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TO

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PREFACE

TO

THE SECOND EDITION.

THIS edition will be found to embody all alterations in and additions to the law as formerly presented, which have been made by decision and by statute, down to the present week.

In the Law of Copyright, since the publication of the first edition, many new points of interest have been decided with respect to maps, newspapers, photographs lectures, and the right of dramatic and musical representation. The Legislature has modified the law as to musical compositions, and has substituted the Act of 1883 for all previous enactments relating to copyright in designs. In the Law of Libel considerable changes have been introduced by the Newspaper Libel and Registration Act of 1881; important principles have been laid down as to the granting of criminal informations; whilst the Law relating to Blasphemous Publications has received judicial interpretations so discordant as to necessitate a searching examination of the subject. Some points which have arisen since the body of the work was passed through the press will be found discussed in the Addenda.

2, ESSEX COURT, TEMPLE,
May 21, 1884.

PREFACE

TO

THE FIRST EDITION.

About four years ago it was proposed to the Author that he should collect in one book the various branches of law relating to works of literature and art, with a view of supplying not only the legal profession with such a work, but also those engaged in literary and artistic pursuits, whether as authors, editors, or publishers, with a complete statement of the law bearing on the subjects of their important labours. The work then begun has from time to time occupied the Author's attention ever since, and the present volume is the result of labours which other business has frequently interrupted.

It was originally not the intention of the Author to deal with the subject of Copyright in Designs; but, in order that the book might contain a complete treatise on the Law of Copyright, a chapter has been added in which this department of law is fully treated.

Essex Court, Temple,
July 18, 1871.

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ADDENDA.

LECTURES.

In the case of *Nicols* v. *Pitman* (50 L. T. N. S. 254), heard before Kay, J., on the 20th of March of this year, and only recently reported, an injunction was granted to restrain the defendant from publishing in the "Phonographic Lecturer," a report in shorthand of a lecture delivered by the plaintiff at the Working Men's College, Great Ormond Street, to which admission was given by tickets gratuitously issued by the committee of the College. The plaintiff had the manuscript of his lecture with him at the time of delivering it, but as he knew it by heart, it was seldom necessary to refer to it.

After quoting Lord Eldon's decision in *Abernethy* v. *Hutchinson* (*vide* pages 39, 40, *post*), Kay, J., observed: "It is quite true that the learned judge seems at one moment to refer to the ground of property and at another to that of implied contract. But I take his meaning to be that, when there is a lecture of this kind delivered to an audience, especially where that audience is a limited one admitted by tickets, the understanding between the lecturer and the audience must be that, whether the lecture has been committed to writing beforehand or not, the audience are quite at liberty to take the fullest notes they like for their own personal convenience; but they are not at liberty, having taken these notes, to use them afterwards for the purpose of publishing the lecture for profit. That is the ground on which I am going to decide this case. The case does not come within the statute of 5 & 6 Will. 4, c. 65, because notice in writing was not given to two justices under sect. 5 of that Act. I do not know whether it is a case in which notice could properly have been given, because it was a lecture delivered at a public college—for I think it is sufficiently proved before me that the place where it was delivered answers the description of a public college—and that is one of the cases in which it is not necessary to give notice. But if the notice be not given, or if the place be a public school or college, or any public foundation, then the law relating thereto is to remain the

same as if the Act had not passed. That will be the law as laid down by Lord Eldon, which is the law I am bound to administer in this particular case. . . . . I cannot regard the publication of the lecture in a system of shorthand—the key to which is in everybody's hands who chooses to buy it—as being different in any material sense from any other kind of publication."

The learned judge, it is submitted, read the enactment as to public schools, colleges, or public foundations in a sense different from that which the Legislature intended. There can be little doubt that the object of that enactment (whether its words sufficiently indicate it or not) was to give unrestricted liberty of publishing any of the lectures delivered at the places enumerated. When the original Bill came down from the House of Lords (where it passed without discussion) it had no such provision in it. In the debate on the second reading in the House of Commons, Mr. Wakley said that "if the Bill were intended to apply only to private lectures it would be a proper protection; but if it were meant to shield public as well as private from publication, he should consider that it ought not to receive the sanction of the House. In the present state of the law [*i.e.*, in 1835] no such protection is needed; for it was laid down by Lord Eldon [in 1825] that private lectures could be protected, if it were proved there was a breach of implied contract between the lecturer and the individual hearer. . . . . It was preposterous to see such a Bill as this passing the Lords without a word of discussion, and unless the Lord Advocate assured him that public lectures were not to be shielded from public notice, he should divide the House against the Bill." (30 Hans. 253.) In committee the same member urged the same views, and denied that lecturers at such places as St. Bartholomew's Hospital, who, he said, derived large incomes from it, were entitled to any such protection as was given to authors. (30 Hans. 977.) It was to meet these objections that the words "or to any lecture or lectures delivered in any university or public school or college, &c.," were inserted before the Bill was read a third time (90 Com. Journ. 605), and the amendment was accepted by the House of Lords.

How stands the Act now? Sect. 1 confers, for the first time, on the author or his assignee, "the sole right and liberty of printing and publishing" his lecture, and prohibits every one else from doing so; even those who pay for leave to attend (sect. 3). But this right is (by sect. 5) dependent—in the case of all lectures, wheresoever delivered—on the requisite notice to justices being given; and the right is not conferred

at all in the case of lectures delivered "in any university or public school or college, or on any public foundation, or by any individual in virtue of or according to any gift, endowment, or foundation:" the law as to lectures of which notice has not been given, and as to lectures delivered in any university, &c., remaining "the same as if this Act had not been passed." If by these last words is meant that Lord Eldon's doctrine of implied contract remains applicable to such lectures, the result is this: every member of the limited audience which is admitted to a lecture delivered at 'any university or public school,' &c., is under an implied contract not to publish the lecture; equity will not permit any other person than the author to publish it; in other words, the author has 'the sole right and liberty of printing and publishing' it—the very thing which the statute distinctly refuses to give him in such a case.

It is submitted that, notwithstanding the concluding words of sect. 5, the doctrine of implied contract was intended to be done away with in the case of lectures delivered at public institutions of the kind mentioned, and, consequently, that if the Working Men's College in Great Ormond Street was an institution of such a kind, it was the intention of the Legislature that the author of a lecture delivered there should not have the right to restrain the publication of it.

A very strict interpretation of the words of the Act may lead to the conclusion drawn by the learned judge; but it will also make the provision as to lectures delivered at public schools, &c., a nullity.

BLASPHEMOUS LIBELS.

Since the chapter on Blasphemous Libels passed through the press, my attention has been directed(*a*) to the opinions given in 1842 by the Judges to the House of Lords in the matter of Lady Hawley's Charities,(*b*) opinions which confirm in the strongest manner the view of the law set forth in that chapter.

The litigation in this case was begun in 1830 by an information filed by the Attorney-General, for the purpose of administering certain charities founded in 1704 and 1707 by Lady Hawley, by distinct sets of deeds, and placed under

(*a*) By a pamphlet on the Law of Blasphemy, written by my friend Mr. L. M. Aspland.

(*b*) *Shore* v. *Wilson*, 9 Cl. & Fin. 355. A verbatim report of the judgment in the Courts below, and of the arguments in the House of Lords, was also published, from the shorthand notes of Messrs. Gurney & Son, in 1839, by Smallfield & Son, Newgate Street.

the direction of distinct sets of trustees. At the dates of the deeds all religious sects tolerated by law believed in the doctrine of the Trinity; but in process of time the estates became vested in trustees, of whom the majority were Unitarians, and they applied the rents for the benefit of Unitarians. We are only concerned with one of the points in the case. It having been contended, *inter alia*, on behalf of those who were attacking the trustees, that the teaching of Unitarians was still an offence at common law—it being agreed that Unitarians did not believe the doctrine of the Trinity, original sin, or the atonement—the House of Lords, in 1839, put six questions to the Judges, of which the last was in this form, viz.: "Whether, upon the true construction of the deed of 1704, ministers or preachers of what is commonly called Unitarian belief and doctrine, and persons of what are commonly called Unitarian belief and doctrine, are excluded from being objects of the charities of that deed?"

As to the effect of this question, Lord Brougham said: "I at one time had a little doubt upon the question which has been discussed by the learned Attorney-General in his reply, as to the criminality or non-criminality in the eye of the law of *denying decently and decorously the doctrine of the Trinity;* for as to any ribaldry, nobody can doubt the law upon that, and the Attorney-General has not himself disputed it; but upon the whole I think that it is unnecessary to be put as a separate question, and if unnecessary, it is better to avoid putting it." The Lord Chancellor: "*The last question embraces it:* whether such ministers, &c., are in the present state of the law incapable of partaking of such charities." Lord Brougham: "I think that covers it, and it is better than putting it separately."(*a*)

To this question, involving, as it was thus admitted to do, the criminality or non-criminality at common law of denying such doctrines of Christianity as Unitarians do not admit, seven judges (in 1842) gave the same reply.

Maule, J., said: "There is no statute now in force prohibiting the profession or preaching of Unitarian doctrines, *and I have not found any authority to show that it is prohibited at common law.*"

Erskine, J., said: "It is indeed still blasphemy, punishable at common law, scoffingly or irreverently to ridicule or impugn the doctrines of the Christian faith, and no one would be allowed to give or to claim any pecuniary encouragement for such purpose; yet *any man may, without subjecting him-*

(*a*) Report published in 1839, pp. 262, 263.

self to any penal consequences, soberly and reverently examine and question the truth of those doctrines which have been assumed as essential to it, and I am not aware of any impediment to the application of any charitable fund for the encouragement of such inquiries."

Coleridge, J., said: "I apprehend that there is *nothing unlawful at common law* in *reverently doubting or denying doctrines, parcel of Christianity, however fundamental.* It would be difficult to draw a line in such matters according to perfect orthodoxy, or to define how far one might depart from it in believing or teaching without offending the law. The only safe and, as it seems to me, practical rule is that which I have pointed at, and which depends on *the sobriety and reverence and seriousness with which the teaching and believing, however erroneous, are maintained.*"

Williams, J., and Gurney, B., having expressed themselves as of the same opinion, Parke, B., added: "I agree entirely with all my brethren, that if Unitarians are not excluded by the true construction of the terms of the deeds, the present state of the law does not exclude them; that is, *the preaching of doctrines called Unitarian is not, on that account, illegal at common law;* and all the statutory penalties have been repealed." Tindal, C.J., concurred.

RIGHT OF DRAMATIC REPRESENTATION.

The judgment of the Court of Appeal (Brett, M.R., and Bowen, L.J., *dissentiente* Fry, L.J.), affirming the judgment of the Divisional Court in *Duck* v. *Bates*, was delivered on the 12th of May. See the facts of the case, and the judgment of the Divisional Court, *post* pp. 239, 240.

Brett, M.R.: "In this case, there being no doubt that what took place was a dramatic entertainment, inasmuch as it was the acting of a well-known play, the question is whether those who acted in the play, particularly the defendant, who seems to have been the person who instigated and managed it, are liable under 3 & 4 Will. 4, c. 15. I do not think that in this case we have anything to do with the Act of Victoria; I do not think that anything in the Act of Victoria can assist us in constructing the Act of 3 & 4 Will. 4. The defendant has been a party to the acting of a dramatic piece in which the plaintiff had the right given him by the Act of William IV. The only question is whether there has been such a breach of his rights as entitles him to sue under the Act. In order to construe the Act according to the mode in which I think

Acts of Parliament ought to be construed, I must apply myself to consider the phraseology used in it according to its ordinary meaning in the English language as used by people speaking of the subject-matter of the Act. The subject-matter of the Act is the right of the author of a dramatic entertainment to the exclusive property in that which he has himself invented and written. Besides that, which I always think is the primary rule for construing Acts of Parliament, I think one has a right to avail oneself, if one can, of other assistance also.

"Now, I agree with the defendant's contention, that what was intended to be protected by the Act was the value, from a commercial point of view, of the property in a dramatic invention. The author does not want a sentimental protection: he wants a business protection—a protection which secures to him the value of his invention. What is that? It is the right of himself representing or causing it to be represented; and the right of giving licences to other persons to represent it for value. That is the right to be protected. We must look, then, to see what would injure such a right, and interfere with such a value. This may furnish a help and a key to the construction of the different parts of the Act.

"If in the case of a play which the author himself has the right to have acted, and has had acted, any other person performs it under similar conditions, that would be an injury, and is probably the first that occurs to one's mind. This would lead the Legislature to protect the author against other persons acting his play for profit. But it is obvious that other modes of acting his play than acting it for profit may injure the author. If a rival company desiring to injure him, and to obtain an audience which would otherwise go to him for profit, allows the public to witness a performance of it gratis, that would be an even greater injury to the author than if the rival company acted it for profit. I should therefore expect to find in the Act a protection against persons acting the play, though not for profit. On this point the Act has already received a construction. It is not necessary, in order to constitute an infringement of the author's rights, that the rival performance should be for profit.

"The next point is, whether, in respect of such a commercial value in the author's production as I have referred to, it would be a sufficient protection to him to enact that other persons should not act his play in any place where plays are usually or habitually acted. If that were so, his right would

be infringed only by a performance in a regular theatre; for that is almost the only place where dramatic pieces are habitually performed. If that had been the intention of the Legislature it could have said so. But the author himself does not always have his play acted in a licensed theatre; and supposing he did, other persons, by taking a room, performing the play there, and admitting the same audience which would otherwise go to the theatre where the author himself is acting it, though from time to time they changed their place of performance—might injure him to a serious extent. I should not expect, therefore, that the places where the Legislature prohibited the acting of the author's play should be only places habitually used for such entertainments. I do not know whether this has actually been held, but I know it has been said; but whether it has been so held or said I cannot think that a right construction of the Act which would confine the prohibition to places habitually used for such a purpose.

"It has been supposed that I have said(*a*) that the mere fact of an entertainment being a dramatic one makes the place where it is given a place of dramatic entertainment within the meaning of the Act. I do not think I ever did say so . . . . but if I did, I am of opinion that what I said was wrong.

"I come now to consider what, to the best of my understanding, is the meaning of the Act as to the place in which a dramatic piece must be represented in order to make the representation an infringement of the author's rights. From the words 'any place or places of dramatic entertainment,' it seems to me that there must be some places where a performance may take place which does not infringe the author's rights, otherwise the words 'at any place or places of dramatic entertainment' would not have been put into the section at all. If the performance is given at a place which is not 'a place of dramatic entertainment,' there is no infringement. The statute requires that not only should there be a dramatic entertainment, but that it should be given in 'a place of dramatic entertainment.' . . . . What is the meaning of those words, as used by people ordinarily when talking of such a subject-matter? Did the Legislature mean to include the acting of a play by children in a drawing-room

(*a*) Referring doubtless to the language reported to have been used by the learned judge in *Wall* v. *Taylor*, L. R. 11 Q. B. D. 108, that the words "dramatic entertainment" are "words of supererogation; for performing a dramatic piece makes the place where it is performed a place of dramatic entertainment."

or in a nursery? It is impossible to think it could. No man using ordinary English language would call a nursery or a drawing-room a place of dramatic entertainment. Yet the Legislature meant something more than a theatre. A place of dramatic entertainment must therefore be something between the two. It is not necessarily a place where dramatic entertainments habitually take place; neither is it necessarily a place for admission to which people must pay. Why would nobody call a nursery or a drawing-room a place of dramatic entertainment? Because each is obviously private and domestic. . . . . Suppose you get some friends to act for some persons in your drawing-room, and admit your servants also, would your drawing-room be a place of dramatic entertainment? Everybody would say no, because it is still private and domestic.

"Now, let us see whether we can get any light from the nature of the protection which is given by the Act. What does the author want protection for? For his right—his right to act his play for value. . . . . We must see then what would injure such a right. A representation not for money might injure him, but it must be such a representation as would interfere with the same people as would otherwise go to his theatre for money. It seems to me, therefore, that a mere domestic representation in a man's house could not have been intended. If, instead of acting it in his own drawing-room, a man took for the purpose a house that happened to be unfurnished, could that make a difference? Obviously not. . . . . I come to the conclusion, therefore, that the place intended by the Act must be one where a dramatic entertainment is given otherwise than as a mere domestic or internal representation. It need not be paid for; but it must be public in this sense, that a sufficient part of the public is entertained there who would otherwise be entertained at the place where the author is acting his play as a commercial transaction. . . . . It does not follow, because you confine the audience to something less than the entire public, that the representation would not be public in the sense in which I use the word. If you were to give a representation, say in a country town, and expressed a desire that all the people in the neighbourhood or in the county—or, if you like, the people of a certain class—should come, they would not come simply as your friends or acquaintances, or as part of an audience which would constitute the entertainment a domestic one; they would really come as part of the public—a limited part no doubt; but just the class of people who would go to the author's own entertainment if he gave one

there. If a gentleman organized an entertainment for the amusement of all the voters in his constituency, ... the entertainment would be a public one. Were a number of ladies and gentlemen to go round the country and act a protected play in a town-hall or schoolroom, charging a price for admission, to be given to a charity, there can be no doubt about such a case, the payment of money being an important though not a necessary test of the public character of the entertainment. But if they were to go in the same way and issue tickets to the library of the town, saying that they might be given for nothing to any of the people round who wished to come and see the performance, this would not be an invitation to friends, but to a considerable portion of the public. . . . The question is one of fact, then, in each particular case; and I would not advise anybody to try by manipulation to make that appear private and domestic which in truth is public in the sense which I have now described, though not open to all the public. The moment you have got at the fact that the entertainment is not private, domestic, or internal, but that it is practically public, in the ordinary sense of that word, then the place where it is given is 'a place of dramatic entertainment,' although it is used once only for the purpose, and although nothing is paid for admission."

[His Lordship, having referred to the remedies for the infringement of his right given by the Act to the author, then proceeded to apply the principles above enunciated to the facts of the particular case, and concluded by holding that the entertainment at Guy's Hospital was not a public one in the sense described, and that the place where it was given was not 'a place of dramatic entertainment' within the meaning of the Act.]

Bowen, L.J., after some preliminary observations, said: "The author is not to have the sole liberty of representing everywhere, but only 'at any place of dramatic entertainment.' Now these words must mean something. If the Legislature meant to protect him against all representations of his piece, those words would mean nothing, and would not have been added. It is not the representation before audiences that is forbidden, but the representation before audiences at particular places. Now, what, in the ordinary and natural meaning of the words in the year 1833, would be intended by the expression 'place of dramatic entertainment'? What would be meant by 'place of worship'? The two expressions seem to me to be framed in very much the same tone and key. I think, *primâ facie*, the Legislature

must have meant localities appropriated or assigned, more or less habitually, to dramatic entertainments—places which, if not licensed theatres, were at all events public or quasi places of amusement—places where the public was admitted and profit made, or, if not that, at all events where such publicity was given to the performances as would interfere with the representation at similar places on behalf of the author, and with the emoluments which naturally and properly are his due. But the language of the Act, as has been pointed out by the Master of the Rolls, is framed more widely than to admit of its being confined to places which are habitually used or ordinarily recognized as places of amusement. It is obvious that the Act might be easily evaded if persons were permitted, merely by changing the spot in which the representation is given, to attract the public to witness the performance of a protected piece. I daresay there are still travelling booths, as there were at the time the Act was passed, where dramatic representations are given. One can also imagine a place selected for the night's performance in some provincial town, which, by the very fact that it is so selected, contains every element which belongs to places of habitual entertainment, except the one element that it is not habitually so used. I think the person who makes a place for the nonce a place of dramatic entertainment cannot say, because it is not so used by others or not habitually so used, that it does not by his own action become for the occasion such a place. I think the true definition of 'a place of dramatic entertainment' is something like this: it must be a place appropriated for the nonce to dramatic entertainments in somewhat of the same way as places which are habitually used for the purpose; it must be appropriated for the nonce to dramatic entertainments of more than a domestic kind, appropriated for the entertainment of the public, or a limited portion of the public, or a species of the public. If that is so, it really comes in each case to be a question of fact whether the place selected is not for the time converted into a place of dramatic entertainment, though not so used before, and never perhaps to be so used again. Now what are the elements from which you have to judge? The element of profit would be a very important one: I do not say that it is an essential one. . . . Then as to numbers, that is a very important matter, because I do not doubt that if, by whatever circuitous device, a performance substantially public was given—that is to say, a performance given to such a number of spectators as passed the reasonable limits of privacy or domesticity—the number

of the audience would be an important element to take into consideration in determining whether the place was used as a place of dramatic entertainment. The view which I have taken of the Act, and which the Master of the Rolls has taken, seems to me to be consistent with, and in a sense may be said to be the only view consistent with, the decision in *Russell* v. *Smith*. It is quite true that all the Court there held was, that where a place was open for profit and to a limited portion of the public, it became a place of dramatic entertainment, and that the Court did not hold that nothing less than this would do. But if the Court thought that anything would do, and that it was immaterial whether there was any audience beyond the mere family and salaried servants of the household, there would have been a short cut to the decision which was not taken." [His Lordship then noticed the particular facts of the case, and concluded that, though approaching very near the line, what took place at Guy's Hospital fell short of passing it.]

Fry, L.J., who dissented from the judgment of the other members of the Court, agreed with the Master of the Rolls that the question turned wholly on the interpretation of 3 & 4 Will. 4, c. 15. Having referred to the words of great generality used by the Legislature as to the productions protected, "any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment," his Lordship proceeded to consider the words "at any place or places of dramatic entertainment whatsoever" as follows: "In the first place, it is to be borne in mind that nothing is said as to its being an ordinary or habitual place of entertainment. Nothing could have been easier than for the Legislature to have so spoken of it if that had been its mind and intention. Again, nothing is expressly said as to its being a public place of entertainment. Lastly, nothing is expressly said as to the performance being for gain or profit. It has been said that we must have regard to the state of things in 1833, when the Act was passed; and that as plays were, for the most part, then acted in playhouses, we should conclude that the Legislature referred to playhouses only. That, it appears to me, would be misinterpreting the words of the Legislature. The Legislature must have known that great changes had taken place in the mode of acting dramatic pieces, and that, comparing the modes of dramatic performance in the reigns of Elizabeth or James I. with those in the reign of William IV., very considerable alterations had occurred. It is probable there were far more strolling players in the former reigns than in the latter. It is certain that in the Elizabethan period plays

were acted in many other places than regular theatres, and that masks prevailed which had fallen into desuetude in the reign of William IV. It seems to me, further, to be plain that the Legislature must have contemplated the probability of changes taking place also in the future. Therefore it is that such general words are used. Finally, I must observe that two words in the phrase used by the Act appear to me extremely important; they are the words 'any' and 'whatsoever.' What is the force of these words? In my judgment it is to exclude any limitation or qualification of the other words used, and to declare affirmatively that the genus of place described by the Legislature shall be taken in its utmost generality. In my opinion the words used negative qualification and affirm generality. I have come, therefore, to the conclusion that the place need not be a place habitually used for the performance of dramatic pieces, and I come to this conclusion for the reasons already given by my learned brethren. . . . . In the next place, I am unable to find any words which import that the performance must necessarily be for reward or hire. If such words were introduced, a distinguished body of amateurs who were willing to act for the mere pleasure of acting might rival a body who are endeavouring to earn their livelihood by acting for reward, and might defeat the right of the author of the dramatic piece. I therefore agree with my learned brethren in thinking that 'hire,' though an important, is not an essential element. But it has been said, and truly said, that the words 'any place or places of dramatic entertainment' import something different from a place where a dramatic piece happens to be represented; for they are added in the Act by way of qualification. I entirely agree in this, and I will inquire what are the notions involved in a dramatic entertainment. In the first place, I think there is no dramatic entertainment unless somebody is entertained or amused. I think, therefore, that the studies of the actors and the rehearsal—even before an audience where the main object is that of improving the performers in their parts, and not the amusement of the spectators—do not constitute a dramatic entertainment. I am therefore of opinion that the author of the piece could not interfere to prevent these preliminary studies or rehearsals, although they took place without his license, possibly in the expectation that a license for a public performance might be obtained from him. I think, further, that the notion of a dramatic entertainment involves to some extent the gathering of a meeting, assembly, or concourse of people for their amusement. If during the

rehearsal in a barn some persons who were casually outside looked through the door and saw what was going on, I should say there was no dramatic entertainment, because the amusement given would be accidental merely. . . . . In the next place, I think the notion of a dramatic entertainment involves this, that the performance is the result of a plan, design, or scheme; that the actors desire and design to amuse the spectators, and that the spectators come together for the purpose of being amused by the actors. Does it also involve the notion of publicity, or any particular mode of selecting the audience? I think not. According to my view of the usage of the English language, the performance of a dramatic piece in a large drawing-room, or in the hall of a large mansion, or at a castle in the country, although the public may not be invited to it, would be a dramatic entertainment. A lady who invites a number of musical performers, whether amateur or professional, to her drawing-room, and invites a number of her friends to come and listen to the music, in my opinion gives a musical entertainment. If you were asked what was going on there, you would say a musical entertainment. If you were asked whether it was a public or a private one, you might well say it was a private musical entertainment. In like manner, I cannot find a better illustration of a dramatic entertainment than that which is afforded by what took place in the board-room of Guy's Hospital on the evenings in question. If one nurse had asked another what amusement they were going to have that Christmas, and the other replied, 'We are going to have a dramatic entertainment,' I think the answer would have been in accordance with the ordinary usage of the English language. I differ, therefore, unfortunately from my learned brethren in their view that publicity is necessary.

"It has been said that it is absurd to extend the words of the Act to internal and domestic representations. It is quite true that there may be some internal and domestic representations which it would be absurd to suppose that the Legislature had in its mind. It is difficult to suppose that the acting of some children before their parents in the nursery or drawing-room would be a dramatic entertainment within the meaning of the Act. If my definition is right, such would not be a dramatic representation within the meaning of the Act. But, on the other hand, it seems to me that there may be internal and domestic representations which are well within the purview of the Act. Suppose, for instance, a nobleman possessed of a large mansion in the country, having his house full of distinguished guests, invites them, his servants and such of the residents in the county as are in the habit of

visiting him, to witness the representation of a dramatic piece, is not such a performance domestic and internal? But is it not at the same time a performance which it would be very reasonable to say interferes with the proprietary rights of the owner of the piece? What would be the chance of the next company which came to the adjoining town to perform the same piece, getting together so good an audience as they would get had the piece not been performed in the neighbouring mansion of the nobleman? It appears to me that the rights of the proprietor of the piece would have been seriously interfered with. . . . . Does the second section of the Act, which gives the author the right of receiving money from the offender, throw any light upon the nature of the right given, or show that it is of a more limited kind than that which I have described? What is the pecuniary benefit which the second section gives to the author? It is such a one of three as he may choose; either (1) 40s. for every representation, or (2) the amount of benefit derived by the offenders, or (3) the amount of injury sustained by himself. The Legislature has provided, therefore, for the case where there is neither benefit to the actor nor injury to the author. What can that be except such a case as I have mentioned, the case in which the proprietary right has been infringed by persons who derived no benefit from the infringement, and in such a degree as not to injure the author. In that case, the Legislature says that the author may still have 40s."

RECTIFICATION OF REGISTER AT STATIONERS' HALL.

In *re Poulton*, reported in *The Weekly Reporter* of the 17th May (vol. xxxii. p. 648), a Divisional Court (consisting of Denman, Manisty and Watkin Williams, J.J.), held that an order could be made under sect. 14 of 5 & 6 Vict. 45, on the application of the proprietor of copyright, to correct a mistake made by himself in the registration of his work at Stationers' Hall; in other words, that a person may be "aggrieved," within the meaning of the Act, by his own mistake.

THE LAW

RELATING TO

WORKS OF LITERATURE AND ART.

PART I.—LAW OF COPYRIGHT.

CHAPTER I.

LITERARY PROPERTY.

Foundation of Literary property.

THE foundation of Literary property is the same as that of all other property. "La propriété," says Bentham,(a) "n'est qu'une base d'attente; l'attente de retirer certains avantages de la chose qu'on dit posséder, en conséquence des rapports où l'on est déjà placé vis-à-vis d'elle;" and this expectation of advantages to be derived is altogether the work of law.

Its constituent elements.

In the right of property two elements are involved, first, the power of using indefinitely the subject of the right, or of applying it to uses or purposes which are not positively and exactly circumscribed; and, secondly, a power of excluding others from using the same subject.(b) These are the advantages which the possessor of literary as well as other property enjoys, and which the law of the land secures to him. The sole right of originally giving to the world the results of his mental labours, and the power to hinder the infringement by others of his property therein, are guaranteed to every British subject by law, so far as law can accomplish that object; for the mental experiences of all of us have so much in common, the thoughts of most men resemble each other to so large an extent, that to determine and guard specific property in ideas merely—ideas which have not embodied themselves in a material form—is a task which no law-makers not pretending to omniscience

(a) "Traités de Legislation," par Dumont, p. 95.
(b) Austin Jur. iii. 19.

PART I. CHAPTER I.

could undertake to perform. Hence our law takes no cognisance of any claim to the ownership of ideas which have not found a material clothing, and refuses to preserve the most original of men from the annoyance of having published abroad, either by writing or by word of mouth, his most original ideas, which have been communicated to another in the course of conversation. The original ideas of a man on any subject, though they exist not out of relation to his mind, in one sense really belong as entirely to him as if they were reduced by him to writing, and hence it might be thought that he ought to be enabled to assert an equal claim to them in the one case as in the other. But the practical impossibility referred to, of dealing by means of legal proof with the former case, has rendered necessary the distinction which the law makes between the two. The intangible and incorporeal products of his mind, so long as they remain in that condition, are beyond the protection of law; when reduced into any material form, which can be produced in a court of justice, or be identified by proofs of a satisfactory kind, the author's right to them (called copyright) becomes enforceable by law.(*a*) And that right is two-fold: first, he has a right to them, and a property in them whilst the materials embodying them remain unpublished in his possession; and, secondly, after they are published he has a statutory exclusive property in them limited in point of duration.(*b*) This obvious division of the subject will be followed in dealing with the copyright belonging to individuals, and we shall treat separately of the property in unpublished works, or (as it is sometimes called) copyright before publication, and in published works, or copyright after publication. Before doing so, however, it will be advisable to determine the answers to the following two questions: first, in what kind of works this property exists? and, secondly, what class of persons are entitled to claim and enjoy the right? With these we shall now proceed to deal in order.

(*a*) "It is a well-known and established maxim (which, I apprehend holds as true now as it did 2000 years ago) 'that nothing can be the *object* of property which has not a *corporeal* substance':" (Yates, J., in *Millar* v. *Taylor*, 4 Burr. 2361.)

(*b*) "Copyright is not of a simple but a complex nature, involving two conditions, one of publication and the other of exclusion. An author claims the right of multiplying the copies of his work, and of thus securing to himself present reputation and distant fame; and he also claims the advantage of excluding by statute law, other persons from multiplying copies of the same work:" (*Arguendo* in *Prince Albert* v. *Strange*, 2 De. G. & Sm. 674.)

CHAPTER II.

CHARACTER OF THE WORKS IN WHICH COPYRIGHT EXISTS.

Who may possess.

THE author of every original work of literature, science, or art, which is innocent in its nature, has a copyright therein.

In what works.

Copyright exists in the case of books, periodicals, magazines, or prints, dramatic and musical compositions, paintings, drawings, and photographs, and sculptures, models, casts, or busts. The writer of letters and the author of lectures have also exclusive rights, which will be considered separately.

Work must be innocent.

If the work be not innocent in its nature, there is no property in it which the law will enforce or protect. Lord Eldon, in the case of *Southey* v. *Sherwood*,(a) observed, "If this publication is an innocent one, I apprehend that I am authorised by decided cases to say that, whether the author did or did not intend to make a profit by its publication, he has a right to an injunction to prevent any other person from publishing it. If, on the other hand, this is not an innocent publication, in such a sense as that an action would not lie in case of its having been published by the author and subsequently pirated, I apprehend that this Court will not grant an injunction."

It is a fundamental principle of our common law that no action can be maintained on any contract, expressed or implied, parol or under seal, which is in direct violation of law —whether statutory or unwritten—which is of an immoral tendency or contrary to sound policy.

When a contract is said to be void and incapable of being enforced as "opposed to sound or public policy," this is in accordance with the principle of law that "no subject can lawfully do that which has a tendency to be injurious to the public or against the public good—which may be termed, as it sometimes has been, the policy of the law, or 'public policy' in relation to the administration of the law."(b) The legal maxim on the subject is, *Nihil quod est inconveniens est licitum.*(c)

A work, then, may lack the character of innocence by

(a) 2 Meriv. 437. See also *Lawrence* v. *Smith* (Jac. 471).
(b) Per Lord Truro in *Egerton* v. *Brownlow* (4 H. L. Cas. 196).
(c) Co. Litt. 66*a*.

being opposed to any law, either unwritten or statutory, by being of an immoral tendency (a test, as applied, of a very comprehensive character) or by being contrary to what is called sound or public policy. If it offends against innocence in any of these respects, no action will lie to enforce any alleged right with reference to it.

Dr. Priestley brought an action against a hundred to recover damages sustained by him in consequence of the riotous proceedings of a mob at Birmingham. Amongst other property alleged to have been destroyed, and for the loss of which he claimed compensation, were certain unpublished MSS. It was alleged, by way of defence, on behalf of the hundred, that the plaintiff was in the habit of publishing works injurious to the government of the State, but no evidence was produced in support of that allegation. The Lord Chief Justice observed that if such evidence had been produced, he should have held it was fit to be received as against the claim made by the plaintiff. (a)

Where the work was of a criminal character the Court of Chancery, not being a court of criminal jurisdiction, would simply refuse to interfere in any way. It punished the author of a criminal, libellous, or immoral production no otherwise than by denying him any assistance in the assertion of a right of property in his work, or in the attempt to hinder the piracy of it. It stood quite neutral. "The Court does not interfere in the way of injunction to punish or to prevent injury done to the character of individuals; but it leaves the party to his remedy at law." (b)

One Lord Chancellor (Macclesfield), indeed, seems to have taken a different and much more lofty view of the province of courts of equity in dealing with books of the character above mentioned, being of opinion "that the Court of Chancery had a superintendency over all books, and might in a summary way restrain the printing or publishing any that contained reflections on religion or morality;" (c) and his lordship granted an injunction to restrain the publi-

(a) Cited 2 Meriv. 437. See also per Lord Eldon in *Walcot* v. *Walker*, 7 Vic. 1.

(b) Per Lord Eldon (*Southey* v. *Sherwood*, 2 Meriv. 438); see also the opinion of Lord Langdale, M.R., in *Clark* v. *Freeman* (11 Beav. 117, 119), but as to the decision in the latter case, see the remarks of Lord Cairns in *Maxwell* v. *Hogg* (L. Rep. 2 Ch. App. 310; 16 L. T. N. S. 130; 36 L. J. 433, Ch.).

(c) *Burnett* v. *Chetwood*, cited from a manuscript volume of cases, in a note, by the learned reporter to *Southey* v. *Sherwood* (*ubi supra*).

cation of a translation of two Latin works ("Archaeologia Philosophica" and "De Statu Mortuorum et Resurgentium") written by Dr. Burnett, on the sole ground that "inasmuch as the book contained to his (the Chancellor's) knowledge (he having read it in his study) strange notions intended to be hid from the vulgar in the Latin language, in which language it could not do much hurt, the learned being better able to judge of it—it was proper to grant an injunction to the printing and publishing it in English." And Lord Ellenborough, in dealing with the case of a libellous picture said, that "upon an application to the Lord Chancellor, he would have granted an injunction against its exhibition."(a) These opinion with regard to the extent of the jurisdiction of courts of equity in dealing with non-innocent publications have, as the cases already cited show, been long since abandoned, and our civil courts will now simply refuse to interfere in the matter at all. Lord Eldon, in *Lawrence* v. *Smith*,(b) in express words repudiates the jurisdiction asserted by Lord Macclesfield. In the judgment pronounced by him in that case, he says: "As this Court has no jurisdiction in matters of crime,(c) it has been said that if the injunction be refused it has the effect of increasing the number of copies. The answer to that is, I have nothing to do with it as a crime. The question relates only to a civil right of property. If the one party has that right, the other must not invade it; if he has not that right, the Court cannot give him the consequences that belong to it."

(a) *Du Bost* v. *Beresford* (2 Camp. 511). Referring to this dictum of Lord Ellenborough, the editor of Howell's State Trials says (vol. xx. p. 799): "I have been informed by very high authority, that the promulgation of this doctrine relating to the Lord Chancellor's injunction excited great astonishment in the minds of all the practitioners in the Courts of Equity, and I had apprehended that this must have happened; since I believe there is not to be found in the books any decision or any dictum, posterior to the days of the Star Chamber, from which such docrine can be deduced, either directly, or by inference, or analogy; unless, indeed, we are to except the proceedings of Lord Ellenborough's predecessor Scroggs and his associates, in the case of Henry Clare, in which case 'Ordinatum est quod liber intitulat.' The Weekly Packet of Advice from Rome, or the History of Popery, non ulterius imprimatur vel publicetur per aliquam personam quamcunque.'" The learned editor does not appear to have known of the decision of Lord Macclesfield in *Burnett* v. *Chetwood*, above cited.

