodies is not of very ancient date. In England, the publishers of "The Political State of Great Britain," about 1698, appear to have been the first who ever dared to publish regular reports of the doings of parliament, for the general public. Prior to that time the only records were the private labors of Sir Symonds D'Ewes, in his journal of Queen Elizabeth's parliament; Sir Benjamin Rudyard (time of Charles I.); Burton, who made reports of the Commonwealth parliaments; Anchitell Grey, who recorded the proceedings of Charles II.'s parliaments; Somers who took pencil notes of the debates of the Convention; and others. Various resolutions had from time to time been passed by both Houses against publishing reports of their debates. There is

a standing order of the House of Lords of the 27th of February, 1698, declaring "that it is a breach of the privilege of this House, for any person whatsoever to print, or publish in print, anything relating to the proceedings of the House, without the leave of the House."[1] And disobedience thereof was visited with emphatic punishment.[2] The House of Commons ordered, in 1641, "That no member shall either give a copy or publish in print anything that he shall speak here, without leave of the House"; and in 1642 resolved, "That what person soever shall print or sell any act or passages of this House, under the name of a diurnal or otherwise, without the particular license of this House, shall be reputed a high contemner and breaker of the privilege of parliament, and so punished accordingly."[3] In 1694, the House resolved, "That no news-letter writers do in their letters, or other papers that they disperse, presume to intermeddle with the debates or any other proceedings of this House;"[4] and repeated the same resolution in 1695[5], 1697,[6] 1703,[7] and 1722.[8] In the last-mentioned year, the Commons also resolved, "That no printer or publisher, of any printed newspapers, do presume to

[1] Shortt, p. 481.

[2] The House of Commons, in 1801, fined one Allen Macleod £100, and committed him to Newgate for six months, for publishing in The Albion and Evening Advertiser certain paragraphs ordered to be expunged from the journals of the House, and also a report of the debate thereupon (43 Lords' J. 105); and, in the same year, the printer and the publisher of the Morning Herald were committed to the custody of the Black Rod, for publishing in that paper what purported to be an account of a debate, which the House resolved to be a scandalous misrepresentation of what had passed (43 Lords' J. 60).

[3] Com. J. 220.

[4] 11 Com. J. 193.

[5] Id. 439.

[6] 12 Id. 48.

[7] 14 Id. 270.

[8] 20 Id. 99.

insert in any such papers any debates or any other proceedings of this House or any committee thereof." In 1728, the House resolved, "That it is an indignity to, and a breach of the privilege of, this House, for any person to presume to give, in written or printed newspapers, any account or minutes of the debates or other proceedings of this House, or of any committee thereof;" and "that upon discovery of the authors, printers, or publishers of any such written or printed newspaper, this House will proceed against the offenders with the utmost severity."[1]

[1] 21 Com. J. 238. See further orders, 23 Com. J. 148; 23 Com. J. 754; 29 Com. J. 207. In a debate which took place on the subject in 1738, Mr. Pulteney said he thought no appeals should be made to the public with regard to what was said in the House, "and to print or publish the speeches of gentlemen in this House, even though they were not misrepresented, looks very like making them accountable without doors for what they say within. Besides, sir," added the honorable member, "we know very well that no man can be so guarded in his expressions as to wish to see everything he says in this House in print" (Parl. Hist. vol. 10, p. 283). Sir Robert Walpole, in the same debate, complained (p. 285) that in some of the reports he had been made to speak the very reverse of what he meant; and that in others, all the wit, the learning, and the argument had been thrown into one side, and into the other nothing but what was low, mean, and ridiculous; and yet, when it came to the question, the division had gone against the side which, upon the face of the debate, had reason and justice to support it, so that, had he been a stranger to the proceedings and the nature of the arguments themselves, he must have thought this to be one of the most contemptible assemblies on the face of the earth. The debate ended in a resolution, "That it is a high indignity to, and a notorious breach of the privilege of this House, for any news-writer, in letters or other papers (as minutes, or under any other denomination), or for any printer or publisher of any printed newspaper of any denomination, to presume to insert in the said letters or papers, or to give therein any account of the debates or other proceedings of this House, or any committee thereof, as well during the recess as the sitting of Parliament; and that this

