A DIGEST

OF THE LAW OF

LIBEL AND SLANDER;

WITH

THE EVIDENCE, PROCEDURE, AND PRACTICE,

BOTH IN

CIVIL AND CRIMINAL CASES,

AND

PRECEDENTS OF PLEADINGS.

BY

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"DEAD SCANDALS FORM GOOD SUBJECTS FOR DISSECTION."—BYRON.

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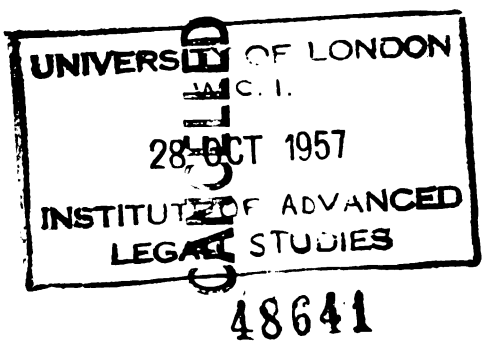

TO

ARTHUR CHARLES, Esq., Q.C.,

RECORDER OF BATH,

IN ACKNOWLEDGMENT OF MANY KINDNESSES,

I Dedicate this Book.

PREFACE.

THIS book has been called "A Digest of the Law of Libel and Slander," because an attempt has been made to state the law on each point in the form of an abstract proposition, citing the decided cases in smaller type merely as illustrations of that abstract proposition.

Every reported case decided in England or Ireland during the last fifteen years has been noticed. Every case reported in England during this century has, I believe, been considered and mentioned, unless it has either been distinctly overruled or has become obsolete by a change in the practice of the Courts or by the repeal of some statute on which it depended. The earlier cases have been more sparingly cited, but I think no case of importance since 1558 has been overlooked. The leading American decisions have also been referred to, and whenever the American law differs from our own, the distinction has been pointed out and explained. Canadian and Australian decisions have also been quoted, whenever the English law was doubtful or silent on the point. The cases have been brought down to the early part of January, 1881.

It would be of but little use to place all these decisions before the reader and leave him to draw his own conclusions. A huge collection of reported cases piled one on the top of the other is not a legal treatise, any more than a tumbled pile of bricks is a house. I have throughout attempted to strike a balance, as it were, and state the net result of the authorities. But this is a process requiring the greatest care and much expenditure of time. When I commenced this book in 1876, I

did not at all realize the amount of labour which was requisite in order to ascertain the law and state it clearly in an abstract form.

It is often very difficult to determine whether or no a decision has ceased to be a binding authority: our judges in the present day seldom expressly overrule a previous decision; they comment on it, distinguish it, explain it away, and then leave it with its lustre tarnished, but still apparently a binding authority should identically the same facts recur. There is no rule which decides how long the process of "blowing upon" a case must continue before it may be considered overruled. Whenever such a case has been cited, I have always referred the reader to the places where it has been criticized, adding however my own opinion as to the effect of such criticism on the authority of the case. And in many places it has been necessary to review the cases in a note, showing how they bear one on another, and justifying the view which I have taken of their result. Such notes are printed in a medium type, smaller than that devoted to the abstract propositions of the Digest, larger than the Illustrations which follow them.

In thus ascertaining the principles underlying the various decisions, no assistance whatever has been derived from any previous book on the Law of Libel and Slander. No such book has been written on the same plan. For all conclusions of law herein stated, I am, of course, solely responsible.

My object throughout has been to save the reader trouble. All the references to every decision have always been cited. All considerations of style, &c., have been sacrificed to clearness and convenience. I have abruptly changed from the third to the first or second person, whenever there was any possibility of mistaking the antecedent of any pronoun. It is sometimes difficult to follow A., B., and C., through a long sentence: it is easier to distinguish between "I," "you," and "he." Again, whenever I have been in doubt whether the law on a particular subject should be noticed in one chapter or in another, I have

invariably stated it in both. Thus, nearly the whole of the chapter on Malice will be found scattered up and down the long chapter on Privilege. So, too, for the sake of practical convenience, all the cases as to the Innuendo and the construction to be put on Defamatory Words, have been collected in Chapter III. In Chapter XII. all the law as to Husband and Wife, Principal and Agent, &c., &c., has been gathered together under the somewhat stilted but convenient title of The Law of Persons. A separate chapter has been devoted to the subject of Costs. In the chapters on Blasphemous and Seditious Words, I have not hesitated to express freely my conviction that many of the early decisions would not be followed in the present day.

One difficulty connected with the subject-matter of the book I have endeavoured to avoid, by restoring the word "malice" to its simple and ordinary meaning. The distinction between "malice in law" and "malice in fact" is of comparatively recent origin. "Malice in law" is the vaguest possible phrase; it merely denotes "absence of legal excuse." The plaintiff is never called on to prove the existence of "malice in law;" the defendant has to show the existence of some legal excuse. In short, to say that a libel must be published "maliciously," means merely that it must be published "on an unprivileged occasion." I have therefore abandoned this technical and fictitious use of the word. Throughout this book (to use the words of Brett, L.J., in *Clark* v. *Molyneux*, see p. 266) "'Malice' does not mean 'malice in law,' a term in pleading, but actual malice, that which is popularly called malice."

The second part of the book is devoted to Practice, Procedure, and Evidence. I have fought both a civil action and a criminal trial through from beginning to end, giving practical hints to each side. Chapter X. is in short a manual of the practice in an action of tort under the Judicature Act. I have taken up the subject at an earlier point than is usual in law books, and have submitted to the plaintiff certain matters which he should carefully consider before he issues his writ (p. 449).

In the Appendix will be found a full collection of Precedents of Pleadings, both in Civil and Criminal cases. Some are drawn from the reports; others are hypothetical cases of my own invention; but the majority are pleadings in actions in which friends of mine, or I myself, have been professionally engaged.

In June, 1880, appeared the Report of the Select Committee of the House of Commons appointed to inquire into the Law of Newspaper Libel. I have ventured to deal *seriatim* with the three recommendations contained in this Report, and to express my opinion thereon (pp. 261, 391, 531). A copy of the Report will be found in Appendix B. (p. 662).

In conclusion, I have to acknowledge my great obligation to my learned friend, Mr. Wurtzburg, of Lincoln's Inn, who has kindly revised the proofs of this book, added all the references to the various reports, and prepared the elaborate Table of Cases at the commencement of the volume.

W. BLAKE ODGERS.

5, HARE COURT, TEMPLE, E.C.
February, 1881.

TABLE OF CONTENTS.

PAGE

TABLE OF CASES . . . . . xix—lxvi

TABLE OF STATUTES CITED . . . . . lxvii—lxix

TABLE OF RULES AND ORDERS CITED . . . . lxx—lxxii

PART I.

A DIGEST OF THE LAW OF LIBEL AND SLANDER.

CHAPTER I.

INTRODUCTORY . . . . . 1—16

Definitions 1

Distinction between Libel and Slander 3

Motive Immaterial, save on the Question of Damages . . . 5

Acts injurious to Reputation 8

"Liberty of the Press" defined 10

History of the Censorship of the Press . . . . . *ib.*

Injunction to Restrain a Libel will not be granted 13

CHAPTER II.

DEFAMATORY WORDS . . . . . 17—92

Definitions 17

Injury to the Reputation the gist of the Action 18

PART I.—LIBEL.

Libel defined 21

Libels on Persons in Office 27

Libels on Professional Men 29

Libels on Traders 30

Libels on Traders' goods 32

PAGE
Fair and *bonâ fide* Comment on Matters of Public Interest . . . 34
Criticism defined and distinguished from Defamation . . . 36
Malicious and Unfair Attacks 38
What are Matters of Public Interest 41
Affairs of State 42
Administration of Justice 44
Public Institutions and Local Authorities 46
Ecclesiastical Affairs 47
Books, Pictures, &c. 48
Theatres, Concerts and other Public Entertainments 49
Other Appeals to the Public 50

PART II.—SLANDER.

I. Words imputing an Indictable Offence 54
Early Cases on this Subject 58
The Charge must be Specific and Precise 60
The Crime imputed must be possible 61
II. Words imputing a Contagious Disease 62
III. Words spoken of the Plaintiff in the way of his Office, Profession or Trade 64
Such Words must affect him in such Office, Profession or Trade . 65
Imputation of Professional Ignorance or Unskilfulness . . 67
Plaintiff must be carrying on such Trade, &c. at the time he is Defamed 69
Words imputing Want of Integrity to any one holding an Office of Trust 70
Words concerning Clergymen 72
Words concerning Barristers, Solicitors, &c. 74
Words concerning Physicians and Surgeons 75
Words affecting Traders in the way of their Trade 77
Imputations of Insolvency 78
Imputations of Dishonesty and Fraud in the Conduct of their Trade 79
IV. Words Actionable only by reason of Special Damage . . . 82
Words imputing Immorality 83
Words imputing Unchastity 84
Unsatisfactory State of the Law on this point 86
All Words causing Special Damage are Actionable . . . 87

CHAPTER III.

CONSTRUCTION AND CERTAINTY . . . . . 93—132
What Meaning the Speaker *intended* to convey is immaterial . . 93
Libel or no Libel is a question for the Jury 94
Duty of the Judge 94
Words not to be construed *in mitiori sensu* 95
Jury to consider the Words as a whole 98
When Evidence may be given of other Defamatory Publications by Defendant of Plaintiff 99

PAGE
Of the Innuendo 100
The Words must be set out *verbatim* in the Statement of Claim . 101
1. Words clearly Defamatory 105
2. Words *primâ facie* Defamatory 107
3. Neutral Words 109
4. Words *primâ facie* Innocent 112
5. Words clearly Innocent 116
Certainty. Early Technicalities 118
Certainty of the Imputation 120
Criminal Charges 121
Indirect Imputations 125
Certainty as to Person Defamed 127

CHAPTER IV.

SCANDALUM MAGNATUM . . . . . 133—136
Statutes 133
What Words are included therein 135

CHAPTER V.

SLANDER OF TITLE, OR WORDS CONCERNING THINGS . 137—149
Definition 137
I. Slander of Title proper 138
Actionable, if words *false* and *malicious*, and if *special damage* be proved . . . . . *ib.*
Proof of Malice 142
II. Slander of Goods Manufactured or Sold by another . . . 145
Other Words producing Special Damage 148

CHAPTER VI.

PUBLICATION . . . . . 150—168
Definition of 150
Plaintiff must Prove a Publication by the Defendant *in fact* . . 153
Publication *per alium* 155
Publication in a Newspaper 157
Repetition of a Slander 161
Naming your Authority now no Defence 162
Rule that every one Repeating a Slander becomes an Independent Slanderer 166
Exceptions to this Rule 167

CHAPTER VII.

PAGE
JUSTIFICATION . . . . . 169—181
Onus of Proving Words true is on the Defendant 169
The whole Libel must be Proved true . . . . . *ib.*
The Rule applies to all Reported Speeches or Repetitions of Slander 173
Justification must be Specially Pleaded 177
Justification in a Criminal Case 178
Roman Law as to Truth of Libel 180

CHAPTER VIII.

PRIVILEGED OCCASIONS . . . . . 182—263
Defence that Words were spoken on a Privileged Occasion . . . 182
Occasions Absolutely Privileged 183
Occasions in which the Privilege is Qualified . . . . . *ib.*
The Judge to Decide whether Occasion is Privileged or not . . 185

PART I.

OCCASIONS ABSOLUTELY PRIVILEGED . . . . . 185—196
(i) Parliamentary Proceedings 186
(ii) Judicial Proceedings 188
Words Spoken by a Judge . . . . . *ib.*
Words Spoken by Counsel 190
Words Spoken by a Witness 191
(iii) Naval and Military Affairs 194

PART II.

QUALIFIED PRIVILEGE . . . . . 196—263
Cases of Qualified Privilege classified 196
I. WHERE CIRCUMSTANCES CAST UPON THE DEFENDANT THE DUTY OF MAKING A COMMUNICATION.
A. *Communications made in pursuance of a Duty owed to Society* . 198
Duty may be Moral or Social . . . . . *ib.*
(i) Characters of Servants 200
(ii) Other Confidential Communications of a Private Nature.
(*a*) Answers to Confidential Inquiries 203
(*b*) Confidential Communications not in answer to a previous Inquiry 207
(*c*) Communications made in discharge of a duty arising from a Confidential Relationship existing between the parties 209
(*d*) Information volunteered when there is no Confidential Relationship existing between the Parties 213
Difficulty of the Question 215

PAGE

(iii) Information given to any Public Officer imputing Crime or Misconduct to others 220
Such Officer must have some Jurisdiction to entertain Complaint 223

B. *Communications made in Self-Defence.*

(iv) Statements necessary to protect Defendant's private Interests 225
(v) Statements provoked by a previous attack by Plaintiff on Defendant 228
Statements invited by the Plaintiff 230

II. WHERE THE DEFENDANT HAS AN INTEREST IN THE SUBJECT-MATTER OF THE COMMUNICATION, AND THE PERSON TO WHOM THE COMMUNICATION IS MADE, HAS A CORRESPONDING INTEREST 233
Where a large Body of Persons are interested 237
If Strangers present, the Privilege will be lost 239

III. PRIVILEGED REPORTS.

(i) Reports of Judicial Proceedings 243
Matters *coram non judice* 244
Reports not privileged 249
Reports must be accurate 250
No Comments should be interpolated 254
An accurate Report may still be malicious 256
(ii) Reports of Parliamentary Proceedings 257
(iii) Other Reports 259
Suggestion of the Select Committee of the House of Commons 261

CHAPTER IX.

MALICE . . . . . 264—288
Intention of Defendant as a rule immaterial 264
Material when the Occasion is one of Qualified Privilege . . . 266
Onus of proving Malice lies on the Plaintiff 269
I. Extrinsic Evidence of Malice 271
Former publications by Defendant of Plaintiff 272
That the Words are false is alone no evidence of Malice . . . 274
II. Evidence of Malice derived from the Mode and Extent of Publication, the Terms employed, &c. 277
(i) Where the Expressions employed are exaggerated and unwarrantable; but there is no other Evidence of Malice 279
(ii) Where the Mode and Extent of Publication is Excessive 282
Communications volunteered 286

CHAPTER X.

PAGE
DAMAGES . . . . . 289—333
General and Special Damage Defined and Distinguished . . . 289
I. *General Damages* 291
General Loss of Custom 293
II. *Evidence for the Plaintiff in Aggravation of Damages.*
(i) Malice 296
(ii) Extent of Publication 298
(iii) Plaintiff's Good Character . . . . . *ib.*
III. *Evidence for the Defendant in Mitigation of Damages.*
(i) Apology and Amends 299
(ii) Absence of Malice 301
Conflicting Cases on this Point 303
(iii) Evidence of the Plaintiff's Bad Character . . . 304
(iv) Plaintiff's previous Conduct in provoking the Publication 306
(v) Absence of Special Damage 308
IV. *Special Damage where the words are not actionable* per se . . *ib.*
What constitutes Special Damage 309
Special Damage must be specially pleaded 313
Special Damage subsequently arising 317
V. *Special Damage where the words are actionable* per se . . . 318
VI. *Remoteness of Damages* 321
Damage resulting to the Husband of the Female Plaintiff . . 323
Damage caused by the act of a Third Party 325
Not essential that such Third Person should believe the Charge . 327
Wrongful and Spontaneous Act of a Third Person 328
Originator of a Slander not liable for Damage caused by its repetition 329
Exceptions to this Rule 331

CHAPTER XI.

COSTS . . . . . 334—343
Costs now follow the Event 334
All early Statutes as to Costs repealed by Judicature Act . . . 335
Application to deprive successful Plaintiff of Costs 336
Costs of New Trial 338
Apportionment of Costs of Issues . . . . . *ib.*
Costs after Payment in Court 340
Costs of Counterclaim 341
Costs in Criminal Proceedings 343

CHAPTER XII.

THE LAW OF PERSONS IN BOTH CIVIL AND CRIMINAL CASES 344—372
1. Husband and Wife 345
Claim by Husband for Words defamatory of Wife. 347
Married Woman Defendant 350
Criminal Liability of a Married Woman 351

PAGE
2. Infants 352
3. Lunatics 353
4. Bankrupts 354
5. Receivers 355
6. Executors and Administrators . . . . . *ib.*
7. Aliens 356
8. Master and Servant—Principal and Agent 358
Master's Commands no Defence 359
Principal liable for Words spoken by his Authority 360
Ratification 361
Criminal Liability of Master or Principal 362
9. Partners 365
10. Corporations and Companies 367
11. Other Joint Plaintiffs 369
12. Joint Defendants 370

CHAPTER XIII.

CRIMINAL LAW . . . . . 373—393
Illegality of Contracts as to Libellous Matter 374
I. Criminal Remedy by Indictment 375
Special Intent, when necessary 376
Punishment at Common Law 378
Statutes 397
II. Criminal Remedy by Information 380
Libels on Foreign Ambassadors, &c. 383
III. Law Common to all Criminal Cases . . . . . *ib.*
Publication of a Libel by one unconscious of its Contents . . 384
Criminal Liability of an Employer 385
Justification not permitted at Common Law 388
Justification under Lord Campbell's Act 389
Considerations as to Criminal Proceedings for Libel 390
Suggestion of the Select Committee of the House of Commons . . . 391

CHAPTER XIV.

BLASPHEMOUS WORDS . . . . . 394—403
Blasphemous Words defined 394
Intent to bring Religion into Contempt 395
Honest Advocacy of Heretical Opinions 396
Justification not allowed 398
Statutory Provisions 400
Jurisdiction of Ecclesiastical Courts 402

CHAPTER XV.

OBSCENE WORDS . . . . . 404—408
Test of Obscenity 404
Summary Proceedings under 20 & 21 Vict. c. 83 405

CHAPTER XVI.

PAGE
SEDITIOUS WORDS . . . . . 409—448
Seditious Words defined 409
Treasonable Words 410
Words Defamatory of the Sovereign himself 413
Truth no Defence 414
Words Defamatory of the King's Ministers 415
Words tending to Subvert the Government 418
Words Defamatory of the Constitution 419
Latitude allowed to Political Writers 420
Words inciting to Disaffection and Riot 421
Words Defamatory of either House of Parliament 422
Commitment for Contempt 423
Colonial Legislative Bodies 425
Words Defamatory of the Superior Courts of Justice 426
Contempt of Court 428
Wilful Disobedience to an Order of Court 431
Attachment and Committal 433
Colonial Courts of Justice 438
Words Defamatory of Inferior Courts of Justice 440
Contempt of an Inferior Court of Record 442
Sureties for Good Behaviour 444
Statutory Powers of Inferior Courts 445
Ecclesiastical Courts 448

PART II.