(b) Jac. 471. *Vide post*, pp. 7, 8.

(c) If a publication, which is criminal, tends also to the destruction or deterioration of property, the High Court of Justice has, since the Judicature Acts, jurisdiction to restrain the publication by injunction. This will be dealt with hereafter in treating of Libel.

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There are other means of punishing the authors of criminal and libellous works, which will be treated of in a subsequent portion of this work.(a)

In *Southey* v. *Sherwood*(b) a motion was made on the part of the poet Southey to restrain the defendants from printing or publishing a poem called "Wat Tyler," which had been composed by the plaintiff about twenty-three years previously, and had lain unpublished during the whole of that period in the hands of the bookseller to whom Southey had first sent it for his perusal and consideration as to the advisability of publishing it. On the part of the defendant it was contended that the poem in question, from its libellous tendency, was of such a nature that there could be no copyright in it; and the case of *Dr. Priestley* and that of *Walcot* v. *Walker* were referred to. Lord Eldon, in refusing the injunction, stated that he remained of the same opinion as that which he entertained in deciding the case of *Walcot* v. *Walker*. "It is very true," he proceeded, "that in some cases it may operate so as to multiply copies of mischievous publications by the refusal of the Court to interfere by restraining them; but to this my answer is, that, sitting here as a judge upon a mere question of property, I have nothing to do with the nature of the property, nor with the conduct of the parties, except as relates to their civil interests: and if the publication be mischievous, either on the part of the author or of the bookseller, it is not my business to interfere with it."(c)

One of the most important cases decided on this subject

(a) See the chapters on "Libel," *post*.

(b) 2 Meriv. 435.

(c) An American writer (Curtis) on Copyright urges some weighty objections to the doctrine laid down by Lord Eldon in the above case. In the case of *Dr. Priestley* the owner of the manuscript was seeking damages for the destruction of what might have been the source of pecuniary profit, and the case goes only to this, that a work existing in manuscript may be of such a character that the author cannot make lawful profits by its publication; and in this sense it may be said that there can be no property in such a work. But this cannot justify the very different doctrine that the author of an unpublished manuscript of a character not innocent or doubtful cannot have the interposition of a court of equity to restrain its publication by a person who is about to publish it against his will. There is a wide difference between seeking protection for a published work of a non-innocent character and the mere assertion of a right to possess and control, to publish or not to publish one's own manuscript. There are two kinds or degrees of property in a literary work, one consisting in the right to take the profits of a book when published, the other in the right to the exclusive possession and control of a manuscript, or the right to publish or withhold from publication altogether. In no case has it been considered that the author's right depends on his

came before Lord Eldon in 1822. In *Lawrence* v. *Smith*,(*a*) the Lord Chancellor dissolved an injunction which had been obtained upon an *ex parte* motion, to hinder the publication of a pirated edition of certain "Lectures on Physiology, Zoology, and the Natural History of Man," which had been delivered by the plaintiff at the College of Surgeons, and afterwards published by him. In support of the motion to dissolve the injunction, it was urged that the nature and general tendency of the work were such, that it could not be the subject of copyright, as it contained several passages hostile to natural and revealed religion, impugning the doctrines of the immateriality and immortality of the soul. And on this ground Lord Eldon refused to continue the injunction, and left the plaintiff to bring his action at law, if he considered that he had any chance of succeeding there. "Looking," said his lordship, "at the general tenor of the work, and at many particular parts of it, recollecting that the immortality of the soul is one of the doctrines of the Scriptures, considering that the law does not give protection to those who contradict the Scriptures, and entertaining a doubt—I think a rational doubt—whether this book does not violate that law, I cannot continue the injunction. The plaintiff may bring an action, and when that is decided he may apply again." As to the injunction originally granted, *ex parte*, Lord Eldon said, "I take it for granted that when the motion for the injunction was made, it was opened as quite of course: nothing probably was said as to the general nature of the work, or of any part of it; for we must look *not only at the general tenor, but at the different parts*; and the question is to be decided, not merely by seeing what is said of materialism, of the immortality of the soul, and of the Scriptures, but by looking at the different parts and inquiring whether there be *any* which deny, or which appear to deny, the truth of Scripture, or which raises a fair question for a court of law to determine whether they do or do not deny it."

Two later instances of the application of the same doctrine

intention to publish and to make a profit; but the cases proceed upon the ground of a *right of property*, by which seems to be intended a right to the possession and control of the manuscript, and to publish or to withhold it from publication; and this holds equally in the case of a non-innocent and an innocent work. When, therefore, an author has not published, or does not intend to publish, a work existing in manuscript, but, on the contrary, desires and intends to withhold it from publication, the question as to its innocence does not arise, because that question affects only so much of his right of property as consists in the right to take the *profits* of the publication.

(*b*) Jac. 471.

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belonging to the said army, and to deter the liege subjects of our said lord the King from entering into the same, published the paper in question, and the question for you to try is, whether the publication has fairly the tendency imputed to it. If it has that tendency the persons must be punished who have published it, intending to produce that effect. If it shall appear to you that such is the obvious tendency of the paper which is in evidence, then what is incumbent on the prosecutor to prove will have been made out."(*a*)

Per Best, J.

In 1820 an information was filed against Sir Francis Burdett for writing and publishing a certain scandalous, malicious, and seditious libel of and concerning the Government of this realm, and of and concerning the troops of our lord the King, unlawfully and maliciously devising and intending to raise and excite discontent, disaffection, and sedition among the liege subjects of the King and amongst the soldiers of our said lord the King, and to move and excite the liege subjects of our said lord the King to hatred and dislike of the Government of this realm, and to insinuate and cause it to be believed by the liege subjects of our said lord the King that divers of the liege subjects of our said lord the King had been inhumanly cut down, maimed, and killed by certain troops of our said lord the King at Loughborough, in the county of Leicester, on the 16th of August, 1819; the libel being contained in an address to the electors of Westminster.(*b*) Best, J., told the jury that whether the address was published with the intention alleged in the information was peculiarly for their consideration, but added that the intention was to be collected from the paper itself, unless the import of the paper were explained by the mode of publication or any other circumstances; that if it appeared that the contents of the paper were likely to excite sedition and disaffection, the defendant must be presumed to intend that which his act was likely to produce; and that if they should be of opinion that such was the intention of the defendant, the paper published with such an intent was a libel.(*c*) The jury found the defendant guilty, and on motion for a new trial the Court of King's Bench held that the question had been correctly left to the jury.(*d*)

Per Littledale, J.

A body of police having dispersed an assembly of people at Birmingham, an indictment for seditious libel was pre-

(*a*) 31 Howell's St. Tr. 408. The jury returned a verdict of not guilty.

(*b*) 4 B. & Ald. 95. (*c*) *Ibid.* 120.

(*d*) Sir Francis Burdett was sentenced to three months' imprisonment, and a fine of £2000.

ferred against the writer and publisher of certain resolutions agreed to by a body called the General Convention, condemning the act of the police as a "wanton, flagrant, and unjust outrage upon the people of Birmingham by a bloodthirsty and unconstitutional force from London, acting under the authority of men who, when out of office, sanctioned and took part in the meetings of the people, and now, when they share in the public plunder, seek to keep the people in social slavery and political degradation;" asserting that the people of Birmingham were "the best judges of their own right to meet in the Bullring or elsewhere, have their own feelings to consult respecting the outrage given, and are the best judges of their own power and resources to obtain justice;" and that the arrest of a particular individual (Dr. Taylor) "affords another convincing proof of the absence of all justice in England, and clearly shows that there is no security for life, liberty, or property till the people have some control over the laws they are called upon to obey."(a) Littledale, J., thus directed the jury as to the law: "You will first have to consider whether the statement at the commencement of the indictment, that there was an unlawful assembly which was dispersed by the police, be true or not, and, if it be true, you will then have to consider whether this publication was or was not a calm and temperate discussion of the events which had occurred; for if the object of it was merely to show that the conduct of the police was improper, that would not be illegal, because every man has a right to give every public matter a candid, full, and free discussion. If the language of this paper was intended to find great fault with the police force, even that might not go beyond the bounds of fair discussion; and you have to say, looking at the whole of this paper, whether or not it does so. With respect to the first resolution, if it contains no more than a calm and quiet discussion, allowing something for a little feeling in men's minds—for you cannot suppose that persons in an excited state will discuss subjects in as calm a manner as if they were discussing matters in which they felt no interest—that would be no libel; but you will consider whether the kind of terms made use of in this paper have not exceeded the reasonable bounds of comment on the conduct of the London police. With respect to the second resolution, it is no sedition to say that the people of Birmingham had a right to meet in the Bullring or anywhere else; but you are to consider

(a) *Rex* v. *Collins; Rex* v. *Lovett* (9 Car. & P. 456, 462).

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whether the words that 'they are the best judges of their own power and resources to obtain justice,' meant the regular mode of proceeding by presenting petitions to the Crown or either House of Parliament, or by publishing a declaration of grievances; or whether they meant that the people should make use of physical force as their own resource to obtain justice, and meant to excite the people to take the power into their own hands, and meant to excite them to tumult and disorder. The third resolution refers to the arrest of Dr. Taylor: and if the arrest of Dr. Taylor was considered to be illegal, the defendant had a right to discuss it in a calm, quiet, and temperate manner; and if Dr. Taylor had been arrested in a manner wholly illegal and improper, we may allow for some warmth of expression. I have already said that the people have a right to discuss any grievance that they have to complain of, but they must not do it in a way to excite tumult. It is imputed that the defendant published this paper with that intent, and, if he did so, it is in my opinion a seditious libel."(*a*)

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

In applying the foregoing dicta, the observations already made as to the flexibility of our common law and the effect of altered circumstances(*c*) should be borne in mind.

LIBELS ON THE CONSTITUTION GENERALLY.

What publications are libellous.

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

(*a*) 9 Car. & P. 460, 461.
(*b*) 9 Car. & P. 466. The jury returned a verdict of guilty in each case.
(*c*) *Ante*, pp. 378, 379.

order, and constitution of things which make up the general system of the law and government of the country."(*a*)

"It is scarcely necessary to point out," said Fitzgerald, J., with reference to certain seditious libels published at the time of the Fenian disturbances in Ireland,(*b*) "that to accomplish treasonable purposes, and to delude the weak, the unwary, and the ignorant, no means can be more effectual than a seditious press. With such machinery the preachers of sedition can sow widecast those poisonous doctrines, which, if unchecked, culminate in insurrection and rebellion. . . . . Words may be of a seditious character, but they might arise from sudden heat, be heard only by a few, create no lasting impression, and differ in malignity and permanent effect from writings."

Much of what has already been said in general as to the other kinds of seditious libels, applies also to the present class. Criticism on any part of the Constitution, made with a view to bring about improvements in it, are not interdicted; but attacks calculated to promote insurrection, and circulate discontent, to degrade and vilify the Constitution, to asperse its justice and anywise impair the exercise of its functions, are termed seditious libels, and punished as such.(*c*)

"It is open to the community and to the press," said Fitzgerald, J.,(*d*) "to complain of a grievance. Well, the mere assertion of a grievance tends to create a discontent, which in a sense may be said to be seditious; but no jury, if a real grievance was put forward, and its redress *bonâ fide* sought, although the language used might be objected to—no jury would find that to be a seditious libel. It might be the province of the press to call attention to the weakness or imbecility of a Government, when it was done for the public good. How closely that trenches on the law of sedition; and yet such writing, when *bonâ fide*, would receive protection from a jury."

State of country and public mind to be considered.

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

"If," said the learned judge last referred to,(*e*) when dealing with a seditious publication in Ireland, "the country was free from political excitement and disaffection, was engaged in

(*a*) Holt's Law of Libel, 81 (2nd Edit.).
(*b*) *Reg.* v. *Sullivan* and *Reg.* v. *Pigot*, 11 Cox Crim. Cas. 46.
(*c*) *Ibid.* 86. (*d*) 11 Cox Crim. Cas. 57.
(*e*) 11 Cox Crim. Cas. 50. See also p. 59.

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the peaceful pursuits of commerce and industry, the publication of such articles as have been extracted from American papers might be free from danger and comparatively innocent: but in a time of political trouble and commotion, when the country has just emerged from an attempt at armed insurrection, and whilst it is still suffering from the machinations and overrun by the emissaries of a treasonable conspiracy hatched and operating in a foreign land, the systematic publication of articles advocating the views and objects of that conspiracy seems to admit but of one interpretation. The intentions of men are inferences of reason from their actions where the action can flow but from one motive, and be the reasonable result of but one intention."

Whole publication to be looked at.

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

Latitude allowed to political writers.

A considerable latitude is allowed to the publications of political writers. "In a free country like ours," said Lord Kenyon, C.J.,(*c*) "the productions of a political author should not be too hardly dealt with." And Fitzgerald, J., told the jury, in the case already referred to, not to pause, in dealing with the articles charged as seditious libels, upon an objectionable sentence here, or a strong word there; that it was not mere strong or turgid language that was to influence them; that to public political articles great latitude is given, dealing as they do with the public affairs of the day; such articles, if written in a fair spirit, and *bonâ fide*, often result in the production of great public good; and therefore the learned judge advised and recommended the jury to deal with the publications before them in a free, fair, and liberal spirit, and not to view them with an eye of narrow criticism.(*d*)

Seditious publications copied from foreign newspapers.

The fact that the seditious writings are only copies of articles published in foreign newspapers, does not exempt the publisher in this country from liability.

It was contended in *Reg.* v. *Pigott*(*e*) that the defendant was justified in publishing, as foreign news, articles of a

(*a*) *Per* Lord Kenyon, C.J., *R.* v. *Reeves* (2 Peake's N.P. Cas. 87). See also *Rex* v. *Lambert and Perry* (2 Camp. 400).
(*b*) *Per* Fitzgerald, J. (11 Cox Crim. Cas. 58).
(*c*) 2 Peakes' N.P. Cas. 86.
(*d*) 11 Cox Crim. Cas. 59.
(*e*) 11 See Cox Crim. Cas. 46.

seditious and treasonable character, extracted from American newspapers. "I am bound," said Fitzgerald, J., to the grand jury, "to warn you against this very unsound contention; and I may now tell you, with the concurrence of my learned colleague (Deasy, B.), that the law gives no such sanction, and does not, in the abstract, justify or excuse the republication of a treasonable or seditious article, no matter from what source it may be taken. In reference to all such republications, the time, the object, and all the surrounding circumstances are to be taken into consideration, and may be such as to rebut any inference of a criminal intention in republication. If, for instance, one of the leading newspapers should, in good faith, publish the preceedings of a foreign conspiracy, with a view to communicate intelligence or a warning to the nation, accompanying it with proper editorial comments, the circumstances would, in every rational mind, negative the idea of any seditious design. If, on the other hand, at a period of great political excitement, where a treasonable confederacy existing amongst them was urging the deluded people to armed insurrection, a journal was found habitually devoting a considerable portion of its space to the republication from a foreign source of treasonable or seditious articles, addressed to the people of this country, without one word of warning, or one note of disapproval, then it would be reasonable to infer that the publisher intended what would be the natural consequences of his acts—namely, to promote some seditious object. If the law be powerless in the case of such publications, then we may as well blot out from the statute-book the chapter on seditious libel, which would take away from society the great protection which the law affords to their institutions."(*a*)

Whether a newspaper article is original or not, may, however, be a material consideration in determining the intention with which it was published.(*b*)

Summary of the older cases.

The following is a summary of the older cases decided under this head, which are not numerous, owing probably to the fact that in the early times of our history, libels of this class were considered as partaking of the nature of treason.(*c*)

(*a*) 11 Cox Crim. Cas. 46, 47. Compare the remarks of the same learned judge at the end of p. 56.

(*b*) See *per* Fitzgerald, J., *Ibid.* 56.

(*c*) Holt, L. L. 86. Williams, a barrister of the Middle Temple, was in the seventeenth year of James I. indicted, convicted, and executed for high treason, in writing two books, the one called "Balaam's Ass." and the other called "Speculum Regale," in which he predicted that the king would die in the year 1621 (2 Roll. Rep. 88).

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

In the 20th Charles II., an information was filed against one Harrison, charging that he, maliciously and traitorously intending to stir up sedition and to create a disturbance between the King and his people, had published, uttered, and proclaimed of and concerning the Government and rule of England, and of and concerning the traitors who adjudged King Charles I. to death, that the Government of the kingdom consists of three estates, and that if a rebellion should happen in the kingdom, unless that rebellion was against the three estates, it was no rebellion. The Court, supposing that the words did tend to set on foot that position upon which the war levied in 1641 by the two Houses against the King was grounded, were much displeased that the counsel for the defendant would pretend to defend them, or to put any tolerable sense upon them, and gave judgment for the King.(b)

In the 5th Anne, Dr. Brown was convicted, on an information, of having published a libel entitled "Mercurius Politicus," reflecting on the State and Constitution, as settled at the Revolution, which he represented as the "destruction of the laws of England."(c)

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

An information was filed in 1754 against Richard Nutt for printing and publishing a certain false, wicked, scandalous, seditious, and malicious libel, entitled *The London*

(a) *Rex* v. *Brewster* (Hil. Term, 15 Car. 2; Dig. L. L. 76).

(b) *Rex* v. *Harrison* (3 Keb. 841; Vent. 324). Harrison was sentenced to pay a fine of £1000, to find surety for his good behaviour for seven years, and to renounce his error in open court.

(c) *Reg.* v. *Brown* (Trin. Term, 5 Anne; 11 Mod. 86). He was sentenced to the pillory, and to pay a fine of forty marks.

(d) *Reg.* v. *Bedford* (2 Str. 789). On this case Lord Coleridge, C.J., in his charge in *Reg.* v. *Foote* observed: "I need hardly say that if such a case arose now no judge would follow that authority, no jury would convict; the whole proceeding would be denounced, and rightly denounced, as altogether monstrous." (P. 13.)

Evening Post, tending to represent this kingdom in a miserable and wretched state and condition, and with a view to traduce the late happy Revolution, and to suggest that it was an unjustifiable and unconstitutional proceeding; and also to dispute and call in question the settlement and limitation of the succession of the Crown of this realm in the present most illustrious family; and to represent the same as illegal and unwarrantable, and to make it be believed that the said late most happy Revolution and the settlement of the Crown of this realm as now by law established had been attended with fatal and pernicious consequences to the subjects of this realm. He was found guilty, and sentenced to the pillory, a fine of £500, and imprisonment in the King's Bench for two years.(*a*)

Dr. John Shebbeare was convicted in 1758 of printing and publishing a certain false, wicked, scandalous, seditious, and malicious libel, entitled "A Sixth Letter to the People of England on the Progress of National Ruin, in which it is shown that the present Grandeur of France and the Calamities of this Nation are owing to the Influence of Hanover on the Councils of England;" tending to traduce the Revolution, and to represent it as the foundation of all those imaginary evils and calamities which the defendant would falsely insinuate the subjects of this kingdom did labour under; and also to asperse the memory of King William III. and of King George I.; and to represent the public measures which were taken and pursued during the course of their respective reigns as wicked, corrupt, and fatal measures to this kingdom; and also to asperse, scandalize, and vilify the late King and his administration of the government of this kingdom; and to make it thought that the public affairs of this kingdom were in a most unhappy and declining state; and that the subjects of this kingdom were unnecessarily and most intolerably loaded and oppressed with taxes, debts, and subsidies; and also to insinuate that the late King had no concern for the people of England, nor any regard for the interest, honour, or welfare of this kingdom, but that the treasure and riches of this kingdom were misapplied, wasted, and dissipated in support of the Electorate of Hanover and his German dominions.(*b*)

Thomas Paine was convicted in 1792 upon an information charging him with being the author and publisher of a sedi-

(*a*) Mich. Term, 27 Geo. 2, Dig. L. L. 68.

(*b*) *Rex* v. *Shebbeare* (Hil. Term. 31 Geo. 2, K.B. MSS.). The defendant was fined £5, sentenced to the pillory, and to be imprisoned three years.

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tious libel, the tendency of which was "to traduce and vilify the late happy Revolution, the settlement of the Crown and regal Government as by law established, and also the Bill of Rights, the Legislature, Government, Laws, and Parliament of this kingdom."(a)

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

General remark as to older authorities.

As to libels upon the Constitution generally, it is beyond question that a number of the old decisions would not be regarded as binding precedents at the present day.(c)

CHAPTER V.

OTHER LIBELS NOT OF A PRIVATE CHARACTER.

Libels of a *quasi* public character.

BESIDES the libels of a public character which have hitherto engaged our attention, and which the State in its corporate capacity punishes, there are others of a *quasi*-public character which present themselves for consideration next in order before we enter on the discussion of libels on private individuals.

I.—LIBELS ON HOUSES OF PARLIAMENT.

Contempts of Houses of Parliament.

Of libels of this kind one class forms a division of the general head of offences called contempts. Libels on either House of Parliament have frequently been treated as breaches of privilege, and punished as such by the immediate action of the House itself. Oftentimes they have been dealt with by prosecutions in the Courts of common law, directed by the House which has been libelled either in its collective character or in the person of one of its members.

The general principle relating to contempts of this kind has thus been stated: "Whatever grossly reflects on the character of a member of either House, or whatever imputes to him what it would be a libel to impute to an ordinary

(a) *Rex* v. *Paine* (32 Geo. 3. K. B. MSS.) The defendant, not appearing to receive the judgment of the Court, was outlawed.

(b) *Rex* v. *Cuthell* (27 Howell's St. Tr. 642).

(c) See, for example, the remarks of Lord Coleridge, C.J., on *Reg.* v. *Bedford*, cited *ante*, p. 414, note (d).

person, is a contempt, and thereby breach of privilege; it is a direct assault upon his character, and through the odium presumed to be excited thereby, a consequential obstruction of his political duties."(*a*)

House of Lords.

The House of Lords formerly inflicted fine, imprisonment, and the pillory for offences of this kind against its members; but in more recent times commitment, with or without fine, has been the ordinary punishment inflicted by both Houses of Parliament.(*b*)

Punishments of the latter description were inflicted by the House of Lords in 1663 for a libel on Lord Gerard of Brandon; in 1688 for printing a paper reflecting on Lord Grey of Wark;(*c*) and in 1779 for a libel on the Bishop of Llandaff.(*d*) In 1722 persons were attached for printing libels concerning Lord Strafford(*e*) and Lord Kinnoul;(*f*) and in 1776 for sending an insulting letter to the Earl of Coventry, the offender in the last case being afterwards reprimanded and ordered to be continued in custody until he find security for his good behaviour.(*g*) For examples of the punishment of pillory, see the cases of Thomas Morley in 1623, for a libel on the Lord Keeper,(*h*) and William Carr in 1667, for dispersing scandalous and seditious printed papers against Lord Gerard of Brandon.(*i*)

In 1834, a leading article having appeared in the *Morning Post* reflecting upon the conduct of the Lord Chancellor

(*a*) Holt's Law of Libel, p. 118.

(*b*) 22 Lords' J. 351, 367, 380. "This summary proceeding is usually defended by a technical analogy to what are called attachments for contempt, by which every court of record is entitled to punish by imprisonment, if not also by fine, any obstruction to its acts or contumacious resistance of them. But it tended also to raise the dignity of Parliament in the eyes of the people, at times when the Government, and even the courts of justice, were not greatly inclined to regard it, and has been also a necessary safeguard against the insolence of power. The majority are bound to respect, and indeed have respected, the rights of every member, however obnoxious to them, on questions of privilege. Even in the case most likely to occur in the present age, that of libels, which by no unreasonable stretch come under the head of obstructions, it would be unjust that a patriotic legislator, exposed to calumny for his zeal in the public cause, should be necessarily driven to a troublesome and uncertain process at law, when the offence so manifestly affects the real interests of Parliament and the nation. The application of this principle must, of course, require a discreet temper, which was not perhaps always observed in former times, especially in the reign of William III." (Hallam, Const. Hist., chap. 16).

(*c*) 14 Lords' J. 144.
(*d*) 42 Lords' J. 129.
(*e*) 22 Lords' J. 129.
(*f*) *Ibid.* 149.
(*g*) 39 Lords' J. 314, 331.
(*h*) 3 Lords' J. 276.
(*i*) 12 Lords' J. 174.

(Lord Brougham) with reference to a case which had come before the House of Lords on appeal, the House resolved that the paragraph was a gross breach of their privileges, and committed the editor to the custody of the Usher of the Black Rod.(a)

House of Commons.

In the case of Arthur Hall in 1581, himself a member of Parliament, the House of Commons inflicted the threefold penalty of imprisonment, fine, and expulsion for a printed libel, "not only reproaching some particular good Members of the House, but also very much slanderous and derogatory to its general authority, power, and state, and prejudicial to the validity of its proceedings in making and establishing of laws."(b)

In 1805, Peter Stuart was committed to the custody of the Serjeant-at-Arms for a breach of privilege in printing and publishing in the *Daily Advertiser, Oracle*, and *True Briton*, certain libellous reflections on the character and conduct of the House.(c) In 1810, Sir F. Burdett, a member of the House, was sent to the Tower for publishing "a libellous and scandalous paper reflecting upon the just rights and privileges of the House."(d) In 1819, the House resolved that a certain pamphlet, of which Mr. Hobhouse acknowledged himself to be the author, was a "scandalous libel containing matter calculated to inflame the people into acts of violence against the Legislature, and against this House in particular," and that it was "an high contempt of the privileges and of the constitutional authority of this House;" and the writer of the pamphlet was committed to Newgate.(e)

Yarrington and Groome in 1680,(f) one Smelt in 1689,(g) and John Rye in 1696,(h) were committed for libellous attacks on members. The House committed one Woodfall in 1774 for publishing a letter reflecting on the character of the Speaker,(i) and, in 1821, the author of a paragraph in the *John Bull* newspaper containing a libel on one of the members.(j) In 1832, two solicitors were called to the bar of the House for a libel

(a) 66 Lords' J. 704, 737, 743, 764.

(b) D'Ewes, 219; Hatsell, 93; 1 Com. J. 125, 126. "This," says Hallam (Const. Hist., chap. 5), "is the leading precedent, as far as records show, for the power of expulsion, which the Commons have ever retained without dispute of those who would most curtail their privileges." This is the first instance of a libel punished by the House (*Per* Lord Ellenborough, C.J., 14 East. 142).

(c) 60 Com. J. 214, 216.

(d) 65 Com. J. 252.

(e) 75 Com. J. 57. See also the case of O'Connell, who was reprimanded in his place by the Speaker for certain defamatory expressions contained in a speech delivered at a public meeting (93 Com. J. 307, 312, 316).

(f) 9 Com. J. 654, 656.

(g) 10 Com. J. 244.

(h) 11 Com. J. 656.

(i) 34 Com. J. 456.

(j) 76 Com. J. 335.

contained in a printed handbill, being a copy of an official letter signed by them and addressed to a committee sitting on the Sunderland Wet Docks Bill, reflecting on the conduct of certain members of the committee, and containing a statement of the manner in which the members had voted in the committee. The writers having expressed regret for their offence, the House resolved that the letter contained libellous matter reflecting on the committee, and that the two solicitors had been guilty of a high breach of the privileges of the House; and that they should be admonished by the Speaker.(a) In 1858, the proprietor and publisher of the *Carlisle Examiner* and *North-Western Advertiser* was committed to the custody of the Serjeant-at-arms for publishing an article imputing partial and corrupt motives to the chairman of a committee on a railway bill, and containing reflections on other members of the committee. He was discharged from custody on unreservedly retracting all imputations contained in the article, and paying the fees.(b)

Complaint having been made to the House of Commons in 1873 of Mr. Plimsoll's book, "Our Seamen: an Appeal," as containing statements impugning the character of certain members of the House and threatening further exposure, in order to influence their conduct in Parliament, a motion was made that "to accuse in a printed book, members of this House of grievous offences, and to threaten them with further exposure if they take part in its debates, is conduct highly reprehensible and injurious to the honour and dignity of this House." Mr. Plimsoll having tendered to the House the sincere expression of his regret for his unintentional fault, and making the most ample apology, the motion was by leave withdrawn.(c)

The publication by the same gentleman in 1880 of placards addressed to the electors of Westminster, and denouncing the conduct of one of its representatives, was resolved to be a breach of the privileges of the House; but, Mr. Plimsoll having apologised and withdrawn the imputation made by him upon the member attacked, the House resolved that no further action on its part was necessary.(d)

The consciousness of full-grown power and irresistible strength has led the House in more recent times to pass by, as unworthy of its notice, many newspaper and other attacks upon the conduct of members which in olden times would have been seriously dealt with.(e)

(a) 87 Com. J. 278, 294.
(b) 113 Com. J. 189, 192, 203. See also 72 *Ibid.* 232; 93 *Ibid.* 436.
(c) 128 Com. J. 60, 61. (d) 135 Com. J. 46, 54.
(e) See, for example, the case of Mr. Aston's letter in 1872 with

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In order that an attack on the character of a member should be a breach of privilege, the attack must be upon him in his capacity of member. "Aspersions," says Sir Erskine May,(*a*) "upon the conduct of members as magistrates, or officers in the army or navy, or as counsel, or employers of labour or in private life, or otherwise than in relation to Parliament, are within the cognisance of the Courts, and are not fit subjects for complaints to the House of Commons."

Resolutions of the House of Commons.

The following resolutions relating to this subject have at various times been passed by the House of Commons.

In 1699 (22nd April) it was resolved "that the publishing the names of the members of this House, and reflecting upon them, and misrepresenting their proceedings in Parliament, is a breach of the privilege of this House, and destructive of the freedom of Parliament."(*b*)

In 1701 (26th February) a resolution of a committee was agreed to by the House, "that to print or publish any books or libels reflecting upon the proceedings of the House of Commons, or any member thereof, for or relating to his service therein, is a high violation of the rights and privileges of the House of Commons."(*c*)

In 1790 (21st May) a general resolution was passed by the House, "that it is against the law and usage of Parliament, and a high breach of the privilege of this House, to write, or publish, or cause to be written or published, any scandalous and libellous reflection on the honour and justice of this House, in any of the impeachments or prosecutions in which it is engaged."(*d*)

Legality of commitment.

The legality of commitments by the House of Commons, on the Speaker's warrant, was discussed and fully recognised by the Court of King's Bench in the case of *Burdett* v. *Abbott*.(*e*) That was an action against the Speaker of the House of Commons for breaking and entering the house of the plaintiff (a member of Parliament), arresting him, taking him to the Tower of London, and imprisoning him there; acts which the defendant justified under a resolution of the House that a certain letter published by the plaintiff in *Cobbett's Weekly Register*, was "a libellous and scandalous paper, reflecting on the just rights and privileges of that House," and that the plaintiff had thereby been guilty of a breach of the privileges of the

reference to the Ecclesiastical Dilapidations Bill of that year (213 Hans. 560); the case of the *Pall Mall Gazette* attack upon the Irish members in 1873 (215 Hans. 530-542), and the case of Mr. O'Donnell and the *Globe* newspaper in 1878 (239 Hans. 1399).

(*a*) Parliamentary Practice, Ed. 9, p. 100. (*b*) 12 Com. J. 661.
(*c*) 13 Com. J. 767. (*d*) 45 Com. J. 508. (*e*) 14 East. 1.

House; whereupon it was ordered that the Speaker should issue his warrant to commit him to the Tower. "Can the High Court of Parliament," said Lord Ellenborough, C.J., in his judgment, "or either of the two Houses of which it consists, be deemed not to possess intrinsically that authority of punishing summarily for contempts which is acknowledged to belong, and is daily exercised as belonging, to every superior court of law, of less dignity undoubtedly than itself? And is not the degradation and disparagement of the two Houses of Parliament, in the estimation of the public, by contemptuous libels, as much an impediment to their efficient acting with regard to the public, as the actual obstruction of an individual member by bodily force, in his endeavour to resort to the place where Parliament is holden? And would it consist with the dignity of such bodies, or, what is more, with the immediate and effectual exercise of their important functions, that they should wait the comparatively tardy result of a prosecution in the ordinary course of law for the vindication of their privileges from wrong and insult? The necessity of the case would therefore, upon principles of natural reason, seem to require that such bodies, constituted for such purposes and exercising such functions as they do, should possess the powers which the history of the earliest times shows that they have in fact possessed and used."(*a*)

The Speaker, in issuing such a warrant, does not, according to Bayley, J.,(*b*) act in the character of a

(*a*) It has been held in America, by the Supreme Court of the United States, that the House of Representatives has, by necessary implication, a general power of punishing and committing for contempts, notwithstanding that the *lex scripta*, "the Constitution of the United States," had expressly conferred upon it a power to punish "its members;" thereby, as it was argued, on the principle that *enumeratio unius est exclusio alterius*, prohibiting the jurisdiction in the case of persons not members of the House. "It is true," said Johnson, J., delivering the judgment of the Court, "that such a power, if it exists, must be derived from implication, and the genius and spirit of our institutions are hostile to the exercise of implied powers. . . . . That a deliberate assembly, clothed with the majesty of the people, and charged with the care of all that is dear to them; composed of the most distinguished citizens, selected and drawn together from every quarter of a great nation; whose deliberations are required by public opinion to be conducted under the eye of the public, and whose decisions must be clothed with all that sanctity which unlimited confidence in their wisdom and purity can inspire; that such an assembly should not possess the power to suppress rudeness or repel insult, is a supposition too wild to be suggested" (*Anderson* v. *Dunn*, 6 Wheat. Rep. 204).

(*b*) 14 East. 159.

subordinate officer, but in that of a member of the House. "When the House make an order that their Speaker shall issue his warrant, they do not direct him to do it as a subordinate minister to them, but only as being the individual member of greatest dignity in the House, by whom on this and other occasions the House speaks and acts; and his act in this respect is not, I think, the act of an officer, but the act of a member of the House. But if," adds the learned judge, "it were the act of an officer of the House, acting under and by virtue of its judgment on the subject matter, I cannot help thinking that, where a Court has competent jurisdiction to decide upon a point, and has decided and given judgment upon it, and they direct their officer to carry that judgment into execution, the officer is protected by that judgment."(*a*)

This was so decided by the Court of Exchequer Chamber(*b*) (Parke, Alderson, and Rolfe, BB., Coltman, Maule, and Creswell, JJ.), reversing the decision of the majority of the Court of Queen's Bench, who held a Speaker's warrant void because it did not show a sufficient authority on the face of it to justify the defendant in all he admitted to have done. Parke, B., in delivering the unanimous judgment of the Exchequer Chamber, said: "If in these Courts the writ of attachment need not state any special grounds in order to show that the Court is acting duly, formally, and regularly, what good reason can be assigned for requiring the House of Commons to do so? If the writ of attachment in the general form used is a protection to the sheriff, the officer of the Court executing it (as it undoubtedly is), and he need state nothing in his plea but the issuing of the attachment—Levinz's Entries, p. 191; *Britton* v. *Cole* (1 Salk. 408; Com. Dig. "Pleader," 3 M. 24), why should not the warrant of the Speaker in a general form be equally a protection to the Serjeant-at-arms, the proper officer of the House? We are clearly of opinion that at least *as much* respect is to be shown and as much authority to be attributed to these mandates of the House as to those of the highest Courts in the country; and if the officers of the ordinary Courts are bound to obey the process delivered to them, and are therefore protected by it, the officer of the House of Commons is as much bound and equally protected."

(*a*) 14 East. 160. Sir Francis Burdett brought an action also against the Serjeant-at-arms of the House of Commons for an assault and false imprisonment in the execution of the Speaker's warrant, but did not succeed (*Burdett* v. *Colman*, 14 East. 163).

(*b*) *Howard* v. *Gosset* (10 Q. B. 359).

The warrant of commitment is not to be construed strictly as that of an inferior court or justice of the peace, but it is to be construed as a writ of a superior Court, not appearing on the face of it to be beyond the scope of its jurisdiction;(*a*) and therefore the warrant, though it does not specify the cause of arrest, furnishes a justification to the officer who executes it.(*b*)

Courts of law will not examine propriety of commitment.

Each House of Parliament is the sole judge whether its privileges have been violated, and whether thereby any person has been guilty of a contempt of its authority. The courts of common law will not inquire into or review its decision in this respect.(*c*)

A commitment by the House of Commons is not reversible for form by a court of common law.(*d*) "We cannot," says Lord Tenterden in *Reg.* v. *Hobhouse*,(*e*) "inquire into the form of the commitment, even supposing it open to objection on the ground of informality."

Where the commitment is for a libel, the Speaker's warrant need not set out what the libel is. "That point is perfectly settled in the case of *Burdett* v. *Abbott*, and it is also established by all the cases on this subject, that if one Court commit for a contempt, no other Court can inquire into that contempt."(*f*)

Colonial assemblies.

Colonial legislative assemblies have not the same power, in this respect, as the Imperial Parliament.