We are told in Hawkins's "Life of Johnson," that the parliamentary reports written by the latter (for "The Gentleman's Magazine") were the only parts of his writings which gave him any compunction; being frequently written from very slender materials, and often from none at all—the mere coinage of his own imagination. Of Pitt's famous speech in reply to Horace Walpole, we learn from "Boswell's Life of Johnson" that the Doctor avowed his having written it in a garret in Exeter-street, adding, "I saved appearances tolerably well; but I took care that the Whig dogs should not have the best of it." In order to evade the resolutions of the Houses of Parliament against the publication of their debates, recourse was had to the expedient of publishing them as the debates in the senate of "Magna .Liliputia," or as the debates in the Roman Senate, with Roman names adapted to the several speeches. In 1771, Colonel George Onslow made a complaint to the House of Commons of a number of newspapers, as misrepresenting the speeches and reflecting on several of the members of the House, in contempt of the order, and in breach of the privilege of the House, and moved that the printers should be brought to justice. Warm and long-continued debates ensued; orders were issued for the arrest of the printers; the city was in a ferment; mobs assembled around the House; and ultimately the offending printers were wrested by force from the hands of the parliamentary messengers. Since this time, no attempt House will proceed with the utmost severity against such offenders." It must be remembered that there was considerable ground for complaining of the manner in which the debates were at this time misrepresented in the reports which appeared, language and sentiment being frequently attributed to members which they never used or entertained.

has been made to check the publication of the parliamentary debates.

At the present day the completest reports of the doings of all deliberative bodies are habitually spread before the reader in the daily newspaper.'

' The following summary of the law, regarding publication of reports and parliamentary proceedings, is epitomized from Shortt's Law of Literature, p. 481.

Reports of proceedings of parliament may now be regarded as standing on the same footing with reports of proceedings in courts of justice.

For a long time the law on the subject remained in a doubtful state, but the recent case of Wason v. Walter (L. R. 4 Q. B. 73) may be considered to have placed beyond doubt the right to publish, without liability to civil action or criminal proceeding, a full and fair report of parliamentary debates, even though they contain matter defamatory of an individual.

In that case an action was brought against the publisher of the "Times" newspaper, for an alleged libel contained in a report of a debate, which took place in the House of Lords, on the presentation of a petition by the plaintiff, charging a high judicial officer with having been guilty of dishonorable conduct many years previously (see Wason v. Walter, ubi supra, and the remarks of Lord Brougham in the 70th vol. of Hansard, p. 1225).

Though a member of either house may, with impunity, make, in the house, a speech defamatory of an individual, the publication of that speech alone, whether by himself or by another person, is libelous; unless, perhaps, where it is published bona fide for the information of his constituents.

In Rex v. Lord Abingdon (1 Esp. 226), tried before Lord Kenyon, in 1774, the defendant had, in the House of Lords, read from a written paper a speech highly defamatory of an attorney, and afterwards had it published in several newspapers; for which a criminal information was filed against him. Lord Kenyon held that, although the defendant was not amenable to the jurisdiction of the court for a speech delivered in parliament, yet he was liable for its publication, if it contained defamatory matter, remarking, "that a member of parliament had certainly a right to publish his speech, but that speech should not be made the vehicle of slander against any individual; if it was, it was a libel."

Rex v. Creevy (1 M. & S. 273), was a stronger case. There

370. The proceedings of public meetings, of whatever nature, are matters of public interest, but in publishing reports of them newspapers must still be scrupulous to confine themselves to the exact occurrences, and to refrain from malicious criticism. Such reports are not "privileged" in the sense in which re-

the defendant, a member of the house of commons, had made, in the course of a debate, a speech containing several charges against a man named Kirkpatrick. An incorrect report of the debate having appeared in the Liverpool and other papers, the defendant sent a correct report of his speech to the editor of a Liverpool paper, with a request that he would publish it, which was done. The court held, that a member of parliament was answerable for publishing what he has delivered in his speech in parliament, if it contains defamatory matter.

The authority of Rex v. Creevy, so far as it is understood to decide that the publication of his speech by a member of parliament can, under no circumstances, be justified, if it contains matter defamatory of an individual, is much weakened by the opinions expressed with reference to it by eminent judges in two recent cases.

In Davison v. Duncan (7 El. & Bl. 233), Lord Campbell, C. J., said: "As Rex v. Creevy has been mentioned, I will add that, though I perfectly concur in the doctrine of Rex v. Lord Abingdon, that a malicious publication of his speech by a member of either house of the legislature is not privileged, I should think that a publication of a report of his speech by a member of the house of commons, bona fide addressed to his constituents, would be privileged;" and Crompton, J., added that, "The privilege in such a case would arise because the publication was as a communication between a member and his constituents, and not because it was a report of what took place in parliament."