PRACTICE, PROCEDURE, AND EVIDENCE.

CHAPTER XVII.

PRACTICE AND EVIDENCE IN CIVIL CASES . . . . 449—570
Considerations before Writ 449
Parties 452
Letter before Action; Notice of Action 453
Choice of Court . . . . . *ib.*
District Registry 454
Statute of Limitations 455, 490
Former Proceedings 456
Joinder of Causes of Action 458
Endorsement on Writ 459
Service of the Writ 460
Appearance 462
Judgment by Default 463
Matters to be considered by the Defendant 465
Security for Costs 466
Remitting the Action to the County Court 468

PAGE
Statement of Claim 469
Venue 474
Instructions for Statement of Defence 475
Demurrer . . . . . *ib.*
Particulars 479
Statement of Defence 480
Traverses 481
Bonâ fide Comment. No Libel 483
Privilege 484
Justification 485
Apology 487
Accord and Satisfaction 489
Previous Action 490
Other Defences . . . . . *ib.*
Payment into Court 491
Counterclaims 494
Judgment in Default of Pleading 495
Reply 496
Rejoinder 498
Amendment of Pleadings . . . . . *ib.*
Default in Pleading 500
Interrogatories . . . . . *ib.*
Striking out Interrogatories 509
Answers to Interrogatories 511
Further and Better Answers 515
Discovery of Documents . . . . . *ib.*
Further and Better Affidavit 519
Inspection of Documents 520
Default in making Discovery 522
Notice of Trial. Entry for Trial . . . . . *ib.*
Advice on Evidence 524
Examination of Witnesses before Trial 526
Special Jury 528
Change of Venue . . . . . *ib.*
Trial 529
Proof of the Plaintiff's Special Character 530
Proof of Publication 531
Proof of the Libel 535
Proof of the Speaking of the Slander 537
Evidence as to the Innuendo 538
Proof that the Words refer to the Plaintiff 540
Proof that the Words were spoken of the Plaintiff in the way of his Office, Profession, or Trade 541
Evidence of Malice . . . . . *ib.*
Evidence of Damage 542
Nonsuit 543
Evidence for the Defendant 545
Withdrawing a Juror 550
Summing-up . . . . . *ib.*
Verdict 551
Judgment 552

PAGE
Costs 553
Proceedings after Judgment 554
Application for a New Trial 556
Proceedings in the Court of Appeal 561
County Court Proceedings 565
Other Inferior Courts 569

CHAPTER XVIII.

PRACTICE AND EVIDENCE IN CRIMINAL CASES . . 571—596

PART I.

PRACTICE AND EVIDENCE IN CRIMINAL PROCEEDINGS BY WAY OF INDICTMENT . . . . . 571—591
Proceedings before Magistrates 571
Indictment 574
Pleading to the Indictment 576
Certiorari 578
Evidence for the Prosecution 580
Evidence for the Defence 582
Summing-up and Verdict 585
Proceedings after Verdict . . . . . *ib.*
Sentence 589
Costs 590

PART II.

PRACTICE AND EVIDENCE IN PROCEEDINGS BY WAY OF CRIMINAL INFORMATION . . . . . 591—596
Motion for the Rule 591
Argument of the Rule 593
Compromise 594
Trial and Costs 595

APPENDICES.

A. APPENDIX OF PRECEDENTS OF PLEADINGS, ETC. . 596—661
Contents 596
I. Precedents of Pleadings in Actions for Libel 600
II. Precedents of Pleadings in Actions of Slander 621
III. Precedents of Pleadings in Actions of Slander of Title . . . 634
IV. Forms of Pleadings, Notices, &c., in the County Court . . 644
V. Precedents of Criminal Pleadings 649
B. REPORT FROM THE SELECT COMMITTEE OF THE HOUSE OF COMMONS ON THE LAW OF LIBEL 662
C. APPENDIX OF STATUTES . . . . . 664—683
Contents 664

GENERAL INDEX . . . . . 685—748

TABLE OF CASES.

Abu—Ann. PAGE

—— *v.* Moor, 1 M. & S. 284 305
Abud *v.* Riches, 2 Ch. D. 528 ; 45 L. J. Ch. 649 ; 24 W. R. 637 ; 34 L. T. 713 434
Adams *v.* Kelly, Ry. & Moo. 157 . . . . 155, 333, 533, 535, 538
—— *v.* Meredew, 2 Y. & J. 417 ; 3 Y. & J. 219 104
—— *v.* Rivers, 11 Barbour (N. Y.) Rep. 390 83
Adlam *v.* Colthurst, L. R. 2 Adm. & Eccl. 30 ; 36 L. J. Ec. Ca. 14 433, 447
Aish *v.* Gerish, 1 Roll. Abr. 81 131
Aldrich *v.* Press Printing Co., 9 Min. 133 368
Alexander *v.* Angle, 4 M. & P. 870 ; S. C. *sub nom.* Angle *v.* Alexander, 7 Bing. 119 ; 1 Tyr. 9 ; 1 C. & J. 143 . 66, 78, 103, 120, 295
—— *v.* North Eastern Ry. Co., 6 B. & S. 340 ; 34 L. J. Q. B. 152 ; 11 Jur. N. S. 619 ; 13 W. R. 651 . . . . 170, 173, 253, 368, 497, 498, 549
Alfred *v.* Farlow, 8 Q. B. 854 ; 15 L. J. Q. B. 258 ; 10 Jur. 714 . . 56, 60, 123
Allardice *v.* Robertson, 1 Dow N. S. 514 ; 1 Dow & Clark, 495 ; 6 Sh. & Dun. 242 ; 7 Sh. & Dun. 691 ; 4 Wils. & Sh. App. Cas. 102 190
Allen *v.* Eaton, 1 Roll. Abr. 54 76
Alleston *v.* Moor, Hetl. 167 . . . . . 71, 75
Allhusen *v.* Labouchere, (C. A.) 3 Q. B. D. 654 ; 47 L. J. Ch. 819 ; 48 L. J. Q. B. 34 ; 27 W. R. 12 ; 39 L. T. 207 . . . 505, 510, 511
Allsop & wife *v.* Allsop, 5 H. & N. 534 ; 29 L. J. Ex. 315 ; 6 Jur. N. S. 433 ; 8 W. R. 449 ; 36 L. T. Old S. 290 86, 312, 323, 325, 349
Amann *v.* Damm, 8 C. B. N. S. 597 ; 29 L. J. C. P. 313 ; 7 Jur. N. S. 47 ; 8 W. R. 470 . . . . . 217, 218, 220, 225, 475
Anderson *v.* Bank of British Columbia, (C. A.) 2 Ch. D. 644 ; 45 L. J. Ch. 449 ; 24 W. R. 724 ; 35 L. T. 76 . . . 516, 517
—— *v.* Dunn, 6 Wheat. 204 424
—— *v.* Hamilton, 2 Brod. & B. 156, n. 536
Andres *v.* Wells, 7 Johns. (N. York) 260 362
Andrews, *Ex parte, In re* Fells, 4 Ch. D. 509 ; 46 L. J. Bkcy. 23 ; 25 W. R. 382 ; 36 L. T. 38 431
—— *v.* Chapman, 3 C. & K. 286 . . . . . 251, 255
Angle *v.* Alexander, 7 Bing. 119 ; 1 Tyrw. 9 ; 1 C. & J. 143 ; 4 M. & P. 870 . . . . . 66, 78, 103, 120, 295
Annison *v.* Blofield, Carter, 214 ; 1 Roll. Abr. 55 . . . . 75, 111

PAGE
Anon., 2 Barnard. 138. See R. v. Osborn 381
—— 11 Mod. 99 . . . . . 22, 24, 104
—— 1 Roll. Abr. 82 102
—— 1 Roll. 746 96
—— Cro. Eliz. 643 56
—— 3 Leon. 231 ; 1 Roll. Abr. 65 . . . . . 60, 122
—— Holt, 652 126
—— 1 Roll. Abr. 37 139
—— 1 Roll. Abr. 81 130
—— 60 N. Y. 262 328
—— (1596) Moo. 459 472
—— (1638) Cro. Jac. 516 74
—— (1650) Style, 251 441
—— (1696) 2 Salk. 644 558
—— Style, 392 . . . . . 472, 575
—— (*per* Lush, J.) 1 Charley, 100 ; Bitt. 4 ; 20 Sol. J. 32 ; 60 L. T. Notes, 32 501
—— (*per* Lush, J.) 1 Charley, 109 ; Bitt. 24 ; 60 L. T. Notes, 66 . 519
—— (*per* Quain, J.) 1 Charley, 119 ; Bitt. 53 ; 60 L. T. Notes, 103 . 528
Anstey v. N. & S. Woolwich Subway Co., 11 Ch. D. 439 ; 48 L. J. Ch. 776 ; 27 W. R. 575 ; 40 L. T. 393 515
Anthony v. Halstead, 37 L. T. 433 557
Appleby v. Waring, 15 L. J. Notes of Cases, 1880, p. 125 520
Archbold v. Sweet, 1 Moo. & Rob. 162 ; 5 C. & P. 219 29
Armitage v. Dunster, 4 Dougl. 291 537
—— v. Fitzwilliam and others, W. N. 1876, p. 56 ; Bitt. 126 ; 20 Sol. J. 281 ; 60 L. T. Notes, 251 503
Armstrong v. Lewis, 2 Cr. & M. 274 551
Arne v. Johnson, 10 Mod. 111 . . . . . 65, 79, 115
Arnold v. Clifford, 2 Sumner, 238 374
Ashley v. Harrison, Peake, 256 ; 1 Esp. 48 . . . 293, 314, 319, 322
—— v. Taylor, 37 L. T. 522 ; (C. A.) 38 L. T. 44 506
Ashworth v. Outram, 9 Ch. D. 483 ; 27 W. R. 98 ; 39 L. T. 441 337, 565
Asquith v. Molineux, 49 L. J. Q. B. 800 ; W. N. 1880, p. 156 . . 524
Astley (Sir John) v. Younge, 2 Burr. 807 ; 2 Ld. Ken. 536 . 192, 193
Aston v. Blagrave, 1 Str. 617 ; 8 Mod. 270 ; Fort. 206 ; 2 Lord Raym. 1369 . . . . . 69, 71
Atherley v. Harvey, 2 Q. B. D. 524 ; 46 L. J. Q. B. 518 ; 25 W. R. 727 ; 36 L. T. 551 505
Atkins v. Perrin, 3 F. & F. 179 144
Atkinson v. Fosbroke, L. R. 1 Q. B. 628 ; 35 L. J. Q. B. 182 ; 12 Jur. N. S. 810 ; 14 W. R. 832 ; 14 L. T. 553 . . . . . 470, 503
Atthill v. Soman, 15 L. T. 36 295
Attorney-General v. Le Merchant, 2 T. R. 201 n. 581
—— v. Siddon, 1 Cr. & Jer. 220 364
—— of New South Wales v. Macpherson, L. R. 3 P. C. 268 ; 7 Moo. P. C. (N. S.) 49 ; 39 L. J. P. C. 59 425
Augustinus v. Nerinckx, (C. A.) 16 Ch. D. 13 ; 43 L. T. 458 . . 506
Austin (Sir J.) v. Culpepper, 2 Show. 313 ; Skin. 123 . . . . . 8, 22
Axmann v. Lund, L. R. 18 Eq. 330 ; 43 L. J. Ch. 655 ; 22 W. R. 789 144
Ayre v. Craven, 4 N. & M. 220 ; 2 A. & E. 2 . . . 66, 76, 77, 84, 541

PAGE
Baal v. Baggerley, Cro. Car. 326 . . . . . 55, 122
Baboneau v. Farrell, 15 C. B. 360; 24 L. J. C. P. 9; 3 C. L. R. 42; 1 Jur. N. S. 114 . . . . . 80, 114
Bagg's Case, 11 Rep. 93, 95; 1 Rolle Rep. 79, 173, 224 441
Bainbridge v. Lax, 9 Q. B. 819 489
Baker v. Lane, 3 H. & C. 544; 34 L. J. Ex. 57; 13 W. R. 293; 11 L. T. 638 504
—— v. Morfue *vel* Morphew, Sid. 327; 2 Keble, 202 . . . . 68, 75
—— v. Newton, W. N. 1876, p. 8; 1 Charley, 107; Bitt. 80; 20 Sol. J. 177; 60 L. T. Notes, 157 507
—— v. Oakes, (C. A.) 2 Q. B. D. 171; 46 L. J. Q. B. 246; 25 W. R. 220; 35 L. T. 832. 336
—— v. Pierce, 2 Ld. Raym. 959; Holt, 654; 6 Mod. 23; 2 Salk. 695 . . . . . 18, 55, 61, 122
Baldwin v. Elphinston, 2 W. Bl. 1037 . . . . . 152, 157, 472, 532
—— v. Flower, 3 Mod. 120 350
Ball v. Roane, Cro. Eliz. 308 119
Banister v. Banister, 4 Rep. 17 . . . . . 139, 143
Bank of Australasia v. Harding, 9 C. B. 661; 19 L. J. C. P. 345 . . 439
—— v. Nias, 16 Q. B. 717; 20 L. J. Q. B. 284 . . 439
Bank of British North America v. Strong, 1 App. Cas. 307; 34 L. T. 627 . . . . . 191, 228
Bankes v. Allen, Roll. Abr. 54 74
Barbaud v. Hookham, 5 Esp. 109 238
Barham's Case, 4 Rep. 20; Yelv. 21 103
Barmund's Case, Cro. Jac. 473 . . . . . 85, 311
Barnabas v. Traunter, 1 Vin. Abr. 396 . . . . . 59, 311, 325
Barnes v. Holloway, 8 T. R. 150 537
—— v. Prudlin, or Bruddel, 1 Sid. 396; 1 Ventr. 4; 1 Lev. 261; 2 Keb. 451 . . . . . 312, 316
Barnett v. Allen, 3 H. & N. 376; 27 L. J. Ex. 412; 1 F. & F. 125; 4 Jur. N. S. 488 . . . . . 24, 61, 83, 539
Barratt v. Collins, 10 Moo. 451 370
Barrett v. Long, 3 H. L. C. 395; 7 Ir. L. R. 439; 8 Ir. L. R. 331 272, 276
Barrons v. Ball, Cro. Jac. 331 118
Barrow v. Lewellin, Hob. 62 . . . . . 150, 151
Barry v. Barclay, 15 C. B. N. S. 849 527
—— v. M'Grath, Ir. R. 3 C. L. 576 . . . . . 301, 493
Bartlett v. Lewis, 12 C. B. N. S. 249; 31 L. J. C. P. 230 . . . 504
Barwell v. Adkins, 1 M. & G. 807; 2 Scott, N. R. 11 . . 274, 276
Barwis v. Keppel, 2 Wils. 314 195
Bash v. Somner, 20 Penns. St. R. 159 350
Bassell v. Elmore, 48 N. Y. R. 563; 65 Barb. 627 316
Bateman *et ux.* v. Lyall *et ux.*, 7 C. B. N. S. 638 . . . 315, 330, 543
Bathurst v. Coxe, 1 Keb. 451, 465; Sir T. Raym. 68 440
—— v. Kearsley, 13 Ves. 494 14
Baylis v. Lawrence, 11 Ad. & E. 920; 3 P. & D. 526; 4 Jur. 652 94, 265, 550
Beach v. Ranney, 2 Hill (N. Y.), 309 312
Beach *et ux.* v. Beach, 2 Hill (N. Y.), 260 . . . . . 349, 490
Beamond v. Hastings, Cro. Jac. 240 71
Beatson v. Skene, 5 H. & N. 838; 29 L. J. Ex. 430; 6 Jur. N. S. 780; 2 L. T. 378 . . . . . 204, 206, 519, 545
Beaumont v. Barrett, 1 Moore, P. C. C. 76 . . . . . 425, 426

PAGE

Beddington *v.* Beddington, 1 P. D. 426; 45 L. J. P. D. 44; 24 W. R. 348; 34 L. T. 366 357
Bedwell *v.* Wood, 2 Q. B. D. 626; 25 W. R. Dig. 188; 36 L. T. 213 . 337
Behrens *v.* Allen, 3 F. & F. 135; 8 Jur. N. S. 118 . . . 171, 486
Bell *v.* Byrne, 13 East, 554 . . . . . 125, 471, 536
—— *v.* Midland Railway Co., 10 C. B. N. S. 287; 30 L. J. C. P. 273; 9 W. R. 612; 4 L. T. 293 . . . . . 83, 292
—— *v.* Parke, 10 Ir. C. L. R. 279; 11 Ir. C. L. R. 413 207, 238, 305, 306
—— *v.* Stone, 1 B. & P. 331 22
—— *v.* Wilkinson and another, (C. A.) 26 W. R. 275; W. N. 1878, p. 3 478
Bellamy *v.* Burch, 16 M. & W. 590 . . . . . 64, 81
Benbow *v.* Low, 13 Ch. D. 553; 49 L. J. Ch. 259; 28 W. R. 384; 42 L. T. 14 498
Bendish *v.* Lindsay, 11 Mod. 194 . . . . . 5, 6
Bennett *v.* Barry, 8 L. T. 857 236
—— *v.* Bennett, 6 C. & P. 586 302
—— *v.* Deacon, 2 C. B. 628; 15 L. J. C. P. 289 . . 215, 218
Bennett *et ux. v.* Watson and another, 3 M. & S. 1 447
Benson *v.* Flowers, Sir W. Jones, 215 354
Berdan *v.* Greenwood and another, 3 Ex. D. 251; 47 L. J. Ex. 628; 26 W. R. 902; 39 L. T. 223 . . . . 301, 480, 492, 493, 494
Berkeley *v.* Standard Discount Co., (interloc.) 9 Ch. D. 643; 26 W. R. 852 502
—— 12 Ch. D. 295; 48 L. J. Ch. 797; 27 W. R. 852; 41 L. T. 29 501
—— (C. A.) 13 Ch. D. 97; 49 L. J. Ch. 1; 28 W. R. 125; 41 L. T. 374 501
Berryman *v.* Wise, 4 T. R. 366 . . . . . 69, 530
Besant *v.* Wood, 12 Ch. D. 605; 40 L. T. 445 553
Bickford *v.* Darcey and Beachey, L. R. 1 Ex. 354; 14 W. R. 900; 14 L. T. 629 504
Biddulph *v.* Chamberlayne, 17 Q. B. 351 . . . . . 177, 340
Biggs *v.* Great Eastern Railway Co., 16 W. R. 908; 18 L. T. 482 173, 253
Bignell *v.* Buzzard, 3 H. & N. 217; 27 L. J. Ex. 355 31
Bigsby *v.* Dickinson, (C. A.) 4 Ch. D. 24; 46 L. J. Ch. 280; 25 W. R. 89, 122; 35 L. T. 679 . . . . . 564, 565
Bill *v.* Neal, 1 Lev. 52 . . . . . 69, 71
Birmingham Estates Co. *v.* Smith, 13 Ch. D. 506; 49 L. J. Ch. 251; 28 W. R. 666; 42 L. T. 111 495
Bishop, *In re*, *Ex parte* Smith, 13 Ch. D. 110; 49 L. J. Bkcy. 1; 28 W. R. 174; 41 L. T. 388 432
Bishop *v.* Latimer, 4 L. T. 775 . . . . . 30, 75, 99, 172, 256, 486
Bishops' (The Seven) Case, 4 St. Tr. 300 . . . . . 534, 581
Bittridge's Case, 4 Rep. 19 . . . . . 99, 109
Black *v.* Hunt, 2 L. R. Ir. 10 . . . . . 61, 82
Blackburn *v.* Blackburn, 4 Bing. 395; 1 M. & P. 33, 63; 3 C. & P. 146 264
Blackham *v.* Pugh, 2 C. B. 611; 15 L. J. C. P. 290 . . 145, 226, 235
Blackman *v.* Bryant, 27 L. T. 491 . . . . . 61, 82, 111
Blades *v.* Lawrence, L. R. 9 Q. B. 374; 43 L. J. Q. B. 133; 22 W. R. 643; 30 L. T. 378 567
Blagg *v.* Sturt, 10 Q. B. 899; 16 L. J. Q. B. 39; 11 Jur. 101; 8 L. T. Old S. 135 . . . . . 29, 224, 270, 276
Blake, *Re*, 30 L. J. Q. B. 32 . . . . . 7, 253