"The privilege of committing for contempt," said Lord Denman, C.J.,(*g*) "is inherent in every deliberative body

(*a*) *Howard* v. *Gosset* (10 Q. B. 359, 411). Powys, J., says in *Reg.* v. *Patey* (2 Ld. Ray. 1108) that "the House of Commons is a great court, and all things done by them are intended to have been *ritè acta*, and the matter need not be so specially recited in their warrants; by the same reason as we commit people by a rule of court of two lines, and such commitments are held good because it is intended that we understand what we do." So Blackstone, J. (*Brass Crosbys' case*, 3 Wils. 205): "Little nice objections of particular words and forms and ceremonies of execution are not to be regarded in the acts of the House of Commons; it is our duty to presume the orders of that House and their execution are according to law." Hawkins (3 Pl. Cr. 219, B. 2, c. 15, s. 73) says: "There can be no doubt but that the highest regard is to be paid to all the proceedings of either of those Houses, and that wherever the contrary *does not plainly and expressly appear*, it shall be presumed that they act within their jurisdiction, and equally to the usages of Parliament, and the rules of law and justice."

(*b*) *Howard* v. *Gosset* (*ubi suprà*).

(*c*) See *Stockdale* v. *Hansard* (9 A. & E. 169, 195).

(*d*) *Per* Gould, J., *Reg.* v. *Paty* (2 Ld. Ray. 1106).

(*e*) 2 Chit. Rep. 210. (*f*) *Per* Parke, B. (1 Moore's P. C. C. 80).

(*g*) See *Stockdale* v. *Hansard* (9 A. & E. 114).

invested with authority by the constitution." In similarly unqualified language, Parke, B., in *Beaumont* v. *Barret*,(*a*) stated it "to be inherent in every assembly that possesses a supreme legislative authority, to have the power of punishing contempts, and not merely such as are a direct obstruction to its due course of proceeding, but such also as have a tendency indirectly to produce such an obstruction, in the same way as courts of record may not only remove or punish persons who actually are interrupting their functions, but may also repress those who indirectly impede the administration of justice by disparaging and weakening their authority." And on this ground chiefly, but partly on that of usage and acquiescence,(*b*) coupled with the adoption of the power in question by virtue of legislative enactment forming the Act of Settlement of the island, the Judicial Committee of the Privy Council held, in that case, that the Jamaica House of Assembly had the power of committing a person who had published certain libellous paragraphs which the House had resolved to be a breach of its privileges.(*c*)

The case last referred to so far as it lays it down that all assemblies possessed of supreme legislative authority have inherent in them the power of committing for contempts, must be taken to be distinctly overruled by subsequent decisions of the Privy Council and of the Court of Queen's Bench. In *Kielly* v. *Carson*(*d*) it was decided by the Privy Council, on appeal from the Supreme Court of Judicature of Newfoundland, that the House of Assembly of that island did not possess, as a legal incident, the power of arrest with a view of adjudication on a contempt committed out of the House; but only such powers as are reasonably necessary for the proper exercise of its functions and duties as a local legislature.

"It is said," said Parke, B., in delivering the judgment, "that this power belongs to the House of Commons in England; and this, it is contended, affords an authority for holding that it belongs as a legal incident, by the common law, to an assembly with analogous functions. But the reason why the House of Commons has this power is not

(*a*) 1 Moore's P. C. C. 76.

(*b*) See also the language of Lord Ellenborough, C.J., in *Burdett* v. *Abbott* (14 East. 137).

(*c*) The members of the Judicial Committee present were Lord Brougham, Bosanquet and Erskine, JJ., and Parke, B.

(*d*) 4 Moore's P. C. C. 63. Present: Lord Lyndhurst, C., Lords Brougham, Denman, Abinger, Cottenham, and Campbell; the Vice-Chancellor of England (Sir L. Shadwell), the Lord Chief Justice of the Common Pleas (Tindal), Parke, B., Erskine, J., and Dr. Lushington.

because it is a representative body with legislative functions, but by virtue of ancient usage and prescription; the *lex et consuetudo Parliamenti*, which forms a part of the common law of the land, and according to which the High Court of Parliament, before its division, and the Houses of Lords and Commons since, are invested with many peculiar privileges, that of punishing for contempt being one. . . . . Nor can the power be said to be incident to the legislative assembly by analogy to the English courts of record which possess it. This assembly is no court of record, nor has it any judicial functions whatever; and it is to be remarked that all those bodies which possess the power of adjudication upon, and punishing in a summary manner, contempts of their authority, have judicial functions, and exercise this as incident to those which they possess, except only the House of Commons, whose authority in this respect rests upon ancient usage." And his Lordship thus referred to the judgment delivered by him in the previous case of *Beaumont* v. *Barrett:* "Their Lordships do not consider that case as one by which they ought to be bound on deciding the present question. The opinion of their Lordships, delivered by myself immediately after the argument was closed, though it clearly expressed that the power was incidental to every legislative assembly, was not the only ground on which that judgment was rested, and therefore was in some degree extra-judicial; but besides, it was stated to be and was grounded entirely on the dictum of Lord Ellenborough, in *Burdett* v. *Abbott*, which dictum, we all think, cannot be taken as an authority for the abstract proposition, that every legislative body has the power of committing for contempt. The observation was made by his Lordship with reference to the peculiar powers of Parliament, and ought not, we all think, to be extended any further."

The case of *Kielley* v. *Carson* was approved and followed in that of *Fenton* v. *Hampton*,(*a*) which had reference to the Legislative Council of Van Diemen's Land. In this case it was held also that there was no distinction, in respect of the power of commitment for contempt, between colonial legislative councils or assemblies whose power is derived by grant from the Crown, and those created under the authority of an Act of the Imperial Parliament.

Summary of the law as to local legislatures.

The effect of the preceding decisions has thus been stated by Cockburn, C.J.: "It has been decided by the Judicial Committee of the Privy Council that when the local legis-

(*a*) 11 Moore's P. C. C. 347.

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lature has not by prescription or by statute the power of committing for contempt, that power is not necessarily inherent in it."(a)

Isle of Man.

The House of Keys (the legislative assembly of the Isle of Man) having committed for contempt the publisher of certain libels in a newspaper, it was held by the Court of Queen's Bench that the House of Keys had not inherent in it as a legislative body the power to commit for contempt.(b)

A provision in a Manx Act of 1817, "that the House of Keys, the Clerk of the Rolls, and the registrars of the ecclesiastical courts, when in the execution of their respective offices, have and shall have the power of punishing contempts in like manner as any court or magistrate within the said island," was construed by the Court of Queen's Bench as referring to the House of Keys when acting in its judicial and not in its legislative capacity.(c)

So, in the case of *Doyle* v. *Falconer*(d) it was held by the Privy Council that the Legislative Assembly of the island of Dominica had not the power of committing for a contempt, though committed in its presence and by one of its members. Reliance having been placed in argument on the common law maxim, *Quando lex aliquid concedit, concedere videtur et illud, sine quo res ipsa esse non potest*, Sir J. W. Colville, in delivering the judgment of the Privy Council, said: "It is necessary to distinguish between a power to punish for a contempt which is a judicial power, and a power to remove any obstruction offered to the deliberations or proper action of a legislative body during its sitting, which last power is necessary for self-preservation. If a member of a colonial house of assembly is guilty of disorderly conduct in the house whilst sitting, he may be removed or excluded for a time, or even expelled; but there is a great difference between such powers and the judicial power of inflicting a penal sentence for the offence. The right to remove for self-security is one thing, the right to inflict punishment is another. The former is, in their Lordships' judgment, all that is warranted by the legal maxim that has been cited, but the latter is not its legitimate consequence. If the good sense and conduct of the members of colonial legislatures prove, as in the present case, insufficient to secure order and decency of debate, the law would sanction the use of that degree of force which might be necessary to

(a) 5 B. & S. 293.

(b) *Ex parte Brown* (5 B. & S. 280; 33 L. J. 193 Q. B.).

(c) *Ibid.* (d) L. Rep. 1 P. C. App. 328; 36 L. J. 33, P. C.

remove the person offending from the place of meeting, and to keep him excluded. The same rule would apply, *à fortiori*, to obstructions caused by any person not a member."

Victoria.

The Legislative Assembly of Victoria stands on a peculiar footing. Being constituted by a colonial Act (which was ratified by a subsequent imperial Act), by one enactment of which the legislature of Victoria was empowered to "define" the privileges, immunities, and powers to be held, enjoyed, and exercised by the council and assembly, and by the members thereof respectively, and having, in pursuance of this power, enacted that it, and the committees and members thereof respectively, should hold, enjoy, and exercise such and the like privileges, immunities, and powers as at the time of the passing of the imperial Act(*a*) were held, enjoyed, and exercised by the Commons House of Parliament of Great Britain and Ireland, and by the committees and members thereof, it has the power of committing for contempt.(*b*) The printer and publisher of a newspaper containing an article upon the subject of the Police Committee of the Legislative Assembly, with particular reference to one member of the assembly, was arrested on the Speaker's warrant, and committed to the custody of the Serjeant-at-Arms.(*c*)

Duration of commitment.

Where the power of committing for contempt exists, the punishment can last only so long as the existing session of the body that inflicts it. "However flagrant the contempt," says Lord Denman, C.J.,(*d*) "the House of Commons can only commit till the close of the existing session. Their privilege to commit is not better known than this limitation of it. Though the party should deserve the severest penalties, yet, his offence being committed the day before a prorogation, if the House ordered his imprisonment but for a week, every court in Westminster Hall, and every judge of all the courts, would be bound to discharge him by *habeas corpus*."

So in America, the imprisonment terminates with the adjournment or dissolution of Congress. "Even to the duration of imprisonment," says an American judge (Johnson),(*e*) "a period is imposed by the nature of things,

(*a*) 18 & 19 Vict. c. 55.
(*b*) *Dill* v. *Murphy* (1 Moore's P. C. C. N. S. 487).
(*c*) *Ibid.*
(*d*) *Stockdale* v. *Hansard* (9 A. & E. 114).
(*e*) *Anderson* v. *Dunn* (6 Wheat's Rep. 231). "In England," says Kent (1 Com. Amer. Law, 236, n.), "libels upon the character or proceedings of either House of Parliament, or any of its members, are regarded as breaches of privilege, and punishable as for contempts by

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since the existence of the power that imprisons is indispensable to its continuance; and although the legislative power continues perpetual, the legislative body ceases to exist on the motion of its adjournment or periodical dissolution. It follows that imprisonment must terminate with that adjournment."

Prosecution instead of commitment.

Parliament has sometimes, instead of punishing the publishers of libels by commitment, prayed the Crown to direct the Attorney-General to prosecute either by indictment or criminal information.

One *Rainer* was convicted in 1733 of having printed a scandalous libel upon the Lords and Commons, and sentenced by the Court of King's Bench to pay a fine of £50, and to be committed for two years, and until he should pay the fine, and likewise till he should find security for his good behaviour for seven years.(*a*)

In 1752, William Owen, a bookseller, having published a pamphlet condemning the proceedings in the House of Commons with reference to the commitment of one of their members, Alexander Murray, for dangerous and seditious practices, the House of Commons resolved that the pamphlet was "an impudent, malicious, scandalous, and seditious libel," and that an address should be presented to his Majesty to give directions to the Attorney-General to prosecute the author, printers, and publishers. Owen was accordingly tried upon an information charging him with having published a wicked, false, scandalous, seditious, and malicious libel, "most unlawfully, wickedly, and maliciously devising, contriving, and intending to asperse, scandalise, and vilify the whole body of the Commons of this kingdom, in Parliament assembled, and most wickedly and audaciously to represent their proceedings in Parliament as cruel, arbitrary and oppressive; and to make it be believed and thought as if the Commons in Parliament assembled were a most wicked, base, and degenerate set of persons, and had acted in their legislative capacity in open violation of the constitution of this kingdom, and had most daringly prostituted their power and acted in defiance of those laws which had been made and provided for the security and welfare of the subjects of this kingdom; and also most unlawfully, wickedly,

imprisonment. But with us, such a course of redress has not been adopted, and the House that was injured would probably, if redress was sought, direct a public prosecution by indictment. The Act of Congress of 14 July, 1798, made it an indictable offence to libel the Government, Congress, or President of the United States."

(*a*) *Rex* v. *Rainer* (2 Barnard, 293).

and audaciously to represent the said House of Commons as a court of inquisition; and most impudently to insinuate as if the commitment of the said Alexander Murray to his Majesty's said goal of Newgate was founded in violence and oppression, and by that means to arraign the public justice and proceedings of the said House, and to bring all the Commons of this kingdom in Parliament assembled into an ill and bad opinion, and into the utmost hatred and contempt with all the subjects of this kingdom," &c. The Chief Justice (Lee), according to the report, delivered it as his opinion that the jury ought to find the defendant guilty; for he thought the fact of publication was fully proved; and if so, they could not avoid bringing in the defendant guilty.(*a*) The jury, however, returned a verdict of not guilty.

In pursuance of a similar resolution and address of the House of Commons, John Stockdale was tried in 1789 upon an information charging him with having published a certain false, scandalous, wicked, seditious, and malicious libel concerning the impeachment of Warren Hastings, intending to asperse, scandalise, and vilify the Commons of Great Britain in Parliament assembled, and most wickedly and audaciously to represent their proceedings in Paliament as corrupt and unjust, &c. After a brilliant speech on behalf of Mr. Stockdale by Erskine, who took the line of defence that the intention of the author was to charge with injustice, not the House of Commons as a body, but the *private accusers* of Mr. Hastings, Lord Kenyon, C.J., told the jury that he acceded to the doctrine that they must be convinced that the pamphlet "was meant as an aspersion upon the HOUSE OF COMMONS;" and the jury returned a verdict of not guilty.

In 1796, John Reeves was tried upon an information filed against him by the Attorney-General in consequence of a resolution of the House of Commons that a pamphlet published by him, entitled "Thoughts on the English Government," was a malicious, scandalous, and seditious libel, and was also a high breach of the privileges of the House, and that an address should be presented to his Majesty asking him to direct a prosecution of the publisher. The jury acquitted the defendant.(*b*)

(*a*) 18 Howell's St. Tr. 1203, 1228.
(*b*) 26 Howell's St. Tr. 530.

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II. LIBELLOUS CONTEMPTS OF COURTS OF JUSTICE.

Various kinds of libellous contempts.

Libellous contempts of courts of justice may consist in scandalising the Court itself; in the calumniation of the parties who are concerned in causes before the Court; or in prejudicing mankind against persons before the cause is heard.(a)

As such libels obstruct the law, and corrupt the very fountains of justice, the wisdom of the Constitution has enabled the Courts who are the subjects of such scandal, with a view to protect themselves and their suitors, to proceed immediately against the offenders by the summary remedy of an attachment.(b) It is, therefore, a rule, founded on the reason of the common law, that all contempts to the process of the Court, to its judges, juries, officers, and ministers, when acting in the due discharge of their respective duties, whether such contempts be by direct obstruction or consequentially; that is to say, whether they be by act or writing, are punishable by the Court itself, and may be abated *instanter*, as nuisances to public justice, and subject the party so offending to fine and imprisonment.(c)

Libels of this character are also punishable by indictment or by criminal information.(d)

Wilmot, C. J.

There is a full discussion of the whole subject of commitments for contempt in an elaborate judgment, referred to with approval in subsequent cases, of Lord Chief Justice Wilmot, which he had prepared, and intended to deliver in the case of an application made in 1765 by the Attorney-General for an attachment against J. Almon for publishing a pamphlet entitled, "A Letter concerning Libels, Warrants, Seizure of Papers, &c.," containing many libellous passages upon the Court of King's Bench, and the Chief Justice for his conduct both in court and out of it, and charging the Court, and particularly the Chief Justice, with having introduced a method of proceeding to deprive the subject

(a) *Per* Lord Hardwicke (2 Atk. 471).

(b) Holt. L. L. 153. (c) *Ibid.* 154.

(d) Lord George Gordon was tried upon an information in 1787, and found guilty of publishing a false, wicked, malicious, scandalous, and seditious libel on the judges and the administration of the law; and Thos. Wilkins was found guilty of printing and publishing the same. The libel was a pamphlet called "The Prisoners' Petition to the Right Honourable Lord George Gordon, to preserve their rights and liberties, and prevent their banishment to Botany Bay." The defendant was sentenced to three years' imprisonment in Newgate (*Rex* v. *Gordon*, 22 Howell's St. Tr. 177).

of the benefit of the Habeas Corpus Act.(*a*) The Chief Justice summarises the objections to the proceeding by commitment as follows: that it is an invasion upon the ancient simplicity of the law; that it took its rise from the Statute of Westminster (c. 2), and that Act applies only to persons resisting process; and though this mode of proceeding is very proper to remove obstructions to the execution of process, or to any contumelious treatment of it, or to any contempt of the authority of the Court, yet that papers reflecting merely upon the qualities of judges themselves are not the proper objects of an attachment; that judges have proper remedies to recover a satisfaction for such reflections by actions of *scandalum magnatum;* and that in the case of a peer the House of Lords may be applied to for a breach of privilege; that such libellers may be brought to punishment by indictment or information; that there are but few instances of this sort of libels on Courts or judges; that libels of this kind have been prosecuted by actions and indictments; and that attachments ought not to be extended to libels of this nature, because judges would be determining in their own cause; and that it is more proper for a jury to determine *quo animo* such libels were published.(*b*)

The Chief Justice, in the first place, denies that attachments derived their origin from the Statute of Westminster (c. 2). "The power which the Courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution; it is a necessary incident to every court of justice, whether of record or not, to fine and imprison for a contempt to the Court acted in the face of it.(*c*) And the issuing of attachments by the supreme courts of justice in Westminster Hall for contempts out of court, stands upon the same immemorial usage as supports the whole fabric of the Common Law: it is as much the *lex terræ*, and within the exception of Magna Charta, as the issuing any other legal process whatsoever."

To the objection that there is not such necessity for summary punishment in the case of libels upon Courts or judges, as in the case of resistance of process, his lordship replies: "When the nature of the offence of libelling judges for what they do in their judicial capacity, either in court or out of

(*a*) The prosecution of Mr. Almon having dropped, in consequence, it is supposed, of the resignation of the then Attorney-General, Sir Fletcher Norton, the judgment prepared by Chief Justice Wilmot was not delivered in court; but it is frequently referred to as an authority.

(*b*) See Wilmot's Notes and Opinions, p. 253.

(*c*) 1 Vent. 1.

court, comes to be considered, it does, in my opinion, become more proper for an attachment than any other case whatsoever. . . . . The arraignment of the justice of the judges is arraigning the King's justice: it is an impeachment of his wisdom and goodness in the choice of his judges, and excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men's allegiance to the law is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the judges as private individuals, but because they are the channels by which the King's justice is conveyed to the people. To be impartial, and to be universally thought so, are both absolutely necessary for the giving justice that free, open, and uninterrupted current which it has for many ages found all over this kingdom, and which so eminently distinguishes and exalts it above all nations upon the earth."(*a*)

After alluding to the action of *scandalum magnatum*, which only redresses the private injury, and the proceedings in the House of Lords for breach of privilege, the Chief Justice proceeds: "The Constitution has provided very apt and proper remedies for correcting and rectifying the involuntary mistakes of judges, and for punishing and removing them for any voluntary perversions of justice. But, if their authority is to be trampled upon by pamphleteers and news-writers, and the people are to be told that the power given to the judges for their protection is prostituted to their destruction, the Court may retain its power some little time, but I am sure it will instantly lose all its authority. The power of the Court will not long survive the authority of it."(*b*)

Libelling judge in chambers.

His Lordship then considers whether a judge making an

(*a*) In a later part of the judgment (Wilmot's Notes and Opinions, p. 270) his Lordship says: "The principle upon which attachments issue for libels upon Courts is of a more enlarged and important nature [than that upon which attachments are granted in respect of bailiffs] —it is to keep a blaze of glory around them, and to deter people from attempting to render them contemptible in the eyes of the public."

(*b*) "The word 'authority' is frequently used to express both the right of declaring the law, which is properly called jurisdiction, and of enforcing obedience to it, in which sense it is equivalent to the word power; but by the word 'authority' I do not mean that coercive power of the judges, but the deference and respect which is paid to them and their acts, from an opinion of their justice and integrity" (*Ibid.* p. 256).

order at his house or chambers is not acting in a judicial capacity as a judge of the court, and both his person and character under the same protection as if he were sitting in court. "It is conceded," he says, "that an act of violence upon his person when he was making such an order would be a contempt punishable by attachment: upon what principle? for striking a judge when walking along the streets would not be a contempt of the court. The reason, therefore, must be, that he is in the exercise of his office, and discharging the function of a judge of this court; and if his person is under this protection, why should not his character be under the same protection? It is not for the sake of the individual, but for the sake of the public, that his person is under such protection; and in respect of the public, the imputing corruption and the perversion of justice to him, in an order made by him at his chambers, is attended with much more mischievous consequences than a blow; and, therefore, the reason of proceeding in this summary manner applies with equal, if not superior, force to one case as well as the other. There is no greater obstruction to the execution of justice from the striking a judge, than from the abusing him, because his order lies open to be enforced or discharged, whether the judge is struck or abused for making it. . . . . It may perhaps merit a less punishment to libel a single judge in court or out of court than to libel the whole court; but the question of the offence does not vary the mode of prosecuting it; it is an offence *ejusdem generis*, although *inferioris gradus;* and I cannot explore a single reason which can be urged to cover the judges in court against calumny and detraction for what they do there, which does not hold equally true, though in a less degree, when applied to what they do in their judicial capacities out of court; the *quantum* of the offence is different, but the quality of the offence is the same."

There is, however, no instance of a judge at chambers fining or imprisoning without the authority of the Court, for any insult offered to him there. We must distinguish in this respect between a judge of a court of record and the court of record itself. "No one of the rights, privileges, and incidents of a judge of a court of record," says Alderson, B.,(*a*) "necessarily carries with it the power of committing for contempt." And Lord Abinger, C.B., observes:(*b*) "A judge of a court of record very often is engaged in the per-

(*a*) *Rex* v. *Faulkner* (2 Mont. & Ayr. 344).
(*b*) 2 Mont. & Ayr. 338, 339.

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formance of functions which are wholly unconnected with his power of committing. A judge of the Court of King's Bench who grants a warrant at chambers is protected, although he should mistake the jurisdiction. Nobody would imagine that a judge, because he might grant a warrant on an information laid before him, could, in his private capacity as a judge of a court of record, punish any man for a contempt by fining him. Suppose an application is made for a warrant, and at the moment he is about to grant it, any letter were presented to him, or any insult offered to him, I believe there is no case to be found where a judge has ventured to fine or imprison without the authority of the Court. Again, the judges of the different courts, who are discharging their judicial functions separately and in chambers, as ancillary to the general business of the court, have never yet ventured to act as courts of record; they are judges of record, but they do not, when they act individually, even when they are discharging part of their judicial functions, assume to themselves the power of a court of record, which is illustrated by the instance referred to, that an order of a judge at chambers cannot be enforced by attachment, but must be made first a rule of court, before there is any contempt in violating it."

An attorney of the King's Bench, in the reign of Edward III., was committed to the custody of the marshal, and had to find sureties for his good behaviour, for having written a letter to one of the King's Council, reflecting on the judges, saying: "That neither Sir William Scot, Chief Justice, nor his fellows the King's justices, nor their clerks, any great thing would do by the commandment of our lord the King, nor of Queen Philippa, in that place more than of any other of the realm."(a)

Discussion of judicial decisions not prohibited.

The temperate and respectful discussion, by the newspaper press, of the decisions of our courts of justice is not interdicted; but mere invective or abuse, and still more the imputation of false, corrupt, or dishonest motives, to those who are engaged in the administration of justice, is punishable as a libel.

In a case of this sort, where the proprietor and printer of a newspaper were tried upon an information filed by the Attorney-General, for a libel upon Le Blanc, J., and the jury before whom the captain of a merchant-ship had been tried for murder at the Old Bailey Grose, J., said: "It certainly was lawful with decency and candour to discuss the

(a) 3 Inst. 174.

propriety of the verdict of a jury, or the decisions of a judge; and if the defendants should be thought to have done no more in this instance, they would be entitled to an acquittal; but, on the contrary, they had transgressed the law, and ought to be convicted, if the extracts from the newspapers set out in the information contained no reasoning or discussion, but only declamation and invective, and were written not with a view to elucidate the truth, but to injure the characters of individuals, and to bring into hatred and contempt the administration of justice in the country."(a)

In similar language, Fitzgerald, J., directed the jury in dealing with a seditious libel which related, amongst other things, to the case of certain men who had been tried and executed for murder:(b) "The defendant had a right to discuss fairly and *bonâ fide* the administration of justice as evidenced at this trial. It is open to him to show that error was committed on the part of the judge or jury; nay, further, for myself, I will say that the judges invite discussion of their acts in the administration of the law, and it is a relief to them to see error pointed out, if it is committed; yet, whilst they invite the freest discussion, it is not open to a journalist to impute corruption."(c)

(a) *Rex* v. *White and another* (1 Camp. N. P. 359). According to the report, the libel in this case affirmed the prisoner to have been guilty of murdering one of his crew, and in a gross and abusive style censured the judge and jury for acquitting him. The defendants having been found guilty, were sentenced to three years' imprisonment.

(b) *Reg.* v. *Sullivan* (11 Cox Crim. Cas. 57).

(c) A lieutenant in the royal marines having, in the year 1743, been sentenced by a court martial to fifteen years imprisonment, brought an action against the president of the court martial, and recovered £1000 damages, and, in pursuance of what fell from the judge at the trial, commenced actions also against the other members of the court martial who had passed the sentence, and they were arrested by *capias* at the breaking up of a court martial against another officer, of which they were also members. This latter court martial then passed certain resolutions reflecting on Sir John Willes, Chief Justice of the Common Pleas, which were laid before the King. Upon this the Chief Justice caused every member of the court to be taken into custody, and was proceeding to assert and maintain the authority of his office, when a written and contrite submission, signed by all the members of the court, stayed the progress of justice. The submission transmitted to the Lord Chief Justice was ordered to be read in open court, and to be registered in the Remembrancer's office. It also appeared in the *London Gazette*, "a memorial (as observed by the Lord Chief Justice) to the present and future ages, that whoever set themselves up in opposition to the laws, or think themselves above the law will, in the end, find themselves mistaken" (C. Pl. M. S. 1743; Holt. L. L. 158, 159).

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Libel published when court is not sitting

Though the libel be published whilst the Court is not sitting, and at a place somewhat distant, a court of record has still the power of punishing by commitment.(*a*)

The publisher and the writer of an article in a newspaper which reflected intemperately on certain proceedings of the Court of Chancery of the Isle of Man, were committed to prison for the contempt, though the Court was not sitting at the time of publication, and the publication took place in Douglas, ten miles distant from where the Court sat.(*b*) "It is objected," said Patterson, J., "that the Court could have no general power of commitment for a libel published out of court some time before. This point has not been expressly decided upon. In *Van Sandau's case*(*c*) the libel appears to have been published both in court and out of it. In *Rex* v. *Almon*(*d*) there was a very learned judgment by Chief Justice Wilmot, which he intended to deliver, though it was not delivered in fact, the case having dropped. He satisfactorily shows that a court of record has power to punish, by commitment for contempt, a libel published while the Court is not sitting." And Erle, J., added: "The commitment here was for a contempt in publishing, while the Court was not sitting, and perhaps at some distance of time and place, a libel on the proceedings of the Court. In the elaborate judgment to which my brother Patterson has referred, it is shown that such a publication may have a strong and immediate tendency to paralyse the proceedings of the Court. Such cases may easily be conceived; the propriety of the decision in the particular case is a question for the Court itself."

A case, which went further than any Court would now probably go, was that of *Rex* v. *Watson*,(*e*) where an information was granted in 1788, against the members of the corporation of Yarmouth, for having entered upon their books an order stating "that the assembly were sensible that Mr. W. [against whom an action had been brought for a malicious prosecution, and a verdict returned for £3000 damages, which the Court refused to disturb] was actuated by motives of public justice, of preserving the rights of the corporation to their admiralty jurisdiction, and of supporting the honour and credit of the chief magistrate; and therefore they vote him the sum of

(*a*) *Crawford's case* (13 Q. B. 613). (*b*) *Ibid.*

(*c*) *Van Sandau* v. *Turner* (6 Q. B. 773); *Ex parte Van Sandau* (1 Phill. 445, 605).

(*d*) Wilmot's Notes and Opinions, 243, 252, 291.

(*e*) 2 T. R. 199.

£2300."(a) "It is," said Butler, J., "a direct insinuation that the Court had judged wrong in all they have done in this case, and it is therefore clearly a libel on the administration of justice."(b)

Publication by person engaged in a suit.

A solicitor in a bankruptcy proceeding was held guilty of a gross contempt of Court in publishing a pamphlet containing insulting observations on the Court of Review, and on certain parties engaged in litigation before it. The pamphlet spoke of the judgment of the Chief Judge in Bankruptcy (Sir J. Knight Bruce) as "an elaborate production, wholly beside the merits of the case, free from all allusions to the facts or statements in the affidavits, which it was but charity to suppose were never referred to by the judge; free from all denunciations against fraud; and that the only object of it seemed to have been to deter solicitors from every attempt to expose and correct abuses in bankruptcy." The Judge of the Court of Review (Sir G. Rose) considered this to be a gross and scandalous contumacy of the learned judge, and a gross libel upon him, which ought to be visited as a contempt of that Court, and committed the writer to custody, from which he was released on humbly apologising and paying all the costs incidental to the application.(c)

Per Lord Cottenham.

A barrister and member of Parliament who wrote a letter in threatening and insulting terms to a Master in Chancery, before whom he had appeared in support of a petition presented by himself and others, the tendency of the letter being to induce the master to alter the opinion he was supposed to have formed upon the case, was committed by the Lord Chancellor (Cottenham) to the Fleet during pleasure.(d) "The power of committal," said his Lordship, "is given to courts of justice for the purpose of securing the better and more secure administration of justice. Every writing, letter, or publication which has for its object to divert the course of justice is a contempt of the Court. It would be strange, indeed, if the judges of the court were the only persons not protected from libels, writings, and proceedings, the direct object of which is to pervert the course of justice. Every insult offered to a judge in the exercise of the duties of his office is a contempt; but when the writing or publication proceeds further, and when, not

(a) *Rex* v. *Watson* (2 T. R. 199).

(b) See also the remarks of Ashurst and Grose, JJ., in the same case.

(c) *Ex parte Turner* (3 Mont. D. & De G. 523, 551, 558).

(d) *Mr. Lechmere Charlton's case* (2 My. & Cr. 316).

by inference, but by plain and direct language, a threat is used, the object of which is to induce a judicial officer to depart from the course of his judicial duty, and to adopt a course he would not otherwise pursue, it is a contempt of the very highest order."(*a*)

The writer of a letter to Lord Hardwicke relative to a threatened suit, and inclosing a bank-note, was held guilty of contempt;(*b*) and so was the writer of a letter to Chief Baron Parker, making mention of a cause depending in the Court of Exchequer, and containing a scandalous offer to his lordship.(*c*)

A threatening letter sent to one of the parties or witnesses in a suit is as much a contempt of court as one addressed to a judge or officer of the court.(*d*)

Lord Erskine, C., committed to prison the committee of a lunatic and his wife for having published a pamphlet, with a dedication to the Lord Chancellor, reflecting upon the conduct of certain persons acting, in the management of the affairs of a lunatic, under orders from the Court of Chancery. His lordship committed also the printer, and held that ignorance of the contents of the pamphlet would not excuse him.(*e*)

A judge of assize (Blackburn, J.,) having ordered part of the court to be cleared on account of the noise made by the persons assembled there, the High Sheriff of the county caused a placard, signed by him, to be posted up in the town opposite the court, in which he recorded his protest against "this unlawful proceeding" of the learned judge, and said: "I have given directions that the court shall be opened again to the public according to the custom and the

(*a*) *Ibid.* 339. Lord Abinger, C.B., and Alderson, B., seem to have taken a different (and it is submitted more sensible) view of the mode of dealing with insulting letters addressed to a judge, touching a matter under consideration. "I can only say," said Lord Abinger, "that if I received such a letter I should not consider myself at liberty to commit the writer." To which Alderson, B., added: "There would be a great many committals if such a course were pursued by the judges." "Do you mean to say," asked Lord Abinger of counsel, "that one of the judges has the power to fine a man for sending him a silly letter, or an impudent letter about any matter that he has decided? I can only say I should be very much afraid of exercising it." (See *Rex* v. *Faulkner*, 2 Mont. & Ayr. 321, 322.)

(*b*) *Martin's case* (2 Russ. & Myl. 674).

(*c*) *Macgill's case* (2 Fow. Ex. Prac. 404).

(*d*) *Smith* v. *Lakeman* (26 L. J. 305, Ch.); *Shaw* v. *Shaw* (31 L. J. Prob. 35; 6 L. T. N. S. 477; 2 S. & T. 515); *Re Mulock* (33 L. J. Prob. 205; 10 Jur. N. S. 1188).

(*e*) *Ex parte Jones* (13 Ves. 237).

law. All persons, so long as they conduct themselves with decorum, have a lawful right to be present in court; and I hereby prohibit my officers from aiding and abetting any attempt to bar out the public from free access to the court." For this contempt the High Sheriff was fined £500 by Cockburn, C.J., who was sitting in the next court.(*a*)

Scotch courts.

The Scotch courts exercise the same powers as to commitments for contempt which the English courts do. Hume,(*b*) after dealing with the case of contemptuous demeanour in court, says: "It is equally indispensable to repress in the like speedy and effectual manner all attempts which may be made with relation to any trial depending at the time, or which has recently been so, to slander the proceedings of the court, or depreciate the character, or sully the honour, of the judges; or to impose on their wisdom and pollute the demands of justice, to the prejudice of a fair and an impartial trial. In former times they scrupled not summarily to inflict high corporal pains for transgressions of the first of these kinds. As in the case of Donald Campbell, who, in the course of a trial, when standing among the multitude by the courthouse, had openly accused the Earl of Athol, Justice-General, of gross partiality and corruption in the case; he had sentence, therefore, to stand two hours upon the cuck-stool and make public confession of his fault, and to have his tongue bored by the common executioner. More lately, after the conviction of Nairn and Ogilvy, certain printers were rebuked (and, on account of their submission, were dismissed without further answer) for publishing an opinion of English counsel on the case, accompanied with notes highly injurious to the Court and the jury. In a still later instance, an account had been published of a certain trial, equally slanderous of the proceedings of the Court, and contemptuous of the persons of the judges; and here, as the offence was not followed with the like symptoms of contrition, the culprits Johnson and Drummond were sent to gaol for three months, and till they should find surety for their good behaviour for the future. In these several instances the Court guarded their own honour. In the following they were no less jealous of the interests of justice and a fair trial. One

(*a*) *In re the High Sheriff of Surrey* (2 F. & F. 237). The same gentleman having persisted in addressing the grand jury in court after a prohibition from the presiding judge, was fined £500, and threatened with commitment if he did not desist. This fine was remitted on his reading a written apology in court (*Ibid.* 234).

(*b*) 2 Com. 139.

Gilkie, a writer, agent for the prosecutor in a case of murder, was condemned to a month's imprisonment, and to find caution for his good behaviour: after execution of the criminal letters, he had published sundry memorials and other addresses commenting on the charge, and tending to prejudice the public against the accused. The Lords declared on this occasion 'that such publications are a high indignity to the Court, and most dangerous to the course of justice, as tending to prepossess and inflame the minds of the country against the persons accused, and thereby obstruct the course of a fair trial.' A fine was awarded, and the like censure of all such unfair practices was inserted in the record, on occasion of the trial of Ewan Macewen before the Lords Justice-Clerk and Eskgrove at Perth, in May, 1785: after service of the indictment, the agent for the pannel had rashly published and circulated in the neighbourhood, a sort of narrative on his part, giving an account of the charge, and the circumstances of the case."

In 1820, Gilbert M'Leod was sentenced to be imprisoned and find caution, under a penalty, for his good behaviour for three years, for having published, in a periodical called *The Spirit of the Union*, a false and slanderous account of what had passed in court at giving sentence of fugitation against George Kinloch, and one which was calculated to raise groundless doubts and jealousies of the due administration of justice in the Court of Justiciary.(*a*)

A newspaper having published (pending the trial of this Gilbert M'Leod, the same year, on a charge of sedition) a paragraph inserted by William Watson, which gave a false and exaggerated account of the charge against the accused, and made his case the subject of public discussion, the Court found "that such conduct is derogatory to the authority of this Court, dangerous to parties, whether prosecutors or pannels, and subversive of the principles of a fair trial;" but in respect of circumstances of extenuation stated by Watson, they dismissed him with a rebuke and a fine of five pounds.(*b*)

It appears that in those cases where the publication of statements having a tendency to interfere with the administration of justice, does not call for punishment, the Court may nevertheless interfere to prohibit such publication. Thus, in 1829, William Haire being charged with the murder of James Wilson, on the motion of the counsel for the accused with reference to an advertisement of a forthcoming

(*a*) Shaw's Cases, No. 4. (*b*) *Ibid.* No. 6.

publication of the confessions of William Burke, which had been announced in the *Edinburgh Evening Courant*, the Lords "prohibit the editor and publisher of the *Edinburgh Evening Courant* from publishing or circulating any statement relative to the alleged murder of James Wilson, or anything prejudicial to the prisoner, William Haire, in the said confession, or doing anything whereby the same may be published, till the proceedings now in dependence against the said William Haire shall be brought to a conclusion, and recommend to the publishers of all newspapers to abstain in like manner from doing so."(*a*)

Colonial courts.