In the more recent case of Wason v. Walter, Cockburn, C. J., in delivering the judgment of the Court of Queen's Bench, said: "Our judgment will in no way interfere with the decisions that the publication of a single speech for the purpose, or with the effect of injuring an individual, will be unlawful, as was held in the cases of Rex v. Lord Abingdon and Rex v. Creevy. At the same time it may be as well to observe that we are disposed to agree with what was said in Davison v. Duncan, as to such a speech being privileged, if bona fide published by a member for the information of his constituents."

ports of courts of justice and of deliberative bodies are privileged. On the trial of an action for a libel contained in a newspaper report of such a meeting, evidence of the accuracy of the report could not be given as a matter of justification, though it might be given in mitigation of damages.[1]

[1] Charlton v. Watton, 6 C. & P. 385.

Fair and correct reports of the proceedings at public meetings do not enjoy in England the same privilege as similar reports of judicial or parliamentary proceedings.—Shortt, L. Lit. p. 489. A fair account of what takes place in a court of justice, says Campbell, L. J., in Davison v. Duncan (7 El. & Bl. 231; 26 L. J. 106 Q. B. "is privileged. The reason is that the balance of public benefit from the publicity is great. It is of great consequenee that the public should know what takes place in court; and the proceedings are under the control of the judges. The inconvenience, therefore, arising from the chance of the injury to private character is infinitesimally small as compared to the convenience of publicity. But it has never yet been contended that such a privilege extends to a report of what takes place at all public meetings. Even if confined to a report of what was relevant to the object of the meeting, it would extend the privilege to an alarming extent. . . . . At such meetings things may well be said very relevant to the subject in hand, yet very calumnious. In what an unhappy situation the calumniated person would be, if the calumny might be published, and yet he could not bring an action and challenge the publishers to prove its truth! The legislature may think fit to extend the privilege of publication beyond the limits to which it now goes. If it does, it can impose such restrictions on the extension as it thinks fit. We in a court of law can only say how the law now stands; and, according to that, it is clear the action lies, and the plea is bad."

The action in this case was for a libel published in a country newspaper, and purporting to be an account of the proceedings of a meeting of the West Hartlepool Improvement Commissioners, at which a license from the Bishop of Durham to the chaplain of the West Hartlepool cemetery was said by some of the commissioners to have been procured by the plaintiff, the late bishop's secretary, from the present bishop, by misrepresentations The defendant pleaded that

371. By the liberty of the press is meant the liberty of those who conduct the press[1] to print, without any other license whatever. They have, subject

the various matters, stated in the libel to have taken place, did take place at a public meeting of the commissioners, acting under the powers of the West Hartlepool Improvement Act, 1854, and that the alleged libel was a just, true, faithful, correct, and accurate report of what took place at the meeting, and was published without malice. The plea was held bad.

A libelous publication cannot be justified on the ground that the matter contained in it was promulgated at a public meeting called to petition parliament (Hearne v. Stowell, 12 A. & E. 919).

In an Irish case, Pierce v. Ellis (6 Ir. L. Rep. N. S. 65, 66), where defendant handed to the newspaper reporter a correct version of his own speech, and the court was of opinion that it appeared from the defense itself, that the report of the proceedings was not a fair one, and in which the privilege accorded to reports of the proceedings of courts of justice was claimed for reports of the meetings of boards of guardians, Pigot, C. B., said: "A difference, great and obvious, exists between their proceedings and those of courts of law, in reference to some, at least, of the grounds on which the publication of fair reports of the latter are generally held to be privileged. Courts of justice are open to all the public who can be conveniently accomodated within them. The public have a right to be admitted to witness their proceedings. No such right exists of being admitted to witness the proceedings of boards of guardians; they have the power of deliberating (I believe rarely exercised, and, I believe, the rarer the better) with closed doors. Again, every court of justice has some presiding authority, with ample power to maintain order, and to control within due bounds the discussions which take place before it. The guardians have no presiding authority save that of the chairman, with very limited powers. It is obvious that,

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[1] Holt on Libel, 1, c. iv.; Hamilton arg. The People v. Croswell, 3 Johns. Cas. 360; and see The Federalist, No. 81; The Fourth Estate; Story on the Constitution, §§ 1880 to 1889; 1 Tindal's continuation of Rapin's History of England, 350; Remarks on Pultney's bill to prohibit the circulation of unlicensed newspapers; Root v. King, 7 Cow. 628; 1 Mence on Libel, 158; Essays on the liberty of the Press, chiefly as it respects personal slander, by Bishop Hayter, p. 6.

only to the law of the land, the right to publish with impunity, the truth with good motives, and for justifiable ends, whether it respects governments, magistracy, or individuals.

in such a body, discussions and accusations may take place altogether *ex parte*, and may be made the medium of the most injurious charges against individuals in their absence, without inquiry, without even adequate means of instituting inquiry, or of enforcing the production of proofs, and without any presiding authority having sufficient power to control or direct the proceedings."