PAGE

Blake *v.* Albion Assurance Society, 4 C. P. D. 94; 48 L. J. C. P. 169; 27 W. R. 321; 40 L. T. 211 272
—— *v.* Appleyard, 3 Ex. D. 195; 47 L. J. Ex. 407; 26 W. R. 592 341, 342
—— *v.* Pilfold, 1 M. & Rob. 198 . . . . . 217, 223, 535
—— *v.* Stevens and others, 4 F. & F. 232; 11 L. T. 543 7, 30, 154, 170, 173, 253, 297
Bliss *v.* Stafford, Owen, 37; Moore, 188; Jenk. 247 140
Bloodworth *v.* Gray, 8 Scott, N. R. 9; 7 M. & G. 334 63
Blumley *v.* Rose, 1 Roll. 73 106
Bolckow *v.* Young, 42 L. T. 690 508
Bold *v.* Bacon, Cro. Eliz. 346 139
Bolton (Sir William) *v.* Dean, cited in Austin *v.* Culpepper, 2 Show. 313; Skinner, 123 9
Bond *v.* Douglas, 7 C. & P. 626 . . . . . 155, 272, 333, 533
Bonomi *v.* Backhouse, E. B. & E. 662; 9 H. L. C. 503; 34 L. J. Q. B. 181 . . . . . 317, 456
Boosey *v.* Wood, 3 H. & C. 484; 34 L. J. Ex. 65; 11 Jur. N. S. 181; 13 W. R. 317; 11 L. T. 639 489
Booth *v.* Briscoe, (C. A.) 2 Q. B. D 496; 25 W. R. 838 28, 47, 365, 370
Boston *v.* Tatam, Cro. Jac. 623 58
Botterill and another *v.* Whytehead, 41 L. T. 588 68, 77, 172, 214, 219, 234, 601
Bourke *v.* Warren, 2 C. & P. 307 . . . . . 129, 130, 540
Bourn's (Sir John) Case, cited Cro. Eliz. 497 131
Bowden *v.* Allen, 39 L. J. C. P. 217; 18 W. R. 695; 22 L. T. 342 . 513
Bowey *v.* Bell, 4 Q. B. D. 95; 48 L. J. Q. B. 161; 27 W. R. 247; 39 L. T. 608 336
Boxe *v.* Barnaby, 1 Roll. Abr. 55; Hob. 117 75
Boydell *v.* Jones, 4 M. & W. 446; 7 Dowl. 210; 1 Horn & H. 408 23, 27, 99, 116, 256
Boyle *v.* Wiseman, 10 Ex. 647; 11 Ex. 360; 24 L. J. Ex. 160, 284; 24 L. T. Old S. 274; 25 L. T. Old S. 203 . . . 504, 534, 536
Bracebridge *v.* Watson, Lilly Entr. 61 311
Bracegirdle *v.* Bailey, 1 F. & F. 536 . . . . . 8, 305
—— *v.* Orford, 2 Mau. & S. 77 8
Bradlaugh, *Ex parte*, 3 Q. B. D. 509; 47 L. J. M. C. 105; 26 W. R. 758; 38 L. T. 680 406
—— and Besant *v.* The Queen, (C. A.) 3 Q. B. D. 607; 48 L. J. M. C. 5; 26 W. R. 410; 38 L. T. 118; 14 Cox, C. C. 68 . . . . . 405, 424
S. C. *sub nomine R.* v. *Bradlaugh and Besant*, 2 Q. B. D. 569; 46 L. J. M. C. 286; 25 W. R. Dig. 91 . . 586
Bradley *v.* Methwyn, Selwyn's Nisi Prius, 982 5
Bradt *v.* Towsley, 13 Wend. 253 313
Brady *v.* Youlden, Kerferd & Box's Digest of Victoria Cases, 709; Melbourne Argus Reports, Sept. 6th, 1867 . . . . 67, 317
Brand and wife *v.* Roberts and wife, 4 Burr. 2418 . . . . . 59, 85
Brandreth *v.* Lance, 8 Paige, 24 (American) 15
Brandrick *v.* Johnson, 1 Vict. L. R. Cases at Law, 306 . . . 66, 77
Bray *v.* Ham, 1 Brownl. & Golds. 4 80
Brayne *v.* Cooper, 5 M. & W. 249 . . . . . 56, 66, 78, 84
Brembridge *v.* Latimer, 12 W. R. 878; 10 L. T. 816 . 102, 177, 487
Brett *v.* Watson, 20 W. R. 723 . . . . . 154, 271
Brewer *v.* Dew and another, 11 M. & W. 625 8

PAGE
Brewster's Case, Dig. L. L. 76 . . . . . 420, 42
Bridges *v.* Playdel, Brownl. & Goldsb. 2 5
Brigg's Case, Godb. 157 5
Brine *v.* Bazalgette, 3 Ex. 692 ; 18 L. J. Ex. 348 . . . . 275, 29
Brinsmead *v.* Harrison, L. R. 7 C. P. 547 ; 41 L. J. C. P. 190 ; 20 W. R. 784 ; 27 L. T. 99 45
Broadhurst *v.* Willey, W. N. 1876, p. 21 34
Brocklebank *v.* King's Lynn Steamship Co., 3 C. P. D. 365 ; 47 L. J. C. P. 321 ; 26 W. R. Dig. 64 ; 38 L. T. 489 . . . . . 354, 467
Broke's Case, Moore, 409 74
Bromage *v.* Prosser, 6 D. & R. 296 ; 4 B. & C. 247 ; 1 C. & P. 475 164, 206, 240, 264, 267, 282, 471
Bromefield *v.* Snoke, 12 Mod. 307 80
Brook *v.* Evans, 29 L. J. Ch. 616 ; 6 Jur. N. S. 1025 ; 8 W. R. 688 249, 436
—— *v.* Rawl, 4 Ex. 521 ; 19 L. J. Ex. 114 . . . . . 141, 143
—— *v.* Wise, Cro. Eliz. 878 63
Brooke *v.* Avrillon, 42 L. J. C. P. 126 274
—— *v.* Clarke, Cro. Eliz. 328 ; 1 Vin. Abr. 464 68
—— *v.* Montague (Sir Henry), Cro. Jac. 90 190
Brookes *v.* Tichborne, 5 Ex. 929 ; 20 L. J. Ex. 69 ; 14 Jur. 1122 . . 533
Brooks *v.* Blanshard, 1 Cr. & M. 779 ; 3 Tyr. 844 . 216, 218, 238, 286
—— *v.* Israel, 4 Q. B. D. 98 ; 48 L. J. Q. B. 161 ; 27 W. R. 247 ; 39 L. T. 608 336
Broome *v.* Gosden, 1 C. B. 728 . . . . 101, 102, 129, 539, 540, 558
Brown, *Ex parte*, 5 B. & S. 280 ; 33 L. J. Q. B. 193 ; 12 W. R. 821 ; 10 L. T. 453 . . . . . 425, 426
—— *v.* Croome, 2 Stark. 297 . . . . . 226, 241, 275, 283, 542
—— *v.* Hirley, 5 Up. Can. Q. B. Rep. (Old S.), 734 458
—— *v.* Lane or Low, Cro. Jac. 443 ; 1 Roll. Abr. 79 . . . 131, 542
—— *v.* Murray, 4 D. & R. 830 525
—— *v.* Smith, 13 C. B. 596 ; 22 L. J. C. P. 151 ; 1 C. L. R. 4 ; 17 Jur. 807 . . . . . 78, 291
—— *v.* Wootton, Cro. Jac. 73 ; Yelv. 67 ; Moo. 762 457
Bruce *v.* Nicolopulo, 11 Ex. 133 ; 24 L. J. Ex. 324 536
Brunkard *v.* Segar, Cro. Jac. 427 ; Hutt. 13 ; 1 Vin. Abr. 427 . 61, 82
Brunswick (Duke of) *v.* Harmer, 14 Q. B. 185 ; 19 L. J. Q. B. 20 ; 14 Jur. 110 ; 3 C. & K. 10 . 160, 168, 230, 232, 293, 456, 532, 539, 592
Bruton *v.* Downes, 1 F. & F. 668 . . . . . 24, 193
Bryant, *In re*, 4 Ch. D. 98 ; 25 W. R. 230 ; 35 L. T. 489 . . . 432
—— *v.* Loxton, 11 Moore, 344 . . . . . 67, 80
Buchanan *v.* Taylor, W. N. 1876, p. 73 ; Bitt. p. 131 ; 20 Sol. J. 298 ; 60 L. T. Notes, 268 508
Buckingham *v.* Murray, 2 C. & P. 46 471
Buckley *v.* Wood, 4 Rep. 14 ; Cro. Eliz. 230 . . . . 192, 193, 245
Buckton *v.* Higgs, 4 Ex. D. 174 ; 27 W. R. 803 ; 40 L. T. 755 . . 341
Buenos Ayres Gas Co. *v.* Wilde, 29 W. R. 43 ; 42 L. T. 657 . 429, 436
Bull *v.* Chapman, 8 Ex. 104 374
Burcher *v.* Orchard (1652), Sty. 349 ; 1 Roll. Abr. 781 . 351, 371, 560
Burder *v.* ——, 3 Curt. 827 403
Burdett *v.* Abbot, 5 Dow, H. L. 165 ; 14 East, 1 . . 154, 155, 157, 426, 435
—— *v.* Colman, 14 East, 163 423
Burford (Bailiff of) *v.* Lenthall and others, 2 Atk. 551 340

PAGE

Burges *v.* Bracher, 8 Mod. 238; 2 Ld. Raym. 1366; 1 Stra. 594 96, 558
Burgoine *v.* Taylor, 9 Ch. D. 1; 47 L. J. Ch. 542; 26 W. R. 568; 38 L. T. 438 530
Burke *v.* Rooney, 4 C. P. D. 226; 48 L. J. C. P. 601; 27 W. R. 915. 522
Burnet *v.* Wells, 12 Mod. 420 . . . . . 79, 137
Burnett *v.* Chetwood, cited in Southey *v.* Sherwood, 2 Mer. p. 441 . 14
Burton *v.* Plummer, 2 A. & E. 343 537
Bush *v.* Trowbridge Waterworks Co., L. R. 10 Ch. 459; 23 W. R. 641; 33 L. T. 137 477
Bustros *v.* Bustros, 49 L. J. Ch. 396; 28 W. R. 595 357
—— *v.* White, (C. A.) 1 Q. B. D. 423; 45 L. J. Q. B. 642; 24 W. R. 721; 34 L. T. 835 . . . . . 517, 521
Butt *v.* Conant, 4 Moore, 195; 1 Brod. & Bing. 548; Gow, 84 428, 571
Button *v.* Heyward *et ux.*, 8 Mod. 24 . . . . . 18, 55, 96
—— *v.* Woolwich Mutual Bg. Soc., 5 Q. B. D. 88; 49 L. J. Q. B. 249; 28 W. R. 136; 42 L. T. 54 569
Byrchley's Case, 4 Rep. 16 75
Byrd *v.* Nunn, 7 Ch. D. 284; 47 L. J. Ch. 1; 26 W. R. 101; 37 L. T. 585 499

Cæsar *v.* Curseny, Cro. Eliz. 305 . . . . . 64, 71
Calder *v.* Halket, 3 Moo. P. C. C. 28 188
Caley *v.* Caley, 25 W. R. 528 352
Camfield *v.* Bird, 3 C. & K. 56 273
Campbell *v.* Spottiswoode, 3 B. & S. 769; 32 L. J. Q. B. 185; 9 Jur. N. S. 1069; 11 W. R. 569; 8 L. T. 201; S. C. at Nisi Prius, 3 F. & F. 421 . . . 22, 30, 35, 38, 39, 40, 49
—— and another *v.* The Queen, 11 Q. B. 799; 17 L. J. M. C. 89 588
Canadian Oilworks Corporation *v.* Hay, 38 L. T. 549; W. N. 1878, p. 107 475
Cane *v.* Golding, Style, 169, 176 . . . . . 141, 143
Cannell *v.* Curtis, 2 Bing. N. C. 228; 2 Scott, 379 . . . . 69, 530
Cans *v.* Roberts, 1 Keb. 418; S. C. *sub nom.* Roberts *v.* Herbert, Sid. 97 . . . . . 59, 85
Capel *v.* Powell and another, 17 C. B. N. S. 743; 34 L. J. C. P. 168; 10 Jur. N. S. 1255; 13 W. R. 159; 11 L. T. 421 . . . 351
—— and others *v.* Jones, 4 C. B. 259; 11 Jur. 396 . . 104, 115
Capes *v.* Brewer, 24 W. R. 40 460
Capital & Counties Bank *v.* Henty & Sons (in C. P. D.) 28 W. R. 490; 42 L. T. 314 . . . . . 26, 103, 116, 228, 236, 555
—— (C. A.), 5 C. P. D. 514; 49 L. J. C. P. 830; 28 W. R. 851; 43 L. T. 651 . . . . 26, 103, 113, 116, 228, 236, 540, 555
Carew *v.* Davies, 5 E. & B. 709; 25 L. J. Q. B. 165 505
Carmichael *v.* Waterford & Limerick Ry. Co., 13 Ir. L. R. 313 . 270, 297
Carn *v.* Osgood, 1 Lev. 280 71
Carpenter *v.* Tarrant, Cas. Temp. Hardwicke, 339 58
Carr *v.* Duckett, 5 H. & N. 783; 29 L. J. Ex. 468 . . 142, 487, 639
—— (Sir John) *v.* Hood, 1 Camp. 355 n. 37, 48
—— *v.* Jones, 3 Smith, 491; S. C. *sub nom.* Stiles *v.* Nokes, 7 East, 493 . . . . . 24, 46, 176, 255
Carrol *v.* Bird, 3 Esp. 201 201
—— *v.* Falkiner, Kerferd & Box Dig. of Victoria Cases, 216 . . 327
Carslake *v.* Mapledoram, 2 T. R. 473 63

PA
Carter *v.* Jones, 6 C. & P. 64 ; 1 M. & R. 281 5
—— *v.* Leeds Daily News Co. & Jackson, W. N. 1876, p. 11 ; Bitt. 91 ; 1 Charley, 101 ; 20 Sol. J. 218 ; 60 L. T. Notes, 196 511, 514, 515, 6
—— *v.* Stubbs (C. A.), 50 L. J. C. P. 4 ; 29 W. R. 132 ; W. N. 1880, p. 183 5
Cartwright *v.* Wright, 5 B. & Ald. 615 4
Casey *v.* Arnott, 2 C. P. D. 24 ; 46 L. J. C. P. 3 ; 25 W. R. 46 ; 35 L. T. 424 . . . . . 148, 3
Cashin *v.* Cradock, 2 Ch. D. 140 ; 34 L. T. 52 ; 25 W. R. 4 ; 3 Ch. D. 376 ; 25 W. R. 4 ; 35 L. T. 452 . . . . . 499, 5
Castro's Case, L. R. 9 Q. B. 219 ; 12 Cox, C. C. 358 . . . 430, 4
Catling *v.* King, 5 Ch. D. 660 ; 46 L. J. Ch. 384 ; 25 W. R. 550 ; 36 L. T. 526 4
Catterall *v.* Kenyon, 3 Q. B. 310 3
Caulfield *v.* Whitworth, 16 W. R. 936 ; 18 L. T. 527 . 269, 274, 537, 5
Cawdrey *v.* Highley, al. Tythay al. Tetley, Cro. Ca. 270 ; Godb. 441 68,
Ceeley *v.* Hoskins, Cro. Car. 509 . . . . . 56, 60, 1
Chadwick *v.* Herapath, 2 C. B. 885 ; 16 L. J. C. P. 104 ; 4 D. & L. 653 . . . . . 300, 4
Chalmers *v.* Payne, 2 C. M. & R. 156 ; 1 Gale, 69 ; 5 Tyr. 766 27, 251, 252, 253, 5
—— *v.* Shackell, 6 C. & P. 475 . . . . . 170, 172, 3
Chamberlain *v.* White or Willmore, Cro. Jac. 647 ; Palm. 313 . . 3
Chantler and wife *v.* Lindsey, 16 M. & W. 82 ; 16 L. J. Ex. 16 ; 4 D. & L. 339 4
Chapman, *Ex parte*, 4 A. & E. 773 4
—— *v.* Lamphire, 3 Mod. 155 . . . . . .
—— *v.* Midland Ry. Co., 5 Q. B. D. 167 ; 28 W. R. 413 . . (C. A.) 5 Q. B. D. 431 ; 49 L. J. Q. B. 449 ; 28 W. R. 592 ; 42 L. T. 612 . 3
Charges (Sir Thomas) *v.* Rone, 3 Lev. 30 9
Charlter *v.* Barret, Peake, 32 9
Charlton *v.* Watton, 6 C. & P. 385 . . . . . 176, 261, 3
Charlton's (Lechmere) Case, 2 My. & Cr. 316 . . . . . 430, 4
Charnel's Case, Cro. Eliz. 279 . . . . . .
Charter *v.* Peter, Cro. Eliz. 602 . . . . . .
Chatfield *v.* Sedgwick, 4 C. P. D. 459 ; 27 W. R. 790 ; 41 L. T. 438 . 3
Cheese *v.* Lovejoy, (C. A.) 2 P. D. 161 ; 46 L. J. P. D. & A. 67 ; 25 W. R. 453 ; 37 L. T. 294 1
—— *v.* Scales, 10 M. & W. 488 ; 12 L. J. Ex. 13 ; 6 Jur. 958 . 22, 29, 3
Cheltenham & Swansea Wagon Company (*In re*), L. R. 8 Eq. 580 ; 38 L. J. Ch. 330 ; 17 W. R. 463 ; 20 L. T. 169 . . . . .
Chennell, *In re*, (C. A.) 8 Ch. D. 492 ; 47 L. J. Ch. 583 ; 26 W. R. 595 ; 38 L. T. 494 . . . . . .
Chester *v.* Wortley, 17 C. B. 410 ; 25 L. J. C. P. 117 . . . . .
Chesterfield Colliery Co. *v.* Black, 24 W. R. 783 ; W. N. 1876, p. 204
Child *v.* Affleck and wife, 4 M. & R. 338 ; 9 B. & C. 403 . . . .
Chillingworth *v.* Grimble, *Times*, Nov. 7th, 1877 . . . . .
Chorlton *v.* Dickie, 13 Ch. D. 160 ; 40 L. J. Ch. 40 ; 28 W. R. 228 ; 41 L. T. 469 . . . . . .
Christie *v.* Christie, L. R. 8 Ch. 499 ; 42 L. J. Ch. 544 ; 21 W. R. 493 ; 28 L. T. 607 . . . . . .
—— *v.* Powell, Peake, 4 . . . . . .