Colonial courts of record possess the same power of commitment for contempt that the home courts do, and an appeal will not lie from such a commitment to the Privy Council.(*b*)

In these cases, however, it must appear clearly on the face of the order that the party had committed a contempt, that he had been duly summoned to make his defence, and that the punishment awarded for the contempt was an appropriate one.(*c*)

Where a barrister and attorney wrote a letter to the Chief Justice of Nova Scotia, reflecting on the judges and the administration of justice generally in the court, but wrote it not in his professional capacity, but in his private capacity as a suitor in respect of a supposed grievance and injury done him as a suitor, the Privy Council held that an order suspending the writer from practising in the court was not an appropriate punishment for the offence, and on that ground advised Her Majesty to discharge the order.(*d*)

"The letter," said Lord Westbury, in delivering the judgment of the Privy Council, "was a contempt of Court which it was hardly possible for the Court to omit taking

(*a*) Bell's notes, 165. See also *Edmond's case* (7 December, 1829, Shaw, 229). For Lord Cottenham's opinion as to the jurisdiction of the Court of Session to prevent by interdict the publication of libellous statements, see 1 H. L. Cas. 376.

(*b*) *McDermott* v. *The Judges of British Guiana* (L. Rep. 2 P. C. App. 341; 20 L. T. N. S. 47). See also *Rainy* v. *The Justices of Sierra Leone* (8 Moore's P. C. C. 47, 54), and *Hughes* v. *Porral* (4 Moore's P. C. C. 41).

(*c*) See *per* Lord Chelmsford (L. Rep. 2 P. C. App. 363), and *Re Wallace* (L. Rep. 1 P. C. App. 283; 14 L. T. N. S. 286; 36 L. J. 9, P. C. C.; 14 W. R. 609); *Re Pollard* (5 Moore's P. C. C. 111; L. Rep. 2 P. C. App. 106); *Re Downie and Arrindell* (3 Moore's P. C. C. 414).

(*d*) *Re Wallace* (*ubi supra*). See also *Re Downie and Arrindell ubi supra.*

cognisance of. It was an offence, however, committed by an individual in his capacity of a suitor in respect of his supposed rights as a suitor and of an imaginary injury done to him as a suitor, and it had no connection whatever with his professional character, or anything done by him professionally either as an advocate or an attorney. It was a contempt of Court committed by an individual in his personal character only. To offences of that kind there has been attached by law and by long practice a definite kind of punishment—viz., fine and imprisonment. It must not, however, be supposed that a court of justice has not the power to remove the officers of the court if unfit to be entrusted with a professional *status* and character. If an advocate, for example, were found guilty of crime, there is no doubt that the Court would suspend him. If an attorney be found guilty of moral delinquency in his private character, there is no doubt that he may be struck off the roll. But in this particular case there is no *delictum* brought forward or assigned, except that which results from the fact of addressing an improper and contemptuous letter to the chief justice of the Court, in respect of something supposed to have been done unjustly to the writer in his private capacity as a suitor. We think, therefore, there was no necessity for the judges to go further than to award to that offence the customary punishment for contempt of Court."(*a*)

(*a*) Besides contempts of Court committed by means of libellous writings (with which alone this work professes to deal), the Courts have frequently punished by attachment the utterance of contemptuous or contumelious words, and also the contemptuous demeanour of parties before it. Contempts of Court by means of words are also indictable. The following are examples of this general head of contempts: Calling a magistrate, in a court of justice, a fool, but not so speaking of him in his absence, and without reference to the execution of his office (*Simmons* v. *Swecte*, Cro. Eliz. 78; *Reg.* v. *Wrightson*, Salk. 698; see also 2 Roll. Rep. 78; 4 Inst. 181; *Ex parte The Mayor of Yarmouth*, 1 Cox Crim. Cas. 122); giving the lie to the steward of a manor holding a court leet (*Earl of Lincoln* v. *Fisher*, Cro. Eliz. 581; Ow. 113; Mo. 470), or telling him in court that he is forsworn (2 Rol. Abridg. 78); saying to justices in session "Though I cannot have justice here, I will have it elsewhere" (*Rex* v. *Mayo*, 1 Keb. 508; 1 Sid. 144); putting on one's hat in presence of the lord of a court leet, and saying he cared not what he could do (*Bathurst* v. *Coxe*, 1 Keb. 451, 465; Raym. 78); saying to a justice of the peace in the execution of his office that he was a rogue and liar (*Rex* v. *Revel*, 1 Str. 420); but not saying of a justice in his absence that he was a scoundrel and a liar (*Rex* v. *Weltje*, 2 Camp. 142). And a Court may be insulted by the most innocent words uttered in a peculiar manner and tone (*Per* Lord Denman, C.J., *Carus Wilson's case*, 7 Q. B. 1015). Wherever a justice may commit for such words, the offender may also be indicted for the misdemeanour (Str. 420). A justice can commit

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Publications which tend to prejudice the hearing of a pending cause.

The calumniation of parties who are concerned in a cause before the Court, or any publication which attempts to create prejudice against any of them before the cause is heard, and thus tends to influence its result, constitutes a contempt.

The rules which have been laid down as to fair comment on matters of public interest and notoriety, do not extend to comments on matters still pending, waiting for argument and decision, which have a direct tendency towards directing and swaying the mind of the Court or jury, by whom the cause is to be determined.(*a*)

The publication by a newspaper of a paragraph taxing certain witnesses in a pending cause with "turning affidavit men," was held a contempt of Court by Lord Hardwicke. His lordship construed the words "affidavit men" to mean "persons who are ready upon all occasions to make affidavits without regarding whether they have any cognisance of the facts," and committed the printers to prison, observing(*b*) that "nothing is more incumbent upon courts of justice than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard. . . . . There cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters."

The publication in a newspaper, pending a cause in Chancery, of articles reflecting on the plaintiff and his witnesses, and characterising the Chancery proceedings as vexatious and unprincipled, and representing the affidavits as containing glaring misrepresentations which the editor believed, and heartily hoped, would lead to an indictment for perjury, was held a contempt of Court by the Master of the Rolls (Lord Langdale). "If parties in the prosecution

only where the contemptuous words are spoken in his presence; in other cases the remedy is by indictment of the offender (*Rex* v. *Revel*, *ubi supra*. See also *Rex* v. *Wrightson*, *ubi supra*, and 1 Vent. 169; 2 Keb. 249; Hutt. 131; 3 Mod. 139; *Rex* v. *Selby*, Mich. 4 Anne K. B.; *Rex* v. *Penny*, 1 Ld. Raym.; *Rex* v. *Pocock*, Str. 1157). A barrister may also commit a contempt of Court in the conduct of a cause (*Re Pater*, 33 L. J. 142 Q. B.); and so may one of the parties to the cause in the course of addressing the jury (*Rex* v. *Davison*, 4 B. & Ald. 329). As to contempts of county courts see sect. 113 of 9 & 10 Vict. c. 95, and the case of *Levy* v. *Moylan* (19 L. J. 308, C. P.); and as to contempts of ecclesiastical courts, see 2 & 3 Will. 4, c. 93.

(*a*) See *per* Wood, V.C., *Tichborne* v. *Mostyn* (17 L. T. N. S. 7; L. Rep. 7 Eq. 57).

(*b*) 2 Atk. 469.

of their rights," said his Lordship, "are to be exposed to this species of attack, and are to be placed in such a situation that they cannot safely proceed in the defence of their rights, and if witnesses are in this way deterred from coming forward in aid of legal proceedings, it will be impossible that justice can be administered. It would be better that the doors of the courts of justice were at once closed."(*a*)

It was held a gross contempt of Court to publish in a newspaper an article commenting on affidavits which had been filed on behalf of the plaintiff in a suit, but were not yet before the Court; and the publisher, after making an ample apology, was ordered to pay the costs of a motion to commit him.(*b*)

Reprint of article.

It is also a contempt to reprint in another newspaper an article of this sort. In the case last referred to, a motion to commit the publishers of two newspapers which had simply reprinted the article was refused, but the publishers had to pay their own costs. The printer of a newspaper which had gone beyond merely reprinting the article, was made to pay the costs of the motion.(*c*)

Vice-Chancellor Kindersley committed to prison the publisher of a newspaper, for having published a leading article commenting on affidavits made in a suit in Chancery, which had not yet come on for hearing, and holding up to ridicule the makers of the affidavits, and characterising their conduct as utterly disgraceful.(*d*)

Printing brief.

On a similar ground—viz., that the publication tended to prejudice the world with regard to the merits of the cause

(*a*) *Littler* v. *Thompson* (2 Beav. 129).

(*b*) *Tichborne* v. *Mostyn* (17 L. T. N. S. 5; L. Rep. 7 Eq. 55). See the language of Wood, V.C., on this subject, cited *ante*, pp. 57, 58.

(*c*) *Ibid.* See also *Tichborne* v. *Tichborne* (22 L. T. N. S. 55).

(*d*) *Felkin* v. *Herbert* (9 L. T. N. S. 635; 33 L. J. 294, Ch.). In this case the publisher was released from custody after ten days' confinement, on payment of costs and fees, and humbly apologising to the Court for the contempt which he had committed. The motion for his discharge was opposed on the ground that he should also have apologised to the persons who had made the affidavits, and whom he had injured by the reflections contained in the leading article. The Vice-Chancellor, however, thought that the making of such an apology could not be made a condition precedent to his discharge. "He was not," said his Honour, "committed for an offence against anything appertaining to the honour or character of the defendants, but because the language used was a contempt of this Court, and tending to impede the course of justice; not because it was an offence against any given individuals; and when he applies to be discharged, and expresses his contrition, how can the judge say he will not discharge him, unless he does something in respect of a matter for which he was not committed?" (*Ibid.*)

before it was heard—the act of a party who printed his brief before the cause came on, was held a contempt of Court, though there was nothing in the publication reflecting upon the Court in any way.(*a*)

Publishing a petition to wind up.

It was also held a contempt of Court for a newspaper to publish, before it was heard, a petition which had been presented to the Court of Chancery for the winding-up of a company, containing grave charges against the directors. It was contended, on behalf of the newspaper proprietor, that the case of a petition to wind-up was an exceptional one, because under the Act it must be advertised, and the advertisement must be accompanied by a statement that persons desiring to possess it might obtain copies from the solicitor by an ordinary application. Malins, V.C., said: "No doubt, every contributory and creditor can obtain such copies, but it is not open to any one of the public, strangers to the matter, and does not give a general licence to publish the petition. . . . . There is nothing in the Act or rules which sanctions the publication of a petition of this kind, any more than a Bill in Chancery."(*b*)

Order of Court prohibiting publication.

If a Court make an order prohibiting the publication of the proceedings pending a trial likely to continue for several successive days, it is a contempt of Court to disobey such order.(*c*)

Publication of letters by solicitor of one of the parties.

It is a contempt of Court for the solicitor of one of the parties in a suit to write letters for publication in a newspaper, which tend to influence the result of the suit.(*d*) "There is," said Lord Romilly, M.R.,(*e*) "one distinct line drawn, which is this, that gentlemen who are concerned for contending clients in this court, whether solicitors or counsel, should abstain entirely from discussing the merits of those questions in public print; if they do it at all, they ought to put their names to their communications. But to let the public suppose that it is merely done by a person who takes a great interest in, and has great knowledge of, the subject, and discusses it from a public point of view, when, if the fact were known, he is the solicitor of the defendant, and has the strongest possible interest in his success, is in my opinion, highly reprehensible."

Liability of editor for insertion of anonymous letters.

The letters published in this case were anonymous. The

(*a*) See *per* Lord Hardwicke (2 Atk. 471); S. C. *nom. Roach* v. *Garvan* (2 Dick. 794).

(*b*) *Re Cheltenham and Swansea Railway Carriage and Waggon Company* (L. Rep. 8 Eq. 580; 20 L. T. N. S. 169).

(*c*) See *Rex* v. *Clement* (4 B. & Ald. 218).

(*d*) *Daw* v. *Eley* (L. Rep. 7 Eq. 49). (*e*) *Ibid.*

suit was to restrain the infringement of a patent, one of the issues raised being as to the novelty of the plaintiff's invention, and the letters written by the defendant's solicitor stated facts tending to disprove the novelty of the invention. On the appearance of the first letter, the plaintiff wrote to the editor referring to the suit, and suggesting that the writer of the published letter was an interested party. Notwithstanding this, the editor, besides refusing to insert the plaintiff's letter, as containing personal imputations, afterwards published a further anonymous letter from the defendant's solicitor, knowing that he was a solicitor, but not knowing that he was the solicitor in the pending suit. A motion was made to commit the editor also for a contempt of Court, but the motion was refused, the editor, however, having to pay his own costs. Lord Romilly said: "The case of the editor of a newspaper is very different from that of persons who write letters to the paper for publication. His duty is simply to take no part in matters purely personal between individuals, or in matters which are the subject of a lawsuit. But it often happens that private matters are so mixed up with public matters into which it is his duty to enter, that it is very difficult to draw the distinction between them. In this case, if the editor had inserted Mr. D.'s [the plaintiff's] letter, I should have thought that there was nothing in his conduct calling for the interference of the Court; but he did not insert it, and afterwards, with notice that a suit was pending, with the knowledge that the author of the letters was Mr. C., and that Mr. C. was a solicitor, which ought to have induced him to inquire further, and ascertain the exact position which Mr. C. occupied, he allowed further letters on both sides to be published. I am inclined to think, by what the plaintiff told him, he was put upon inquiry whether 'Copper Cap' [the *nom de plume* of the letter-writer] was connected with the suit."

Party supplying newspaper with information cannot complain of contempt.

If one of the parties to a suit has himself supplied the newspaper with the information upon which comments are made, he is not in a position to complain of the contempt.

Where the plaintiff in a suit procured the insertion in a local newspaper of a statement of his claim, and his agent gave the newspaper proprietor a copy of the bill, a motion having been made to commit the proprietor for contempt in publishing certain articles disparaging the plaintiff's claim, Bacon, V.C., refused to make any order whatever in the matter, saying: "I am not considering the offence committed against the Court by contempt, but the right which the plaintiff in the suit, who has endeavoured to make use of a

newspaper for his own purpose, has to come afterwards and complain of subsequent statements or comments, not malevolent and not libellous, upon the subject which he has submitted to the editor of that newspaper. What right has he to be here to complain? I cannot conceive that he has the slightest right in the world."(a)

Publication by one party does not justify publication by the other.

Though one of the parties to an action publish newspaper attacks on the conduct of his opponent, the latter will not be allowed, by way of defence, to publish, pending litigation, *ex parte* garbled accounts of any of the proceedings in court or before the examiner.(b)

In a case of this kind, Lord Hatherley (when Vice-Chancellor Wood) restrained, by injunction, the publication of a pamphlet containing an unfair account of the evidence of one of the witnesses, taken before the examiner, saying: "If the one party endeavours to prejudice the public in any way against the other litigant party, there is not the slightest justification for the other party doing the same; and this Court, in the administration of justice, always takes care that neither party shall do it. . . . I quite agree with the respondent's counsel in thinking that the present times are very different from those of Lord Hardwicke, and that the present feeling and the general judgment of mankind as to what is or is not proper to be published, are exceedingly different to what they were at that time. That may at once be conceded; but at the same time, even as regards the publicity of proceedings in courts of justice, and when it is a question between parties who are not litigant, but between one of the parties litigant and the publisher of a newspaper, for instance; even as between these parties the Court, in these days, recognising in the highest possible degree the importance of the public being duly and fairly informed of all that takes place, yet does take care that there shall only be such proper information published in a fair and reasonable manner. I mean that courts of justice, in giving directions to a jury as to the ultimate result in that which is or is not a fair publication, always leaves it for the consideration of such jury whether or not an independent, or supposed to be independent, person, who has published a narrative of proceedings of a court of justice, has published them in a fair and reasonable manner, being anxious to inform the public; or whether there is evidence of malice in the modes in which

(a) *Vernon* v. *Vernon* (23 L. T. N. S. 697; 40 L. J. Ch. 118).
(b) *Coleman* v. *West Hartlepool Harbour and Railway Company* (2 L. T. N. S. 766; 8 W. R. 734).

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the report was framed. Now, this Court, in dealing between litigants, takes care that the litigants shall not, by such foolish attempts as appear to me to have been made on both sides here, create public prejudice, each against his opponent, in the progress of the litigation, which ought to be conducted with all proper calmness and discretion, and for the purpose of eliciting truth."(a)

Distinction between publication by newspaper reporter, and publication by one of the litigants.

The publication of the proceedings in court, pending litigation, by a newspaper reporter, differs from a publication by one of the parties to the litigation in this, that there is a *primâ facie* presumption against the fairness of the latter publication. "Nobody," said Lord Hatherley, in the case last referred to,(b) "feels more sensibly than myself the advantage of having a fair publication of all that takes place in a court of justice; but I make this observation, that whenever one of the litigants is the party making the statement, that is a very strong *primâ facie* presumption against its being at all fair, and that in any case in which a litigant makes a publication, it is exceedingly different from that which a newspaper reporter would publish simply in the discharge of what was his duty. Such a case is widely different."

Advertisements of rewards for evidence.

On similar grounds, in a case(c) since questioned, the publication in a newspaper of an advertisement offering a reward to any one who should make legal proof of a marriage, in question before the Court of Chancery in a pending suit, was held by Lord Chancellor Parker to be a contempt of Court, as having a tendency to produce false evidence.

In the recent case of *Plating* v. *Farquharson*,(d) this decision was thus referred to by Jessel, M.R.: "I do not profess to understand it as it is reported. The advertisement seems to have been an advertisement for oral evidence to disprove a marriage, by showing that a marriage certificate which was alleged to refer to two persons not having the names mentioned in the certificate, applied in fact to two persons who really bore those names. That was treated by Lord Macclesfield as a direct inducement to subornation of perjury. Of course, if it was an attempt to suborn witnesses, it would be a contempt of Court, and an undue interference with the course of justice. With great respect, however, to that learned Lord Chancellor, I should not have come to the same conclusion on the same facts; and it does not appear to me

(a) 2 L. T. N. S. 767.
(b) 2 L. T. N. S. 768.
(c) *Pool* v. *Sacheverel* (1 P. Wms. 675).
(d) L. R. 17 C. D. 55).

that an advertisement for a witness to prove a thing not in the knowledge of the man who advertises for it, but which he believes to be true, can be treated as subornation of perjury, because subornation of perjury means doing something to induce people to come forward to prove that which the person seeking to prove it believes to be false; and on that distinction, it appears to me, the case ought to turn."

In *Plating* v. *Farquharson*, the defendants, appealing against an injunction which had been granted against them for infringing a patent for nickel-plating, inserted in a newspaper an advertisement asking subscriptions from the trade towards the expenses of the appeal, and also offering a reward of £100 to any one who could produce documentary evidence that nickel-plating was done previously to 1869. The Court of Appeal could see nothing objectionable in either advertisement, and dismissed with costs an application to commit for contempt the publisher of the newspaper in which the advertisement was published.(*a*)

Injunction is in discretion of court.

It is not every unfair report that the Court will interfere to restrain by injunction.(*b*) "Every Court," said Turner, L.J., "has the power of preventing the publication of its proceedings pending litigation; but it is not to be exercised in all cases, and it is a question quite in the discretion of the Court."(*c*)

Publications concerning a person charged with a crime.

The exhibition in an assize town of inflammatory publications respecting a prisoner about to be tried for murder, was considered by Littledale and Gaselee, JJ., not to be a contempt which the judge of assize could interfere to stop by commitment, though they thought it "highly indecorous and improper, and one that might subject the man to punishment."(*d*) There is little doubt that a criminal information would be granted against him.

It was held a contempt of Court, pending the trial of an indictment, to address public meetings, alleging that the defendant was not guilty, that there was a conspiracy against him, and that he could not have a fair trial.(*e*)

Whether proceedings must be pending.

It was the opinion of Sir G. Rose, judge of the Court of Review in Bankruptcy, that the pendency of proceedings

(*a*) *Mrs. Farley's case* (2 Ves. Sen. 520), in which Lord Hardwicke committed to prison a person who had published "an advertisement" relating to the answer put in by the defendant in a Chancery suit, does not state what the nature of the advertisement was.

(*b*) *Brook* v. *Evans* (29 L. J. 616, Ch.). (*c*) *Ibid.*

(*d*) *Rex* v. *Gilham* (1 Mood. & Malk. 165).

(*e*) *Onslow's and Whalley's case* (L. R. 9 Q. B. 219); *Skipworth's case* (*Ibid.* 230).

was not necessary to give the Court jurisdiction to commit for contempt in publishing insulting observations respecting the parties to a proceeding before it.

In a case in which judgment had been finally pronounced upon a petition, but the order had not been drawn up when the libel was published, that learned judge said: "A distinction has been attempted to be maintained, that in this case the proceeding is not a pending proceeding, but a proceeding that has been concluded; but, even if this case could be so looked at, it is not in my humble opinion a right conclusion, that parties are at liberty to attack each other with abuse or libellous statements as to what has been done in any particular litigation, though that litigation has been brought to a close. And if the principle be the protection of the subject in all fair matter of litigation, in order that his mind may be unbiassed by threat or intimidation, and that he may go on freely through that course of proceeding which the laws of his country have provided for him, I cannot but consider it the duty of the Court to protect him against an impression, that when the proceeding is concluded he may be liable to imputations and abuse, and have no protection but by going into a court of law for damages in an action for libel. I apprehend it is the duty of the Court to the suitors, to tell them that, though the matter is ended with respect to them, the Court will still protect them, as if the litigation or the business of the court were still pending, and that the principle is not varied by the circumstance that the matter is altogether concluded. And I am rather fortified in that mode of dealing with the question, because, if the attention of the learned counsel be directed, I think, to that case in *Atkins*(*a*), unless I am mistaken, it will be found that the decree was pronounced, and that what took place did not take place until after the Court had dismissed the matter."(*b*)

A petition on which judgment had been finally pronounced, but on which the order had not been drawn up, was considered by the same learned judge to be a pending proceeding for the purpose of rendering a publication reflecting on any of the parties a contempt of Court, if the actual pendency of a proceeding were necessary to give the Court jurisdiction to commit.(*c*)

On a footing of its own stands the case of *Price* v.

(*a*) 2 Atk. 469.
(*b*) *Ex parte Turner* (3 Mont. D. & De G. 544, 545).
(*c*) *Ibid.*

Hutchinson,(a) in which Malins, V.C., committed to prison two persons, one of them the defendant to a Chancery suit, for using violent and abusive language towards the clerk of the firm of solicitors, who went to serve a copy of the bill upon the defendant.

Warrant of commitment.

A warrant of commitment by the judge of a superior court may be in general terms;(b) but it must be for a time certain.(c)

Attachment.

The Court may grant an attachment in the first instance, or a rule calling on the offender to show cause why an attachment should not issue against him.(d)

III.—LIBELS ON FOREIGN RULERS, AMBASSADORS, ETC.

Any publication which tends to degrade, revile, and defame persons in considerable situations of power and dignity in foreign countries, may be taken to be, and treated as, a libel, and particularly where it has a tendency to interrupt the pacific relations between the two countries: if the publication contains a plain and manifest incitement and persuasion addressed to others to assassinate and destroy the persons of such magistrates, as the tendency of such a publication is to interrupt the harmony subsisting between two countries, the libel assumes a still more criminal complexion.(e)

Thus was the law laid down by Lord Ellenborough on the trial of Jean Peltier, in 1803, upon an information for a libel on Napoleon Bonaparte, first consul of the French Republic. The libel contained the following passages, amongst others: "Oh! eternal disgrace of France! Cæsar, on the banks of the Rubicon, has against him, in his quarrel, the Senate, Pompey, and Cato; and in the Plains of Pharsalia, if fortune is unequal—if you must yield to the destinies, Rome, in this sad reverse—at least there remains to avenge you a poniard among the last Romans:"(f) "He is proclaimed chief and

(a) L. R. 9 Eq. 534.
(b) *Ex parte Fernandez* (10 C. B. N. S. 3; 6 H. & N. 717).
(c) *Rex* v. *James* (5 B. & Ald. 894).
(d) See *Lechmere Charlton's case* (2 My. & Cr. 316); *Rex* v. *Clement* (4 B. & Ald. 218); Anon. (2 Barnard 43); *Rex* v. *Wyatt* (8 Mod. 123).
(e) *Per* Lord Ellenborough, C.J., *Rex* v. *Peltier* (28 Howell's St. Tr. 617).
(f) "De la France, ô honte eternelle!
César, au bord du Rubicon,
A contre lui dans sa querelle
Le Sénat, Pompée, et Caton.
Et dans les plaines de Pharsale,
Si la fortune est inégale—

consul for life. As for me, far from envying his lot, let him name—I consent to it—his worthy successor. Carried on the shield, let him be elected! Finally (and Romulus recalls the thing to mind), I wish that on the morrow he may have his apotheosis. Amen."(a) Lord Ellenborough, said that it appeared to him that the aim and tendency of these passages was to degrade and vilify, to render odious and contemptible, the person of the First Consul in the estimation of the people of this country and of France, and likewise to excite to his assassination and destruction. "That appearing to be the immediate and direct tendency of these publications, I cannot," said his Lordship, "in the correct discharge of my duty, do otherwise than state, that these publications, having such a tendency in respect of a foreign magistrate, and being published within this country, and the consequence of such publications having a direct tendency to interrupt and destroy the peace and amity between the two countries, are, in point of law, libels."(b)

In 1799, one Vint and others were found guilty on an information for publishing in the *Courier* newspaper the following libel upon the Emperor Paul I., of Russia: "The Emperor of Russia is rendering himself obnoxious to his subjects by various acts of tyranny, and ridiculous in the eyes of Europe by his inconsistency. He has now passed an edict prohibiting the exportation of timber, deals, &c. In consequence of that ill-timed law, upwards of 100 sail of vessels, are likely to return to this kingdom without freights." Lord Kenyon, C.J., told the jury that such a publication might provoke a call for satisfaction, as for a national affront, if it passed unreprobated by our Government and courts of justice.(c)

Lord George Gordon was found guilty, in 1787, on an information charging him with publishing, in the *Public Advertiser*, certain libels on the Queen of France, Marie Antoinette,

S'il te faut céder aux destins,
Rome, dans ce revers funeste—
Pour te venger au moins il reste
Un poignard aux derniers Romains."

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

(b) The jury returned a verdict of guilty; but war between Great Britain and France being renewed soon after this trial, the defendant was never called upon to receive judgment.

(c) 27 Howell's St. Tr. 627, 643.

and on the French Ambassador in London, imputing to the former tyranny and oppression, and charging the latter with being the tool employed in carrying them on.(a)

An information was filed, in 1764, against D'Eon de Beaumont, for a libel upon a previous French Ambassador, principally consisting of some angry reflections on the public conduct of the ambassador, charging him with ignorance in his special capacity, and of having used stratagem to supplant and depreciate the defendant at the Court of Versailles.(b) A verdict of guilty was returned.

Johann Most was tried, in 1881, for having published in *The Freiheit* (a weekly German newspaper, published in London) an article upon the assassination of the late Emperor of Russia. The first two counts of the indictment charged the publication of a scandalous libel at common law, on which a verdict of guilty was taken. Other counts charged, as offences against 24 and 25 Vict. c. 100, s. 4, the encouraging certain persons unknown, and the endeavouring to persuade such persons, to murder the Emperors of Russia and Germany, and the sovereigns and rulers of Europe. The above enactment makes it a misdemeanour to "conspire, confederate, and agree to murder any person, whether he be a subject of Her Majesty or not, and whether he be within the Queen's dominions or not," and also to "solicit, encourage, persuade, or endeavour to persuade, or . . . . propose to murder any other person, &c." Lord Coleridge, C.J., told the jury that if they thought that by the publication the accused "did intend to, and did encourage, or endeavour to persuade any person to murder any other person . . . . and that such encouragement and endeavouring to persuade was the natural and reasonable effect of the article, they should find the prisoner guilty" on the counts framed on the statute. The prisoner having been found guilty on these counts also, it was argued on his behalf before the Court for Crown Cases Reserved,(c) that though the publication was a seditious libel, it was not an offence against the statute, not being addressed to any definite person, but only to the public at large. The Court rejected the argument and sustained the conviction.(d) "An endeavour to persuade or an encouragement," said Lord Coleridge, C.J., "is none the less an endeavour to persuade or an encouragement, because the person who so encourages or

(a) 22 Howell's St. Tr. 175.
(b) *The King* v. *D'Eon* (W. Black Rep. 501, 517; Dig. L. L. 88).
(c) Lord Coleridge, C.J., Grove, Denman and Watkin Williams, J.J., and Huddleston, B.
(d) *Reg.* v. *Most*, 14 Cox C.C. 583.

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endeavours to persuade does not, in the particular act of encouragement or persuasion, personally address the one or more persons whom the address which contains the encouragement or the endeavour to persuade reaches. The argument has been well put that an orator who makes a speech to two thousand people does not address it to any one individual amongst those two thousand; it is addressed to the whole number. It is endeavouring to persuade the whole number, or large portions of that number; and, if a particular individual amongst that number addressed by the orator is persuaded, or listens to it and is encouraged, it is plain that the words of this statute are complied with."

Scotland.

The Scotch law on this subject appears to be the same as the English.(*a*)

Libels on a body of persons.

The law will also punish a libel on a body of persons where no particular individual is reflected on. The Court of King's Bench in 1732, 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 newborn infant the latter end of February, because the infant was begotten by a Christian."(*b*)

Publication of false news.

It seems that the publication of false news producing detriment to the public is indictable, such as false rumours to raise the price of provisions or other necessaries of life;(*c*) and, from a case in the 43rd Edw. 3,(*d*) that the attempt by words to enhance the price of merchandise was punishable by law.

In 1814, one De Berenger and others were indicted for conspiring by false rumours 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;(*e*) but the crime here lay in the act of conspiracy and combination to effect the illegal purpose.(*f*)

(*a*) Borthwick's Law of Libel, 74, 75.

(*b*) *Rex* v. *Osborne* (Kel. 30; 2 Barn. K. B. 138, 166). See also *Reg.* v. *Gathercole* (2 Lew. C. C. 237.

(*c*) 3 Inst. 196; Dig. L. L. 23; *Rex* v. *Waddington* (1 East, 143).

(*d*) Lib. Ass. Pl. 38.

(*e*) *Rex* v. *De Berenger* (3 M. & S. 67). The false rumour was that Napoleon Bonaparte, with whom we were then at war, was dead.

(*f*) *Ibid.* pp. 72, 74, 75.

CHAPTER VI.

LIBELS ON INDIVIDUALS.

Protection of character.

THE English law has been always and justly careful to preserve to every man that most valuable of all his possessions, his good character: and, as time rolls on, the need of legal intervention to secure this object becomes perhaps greater instead of less; for advancing civilization, whilst it produces increased refinement and sensitiveness to the aspersions of calumny, involves also a decay of those rude codes of honour which served a purpose that cannot be wholly ignored in an age of enlightenment.

Distinction between oral and written defamation.

Defamatory language, whether spoken or written, subjects the utterer to consequences, partly of a criminal and partly of a civil character. But, for a long time, there has existed an important distinction between the two kinds of defamation. The law—proceeding on the ground that words uttered orally, possibly in the heat of passion, are less likely to be in themselves malicious or productive of injury to reputation than those which are deliberately committed to writing and published—has treated the former kind of defamation in a much more lenient fashion than the latter. Many words which, if spoken, would not render the speaker liable to an action of slander, would, if written and published, lay him open to an action of libel; and, even where the words spoken do furnish a ground for a civil action, if written and published, they furthermore expose the writer to a criminal prosecution.

The soundness of the distinction which our law makes between oral and written defamation has been doubted by more than one authority entitled to respect;(*a*) and it is

(*a*) "I cannot, upon principle," said Mansfield, C.J., "make any difference between words written and words spoken as to the right which arises on them of bringing an action. For the plaintiff in error it has been truly urged, that in the old books and abridgments no distinction is taken between words written and spoken. But the distinction has been made between written and spoken slander as far back as Charles the Second's time, and the difference has been recognised by the courts for at least a century back. . . . In the arguments both of the judges and counsel, in almost all the cases in which the question has been whether what is contained in a writing is the subject of an action or not, it has been considered whether the words, if spoken, would maintain an action. It is curious that they have also adverted to the question whether it tends to produce a breach of the peace: but that is wholly irrelevant, and is no ground for recovering damages. So it has been argued that writing shows

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certainly not easy to see why the imputation of disgraceful conduct to another person should be punishable by action if the imputation is contained in a letter addressed to a third party, though it be seen by nobody but the party to whom it is addressed, whilst the very same imputation may be made orally in the hearing of hundreds, and the slandered party have no remedy, in most cases,(*a*) unless he can prove that special damage has been thereby occasioned to him. The injury to reputation may be far greater in the latter case than in the former, and the tendency to produce a breach of the peace—the reason assigned for making written defamation punishable criminally—is indisputably greater in the case of a slanderous assertion made orally in the hearing of the slandered person, than in the case of a written or even a printed libel. But, whatever we may think of the soundness of the distinction, it is now well established.(*b*)

Definition of libel.

A libel of the kind we are now dealing with has been defined to be "a malicious defamation, expressed either in printing or writing, or by signs, pictures, &c., tending either to blacken the memory of one who is dead, or the

more deliberate malignity; but the same answer suffices, that the action is not maintainable upon the ground of the malignity, but for the damage sustained. So it is argued that written scandal is more generally diffused than words spoken, and is therefore actionable; but an assertion made in a public place, as upon the Royal Exchange, concerning a merchant in London, may be much more extensively diffused than a few printed papers dispersed, or a private letter: it is true that a newspaper may be 'very generally read,' but that is all casual. These are the arguments which prevail on my mind to repudiate the distinction between written and spoken scandal; but that distinction has been established by some of the greatest names known to the law—Lord Hardwicke, Hale I believe, Holt, C.J., and others. . . . . If the matter were for the first time to be decided at this day, I should have no hesitation in saying that no action could be maintained for written scandal which could not be maintained for the words if they had been spoken" (*Thorley* v. *Lord Kerry*, 4 Taunt. 364). So Best, C.J.: "It is not easy to perceive why any distinction should be made between written and oral slander; but the case referred to (*Lord Kerry* v. *Thorley*) has established it too firmly to be shaken" (*Archbishop of Tuam* v. *Robison*, 5 Bing. 21).

(*a*) The exceptions are where, first, the commission of an indictable offence or, secondly, the present possession of an infectious or contagious disorder is imputed; or, thirdly, where the imputation is made on a person in respect of his office, profession, trade, or calling, and has a tendency to injure him in respect thereof.

(*b*) See *per* Hale, C.B., *King* v. *Lake* (2 Vent. 28), *Austen* v. *Culpepper* (2 Show. 313; Skinner, 123); *per* Best, C.J. (*Archbishop of Tuam* v. *Robison* (5 Bing. 17); *per* Bayley, J., *Clement* v. *Chivis* (9 B. & C. 174).

reputation of one who is alive, and thereby exposing him to public hatred, contempt, or ridicule."(*a*) "But," says Hawkins, in his "Pleas of the Crown,"(*b*) "it is said that in a larger sense the notion of a libel may be applied to any defamation whatsoever, expressed either by signs or pictures,(*c*) as by fixing up a gallows against a man's door, or by painting him in a shameful and ignominious manner."

Various kinds of libel.

It is obvious that a definition of this wide character must include writings of very various kinds; and accordingly we find it laid down(*d*) that libels on private persons embrace all those "which by accusing a man of a crime,(*e*) bring him within the danger of the law;" or "which have a tendency to injure him in his office, profession, calling, or trade;" or "which by holding him up to scorn and ridicule, and still more to any stronger feeling of contempt or execration, impair him in the enjoyment of general society, and injure those imperfect rights of friendly intercourse and mutual benevolence which man has with respect to man."(*f*)

Immaterial in what language libel is conveyed.

It matters not in what language the libel is written, whether in grammatical or ungrammatical phraseology; whether the imputation be made directly or only insinuated, even by means of a question;(*g*) whether the language be ironical,(*h*) or figurative, or allegorical.(*i*) Whatever the character of the

(*a*) Bacon's Abridg. tit. Libel. (*b*) 8th edit. 542.

(*c*) The civil law made a distinction between defamation by pictures and by writing, treating the former as a real and the latter only as a verbal injury: (*Vide* Heineccius, Antiq. Rom. lib. 4, tit. 4, sect. 5).

(*d*) See Holt's Law of Libel, p. 75.