Even where the legislature renders imperative the publication, at a specified time, of a report made by a medical officer of health to a vestry board, and directs that copies shall be given to any person on paying for them, a publisher of a newspaper will not be justified in publishing it, even without comment, as part of a report of the proceedings of the parish vestry, at any rate before it has been published by the vestry, as directed by the act of parliament (Popham v. Pickburn, 7 H. & N. 891; 5 L. T. N. S. 846; 31 L. J. 133, Ex).

A newspaper proprietor was held liable for publishing, under the circumstances last referred to, the following libel of the plaintiff, a chemist and druggist: "I communicated some time since with the registrar-general upon the giving of false medical certificates by Mr. P., of Exmouth-street. The registrar has requested the district registrar to warn this person. I beg, however, to advise the vestry to communicate with the secretary of state, so that a prosecution for forgery may be instituted. It is most important to the welfare of this district that this proceeding be put a decisive stop to."

"In this case," said Wilde, B., delivering the judgment of the court of exchequer, "the plaintiff is entitled to judgment. The defendant has published that of the plaintiff which is undoubtedly a libel, and which is untrue. He seeks to protect himself, on the ground that the publication is a correct report of a document read at a meeting of the Clerkenwell vestry, which document must have been published and sold at a small price by the vestry for a short time. But we are of opinion this furnishes no defense. Undoubtedly, the report of a trial in a court of justice, in which this document had been read, would not make the publisher thereof liable to an action for libel, and reasonably; for such reports only extend that publicity which is so important a feature of the administration of

On the introduction of the printing press into England, at the expense of the government, the press was regarded as a state right, and subject to the coercion of the crown,[1] as too dangerous a contrivance to be left unwatched. It was regulated, therefore, by the king's proclamations, prohibitions, charters of privileges, and licenses, and then by the decrees of the court of the star chamber, until the abolition of that court, in 1641. The long parliament, in 1643, assumed the power of licensing, which was continued by various statutes, till 1694. Governor Dongan was instructed (A. D. 1688) not to allow any printing press in New York, although Massachusetts had at that time en-

the law in England, and thus enable to be witnesses of it, not merely the few whom the court can hold, but the thousands who can read the reports. But no case has decided that the reports of what takes place at the meeting of such a body as this vestry are so privileged; indeed the case cited in the argument (Davison v. Davison) is an authority that they are not. Then, is the publication justified by the statute? It is true that the documents would have been accessible to the public in a short time, though not published by the defendant; but this cannot justify his anticipating the publication, and giving it a wider circulation, and, possibly, without an answer which the vestry might have received in some subsequent report or otherwise, and which would then have been circulated with the libel. This defense, therefore, fails. It was further contended that this libel might be justified as a matter of public discussion on a subject of public interest. The answer is—this is not a discussion or comment. It is the statement of a fact. To charge a man incorrectly with a disgraceful act is very different from commenting on a fact relating to him truly stated. There the writer may, by his opinion, libel himself rather than the subject of his remarks."

His Lordship added: "It is to be further observed that this decision does not determine or affect the question whether, after the statutory publication, it might or not be competent to others to republish these reports with or without reasonable comment."

[1] Hills v. University of Oxford, 1 Vern. 275; Basket v. University of Cambridge, 2 Burr 661.

joyed a printing press for nearly thirty years. By the common law of England no man not authorized by the crown had the right to publish political news.[1] But the constitution of the United States provides that congress shall make no law abridging the freedom of speech or of the press.[2] "It was," says Holt,[3] "from the press that originated what is in fact the main distinction of the ancient and modern world, public opinion."[4]

372. The proprietor of a newspaper is responsible for all that appears in its columns, although the publication be made without his knowledge, in his absence, or against his positive orders; because he, and he alone, is responsible to the public for the acts of the actual publisher.[5]

An action for a libel lies against the proprietor of a journal edited by another, though the publication was made without the knowledge of such proprietor.[6]

But if a printing press and newspaper establishment be assigned to a person, merely as security for a

[1] London Gazette, May 5 and 17, A. D. 1680.

[2] Art. 1, Amendment of 1789. And so the constitution of New York provides: Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right, and no law shall be passed to restrain or abridge the liberty of speech or of the press (C. of 1846, art. 7, § 8). This is repeated in the bill of rights of that State, and similar provisions occur in the constitution of every State of the Union.

[3] On Libel, p. 61.

[4] In the "Tent on the Beach," the poet Whittier speaks of an editor who

> Had left the Muses' haunts to turn
> The crank of an opinion mill.

[5] Huff v. Bennett, 4 Sand. 120; Dunn v. Hall, 1 Carter (Ind.) 345; 1 Smith, 288; Curtis v. Mussey, 6 Gray (Mass.) 261; Commonwealth v. Kneeland, Thatcher's Crim. Cas. 346.