PAGE
Chubb *v.* Flannagan, 6 C. & P. 431 . . . . . 160, 387
—— *v.* Westley, 6 C. & P. 436 . . . . . 273, 276
Church *v.* Barnett, L. R. 6 C. P. 116 ; 40 L. J. C. P. 138 . . . 528
—— *v.* Perry, 36 L. T. 513 . . . . . 512, 515
Churchill (Lord) *v.* Hunt, 1 Chit. 480 ; 2 B. & Ald. 685 . 23, 176, 537
Clare *v.* Blakesley and others, 8 Dowl. 835 432
Clark *v.* Chambers, 3 Q. B. D. 327 ; 47 L. J. Q. B. 427 ; 26 W. R. 613 ; 38 L. T. 454 322
—— *v.* Freeman, 11 Beav. 112 ; 17 L. J. Ch. 142 ; 12 Jur. 149 . 14, 16, 29, 34, 79
—— *v.* Molyneux, 3 Q. B. D. 237 ; 47 L. J. Q. B. 230 ; 26 W. R. 104 ; 36 L. T. 466 ; 37 L. T. 694 ; 14 Cox, C. C. 10 142, 214, 219, 266, 269, 274, 278, 280, 472, 541
—— *v.* Newsam, 1 Ex. 131 . . . . . 270, 297
Clarke *v.* Cookson, 2 Ch. D. 746 ; 45 L. J. Ch. 752 ; 24 W. R. 535 ; 34 L. T. 646 454
—— *v.* Morgan, 38 L. T. 354 . . . . . 315, 330
—— *v.* Taylor, 3 Scott, 95 ; 2 Bing. N. C. 654 ; 2 Hodges, 65 173, 176
Clarke's Case, de Dorchester, 2 Roll. Rep. 136 . . . 56, 102, 123
Clarkson *v.* Lawson, 6 Bing. 266 ; 3 M. & P 605 ; 6 Bing. 587 ; 4 M. & P. 356 . . . . . 30, 173
Clay *v.* Roberts, 9 Jur. N. S. 580 ; 11 W. R. 649 ; 8 L. T. 397 26, 29, 76, 477, 497
—— *v.* Yates, 1 H. & N. 73 ; 25 L. J. Ex. 237 ; 4 W. R. 557 ; 27 L. T. Old S. 126 374
Cleaver *v.* Sarraude, 1 Camp. 268 217
Clegg *v.* Laffer, 3 M. & Scott, 727 ; 10 Bing. 250 . . 103, 125, 154
Clement *v.* Chivis, 9 B. & C. 172 ; 4 M. & R. 127 22
—— *v.* Fisher, 7 B. & C. 459 ; 1 M. & R. 281 128
—— *v.* Lewis, 7 Moore, 200 ; 3 Br. & Bing. 297 ; 3 B. & Ald. 702 . . . . . 29, 99, 172, 256, 291, 486
Clerk *v.* Dyer, 8 Mod. 290 124
Clifton *v.* Wells, 12 Mod. 634 63
Clinton *v.* Henderson, 13 Ir. C. L. R. App. 43 . . . . . .
Clover *v.* Roydon, L. R. 17 Eq. 190 ; 43 L. J. Ch. 665 : 22 W. R. 254 ; 29 L. T. 639 15
Clutterbuck *v.* Chaffers, 1 Stark. 471 . . . . . 153, 383, 580
Cobham *v.* Dalton, L. R. 10 Ch. App. 655 ; 44 L. J. Ch. 702 ; 23 W. R. 865 432
Cochrane, *Ex parte, in re* Mead, L. R. 20 Eq. 282 ; 44 L. J. Bkcy. 87 ; 23 W. R. 726 ; 32 L. T. 508 431
Cockaine *v.* Hopkins, 2 Lev. 214 . . . . . 61, 82, 125
Cockaine's (Lady) Case, Sir Thos. Cockaine and wife *v.* Witnam, Cro. Eliz. 49 56
Cockayne *v.* Hodgkisson, 5 C. & P. 543 . . . . . 209, 217
Colburn *v.* Patmore, 1 C. M. & R. 73 ; 4 Tyr. 677 . 157, 294, 372, 374
Cole *v.* Firth, 4 Ex. D. 301 ; 40 L. T. 857 342
Coleman *v.* West Hartlepool Harbour and Ry. Co., 8 W. R. 734 ; 2 L. T. 766 . . . . . 256, 429, 436
—— *et ux. v.* Harcourt, 1 Lev. 140 . . . . . 348, 350
Coles *v.* Haveland, Cro. Eliz. 250 ; Hob. 12 111
Collette *v.* Goode, 7 Ch. D. 842 ; 47 L. J. Ch. 370 ; 37 L. T. 504 . . 499
Collins *v.* Carnegie, 3 N. & M. 703 ; 1 A. & E. 695 . . 69, 76, 81, 531
—— *v.* Vestry of Paddington (C. A.) 5 Q. B. D. 368 ; 49 L. J. Q. B. 264 ; 28 W. R. 588 ; 42 L. T. 573 563

PAGE

Collins *v.* Welch, 5 C. P. D. 27; 49 L. J. C. P. 260; 28 W. R. 208; 41 L. T. 785 337
—— *v.* Yates and another, 27 L. J. Ex. 150 517
Colman *v.* Godwin, 3 Dougl. 90; 2 B. & C. 285 n. 56, 121
Colonial Assurance Co. Limited *v.* Prosser, W. N. 1876, p. 55; Bitt. 122; 20 Sol. J. 281; 60 L. T. Notes, 250 496
Combe *v.* Edwards, 3 P. D. 103 431
Commonwealth, The, *v.* Kneeland, Thacher's C. C. 346 159
Conesby's Case, Year Book, 9 Hen. VII. pp. 7, 8; 1 Roll. Abr. 108 149
Connors *v.* Justice, 13 Ir. C. L. R. 451 77
Cook *v.* Cook, 100 Mass. 194 317
—— *v.* Dey, 2 Ch. D. 218; 45 L. J. Ch. 611; 24 W. R. 362 . . 460
—— *v.* Field, 3 Esp. 133 . . . . . 178, 291, 319
—— *v.* Ward, 6 Bing. 409; 4 M. & P. 99 . . . . . 6, 540, 625
—— *v.* Wingfield, 1 Str. 555 . . . . . 59, 85
—— and another *v.* Batchellor, 3 Bos. & Pull. 150 . . . . 81, 367
Cooke *v.* Cox, 3 M. & S. 110 470
—— *v.* Hughes, R. & M. 112 . . . . . 22, 98, 302, 535
—— *v.* Oceanic Steam Co., W. N. 1875, p. 220; Bitt. 33; 20 Sol. J. 80; 60 L. T. Notes, 68 501
—— and another *v.* Wildes, 5 El. & Bl. 328; 24 L. J. Q. B. 367; 1 Jur. N. S. 610; 3 C. L. R. 1090 . . . . . 228, 269, 281
Cooper *v.* Hawkswell, 2 Mod. 58 126
—— *v.* Lawson, 1 P. & D. 15; 8 A. & E. 746; 1 W. W. & H. 601; 2 Jur. 919 . . . . . 40, 171, 248, 256
—— *v.* Smith, Cro. Jac. 423; 1 Roll. Abr. 77 121
Corcoran *v.* Corcoran, 7 Ir. C. L. R. 272 311
Cornwall *v.* Richardson, R. & M. 305 . . . . . 275, 298
Cosgrave *v.* Trade Auxiliary Co., Ir. R. 8 C. L. 349 . . . . 249, 483
Cotes *v.* Ketle, Cro. Jac. 204 . . . . . 67, 80
Counsel *v.* Garvie, Ir. R. 5 C. L. 74 566
Cowan *v.* Milbourn, L. R. 2 Ex. 330; 36 L. J. Ex. 124; 15 W. R. 750; 16 L. T. 290 . . . . . 374, 399
Coward *v.* Wellington, 7 C. & P. 531. . . . . 311, 349
Cowles *v.* Potts, 34 L. J. Q. B. 247; 11 Jur. N. S. 946; 13 W. R. 858 206
Cox *v.* Cooper, 12 W. R. 75; 9 L. T. 329 . . . . . 25, 100, 112
— *v.* Feeney, 4 F. & F. 13 . . . . . 41, 47
— *v.* Humphrey, Cro. Eliz. 889 . . . . . 59, 96
— *v.* Lee, L. R. 4 Ex. 284; 38 L. J. Ex. 219 . . . . . 22, 23
Coxhead *v.* Richards, 2 C. B. 569; 15 L. J. C. P. 278; 10 Jur. 984 29, 205, 214, 215, 218
Cracknall *v.* Janson, 11 Ch. D. 1; 27 W. R. 851; 40 L. T. 640. . 340
Craig *v.* Phillips, (C. A.) 3 Ch. D. 249; 47 L. J. Ch. 239; 26 W. R. 293; 37 L. T. 772 563
Crauden *v.* Walden, 3 Lev. 17 73
Craven *v.* Smith, L. R. 4 Ex. 146; 38 L. J. Ex. 90; 17 W. R. 710; 20 L. T. 400 . . . . . 334, 337, 464
Crawfoot *v.* Dale, 1 Ventr. 263; 3 Salk. 327 80
Crawford *v.* Middleton, 1 Lev. 82 . . . . . 163, 265
Crawford's Case, 13 Q. B. 613; 18 L. J. Q. B. 225; 13 Jur. 955 427, 438
Creen *v.* Wright, 2 C. P. D. 354; 46 L. J. C. P. 427; 25 W. R. 502; 36 L. T. 355 . . . . . 338, 560
Creevy *v.* Carr, 7 C. & P. 64 . . . . . 159, 309, 458

PAGE
Creighton *v.* Finlay, Arm. Mac. & Ogle, 385 303
Crisp *v.* Gill, 29 L. T. Old S. 82. . . . . 79, 80, 227, 236
Croford *v.* Blisse, 2 Bula. 150 126
Croft *v.* Stevens, 7 H. & N. 570; 31 L. J. Exch. 143; 10 W. R. 272; 5 L. T. 683. 237
—— (Sir Herbert) *v.* Brown, 3 Buls. 167 . . . . . 55, 124
Cromwell's (Lord) Case, 4 Rep. 13 . . . . . 108, 476
Cropp *v.* Tilney, 3 Salk. 226. . . . . 9, 21
Crowe *v.* Barnicot, 37 L. T. 68 495
Cucks *v.* Starre, Cro. Car. 285 73
Cuddington *v.* Wilkins, Hobart, 67, 81; 2 Hawk. P. C. c. 37, s. 48 58, 497
Curry *v.* Walter, 1 B. & P. 525; 1 Esp. 456 244
Curtis *v.* Curtis, 3 M. & Scott, 819; 4 M. & Scott, 337; 10 Bing. 447 55
—— *v.* Mussey, 6 Gray (Mass.) 261 362

Dacy *v.* Clinch, Sid. 53 . . . . . 59, 62, 119
Daines and another *v.* Hartley, 3 Ex. 200; 18 L. J. Ex. 81; 12 Jur. 1093 . . . . . 111, 538
Dale, *Ex parte*, 2 C. L. R. 870 382
—— *Ex parte*, 43 L. T. 534 448
Dancaster *v.* Hewson, 2 M. & R. 176 . . . . . 193, 537
Darby *v.* Ouseley, 1 H. & N. 1; 25 L. J. Ex. 227; 2 Jur. N. S. 497 99, 272, 297, 302, 551
Davey *v.* Pemberton, 11 C. B. N. S. 628; 8 Jur. N. S. 891 . 337, 521
Davidson *v.* Gray, 5 Ex. D. 189, n.; 40 L. T. 192 . . . 339, 342
(C. A.) 42 L. T. 834 . . . . . 339, 342
Davies *v.* Snead, L. R. 5 Q. B. 608; 39 L. J. Q. B. 202; 18 W. R. Dig. 33; 23 L. T. 609 . . . . . 215, 219
—— and others *v.* Felix and others, (C. A.) 4 Ex. D. 32; 48 L. J. Ex. 3; 27 W. R. 108; 39 L. T. 322 555
—— and wife *v.* Solomon, L. R. 7 Q. B. 112; 41 L. J. Q. B. 10; 20 W. R. 167; 25 L. T. 799 . . . . . 311, 316, 324
Davis *v.* Cutbush and others, 1 F. & F. 487 . . 242, 285, 302, 304
—— *v.* Davis, 13 Ch. D. 861; 48 L. J. Ch. 40; 28 W. R. 345 . . 550
—— *v.* Duncan, L. R. 9 C. P. 396; 43 L. J. C. P. 185; 22 W. R. 575; 30 L. T. 464 . . . . . 52, 450
—— *v.* Gardiner, 4 Rep. 16; 2 Salk. 694; 1 Roll. Abr. 38 (Ann Davis's Case) 58, 310, 326
—— *v.* Garland, 1 Q. B. D. 250; 45 L. J. Q. B. 137; 24 W. R. 252; 33 L. T. 727 459
—— *v.* Gray, 30 L. T. 418 507
—— *v.* Lewis, 7 T. R. 17 . . . . . 65, 79, 126, 163, 165
—— *v.* Miller *et ux.*, 2 Str. 1169 . . . . . 61, 80, 83
—— *v.* Reeves, 5 Ir. C. L. R. 79 211
—— *v.* Williams, 13 Ch. D. 550; 28 W. R. 223 516
Davison *v.* Duncan, 7 El. & Bl. 229; 26 L. J. Q. B. 104; 3 Jur. N. S. 613; 5 W. R. 253; 28 L. T. Old S. 265 165, 175, 186, 236, 259, 261, 262, 283
Daw *v.* Eley, L. R. 7 Eq. 49; 38 L. J. Ch. 113; 17 W. R. 245 44, 430, 436
Dawes *v.* Bolton or Boughton, Cro. Eliz. 888; 1 Roll. Abr. 68 . . 59
Dawkins *v.* Paulet (Lord), L. R. 5 Q. B. 94; 39 L. J. Q. B. 53; 18 W. R. 336; 21 L. T. 584 . . . . . 194, 195, 199, 484, 497

PAGE

Dawkins *v.* Penrhyn (Lord), (C. A.) 6 Ch. D. 318 ; 26 W. R. 6 ; 37 L. T. 80 478
(H. L.) 4 App. Cas. 51 ; 48 L. J. Ch. 304 ; 27 W. R. 173 ; 39 L. T. 583 . 477, 478
—— *v.* Rokeby (Lord), L. R. 8 Q. B. 255 ; 42 L. J. Q. B. 63 ; 21 W. R. 544 ; 4 F. & F. 806 ; 28 L. T. 134 193, 194, 195, 196, 536
(H. L.) L. R. 7 H. L. 744 ; 45 L. J. Q. B. 8 ; 23 W. R. 931 ; 33 L. T. 196 . . 193, 194, 536
Day *v.* Bream, 2 M. & Rob. 54 . . . . . 153, 360, 384, 547
—— *v.* Brownrigg, 10 Ch. D. 307 ; 48 L. J. Ch. 173 ; 27 W. R. 217 ; 39 L. T. 226, 553 15
—— *v.* Buller, 3 Wils. 59 75
—— *v.* Robinson, 1 A. & E. 554 ; 4 N. & M. 884 . . 104, 109, 295
Dean's Case, Cro. Eliz. 689 444
De Cosse Brissac *v.* Rathbone, 6 H. & N. 301 ; 30 L. J. Ex. 238 . 439
De Crespigny *v.* Wellesley, 5 Bing. 392 ; 2 M. & P. 695 157, 163, 164, 174, 262
Defries *v.* Davis, 7 C. & P. 112 ; 3 Dowl. 629 . . . . 273, 353
Delacroix *v.* Thevenot, 2 Stark. 63 151
De La Grange *v.* McAndrew, 4 Q. B. D. 210 ; 48 L. J. Q. B. 315 ; 27 W. R. 417 467
Delany *v.* Jones, 4 Esp. 191 . . . . . 55, 226, 241, 283
Delegal *v.* Highley, 5 Scott, 154 ; 3 Bing. N. C. 950 ; 8 C. & P. 444 ; 3 Hodges, 158 . . . . . 190, 276, 293, 319
Dengate and wife *v.* Gardiner, 4 M. & W. 5 ; 2 Jur. 470 . . 319, 325
Derry *v.* Handley, 16 L. T. 263 . . . . . 168, 333
Desilla *v.* Schunck & Co. and Fels & Co., W. N. 1880, p. 196 . . 458
Deverill *v.* Hulbert (not reported) 108
Dexter *v.* Spear, 4 Mason, 115 387
Dibdin *v.* Swan and Bostock, 1 Esp. 28 50
Dicas *v.* Lord Brougham, 6 C. & P. 249 ; 1 M. & R. 309 . . . 189
—— *v.* Lawson, cited 5 Tyrw. 766 ; 2 C. M. & R. 156 . . . 253
Dickeson *v.* Hilliard and another, L. R. 9 Exch. 79 ; 43 L. J. Ex. 37 ; 22 W. R. 372 ; 30 L. T. 196 212
Dickinson *v.* Barber, 9 Tyng. Mass. 218 354
Dicks *v.* Brooks, (interloc.), (C. A.) 13 Ch. D. 652 ; 28 W. R. 525 . 564
(C. A.) 15 Ch. D. 22 ; 49 L. J. Ch. 812 ; 29 W. R. 87 ; 40 L. T. 710 ; 43 L. T. 71 144
Dickson *v.* Combermere and others, 3 F. & F. 527 196
—— *v.* Wilton (The Earl of), 1 F. & F. 419 . . . 196, 236, 268
Digby *v.* Thompson and another, 1 N. & M. 485 ; 4 B. & Ad. 821 . 25
Dill *v.* Murphy and another, 1 Moore P. C. C. N. S. 487 . . . 425
Disney *v.* Longbourne, 2 Ch. D. 704 ; 45 L. J. Ch. 532 ; 24 W. R. 663 ; 35 L. T. 301 501
Dixon *v.* Bell, 5 Maule & S. 198 352
—— *v.* Enoch, L. R. 13 Eq. 394 ; 41 L. J. Ch. 231 ; 20 W. R. 359 ; 26 L. T. 127 . . . . . 514, 532
—— *v.* Holden, L. R. 7 Eq. 488 ; 17 W. R. 482 ; 20 L. T. 357 14, 15, 16, 17
—— *v.* Parsons, 1 F. & F. 24. 201
—— *v.* Smith, 5 H. & N. 450 ; 29 L. J. Ex. 125 76, 167, 218, 313, 315, 316, 330, 543
Dobede *v.* Fisher, *Times* of July 29th, 1880 . . . . . 306, 494
Dobson *v.* Thornistone, 3 Mod. 112 79