(*e*) "The expression 'indictable offence' seems to have crept into the textbooks; but I think that the passages in Comyn's Digest (Tit. Action on the Case for Defamation, D 5 & 9) are conclusive to show that words which impute any criminal offence are actionable *per se.*" (*Per* Pollock, B., in *Webb* v. *Beavan*, L. R. 11 Q. B. D. 610).

(*f*) The civil code of the State of New York (sect. 29) defines libel to be "a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." The Penal Code (sect. 309) defines it to be "any malicious publication, by writing, printing, picture, effigy, sign, or otherwise, which exposes any person, or the memory of any person deceased, to hatred, contempt, ridicule, or obloquy, or which causes any person to be shunned or avoided, or which has a tendency to injure any person or corporation or association of persons, in their occupation or business."

(*g*) *Gathercole's case* (2 Lew. C. C. 255).

(*h*) Hob. 215; 11 Mod. 86; *Boydell* v. *Jones* (4 M. & W. 446).

(*i*) See *Hoare* v. *Silverlock* (12 Q. B. 624, 632), and *Woodgate* v. *Rideout* (4 F. & F. 202).

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language, provided the publication tends to convey an imputation injurious to the reputation of the person attacked, it is equally a libel.(*a*)

Words to be taken in their popular sense.

"The rule," says Lord Ellenborough, C.J., in dealing with a case of slander(*b*), "which at one time prevailed that words are to be understood in *mitiori sensu*(*c*) has been long ago superseded; and words are now construed by Courts, as they always ought to have been, in the plain and popular sense in which the rest of the world naturally understand them."(*d*)

The reason of the former rule and of the change was thus stated by the Court of Queen's Bench in *Harrison* v. *Thornborough*:(*e*) "In this kind of action for words, which are not of very great antiquity, the Courts did at first, as much as they could, discountenance them, and that for a wise reason, because generally brought for contention and vexation; and, therefore, when the words were capable of two constructions, the Court always took them *mitiori sensu*. But latterly these actions have been more discountenanced (? countenanced); for men's tongues growing more virulent, and irreparable damage arising from words, it has been by experience found, that unless men can get satisfaction by law, they will be apt to take it themselves. The rule, therefore, that has now prevailed is, that words are to be taken in that sense that is most natural and obvious, and in which those to whom they are spoken will be sure to understand them."

Libel badly spelt.

An indictment for libel was demurred to on the ground that, by reason of its bad spelling, it was unintelligible, and wanted a meaning. The libel as set out in the indictment was as follows: "Here is three *cockels* in this place (meaning *cuckolds*), we *now* (meaning *know*) them well, *he* (meaning *Lambert*) is a *nave* (meaning *knave*), he cheats and *rongs* (meaning *wrongs*) the county, and is the cur of the son of a whore." The indictment was held good, Raymond, C.J., saying: "The present libel is plain to all men and easily to be understood, and it would be hard that a Court of justice must not understand it is badly spelt, when all the world

(*a*) See *Fisher* v. *Clement* (10 B. & C. 472).

(*b*) *Roberts* v. *Camden* (9 East. 96). Cf. *Woolnoth* v. *Meadows* (5 East. 463); and *per* Holt, C.J., *Somers* v. *House* (Holt's Rep. 39).

(*c*) See for examples, Cro. Jac. 204; *Forster* v. *Browning* (Cro. Jac. 688); *Holland* v. *Stoner* (Cro. Jac. 315); and *King* v. *Bagg* (Cro. Jac. 331).

(*d*) Cf. the language of Pratt, C.J., Eyre, and Fortescue, JJ., in *Button* v. *Hayward* (8 Mod. 24); of Lord Mansfield in *Rex* v. *Horne* (2 Cowp. 672); and of Buller, J., in *Rex* v. *Watson* (2 T. R. 206).

(*e*) 10 Mod. 197.

besides make no scruple to find the signification of the words."(a)

Imputation only insinuated.

In a case(b) where a great portion of the libel consisted of insinuations by means of questions, Alderson, B., directed the jury that "if a man *insinuates a fact* in asking a question, meaning thereby to *assert it*, it is the same thing as if he asserted it in terms." The libel in that case contained the following passage: "We should be glad to know how many popish priests enter the nunneries at Scorton and Darlington each week? and also how many infants are born in them every year, and what becomes of them? whether the holy fathers bring them up or not, or whether the innocents are murdered out of hand or not?" The learned judge told the jury that if they thought that the defendant, by asking the questions, "meant to insinuate and to state that infants are born in the nunnery at Scorton, and that holy fathers bring them up or murder the innocents," then it was a libel on those persons.(c)

General language.

However general the language of the defamatory publication may be, if its application to a particular individual can be generally perceived, it is a libel upon him.

"If a party," said Lord Cottenham,(d) "can publish a libel so framed as to describe individuals, though not naming them, and not specifically describing them by any express form of words, but still so describing them that it is known who they are; and if those who must be acquainted with the circumstances connected with the party described may also come to the same conclusion, and may have no doubt that the writer of the libel intended to mean those individuals, it would be opening a very wide door to defamation, if parties suffering all the inconvenience of being libelled were not permitted to have that protection which the law affords. If they are so described that they are known to all their neighbours as being the parties alluded to; and if they are able to prove to the satisfaction of a jury that the party writing the libel did intend to allude to them, it would be unfortunate to find the law in a state which would prevent the party being protected against such libels." "Whether a man," said Lord Campell,(e) "is called by

(a) *Rex* v. *Edgar* (2 Sess. Cas. 29; 5 Bac. Abr. tit. Libel, 199).
(b) *Gathercole's case* (2 Lew. C. C. 255).
(c) Cf. *Hunt* v. *Thimblethorpe* (Moo. 418; 1 Vin. Ab. 429); *Earl of Northampton's case* (12 Rep. 134); *Delany* v. *Jones* (4 Esp. C. 191); *Woolnoth* v. *Meadows* (5 East. 463); *Hemming* v. *Power* (10 M. & W. 564).
(d) *Le Fanu* v. *Malcomson* (1 H. L. Cas. 664).
(e) 1 H. L. Cas. 668.

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one name, or whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done, as would be done if his name and Christian name were ten times repeated."

In the case in which the foregoing opinions were expressed, the libel consisted of a newspaper article imputing in general terms that "in some of the Irish factories" (the declaration adding an innuendo that thereby the plaintiff's factory was meant) cruelties were practised upon the workpeople. After verdict for the plaintiff, the declaration was held good by the House of Lords.

Ironical language.

A libel may be expressed in ironical language, the *quo animo* with which it is used being a question for the jury to determine.(*a*) It was held to be a libel to publish of an attorney the following *ironical*, false, malicious, and defamatory matter—"An honest lawyer. A person of the name of C. B., &c., was severely reprimanded the other day by one of the masters of the Queen's Bench, for what is called sharp practice in his profession."

Hieroglyphics, rebus, anagrams.

For similar reasons a libel disguised in hieroglyphics, if it be not really unintelligible, will be narrowly examined by a court of law and judged of according to the intention of the maker and the influence it may have upon the injured party's reputation.(*b*) And, on the same ground, not only an allegory, but a rebus or anagram may be a libel, and courts of law, notwithstanding its obscurity and perplexity, may judge of its meaning as well as other readers.(*c*)

Initials only used.

A defamatory writing expressing only one or two letters of a name in such a manner that, from what goes before and follows after, it must necessarily be understood to signify a *certain* person, in the plain, obvious, and natural construction of the whole, and would be nonsense if strained to any other meaning, is as properly a libel as if it had expressed the whole name at large.(*d*) "All the libellers of the kingdom now know," said Lord Hardwicke, so far back as 1742,(*e*) "that printing initial letters will not serve their turn, for that objection has been long got over."

Libellous pictures, caricatures, &c.

On the same footing as written or printed libels stand those which are published by means of pictures, prints, or carica-

(*a*) See Holt's Rep. 425; *Reg.* v. *Brown* (11 Mod. 86; Hob. 215; Poph. 139). (*b*) Holt's L. L. 235.
(*c*) Holt's L. L. 235. (*d*) *Ibid.* 233.
(*e*) See the case of *Read* v. *Huggonson* (2 Atk. 470).

tures,(*a*) modes of publication which, it is obvious, may be quite as efficacious as any other in damaging the character. In the case *De Libellis Famosis*(*b*) it was resolved, amongst other things, that a "*famosus libellus sine scriptis* may be *picturis*, as to paint the party in any shameful and ignominious manner." "In case upon a libel," says Holt, C.J.,(*c*) "it is sufficient if the matter be reflecting: as to paint a man playing at cudgels with his wife."(*d*) Lord Ellenborough, C.J., said of a libellous picture of a gentleman and his lady, which was entitled "La Belle et la Bête," that the person who exhibited it in public was "both civilly and criminally liable for having exhibited it."(*e*)

Partners. Partners may jointly maintain an action of libel for a publication defamatory of the partnership.(*f*)

A society of persons. A publication defamatory of a society of persons, or a company, whether incorporated or not, is also a libel, *e.g.*, a publication insinuating that the members of a nunnery led immoral or depraved lives,(*g*) or one attacking the mode in

(*a*) There are other modes, with which we are not concerned here, in which a libel may be expressed, as by fixing a gallows or other reproachful and ignominious signs at a person's door, or elsewhere (5 Coke 125; see *Jefferies* v. *Duncombe*, 11 East. 226, where a lamp was set up in front of the plaintiff's house, and kept burning in the daytime, in order to defame him as the keeper of a bawdy-house); or by the custom known as "riding Skimmington" (see *Cropp* v. *Tilney*, 3 Salk. 225, 226, and *Bolton* v. *Dean*, referred to by the Court in *Austin* v. *Culpepper*, 2 Show. 314).

(*b*) 5 Cok. 125.

(*c*) Anon. 11 Mod. 99.

(*d*) According to Blackstone (in a statement omitted in the later editions of his "Commentaries"), in the case of signs or pictures, it seems necessary to show not only the import and application of the scandal, but also "that some special damage has followed;" and he gives as a reason—that "otherwise it cannot appear that such libel by picture was understood to be levelled at the plaintiff, or that it was attended with any actionable consequences" (see 3 Com. 126). There appears to be no authority whatever for the proposition that, in the case of signs or pictures, special damage must be shown to have followed from the publication; and there is as little force in the reason assigned for making a distinction between libellous signs or pictures and written or printed libels, for the former tell their tale, in general, even more unmistakably than the latter.

(*e*) *Du Bost* v. *Beresford* (2 Camp. 511). See also *Austin* v. *Culpepper* (2 Show. 314; Skin. 123), where the defendant was held liable in an action for having forged an order of the Court of Chancery defamatory of the plaintiff, and drawn on the bottom of it the picture of a pillory with the words subscribed, "For Sir J. Austin and his witnesses by him suborned."

(*f*) *Le Fanu* v. *Malcomson* (1 H. L. Cas. 637); *Haythorn* v. *Lawson* (3 C. & P. 196); *Ward* v. *Smith* (6 Bing. 749).

(*g*) *Reg.* v. *Gathercole* (2 Lew. C. C. 237).

which an insurance company carries on its business,(a) or imputing insolvency, mismanagement, and a dishonest carrying on of its affairs to a joint-stock company incorporated under 19 & 20 Vict. c. 47.(b)

It has been held that such a company can maintain an action against one of its own shareholders for a libel published by him.(c)

A society of persons, or company, are also themselves liable for any defamatory matter published by them; as, for example, the committee of a reform union for publishing a report charging a person with bribery at an election,(d) or a railway company for telegraphing that a bank had stopped payment.(e)

Meaning of malice.

When libel is described as a "malicious defamation," and when malice is said to be the gist of the action for libel, the legal import of the word malice must be borne in mind. "Malice," says Lord Campbell,(f) "in the legal acceptation of the word, is not confined to personal spite against individuals, but consists in a conscious violation of the law to the prejudice of another." "Malice," says Bayley, J.,(g) "in common acceptation, means ill-will against a person; but in its legal sense it means a wrongful act done intentionally without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of *malice*, because I do it *intentionally*, and without just cause or excuse. If I maim cattle without knowing whose they are; if I poison a fishery without knowing the owner, I do it of *malice*, because it is a wrongful act, and done intentionally. If I am arraigned of felony, and wilfully stand mute, I am said to do it of *malice*, because it is intentional, and without just cause or excuse. And if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury whether I meant to produce an injury or not, and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces?" "If a

(a) *Williams* v. *Beaumont* (10 Bing. 260; 3 M. & Scott. 705).
(b) *Metropolitan Saloon Omnibus Company* (*Limited*) v. *Hawkins* (4 H. & N. 87; 28 L. J. 201, Ex.).
(c) *Ibid.* As to a Friendly Society, see *Hill* v. *Hart Davies* (L. R. 21 C. D. 798).
(d) *Wilson* v. *Reed and others* (2 F. & F. 149).
(e) *Whitfield* v. *South-Eastern Railway Company* (El. Bl. & E. 115; 27 L. J. Q. B. 229).
(f) *Ferguson* v. *Earl of Kinnoul* (9 Cl. & Fin. 321).
(g) *Bromage* v. *Prosser* (4 B. & C. 255).

person writes defamatory matter of another," says Bramwell, B.,(a) "however honestly he may believe it to be true, if it be in fact untrue the law implies malice."(b) And Alderson, B.: "The law implies malice from the publication of a libel, except where the occasion justifies the publication."(c) "A man," said Lord Denman, C.J., "may wilfully publish a mischievous libel without intending to injure the party, yet may be responsible."(d)

Instead of saying, in the case of a publication calculated to convey an actionable imputation, that the law implies malice, Lord Blackburn would prefer saying that the law holds him "responsible for the natural consequences of his act."(e)

Intention of writer immaterial.

The intention of the writer or publisher of the defamatory matter is then, in the case of unprivileged communications, wholly immaterial, except so far as it may affect the amount of damages which a jury will award. "Everything printed or written," says Parke, B.,(f) "which reflects on the character of another, and is published without lawful justification or excuse, is a libel, whatever the intention may have been."

A judge who, in an action of libel left it to the jury to say whether the defendant intended by his publication to injure the plaintiff, was held to have wrongly directed them.(g) "If the tendency of the publication," said Littledale, J., "was injurious to the plaintiff, then the law will presume that the defendant, by publishing it, intended to produce that injury which it was calculated to effect. If it had that tendency, there can be no doubt it was a libel." "The judge," said Lord Tenterden, C.J., "ought not to have left it as a question to the jury whether the defendant *intended* to injure the plaintiff, for every man must be presumed to intend the natural and ordinary consequences of his own act."(h)

"The real question is not what was the intention with which the libel was published, but what was the tendency of the libel as published."(i)

(a) *Darby* v. *Ouseley* (1 H. & N. 9; 25 L. J. 230, Ex.).
(b) Cf. *per* Parke, B., *O'Brien* v. *Clement* (15 M. & W. 437).
(c) 1 H. & N. 9. (d) *Baylis* v. *Lawrence* (11 A. & El. 924).
(e) *Capital and Counties Bank* v. *Henty* (L. R. 7 App. Cas. 767).
(f) *Baylis* v. *Lawrence* (11 A. & El. 924).
(g) *Haire* v. *Wilson* (9 B. & C. 643).
(h) *Ibid.* 645. See also *Darby* v. *Ouseley* (*ubi supra*) and *Fisher* v. *Clement* (10 B. & C. 472).
(i) *Per* Lord Blackburn, *Capital and Counties Bank* v. *Henty* (*ubi supra*).

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What are privileged occasions will hereafter be considered.(*a*)

Scotch law as to malice.

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

Whole publication to be looked at.

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

"In *Dicas* v. *Lawson*," says Alderson, B.,(*e*) "I directed the jury to look to the whole of the publication to see whether it was calculated to injure the plaintiff's character. The publication there complained of was the report of a trial in which there were strong observations on the character of the plaintiff, but in which the plaintiff had recovered a verdict for £30. It was said that the report was libellous, because it set forth the charge made on the trial against the plaintiff. I left it to the jury to say whether, taking the whole of the publication together, they thought it likely to depreciate his character. The jury thought not, and on application for a new trial, this Court (Exchequer) approved of my direction."

Falsehood.

The libellous matter, in order to be actionable, must be *falsely* as well as *maliciously* published of the plaintiff. The truth of an alleged defamatory publication is a complete answer to an action for it;(*f*) "not," according to Little-

(*a*) See chapter VII. on "Privileged Publications," *post*.
(*b*) 1 Com. 342. See Borthwick, 190, 195.
(*c*) See *Chalmers* v. *Payne* (2 C. M. & R. 156; 5 Tyrw. 766).
(*d*) *Ibid. per* Alderson, B. (*e*) *Ibid.*
(*f*) Something more is required in the case of criminal proceedings for libels. As to these, *vide post*.

dale, J.,(a) "because it negatives the charge of malice (for a person may wrongfully or maliciously utter slanderous matter though true, and thereby subject himself to an indictment), but because it shows that the plaintiff is not entitled to recover damages; for the law will not permit a man to recover damages in respect of an injury to a character which he either does not or ought not to possess."

Bonâ fide belief no justification.

If the libel be false it is no justification, even in the case of public criticism appearing in the leading articles of newspapers, that the writer *bonâ fide* believes in its truth.(b) "*Bonâ fide* belief in the truth of what is written," says Blackburn, J.,(c) "is no defence to an action; it may mitigate the amount, but it cannot disentitle the plaintiff to damages. Moreover, that honest belief may be an ingredient to be taken into consideration by the jury in determining whether the publication is a libel; that is, whether it exceeds the limits of a fair and proper comment; but it cannot in itself prevent the matter being libellous."

Publication is libellous if any material part be not true.

The publication, moreover, is actionable if any material part of it be not proved true, and a plea which, professing to justify the entire libel, fails to justify a material part of it, is a bad plea.(d)

Thus, if a libel imputes to a person that he has been guilty of murder in killing his opponent in a duel, and alleges further that the duel was supposed to have been fought under circumstances revolting to the ordinary notions of honour (it being suggested that the plaintiff had spent the whole of the night preceding the duel in practising pistol firing), it is not a sufficient defence to prove merely that the plaintiff had killed his antagonist, and had been tried for murder and acquitted.(e) "When an action is brought for a libel," said Maule, J., in this case(f) "to make a good plea to the whole charge, the defendant must justify everything that the libel contains which is injurious to the plaintiff. If the libel charges the commission of several crimes, or the commission of a crime in a particular manner, the plea must

(a) *McPherson* v. *Daniels* (10 B. & C. 272). See also *per* Holt, C.J. (Anon. 11 Mod. 99); *per* Parke, J., *Cockayne* v. *Hodgkisson* (5 C. & P. 548); *Weaver* v. *Lloyd* (2 B. & C. 678); *Tighe* v. *Cooper* (7 El. & B. 639); *Biggs* v. *The Great Eastern Railway Company* (18 L. T. N. S. 482).

(b) *Campbell* v. *Spottiswoode* (3 B. & S. 769; 8 L. T. N. S. 201; 32 L. J. 185, Q. B.).

(c) *Ibid.*

(d) See *per* Jervis, C.J., *Helsham* v. *Blackwood* (11 C. B. 128; 20 L. J. 187, C. P.).

(e) *Ibid.*

(f) *Ibid.* 129.

justify the charge as to the number of crimes(a) or the manner of committing the crime. If the crime is charged with circumstances of aggravation as here, the plea is clearly bad if it omit to justify that. . . . If the libel had imputed murder *simpliciter*, it would have been enough to show in the plea that the plaintiff had committed murder. But if the libel goes further, and states something besides, which is injurious to the plaintiff's character, it is clear upon every principle of the law of libel that that must be justified as well as the rest, or the defence fails.(b)

Where the libel charged the plaintiff with having in *two* mayoralties bought coals at *6d.* a bushel, sold them to the poor at *4d.*, and charged the corporation *8d.*, thereby pocketing *2d.* a bushel, a plea that the plaintiff did this in his first mayoralty, and in his second altered his charges, buying the coals at *6d.*, selling them to the poor at *3d.*, and charging the corporation *6d.*, was held a bad plea.(c)

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

And where the libel consisted of a paragraph published in a newspaper, stating in substance that the plaintiff was a confederate of blacklegs: that he had sought admission into a yacht club; that he gave an entertainment in the expectation of being elected, but was blackballed, and the next morning *bolted*, and some of the tradesmen of the town had to lament the fashionable character of his entertain-

(a) See *Clarkson* v. *Lawson* (6 Bing. 266, 587); *Clarke* v. *Taylor* (2 Bing. N. C. 654; 3 Scott, 95).

(b) See also *Cuddington* v. *Wilkins* (Hob. 81); *Hilsden* v. *Mercer* (Cro. J. 676); *Upsheer* v. *Betts* (Cro. J. 578).

(c) *Goodburne* v. *Bowman* (9 Bing. 532). See also *Clarke* v. *Taylor* (2 Bing. N. C. 654) and *Johns* v. *Gittings* (Cro. Eliz. 239).

(d) *Clarkson* v. *Lawson* (6 Bing. 266).

ment; a plea of justification, which, after alleging facts to show that the plaintiff was the confederate of persons who had been guilty of cheating at cards, and the facts of his giving an entertainment, and being blackballed, &c., stated "that on the following morning he *quitted* the town and neighbourhood, leaving divers of the tradesmen to whom he owed money, unpaid," was held bad, because the *quitting* might be innocent and without any intention to defraud.(*a*) "The libel as stated in the declaration," said Parke, B., "imputes to the plaintiff a fraudulent evasion of his creditors, he being unable to pay them. The plea does not meet that; for the plaintiff might be unable to pay without being guilty of fraud, as imputed by the word '*bolting*' used in the libel. The expression charged the plaintiff with going away suddenly from Plymouth, leaving debts unpaid, and under such circumstances that the creditors could not find him, and therefore means more than the mere 'quitting,' which is stated in the plea. That would be an innocent departure, and consistent with proof that the plaintiff went out of the town for a day, but then returned and *paid* his debts."

And if the words declared upon impute an actual felony, a justification which merely sets out circumstances inducing suspicion is not sufficient. Thus, where the declaration stated that the defendant, intending to cause it to be believed that the plaintiff was guilty of feloniously stealing a horse, published a libel concerning him, which was headed "Horse stealer," and alleged that the plaintiff had been taken up, on suspicion of having stolen a horse, by a constable who was informed that "such a character" was at a certain public-house; the libel then going on to state circumstances of suspicion against the plaintiff, and alleging finally that having obtained permission to go out of the constable's

(*a*) *O'Brien* v. *Bryant* (16 M. & W. 168). See also *Wadsworth* v. *Bentley* (23 L. J. 3, Q. B.), where the declaration in an action of slander alleged that the defendant spoke of the plaintiff, *in the way of his trade*, the words, "He cheated me;" "He is a thief, and robbed me of £100;" and contained an averment of special damage, and the defendant pleaded a former judgment recovered for the same grievances. The record of the previous action showed the slanderous words to have been: "That thief is a villain, a scoundrel, and a rascal, and I can prove him a thief at any moment;" and it neither alleged that the words were spoken of the plaintiff in the way of his trade, nor contained an averment of special damage. This was held to be no bar to the action. "I cannot think," said Crompton, J., "that the cause of action in that record which contains words charging the plaintiff with felony, is the same cause of action as that in the present declaration, which imputes a charge against the plaintiff as a trader."

sight, he had made his escape, but was retaken and confined in gaol for examination; innuendo that the plaintiff was guilty of stealing a horse: it was held that a plea setting out the several circumstances related in the libel, and justifying all the parts of it except the word "horse-stealer," was not a sufficient justification of the libel.(a)

But where the alleged libel, contained in a letter addressed to a person who employed the plaintiff as cashier, was, "I conceive there is nothing too base for him to be guilty of;" a plea alleging that the plaintiff signed and delivered to the defendant an I O U, and afterwards, on having sight thereof, falsely and fraudulently asserted that the signature was not his, and averring that the alleged libel was written and published solely in reference to this transaction, was held to be a sufficient justification.(b)

In a case where the libel charged the plaintiff (a newspaper editor) with being "a convicted felon," and called him a "felon editor," the defendant justified on the ground that the plaintiff had (many years previously) been convicted of felony and sentenced to twelve months' imprisonment for it, which was admitted to be the fact. Lord Blackburn (then Blackburn, J.), before whom the case was tried without a jury, gave judgment for the defendant on the ground that the meaning of the libel was that the plaintiff had been convicted of felony, which was literally true. The Divisional Court, consisting of Cleasby and Pollock, B.B., made absolute a rule for a new trial; giving judgment also for the plaintiff on demurrer to the paragraphs of the defence which justified the libel on the ground that the words "felon editor" meant that he was actually a felon, whereas 9 Geo. 4, c. 32, s. 3, which gives to the endurance of the sentence the same effect as a pardon under the Great Seal, made it untrue to call him any longer a felon. The Court was further of opinion that it was untrue to say of him that he was "a convicted felon," he being then in the same position as a pardoned one. The Court of Appeal affirmed this judgment; *per* Bramwell, L.J., on the ground that the words "felon editor" implied that he had been actually guilty (not merely convicted) of felony, and the justification did not allege this; *per* Brett, L.J., on the ground that after endurance of the punishment he was no longer a "felon," and that the charge of being a "felon editor," as well as that of being "a convicted felon," meant that he had been actually guilty; *per* Cotton, L.J., on the ground that the words "felon editor"

(a) *Mountney* v. *Watton* (2 B. & Ad. 673). See also *Chalmers* v. *Shackell* (6 C. & P. 475).

(b) *Tighe* v. *Cooper* (7 E. & B. 639; 26 L. J. 215, Q. B.).

meant that he was undergoing punishment for felony, and on the effect of 9 Geo. 4, c. 3.(*a*)

In an action for libelling the plaintiff by publishing in a newspaper an advertisement stating that a writ of *capias* had issued against him, that it had hitherto been impracticable to take him, and offering a reward for such information to be given to the sheriff's officer as would enable him to take the plaintiff; innuendo that plaintiff was in indigent circumstances, incapable of paying his just debts, and keeping out of the way to avoid being served with process; it was held a sufficient defence to prove that a writ of *capias* had been issued against the plaintiff, indorsed for bail, and delivered to the sheriff; that the plaintiff had kept out of the way to avoid being taken; that the sheriff's officer had been unable to take him; and that the defendant had published the advertisement at the request of the party suing out the writ, within four calendar months of the date of the writ, to enable the sheriff and his officer to arrest.(*b*)

If substantial imputation be true, every expression need not be justified.

Though the truth of every material part of the alleged libel must be proved in order to constitute a defence to an action, if the truth of the substantial imputation contained in the libel be proved, the justification need not extend also to every epithet or term of general abuse which may be found in the description or statement of the imputation,(*c*) and which contains no ground of charge substantially distinct in its nature or character from that which forms the main charge or gist of the libel.

Thus, in action for libelling the plaintiffs in their business of sellers of medicine, by publishing that the defendants claimed "the merit of having crushed the self-styled hygeist system of wholesale poisoning, since they commenced exposing the homicidal tricks of those impudent and ignorant *scamps* who had the audacity to pretend to cure all diseases with one kind of pill;" and that "several of the *rot-gut rascals* had been convicted of manslaughter, and fined and imprisoned for killing people with enormous doses of their universal vegetable boluses," &c.; the defendants pleaded a justification of the libel on the ground of truth, but did not justify the expressions "scamps" and "rascals;" and they proved at the trial that two persons had died in consequence of taking large quantities of the plain-

(*a*) *Leyman* v. *Latimer* (L. R. 3 Ex. Div. 15, 352). See also *Caddington* v. *Wilkins* (Hob. 67 & 81), and *Searle* v. *Williams* (Hob. 293).

(*b*) *Lay* v. *Lawson* (4 A. & E. 795). See also *Carr* v. *Duckett* (29 L. J. 468, Ex.).

(*c*) See *per* Tindal, C.J., *Morisson* v. *Harmer* (3 Bing. N. C. 767; 4 Scott, 533).

tiff's pills, and that the parties who had administered the pills were tried, convicted, and imprisoned for manslaughter. The defence, after verdict, was held sufficient, though the plea contained no justification of the expressions "scamps" and "rascals," and though it had not been proved that the defendants had completely crushed the "self-styled hygeist system of wholesale poisoning."(a)

As to the objection grounded on the non-justification of the words "scamps" and "rascals," the Court said: "It must be admitted that if these terms of invective and reproach contain any ground of charge or imputation against the plaintiffs, substantially distinct in its nature or character from that which forms the main charge or gist of the libel, and the truth of which has been justified by the plea, the consequence contended for on the part of the plaintiffs would justly follow, for the plea upon that supposition would not contain an answer to so much of the delaration as by the commencement of the plea it expressly undertakes to justify. The main charge against the plaintiffs in the libel is, that they were the compounders and sellers of pills of a poisonous and deleterious nature; and the main and principal allegation in the plea of justification is 'that the pills sold by the plaintiffs, when administered and taken in the doses and quantities suggested and recommended by them, were of a highly dangerous, deadly, and poisonous nature, and in the highest degree injurious to the stomachs and bowels of persons using and taking the same.' The question therefore is, whether the terms of abuse which have been above referred to, carry the matter any further than this, the main charge. The words, themselves, in their vulgar use, convey no other meaning than that of general reproach and invective; and we can only discover whether they have any particular meaning in this libel by referring to the context of the libel and to the allegations on the record. As to the word 'scamps,' the plaintiffs themselves have given the meaning to it; for they allege in their declaration that it is intended to be applied to them 'in the way of their aforesaid trade, business, and occupation,' that is, as vendors of the pills, the making and selling of which by the plaintiffs is the main imputation against them. And the word 'rascals' is associated with an epithet or adjunct which appears to confine its general abusive quality to a description and designation of the persons who have been occupied in administering the pills spoken of in the libel, of whom two have been convicted of manslaughter.

(a) See per Tindal, C. J., *Morisson* v. *Harmer* (3 Bing. N.C. 767; 4 Scott, 533).

We cannot, therefore, understand these words, however offensive, as containing any charge different and distinct from that of which the truth has been justified in the first plea; and we are not aware of any authority by which it is determined that the justification of the truth of the substantial imputation contained in a libel is not sufficient, unless it extends also to every epithet or term of general abuse which may be found in the description or statement of such imputation."

In an action against the proprietor of the *Times* for publishing the following libel on the plaintiff, a dissenting minister:—"A serious misunderstanding has recently taken place amongst the Independent dissenters of Great Marlow and their pastor, in consequence of some personal invectives publicly thrown from the pulpit by the latter against a young lady of distinguished merit and spotless reputation. We understand that the matter is to be taken up seriously. —*Bucks Chronicle*," the defendant pleaded, as a justification, that the plaintiff, whilst officiating as minister, published from a part of a chapel assigned to him as minister for the delivery of a sermon, to and in the presence of his congregation, of and concerning Margaret Fair, a teacher of a certain Sunday School, the scandalous words following:— "I have something to say which I have thought of saying for some time, namely, the improper conduct of one of the female teachers. Her name is Miss Fair; her conduct is a bad example and disgrace to the school, and if any of the children dare ask her to go home, she shall be turned out of the school, and never enter it again. Miss Fair does more harm than good;" and thereby gave great offence to divers of the dissenters, to wit, one I. W., &c., and occasioned a serious misunderstanding amongst the said dissenters in the declaration mentioned. A verdict having been returned for the defendant upon this plea, the Court, upon motion to enter a verdict for the plaintiff *non obstante veredicto*, held that the plea was a sufficient answer to the libel charged.(*a*) It was urged on behalf of the plaintiff that the allegation that "the matter was about to be taken up seriously"' implied that charges were about to be preferred against him by his congregation, and that the justification contained no answer to that part of the libel; but, said Gifford, C.J., "I do not see that the allegation necessarily conveys any such meaning; it is only alleged as that which naturally followed upon the plaintiff's conduct on the occasion in question; and the charge on the subject of his conduct is substantially met and answered in the justifica-

(*a*) *Edwards* v. *Bell* (1 Bing. 403).

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tion." It was further objected that the libel alleged a misunderstanding to have arisen between the pastor and his congregation, while the justification alleged the misunderstanding to have existed only amongst the congregation; but the Court were of opinion that in that respect the plea substantially supported the statements contained in the libel. "In such a case," said Burrough, J., "it is sufficient if the substance of the libellous statement be justified; it is unnecessary to repeat every word which might have been the subject of the original comment. As much must be justified as meets the sting of the charge, and if anything be contained in a charge which does not add to the sting of it, that need not be justified."(a)

Slight inaccuracy.

A slight inaccuracy will not necessarily make a publication libellous, which can be proved substantially true. Thus, where the libel complained of was a notice published by a railway company to the effect that the plaintiff had been convicted of travelling by a train for which his ticket was not available, and fined a certain sum, with the alternative of three weeks' imprisonment in case of non-payment, whereas the period of imprisonment was a fortnight only, it was held that this inaccuracy did not necessarily make the notice libellous; it was a question for the jury whether the statement contained in it was not substantially true, or whether the inaccurate statement would have a different effect upon the public from that which the literal truth would produce.(b)

Where a libel charged the plaintiff with having been a "great defaulter" in his office of guardian of the poor during the preceding year, and evidence tending to show that he had been a defaulter was given under a plea of justification, it was held to be a question for the jury whether the facts proved amounted to a sufficient justification of the charge of having been a "great" defaulter.(c)

Imputations of criminal offences.

In the following cases, where an action of slander has been held to lie, without proof of special damage, against the utterer of the slanderous words, an action of libel would, *à fortiori*, lie, if the words were written or printed and published:—Saying that the plaintiff had done an act for which the defendant could transport him:(d) saying, "If you had your deserts, you had been hanged before now:"(e) saying that the plaintiff had murdered his first wife by administering improper medicines to her for a certain complaint:(f)

(a) *Edwards* v. *Bell* (1 Bing. 409).

(b) *Alexander* v. *North-Eastern Railway Company* (34 L. J. 152, Q. B.; 6 B. & S. 240).

(c) *Warman* v. *Hine* (1 Jur. 820).

(d) *Curtis* v. *Curtis* (10 Bing. 477).

(e) Cro. Eliz. 62.

(f) *Ford* v. *Primrose* (5 D. & R. 287).

using the words, "I am thoroughly convinced that you (the plaintiff) are guilty (innuendo of the death of D.), and rather than you should go without a hangman, I will hang you:"(a) saying that the plaintiff was "a returned convict:"(b) that he had been "in gaol and tried for his life, and would have been hanged had it not been for L., for breaking open the granary of farmer A., and stealing his bacon:"(c) that he had been "in gaol and burnt in the hand for coining;"(d) though in none of the three last-mentioned cases was there any imputation of present or future liability to punishment: imputing bigamy to the plaintiff's wife:(e) saying either that the plaintiff or his wife kept a bawdy-house:(f) saying any of the following things: "You robbed me, for I found the thing you have done it with;"(g) "He (the plaintiff) is a thief, and robbed me of my bricks:"(h) "He robbed J. W.";(i) "You are a rogue, and broke open a house at Oxford;"(j) "You are a rogue, and I will prove you a rogue, for you forged my name:"(k) charging the plaintiff with having committed embezzlement,(l) or receiving goods, knowing them to be stolen:(m) calling him a "pickpocket:"(n) saying that the plaintiff was perjured,(o) or accusing him of subornation of perjury:(p) saying of the plaintiff, who was one of four Commissioners appointed by the Court of Chancery to examine witnesses and hear and determine a suit, "Sir G. M. (the plaintiff) is a corrupt man, and hath taken bribes of R. K." (one of the parties to the suit); "R. K. hath set Sir G. M. on horseback, with his bribes to pervert justice and equity,"(q) bribery having been an offence at common law

(a) *Peake* v. *Oldham* (Cowp. 275; 2 W. Bl. 960). See also *Button* v. *Hayward* (8 Mod. 24).

(b) *Fowler* v. *Dowdney* (2 M. & Rob. 119).

(c) *Carpenter* v. *Tarrant* (Rep. Temp. Hardwicke, 339).

(d) *Gainford* v. *Tuke* (Cro. Jac. 536).

(e) *Heming* v. *Power* (10 M. & W. 564). See *Delany* v. *Jones* (4 Esp. 191).

(f) Cro. Eliz. 643; 1 Roll. Ab. 44; 1 Buls. 138; *Huckle* v. *Reynolds* (7 C. B. N. S. 114). Cf. *Brayne* v. *Cooper* (5 M. & W. 249).

(g) *Rowcliffe* v. *Edmonds* (7 M. & W. 12; 4 Jur. 684).

(h) *Slowman* v. *Dutton* (10 Bing. 402). See also *Baker* v. *Pierce* (Ld. Raym. 959; Holt, 654; 6 Mod. 23); Cro. Jac. 687.

(i) *Tomlinson* v. *Brittlebank* (4 B. & Ald. 630; 1 N. & M. 455).

(j) *Somers* v. *House* (Holt's Rep. 39).

(k) *Jones* v. *Herne* (2 Wils. 87).

(l) See *Williams* v. *Stott* (3 Tyr. 688; 1 C. & M. 675).

(m) *Alfred* v. *Farlow* (8 Q. B. 854; 15 L. J. 260, Q. B.). See *Brigg's case* (God. 157).