[6] Andres v. Wells, 7 Johns. 260.

debt, and the press remains in the sole possession and management of the assignor, the ownership of the person holding the security or lien, is not such as will render him liable to an action as proprietor.[1]

But a receiver of a newspaper establishment, appointed to take charge thereof, and continue the publication of the newspaper, would be responsible for any defamatory matter published in the newspaper while the same was under his control.[2]

And in a late case, where the proprietor of a newspaper, gave to his assistant express instructions not to print anything personal, abusive, or exceptionable, which might be brought to the office by one who was in fact the author of the libel published, he was still held liable."[3]

A person who derives profit from, and who furnishes means for carrying on the concern, and entrusts the conduct of the publication to one whom he selects, and in whom he confides, may be said to cause to be published what actually appears.[4]

373. The question as to the conflicting rights of contributors and proprietors, to which allusion has already been made in the chapter on Originality, will be found further treated in the chapter on Piracy.

[1] Id.

[2] Marten v. Van Schaick, 4 Paige, 479; Dayton v. Wilkes, 17 How. Pr. 510.

[3] Dunn v. Hall, 1 Carter (Ind.) 345.

[4] Per Curiam in Rex v. Gutch, 1 Moo. & Mal. 433, and see Att'y-Gen. v. Seddon, 1 Cr. & Jer., 220; 3 Albany Journal, 46; Rex v. Alexander, 1 Moo. & Mal. 437; Perret v. New Orleans Times Newspaper, 25 La. Ann. 170; Tresca v. Maddox, 11 La. Ann. 206; Runkle v. Meyer, 3 Yeates, 518; Romayne v. Duane, 3 Wash. 246; Kennedy v. Gregory, 1 Bonney, 85; Daly v. Van Benthuysen, 3 La. Ann. 69; Huff v. Bennett, 4 Sandf. (N. Y.) 130; Ackermann v. Jones, 37 N. Y. Superior Ct. 44.

374. It seems to be popularly supposed that the proceedings of courts of justice are open to public inspection and criticism, as a matter of right, but such is very far from being the case, unless so enacted expressly by statute. "No law," says Lieber,[1] "insures the publicity of courts of justice either in England or the United States. A court has as much right to sit with closed doors, as the congress of the United States or as the legislature of any State, unless expressly enacted otherwise by statute." Thus in New York it is provided by statute that the sittings of every court shall be public, and every citizen may freely attend the same, and the custom is the same in England, where Lord Campbell,[2] pronounced it to be "of great consequence that the public should know what takes place in the courts." It is said furthermore,[3] that, as a rule of law every citizen is supposed to be cognizant of the proceedings of courts of justice—but this, probably, goes no further than to mean that every citizen is supposed to know the law of his country, which is to a large degree pronounced by courts.

We have seen, in treating of contempt, that every court is presumed to have the potentiality of controlling the publication of its own proceedings, although disposed to exercise it very rarely and only when such publication can interfere with, trammel, or affect the impartiality and freedom of its inquiry. Newspapers are, with this exception, entitled to publish as news the proceedings of courts. Said Lord Mansfield[4] on its

[1] Civil Liberty, 134, ed. 1859.

[2] In Hearne v. Stowell, 12 Ad. & El. 718; 4 Per. & D. 696.

[3] Willard Equity Juris. p. 251.

[4] And see Per Wilde B. in Popham v. Pickburn, 7 Hurl. & N. 891; Pollock, Ch. B., Ryalls v. Leader, Law Rep. 1 Ex. 298; Flint v. Pike, 4 B. & C. 473, Littledale, J.; Campbell, Ch. J., Hearne v. Stowell, 12 Adol. & El. 718; 4 Per. & D. 696;

once being remarked before him that certain persons attended court merely to watch the proceedings, "No matter; we sit every day in the newspapers."

But there may be cases in which a jus tertii or third right intervenes upon the privilege of the press. Such a case occurs when the proceedings in court, upon being published, become libelous of an individual.

If a court of justice, after impartial and careful scrutiny, and after permitting to the defendant every right to be heard in his own behalf, decide that he is a thief, an adulterer, or a swindler, a newspaper may undoubtedly publish that decision among other news of the day. It is quite a different thing, however, if the newspaper overhear that—in a court of justice or before a grand jury—a man has been accused of being a thief, an adulterer, or a swindler, and forthwith publish such tidings to the world. The ex parte and preliminary statements of litigants, or of counsel, may be in effect libelous, and, while the privilege of the court may extend its protection to them, that privilege may not extend to a newspaper which, with indecent haste, announces the fact. Nay more, preliminary examinations, which are generally ex parte before a magistrate, may result in a presumption of the guilt of a citizen, but no newspaper will have the right to comment, injuriously to him, upon such preliminary and ex parte examinations.