PAGE
Dod *v.* Robinson, Al. 63 . . . . . 66, 72
Doe d. Devines *v.* Wilson, 10 Moo. P. C. 502, 530 534
—— Mudd *v.* Suckermore, 5 A. & E. 703 533
Dole *v.* Lyon, 10 Johns (New York), 447 164
Dollman *v.* Jones, 12 Ch. D. 553; 27 W. R. 877; 41 L. T. 258 . . 561
Dolloway *v.* Turrell, 26 (Wend.) N. Y. 383 71
Dorchester (Marquess of) *v.* Proby, 1 Levinz, 148 136
Dorme's Case, Cro. Eliz. 62 55
Doss *v.* Secretary of State for India, L. R. 19 Eq. 509; 23 W. R. 773; 32 L. T. 294 196
Dovaston *v.* Payne, 2 Sm. L. C. 8th Ed. p. 142 83
Doveton, *Ex parte*, 26 L. T. 73 382
Dowling *v.* Browne (1854), 4 Ir. C. L. R. 265 354
Downie & Arrindell, *Re*, 3 Moore, P. C. C. 414 439
Doyle *v.* Kaufmann, 3 Q. B. D. 7; 47 L. J. Q. B. 2; 26 W. R. 98 . 460
—— *v.* O'Doherty, Car. & M. 418 192
—— and others *v.* Falconer, L. R. 1 P. C. 328; 36 L. J. P. C. 37; 15 W. R. 366 425
Doyley *v.* Roberts, 3 Bing. N. C. 835; 5 Scott, 40; 3 Hodges, 154 66, 74, 75, 293, 311, 541
Drake, *Ex parte*, *In re* Ware, 5 Ch. D. 866; 46 L. J. Ch. 105; 25 W. R. 641; 36 L. T. 677 . . . . . 431, 457
—— *v.* Drake, 1 Vin. Abr. 463; 1 Roll. Abr. 58 . . . . . 72, 73
—— *v.* Hill, Sir T. Raym. 184; 2 Keb. 549; 1 Lev. 276; Sid. 424 79
Du Bost *v.* Beresford, 2 Camp. 511 . . . . 8, 13, 22, 24, 374, 540
Dugdale *v.* Regina, 1 E. & B. 425; 22 L. J. M. C. 50; Dears C. C. 64; 17 Jur. 546 405
Duncan *v.* Thwaites, 3 B. & C. 556; 5 D. & R. 447 244, 245, 246, 251, 486
Duncombe *v.* Daniell, 8 C. & P. 222; 2 Jur. 32; 1 W. W. & H. 101 236, 241, 302, 304
Dunman *v.* Bigg, 1 Camp. 269, n. 235
Dunn *v.* Hall, 1 Carter, 345 (Indiana); 1 Smith, 288 362
Dunne *v.* Anderson, 3 Bing. 88; 10 Moore, 407; R. & M. 287 . . 43
Dwyer *v.* Esmonde, 2 L. R. Ir. 243; Ir. R. 11 C. L. 542, below 52, 168, 230
Dymond *v.* Croft, 3 Ch. D. 512; 45 L. J. Ch. 604; 24 W. R. 700; 35 L. T. 27 462

EADEN AND ANOTHER *v.* Jacobs (C. A.), 3 Ex. D. 335; 47 L. J. Ex. 74; 26 W. R. 159; 37 L. T. 621 506
Eagleton *v.* Kingston, 8 Ves. 473 533
East *v.* Chapman, 1 M. & M. 46; 2 C. & P. 570 . . . . 302, 304
Eastmead *v.* Witt, 18 C. B. 544; 25 L. J. C. P. 294; 2 Jur. N. S. 1004 . . . . . 203, 226, 225
Eastwood *v.* Holmes, 1 F. & F. 347 . . . . . 32, 51, 127
Eaton *v.* Allen, 4 Rep. 16; Cro. Eliz. 684 56
—— *v.* Johns, 1 Dowl. (N. S.) 602 . . . . . 22, 477
Edmunds *v.* Greenwood, L. R. 4 C. P. 70; 38 L. J. C. P. 115; 17 W. R. 142; 19 L. T. 423 404
Edsall *v.* Russell, 4 M. & G. 1090; 5 Scott, N. R. 801; 12 L. J. C. P. 4; 2 Dowl. (N. S.) 641; 6 Jur. 996 . . . . . 55, 68, 76, 173
Edwards *v.* Bell and others, 1 Bing. 403 . . . . . 28, 170, 173
—— *v.* London & N. W. Ry. Co., L. R. 5 C. P. 449 361
Egremont Burial Board *v.* Egremont Iron Ore Co., 14 Ch. D. 158; 49 L. J. Ch. 623; 28 W. R. 594; 42 L. T. 179 . . . . 516, 517

PAGE
Elborow *v.* Allen, Cro. Jac. 642 140
Elliot *v.* Halmarack, 1 Mer. 303 431
Ellis *v.* Ambler, 25 W. R. 557; 36 L. T. 410 501
—— *v.* Munson (C. A.), 35 L. T. 585; W. N. 1876, p. 253 . . . 495
Ellissen, *Ex parte*, cited 5 Q. B. D., at p. 13 573
Elmer *v.* Creasy, 9 Ch. D. 69 510
Emblen *v.* Myers, 6 H. & N. 54; 30 L. J. Ex. 71 292
Emond's Case, Dec. 7, 1829; Shaw, 229 436
Emperor (The) of Austria *v.* Day and Kossuth, 3 De G. F. & J. 217, 239; 30 L. J. Ch. 690; 7 Jur. N. S. 639 14
Empson *v.* Fairfax and another, 8 A. & E. 296; 3 N. & P. 385 . . 339
England *v.* Bourke, 3 Esp. 80 549
English *v.* Tottie, 1 Q. B. D. 141; 45 L. J. Q. B. 138; 21 W. R. 393; 33 L. T. 724 518
Entick *v.* Carrington, 11 St. Tr. 317; 19 How. St. Tr. 1029 . 152, 574
Etty *v.* Wilson (C. A.), 3 Ex. D. 359; 47 L. J. Ex. 664; 39 L. T. 83 555
Evans *v.* Gwyn, 5 Q. B. 844 73
—— *v.* Harlow, 5 Q. B. 624; 13 L. J. Q. B. 120; D. & M. 507; 8 Jur. 571 . . . . . 32, 33, 79, 145, 147
—— *v.* Harries, 1 H. & N. 251; 26 L. J. Ex. 31 . 291, 316, 319, 320, 330
—— *v.* Rees, 9 C. B. N. S. 391; 30 L. J. C. P. 16 335
—— *v.* Walton, L. R. 2 C. P. 615; 15 W. R. 1062 352

Fairman *v.* Ives, 1 D. & R. 252; 5 B. & Ald. 642; 1 Chit. 85 222, 224, 245, 287
Falkland (Lord) *v.* Phipps, 2 Comyns, 439; 1 Vin. Abr. 549 . . 136
Falkner *v.* Cooper, Carter, 55 130
Falvey *v.* Stanford, L. R. 10 Q. B. 54; 44 L. J. Q. B. 7; 23 W. R. 162; 31 L. T. 677 . . . . . 292, 559
Farley's (Mrs.) Case, 2 Ves. Sen. 520 429
Farrow *v.* Hague, 3 H. & C. 101; 33 L. J. Ex. 258 569
Faund *v.* Wallace, 35 L. T. 361 557
Felkin *v.* Herbert, 33 L. J. Ch. 294; 12 W. R. 241, 332; 9 L. T. 635; 10 Jur. N. S. 62 430
Fellowes *v.* Hunter, 20 Up. Can. Q. B. 382 80
Fells, *In re*, *Ex parte*, Andrews, 4 Ch. D. 509; 46 L. J. Bkcy. 23; 25 W. R. 382; 36 L. T. 38 431
Fenn *v.* Dixe, 1 Roll. Abr. 58 79
Fennell *v.* Tait, 1 C. M. & R. 814 526
Fenton *v.* Hampton, 11 Moore, P. C. C. 347 425
Fernandez, *Ex parte*, 6 H. & N. 717; 10 C. B. N. S. 3; 30 L. J. C. P. 321; 7 Jur. N. S. 529, 571; 9 W. R. 832; 4 L. T. 296, 324 . 435, 437
Field *v.* Gt. Northern Ry. Co. 3 Ex. D. 261; 26 W. R. 817; 39 L. T. 80 338, 560
Figgins *v.* Cogswell, 3 M. & S. 369 . . . . . 79, 81
Finden *v.* Westlake, M. & M. 461 . . . . . 228, 277, 285
Finnerty *v.* Tipper, 2 Camp. 72 . . . . . 273, 296, 307
Fisher *v.* Atkinson, 1 Roll. Abr. 43 82
—— *v.* Clement, 10 B. & C. 472; 5 Man. & Ry. 730 . . . 264, 539
—— *v.* Hughes, 25 W. R. 528 522
—— *v.* Owen (C. A.), 8 Ch. D. 645; 47 L. J. Ch. 477, 681; 26 W. R. 417, 581; 38 L. T. 252, 577 . 505, 509, 510, 511, 512, 519
Fisher & Co. *v.* Appollinaris Co., L. R. 10 Ch. App. 297; 44 L. J. Ch. 500; 23 W. R. 460; 32 L. T. 628 15

PAGE

Fitter *v.* **Veal**, 12 Mod. 542; B. N. P. 7 . . . . 295, 317, 320, 552
Fitzgerald *v.* **Campbell**, 18 Ir. Jur. 153; 15 L. T. 74 . . . 278, 484
—— *v.* **Villiers**, 3 Moo. 236 463
Fitzgibbon *v.* **Greer**, I. R. 9 C. L. 294 508
Fleetwood *v.* **Curl or Curley**, Cro. Jac. 557; Hob. 268 . . 70, 110, 131
Fleming *v.* **Newton**, 1 H. L. C. 363 . . . . . 14, 248, 436
Flint *v.* **Pike**, 6 D. & R. 528; 4 B. & C. 473 . . . 176, 253, 256
Flower's Case, Cro. Car. 211 68
Floyd *v.* **Barker**, 12 Rep. 24 . . . . . 188, 189
Fonville *v.* **Nease, Dudley**, S. C. 303 . . . . . 151, 153
Forbes *v.* **King**, 2 L. J. Ex. 109; 1 Dowl. 672 . . . . 25, 114
Force *v.* **Warren**, 15 C. B. N. S. 806 231
Footman *v.* **Dunn**, 4 Camp. 211 193
Ford *v.* **Primrose**, 5 D. & R. 287 55
Fores *v.* **Johnes**, 4 Esp. 97 374
Forsdike and wife *v.* **Stone**, L. R. 3 C. P. 607; 37 L. J. C. P. 301; 16 W. R. 976; 18 L. T. 722 . . . . . 292, 336, 559
Fortescue *v.* **Fortescue**, 24 W. R. 945; 34 L. T. 847 517
Foster *v.* **Browning**, Cro. Jac. 688 . . . . . 55, 119
—— *v.* **Pointer**, 9 C. & P. 718 537
—— *v.* **Roberts**, W. N. 1877, p. 11 562
—— **and others** *v.* **Lawson**, 11 Moore, 360; 3 Bing. 452 . . 81, 367
Foulger *v.* **Newcomb**, L. R. 2 Ex. 327; 36 L. J. Ex. 169; 15 W. R. 1181; 16 L. T. 595 . . . . . 25, 67, 77, 115, 120, 474
Fountain *v.* **Boodle** *et ux.*, 3 Q. B. 5; 2 G. & D. 455 . . 274, 275, 298
—— *v.* **Rogers**, Cro. Eliz. 878 121
Fowell *v.* **Cowe**, Roll. Abr. 56 71
Fowler *v.* **Aston**, Cro. Eliz. 268; 1 Roll. Abr. 43 121
—— *v.* **Dowdney**, 2 M. & Rob. 119 58
—— **and wife** *v.* **Homer**, 3 Camp. 294 . . . . 212, 221, 284
Fowles *v.* **Bowen**, 3 Tiffany (30 N. Y. R.), 20 . 202, 270, 273, 287, 332
Fox *v.* **Broderick**, 14 Ir. C. L. Rep. 453 154
Francis *v.* **Roose**, 3 M. & W. 191; 1 H. & H. 36 . . . 55, 106
Franklyn *v.* **Butler**, Pasch. 11 Car. I., cited Carter, 214 . . . 115
Fray *v.* **Blackburn**, 3 B. & S. 576 189
—— *v.* **Fray**, 17 C. B. N. S. 603; 34 L. J. C. P. 45; 10 Jur. N. S. 1153 . . . . . 23, 94, 544
Frean *v.* **Sargent**, 2 H. & C. 293; 32 L. J. Ex. 281; 11 W. R. 808; 8 L. T. 467 338
Freethy *v.* **Freethy**, 42 Barb. N. York, 641 347
Frescoe *v.* **May**, 2 F. & F. 123 . . . . . 157, 294, 457, 549
Friend *v.* **London, Chatham, & Dover Ry. Co.** (C. A.), 2 Ex. D. 437; 46 L. J. Ex. 696; 25 W. R. 735; 36 L. T. 739 518
Fry *v.* **Carne**, 8 Mod. 283 . . . . . 56, 121
Fryer *v.* **Gathercole**, 4 Exch. 262; 18 L. J. Ex. 389; 13 Jur. 542 . 535
—— *v.* **Kinnersley**, 15 C. B. N. S. 422; 33 L. J. C. P. 96; 10 Jur. N. S. 441; 12 W. R. 155; 9 L. T. 415 . . 201, 239, 280
Fuller *v.* **Fenner**, 16 Barb. 333 313

Gainford *v.* **Tuke**, Cro. Jac. 536 . . . . . 58, 126
Gale *v.* **Leckie**, 2 Stark. 107 374
Gallwey *v.* **Marshall**, 9 Ex. 294; 23 L. J. Ex. 78; 2 C. L. R. 399 . 66, 72, 73, 83, 473
Gardiner *v.* **Atwater**, Say. 265 . . . . . 127, 165

PAGE
Gardner *v.* Irwin, 4 Ex. D. 49 ; 48 L. J. Ex. 223 ; 27 W. R. 442 ; 40 L. T. 357 517
—— *v.* Slade, 13 Q. B. 796 ; 18 L. J. Q. B. 334 ; 13 Jur. 826 . . 201
Garnett *v.* Bradley (C. A.), 2 Ex. D. 349 ; 46 L. J. Ex. 545 ; 25 W. R. 653 ; 39 L. T. 725 . . . . . 335, 468
(H. L.), 3 App. Cas. 944 ; 48 L. J. Ex. 186 ; 26 W. R. 698 ; 39 L. T. 261 . . . . 335, 468
—— *v.* Ferrand, 6 B. & C. 611 . . . . . 442, 443
Garrels *v.* Alexander, 4 Esp. 37 533
Garret *v.* Taylor, Cro. Jac. 567 ; 1 Roll. Abr. 108 . . . . 149, 359
Gascoigne *et ux. v.* Ambler, 2 Lord Raym. 1004 85
Gaskin *v.* Balls, 13 Ch. D. 324 ; 28 W. R. 552 15
Gathercole *v.* Miall, 15 M. & W. 319 ; 15 L. J. Ex. 179 ; 10 Jur. 337 28, 47, 48, 242, 285, 298, 355
Gay *v.* Labouchere, 4 Q. B. D. 206 ; 48 L. J. Q. B. 279 ; 27 W. R. 413 506, 509, 510, 512
Geary *v.* Physic, 5 B. & C. 238 7
Gee *v.* Pritchard, 2 Swan. 413 14
Gelen *v.* Hall, 2 H. & N. 379 188
George *v.* Goddard, 2 F. & F. 689 236
Gerard (Sir G.) *v.* Dickenson, 4 Rep. 18 ; Cro. Eliz. 197 . . . 143
Getting *v.* Foss, 3 C. & P. 160 212
Gibbons *v.* London Financial Association, 4 C. P. D. 263 ; 48 L. J. C. P. 514 ; 27 W. R. 619 499
Gillett *v.* Bullivant, 7 L. T. Old S. 490 . . . . . 168, 327, 332
Gilpin *v.* Fowler, 9 Ex. 615 ; 23 L. J. Ex. 152 ; 18 Jur. 293 242, 268, 280, 535
Glynn *v.* Houston, 1 Keen, 329 505
Godard *v.* Gray, L. R. 6 Q. B. 139 ; 40 L. J. Q. B. 62 ; 19 W. R. 348 ; 24 L. T. 89 439
Goddard *v.* Thompson (C. A.), 47 L. J. Q. B. 382 ; 26 W. R. 362 ; 38 L. T. 166 . . . . . 560, 564
Goddart *v.* Haselfoot, 1 Roll. Abr. 54 ; 1 Vin. Abr. S. a. pl. 12 . . 76
Godfrey *v.* Owen, Palm. 21 ; 3 Salk. 327 59
—— *v.* Tucker, 3 N. R. 20 477
Godson *v.* Home, 3 Moore, 223 ; 1 Br. & B. 7 . . . . . 209, 265
Golding *v.* Wharton Saltworks Co., 1 Q. B. D. 374 ; 24 W. R. 423 ; 34 L. T. 474 499
Goldstein *v.* Foss, 1 M. & P. 402 ; 6 B. & C. 154 ; 2 Y. & J. 146 ; 9 D. & R. 197 ; 4 Bing. 489 ; 2 C. & P. 252 . . . 25, 115, 120, 212
Gompertz *v.* Levy, 9 A. & E. 282 ; 1 P. & D. 214 ; 1 W., W. & H. 728 ; 2 Jur. 1013 104
Goodale *v.* Castle, Cro. Eliz. 554 . . . . . 61, 82
Goodbarne *v.* Fothergill, *In re* Harker, (C. A.) 10 Ch. D. 613 ; 27 W. R. 587 ; 40 L. T. 408 563
Goodburne *v.* Bowman, 9 Bing. 532 . . . . . 27, 173, 486
—— *v.* —— (as to costs), 9 Bing. 667 340
Goodtitle *v.* Badtitle, 2 Bos. & P. 120 464
Goslin *v.* Corry, 7 M. & G. 342 ; 8 Scott, N. R. 21 . . . 311, 317, 320
Gosset *v.* Howard, 10 Q. B. 359, 411 ; 14 L. J. Q. B. 367 ; 16 L. J. Q. B. 345 ; 11 Jur. 750 ; Car. & M. 380 . . . . . 423, 435
Gostling *v.* Brooks, 2 F. & F. 76 . . . . . 78, 115
Gould *v.* Hulme, 3 C. & P. 625 . . . . . 191, 237
Gourley *v.* Plimsoll, L. R. 8 C. P. 362 ; 42 L. J. C. P. 121 ; 21 W. R. 683 ; 28 L. T. 598 . . . . . 486, 508