(n) *Stebbing* v. *Warner* (11 Mod. 255, overruling 3 Salk. 326).

(o) *Holt* v. *Scholefield* (6 T. R. 691). See also *Ceeley* v. *Hoskins* (Cro. Car. 509); *Roberts* v. *Camden* (9 East. 93).

(p) *Harris* v. *Dixon* (Cro. Jac. 158).

(q) *Moor* v. *Foster* (Cro. Jac. 65).

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punishable by indictment or information: saying at a Parliamentary election of the plaintiff, who was one of the candidates, "These guineas are Mr. B.'s (the plaintiff's) money, and were given me to vote for him: he has bought my vote, and he shall have it."(*a*)

To accuse a person of having committed fornication was also held to be actionable whilst the statute making it a temporal offence was in force;"(*b*) and so it seems was saying "Thou art a witch and a sorcerer," whilst the statutes against witchcraft remained in force.(*c*)

Imputation made indirectly.

The law is the same if the imputation be made, not directly, but by means of words of suspicion as (with reference to a crime of arson), "I cannot imagine who should do it but S."(*d*) or, "I do not doubt but within two days to arrest H. for suspicion of felony;":(*e*) or, "I will call him in question for poisoning my aunt, and I make no doubt to prove it;"(*f*) or by repeating a story heard from another as "A woman told me that she heard some one say that M., his wife, had poisoned G., her first husband, &c.;"(*g*) and though it should be only in alternative words as that "either the plaintiff or somebody else" committed the offence;(*h*) or that "A. or B. did it."(*i*)

Words imputing an attempt to commit a felony, as "He sought to murder me, and I can prove it;"(*j*) or a hiring or solicitation of another to commit a crime have also been held actionable.(*k*)

Charge in vulgar language.

The charge of a crime in the vulgar language is sufficient to ground an action. It is not necessary that the words should impute the crime in the technical terms known to the law; all that is requisite being that the intention to charge the plaintiff with its commission should plainly appear.(*l*)

(*a*) *Bendish* v. *Lindsay* (11 Mod. 194). See *Purdy* v. *Stacey* (Burr. 2699).

(*b*) Anon. 2 Sid. 21.

(*c*) *Rogers* v. *Gravat* (Cro. Eliz. 571).

(*d*) Mo. 142; 1 Vin. Abr. 435. See also *Smith* v. *Wisdome* (Cro. Eliz. 348).

(*e*) *Heet* v. *Yeomans* (4 Rep. 15; Poph. 210; 3 Bulst. 262).

(*f*) *Web* v. *Poor* (Cro. Eliz. 569). According to the old authorities, if the charge be of killing a person who is not really dead, an action cannot be maintained. See *Snag* v. *Gee* (4 Rep. 16); *Talbot* v. *Case* (Cro. Eliz. 823); 1 Vent. 117.

(*g*) See Cro. Eliz. 645; Mo. 408).

(*h*) *Harrison* v. *Thornborough* (10 Mod. 196).

(*i*) *Wiseman* v. *Wiseman* (Cro. Jac. 107).

(*j*) Cro. Eliz. 308; *Lawknor* v. *Cruchley* (Cro. Car. 140).

(*k*) *Tibbott* v. *Haynes* (Cro. Eliz. 191; 4 Coke, 16; Cro. Eliz. 747); *Lady Cockaine's case* (Cro. Eliz. 49; Cro. Eliz. 710).

(*l*) See *Coleman* v. *Goodwin* (2 B. & Cr. 285, note) and *Francis* v. *Roose* (3 M. & W. 191). See also *Hankinson* v. *Bilby* (16 M. & W.

Ordinary sense to be given in words.

Whether defamatory words are uttered or printed, the ordinary sense of them is to be taken to be the meaning of the person who uses them. However, if anything can be shown to have taken place which may give a peculiar character to the expressions used, evidence of it may be given.(*a*)

Where the slanderous words complained of—"Thou art a thievish rogue, for thou hast stolen my faggots"—were spoken by the defendant's wife, who, as a married woman, could not have possessed the property in the faggots, the court held the words to be actionable, understanding them, according to common intendment, to mean a charge of having stolen her husband's faggots.(*b*)

Infectious or contagious disease.

On the same footing as an imputation of an indictable offence stands the imputation of being, *at the time the imputation is made*, afflicted with an infectious or contagious disease which would cause the person who had it to be shunned by society, such as leprosy or the *lues venerea*.(*c*)

Libels affecting office, profession, trade or calling.

Words spoken which would not otherwise be actionable, become so when they are, without justification, spoken of a person in respect of his profession, office, trade, or calling (provided it be not an unlawful one), and have a tendency to injure him in respect thereof, the law implying in such cases "actionable damage" without proof of any:(*d*) *à fortiori*, if the injurious imputation is conveyed by writing or printing, the defamation being in this case punishable criminally as well as by action.

Any unfounded imputation against a person who is in the enjoyment of an office, either public or private, whether of honour, profit, or trust, which imparts a charge of unfitness to administer the duties of that office, is a libel.(*e*)

442); *Woolnoth* v. *Meadows* (5 East. 463). Cf. *Sweetapple* v. *Jesse* (5 B. & Ald. 31). See also Hob. 126; Cro. Eliz. 250, 496; 1 Roll. Abr. 74; and 4 Rep. 13.

(*a*) See *per* Pollock, C.B., *Daines* v. *Hartley* (3 Exch. 200; 18 L. J. 81, Ex.); and cf. *Hankinson* v. *Bilby* (*ubi suprà*), *Tempest* v. *Chambers* (1 Stark. 68); *Tomlinson* v. *Brittlebank* (4 B. & Ad. 630); *Harvey* v. *French* (1 C. & M. 17); *Thompson* v. *Bernard* (1 Camp. 48); *Christie* v. *Powell* (Peake's Cas. 4); 4 Rep. 13.

(*b*) *Stamp* v. *White* (Cro. Jac. 600). See also *Charnel's case* (Cro. Eliz. 279). The doctrine as to repugnancy laid down in 7 Bac. Abr. 296, 1 Roll. Abr. 74, cannot now be considered law (see sect. 61 of the C. L. P. A. 1852).

(*c*) 7 Bac. Abr. 266; Holt. 653; Cro. Eliz. 214, 289, 648; Cro. Jac. 144, 430; 1 Vin. Abr. 488. *Carslake* v. *Mapledoram* (2 T. R. 473; Str. 1189); *Bloodworth* v. *Gray* (7 M. & G. 334).

(*d*) See *per* Channell, B., *Foulger* v. *Newcomb* (L. Rep. 2 Ex. 330; 16 L. T. N. S. 596; 36 L. J. Ex. 169).

(*e*) See Buller, N. P. 4, 5.

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Office one of honour only.

If the office is merely one of honour, as that of justice of the peace, the oral imputation, according to the old authorities,(*a*) must be of want of integrity, or charge a criminal breach of duty: an allegation of incompetency or want of ability is not of itself sufficient to ground an action of slander.

Where the defendant said of the plaintiff, a justice of the peace, "He is a fool, an ass, a beetle-headed justice," it was held by Foster, C.J., Wyndham and Twysden, JJ. (*dissentiente* Mallet, J.), that the words were not actionable, citing *Briscoe* v. *Hollis*(*b*) as a stronger case than this, and *Hammond* v. *Kingsmill*,(*c*) where for saying of a justice of the peace, "He is a debauched man, and unfit to be a justice,"(*d*) it was adjudged that no action lay; and Twysden, J., said that words which sound in *disability* only are not actionable, except they are spoken of one who gains his living by that thing (profession) wherein the words do disable him.(*e*) It does not follow, however, that an action of libel would not lie in these cases, if the words, instead of being spoken, had been written or printed and published.

The reason for making the above curious distinction has been given by Lord Holt, C.J., thus:(*f*) "It has been adjudged that to call a justice of the peace *blockhead*, *ass*, &c., is not a slander for which action lies, because he was not accused of any corruption in his employment, or any ill design or principle; and it was not his fault that he was a blockhead, for he cannot be otherwise than his Maker made him; but if he had been a wise man, and wicked principles were charged upon him when he had not them, an action would have lain; for though a man cannot be wiser, he may be honester than he is. If a person be in a place of profit, and he is accused of insufficiency, he shall have remedy by action: 'tis otherwise if he be only in a place of honour; though even there, if he is charged with ill principles, and as disaffected to the Government, he shall have an action for such scandal to his reputation." In this case it was held actionable to say of the plaintiff, who was a justice of the peace and deputy-lieutenant of the county of Surrey, and a candidate for Parliament, that he was a Jacobite, and for

(*a*) *Bill* v. *Neal* (1 Lev. 52); *per* Holt, C.J., *How* v. *Prin* (Holt, 652; 3 Salk. 694).

(*b*) Cro. Jac. 58.

(*c*) 7 Jac. 1.

(*d*) This action, according to Twysden, J. (*Kerle* v. *Osgood*, 1 Vent. 50), was held not maintainable because spoken of the time past: it the words had been, "he is debauched," he said the action would lie.

(*e*) *Bill* v. *Neal* (*ubi supra*).

(*f*) *How* v. *Prin* (*ubi supra*).

bringing in the Prince of Wales and Popery to destroy the nation, &c.

The words "You are a rascal, a villain, and a liar," applied to a justice of the peace, were held actionable, "for though *rascal* and *villain* were uncertain, yet, being joined with *liar*, and spoken of a justice of peace, they did import a charge of acting corruptly and partially." And so were the words, "He is a foresworn justice, and not fit to be a justice of peace; if I did see him, I would tell him so to his face."(*a*)

In one case(*b*) it was held actionable to say, "When thou wert justice, thou wert a bribing justice;"(*c*) in another, to say, "I have been often with Sir J. J. for justice, but could never get any at his hand, but injustice;"(*d*) in another, to say, "Mr. S. covereth and hideth felonies, and is not worthy to be a justice of peace;"(*e*) and in another case(*f*) it was said, "that where a man *had been* in an office of trust, to say that he had behaved himself corruptly in it, as it imported great scandal, so it might prevent his coming in to that or the like office again, and therefore was actionable." But the authority of the two latter cases is much weakened by what De Grey, C.J., says in *Onslow* v. *Horne*:(*g*) "I know of no case where ever an action for words was grounded upon eventual damages which may possibly happen to a man in a future situation, notwithstanding what the Chief Justice throws out in 2 Vent. 266. . . . . I think the Chief Justice went too far." There is no doubt, however, that an action of libel would lie, if such an imputation as the above were written or printed and published.

To say of a judge that a particular sentence pronounced by him "was corruptly given" is actionable,(*h*), or that he was "a corrupt judge."(*i*)

Imputations contained in a newspaper of partial and corrupt conduct on a person who occupied the office of mayor and justice of the peace for a borough are libellous, whether the public or private capacity of the person be regarded.(*j*)

(*a*) *Kerle* v. *Osgood* (1 Vent. 50).

(*b*) See Yelv. 153. The reason assigned for this decision is, "Car coment il referre a chose passe, uncore il defame luy a touts jours en l'opinion d'auters, et fait lui d'estre account unworthy a porter office enapres."

(*c*) *Aston* v. *Blagrave* (Str. 617).

(*d*) *Isham* v. *York* (Cro. Car. 15).

(*e*) *Stuckley* v. *Bulhead* (4 Rep. 16).

(*f*) *Walden* v. *Mitchell* (2 Vent. 266).

(*g*) 3 Wils. 188.

(*h*) *Cæsar* v. *Curseny* (Cro. Eliz. 305).

(*i*) See 4 Rep. 16 (*Birchley's case*).

(*j*) See Alderson, B., *Parmiter* v. *Coupland* (6 M. & W. 109).

PART IV. CHAPTER VI.

It is laid down as a general rule by De Grey, C.J., in *Onslow* v. *Horne*,(*a*) "that words are actionable when spoken of one in an office of profit, which *may probably* occasion the loss of his office, or when spoken of persons touching their respective professions, trades, and business, and do or may probably tend to their damage;" or, as reported in Sir W. Blackstone's Reports (p. 753): "if the words may be of *probable* ill consequence to a person in a trade, a profession, or an office." The rule, as thus expressed, is, according to Bayley, B.,(*b*) objectionable, the words "probably" and "probable" being too indefinite and loose, and—unless considered as equivalent to *having a natural tendency to*, and confined within the limits of showing the want of some necessary qualification, or some misconduct in the office—not warranted by the authorities. "Every authority," he says, "which I have been able to find, either shows the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business."

Professions, &c.

The law is the same in the case of imputations made against a member of any of the professions, having a tendency to injure him in respect thereof, whether the imputation be want of integrity or want of ability.

Thus it has been held actionable to say of a physician, "Thou art a drunken fool and an ass; thou wert never scholar, and art not worthy to speak to a scholar, and that I will prove and justify;"(*c*) or to say of a surgeon and accoucheur, "I wonder you had him to attend you. Do you know him? He is not an apothecary; he has not passed any examination; he is a bad character; none of the medical men here will meet him. Several have died that he has attended, and there have been inquests held on them."(*d*) The Court were of opinion, though it was not necessary to so decide, that the words, "he is a bad character; none of the medical men here will meet him," were of themselves actionable. In the case of a libel they would no doubt be held to be so.

But it was held to be no libel to publish in a medical paper (the *Lancet*) of a physician that he had met homœopathists in consultation, though it was alleged that, in the opinion of the profession, meeting homœopathists in consultation was improper and against etiquette.(*e*)

(*a*) 3 Wils. 186.
(*b*) *Lumby* v. *Allday* (1 Cr. & Jer. 305).
(*c*) *Cawdry* v. *Highley* (Cro. Car. 270; 1 Roll. Abr. 54).
(*d*) *Southee* v. *Denny* (1 Exch. 196).
(*e*) *Clay* v. *Roberts* (8 L. T. N. S. 397; 9 Jur. N. S. 580; 11 W. R. 649).

It was held actionable to say of a barrister, "He is a dunce, and will get little by the law;(*a*) or, "Thou art no lawyer, thou canst not make a lease; thou hast that degree without desert; they are fools that come to thee for law;"(*b*) or, "Thou art a daffidowndilly," with an averment that the words signify that he is an "ambidexter."(*c*)

So to say of an attorney that he is no lawyer was held to be actionable, such a statement, meaning that he does not understand his business, being a great reflection on him.(*d*)

It has also been held actionable to say of an attorney, "Thou art a false knave, a cozening knave, and hast got all that thou hast by cozenage; and thou hast cozened all those that have dealt with thee;"(*e*) or that he is a "common barrator."(*f*)

A publication headed, "An honest lawyer," and stating that the plaintiff (an attorney) had been reprimanded by one of the Masters of the Queen's Bench, "for what is called sharp practice in his profession," was held to be a libel, whether the plaintiff had his name still on the roll of attorneys or not(*g*).

A libel may be contained in the heading to the report of a case in one of the Superior Courts. Thus it was ruled by Byles, J., at Nisi Prius, that proof that an attorney treated his client badly in a particular case would not justify a heading to the report of that case "How lawyer B. treats his clients." "The libel," said his Lordship, "is in general terms. It is not how he treated them in this particular case, but how he treated them generally; and even if you succeed in proving that the report is correct, so as to justify the inference that in this instance he treated his client ill, that would not answer the implied charge in the libel that he so treats his clients generally."(*h*)

It has been observed that if one say to a counsel, "Thou didst disclose my counsel," or to a counsel or attorney, "Thou didst deliver my evidence to my adversary," an action lies.(*i*) The publication of a charge of disgraceful conduct in having disclosed, at an election, confidential

(*a*) *Peard* v. *Jones* (Cro. Car. 382).
(*b*) *Bankes* v. *Allen* (Roll. Abr. 54). (*c*) Roll. Abr. 35.
(*d*) *Day* v. *Buller* (3 Wils. 59).
(*e*) *Jenkins* v. *Smith* (Cro. Jac. 586). See also *Birchley's case* (4 Rep. 16). (*f*) *Taylor* v. *Starkey* (Cro. Car. 192).
(*g*) *Boydell* v. *Jones* (4 M. & W. 446).
(*h*) *Bishop* v. *Latimer* (4 L. T. N. S. 775). Cf. *Clement* v. *Lewis*, in error (7 Moore, 200; 2 Brod. & Bing. 297).
(*i*) *Per* Anderson and Bramond, JJ., *Wright* v. *Moorhouse* (Cro. Eliz. 358). *Sed vide Brown* v. *Kennedy* (33 L. J. 342, Ch.).

communications which he had acquired professionally, would be libellous.(*a*)

Imputations which reflect on a clergyman in his professional character are *per se* actionable.(*b*) A letter published in a newspaper stating that the vicar of the parish came to the performance of divine service in a towering passion, and that his conduct was calculated to make infidels of his congregation, was held to be a clear libel.(*c*)

A letter charging the clerk to the justices of a borough with corruption, even though written to the Secretary of State by an inhabitant of the borough, is a libel.(*d*)

To say of a midwife, "She is an ignorant woman, and of small practice, and very unfortunate in her way; there are few that she goes to, but lie desperately ill, or die under her hands," was held actionable.(*e*) Also to say, "many have perished for her want of skill."(*f*)

An imputation of insanity on a governess would be libellous.(*g*)

So in a variety of other cases, as saying of a churchwarden, "Thou art a cheating knave, and hast cheated the parish of £40;"(*h*) of a town clerk, "He hath taken 40s. for a bribe;"(*i*) of a constable, "He is not worthy the office of a constable; for he and his company, the last time he was constable, stole five of my swine and eat them;"(*j*) of a deputy of Clarencieux king of arms, that he was "a scrivener, and no herald," &c.;(*k*) of an apothecary, "It is a world of blood he has to answer for in this town, through his ignorance: he did kill a woman and two children at S.; he did kill J. P. at P.; he was the death of J. P.; he has killed his patient with physic."(*l*)

(*a*) *Moore* v. *Terrell* (4 B. & Ad. 870).

(*b*) *Pemberton* v. *Colls* (10 Q. B. 461; 16 L. J. Q. B. 403). See also *Drake* v. *Drake* (1 Vin. Abr. 463; *Hearne* v. *Stowell* (12 A. & E. 719); *Kelly* v. *Sherlock* (L. Rep. 1 Q. B. 686; 35 L. J. 209, Q. B.).

(*c*) *Walker* v. *Brogden* (19 C. B. N. S. 65).

(*d*) *Blagg* v. *Sturt* (10 Q. B. 899).

(*e*) *Wharton* v. *Brook* (1 Vent. 21).

(*f*) *Flowers' case* (Cro. Car. 211).

(*g*) *Morgan* v. *Lingen* (8 L. T. N. S. 800).

(*h*) *Strode* v. *Holmes* (Sty. 338; 1 Vin. Abr. 463). See also *Woodruff* v. *Wooley* (1 Vin. Abr. 463).

(*i*) Yelv. 142; 1 Vin. Abr. 463. See 1 Roll. Abr. 56.

(*j*) Cro. Eliz. 861; 1 Vin. Abr. 464.

(*k*) Cro. Eliz. 328, 329; 1 Vin. Abr. 464. &c. The following are similar cases: Cro. Eliz. 358; Dal. 45; Yelv. 153; Cro. Car. 563; Mar. 82, pl. 135; Style. 43; 2 Roll. R. 72.

(*l*) *Tutty* v. *Alewin* (11 Mod. 221). See also *Edsall* v. *Russell* (4 M. & Gr. 1090).

So in the case of any other lawful trade, business, or employment, however humble or menial, and though it be one of which the Court cannot take judicial notice,(*a*) words spoken, and *à fortiori*, words written or printed and published, of a person in relation to such employment, which have a tendency to injure him in respect thereof, are actionable *per se*.

"An action," it has been said,(*b*) "lies for speaking scandalous words of any man of any trade or profession, be it never so base, if they are spoken with reference to his profession." Thus, it has been held actionable to say of a servant in husbandry and bailiff, "Thou art a cozening knave, and hast cozened thy master of a bushel of barley;"(*c*) or of a tradesman, "Thou art a rogue, and thou hast cheated me of several pounds;"(*d*) of a person carrying on the business of a butcher that she had used false weights in her trade;"(*e*) of a cornseller, "You are a rogue and a swindling rascal; you delivered me one hundred bushels of oats worse by sixpence a bushel than I bargained for;"(*f*) of an auctioneer and appraiser employed by the defendant to value certain goods, "He is a damned rascal, he has cheated me out of a hundred pounds on the valuation;"(*g*) of an asphalte manufacturer, "The old materials have been relaid by your company in the asphalte work executed in front of the Ordnance Office, and I have seen the work done:" innuendo, that the plaintiff "had been guilty of dishonesty in the conduct of his said trade, by laying down again the old asphalte materials which had before been used at the entrance of the said Ordnance Office instead of new asphalte according to his contract;(*h*) or of a certificated master mariner that "during his stay at N. he was frequently drunk, and in that state had to be carried to his boat to reach his vessel, &c."(*i*) So it was held slanderous to say of a gamekeeper, that he had trapped foxes; the declaration stating that it was his duty as such gamekeeper not to kill

(*a*) *Foulger* v. *Newcomb* (L. Rep. 2 Ex. 327; 16 L. T. N. S. 596; 36 L. J. 169, Ex.).

(*b*) *Per* Kelynge, Wyndham, and Twysden, JJ., *Terry* v. *Hooper* (Lev. 115).

(*c*) *Seaman* v. *Bigg* (Cro. Car. 480).

(*d*) *Surman* v. *Shelleto* (Burr. 1688).

(*e*) *Griffiths* v. *Lewis* (7 Q. B. 61).

(*f*) *Thomas* v. *Jackson* (3 Bing. 104).

(*g*) *Byrant* v. *Loxton* (4 Moore, 344).

(*h*) *Babonneau* v. *Farrell* (13 C. B. 360).

(*i*) *Irwin* v. *Brandwood* (2 H. & C. 960; 9 L. T. N. S. 772; 33 L. J. 257, Ex.). See *Coxhead* v. *Richards* (2 C. B. 569; 15 L. J. 278, C. P.); and *Harwood* v. *Green* (2 C. & P. 141).

foxes, and that he was employed on the terms of his not doing so, as the defendant knew.(a)

Where the plaintiffs, bag manufacturers, called one of their bags "The Bag of Bags," and a newspaper described the title as "very silly, very slangy, and very vulgar; and which has been forced upon the notice of the public *ad nauseam*," Lush, J., was of opinion that the words could not be deemed libellous, either upon the plaintiffs or their mode of carrying on business; but Mellor and Hannen, JJ., held that it was a question for the determination of a jury.(b)

A letter published in the *Times* newspaper stating that a ship of which the plaintiff was owner and master, and which was advertised as about to sail to the East Indies, was not seaworthy, and that some Jews had bought her for the purpose of taking out convicts, was held to be a libel on the plaintiff in his trade and business, and not a mere disparagement of the ship.(c) "This is not," said Coltman, J., "a case of mere disparagement of a chattel, but a libel on the plaintiff in the way of his business, and with reference to an intended voyage. It is impossible, therefore, to say that the action is not maintainable independently of malice. To say of a ship-owner that he has sold his ship to carry convicts, when she was in a condition in which she must be expected to go to the bottom, is as bad as saying of a wine-merchant that his wine is poisoned; or of a tea-dealer that his tea is made green by drying it on copper." And Erskine, J., added: "I think there could not be a more flagrant personal libel than such a statement made with respect to the master of a ship."

In order that an action of slander shall be maintainable for words spoken of a man in his office, profession, trade, or calling, it must clearly appear that the words were spoken of him in relation to that office, profession, trade, or calling.(d)

Imputations injurious to the credit of a trader or merchant.

Imputations which would affect injuriously the credit of a trader or merchant are also actionable; and it is not necessary that actual bankruptcy should be imputed.

Thus it has been held actionable to use words of an im-

(a) *Foulger* v. *Newcomb* (*ubi supra*).

(b) *Jenner* v. *A'Beckett* (L. R. 7 Q. B. 11).

(c) *Ingram* v. *Lawson* (6 Bing. N. C. 212; 8 Scott, 471).

(d) *Sibley* v. *Tomlins* (4 Tyrw. 90). See 1 Vin. Abr. 464; 3 Salk. 328; *Ayre* v. *Craven* (2 A. & El. 7; 4 Nev. & Man. 220); *Doyley* v. *Roberts* (3 Bing. N. C. 835); *Lumby* v. *Allday* (1 Tyrw. 217; 1 C. & J. 301); *James* v. *Brook* (9 Q. B. 7; 16 L. J. 17, Q. B.); *Hopwood* v. *Thorn* (8 C. B. 293; 19 L. J. C. P. 94); *Morgan* v. *Lingen* (8 L. T. N. S. 800).

keeper imputing insolvency, although at the time they were spoken an innkeeper was not subject to the bankrupt laws.(*a*) "The single question is" said Abbott, C.J.,(*b*) "whether words imputing an inability to pay debts be injurious to a person who seeks his living by buying provisions upon credit and selling them again to his guests at a profit, he not being liable to the bankrupt laws. Now, such an imputation is calculated to prevent him from having that credit which is at least useful, if not necessary, in his business; the words, therefore, are likely to be injurious to him."

So to say of a trader that he is "A sorry, pitiful fellow, and a rogue; he compounded his debts at five shillings in the pound;"(*c*) or "If he does not come and make terms with me, I will make a bankrupt of him, and ruin him;"(*d*) of a brewer, "I will bet £5 to £1 that Mr. J. was in a sponging-house for debt within the last fortnight, and I can produce the man who locked him up; the man told me so himself;" &c.;(*e*) of a dyer that "He is a bankrupt knave, and is not worth three half-pence"(*f*); of a tailor, "I heard you were run away;"(*g*) of a husbandman, "He owes more money than he is worth; he is run away and is broke:"(*h*) of a carpenter, "He is broken and run away, and will never return again;(*i*) and even in cases where an expectation or opinion only was expressed, as "I believe all is not well with Daniel Vivian: there are many merchants who have lately failed, and I expect no otherwise of Daniel Vivian."(*j*)

(*a*) *Whittington* v. *Gladwin* (5 B. & C. 180); see also *Southam* v. *Allen* (Sir T. Ray. 231), where the words were, "Deal not with the plaintiff, for he is broke, and there is neither entertainment for man or horse."

(*b*) 5 B. & C. 181.

(*c*) *Stanton* v. *Smith* (Ld. Ray. 1480; Str. 762). See a case relating to a pawnbroker (Holt, 652).

(*d*) *Brown* v. *Smith* (13 C. B. 596; 22 L. J. 151, C. P.).

(*e*) *Jones* v. *Littler* (7 M. & W. 423). See as to calling a stock-jobber "a lame duck," *Morris* v. *Langdale* (2 Bos. & P. 284); and, as to imputing insolvency to a banker, *Robinson* v. *Marchant* (7 Q. B. 918).

(*f*) *Squire* v. *Johns* (Cro. Jac. 585).

(*g*) *Davis* v. *Lewis* (7 T. R. 17).

(*h*) *Dobson* v. *Thornistone* (3 Mod. 112).

(*i*) *Chapman* v. *Lampshire* (3 Mod. 155). In this case it was argued for the defendant that the plaintiff might be broken and yet be as good a carpenter as before. "But," said the Chief Justice "the credit which the defendant (plaintiff?) has in the world may be the means to support his skill, for he may not have an opportunity to show his workmanship without those materials with which he is entrusted."

(*j*) 3 Salk. 326; Raym. 207. See also *Harrison* v. *Thornborough* (10 Mod. 196).

It was held actionable to say of an upholsterer, "You are a soldier; I saw you in your red coat doing duty; your word is not to be taken"—it having been a common practice for tradesmen to protect themselves against their creditors by a counterfeit enlisting.(a)

In one case, where it was said of a merchant with respect to an event which had occurred eight years previously, "He came a broken merchant from Hamburgh," the Court(b) held that an action would lie, the charge being of having been "once broken, *Et qui semel malus semper presumitur esse malus eodem genere*, or at least may have an inclination thereto; and it being alleged to be spoken *falso et malitiosè*, and to scandalise him in his profession, it is a great cause of discrediting and impairing him in his trade, whereas their credit is the principal means of their gain."(c)

And according to Kelly, C.B.,(d) it is libellous to impute untruly to any person pecuniary embarrassment and inability to purchase a certain property without the aid of a loan from a third party; even although it be at the same time stated that the loan was afterwards honourably repaid.

Where a firm of brewers, having had a quarrel with the manager of a branch of the Capital and Counties Bank, sent round to their own customers a printed notice that they would "not receive in payment cheques drawn on any of the branches" of the Bank, and there was in consequence a run on the Bank and loss inflicted, an action was brought by the Bank for libel, with an innuendo that the notice imputed insolvency. The jury could not agree, and were discharged. There was no proof of the innuendo beyond the notice itself. On this the Court of Appeal (Brett & Cotton, LJJ., *dissentiente* Thesiger, L.J.) reversing the judgment of the C. P. Division (Grove & Denman, J.J.), entered judgment for the defendants on the grounds (1) that there was no evidence that the notice was defamatory in either a primary or secondary sense; and (2) that the occasion was privileged, and there was no proof of express malice to rebut the privilege. This judgment was upheld by the House of Lords (Lord Selborne, C., Lords Blackburn, Watson, and Bramwell, *dissentiente* Lord Penzance), on the ground that the notice was not in itself libellous, that the innuendo was (at the utmost) only one of several possible meanings, that it was not the inference which reasonable

(a) *Arne* v. *Johnson* (10 Mod. 111).
(b) Croke, Jones, and Berkley, JJ., *dissentiente* Richardson, C.J.
(c) *Leycroft* v. *Dunker* (Cro. Car. 317).
(d) *Cox* v. *Lee* (L. Rep. 4, Ex. 284; 38 L. J. 219, Ex.; 21 L. T. N. S. 178).
(e) *Ibid.*

persons would draw, and that the plaintiffs had failed to discharge the onus which lay upon them of proving that the notice had a libellous tendency.(a)

A notice was published in a newspaper that the plaintiff, who had been, but had ceased to be, a master in the Walsall Science and Art Institute, and who had set up another school of art in the town, had ceased to be connected with the Institute, and that he was not authorized to receive subscriptions on its behalf. An action for libel having been brought, with an innuendo that the plaintiff falsely pretended to be authorized to receive subscriptions on behalf of the Institute, a nonsuit was directed on the ground that there was no evidence to support the innuendo; and the nonsuit was upheld by a Divisional Court.(b)

If any libellous construction can reasonably be put upon the document, it is for the jury to say whether or not that is the true interpretation.(c)

Criticisms on works appealing to public.

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

Publications disparaging commodities of rival tradesmen.

Publications merely disparaging the commodities of a rival tradesman must also be distinguished from libels upon him in the way of his trade.

Where a person published a circular and report comparing his own goods with those of another tradesman, and describing his own as superior, but not making any false misrepresentations as to the quality and character of the latter, it was held, on demurrer to a declaration, that an action of libel could not be maintained by the tradesman whose goods were disparaged, notwithstanding an

(a) *The Capital and Counties Bank* v. *Henty* (L. R. 5 C. P. D. 514; 7 App. Cas. 740).

(b) *Mulligan* v. *Cole* (L. R. 10 Q. B. 549). See also *Miller* v. *David* (L. R. 9 C. P. 118).

(c) *Per* Lord Coleridge, C.J., *Hart* v. *Wall* (L. R. 2 C. P. D. 149).

(d) See the chapter on "Comments on Matters of Public Interest," *post*.

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allegation in the declaration of special damage, though they might be superior to the goods of the other.(a) "I am far from saying," said Cockburn, C.J., "that if a man falsely and maliciously makes a statement disparaging an article which another manufactures or vends, although in so doing he casts no imputation on his personal or professional character, and thereby causes an injury, and special damage is averred, an action might not be maintained." "My own impression is," said Blackburn, J., "that where there is a written depreciation of an article, unless it is a slander actionable in itself, no allegation of special damage will render it actionable, except in the case of slander of title. But there may, as my lord says, be cases where there is a *scienter* on the part of the defendant who has made statements doing mischief and calculated to do it, in which an action would lie."

So where the defendant issued a notice cautioning the public that the "self-acting tallow syphons or lubricators" sold by the plaintiff were not good for their purpose, and that those who bought them would find that the tallow was wasted instead of being effectually employed as professed: the publication was held not to be a libel on the plaintiff in the way of his trade.(b) "A tradesman," said Lord Denman, C.J., "offering goods for sale, exposes himself to observations of this kind; and it is not by assuming them to be 'false, scandalous, malicious, and defamatory,' that the plaintiff can found a charge of libel upon them. To decide so would open a very wide door to litigation, and might expose every man who said his goods were better than another's to the risk of an action." Patteson, J., said that if the caution had been against the plaintiff as a tradesman in *the habit* of selling goods which he knew to be bad, it would be a libel upon him personally.

The hypothetical case put by Cockburn, C.J., in *Young* v. *Macrae*, arose in the *Western Counties Manure Company* v. *Lawes' Chemical Manure Company*,(c) where the publication of a false and malicious statement, disparaging the plaintiff's goods and causing special damage, was held actionable by Bramwell and Pollock, BB.

Publications holding up to scorn or ridicule.

The third class of libels on individuals embraces those which, by holding up a man to scorn and ridicule, and still more to any stronger feeling of contempt or execration, impair him in the enjoyment of general society, and injure

(a) *Young* v. *Macrae* (3 B. & S. 264; 32 L. J. 6, Q. B.).
(b) *Evans* v. *Harlow* (5 Q. B. 624).
(c) L. R. 9 Ex. 218.

those imperfect rights of friendly intercourse and mutual benevolence which man has with respect to man.(a) Everything, also, which, by holding him up to that scorn and ridicule that might reasonably (that is, according to our natural passions) be considered as provoking him to a breach of the peace, is a libel.(b)

A libel of this kind may be briefly defined to be "any publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule.(c)

The following language of eminent judges may be cited in support of the preceding definition. "In a libel," says Best, C.J.,(d) "any tendency to bring a party into contempt or ridicule is actionable; and, in general, any charge of immoral conduct, although in matters not punishable by law."(e)

To charge a man with ingratitude was held libellous.(f)

"If any man," says Wilmot, C.J.,(g) "deliberately or maliciously,(h) publishes anything in writing concerning another which makes him *ridiculous*, or tends to hinder mankind from associating or having intercourse with him, an action well lies against such publisher." "Scandalous matter is not necessary to make a libel, 'tis enough if the defendant induces an ill opinion to be had of the plaintiff, or makes him contemptible and ridiculous."(i) "In case upon a libel it is sufficient if the matter be reflecting, as to paint a man playing at cudgels with his wife."(j)

Thus it was held libellous to publish of a man that he stank of brimstone and had the itch.(k)

It is chiefly with respect to the class of libels with which we are now dealing that the distinction between oral and written or printed defamation becomes important.

To publish, even orally, of any one that he has committed an indictable offence, or that he has—*i.e.*, at the time the words are spoken of him—some contagious or infectious disorder which may exclude from society,(l) or anything

(a) Holt. L. L. 210. (b) *Ibid.* 213.
(c) *Per* Parke, B., *Parmiter* v. *Coupland* (6 M. & W. 108).
(d) *Archbishop of Tuam* v. *Robeson* (5 Bing. 21).
(e) See as to imputations of immoral or unfeeling conduct, *Clement* v. *Chivis* (9 B. & C. 172); *Churchill* v. *Hunt* (1 Chit. 480).
(f) *Cox* v. *Lee* (L. R. 4 Ex. 284).
(g) *Villers* v. *Monsley* (2 Wils. 403).
(h) As to the meaning of malice, *vide ante*, pp. 462, 463.
(i) *Per* Holt, C.J., *Cropp* v. *Tilney* (3 Salk. 226).
(j) *Per* Holt, C.J. (11 Mod. 99).
(k) *Villers* v. *Monsley* (*ubi supra*).
(l) 7 Bac. Abr. tit. Slander, p. 266; 1 Roll. Abr. 44; *Carslake* v.

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referring to his trade, office (be it one of profit or not), or profession, and calculated to injure him therein, (*a*) is actionable.(*b*) But where the imputation of an offence against the law is made orally, in order to be actionable, it must, in the absence of special damage resulting from it, be of some offence liable to punishment in a criminal court otherwise than merely by fine, with imprisonment in default of payment.(*c*)

Calling a man a scoundrel, rascal, blackleg, or even rogue or swindler, will not support an action of slander without proof of special damage caused by the utterance.(*d*)

Neither will the oral imputation of unchastity to a woman, married or unmarried, however gross it may be, entitle her to maintain an action, unless she can prove that the slander has caused her special damage.(*e*)

The publication, however, by writing or printing, of any

Mapledoram (2 T. R. 473); *Bloodworth* v. *Gray* (7 M. & Gr. 334). See also Cro. Eliz. 214, 289, 648; Cro. Jac. 430.