If, however, the newspaper published the proceedings, and then added that the accused was discharged, the whole might be regarded as merely a matter of

Bramwell, B., Ryalls v. Leader, Law Rep. 1 Ex. 298; Eyre, Ch. J., Currie v. Walter, 1 B. & P. 525; Stiles v. Nokes, 7 East, 493; 2 Stark. Slan. 263.

public interest, although much of the matter published would otherwise have been libelous, but if it merely publishes the report of the examination, it seems that it will do so at its own peril,[1] though the circumstances of the case and the question of malice or of the absence thereof, may mitigate the liability. For instance, if in the publication, of the minutes of a trial lasting from day to day, the matters and things contained in the testimony given on one particular day might be scandalous and libelous, and if the newspaper do not afterwards give the contrary testimony elicited, or leave the matter there, it would undoubtedly be responsible for the matter printed.

So where a newspaper published a highly-colored account of a charge against the captain of a vessel, who was brought before a magistrate for an alleged felonious assault on a lady on board his own ship, and held to bail to take his trial for the offense, which report was not a mere statement of the nature of the charge and the evidence given on the examination before the magistrate, but a highly-colored narrative of the transaction, interspersed with comments of the writer tending to inflame violently the public against the accused; telling of the assistance rendered by a passenger, who, having his attention attracted by the cries of the lady, "instantly rushed to the spot in time to prevent the perpetration of the vile and dishonorable intentions of the captain, from whose loathsome embrace he extricated his almost senseless victim"; stated that immediate application was made for a warrant, "in consequence of which the criminal is likely to meet the legal punishment of his villainy"; de

[1] Lewis v. Levy, El. Bl. & El. 537; 27 L. J. 287, Q. B.
[2] Rex v. Fisher, 2 Camp. 563.

scribed the accused as not seeming "the least affected at his disgraceful situation, or feeling in the slightest degree the very contemptuous manner in which he was regarded by all who were aware of his unmanly conduct"; and continuing—"he employed a short-hand writer, a barrister, and a phalanx of friends, if possible, to intimidate his accuser by the publicity of her exposure; notwithstanding these attempts, however, to screen himself behind her delicacy, she gave her testimony in the clearest and most collected manner, which conscious innocence and innate virtue could only have enabled her to accomplish, &c., &c." Such an inflammatory account of the preliminary investigation before the magistrate, could not, of course be regarded as an impartial and dispassionate report of what had taken place, and was held libelous. "Does this publication," said Lord Ellenborough, "leave the mind in a state of equipoise as to his guilt or innocence? No one with the feelings of a man can read it without being roused to indignation against the person whose misconduct is depicted in such glowing colors. Even if a fair and dispassionate account of the examination were allowed, is this account fair and dispassionate? It comes to conclusions which would only be fair after verdict. It assumes everything that the woman said to be true, and represents the accused as conscious of his guilt. It talks of 'the contemptuous manner in which he was regarded by all who were aware of his unmanly conduct,' and triumphantly asserts that 'he is likely to meet the legal punishment of his villainy.' Allowing the utmost latitude to fair and candid statement, is this to be tolerated? Jurors and judges are still but men; they cannot always control feelings excited by such inflammatory language. If

they are exposed to be thus warped and misled, injustice must sometimes be done."[1]

A highly-colored account of the trial of a prosecution against an attorney and judge of a court of conscience, for an assault—headed "judicial delinquency," calling him "our hero," describing, amongst other similar things, how, on the instant of being pronounced guilty, he bustled out of court, "reduced to a condition in which ordinary manners or brutality might be expected to excite some little compassion"; how he was pursued by hisses, and "the feelings of disgust and indignation triumphed over the decorum of the court"; and adding that "though it clearly appeared from the testimony of every person that was in the room" when the assault was committed, except him, that no violence had been used against him yet he had sworn to a violent assault committed upon him by the prosecutor—was attempted to be justified by a plea, referring generally to "such parts of the supposed libel as purport to contain an account or statement of the trial," and stating that such parts contained a just and faithful account of the trial; but the court gave judgment for the plaintiff.[2]

If the newspaper makes any comments, or adds any reflections upon the ex parte statement, it seems that it does so at its peril.[3]

[1] Rex v. Fisher, 2 Camp. 563.

[2] Stiles v. Noakes, 7 East. 453; Andrews v. Chapman, 3 Car. & Kir. 288.

[3] Andrews v. Chapman, 1 Car. & K. 288.