PAGE

Grant *v.* Banque Franco-Egyptienne (C. A.), 2 C. P. D. 430; 47 L. J. C. P. 41; 26 W. R. 68 . . 563
—— (C. A.), 3 C. P. D. 202; 47 L. J. C. P. 455; 26 W. R. 669; 38 L. T. 622 564
—— *v.* Gould, 2 H. Bl. 69 195
—— *v.* Holland, 49 L. J. Q. B. 800; 29 W. R. 32 556
—— *v.* Secretary of State for India, 2 C. P. D. 445; 25 W. R. 848; 37 L. T. 188 . . . . . 196, 257
Grater *v.* Collard, 6 Dowl. 503 295
Grave's Case, Cro. Eliz. 289 126
Gray *v.* West *et ux.*, L. R. 4 Q. B. 175; 9 B. & S. 156; 38 L. J. Q. B. 78; 17 W. R. 497; 20 L. T. 221 334
Greaves *v.* Keene, 4 Ex. D. 73; 27 W. R. 416; 40 L. T. 216 . . . 435
Green *v.* Button, 2 C. M. & R. 707 . . . . . 91, 149, 326
—— *v.* Chapman, 4 Bing. N. C. 92; 5 Scott, 340 50
—— *v.* Elgie and another, 5 Q. B. 99 434
—— *v.* Sevin, 13 Ch. D. 589; 41 L. T. 724 498
Greenfield *v.* Reay, L. R. 10 Q. B. 217; 44 L. J. Q. B. 81; 21 W. R. 732; 31 L. T. 756 504
Greenfield's Case, Mar. 82; 1 Vin. Abr. 465 80
Greenwood *v.* Prick, Cro. Jac. 91; 1 Camp. 270 . . . 6, 242, 265
Gregory *v.* The Queen, 15 Q. B. 957; 14 L. J. M. C. 82; 15 Jur. 74; 5 Cox, C. C. 247 575
—— and another *v.* Williams, 1 C. & K. 568 . . . . 292, 320, 552
Greville *v.* Chapman and others, 5 Q. B. 731; 13 L. J. Q. B. 172; D. & M. 553; 8 Jur. 189 24
Griffiths *v.* Hardenburgh, 41 New York, 469 374
—— *v.* Lewis, 7 Q. B. 61; 14 L. J. Q. B. 197; 9 Jur. 370 8 Q. B. 841; 15 L. J. Q. B. 249; 10 Jur. 711 80, 114, 168, 231, 233, 452
Grimes *v.* Lovel, 12 Mod. 242 63
Grissell's Case, Aug. 1879 423
Groenvelt *v.* Burwell, 1 Ld. Raym. 454; 12 Mod. 388 189
Grove *et ux. v.* Hart, (1752) B. N. P. 7 . . . . . 348, 350
Guerdon *v.* Winterstud, Cro. Eliz. 308 56
Gurney *v.* Longman, 13 Ves. 493 14
Gutsole *v.* Mathers, 1 M. & W. 495; 2 Gale, 64; 5 Dowl. 69; 1 Twyr. & Gr. 694 . . . . . 142, 470
Guy *v.* Gregory, 9 C. & P. 584 . . . . . 298, 325, 350
Gwynn *v.* S. E. Rail. Co., 18 L. T. 738 . . . . . 173, 253, 548

Haddon *v.* Lott, 15 C. B. 411; 24 L. J. C. P. 49 . . . 139, 322, 326
Haire *v.* Wilson, 4 M. & R. 605; 9 B. & C. 643 . . . . 23, 264, 265
Hake *v.* Molton, Roll. Abr. 43 125
Hakewell *v.* Ingram, 2 C. L. R. 1397 . . . . . 24, 558
Hall *v.* Hollander, 4 B. & C. 660; 7 D. & R. 133 352
—— *v.* L. & N. W. Ry. Co., 35 L. T. 848 510
—— *v.* Smith, 1 M. & S. 287 . . . . . 79, 81
—— *v.* Weedon, 8 D. & R. 140 123
Hall's (Arthur) Case (1581) 423
Hallinan *v.* Price, 27 W. R. 490; 41 L. T. 627 342
Halsey *v.* Brotherhood, 15 Ch. D. 514; 49 L. J. Ch. 786; 29 W. R. 9; 43 L. T. 366 144

PAGE

Hamilton & Co. *v.* Johnson & Co., (C. A.) 5 Q. B. D. 263 ; 49 L. J. Q. B. 155 ; 28 W. R. 879 ; 41 L. T. 461 555
Hammersmith Skating Rink Co. *v.* Dublin Skating Rink Co., 10 Ir. R. Eq. 235 . . . . . 15, 144
Hancock *v.* Guerin, 4 Ex. D. 3 ; 27 W. R. 112 516
Hancocks *v.* Lablache, 3 C. P. D. 197 ; 47 L. J. C. P. 514 ; 26 W. R. 402 ; 38 L. T. 753 350
Hand *v.* Winton, 38 N. Y. 122 71
Hankinson *v.* Bilby, 16 M. & W. 442 ; 2 C. & K. 440 . 93, 94, 106, 107, 109, 548
Harding *v.* Greening, 1 Moore, 477 ; 8 Taunt. 42 ; 1 Holt, N. P., 531 361
Hardwick *v.* Chandler, 2 Str. 1138 75
Hargrave *v.* Le Breton, 4 Burr. 2422 . . . . . 142, 144, 226, 264
Harker (*In re*), Goodbarne *v.* Fothergill, (C. A.) 10 Ch. D. 613; 27 W. R. 587 ; 40 L. T. 408 563
Harle *v.* Catherall, 14 L. T. 801 . . . . . 40, 46, 236, 241, 453
Harman *v.* Delany, 2 Str. 898 ; 1 Barnard. 289, 438 ; Fitz. 121 . . 31, 33, 79, 145
Harnett *v.* Vise, (C.A.) 5 Ex. D. 307 ; 29 W. R. 7 . . 216, 307, 336
Harper (Sir J.) *v.* Beamond, Cro. Jac. 56 70
Harris *v.* Dixon, Cro. Jac. 158 56
—— *v.* Fleming, 13 Ch. D. 208 ; 49 L. J. Ch. 32 ; 28 W. R. 389 . 462
—— *v.* Petherick, (C. A.) 4 Q. B. D. 611 ; 48 L. J. Q. B. 521 ; 28 W. R. 11 ; 41 L. T. 146 . . . . . 338, 560
—— *v.* Thompson, 13 C. B. 333 . . . . . 216, 218, 238, 270, 544
—— *v.* Warre, 4 C. P. D. 125; 48 L. J. C. P. 310; 27 W. R. 461 ; 40 L. T. 429 . . . . . 101, 424, 470
Harrison *v.* Bevington, 8 C. & P. 708 . . . . . 78, 81, 367
—— *v.* Bush, 5 El. & Bl. 344 ; 25 L. J. Q. B. 25 ; 1 Jur. N. S. 846 . . . . . 198, 222, 224, 287
25 L. J. Q. B. 99; 2 Jur. N. S. 90 339
—— *v.* King, 4 Price, 46 ; 7 Taunt. 431 ; 1 B. & Ald. 161 . 57, 125
—— *v.* Pearce, 1 F. & F. 567 ; 32 L. T. Old S. 298 ; 7 W. R. Dig. C. L. 51 . . 157, 159, 294, 314, 319, 331, 362, 458, 549
—— *v.* Stratton, 4 Esp. 217 57
—— *v.* Thornborough, 10 Mod. 196; Gilb. Cas. in Law & Eq. 114 79, 97, 125, 130
Hart *v.* Gumpach, L. R. 4 P. C. 439 ; 42 L. J. P. C. 25 ; 21 W. R. 365 ; 9 Moore, P. C. C. N. S. 241 194
—— and another *v.* Wall, 2 C. P. D. 146 ; 46 L. J. C. P. 227 ; 25 W. R. 373 . . . . . 26, 34, 113, 141, 544, 641
Hartlepool Original Colliery Co. *v.* Gibb, 5 Ch. D. 713 ; 46 L. J. Ch. 311 ; 36 L. T. 433 495
Hartley *v.* Dilke, 35 L. T. 706 460
—— *v.* Herring, 8 T. R. 130 . . . . . 72, 310, 311, 316, 320
—— *v.* Hindmarsh, L. R. 1 C. P. 533 ; 35 L. J. M. C. 254 ; 14 W. R. 862 ; 13 L. T. 795 ; 12 Jur. N. S. 502 546
Hartsock *v.* Reddick, 6 Blackf. (Indiana) 255 193
Hartwell *v.* Vesey *et ux.*, 3 L. T. 275 238
Harvey *v.* French, 1 C. & M. 11 ; 2 M. & Scott, 591 ; 2 Tyr. 585 24, 99, 106
Harwood *v.* Astley, 1 N. R. 47 236
—— *v.* Green, 3 C. & P. 141 . . . . . 29, 215, 288
—— *et ux. v.* Hardwick *et ux.*, 2 Keb. 387 . . . . . 324, 348

PAGE
Hassell *v.* Capcot, 1 Vin. Abr. 395 ; 1 Roll. Abr. 36 . . . . 59, 85
Hastie *v.* Hastie, (C. A.) 1 Ch. D. 562 ; 45 L. J. Ch. 288 ; 24 W. R. 564 ; 34 L. T. 13 564
Hawkesley *v.* Bradshaw, (Q. B. D.), 5 Q. B. D. 22; 49 L. J. Q. B. 207 ; 28 W. R. 167 ; 41 L. T. 653 . . 481, 492
(C. A.) 5 Q. B. D. 302 ; 49 L. J. Q. B. 333 ; 28 W. R. 557 ; 42 L. T. 285 301, 481, 488, 493
Hawley *v.* Reade, W. N. 1876, p. 64; Bitt. 130; 20 Sol. J. 298; 60 L. T. Notes, 268 . . . . . 301, 340, 501
Haylock *v.* Sparke, 1 E. & B. 471 ; 22 L. J. M. C. 67 574
Haythorn *v.* Lawson, 3 C. & P. 196 . . . . 32, 319, 324, 365, 367
Haywood *v.* Nayler, 1 Roll. Abr. 50 126
Head *v.* Briscoe *et ux.*, 5 C. & P. 485 ; 2 L. J. C. P. 101 351
Hearne *v.* Stowell, 12 A. & E. 719 ; 11 L. J. Q. B. 25 ; 4 P. & D. 696 ; 6 Jur. 458 . . . . . 28, 127, 158, 260, 550, 559
Hedley *v.* Barlow, 4 F. & F. 224 . . . . . 43, 46, 545
Helsham *v.* Blackwood, 11 C. B. 111 ; 20 L. J. C. P. 187 ; 15 Jur. 861 45, 170, 172, 485
Heming and wife *v.* Power, 10 M. & W. 564 . . . . . 55, 62, 123
Hemmings *v.* Gasson, El. Bl. & El. 346 ; 27 L. J. Q. B. 252 ; 4 Jur., N. S. 834 . . . . . 104, 230, 277
Henderson *v.* Broomhead, 4 H. & N. 569 ; 28 L. J. Ex. 360 ; 5 Jur., N. S. 1175 . . . . . 191, 193
Henwood *v.* Harrison, L. R. 7 C. P. 606 ; 41 L. J. C. P. 206 ; 20 W. R. 1000 ; 26 L. T. 938 . . . . . 44, 211
Heriot *v.* Stuart, 1 Esp. 437 . . . . . 30, 32, 49
Hewetson *v.* Whittington Life Insurance Society, W. N. 1875, p. 219; Bitt. 27 ; 1 Charley, 101 ; 20 Sol. J. 79 ; 60 L. T. Notes, 67 . 502
Hext *v.* Yeomans, 4 Rep. 15 122
Hey *v.* Moorhouse and others, 6 Bing. N. C. 52 489
Heymann *v.* The Queen, L. R. 8 Q. B. 105 ; 21 W. R. 357 ; 28 L. T. 162 586
Hibbins *v.* Lee, 4 F. & F. 243 ; 11 L. T. 541 45
Hibbs *v.* Wilkinson, 1 F. & F. 608 . . . . . 52, 230
Hickinbotham *v.* Leach, 10 M. & W. 361 ; 2 Dowl. N. S. 270 111, 178, 485
Hicks' (Sir Baptist) Case, R. *v.* Garret, Hob. 215 ; Poph. 139 . 23, 383
Higginson *v.* Flaherty, 4 Ir. C. L. R. 125 190
Highmore *v.* Earl and Countess of Harrington, 3 C. B. N. S. 142 . 64, 73, 558
Highton *v.* Treherne, 48 L. J. Ex. 167 ; 27 W. R. 245 ; 39 L. T. 411 560, 562, 563
Hill *v.* Campbell and Wife, L. R. 10 C. P. 222 ; 44 L. J. C. P. 97 ; 23 W. R. 336 ; 32 L. T. 59 519
Hill's Executors *v.* Metropolitan District Asylum, 49 L. J. Q. B. 668 ; 43 L. T. 462 ; W. N. 1880, p. 98 . . . . . 337, 565
Hilliard (Sir Christopher) *v.* Constable, Cro. Eliz. 306 72
Hinrichs *v.* Berndes, W. N. 1878, p. 11 16
Hirst *v.* Goodwin, 3 F. & F. 257 330
Hixe *v.* Hollingshed, Cro. Car. 261 85
Hoare, *Ex parte*, 23 L. T. 83 382
Hoare *v.* Dickson, 7 C. B. 164 ; 18 L. J. C. P. 158 545
Hoare *v.* Silverlock (No. 1, 1848) ; 12 Q. B. 624 ; 17 L. J. Q. B. 306 ; 12 Jur. 695 . . . . . 22, 23, 106, 239, 539, 544

Hoare *v.* Silverlock (No. 2, 1850), 9 C. B. 20; 19 L. J. C. P. 215 244,
Hobbs *v.* Bryers, 2 L. R. Ir. 496
Hodgkins *et ux. v.* Corbet *et ux.*, 1 Str. 545 85,
Hodgson *v.* Scarlett, 1 B. & Ald. 232
Hoey *v.* Felton, 11 C. B. N. S. 142; 31 L. J. C. P. 105
Holland *v.* Stoner, Cro. Jac. 315
Hollingshead's Case, Cro. Car. 229
Hollingworth *v.* Brodrick, 4 A. & E. 646; 6 N. & M. 240; 1 H. & W. 691
Hollis (Sir John) *v.* Briscow *et ux.*, Cro. Jac. 58
Holmes *v.* Catesby, 1 Taunt. 543 77,
—— *v.* Mountstephen, L. R. 10 C. P. 474; 33 L. T. 351
Holt, *In re*, 10 Ch. D. 168; 27 W. R. 485; 40 L. T. 207
—— (Sir Thomas) *v.* Astrigg, Cro. Jac. 184
—— *v.* Scholefield, 6 T. R. 691 56, 60, 102, 123,
Holwood *v.* Hopkins, Cro. Eliz. 787
Home *v.* Bentinck, 4 Moore, 563; 2 B. & B. 130 189,
Homer *v.* Taunton, 5 H. & N. 661; 29 L. J. Ex. 318; 8 W. R. 499; 2 L. T. 512 24, 106,
Honess and another *v.* Stubbs, 7 C. B. N. S. 555; 29 L. J. C. P. 220; 8 W. R. 188; 6 Jur. N. S. 682
Hooker *v.* Tucker, Holt, 39
Hooper *v.* Truscott, 2 Scott, 672; 2 Bing. N. C. 457 221, 265,
Hopkinson *v.* Lord Burghley, L. R. 2 Ch. 447; 36 L. J. Ch. 504; 15 W. R. 543
Hopper *v.* Warburton, 7 L. T. 722
Hopwood *v.* Thorn, 8 C. B. 293; 19 L. J. C. P. 94; 14 Jur. 87 73, 204, 206, 211, 232, 310, 316,
Horne *v.* Hough and others, L. R. 9 C. P. 135; 43 L. J. C. P. 70; 22 W. R. 412
Horner *v.* Marshall's Administratrix, 5 Mumford, Virginia, 466
—— *v.* Oyler, 49 L. J. C. P. 655
Hort *v.* Reade, Ir. R. 7 C. L. 551 177,
Horwell *v.* London General Omnibus Co., 2 Ex. D. 365; 46 L. J. Ex. 700; 25 W. R. 610; 36 L. T. 637
Houlden *v.* Smith, 14 Q. B. 841; 19 L. J. Q. B. 170
How *v.* Prin, Holt, 652; 7 Mod. 107; 1 Brown's P. C. 64; 2 Salk. 694; 2 Ld. Raym. 812 69, 71, 121,
Howard *v.* Gosset, 10 Q. B. 359, 411; 14 L. J. Q. B. 367; 16 L. J. Q. B. 345; 11 Jur. 750; Car. & M. 380 423,
Howe *v.* Buffalo & Erie Ry. Co., 38 Barb. (New York), 124
Hoyt *v.* McKenzie, 3 Barb. Ch. R. 320, (American)
Huckle *v.* Reynolds, 7 C. B. N. S. 114 56, 131,
Hudson *v.* Tooth, 2 P. D. 125; 25 W. R. 107; 35 L. T. 820
Huff *v.* Bennett, 4 Sand. (New York), 120
Huggons *v.* Tweed, 10 Ch. D. 359; 27 W. R. 495; 40 L. T. 284
Hughes *v.* Porral and others, 4 Moore, P. C. C. 41
Hume *v.* Marshall, *Times*, Nov. 26, 1877 66, 212,
Humphreys *v.* Miller, 4 C. & P. 7 212,
—— *v.* Stanfield, Cro. Car. 469; Godb. 451; Sir W. Jones, 388; 1 Roll. Abr. 38
—— *v.* Stillwell, 2 F. & F. 590
Hunt *v.* Algar and others, 6 C. & P. 245 27, 100, 159,