(*a*) 1 Vin. Abr. 463; Cro. Eliz. 328, 358; 1 Roll. Abr. 56; *Herle* v. *Osgood* (1 Vent. 50); *Parrat* v. *Carpenter* (Cro. Eliz. 502); *Seaman* v. *Bigg* (Cro. Car. 480); *Peard* v. *Jones* (Cro. Car. 382); *Aston* v. *Blagrave* (Str. 617); *How* v. *Prin* (Holt, 652); *Thomas* v. *Jackson* (3 Bing. 104); *South* v. *Denny* (1 Ex. 196); *Totty* v. *Alewin* (11 Mod. 221); *Robinson* v. *Marchant* (7 Q. B. 918); *Morris* v. *Langdale* (2 B. & P. 84); *Brown* v. *Smith* (13 C. B. 596); *Babonneau* v. *Farrell* (15 C. B. 360); *Irwin* v. *Brandwood* (2 H. & C. 960).

(*b*) *Gainsford* v. *Tuke* (Cro. Jac. 536); *Boston* v. *Tatam* (*Ibid.* 623); *Carpenter* v. *Tarrant* (Cas. Temp. Lord Hardwicke, 339); *Cuddington* v. *Wilkins* (Hob. 81); *Moor* v. *Foster* (Cro. Jac. 65); *Bendish* v. *Lindsey* (11 Mod. 194); *Roberts* v. *Camden* (9 East. 93); *Fowler* v. *Dowdney* (2 M. & Rob. 119); *Alfred* v. *Farlow* (8 Q. B. 854); *Williams* v. *Stott* (1 C. & M. 675); *Colman* v. *Godwin* (3 Doug. 90); *Richardson* v. *Allen* (2 Chit. 657); *Tomlinson* v. *Brittlebank* (4 B. & Ad. 630); *Huckle* v. *Reynolds* (7 C. B. N. S. 114, 337) *I'Anson* v. *Stuart* (1 T. R. 748); *Barnett* v. *Allen* (3 H. & N. 381). As to the imputation of a mere fineable offence, see *Ogden* v. *Turner* (Salk. 696; 6 Mod. 104); *M'Cabe* v. *Foot* (15 L. T. N. S. 115).

(*c*) 4 Rep. 15; 2 Bulst. 150; 1 Vin. Abr. 404, 417; 1 Roll. Abr. 40, &c.; *Holt* v. *Scholefield* (6 T. R. 691).

(*d*) *Barnett* v. *Allen* (3 H. & N. 376; 27 L. J. 412, Ex.); *Richardson* v. *Allen* (2 Chit. 657); *Saville* v. *Jardine* (2 H. Bl. 531, &c.).

(*e*) *Stainton* v. *Jones* (Selw. N. P. 12th edit. 1259); *Wilby* v. *Elston* (8 C. B. 142; 18 L. J. 320, C. P.); *Roberts* v. *Roberts* (33 L. J. 249, Q. B.; 10 L. T. N. S. 602); *Lynch* v. *Knight* (9 H. L. Cas. 577).

The state of our law on this subject is really disgraceful. Lord Campbell, a good while ago (*Lynch* v. *Knight*, *ubi supra*), considered it "unsatisfactory;" Lord Brougham, in the same case (p. 594), stigmatised it as "barbarous;" and Cockburn, C.J., in another case, as "very cruel" (33 L. J. 250, Q. B.); notwithstanding which it still continues as above stated. The only exception is the calling a woman a whore within the city of London, that being by the custom of the city actionable. See *Brand* v. *Roberts* (4 Burr. 2418, and cases there

of these things is actionable *per se*, without proof of special damage, on account of the greater mischief said to be produced by this mode of publication, as well as the greater malice which it indicates on the part of the defamer. "A libel," it has been said,(*a*) "is punishable both criminally and by action, when mere speaking the words would not be punishable in either way."(*b*)

By the Scotch law the oral imputation of unchastity to a woman is actionable, without proof of special damage.(*c*)

For speaking the words *rogue* and rascal of any one, an action, as already observed, will not lie. "But if those words," says Gould, J., (*d*) "were written and published of any one, I doubt not an action would lie."

So, to publish of any one that he is a *swindler* is a libel, and actionable,(*e*) or that he is "a dishonest man,"(*f*) or a

cited); *Robertson* v. *Powell* (2 Selw. N. P. 1259, 5th edit.). See also 1 Str. 741; 1 Vin. Abr. 395; Holt's Rep. 40; 12 Mod. 106. Loss of the hospitality of friends is sufficient special damage (*Davies* v. *Solomon*, L. R. 7 Q. B. 112). See also *Riding* v. *Smith* (L. R. 1 Ex. Div. 91).

(*a*) *Per* Gould, J., *Villers* v. *Monsley* (2 Wils. 404). See also *Thorley* v. *Lord Kerry* (2 Taunt. 358), and the note in 3 Camp. 214.

(*b*) "The common law, in respect to our natural passions, gives no action for mere defamatory words, which it considers as transitory abuse, and not having substance and body enough to constitute an injury by affecting the reputation. It confines, therefore, the action for slander to such of the grosser kind of words as impute positive crimes, or, by charging a man with contagious disorders, tends to expel him from society; and to words which injure him in his profession and calling. It does not consider words amounting to a breach of the peace, and, therefore, gives neither indictment nor information for unwritten slander, except in the case of seditious language or words reflecting on a magistrate in the immediate execution of his office. The reason of the law in this distinction is simple enough. It was necessary to punish the grosser and more palpable injuries, and it was equally convenient to pass over the less. The law, therefore, by classing the greater injuries, established the *criteria* of this distinction, and adhered to it closely in its practice. This reason, however, ceased when the words, by being written, could no longer be considered as the results of transitory passion or venial levity, but therein gained the shape and efficacy of a mischievous malignity. The act of writing is in itself an act of deliberation, and the instrument of a permanent mischief. What before was mere *convitium* and contumely grew into a deliberate charge and accusation. The law, therefore, both with respect to the public peace and the prevention of private injury, allowed an indictment and information, as well as an action on the case, for words written which it denied to words spoken" (Holt, L. L. 211, 212).

(*c*) Borthwick's Law of Libel, p. 185.

(*d*) *Villers* v. *Monsley* (2 Wils. 403).

(*e*) *I'Anson* v. *Stuart* (1 T. R. 748).

(*f*) *Per Cur.*, *Austin* v. *Culpepper* (Skin. 124; 2 Show. 314).

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"black-leg" or "black sheep,"(a) or that he was black-balled at a club, and "bolted" the next morning, whilst some of the poor tradesmen had to lament the fashionable character of an entertainment which he had given.(b) So also is a letter written to a third party calling a person a *villain*.(c)

It was held to be a libel to publish of a Protestant archbishop that he had attempted to convert a Roman Catholic priest (against whom a charge of seduction had been made) by offers of money and preferment.(d) The libel in this case was contained in a letter from Dublin, published in the *Morning Herald*; and it was contended, on motion to set aside the verdict which had been given for the plaintiff, that there was no imputation on the plaintiff's character in the conduct ascribed to him: that to make converts, even by purchase, is a praiseworthy effort of religious zeal, sanctioned by Act of Parliament, and warranted by the practice of our own and other Christian establishments; that the imputation, if any, on the plaintiff was only of extraordinary zeal. But Best, C.J., after laying it down that, in general, any charge of immoral conduct in a libel is actionable, although in matters not punishable by law, said: "Would it be immoral in the archbishop if he attempted to bribe a man to renounce his religion, and to endow such a proselyte with a Church of England preferment? Would it be immoral to employ in making hypocrites funds destined to the support of the Protestant Church? If the seduced be guilty it is impossible to say that the seducer is innocent. But it has been urged that nothing immoral is imputed, since the legislature has held out to Catholic priests the same kind of temptation to become Protestants. Even if that were so, it would not persuade me that such a course was moral. But the Legislature has not done this; it has only said that if a man be converted he shall not be left to starve in the midst of a hostile community." "If," said Burrough, J., "we are to understand the language of this attack as the rest of the world would do, there can be no doubt it is a gross and infamous libel. The plaintiff is charged with having sought to induce an improper person to abandon his religious creed, not by reasoning but by a gross bribe." "As to the merits, said Gaselee, J., "this is equally a libel whether it proposed to impute to the plaintiff indiscretion or

(a) *O'Brien* v. *Clement* (16 M. & W. 159). (b) *Ibid.*
(c) *Bell* v. *Stone* (1 Bos. & P. 331).
(d) *Archbishop of Tuam* v. *Robeson* (5 Bing. 21).

dishonesty; the manifest object of it was to bring him into disrepute."

A publication which charged an overseer of a parish with oppressive conduct towards paupers in compelling them to receive payment of their weekly allowance in orders for flour upon a particular tradesman, was held to be a libel;(a) and so was a placard stating of an overseer that when out of office he had advocated low rates, and when in office he had advocated high rates, and that the defendant would not trust him with £5 of his property.(b)

In another case where an action was held maintainable, the important part of the libel was, "I sincerely pity the man" (meaning the plaintiff) "that can so far forget what is due, not only to himself, but to others, who, under the cloak of religious and spiritual reform, hypocritically and with the grossest impurity deals out his malice, uncharitableness, and falsehoods."(c)

It has also been held libellous to publish of any man that he has been guilty of gross misconduct, and insulted females in a barefaced manner.(d) The individual libelled in this case was a coachman, but the publication was not held libellous, because published of him in that capacity, the Court considering it only necessary to inquire whether the publication in question held up the plaintiff to public hatred, contempt, or ridicule: the imputation was a very serious and contumelious one, clearly calculated to bring the plaintiff into contempt by some persons, and hatred by others, and, therefore, according to established rule, the publication was libellous.

So it has been held libellous to publish of a person seeking assistance from a charitable society that she prefers unworthy claims, which it is hoped the members will reject for ever, and that she has squandered away money already obtained by her from the benevolent in printing circulars abusive of the society's secretary.(e)

A person was found guilty of publishing a libel for having caused the insertion in a newspaper of a paragraph imputing that the "myrmidons" of the prosecutor had poisoned some foxes in a country hunted over by the hounds of Sir W. M. S., and had hung their bodies up by the

(a) *Woodard* v. *Dowsing* (2 M. & Ry. 74).
(b) *Cheese* v. *Scales* (10 M. & W. 488). Cf. *Warman* v. *Hine* (1 Jur. 820).
(c) *Thorley* v. *Lord Kerry* (4 Taunt. 355).
(d) *Clement* v. *Chivis* (9 B. & C. 192).
(e) *Hoare* v. *Silverlock* (12 Q. B. 624).

neck; and that the tenantry of Sir W. M. S., by way of retaliation, had hung up effigies of the prosecutor and his brother, with foxes' tails appended.(*a*)

The publication in a newspaper of a paragraph stating that, although the plaintiff was aware of the death of a lady occasioned by his furious and careless driving a carriage against that in which she had been driving, he nevertheless, on the very evening of the catastrophe, attended a public ball, was held actionable.(*b*)

Even a publication alleging that a person has for years, without cause, systematically done everything to annoy another, and had unnecessarily dragged that other into the Court of Chancery, and put him to great expense, may be libellous.(*c*)

It has been held a libel to publish of a person in a newspaper that he had entered a horse to run for certain stakes at a race, and had afterwards fraudulently withdrawn it for the purpose of obtaining an unfair advantage over other persons with whom he had laid wagers on the expected race.(*d*) It was contended in this case that horse racing was illegal, and therefore that the plaintiff had no right to sue; but the Court held that "even if running a race without fraud were altogether prohibited by the law, still the party infringing its provisions would not thereby be deprived of all protection to his character in other matters connected with the transaction; but, moreover, the fact of engaging in a horse race is not in itself an illegal act."

It was held libellous to publish the following paragraph, which appeared in a newspaper: "K. D. has had a tolerable run of luck this season. He is still here, and keeps—I assure you friend Sat.—a well-spread sideboard; but, curse the fellow! I always consider myself in a family hotel when my legs are singing duets under his table; for the bill is sure to come in sooner or later, although, as you know, I rarely dabble in the mysteries of ecarté, or any other game. The fellow is as deep as Crockford, and as knowing as the Marquis. I do dislike this leg-al profession;" the Court being of opinion that, apart from any innuendo, it imputed something disgraceful to the plaintiff.(*e*)

To publish of a person who had been an attorney that

(*a*) *Reg.* v. *Cooper* (8 Q. B. 533; 15 L. J. 206, Q. B.).
(*b*) *Churchill* v. *Hunt* (1 Chit. 480).
(*c*) *Fray* v. *Fray* (17 C. B. N. S. 603; 34 L. J. 45, C. P.).
(*d*) *Greville* v. *Chapman* (5 Q. B. 731).
(*e*) *Digby* v. *Thompson* (4 B. & Ald. 821).

whilst he practised he had been guilty of "sharp practice," would be a libel.(*a*)

The following paragraph inserted in a newspaper was also held to be libellous, without any innuendo to explain its meaning: "Threatening letters.—The Middlesex grand jury have returned a true bill against a gentleman of some property named French."(*b*) In reply to an argument urged on behalf of the defendant, that the Court could not intend that the bill of indictment found by the grand jury was a bill of indictment for sending threatening letters, Lord Tenterden, C.J., said:(*c*) "We are all agreed, and it is quite clear from all the modern authorities, that a Court must read these words in the sense in which ordinary persons, or in which we ourselves out of court, reading this paragraph, would understand them; and that it cannot be read otherwise than that the grand jury had found a true bill against the plaintiff for sending threatening letters. A bill of indictment for sending a threatening letter must import an unlawful threatening letter."

A general charge of ingratitude published in a newspaper has been held to be libellous,(*d*) even where the facts upon which the charge is grounded were also stated, and were insufficient to support the charge;(*e*) for, according to Bramwell, B., a doubt is raised whether there are not some other facts which, if mentioned, would justify the charge.(*f*)

Repeating story told by plaintiff.

Though a man should tell a ludicrous story concerning himself, the unauthorised publication of it in a newspaper will be libellous.(*g*) "There is a great difference," said Tindall, C.J., "between a man's telling a ludicrous story of himself to a circle of his own acquaintance, and a publication of it to all the world through the medium of a newspaper."(*h*)

Defamation by reference or comparison.

A libel is not the less actionable because the defamatory imputation is made by reference or comparison, direct or indirect, to some character in history or fiction, or to some animal which suggests the injurious idea.

Thus, it was held a libel to publish, in a newspaper, of the plaintiff, who was an applicant for assistance from a charitable society, that her warmest friends, in giving up the advocacy of her claims, stated that they had realised the fable of the "Frozen Snake."(*i*) To an objection, grounded on the

(*a*) *Boydell* v. *Jones* (4 M. & W. 450), *Per* Parke, B.
(*b*) *Harvey* v. *French* (1 Cr. & M. 11). (*c*) *Ibid.* 18.
(*d*) *Cox* v. *Lee* (L. Rep. 4 Ex. 284; 21 L. T. N. S. 178; 38 L. J. 219, Ex.) (*e*) *Ibid.* (*f*) *Ibid.*
(*g*) *Cook* v. *Ward* (6 Bing. 409). (*h*) *Ibid.*
(*i*) *Hoare* v. *Silverlock* (12 C. B. 624; 17 L. J. 306, Q. B.).

absence of an innuendo in the declaration, explaining the meaning of the allusion to the "Frozen Snake," Coleridge, J., replied,(*a*) "The jury and Court in such a case as this are in an odd predicament, if they alone of all persons are not to understand the allusion complained of. Suppose the libel had said that the plaintiff acted like Judas: must the history of Judas have been given and referred to by innuendo? We ought to attribute to a Court and jury an acquaintance with ordinary terms and allusions, whether historical or figurative, or parabolical. If an expression, originally allegorical, has passed into such common use that it ceases to be figurative, and has obtained a signification almost literal, we must understand it as it is used. Half of our language is founded upon allegorical allusion: 'vinegar' is talked of in describing a bad temper: even the word 'sour' is figurative. We must understand such terms according to the sense which has become familiar." "Nothing is easier," said Erle, J., "than to bring persons into contempt by allusion to names well known in history, or by mention of animals to which certain ideas are attached; and I may take judicial notice that the words 'Frozen Snake' have an application very generally known indeed, which application is likely to bring into contempt a person against whom it is directed."

See also the case of *Woodgate* v. *Ridout*,(*b*) where part of the libel consisted in a comparison of the conduct of the plaintiff, an attorney, in reference to a particular case, with that of the firm of Quirk, Gammon, and Snap, in the novel of "Ten Thousand a Year."

Libel on the dead.

A libel on a dead person is also, according to Lord Coke, punishable: for it stirs up others of the same family, blood, or society, to revenge, and to break the peace.(*c*) The chief cause for which the law so severely punishes all libels is, says Hawkins,(*d*) the direct tendency of them to a breach of public peace, by provoking the parties injured, and their friends and families to acts of revenge, which it would be impossible to restrain by the severest laws, were there no redress from public justice for injuries of this kind, which of all others are most sensibly felt.

No very definite principle can be extracted from the reported cases on this subject. *Rex* v. *Paine*(*e*), sometimes referred to, was really a case of seditious libel. The indictment was for a scandalous libel upon the King (Will. III.) and late Queen and their Government, and the indictment

(*a*) 12 C. B. P. 633. (*b*) 4 F. & F. 202. (*c*) Co. 5, 124 b.
(*d*) P. C. Book 1, c. 28, Libels. (*e*) Carth. 405.

charged that the defendants published it "seditiously" and with intent to subvert the Government.

In the curious case of *Reg.* v. *Critchley* (Hil. 7 Geo. 2) an information was granted against one Critchley for publishing a libel reflecting on Sir C. G. Nicoll, Lady Dartmouth's father, and (so says the report) on the Government.

The libel said of the deceased: "He could not be called a friend to his country, for he changed his principles for a red ribbon, and voted for that pernicious project, the excise."(*a*) Here, however, the information charged a malicious intent "to stir up the hatred and evil will of the subjects of the King against the family and posterity" of the deceased, a point emphasized by Lord Kenyon(*b*) in his reference to the case.

In libel on dead malevolent intention to injure the living family must be shown.

No attack upon the character of a deceased person, however gross it be, can be dealt with as a libel, unless it is shown to have been published with the malevolent intention of bringing contempt upon his family, and is of a nature to stir up his relations to a breach of the peace. "To say in general that the conduct of a dead person can at no time be canvassed; to hold that, even after ages are passed, the conduct of bad men cannot be contrasted with the good—would be," in the words of Lord Kenyon,(*c*) "to exclude the most useful part of history. And, therefore, it must be allowed that such publications may be made fairly and honestly. But let this be done whenever it may, whether soon or late after the death of the party, if it be done with a malevolent purpose, to vilify the memory of the deceased, and with a view to injure his posterity, as in *Rex* v. *Critchley*, then it comes within the rule stated by Hawkins: then it is done with a design to break the peace, and then it becomes illegal."(*d*)

For the reasons thus stated by Lord Kenyon, the Court of King's Bench, in 1791, held bad, after a verdict of guilty, an indictment charging the defendant that he, "wickedly and maliciously contriving and intending to injure, defame, disgrace, and vilify the memory, reputation and character of George Nassau Clavering, Earl Cowper, then deceased, and to cause it to be believed that the said earl in his lifetime was a person of a vicious and depraved mind and disposition, and destitute of filial duty and affection, and of all honourable and virtuous sentiments and inclinations, and that the said earl had led a wicked and profligate course of life, and had addicted himself to the practice and use of the most criminal and unmanly vices and debaucheries, &c., wickedly, maliciously, and unlawfully did print and publish

(*a*) Cited 4 T. R. 129.
(*b*) *The King* v. *Topham* (4 T. R. 127). (*c*) *Ibid* (*d*) 4 T. R. 129.

and cause to be printed and published, in a certain newspaper called *The World*, a certain false, scandalous, and malicious libel of and concerning the said Earl Cowper, &c." The Court made absolute a rule to arrest the judgment, because the indictment did not allege that the libel had been published with an intent to create any ill blood or to throw any scandal on the family and posterity of Lord Cowper, or to induce them to break the peace in vindicating the honour of the family.(*a*)

There is no instance of an action for libel by the representative of a deceased person; and, according to the judgment of the Queen's Bench Division in a recent case,(*b*) "it must be some very unusual publication to justify an indictment or information for aspersing the character of the dead."

Liability for libel which one person requests another to publish.

A person is answerable for a libel which he either requests or directs another to write or publish for him, even where the publication differs in some respects from what he has suggested, provided the direction be in substance followed out.

Thus, where the evidence was that the defendant told the reporter of a newspaper a story defamatory of the plaintiff, saying that "it would make a good case for the newspaper," and afterwards gave the reporter a more detailed account, for the express purpose of inserting it in the newspaper; whereupon the reporter, from the particulars thus furnished to him, drew up an account, which, after some slight alterations, not affecting the sense, were made in it by the editor, was published in the newspaper, Abbott, C.J., held that what the reporter published in consequence of what passed with the defendant might be considered as published by the defendant.(*c*)

And where the defendant asked the editor of a newspaper to "show up" the prosecutor and his brother, telling him a ludicrous story concerning them; and the editor told the story to a reporter for the paper, and the story appeared in the paper, with comments added; the defendant, before the publication, having remarked on the delay, and, after the publication, expressed approbation of it, it was held that the jury (who had found the defendant guilty) might, on this

(*a*) *The King* v. *Topham* (4 T. R. 129).

(*b*) *Reg.* v. *Labouchere* (not yet reported). The judgment cites with approval the following passage from Hawkins (P. C. Bk. i. ch. 28, Libels, note 1): "The Court will not grant this extraordinary remedy by information, nor should a grand jury find an indictment, unless the offence be of such signal enormity that it may reasonably be construed to have a tendency to disturb the peace and harmony of the community. In such a case the public are justly placed in the character of an offended prosecutor, to vindicate the common right of all, though violated only in the person of an individual," &c.

(*c*) *Adams* v. *Kelly* (1 Ry. & M. 157).

evidence, find that the defendant authorised the publication of the particular libel, notwithstanding the comments added, and although it appeared that the editor had heard the story before the defendant told it to him.(*a*)

"If," said Lord Denman, C.J., "a man requests another generally to write a libel, he must be answerable for any libel written in pursuance of his request: he contributes to a misdemeanour, and is therefore responsible as a principal. He takes his chance of what is to be published. Here the defendant first desires the newspaper editor to 'shew up' the prosecutor, and communicates to him the particulars of the story, which afterwards appear in the newspaper. Having given this general authority, he meets the editor and says that the article has not appeared. That which did, in fact, form the foundation of the libel, and which the editor communicated to the reporter, was what the defendant communicated to the editor; and, after the publication, it was approved of by the defendant. It is observed that there were additions; but the editor said that what the defendant communicated was substantially what was published. If we held this not to be a publication by the defendant, we must go the length of exonerating a party who gives instructions for a libel, in every case where the libel published departs from the instructions by a single word. It is enough that there is a substantial identity. I have no doubt that a man who employs another generally to write a libel must take his chance of what appears, though something may be added which he did not state." Wightman, J., added: "It would be very dangerous to allow a man to direct a libel to be published on a particular subject, and, after he has approved of what is published, to defend himself on the ground that something has been added to his original communications."(*b*)

In the case just referred to there was, in addition to a previous request, a subsequent approval of the libel as published. But if a request be made, and the publication take place in pursuance of the request, that is sufficient to fix with liability.

Request to reporters to notice a speech.

And in the case of a speech, made at a meeting, which the speaker requests the newspaper reporters present to "take notice of," he is liable not only for a *verbatim* report, but also for a published outline or summary of it.(*c*)

(*a*) *Reg.* v. *Cooper* (8 Q. B. 533; 15 L. J. 206, Q. B.). (*b*) *Ibid.*
(*c*) *Parkes* v. *Prescott* (L. Rep. 4 Ex. 169; 20 L. T. N. S. 537; ? L. J. 105, Ex.; 17 W. R. 773).

In an action against the chairman, and E., a member, of a board of guardians, for a libel published in a newspaper report of one of the meetings of the board, it appeared that a discussion having taken place at the meeting respecting the case of the plaintiff's daughter, then an inmate of the workhouse, and reporters of the local newspapers being present in the ordinary discharge of their duty, the defendant E. said "he hoped the local press would take notice of this very scandalous case," and requested the chairman to "give an outline of it," which was done accordingly. The chairman, in the course of his statement of the case, said: "I am glad gentlemen of the press are in the room, and I hope they will take notice of it," to which E. added, "and so do I;" the chairman further expressing a hope that publicity would be given to the matter. The libel was contained in what was proved to be a correct but condensed summary of what took place at the meeting, published in a local newspaper, and containing matter defamatory of the plaintiff. The learned judge (Martin, B.) who presided at the trial was of opinion that there was not sufficient evidence for the jury of the publication of the libel by the defendants, and directed a verdict to be entered for them. A bill of exceptions was tendered to this ruling; and the majority of the Court of Exchequer Chamber (Keating, Montague Smith, and Hannen, JJ.) held that the ruling was incorrect, Byles and Mellor, JJ., dissenting.(a)

It was contended, on behalf of the defendants in this case, that the words used by them did not amount to a request to the reporters to publish the proceedings, but were merely the expression of a wish or hope that they would do so, nor to an authority to publish the particular reports in the words in which they, in fact, appeared; but the majority of the Court of Error were of opinion that the facts proved afforded evidence, fit, at all events, to be laid before the jury, of a request by the defendants to the reporters to publish an outline, or summary, of the proceedings, and to publish the report in such a way as to show the conduct of the plaintiff to have been disgraceful; the disclosure to the local public of what was called the plaintiff's disgraceful conduct being the avowed object of the request made by the defendants to the reporters.

"I agree with the learned counsel for the defendants," said Montague Smith, J., in whose judgment Keating and Hannen, JJ., concurred, "that loose expressions of a mere

(a) *Parkes* v. *Prescott* (L. Rep. 4 Ex. 169; 20 L. T. N. S. 537; 38 L. J. 105, Ex.; 17 W. R. 773).

wish or hope that proceedings should be published, would not be sufficient to fix liability on the defendants in cases like the present. I think the words must be of such a kind, and used in such a manner, as to satisfy the jury that they amounted to, and were in fact, a request to publish. If the words do amount to such a request, and the publication be made in pursuance of it by the persons to whom it was addressed, then it seems to me the persons making such request would be responsible for the libellous matter so published. Whether the libellous matter published is in pursuance of, and in accordance with, the request, or a departure from it, and so unauthorised, would be a question to be considered on the circumstances of the particular case. It is, of course, plain that if a man gives a copy of his speech to another to publish, he is answerable as a publisher. It cannot be contended that he would not be equally answerable, if he desired a reporter to take down his speech as he delivered it, and to publish it. Then, can it make any difference in his liability, that he requests the reporter, instead of publishing the whole speech, to make and publish an outline or summary of it? Surely, in reason and principle, there can be none, where the request is acted on, and a correct outline or summary made and published. It was strongly urged for the defendants that they could not be liable, unless they authorised the libel in the very words in which it was published. If this argument is correct, then it must follow that a man could never be liable when he desired another to make and publish an outline or summary of a speech or writing; because such an outline or summary necessitates condensation and consequent alteration of language. But the argument cannot, as it seems to me, be correct. The man who requests another to make and publish an outline or summary of a speech, writing, or proceedings, must know that the words will be, to some extent, those of him who makes such summary or outline; and he must, therefore, be taken to constitute him an agent for the purpose, and be answerable for the result, subject always to the question whether the authority has been really followed. If this be not so, a man might become a libeller with impunity. Again, if the very words of the libel, and not its substance, are in these cases to be regarded, a man who gives the manuscript of a libel to an agent to print and publish, would not be answerable if, by accident or negligence, there were variations in some of the words, although not in the substance of the libel. . . . . In the result, I come to the conclusion that on principle it is correct to

Condensed report.

hold that where a man makes a request to another to publish defamatory matter, of which, for the purpose, he gives him a statement, whether in full or in outline, and the agent publishes that matter, adhering to the sense and substance of it, although the language be, to some extent, his own, the man making the request is liable to an action as the publisher. If the law were otherwise, it would, in many cases, throw a shield over those who are the real authors of libels, and who seek to defame others under, what would then be, the safe shelter of intermediate agents."(*a*)

Byles and Mellor, JJ., dissented from the judgment in this case. Byles, J., very much doubted "whether the expression of a hope that the press would take notice of the case, or give publicity to it, or that the chairman would give an outline of the proceedings, amounts to an authority to publish in a newspaper defamatory and unjustifiable matter spoken at a meeting." The learned judge pointed out that the libel must be proved as laid; and that though a variance is now amendable, none was in this case asked for or made, or could be made so as to cure the objection that the evidence did not show what particular facts or what particular defamatory expressions were or were not authorised by the defendant. His Lordship also remarked on the great difference between the authority which will make a man liable criminally for the acts of his agents(*b*) and that which will make him liable civilly; a principal not being civilly liable unless the agent duly pursues his authority, though liable criminally even where the agent has widely deviated from the authority. Mellor, J., said: "I think that in order to make a man responsible for a report printed and published by a third person, it ought to be shown that he had seen or heard or dictated the report itself, or approved of the libellous statements therein. . . . . I think that in order to support the allegation that the defendants caused to be printed and published the libels set out in the declaration, there ought to have been evidence of a communication either verbal or written, of the entire substance of the libel to the reporter, as the libel to be published; or that either before or after the publication thereof, the defendants, sought to be charged, saw and approved of the particular libel; and that, inasmuch as in the present case the expressions used only indicate a wish that gentlemen of the press present would notice the case, or call attention to it, or give publicity thereto, leaving

(*a*) *Parkes* v. *Prescott* (L. Rep. 4 Ex. 169; 20 L. T. N. S. 537; 38 L. J. 105, Ex.; 17 W. R. 773).

(*b*) As in *Reg.* v. *Cooper* (8 Q. B. 533; 15 L. J. 206, Q. B.).

the mode and manner to the absolute discretion of the reporters, I am of opinion that my brother Martin was justified in holding the evidence not to be sufficient to be submitted to the jury in support of the issue joined upon the pleadings."(*a*)

Publication of libel received from another disclosing author's name.

And it is no defence to an action for libel that the defendant received the libellous statement from another, and upon publication disclosed the author's name.(*b*)

"We do not hesitate to say," observed Best, C.J., delivering the judgment of the Court of Common Pleas in *De Crespigny* v. *Wellesley*, "that even if we were to admit, what we beg not to be considered as admitting, that in oral slander, when a man at the time of his speaking the words names the person who told him what he relates, he may plead to an action brought against him that the person whom he names did tell him what he related, such a justification cannot be pleaded to an action for the publication of the libel. If the person receiving a libel may publish it at all, he may publish it in whatever manner he pleases; he may insert it in all the journals, and thus circulate the calumny through every region of the globe. The effect of this is very different from that of the repetition of oral slander. In the latter case, what has been said is known only to a few persons, and if the statement be untrue, the imputation cast upon any one may be got rid of; the report is not heard of beyond the circle in which all the parties are known, and the veracity of the accuser and the previous character of the accused will be estimated. But if the report is to be spread over the world by means of the press, the malignant falsehood of the vilest of mankind, which would not receive the least credit where the author is known, would make an impression which it would require much time and trouble to erase, and which it might be difficult, if not impossible, ever completely to remove. . . . . Of what use is it to send the name of the author with a libel that is to pass into a country where he is entirely unknown? The name of the author of a statement will not inform those who do not know his character, whether he is a person entitled to credit for veracity or not; whether his statement was made in earnest or by way of joke; whether it contains a charge made by a man of sound mind or the delusion of a lunatic. . . . . If, without any allegation that its contents were true, or that the publisher had any

(*a*) *Parkes* v. *Prescott* (*ubi supra*). Cf. *Pierce* v. *Ellis* (6 Ir. L. Rep. 55).
(*b*) *De Crespigny* v. *Wellesley* (5 Bing. 392).

reason to believe them to be true, we were to hold that these pleas were a justification, we should establish a mode by which men might indulge themselves in ruining the characters of any persons they might be disposed to calumniate; there will be no difficulty in getting wretches, who would be better off within the walls of a prison than they are without, to furnish such as will pay for them with any statements they may desire respecting the character of any person whatsoever."(*a*)

Where a newspaper copied a libellous paragraph from another newspaper, and added the word "fudge" at the end of it, Lord Lyndhurst, C.B., on the trial of an action of libel against the publisher, left it to the jury to say with what motive the paragraph was copied, and what was meant by the addition of the word "fudge;" if that word were added only for the purpose of making an argument at a future day it would not take away the effect of the libel.(*b*)

CHAPTER VII.

PRIVILEGED PUBLICATIONS.

Occasion may justify publication.

Injurious reflections on the character and conduct of a person may be rendered justifiable by the occasion on which, or the circumstances under which, they are uttered or published; and this, it would appear, in some cases, however malicious the motive which may have prompted the utterance or publication. Occasions which justify such publications are called *privileged;* and the privilege may be either of an *absolute* or a *qualified* character.

Absolute privilege.

It is essential to the due performance of certain duties that the fear of legal liability for statements which may possibly affect injuriously the characters of individuals should not check the most outspoken criticisms and reflections on the part of those whose position calls upon them to pronounce on the conduct of others; and in such cases the privilege furnished by the occasion would seem to be of an

(*a*) See *M'Gregor* v. *Thwaites* (3 B. & C. 24); *M'Pherson* v. *Daniels* (10 B. & C. 263); *Watkin* v. *Hall* (9 B. & S. 279; L. Rep. 3 Q. B. 396; 37 L. J. 125, Q. B.; 18 L. T. N. S. 561).
(*b*) *Hunt* v. *Algar* (6 C. & P. 245).

absolute character. How malicious soever the motive which may prompt the untrue and injurious reflection, the privilege afforded by the occasion appears to be an absolute bar to an action.

Thus, it is necessary to the due administration of justice that judges, jurors, suitors, and witnesses should enjoy an absolute immunity for all words spoken or written in the course of any judicial proceeding, and relating thereto. Of this kind also is the privilege accorded to the utterances in Parliament of members of either House.

A judge enjoys this absolute immunity, whether he be judge of a superior court, judge of a county court, or coroner;(a) so does an advocate when acting as such, whether he be counsel or solicitor.(b)

An action of libel will not lie for defamatory allegations in pleadings,(c) defamatory bills or proceedings filed in Chancery or in the ecclesiastical courts,(d) or defamatory statements in an affidavit;(e) or in the witness box,(f) and a want of jurisdiction of the Court, to which application is *bonâ fide* made, will not take away the privilege.(g)

The same privilege is accorded to the judgment of a court-martial.(h)

As to communications made by military men in the course

(a) *Scott* v. *Stanfield* (L. Rep. 3 Ex. 220; 18 L. T. N. S. 572); *Floyd* v. *Barker* (Co. Rep. part 12, p. 24); *Rex* v. *Skinner* (Lofft. 55); *Miller* v. *Hope* (2 Shaw, Sc. App. Cas. 125); *Jekyll* v. *Moore* (2 B. & P. N. R. 341); *Revis* v. *Smith* (18 C. B. 126); *Henderson* v. *Broomhead* (4 H. & N. 569); *Fray* v. *Blackburn* (3 B. & S. 576); *Thomas* v. *Churton* (2 B. & S. 475; 31 L. J. 139, Q. B.); *per* Kent, C.J., in the American case of *Yates* v. *Lansing* (5 Joh. 282; 9 Joh. 395). But see *per* Cockburn, C.J. (2 B. & S. 479).

(b) *Munster* v. *Lamb* (L. R. 11 Q. B. D. 588), in which the Court of Appeal (Brett, M.R., and Fry, L.J.) dissented from the opinion of Lord Denman, C.J., expressed at *Nisi Prius* in *Kendillon* v. *Maltby* (1 Car. & Mar. 409).

(c) 1 Roll. 33; Dyer, 285; 2 Burr. 808, 817; *Weston* v. *Dobniet* (Cro. Jac. 432).

(d) *Ram* v. *Lamley* (Hutt. 113); *Weston* v. *Dobniet* (Cro. Jac. 432); *Astley* v. *Younge* (2 Burr. 809, 817).

(e) *Revis* v. *Smith* (18 C. B. 126); *Astley* v. *Younge* (2 Burr. 817); *Henderson* v. *Broomhead* (4 H. & N. 569; 28 L. J. 360, Ex.); *Doyle* v. *O'Doherty* (1 C. & Mar. 418). See *Maloney* v. *Bartley* (3 Camp. 210), and *M'Gregor* v. *Thwaites* (3 B. & C. 24).

(f) *Seaman* v. *Netherclift* (L. R. 1 C. P. D. 540; 2 C. P. D. 53). See also *Goffin* v. *Donnelly* (L. R. 6 Q. B. D. 307).

(g) See *Lake* v. *King* (1 Vin. Abr. 389); Hawk. Pl. Cr. 73, s. 8); *Hare* v. *Meller* (3 Lev. 169).

(h) *Jekyll* v. *Moore* (2 B. & P. N. R. 341), *Home* v. *Bentinck* (2 Brod. & Bing. 130). See *Oliver* v. *Bentinck* (3 Taunt. 456), and *Dawkins* v. *Lord Rokeby* (L. R. 7 H. L. 744).