In Roberts v. Brown (4 Moo. & S. 407; 10 Bing. 519), an account of the proceedings under a commission of lunacy, in which the plaintiff had been examined as a witness (to prove the insanity of Mr. W.), did not set out his evidence, but stated shortly that "it was attempted to be proved by the testimony of Mr. R., the plaintiff, that Mr. W. had conversed in a peculiar manner with him on a certain day;" that "on this

If the newspaper has any right in the matter at all, it is only a right to state nakedly, and without any high coloring, the facts as they appear in evidence. It should not describe their effect merely as pointing to or establishing the guilt of the accused, or confirming or negativing the account of the matter given by him.

If there is any justification for the publication, it is the justification of "public interest;" and the public interest, if it exist, exists only in the facts as they occur, and not in the gratuitous announcement of the opinion of the newspaper, that the facts proved this, or disproved that, or "showed plainly this," or "entirely negatived that."

A report of the proceedings upon the hearing of a summons before a magistrate, charging a person with having committed perjury, which stated simply that the evidence before the magistrate "entirely negatived" the story of the accused, was held not to be protected; and a plea, justifying it on the ground that it was a fair and correct report of the proceedings which had taken place, was held bad, even after verdict for the defendant. A reporter may not take upon himself to aver that the evidence adduced against the plaintiff entirely negatived his story. Such conclusions are wholly unjustifiable. And, where the report of legal proceedings contains, beside commentaries reflecting

evidence it was meant to be inferred that Mr. W. was insane at that time and on that day; but Mr. R.'s testimony being unsupported by that of any other person, it failed to have any effect on the jury;" that "the object of fixing on the 22nd of September was to set aside a will supposed to be made on that day;" and concluded thus: "Mr. Jervis made a splendid speech of two hours' duration in favor of Mr. W.'s sanity, and commented with cutting severity on the testimony of Mr. R.," it was held that the whole publication, taken together, was libelous, and that a plea justifying the concluding sentence only was bad on demurrer.

upon any of the parties whose names appear in it, it entirely loses any privilege which it might otherwise claim.'

[1] Lewis v. Levy, El. Bl. & El. 544. And see Behrens v. Allen, 3 F. & F. 135.

In Cooper v. Lawson (8 A. & El. 746) the newspaper report of an examination into the sufficiency of the sureties on an election petition, before the examiners appointed under 9 Geo. 4, c. 22, § 7, set forth affidavits stating circumstances to show that the plaintiff, who had sworn to his own sufficiency as one of the sureties, was embarrassed in his affairs, unable to pay his debts, and an insufficient surety; and, after asking why, being unconnected with the borough, he should take so much trouble about the matter, proceeded—"There can be but one answer to these very natural and reasonable queries: he is hired for the occasion." The publisher of the newspaper, against whom an action for libel was brought, having pleaded that the publication was a correct report of proceedings in a legal court, together with a fair and bona fide commentary thereon, it was held that the statement as to the plaintiff's being hired for the occasion, not being mere inference from the previous statement, but introducing a substantive fact, required a distinct justification; and, therefore, that, on the trial of an issue on a replication de injuriâ to the above plea, it was properly left to the jury to say, not only whether the evidence made out the facts first alleged, but also whether the imputation that the plaintiff had been hired was a fair comment. "I do not say," said Patteson, J., "that in all cases where an alleged libel consists partly of comment, it should be left to the jury to say whether the comment is fair, because if, as the attorney-general has put it, the words were 'he has murdered his father, and therefore is a disgrace to human nature,' it would be ridiculous to ask whether the observation was or was not a fair comment. But where the comment raises an imputation of motives which may or may not be a just inference from the preceding statement, it is a distinct libel. That is so here; and therefore the question put to the jury related to a material part of the issue." "The plea," said Lord Denman, C. J., "is perfectly good, justifying the libel; partly as the report of proceedings before a court, partly as stating that which is in itself true, and partly as giving a fair and bona fide commentary on the proceedings stated. Now, a comment may be the mere shadow of the previous imputation; but if

Again: the matter may be so scandalous in itself as not to justify its publication in the newspapers. Courts are often bound, for the purpose of justice, to hear evidence in the course of judicial proceedings, the publication of which, at any distant period of time, or at any time afterwards, may have the effect of an utter subversion of the morals and religion of the people. It very often happens that, for the purposes of justice, our ears may be shocked with extremely offensive and indelicate evidence. But though we are bound in a court of justice to hear it, other persons are not at liberty afterwards to circulate it at the risk of those effects, which, in the minds of the young and unwary, such evidence may be calculated to produce.[1] Matters may appear in a court of justice that may have so immoral a tendency, or be so injurious to the character of an individual, that their publication could not be tolerated.[2]

In Rex v. Carlile,[3] the defendant had published, with the heading, "The Mock Trial of Mr. Carlile," a full and correct report of the trial of an indictment for publishing "Paine's Age of Reason;" in the course of which Mr. Carlile had read over to the jury the whole of that book. The court were unanimous in holding that the republication of the book could not be justified on the ground that it was part of a true report of what took place at the trial.