PAGE

Hunt *v.* City of London Real Property Co., 3 Q. B. D. 19; 47 L. J. Q. B. 42, 51; 26 W. R. 37; 37 L. T. 344 561
—— *v.* Goodlake, 43 L. J. C. P. 54; 29 L. T. 472 . 25, 94, 101, 117, 544
—— *v.* Jones, Cro. Jac. 499 316
Hunter *v.* Sharpe, 4 F. & F. 983; 15 L. T. 421 . . . . 51, 102
Huntley *v.* Ward, 6 C. B. N. S. 514; 1 F. & F. 552; 6 Jur. N. S. 18 199, 205, 227, 229, 264, 279
Hurst *v.* Bell, 1 Bing. 1 547
Hutchinson *v.* Glover, 1 Q. B. D. 138; 45 L. J. Q. B. 120; 24 W. R. 185; 33 L. T. 605, 834 . . . . . 517, 518
—— *v.* Hartmont, W. N. 1877, p. 29 (M. R.) 432
Hutton *v.* Harrison, Hutton, 131 428

I'Anson *v.* Stuart, 1 T. R. 748; 2 Sm. L. C. 6th edit., p. 57 . 23, 131, 177, 485
Imperial Land Co. of Marseilles, *Re*, 37 L. T. 588; W. N. 1877, p. 244 527
Ingram *v.* Lawson, 6 Scott, 775; 5 Bing. N. C. 66; 7 Dowl. 125; 1 Arn. 387; 3 Jur. 73; [as to plea of justification] 169
6 Bing. N. C. 212; 8 Scott, 471; 4 Jur. 151; 9 C. & P. 326 34, 132, 137, 311, 319, 320, 455, 543
Inman *v.* Foster, 8 Wend. 602 164
—— and others *v.* Jenkins, L. R. 5 C. P. 738; 39 L. J. C. P. 258; 18 W. R. 897; 22 L. T. 659 504
International Financial Society *v.* City of Moscow Gas Co., (C. A.) 7 Ch. D. 241; 47 L. J. Ch. 258; 26 W. R. 272; 37 L. T. 736 . 563
Ireland *v.* Champneys, 4 Taunt. 884 355
Irwin *v.* Brandwood, 2 H. & C. 960; 33 L. J. Ex. 257; 10 Jur. N. S. 370; 12 W. R. 438; 9 L. T. 772 . . . . . 29, 66
Isaacs, *Ex parte*, 10 Ch. D. 1; 27 W. R. 297; 39 L. T. 520 . . 467
Isham *v.* York, Cro. Car. 15 71

Jackson *v.* Adams, 2 Scott, 599; 2 Bing. N. C 402; 1 Hodges, 78, 339 . . . . . 62, 273
—— *v.* Hopperton, 16 C. B. N. S. 829; 12 W. R. 913; 10 L. T. 529 . . . . . 203, 268, 275
—— *v.* Mawby, 1 Ch. D. 86; 45 L. J. Ch. 53; 24 W. R. 92 . . 435
Jacob *v.* Lawrence, 4 L. R. (Ir.), 579; 14 Cox C. C. 321 . . . 227
—— *v.* Mills, 1 Ventr. 117; Cro. Jac. 343 62
James *v.* Boston, 2 C. & K. 4 . . . . . 217, 223
—— *v.* Brook, 9 Q. B. 7; 16 L. J. Q. B. 17; 10 Jur. 541 . . . 78
(as to costs) 16 L. J. Q. B. 168 339
—— *v.* James, L. R. 13 Eq. 421; 41 L. J. Ch. 253; 26 L. T. 568 . 15
—— *v.* Jolly, Bristol Summer Assizes, 1879 212
Jarman *v.* Lucas, 33 L. J. C. P. 108 463
Jarnigan *v.* Fleming, 43 Miss. 711 164
Jefferies *v.* Duncombe, 2 Camp. 3; 11 East, 226 . . . . . 8, 22
Jekyll *v.* Sir John Moore, 2 B. & P. N. R. 341; 6 Esp. 63 . . . 189
Jenkins *v.* Morris, (C. A.) 14 Ch. D. 674; 49 L. J. Ch. 392 . . 561
—— *v.* Smith, Cro. Jac. 586 74
Jenkinson *v.* Mayne, Cro. Eliz. 384; 1 Vin. Abr. 415 55
Jenner and another *v.* A'Beckett, L. R. 7 Q. B. 11; 41 L. J. Q. B. 14; 20 W. R. 181; 25 L. T. 464 . . . . . 26, 33, 51, 79, 113
Jennings and Wife *v.* London General Omnibus Co., 30 L. T. 266 . 566
Jesson *v.* Hayes, Roll. Abr. 63 . . . . . 80, 137

PAGE

Johnasson *v.* Bonhote, 2 Ch. D. 298 ; 45 L. J. Ch. 651 ; 24 W. R. 619 ; 34 L. T. 745 477
Johns *v.* Gittings, Cro. Eliz. 239 80
—— *v.* James, 13 Ch. D. 370 506
Johnson *v.* Aylmer, Sir John, Cro. Jac. 126 119
—— *v.* Browning, 6 Mod. 217 178
—— *v.* Evans, 3 Esp. 32 . . . . . 193, 220
—— *v.* Hudson and Morgan, 7 A. & E. 233 ; 1 H. & W. 680 . 158, 535
—— *v.* Lemmon, 2 Roll. Rep. 144 78
—— *v.* Palmer, 4 C. P. D. 258 ; 27 W. R. 941 569
—— *v.* Smith, 25 W. R. 539 ; 36 L. T. 741 520
Jolliffe, *Ex parte*, R. *v.* Lefroy, L. R. 8 Q. B. 134 ; 42 L. J. Q. B. 121 ; 21 W. R. 332 ; 28 L. T. 132 . . . . . 442, 446
Jones, *Ex parte*, 13 Ves. 237 . . . . . 430, 436
—— *v.* Baxter (C. A.), 5 Ex. D. 275 ; 28 W. R. 817 561
—— *v.* Bewicke, L. R. 5 C. P. 32 486
—— *v.* Broadhurst, 9 C. B. 173 489
—— *v.* Davers *vel* Dawkes, Cro. Eliz. 496 ; 1 Roll. Abr. 74 110, 130, 471
—— *v.* Davis (C. A.), 36 L. T. 415 ; W. N. 1877, p. 86 562
—— *v.* Herne, 2 Wils. 87 . . . . . 55, 60, 86, 122
—— *v.* Hough (C. A.), 5 Ex. D. 115 ; 42 L. T. 108 561
—— *v.* Littler, 7 M. & W. 423 ; 10 L. J. Ex. 171 . . 70, 79, 124, 541
—— *v.* McGovern, Ir. R. 1 C. L. 681 249
—— *v.* Mackie, L. R. 3 Ex. 1 ; 37 L. J. Ex. 1 ; 16 W. R. 109 ; 17 L. T. 151 . . . . . 300, 301, 487
—— *v.* Monte Video Gas Co. (C. A.), 5 Q. B. D. 556 ; 49 L. J. Q. B. 627 ; 28 W. R. 758 ; 42 L. T. 639 . . . . . 508, 520
—— *v.* Orchard, 16 C. B. 614 ; 24 L. J. C. P. 229 ; 3 W. R. 554 . 579
—— *v.* Pritchard, 18 L. J. Q. B. 104 ; 6 D. & L. 529 466
—— *v.* Stevens, 11 Price, 235 . . . . . 177, 305, 531
Jourdain *v.* Palmer, L. R. 1 Ex. 102 ; 35 L. J. Ex. 69 ; 12 Jur. N. S. 214 ; 14 W. R. 283 ; 13 L. T. 600 506
Justice *v.* Gosling, 12 C. B. 39 ; 21 L. J. C. P. 94 549

Kain *v.* Farrer, 37 L. T. 469 ; W. N. 1877, p. 266 . . 519, 521, 535
Kane *v.* Mulvany, Ir. R. 2 C. L. 402 . . . . . 35, 187, 253, 259
Keble *v.* Hickeringill, 11 East, 576 n. 149
Keene *v.* Ruff, 1 Clarke (Iowa), 482 151
Keenholts *v.* Becker, 3 Denio N. Y. 352 332
Keighley *v.* Bell, 4 F. & F. 763 . . . . . 193, 195
Kelly *v.* Partington, 4 B. & Ad. 700 ; 2 N. & M. 460 ; 5 B. & Ad. 645 ; 3 N. & M. 116 . . . . . 89, 114, 275, 326
—— *v.* Sherlock, L. R. 1 Q. B. 686 ; 35 L. J. Q. B. 209 ; 12 Jur. N. S. 937 ; 15 W. R. Dig. C. L. 64 . 41, 292, 295, 307, 559
—— *v.* Tinling, L. R. 1 Q. B. 699 ; 35 L. J. Q. B. 231 ; 14 W. R. 51 ; 13 L. T. 255 ; 12 Jur. N. S. 940 . . . . . 28, 47
Kemp *v.* Neville, 10 C. B. N. S. 523 ; 31 L. J. C. P. 158 ; 9 W. R. C. L. Dig. 84 ; 4 L. T. 640 189
Kendillon *v.* Maltby, 1 Car. & M. 402 ; 2 M. & Rob. 438 ; 1 Dow & Clark, 495 . . . . . 168, 190, 332
Kennedy *v.* Hilliard, 10 Ir. C. L. R. 195 ; 1 L. T. 578 192
Kent *v.* Lewis, 21 W. R. 413 334
—— *v.* Stone, Bristol Summer Assizes, 1880 315
Kerr *v.* Shedden, 4 C. & P. 528 322

PAGE

Kerry (Earl of) *v.* Thorley, 4 Taunt. 355 ; 3 Camp. 214 n. . . 5, 22
Kershaw *v.* Bailey, 1 Exch. 743 ; 17 L. J. Ex. 129 . . 224, 236, 239, 271, 285
Keyworth *v.* Hill, 3 B. & Ald. 685 372
Keyzor and another *v.* Newcomb, 1 F. & F. 559 . . . . 31, 159
Kielley *v.* Carson and others, 4 Moore, P. C. C. 63 . . . 424, 425
Kilmore *v.* Abdoolah, 27 L. J. Ex. 307 559
Kine *v.* Sewell, 3 M. & W. 297 . . . 204, 217, 226, 231, 233, 238
King *v.* Bagg, Cro. Jac. 331 123
—— *v.* Davenport, 4 Q. B. D. 402 ; 48 L. J. Q. B. 606 ; 27 W. R. 798 522
—— *v.* Hoare, 13 M. & W. 494, 504 457
—— (Col.) *v.* Lake, 2 Ventr. 28 ; Hardres, 470 . . . . 5, 74
—— *v.* Waring and *ux.* 5 Esp. 15 . . . . . 168, 232
—— *v.* Watts, 8 C. & P. 615 . . . . . 209, 218
—— *v.* Wood, 1 N. & M. (South Car.) 184 25
—— and another *v.* Hawkesworth, 4 Q. B. D. 371 ; 48 L. J. Q. B. 484 ; 27 W. R. 660 ; 41 L. T. 411 . . 338, 570
Kinnahan *v.* McCullagh, Ir. R. 11 C. L. 1 . . . . . 106, 242
Kirby *v.* Simpson, 10 Exch. 358 ; 3 Dowl. 791 . . . . . 188, 487
Knight *v.* Gibbs, 1 A. & E. 43 ; 3 N. & M. 467 . . . . 326, 327
—— *v.* Purcell, 49 L. J. Ch. 120 ; 28 W. R. 90 ; 41 L. T. 581 . 340
—— and wife *v.* Lynch, 9 H. L. C. 577 ; 8 Jur. N. S. 724 ; 5 L. T. 291 . . . . . 86, 88, 312, 319, 323, 324, 325, 326, 349
Knobell *v.* Fuller, Peake's Add. Cas. 139 306
Kœnig *v.* Ritchie, 3 F. & F. 413 . . . . . 52, 229
Kramer *v.* Waymark, L. R. 1 Ex. 241 ; 35 L. J. Ex. 148 ; 12 Jur. N. S. 395 ; 14 W. R. 659 ; 14 L. T. 368 355
Krehl *v.* Burrell (C. A.), 10 Ch. D. 420 ; 48 L. J. Ch. 252 ; 27 W. R. 234 ; 39 L. T. 461 561
Kynaston *v.* Mackinder, 47 L. J. Q. B. 76 ; 26 W. R. Dig. 62 ; 37 L. T. 390 336

Lafone *v.* Smith, 3 H. & N. 735 ; 28 L. J. Ex. 33 ; 4 Jur. N. S. 1064 300
Costs and payment into Court, 4 H. & N. 158 ; 5 Jur. N. S. 127 301
Lake *v.* King, 1 Lev. 241 ; 1 Saund. 131 ; Sid. 414 ; 1 Mod. 58 152, 187, 222, 242, 245, 284
Lake and another *v.* Pooley, W. N. 1876, p. 54 ; Bitt. 121 ; 20 Sol. J. 280 ; 60 L. T. Notes, 250 517
Lamb *v.* Walker, 3 Q. B. D. 389 ; 45 L. J. Q. B. 451 ; 26 W. R. 775 ; 38 L. T. 643 317
Lamb's Case, 9 Rep. 60 . . . . . 156, 386
Laming *v.* Gee (C. A.), 28 W. R. 217 565
Lancaster *v.* French, 2 Str. 797 . . . . . 67, 80
Lane *v.* Applegate, 1 Stark. 97 489
Langley, *Ex parte*, *Ex parte* Smith, *Re* Bishop, 13 Ch. D. 110 ; 49 L. J. Bkcy. 1 ; 28 W. R. 174 ; 41 L. T. 388 432
Langridge *v.* Campbell, 2 Ex. D. 281 ; 46 L. J. Ex. 277 ; 25 W. R. 351 ; 36 L. T. 64 341
Large *v.* Large, W. N. 1877, p. 198 569
Latimer *v.* Western Morning News, 25 L. T. 44 368
Laughton *v.* Bishop of Sodor and Man, L. R. 4 P. C. 495 ; 42 L. J. P. C. 11 ; 21 W. R. 204 ; 28 L. T. 377 ; 9 Moore, P. C. C. N. S. 318 . . . . . 230, 235

PAGE

Laurenson *v.* The Dublin Metropolitan Junction Railway Co., 37 L. T. 32 461
Lauretta, The, 4 P. D. 25; 48 L. J. Prob. 55; 27 W. R. 902; 40 L. T. 444 565
Law *v.* Harwood, Sir W. Jones, 196; Palm. 529; Cro. Car. 140 141
Lawless *v.* Anglo-Egyptian Cotton and Oil Co., L. R. 4 Q. B. 262; 10 B. & S. 226; 38 L. J. Q. B. 129; 17 W. R. 498 152, 235, 242, 283, 284, 368, 532
Lawrence *v.* Smith, Jacob, 471 374
—— *v.* Woodward. Cro. Car. 277; 1 Roll. Abr. 74 56
Lay *v.* Lawson, 4 Ad. & E. 795 . . . . . 241, 246, 283
Leach's Case, 11 St. Tr. 307; 19 How. St. Tr. 1002 574
Lee *v.* Colyer, W. N. 1876, p. 8; Bitt. 80; 1 Charley, 86; 20 Sol. J. 177; 60 L. T. Notes, 157. 494
— *v.* Huson, Peake, 223 273
— *v.* Riley, 18 C. B. N. S. 722 327
Le Fanu and another *v.* Malcomson, 1 H. L. C. 637; 8 Ir. L. R. 418; 13 L. T. 61 . . . . . 32, 129, 130, 319, 324, 365, 367
Lefroy *v.* Burnside, 4 L. R. Ir. 340; 41 L. T. 199; 14 Cox, C. C. 260 514, 619
—— 4 L. R. Ir. 556 171
Leicester (Earl of) *v.* Walter, 2 Camp. 251 . . . . . 305, 306
Le Merchant, Attorney-General *v.*, 2 T. R. 201, n. 581
Lentner *v.* Merfield, *Times*, May 6th, 1880 204
Lethbridge *v.* Cronk, 44 L. J. C. P. 381 508
Leversage *v.* Smith, Cro. Eliz. 710 56
Levet's Case, Cro. Eliz. 289 . . . . . 78, 91, 350
Levi *v.* Milne, 4 Bing. 195; 12 Moore, 418 . 105, 130, 550, 552, 558
Levy *v.* Lawson, 3 E. B. & E. 560; 27 L. J. Q. B. 282 249
—— *v.* Moylan, 19 L. J. C. P. 308; 1 L. M. & P. 307 . . 443, 446
Lewes *v.* Walter [1617], 3 Bulstr. 225; Cro. Jac. 406, 413; Roll. Rep. 444 . . . . . 131, 165
—— (Earl of) *v.* Barnett, 6 Ch. D. 252; 47 L. J. Ch. 144; 26 W. R. 101 432
Lewis *v.* Clement, 3 B. & Ald. 702; 3 Br. & B. 297; 7 Moore, 200 29, 99, 172, 256, 291, 486
—— *v.* Levy, E. B. & E. 537; 27 L. J. Q. B. 282; 4 Jur. N. S. 970 44, 99, 176, 243, 245, 247, 248, 256
—— *v.* Walter, 4 B. & Ald. 605 . . . . 45, 163, 164, 176, 253
—— and Herrick *v.* Chapman, 2 Smith, 16 N. Y. R. 369 269
Lewknor *v.* Cruchley and wife, Cro. Car. 140 55
Leycroft *v.* Dunker, Cro. Car. 317 79
Leyman *v.* Latimer and others, 3 Ex. D. 15, 352; 46 L. J. Ex. 765; 47 L. J. Ex. 470; 25 W. R. 751; 26 W. R. 305; 37 L. T. 360, 819; 14 Cox, C. C. 51 . . . . 24, 58, 171, 177, 485, 497, 603
Liberia (Republic of) *v.* Roye, 1 App. Cas. 139; 45 L. J. Ch. 297; 24 W. R. 967; 34 L. T. 145 431
Lincoln (Earl of) *v.* Fisher, Cro. Eliz. 581; Ow. 113; Moore, 470 . 440
Lister *v.* Perryman, L. R. 4 H. L. 521; 39 L. J. Ex. 177; 18 W. R. Dig. 14; 23 L. T. 269 . . . . . 214, 278
Littler *v.* Thompson, 2 Beav. 129 . . . . . 46, 429, 430
Litton *v.* Litton, 3 Ch. D. 793; 24 W. R. 962 500
Lloyd *v.* Jones, 7 B. & S. 475 559
—— *v.* Morley, 5 L. R. Ir. 74 515
London *v.* Eastgate, 2 Rolle's Rep. 72 77