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of their duty, see the cases of *Dawkins* v. *Paulett*;(a) *Dickson* v. *The Earl of Wilton*;(b) and *Keighley* v. *Bell*,(c) and as to an official publication in the *Gazette* by a Secretary of State, *Grant* v. *Secretary of State for India*.(d)

Scotch law.

The Scotch law on this subject is in general the same as the English.(e) In case of an action of libel against a judge or witness there is a *presumptio juris et de jure* in favour of the defendant, the effect of which cannot be traversed by any contrary evidence. Proof of actual malice will, however, take away the privilege from a litigant party.(f)

Qualified privilege.

In other cases the privilege is of a qualified character: the occasion on which the untrue and injurious imputation is made excuses everything but actual malice. "In such cases," said Parke, B.,(g) "the occasion prevents the inference of malice, which the law draws from unauthorised communications, and affords a qualified defence, depending upon the absence of actual malice. If *fairly* warranted by any reasonable occasion or inquiry, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits." The same learned judge elsewhere(h) observes: "The proper meaning of a privileged communication is only this: that the occasion on which the communication was made rebuts the inference *primâ facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact—that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made." To the same effect Lord Campbell:(i) "The rule is, that 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: if he gives no such evidence, it is the office of the judge to say that there is no question for the jury, and to direct a nonsuit or a verdict for the defendant."

(a) 9 B. & S. 768; L. Rep. 5 Q. B. 94; 21 L. T. N. S. 584; 39 L. J. 53, Q. B. (b) 1 F. & F. 419. (c) 4 F. & F. 763.
(d) L. R. 2 C. P. D. 445.
(e) See Borthwick's Law of Libel, chap. 5, sect. 1.
(f) *Ibid.* p. 217.
(g) *Toogood* v. *Spyring* (1 Cr. M. & R. 193). See also *Somerville* v. *Hawkins* (10 C. B. 583); *Croft* v. *Stevens* (7 H. & N. 570); *Whiteley* v. *Adams* (15 C. B. N. S. 419); *Cowles* v. *Potts* (34 L. J. 247, Q. B.).
(h) *Wright* v. *Woodgate* (2 Cr. M. & R. 577).
(i) *Taylor* v. *Hawkins* (16 Q. B. 321).

Why proof of actual malice destroys the privilege is well explained by Brett, L.J., in *Clark* v. *Molyneux*:(*a*) "If the occasion is privileged, it is so for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason. He is not entitled to the protection if he uses the occasion for some indirect and wrong motive. If he uses the occasion to gratify his anger or his malice, he uses the occasion not for the reason which makes the occasion privileged."

To what cases privilege extends.

This qualified privilege extends to all cases where the publication of the injurious statement is made by a person fairly in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned.(*b*)

Whether actual malice is present or absent is a question of fact for the jury to determine.(*c*) Whether the occasion makes the publication privileged, is a question of law for the judge or Court to determine.(*d*)

General rule as to what are privileged communications.

It was laid down by the Court of Queen's Bench, in the case of *Harrison* v. *Bush*, (*e*) that a communication made *bonâ fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it contain criminatory matter which, without this privilege, would be slanderous and actionable; and this, though the duty be not a legal one, but only a moral or social duty of imperfect obligation. And the Court was of opinion, though it was not necessary to decide so expressly in that case, that the same privilege would be accorded to a communication made to a person who had not *in fact* such a corresponding interest or duty as referred to, but who might reasonably be, and is, supposed by the party making the communication to have such interest or duty.(*f*)

Scotch law.

The cases in which the law of Scotland accords this

(*a*) L. R. 3 Q. B. D. 246.

(*b*) *Per* Parke, B., *Toogood* v. *Spyring* (1 Cr. M. & R. 193); *Davies* v. *Snead* (L. R. 5 Q. B. 608). See *Hamon* v. *Falle* (L. R. 4 App. Cas. 247), and *Waller* v. *Loch* (L. R. 7 Q. B. D. 619).

(*c*) *Taylor* v. *Hawkins* (16 Q. B. 321); *Cooke* v. *Wildes* (5 El. & Bl. 335); *Dickson* v. *Earl of Wilton* (1 F. & F. 426); *Hancock* v. *Case* (2 F. & F. 711).

(*d*) *Ibid.* *Whiteley* v. *Adams* (15 C. B. N. S. 392; 33 L. J. 89, C. P.).

(*e*) 5 El. & Bl. 344. See also *Davies* v. *Snead* (L. R. 5 Q. B. 608).

(*f*) See also *Fairman* v. *Ives* (5 B. & Ald. 642). *King* v. *Bayley*, cited by Bayley, J. (5 B. & Ald. 647); *Scarll* v. *Dixon* (4 F. & F. 250).

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qualified privilege are those of counsel, litigants, masters giving characters of servants, literary criticisms, and communications to persons having an interest in the matters made known.

Examples of privileged communications.

Some examples of the general rule, which do not, however, properly fall within the scope of this work, may here be given. The following have been held communications privileged by the occasion of their publication: a letter written by a person to his mother-in-law, giving her advice on the subject of her proposed marriage, and containing imputations upon the person whom she was about to marry;(a) a letter written by a tenant who had been asked by his landlord to tell him if he saw or heard anything respecting game, informing the landlord that his gamekeeper sold game;(b) information given to a party asking for it, as to the respectability of a tradesman with whom that party is about to deal:(c) a letter written confidentially to persons employing a particular solicitor, containing charges as to his professional conduct in the management of certain matters intrusted to him by the writer, and in which the writer was interested;(d) a letter written *bonâ fide* and confidentially to the employer of a steward, informing him of certain supposed malpractices on the part of the steward;(e) a character given by a master or mistress of a servant,(f) or a retractation of a character formerly given;(g) a letter written by a subscriber to a charitable institution to the committee, reflecting on the conduct of the secretary;(h) a communication made by one director of a company to his co-directors respecting the conduct of one of its officers;(i) a communication addressed by a ratepayer to a parish meeting reflecting on the parish constable;(j) a letter addressed to

(a) *Todd* v. *Hawkins* (2 M. & Rob. 20; 8 C. & P. 88).

(b) *Cockayne* v. *Hodgkisson* (5 C. & P. 543).

(c) *Storey* v. *Challands* (8 C. & P. 234). See *Bennett* v. *Deacon* (2 C. B. 628); *King* v. *Watts* (8 C. & P. 614).

(d) *M'Dougall* v. *Claridge* (1 Camp. 267). See also *Dunman* v. *Bigg* (3 Camp. 260).

(e) *Cleaver* v. *Senande*, referred to by Lord Ellenborough, 1 Camp. 267.

(f) Burr. 2425; *Edmondson* v. *Stevenson* (Bull. N. P. 8); *Child* v. *Affleck* (9 B. & C. 403); *Pattison* v. *Jones* (8 B. & C. 578); *Fountain* v. *Boodle* (3 Q. B. 11); *Dixon* v. *Parsons* (1 F. & F. 24).

(g) *Gardner* v. *Slade* (13 Q. B. 796; 18 L. J. 334, Q. B.).

(h) *Maitland* v. *Bramwell* (2 F. & F. 623). See *Hartwell* v. *Vesey* (3 L. T. N. S. 275).

(i) *Harris* v. *Thompson* (13 C. B. 333). See *Brooks* v. *Blanshard* (1 Cr. & M. 779; 3 Tyrw. 844).

(j) *Spencer* v. *Amerton* (1 M. & Rob. 470). See *George* v. *Goddard* (2 F. & F. 689).

a bishop informing him of a report affecting the character of an incumbent in his diocese;(a) a bishop's charge replying to animadversions upon his own conduct;(b) *bonâ fide* applications to the proper authorities for redress for wrongs suffered;(c) letters written by the defendant in answer to a letter from a friend of the plaintiff who had been in correspondence with the defendant on the subject of certain charges against the plaintiff, with the sanction and concurrence of the latter;(d) a memorial from an elector and inhabitant of a borough complaining of misconduct on the part of a magistrate of the county in which the borough was situated, although addressed not to the Lord Chancellor, but to the Home Secretary.(e)

Advertisement for information, &c.

If a person advertises in a newspaper *bonâ fide*, in order to find out the truth of something in which he is really interested, the privilege furnished by the occasion would seem to afford a defence to an action for any defamatory imputation contained in the advertisement.

Where an action of libel was brought for an advertisement, published in a newspaper, offering a reward to any person who could give notice to the defendant of the marriage of James Delany previous to a certain date, there being an innuendo that the defendant meant thereby to insinuate that J. D., the plaintiff, had been and was married before the time mentioned in the advertisement, and had another wife then living; and the defence relied upon was that the advertisement had been inserted by the authority of the plaintiff's wife, for the purpose of making a discovery which it was important for her to know, namely, whether the plaintiff had another wife then living, Lord Ellenborough, C.J., told the jury that, though that which is spoken or written may be injurious to the character of the party, yet if done *bonâ fide*, with a view of investigating a fact in which the party making it was interested, it was not libellous; and, therefore, if the investigation had been set on foot and the advertisement published by the plaintiff's wife, either from

(a) *James* v. *Boston* (2 C. & Kir. 4).
(b) *Laughton* v. *Bishop of Sodor and Man* (4 P. C. 495).
(c) *Johnson* v. *Evans* (3 Esp. 32); *Woodward* v. *Lander* (6 C. & P. 548).
(d) *Hoopwood* v. *Thorn* (8 C. B. 293; 19 L. J. 94, C. P.). If a person, writing to another, to whom a communication would be privileged, by mistake puts the letter into an envelope addressed to a third person who receives and reads it, the privilege is not lost (*Per* Williams and Mathew, JJ., *Tompson* v. *Dashwood*, L. R. 11 Q. B. D. 43).
(e) *Harrison* v. *Bush* (5 E. & B. 344; 25 L. J. 28, Q. B.).

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anxiety to know whether she was legally the wife of the plaintiff or whether he had another wife living when he married her, it was justifiable, though done through the medium of imputing bigamy to the plaintiff.(*a*) The soundness of this law, however, was doubted by Lord Denman, C.J., in a subsequent case.(*b*) "I have great doubt," said that learned judge, "whether the interest which the wife had in the inquiry could justify the offering a reward in a newspaper."

Publication to vindicate character of writer.

A publication which has for its *bonâ fide* object the vindication of the character of the writer against charges brought against him is privileged.

Thus, where the plaintiff, a policy-holder in an insurance company, published a pamphlet accusing the directors of fraud, Cockburn, C.J., held privileged, if the jury should be of opinion that it was published without malice,(*c*) a pamphlet published in reply by the directors, declaring the charges contained in the plaintiff's pamphlet to be false and calumnious, and also asserting that in a suit he had instituted he had sworn, in support of those charges, in opposition to his own handwriting. On the question of privilege his Lordship thus directed the jury: "The law is that a publication is privileged which is called for either by the duty or the fair and honest interest of the party who has made it. And I am of opinion that the answer here was privileged, and that the publication was privileged. If you are of opinion that it was *bonâ fide* for the purpose of the defence of the company, and in order to prevent these charges from operating to their prejudice, and with a view to vindicate the character of the directors, and not with a view to injure or lower the character of the plaintiff—if you are of that opinion and think that the publication did not go beyond the occasion, then you ought to find for the defendants on the general issue."(*d*)

Publications not privileged.

The publication in a newspaper, by a voter at an election, of statements reflecting on the character of one of the candidates, is not privileged.(*e*) "However large the privilege of electors may be," said Lord Denman, C.J.,(*f*) "it is extravagant to suppose that it can justify the publication to all the world of facts injurious to a person who happens

(*a*) *Delany* v. *Jones* (4 Esp. 191).
(*b*) *Lay* v. *Lawson* (4 A. & E. 795).
(*c*) *Kœnig* v. *Ritchie* (3 F. & F. 413).
(*d*) *Ibid.* See also *Rex* v. *Veley* (4 F. & F. 1117).
(*e*) *Duncombe* v. *Daniell* (8 C. & P. 222). (*f*) *Ibid.* 229.

to stand in the situation of a candidate." The same would apply to defamation of his agent.(a)

Neither is a letter written to the Secretary of State by an inhabitant of a borough, imputing to a person holding the offices of town-clerk and clerk to the justices of the borough, corruption in the latter office;(b) nor a letter written to Lloyd's by an officer in the navy, imputing to a captain of a transport ship misconduct and incapacity in the management of it;(c) nor a letter written by an opposing creditor to a judge of the Bankruptcy Court, previous to the hearing of an insolvent's case;(d) nor a letter written to a newspaper by members of a town council, charging certain contractors for the erection of a borough gaol with misconduct in the performance of their contract;(e) nor an advertisement in a newspaper, addressed to the creditors of B. and Co., who had been declared bankrupts, and containing imputations on B. of fraudulent conduct, published by the solicitor who had acted under the commission of bankruptcy.(f)

Exaggerated language.

In cases where the occasion would render privileged a communication otherwise defamatory, the privilege may be lost by the use of language so exaggerated as to be clearly in excess of the occasion.(g)

Newspaper reports.

The character of the privilege accorded to fair and *bonâ fide* newspaper reports of judicial, parliamentary, and other proceedings, will be treated of in a subsequent chapter.(h)

Comments upon matters of public interest.

The nature of the protection afforded to the writers of fair comments on matters of public interest, will be considered in the next chapter.

(a) *Dickeson* v. *Villiard* (L. R. 9 Ex. 79).
(b) *Blagg* v. *Sturt* (10 Q. B. 899; 16 L. J. 39, Q. B.).
(c) *Harwood* v. *Green* (3 C. & P. 141).
(d) *Gould* v. *Hulme* (3 C. & P. 625).
(e) *Simpson* v. *Downs* (16 L. T. N. S. 391). But see *Harle* v. *Catherall* (14 L. T. N. S. 801).
(f) *Brown* v. *Croome* (2 Stark. N. P. 297).
(g) *Wright* v. *Woodgate* (2 Cro. M. & R. 573); *Cooke* v. *Wildes* (5 E. & B. 335); *per* Erle, J., *Fryer* v. *Kinnersley* (15 C. B. N. S. 422; 33 L. J. 96, C. P.); *Toogood* v. *Spyring* (1 Cro. M. & R. 194).
(h) See chapter ix., *post*.

CHAPTER VIII.

COMMENTS ON MATTERS OF PUBLIC INTEREST

Newspaper criticism on public men, and matters of public interest.

THE vast benefits which accrue to the community at large from the close and searching supervision exercised by the newspaper press over all matters of public or general interest, and its criticisms on the conduct of men occupying prominent positions, might seem to justify, in its case, 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. It might be thought that the duty which the public expects from a writer for the press, of watching and making generally known the acts of all 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, and of acting, in general, as a kind of censor of the morals of the time, would have given him immunity in all cases where he writes honestly and *bonâ fide* in the discharge of his public duty: and that actual malice alone should render an action against him sustainable. The newspaper writer, however, stands in this respect in no different position from any other member of the community, save so far as a jury may be inclined to deal more leniently with defamatory matter contained in his publications. The law with regard to him is the same as in the case of other men; he is no way privileged, in the strict sense of the word privileged.(*a*)

A much greater latitude, however, is allowed 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," says Alderson, B.,(*b*) "may reasonably be applied 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."

(*a*) The word "privileged" is, however, in a looser sense, frequently applied to such publications, especially in the reports of cases decided at Nisi Prius.

(*b*) *Parmiter* v. *Coupland* (6 M. & W. 108).

Limits of public criticism.

Every person has a right to discuss all matters of public interest, and to comment publicly and even hostilely upon, or to ridicule the acts of, public men; but there is a limit beyond which neither the newspaper writer nor anybody else may go: and that limit appears, from the cases decided on the subject, 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: he must not, in short, go beyond what a jury shall consider the limits of fair and honest, though it may be hostile or severe, or even, in some respects, inaccurate criticisms. If he does, even though he may *bonâ fide* believe in the truth of his imputations, the publication is a libel.

"There is a difference," says Parke, B.,(*a*) "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," says Cockburn, C.J.,(*b*) "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. And, so long as it is exercised fairly and honestly, it is protected or excused, even although it may incidentally involve the publication of defamatory matter. But at the same time 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."

Whether honest belief justifies defamatory publication.

An honest belief in the justice of the comments made is not sufficient of itself to justify a defamatory publication: for such belief might originate in the blindness of party zeal, or in personal or political aversion. A person taking upon himself publicly to criticise and to 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

(*a*) *Parmiter* v. *Coupland* (6 M. & W. 108).
(*b*) *Hedley* v. *Barlow* (4 F. & F. 230.

moderation, so that the result may be what a jury shall deem, under the circumstances of the case, a fair and legitimate criticism on the conduct and motives of the party who is the object of censure.(*a*)

In a case where a newspaper article imputed to the editor and part proprietor of another newspaper that 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 also 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.(*b*)

"It is said, on behalf of the defendant," said Cockburn, C.J., "that as the plaintiff addressed himself to the public in a matter, not only of public, but of universal, interest, his conduct in that matter was open to public criticism; and I entirely concur in that proposition. If the proposed scheme were defective, or utterly disproportionate to the result arrived at, it might be assailed with hostile criticism. But then a line must be drawn 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. . . . It is said that 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 it seems to me that 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 honour with a view to the welfare of the country, if we were to sanction attacks upon them, destructive of their honour and character, and made without any foundation. I think the fair position

(*a*) *Per* Cockburn, C.J., *Wason* v. *Walter* (L. Rep. 4 Q. B. 96; 19 L. T. N. S. 409; 38 L. J. 34, Q. B.).

(*b*) *Campbell* v. *Spottiswoode* (3 B. & S. 769; 8 L. T. N. S. 201; 32 L. J. 185, Q. B.).

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. But it is not because a public writer fancies that the conduct of a public man is open to the suspicion of dishonesty, he is therefore justified in assailing his character as dishonest." "I should be unwilling," said Mellor, J., "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 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."

The rule is much more loosely laid down in the directions given to juries at Nisi Prius by more than one judge, making the test of legal liability the honesty and *bona fides* of the writer, even in cases where his criticisms and inferences are erroneous. Thus Erle, C.J.: "The rule in these cases is that the comments are justified, provided the defendant *honestly* believes that they were fair and just; with that limitation the law allows the publication."(a) In another case,(b) Martin, B., told the jury that there was no limit except malice to comments upon a man who claimed a public office. And in a case(c) 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, Cockburn, C.J., thus directed the jury on the second ground of defence relied on by the defendant—viz., that the publication was justifiable as a fair comment on a matter of public interest:—"Under that head of defence 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 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 inten-

(a) *Turnbull* v. *Bird* (2 F. & F. 524). See the language of the same learned judge in *Paris* v. *Levy* (2 F. & F. 74, 75).
(b) *Hoyle* v. *Catherall* (14 L. T. N. S. 801).
(c) *Hunter* v. *Sharp* (4 F. & F. 1005).

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tion, 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(*a*) 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 authority of these *dicta*, so far as they place the test of freedom from liability in the mere *bona fides* and honest belief of the writer, must, however, be considered as outweighed by the deliberate decision of the Court of Queen's Bench, in *Campbell* v. *Spottiswoode*,(*b*) that the belief, however honest, of the writer, will not justify defamatory imputations which are erroneous in point of fact.

Privilege.

"The word 'privilege,'" said Blackburn, J., in the case last referred to,(*c*) "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 libellous in any one else. For instance, a master giving a character of a servant stands in a

(*a*) See further as to privilege, the observations of the same learned judge in *Davies* v. *Snead* (L. R. 5 Q. B. 608, 611), and the remarks of Jessel, M.R., Brett and Cotton, L.JJ., in *Waller* v. *Loch* (L. R. 7 Q. B. D. 621, 622).

(*b*) 3 B. & S. 769; 8 L. T. N. S. 201; 32 L. J. 185, Q. B.

(*c*) 3 B. & S. 780.

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,(a) and of a statement to a public functionary reflecting upon some public officer,(b) rank themselves under that class. In *Maitland* v. *Bramwell*(c) the *bona fides* of the defendant was left to the jury, because she was privileged by her position to say what she believed to be true. So in *Eastwood* v. *Holmes*(d) when properly understood, Willes, J., must have considered that there was a privilege of this kind when he nonsuited 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.(e) 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."

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 applied 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,

(a) *Harrison* v. *Bush* (5 E. & B. 344).
(b) *Beatson* v. *Skene* (5 H. & N. 838). (c) 2 F. & F. 623.
(d) 1 F. & F. 347.
(e) *Paris* v. *Levy* (9 C. B. N. S. 342; 30 L. J. 11, C. P.).

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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;(a) whereas the case of *Campbell* v. *Spottiswoode* has distinctly decided that neither the absence of actual malice nor the *bonâ 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 the malicious design of doing a personal injury.

Result of the cases.

Perhaps the result of the various *dicta* on this subject, taken along with the decision of the Court of Queen's Bench in *Campbell* v. *Spottiswoode*, might be expressed in the language of Pollock, C.B., in *Gathercole* v. *Miall*,(b)—that all *bonâ fide* and honest remarks upon persons occupying public positions may be freely made "without being questioned *too nicely* for either truth or justice."(c)

Or perhaps the rule might be laid down thus: that *bonâ 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;(d) whilst, on the other hand, as expressly decided in *Campbell* v. *Spottiswoode*,(e) unfounded imputations of base

(a) *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).

(b) 15 M. & W. 332.

(c) His lordship calls comment upon matters of a public nature "*licentious* comment, as opposed to a comment that must be based in truth."

(d) In *Morrison* v. *Belcher* (3 F. & F. 619), Cockburn, C.J., told the jury that "it was not because a public writer might not be able to prove to the letter all he had stated that therefore he was liable; but the jury must be of opinion that his observations and inferences were fair and legitimate under the circumstances, or that they were *not so unfair as to be reckless, and thus in law, malicious.*"

(e) Compare the language of Cockburn, C.J., at the end of the judgment in *Wason* v. *Walter* (L. Rep. 4 Q. B. 73; 19 L. T. N. S. 409).

and sordid motives are unjustifiable, however honestly their truth may be believed in by the writer who publishes them.

Matters of public interest.

Where a petition was presented to the House of Lords charging a high judicial officer with having been guilty of dishonourable 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 Queen's Bench that this was a matter of great public concern, on which a newspaper had a right to comment, and that its comments, though reflecting strongly on the person who presented the petition, were not actionable if they were honest and fair, and made with a reasonable degree of judgment and moderation.(*a*)

College or hospital.

The working of a public institution, such as a college or hospital, is a matter of public interest, which may freely be discussed by and through the medium of the press.(*b*)

An inspector sent by the Charity Commissioners to institute an inquiry into the working of a medical college at Birmingham, made a report to the commissioners of the results of his inquiry (which was an open and public one), 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. "We therefore," it proceeded, "feel it our duty to assist the council in the arduous labours they have undertaken, by laying before the public the materials necessary to the foundation of a sound judgment on the condition and prospects of the college. As we cannot do this well more completely or impartially than by publishing the report, we have obtained an official copy of it, and publish it in portions," &c. It was contended, on behalf of the plaintiff, that the publication of the report

(*a*) *Wason* v. *Walter* (L. Rep. 4 Q. B. 73; 19 L. T. N. S. 409).
(*b*) *Fox* v. *Feeney* (4 F. & F. 13).

nearly three years after it was made could not be for public information; that the matter had become stale, and that the publication of the report revived it wantonly; but Cockburn, C.J., left it to the jury to say whether (1) 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 plaintiff; and directed them, if they answered both these questions in the affirmative, to find a verdict for the defendant.

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—ay, 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 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."(a)

Parochial charity.

It has been 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 are by his sanction excluded, is not a matter of public interest, so as to justify, under the plea of not guilty,

(a) *Cox* v. *Feeney* (4 F. & F. 20, 21).

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the publication in a newspaper of defamatory matter respecting the clergyman in relation to the charity.(a)

"I think," said Pollock, C.B., "that a parochial charity, with the 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."

Unpublished sermons.

There was a difference of opinion amongst the learned judges who decided the last case, on the point (which it was not necessary to decide) whether sermons preached in a church, but not published, are the lawful subject of public comment; Alderson and Rolfe, B.B., leaning to the opinion that they are; Pollock, C.B., and Parke, B., inclining the other way.

Judicial sentences and decisions.

If a sentence is pronounced upon any person by a competent authority, a public writer may comment upon it, and assume it to be correct, at least if the matter be one of public interest and public observation.

"The person affected," said Cockburn, C.J., in a case of this sort,(b) "might have the sentence revoked, or he might have the verdict set aside, but the decision pronounced by

(a) *Gathercole* v. *Miall* (15 M. & W. 319).
(b) *Seymour* v. *Butterworth* (3 F. & F. 385).

competent authority must be taken to be the fact until the contrary appeared; and a public writer, who commented upon what was public property, ought not to be held responsible in an action, and bound to take upon himself the burthen of proof as to the whole of the matters upon which the decision rested, involving, as it probably would, an inquiry of great magnitude and great expense;" the question was not whether the sentence was properly pronounced, but whether the writer had gone beyond the limits of fair comment.

"The administration of justice," said the same learned judge in another case,(a) "is matter of universal interest to the whole public. The direction of the judge, the verdict of the jury, the decree of a Court of Equity, 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 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. But it is for the jury to say whether a given comment upon proceedings of a court of justice is a fair comment upon them, or the result of them, or not. . . . . On the one hand, let it not be supposed that the law imposes any 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."(b)

On this ground, the hearing of a case upon a charge of felony or a fair report of it in a newspaper is a proper subject for comment in the press; and a public writer would not be liable to an action for discussing the conduct of the magis-

(a) *Woodgate* v. *Ridout* (4 F. & F. 216). (b) *Ibid.* 223.

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trates in dismissing the charge without fully hearing the evidence, and even in commenting upon the evidence given, in support of the view that the charge ought not to have been dismissed. If, however, the writer goes further, and not only argues upon the effect of the evidence given, but speaks of "evidence which might have been adduced," and makes statements of matters of fact not in evidence, and tending to show that the accused was guilty of the felony, the publication is a libel.(a)

Evidence of witnesses.

Comments may be made in the press on the evidence given by a particular witness in any inquiry on a matter of public interest, even, it seems, to the extent of imputing that the evidence is unfounded, incautious, or careless; but an unfounded imputation that the evidence is "maliciously" or "recklessly" false would be libellous.(b)

Management of church.

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 a jury will consider justified by the occasion.(c) "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.,(d) "is surely a matter of the greatest public concern. The very use of the term 'public worship' shows this."

Advertised new medical cure.

So, it has been held, is the publication in a newspaper, by a medical practitioner, of an advertisement of a new mode of treating and curing consumption.(e) The alleged libel in this case was contained in a leading article, and represented the advertiser as a quack and impostor, and also—by reason of his describing himself as an M.D., on account of a diploma obtained in America—as like scoundrels who pass bad coin. The libel having been justified on the ground of its being true in substance and effect, the jury were told by Cockburn, C.J., "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 fairly, and with reasonable moderation and judgment."(f)

(a) *Hibbins* v. *Lee* (4 F. & F. 243).
(b) *Hedley* v. *Barlow* (4 F. & F. 224).
(c) *Kelly* v. *Tinling* (L. Rep. 1 Q. B. 699; 13 L. T. N. S. 255; 35 L. J. 231, Q. B.).
(d) *Ibid.*
(e) *Hunter* v. *Sharpe* (4 F. & F. 983).
(f) 4 F. & F. 1005.

Election meetings.

The conduct of persons present at a Parliamentary election meeting is a matter of public interest, though the conduct criticized is that of persons who did not attend it in any public capacity.(a)

Other matters of public interest.

A minute of the Admiralty prepared for presentation to Parliament, contained a letter addressed to the Admiralty by the Controller of the Navy, reflecting upon "the known antecedants" of the plaintiff in connection with the conversion of wooden ships into ironclads. This minute was by order of the Admiralty printed, by the Queen's Printer, and copies were sold before the meeting of Parliament. In an action against the Queen's Printer, the plaintiff was nonsuited on the ground that it was a fair criticism on a matter of public interest; and the Court (Willes, Byles and Brett, JJ., dissentiente Grove, J.) held that the nonsuit was right.(b)

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 by Willes, J., to be, in the absence of malice, protected by the privilege of fair discussion on a matter of public interest. His lordship held the action to be not maintainable on another ground also—viz., that the alleged libel reflected only on a class of persons dealing in such objects, and there was nothing to show that the article was inserted with any special reference to the plaintiff.(c)

It is, according to Cockburn, C.J.,(d) a perfectly fair subject for discussion by the press (in dealing with a 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 libellous. "Not only," says his Lordship, "was this a fair matter for discussion, and within the province of a public writer, but a public writer was fairly entitled, if in his opinion such a

(a) *Davis* v. *Duncan* (L. R. 9 C. P. 396).
(b) *Henwood* v. *Harrison* (L. R. 7 C. P. 606).
(c) *Eastwood* v. *Holmes* (1 F. & F. 347). See, as to the second ground of this ruling, *Le Fann* v. *Malcolmson* (1 H. L. Cas. 637).
(d) *Seymour* v. *Butterworth* (3 F. & F. 376, 377).

course of proceeding was detrimental to the independence of the bar, to the independence of Parliament, and to the independence of the representatives of the people, to animadvert with severity upon the conduct of those who gave and of those who received such patronage. But if he went beyond that, and asserted 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 became a most serious charge, and one which no man, writing, whether in public or private, should venture to make against another." "At the same time," added his Lordship, "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."

The plaintiff, a clergyman, having 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, the defendant published another article in his newspaper 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 for 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."(a)

The committee of a Reform Union published in a newspaper a report stating—"The first exposures of the union

(a) *Hibbs* v. *Wilkinson* (1 F. & F. 608).

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, Hill, J., 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 *bonâ 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 contents of what they put forth."(a)

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;" for which letter an action of libel was brought, Cockburn, C.J., 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," said his Lordship, "was mischievous, and calculated to delude the unwary and the credulous, it was, no doubt, fit subject for indignant denunciation. But it was another

(a) *Wilson* v. *Reed and Ors* (2 F. & F. 151, 152).

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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 state facts which were not true and were calculated to 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 the credit of it." His Lordship further told the jury that, 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."(a)

An action having been brought for an alleged libel contained in the following paragraph, published in a newspaper: "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 wilful murder against Hunt, who is committed to gaol.—Fudge"—the plaintiff contended that the word "fudge" was merely introduced with reference to the future, in order that the defendants might afterwards, if the paragraph were complained of, be able to refer to it, as showing that they intended to discredit the statement. Lord Lyndhurst, C.B., told the jury that the question was, with what motive the publication was made. It was not disputed 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.(b)

Criticisms on theatrical and musical performances.

The performances at theatres, and other such places of public entertainment, may be freely criticized by the press, under the same limitations as before stated with regard to other matters of public interest.

In an action for libel, brought by the proprietor of a place of public entertainment (where he sang 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 the plaintiff, that on the

(a) *Morrison* v. *Belcher* (3 F. & F. 614).
(b) *Hunt* v. *Algar* (6 C. & P. 247, 248).

first night of the performance there had been a very thin audience, and that 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 stated the law on this subject to be "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."(*a*)

Criticism on floral exhibition.

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 carcase," the Court at once held that such observations did not fall within the limits of fair criticism on G.'s floral exhibition.(*b*)

Reviews.

The published productions of authors are, of course, also matters of public interest, which the press may freely discuss and criticize. The only 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 criticized. *Bonâ fide* strictures, however unsparing their character—ridicule, however poignant—may be employed, provided the limits above mentioned be not exceeded; and, as it is difficult, if not impossible, always to separate the author from his work, criticisms and ridicule which affect him personally, but only in his character of author, and are not directed against his private life, are not libellous.

"Liberty of criticism," says Lord Ellenborough,(*c*) "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

(*a*) *Dibdin* v. *Swan* (1 Esp. 28).
(*b*) *Green* v. *Chapman* (4 Bing. N. C. 92).
(*c*) *Tabart* v. *Tipper* (1 Camp. N. P. 351).

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,(*a*) "who publishes a book commits himself to the judgment of the public, and anyone may comment upon his performance. If the commentator does not step aside from the work, or introduce fiction 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 everyone 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 injuriâ.* 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 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."(*b*) 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 libellous.

In language of like import, Lord Tenterden, C.J., directed a jury, on the trial of an action for an alleged libel published in the *Lancet*, relating to the plaintiff as the editor of another medical journal:(*c*) "Whatever is fair and can

(*a*) *Carr* v. *Hood* (1 Camp. N. P. 358).
(*b*) 1 Camp. N. P. 357.
(*c*) *Macleod* v. *Wakley* (3 C. & P. 313).

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 rancour; still, if you 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 you think the remarks were not fairly called for, you will find for the plaintiff."

Where the alleged libel was contained in a critique (published 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, Cockburn, C.J., directed the jury thus as to the critique: "That it was severe there could not be a doubt; but 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 libellous. 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. It was all very well for the plaintiff's counsel to contend that literature should be free and unfettered. Be it so. But then, if you give on the one hand the utmost latitude to literary composition, there ought to be at least the same latitude to literary criticism. Those who, in their capacity as literary critics, are, so to speak, prosecutors on behalf of the public, should be allowed to bring to the bar of public opinion those who are guilty of

delinquencies against good taste, against morality, or against religion. The critic who sits in judgment upon the works of others, is, no doubt, bound to be impartial; but, on the other hand, he cannot pretend to be infallible; and, even although you should be of opinion that the work did not wholly deserve the description given of it, still that is not the question. The plaintiff's counsel, in his reply, adroitly endeavoured to show that there were parts of the critique which were not sustained. But the question is whether, as a whole, it was fair, or prompted by motives of another character; and you must say whether, on the whole, you think this was a fair or a malicious piece of criticism."(a)

The defendants in the case last referred to, 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, Cockburn, C.J., said to the jury: "It was urged by the plaintiff's counsel, truly enough, that, in criticising a man's work, it is not proper to allude to his private circumstances. But in this instance the object was to explain how the defendants came to consent to waive a verdict, and to show that they had substantially attained the same result; because, if they had got a verdict, in all probability they would not have obtained their costs. If you think 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; but if it was adverted to merely in order to explain and vindicate the course taken by the defendants, then you would probably think that it was not unfairly introduced."(b)

The plaintiff (Sir John Carr) in the case before Lord Ellenborough, 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,

(a) *Strauss* v. *Francis* (4 F. & F. 1113).

(b) 4 F. & F. 1116. The jury returned a verdict for the defendant.

and also containing therein a certain false, malicious, and ridiculous representation of a man of ludicrous 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 injuriâ*. 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 sustained an action for defamation against that great philosopher, who was labouring 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 travelled 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.(a)

(a) The jury returned a verdict for the defendants. This case is constantly referred to in later cases as a leading authority on the subject. The only subsequent reference not entirely approving of it is

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False imputation of authorship.

Criticisms on advertisements, circulars, &c.

Falsely to impute to a person the publication of any immoral or absurd literary production, would be libellous.(a)

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.

"I can see no distinction," said Byles, J.,(b) "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."

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 stigmatised 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 the 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-jamb 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 legitimate and allowed perquisites run short, to make perquisites for themselves. How many

by Best, C.J. (in *Thompson* v. *Shackell*, 1 M. & Mal. 188), who says, "I have myself acted on the doctrine of my Lord Ellenborough, in the case referred to, though I do not go quite so far as he did in that case, because I think no personal ridicule of the author is justifiable."

(a) *Tabart* v. *Tipper* (1 Camp. N. P. 350).

(b) *Paris* v. *Levy* (9 C. B. N. S. 362; 3 L. T. N. S. 324; 30 L. J. 11, C. P.). See also *Hunter* v. *Sharpe* (*ante*, p. 522).

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 mistress's 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, Erle, 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 pretence of justification.(a) 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.(b) "The real question was," said Byles, J., "did the remarks exceed the fair licence of criticism, and degenerate into reflections upon the private character of the plaintiff." "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."

Books privately circulated.

It has been doubted (by Pollock, C.B.) whether the rules which have been laid down, in the decided cases, as to criticisms on published works (which invite criticism) would

(a) Cf. the language of Lord Abinger, C.B., in *Fraser* v. *Berkeley* (7 C. & P. 625): "If a critic, in criticising a book, goes out of his way, and attacks the private character of the author, this cannot be justified, and the author may recover damages."

(b) *Paris* v. *Levy* (*ubi supra*).

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apply to works not published but only circulated among friends.(*a*)

Pictures.

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, 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.(*b*) "If this be really an honest criticism and no more," said Best, C.J., to the jury, "the defendant is entitled to your verdict. If he has exceeded the limits of fair and honest criticism, then you will find for the plaintiff."

Architecture.

And where an architect and professor of architecture in the Royal Academy brought an action for an alleged libel upon him, in the way of his profession, contained in a publication which professed to give an account of the principles of a new order of architecture, called the Bœotian order of architecture, 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 unfavourable 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 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."(*c*)

(*a*) *Gathercole* v. *Miall* (15 M. & W. 334).
(*b*) *Thompson* v. *Shackell* (4 M. & Mal. 187).
(*c*) *Soane* v. *Knight* (1 M. & Mal. 75).