375. However a proceeding may be privileged it

it infers a new fact, the defendant must abide by that inference of fact, and the fairness of the comment must be decided upon by a jury. The defendant here cannot say that if the plaintiff became bail under the circumstances stated, it followed as a necessary inference that he was hired."

[1] Per Curiam, in Rex v. Carlile, 3 B. & Ald. 167.

[2] Carry v. Walter, 1 Bos. & P. 525.

[3] 3 B. & Ald. 167.

does not always follow that therefore other proceedings only incidentally connected therewith, are privileged. It may be libelous to publish a report of a privileged speech in a deliberative body. "For speeches made in parliament by a member, to the prejudice of any other person, or hazardous to the public peace, that any member enjoys complete immunity," said Muller, J.[1] "For any paper signed by the speaker by order of the House, though to the last degree calumnious, or even if it brought personal suffering upon individuals, the speaker cannot be arraigned in a court of justice. But if the calumnious or inflammatory speeches should be reported and published, the law will attach responsibility on the publisher. So, if the speaker, by authority of the House, order an illegal act, though that authority shall exempt him from question, his order shall no more justify the person who executed it, than King Charles's warrant for levying ship-money could justify his revenue officer."[2] And so while the words of a witness on the box are privileged,[3] it is not settled, beyond dispute, that a newspaper would be justified in publishing the words if libelous.—But as to this, quære?

[1] Dorecote v. Dorecote, 4 M. & S. 23.

[2] Shortt, p. 462.

[3] Weston v. Dobniet, Cro. Jac. 432; Damport v. Sympson, Cro. Eliz. 520; Astley v. Younge, 2 Burr. 807; Harding v. Bulman, 1 Brownl. 2; Lewis v. Few, 5 Johns. 13; Revis v. Smith, 18 C. B., 126; Rex v. Skinner, Lofft, 55; Calkins v. Sumner, 13 Wis. 293; Barnes v. McCrate, 32 Maine (2 Red.) 442, and Perkins v. Mitchell, 31 Barb. 461; Smith v. Lewis, 3 Johns. 157; Grove v. Brandenburg, 7 Blackf. 234; Cunningham v. Brown, 18 Verm. 123; Dunlap v. Gladding, 31 Maine, 435.

In a case where a charge of perjury having been preferred against the plaintiff, the investigation before a magistrate was adjourned from time to time, and the defendant published in his newspaper a report of each day's proceedings in next day's impression—one on the 26th of June, stating that the plaintiff

"It has been argued," said the court (Bayley, J.), in Rex v. Creevey,[1] "that the proceedings of courts of justice are open to publication. Against that, as an

was charged with perjury, and an adjournment, but reserving the report; another on the 4th of July, also stating an adjournment, in language intimating that there would be a report of the proceedings of the day to which the proceedings were adjourned; and the third on the 18th of July, stating that "the magistrate dismissed the summons, there not being sufficient evidence to secure a conviction," the two former reports being headed "Willful and Corrupt Perjury;" it was held by the Court of Queen's Bench, after verdict finding that the reports were fair and correct, that an action of libel could not be maintained by the plaintiff for their publication.

The court held that the defense was sufficient as to the reports of the first and third day's proceedings; the great doubt was as to the report of the second day's proceedings, which set out evidence injurious to the plaintff, whilst the charge against him was still pending. "If the whole inquiry," said Lord Campbell, "had taken place before a magistrate during one hearing, would an impartial and correct report of the proceeding published in a newspaper next morning have been actionable? We think not. . . . . And for the same reasons an impartial and correct report of the proceedings at the three different hearings would have been privileged, if published simultaneously on the 18th of July. We have, therefore, only to consider the effect, under the circumstances of the case, of there having being three publications instead of one. Considering that the three taken together are found by the jury to have been a true and faithful and bona fide report of the proceedings against the plaintiff on this charge of willful and corrupt perjury, we think that the second cannot be selected and taken separately to be a libel. Had there been no other notice of the charge in the defendant's journal, it might well have been deemed malicious and actionable. But the number of 26th of June, after stating the adjournment, says 'as the publication of what transpired might frustrate the ends of justice, we reserve our report until the next hearing.' From the number of the 4th of July it might reasonably be inferred that a report would subsequently be given of what should be done at the adjourned meeting: and the number of 18th of July concludes the history by stating that the magis-

[1] 1 M. & S. 281.