PAGE
Lovejoy *v.* Murray, 3 Wall. (Sup. Ct.), 1 458
Lovett *v.* Willer, 1 Roll. 469 143
Lowe *v.* Harewood, Sir W. Jones, 196 ; Cro. Car. 140 138
—— *v.* Lowe (C. A.), 10 Ch. D. 432 ; 48 L. J. Ch. 383 ; 27 W. R. 309 ; 40 L. T. 236 561
Lows, *Ex parte*, *In re* Lows (C. A.), 7 Ch. D. 160 ; 47 L. J. Bank. 24 ; 26 W. R. 229 ; 37 L. T. 583 564
Lucan (Earl of) *v.* Smith, 1 H. & N. 481 ; 26 L. J. Exch. 94 ; 2 Jur. N. S. 1170 483
Lumby *v.* Allday, 1 Tyr. 217 ; 1 C. & J. 301 . . . . 66, 78, 84, 293
Lumley *v.* Gye, 2 E. & B. 216 . . . . . 322, 326
Lynam *v.* Gowing, 6 L. R. Ir. 259 . . . . . 191, 254
Lynch *v.* Knight and wife, 9 H. L. C. 577 ; 8 Jur. N. S. 724 ; 5 L. T. 291 . . . . . 86, 88, 312, 319, 323, 324, 325, 326, 349
Lyon *v.* Tweddell, 13 Ch. D. 375 506

M. Moxham, The (C. A.), 1 P. D. 107 ; 46 L. J. P. D. & A. 17 ; 24 W. R. 597, 650 ; 34 L. T. 559 527
Macaulay *v.* Shakell and others, 1 Bligh, N. S. 96 527
Macgill's Case, 2 Fowl. Ex. Pr. 404 429
Macintosh *v.* Great Western Railway Co., 22 L. J. Ch. 72 510
Mackay *v.* Ford, 5 H. & N. 792 ; 29 L. J. Ex. 404 ; 6 Jur. N. S. 587 ; 8 W. R. 586 190
Mackereth *v.* Glasgow and South-Western Railway Co., L. R. 8 Ex. 149 ; 42 L. J. Ex. 82 ; 21 W. R. 339 ; 28 L. T. 167 461
Macleod *v.* Wakley, 3 C. & P. 311 . . . . . 52, 276, 534
McAleece, *In re*, Ir. R. 7 C. L. 146 437
McAndrew *v.* Barker (C. A.), 7 Ch. D. 701 ; 47 L. J. Ch. 340 ; 26 W. R. 317 ; 37 L. T. 810 563
McCabe *v.* Foot, 18 Ir. Jur. (vol. xi., N. S.) 287 ; 15 L. T. 115 . . 57
M'Cauley *v.* Thorp, 1 Chit. 685 525
M'Corquodale *v.* Bell and another, Weekly Notes, 1876, p. 39 ; Bitt. 111 ; 20 Sol. J. 260 ; 60 L. T. Notes, 232 . . . 509
—— and another *v.* Bell and another, 1 C. P. D. 471 ; 45 L. J. C. P. 329 ; 24 W. R. 399 ; 35 L. T. 261 . . 518
McCombe *v.* Gray, 4 L. R. (Ir.) 432 435
McCombs *v.* Tuttle, 5 Blackford (Indiana), 431 152
McDermott, *In re*, L. R. 1 P. C. 260 ; L. R. 2 P. C. 341 ; 38 L. J. P. C. 1 ; 20 L. T. 47 438
M'Dougall *v.* Claridge, 1 Camp. 267 235
M'Elveney *v.* Connellan, 17 Ir. C. L. R. 55 535
McFadzen *v.* Mayor and Corporation of Liverpool, L. R. 3 Ex. 279 ; 16 W. R. 48 505
McGregor *v.* Gregory, 11 M. & W. 287 ; 12 L. J. Ex. 204 ; 2 Dowl. N. S. 769 . . . . . 24, 176, 244
—— *v.* Thwaites, 3 B. & C. 24 ; 4 D. & R. 695 . . . 165, 193
McIntyre *v.* McBean, 13 Upper Canada, Q. B. Rep. 534 224
M'Loughlin *v.* Dwyer (1), Ir. R. 9 C. L. 170 . . . . 483, 515
McNally *v.* Oldham, 16 Ir. C. L. R. 298 ; 8 L. T. 604 249
M'Pherson *v.* Daniels, 10 B. & C. 263 ; 5 M. & R. 251 . 162, 163, 164, 165, 174, 175, 471
McStephens *v.* Carnegie, 28 W. R. 385 ; 42 L. T. 309 462
Magrath *v.* Finn, I. R. 11 C. L. 152 242
Maguire *v.* Knox, 5 Ir. C. L. R. 408 . . . . . 102, 483
Maitland *v.* Bramwell, 2 F. & F. 623 . . . . . 214, 238

PAGE
Maitland and others *v.* Goldney and another, 2 East, 426 163, 367, 537
Malachy *v.* Soper and another, 3 Bing. N. C. 371 ; 3 Scott, 723 ; 2 Hodges, 217 . . . . . 139, 141
Maloney *v.* Bartley, 3 Camp. 210 . . . . . 156, 193, 359, 384
Manby *v.* Witt, 18 C. B. 544 ; 25 L. J. C. P. 294 ; 2 Jur. N. S. 1004 . . . . . 203, 226, 285
Manchester, &c., Railway Co. and London and North-Western Railway Co. *v.* Brooks, 2 Ex. D. 243 ; 46 L. J. Ex. 244 ; 25 W. R. 413 ; 36 L. T. 103 370
Manning *v.* Avery, 3 Keb. 153 ; 1 Vin. Abr. 553 140
—— *v.* Clement, 7 Bing. 362 ; 5 M. & P. 211 . . . . 547, 549
Mansel, *In re*, Rhodes *v.* Jenkins (C. A.), 7 Ch. D. 711 ; 47 L. J. Ch. 870 ; 26 W. R. 361 ; 38 L. T. 403 563
Mansergh, *Re*, 1 B. & S. 400 ; 30 L. J. Q. B. 296 195
Mansfield *v.* Childerhouse, 4 Ch. D. 82 ; 46 L. J. Ch. 30 ; 25 W. R. 68 ; 35 L. T. 590 508
Mapleson *v.* Masini, 5 Q. B. D. 144 ; 49 L. J. Q. B. 423 ; 28 W. R. 488 ; 42 L. T. 531 495
Marlborough (Duke of), *Ex parte*, 5 Q. B. 955 ; 13 L. J. M. C. 105 ; 1 Dav. & Mer. 720 . . . . . 381, 440
Marriott *v.* Marriott, 26 W. R. 416 ; Weekly Notes, 1878, p. 57 . . 498
Marsden and wife *v.* Lancashire and Yorkshire Railway Co., 42 L. T. 631 337
Marsh *v.* Isaacs, 45 L. J. C. P. 505 557
Marshall *v.* Martin, L. R. 5 Q. B. 239 ; 39 L. J. Q. B. 85 ; 18 W. R. 378 ; 21 L. T. 788 335
Martano *v.* Mann (C. A.), 14 Ch. D. 419 ; 49 L. J. Ch. 510 ; 42 L. T. 890 ; 28 W. R. Dig. 67 346
Martin *v.* Bannister, 4 Q. B. D. 212, 491 ; 48 L. J. Ex. 300 ; 27 W. R. 431 446
—— *v.* Butchard, 36 L. T. 732 518
—— *v.* Loëi, 2 F. & F. 654 . . . . . 106, 109, 549
—— *v.* Mackonochie, 3 Q. B. D. 730 431
—— *v.* Strong, 5 A. & E. 535 ; 1 N. & P. 29 ; 2 H. & W. 336 . . . . . 238, 239, 310
—— *v.* Van Schaith, 4 Paige, 479 355
—— *v.* Wright, 6 Sim. 297 14
Martin's Case, 2 Russ. & My. 674 n. 429, 434
Martyn *v.* Burlings, Cro. Eliz. 589 75
—— *v.* Williams, 1 H. & N. 817 ; 26 L. J. Ex. 117 537
Marzetti *v.* Williams, 1 B. & Ad. 415 8
Masham *v.* Bridges, Cro. Car. 223 71
Mason *v.* Brentini, 15 Ch. D. 287 ; 29 W. R. 126 ; 42 L. T. 726 ; 43 L. T. 557 342
—— *v.* Jennings, Sir T. Raym. 401 9
—— *v.* Thompson, Hutt. 38 122
Massey *v.* Allen, 12 Ch. D. 807 ; 48 L. J. Ch. 692 ; 28 W. R. 243 . 356, 467
Matthew *v.* Crass, Cro. Jac. 323 310
Mawe *v.* Pigott, Ir. R. 4 C. L. 54 26
May *v.* Brown, 3 B. & C. 113 ; 4 D. & R. 670 . . . 29, 297, 307, 537
Mayhew *v.* Locke, 7 Taunt. 63 442
Mayne *v.* Fletcher, 4 M. & R. 312 ; 9 B. & C. 382 . 6, 154, 159, 387, 531
Mead, *In re*, *Ex parte* Cochrane, L. R. 20 Eq. 282 ; 44 L. J. Bkcy. 87 ; 23 W. R. 726 ; 32 L. T. 508 431
—— *v.* Daubigny, Peake, 168 . . . . . 272, 276

PAGE
Meagher *v.* Moore, 3 Smith, 135 ; in error, 1 Taunt. 39 . . . 88, 311
Mears *v.* Griffin, 1 M. & Gr. 796 ; 2 Scott, N. R. 15 559
Medhurst *v.* Balam, cited 1 Sider. 397 312
Meggs *v.* Griffith, Cro. Eliz. 400 ; Moore, 408 . . . . . 127, 165
Mercer *v.* Sparks, (1586) Owen, 51 ; Noy, 35. 472
—— *v.* Whall, 5 Q. B. 447, 462, 463 ; 14 L. J. Q. B. 267, 272 . . 530
Mercers Co., *Ex parte*, 10 Ch. D. 481 ; 48 L. J. Ch. 384 ; 27 W. R. 424 335
Mercier *v.* Cotton, 1 Q. B. D. 442 ; 46 L. J. Q. B. 184 ; 24 W. R. 566 ; 35 L. T. 79 . . . . . 501, 510
Merest *v.* Harvey, 5 Taunt. 442 83
Merryweather *v.* Nixan, 8 T. R. 186 ; 2 Sm. L. C. 546 (8th ed.) . 359, 372
Metropolitan Inner Circle Railway Co. *v.* Metropolitan Railway Co., 5 Ex. D. 196 ; 49 L. J. Ex. 505 ; 28 W. R. 510 ; 42 L. T. 591 523
———— Omnibus Co. *v.* Hawkins, 4 H. & N. 87 ; 28 L. J. Ex. 201 ; 5 Jur. N. S. 226 ; 7 W. R. 265 ; 32 L. T. Old S. 281 . . . . . 2, 32, 178, 368, 369, 516
Michel *v.* Wilson, 25 W. R. 380 474
Mickelthwaite *v.* Fletcher, 27 W. R. 793 436
Milissich *v.* Lloyds, 46 L. J. C. P. 404 ; 36 L. T. 423 ; 13 Cox, C. C. 575 . . . . . 251, 252, 254
—— W. N. 1875, p. 200 ; Bitt. 5 ; 1 Charley, 119 ; 20 Sol. J. 31 ; 60 L. T. Notes, 33 527
Miller *v.* Buckdon, 2 Buls. 10 122
—— *v.* David, L. R. 9 C. P. 118 ; 43 L. J. C. P. 84 ; 22 W. R. 332 ; 30 L. T. 58 . . . . . 90, 117, 323, 474
—— *v.* Hope, 2 Shaw Sc. App. Cas. 125 189
Milman *v.* Pratt, 2 B. & C. 486 ; 3 D. & R. 728. 141
Mills and wife *v.* Spencer and wife (1817), Holt, N. P. 533 165, 302, 305
Minnehaha, The, L. R. 3 A. & E. 148 ; 19 W. R. 304 ; 23 L. T. 747 512
Minors *v.* Leeford, Cro. Jac. 114 . . . . . 109, 119, 122
Mitchell *v.* Brown, 3 Inst. 167 ; 1 Roll. Abr. 70 96
Moises *v.* Thornton, 8 T. R. 303 . . . . . 69, 531
Moody *v.* Steward, L. R. 6 Ex. 35 ; 40 L. J. Ex. 25 ; 19 W. R 161 ; 23 L. T. 465 . . . . . 567, 569
Moon *v.* Towers, 8 C. B. N. S. 611 361
Moone *v.* Rose, L. R. 4 Q. B. 486 ; 38 L. J. Q. B. 236 435
Moor (Sir George) *v.* Foster, Cro. Jac. 65 70
—— *v.* Roberts, 3 C. B. N. S. 671 ; 26 L. J. C. P. 246 . 505, 508
—— ats. —— 1 M. & S. 284 305
Moore *v.* Meagher (in error), 1 Taunt. 39 ; (below) 3 Smith, 135 88, 311
—— *v.* Terrell and others, 4 B. & Ad. 870 ; 1 N. & M. 559 . 30, 485
Mordaunt *v.* Mordaunt, 39 L. J. Prob. & Matr. 59 . . . 264, 353
More *v.* Bennett (1872), 48 N. Y. R. (3 Sickel), 472 . . . 24, 106
Morgan *v.* Lingen, 8 L. T. 800 23
Morris *v.* Freeman and wife, 3 P. D. 65 ; 47 L. J. P. D. & A. 79 ; 27 W. R. 62 ; 39 L. T. 125 . . . . . 347, 553
—— *v.* Langdale, 2 B. & P. 284 . . . . . 79, 81, 111, 326
Morrison *v.* Belcher, 3 F. & F. 614 50
—— and another *v.* Harmer and another, 3 Bing. N. C. 759 ; 4 Scott, 524 ; 3 Hodges, 108 . . . . 34, 51, 170, 486
Mortimer *v.* M'Callan, 6 M. & W. 58 . . . . . 8, 536
Mot *et ux.* *v.* Butler, Cro. Car. 236 122

PAGE
Mountney *v.* Watton, 2 B. & Ad. 673 . . . . . 99, 170, 172
Mulkern *v.* Ward, L. R. 13 Eq. 619; 41 L. J. Ch. 464; 20 W. R. Dig. 38; 26 L. T. 831 . . . . . 15, 43
Mullett *v.* Hulton, 4 Esp. 248 302
Mulligan *v.* Cole and others, L. R. 10 Q. B. 549; 44 L. J. Q. B. 153; 33 L. T. 12 . . . . . 26, 117, 228, 544
Mulock, *Re*, 33 L. J. Pr. & Matr. 205; 10 Jur. N. S. 1188; 13 W. R. 278 430
Munroe *v.* Pilkington, 31 L. J. Q. B. 89; 8 Jur. N. S. 557; 10 W. R. Dig. 37; 6 L. T. 21 439
Murdoch *v.* Warner, 4 Ch. D. 750; 46 L. J. Ch. 121; 25 W. R. 207; 35 L. T. 748 454
Murphy *v.* Halpin, Ir. R. 8 C. L. 127 . . . . . 52, 229
Murrey's Case, 2 Buls. 206; 1 Vin. Abr. 440 124
Musgrave *v.* Bovey, 2 Str. 946 73
Myers *v.* Defries, *Times*, July 23, 1877 . . . . . 248, 269
—— 3 Q. B. D. 95, 459; 4 Ex. D. 176; 48 L. J. 446; 27 W. R. 191; 40 L. T. 795; 5 Ex. D. 15, 180; 28 W. R. 406; 41 L. T. 659 . . . . 269, 339

Naden *v.* Micocke (1684), 3 Lev. 166; Sir T. Jones, 235; 2 Ventr. 172; 3 Salk. 325 558
Napier *v.* Daniel and another, 3 Scott, 417; 3 Bing. N. C. 77; 2 Hodges, 187 558
National Funds Assurance Co., *In re* (C. A.), 4 Ch. D. 305; 46 L. J. Ch. 183; 25 W. R. 151; 35 L. T. 689 563
Neale and others *v.* Clark and others, 4 Ex. D. 286; 41 L. T. 438 . 342
Neve *v.* Cross, Sty. 350 55
New British Co. *v.* Peed, 26 W. R. 354; W. N. 1878, p. 52 . . . 517
Newley *v.* Van Offen, L. R. 7 Q. B. 293; 41 L. J. Q. B. 148; 20 W. R. 383; 26 L. T. 164 461
Newman *v.* Bailey, 2 Chit. 665 . . . . . 177, 485
—— *v.* Zachary, Aleyn, 3 140
Newton, *Ex parte, re* Pigott, 11 Cox, C. C. 311 587
—— *v.* Chaplin, 10 C. B. 56 536
—— *v.* Stubbs, 3 Mod. 71 470
—— and wife *v.* Boodle and others, 4 C. B. 359; 18 L. J. C. P. 73 347, 553
Nicholl *v.* Jones, 2 H. & M. 588; 13 W. R. 451 518
Nicholson *v.* Jackson, W. N. 1876, p. 38 494
—— *v.* Lyne, Cro. Eliz. 94 72
Nixon *v.* Harvey, 8 Ir. C. L. Rep. 446 483
Noel *v.* Noel, 13 Ch. D. 510; 28 W. R. 720; 42 L. T. 352 . . . 467
Norman *v.* Johnson, 29 Beav. 77 338
Norris *v.* Smith, 10 A. & E. 188 453
North *v.* Bilton, 4 Q. B. D. 99; 48 L. J. Q. B. 161; 27 W. R. 247; 39 L. T. 608 336
Northampton's (Earl of) Case, 12 Rep. 134 . . . . . 127, 162
Nutt's (Elizabeth) Case, Fitzg. 47; 1 Barnard. 306 . 161, 363, 413

Oake and another *v.* Moorecroft, L. R. 5 Q. B. 76; 39 L. J. Q. B. 15; 18 W. R. 115 463
Oastler *v.* Henderson (C. A.), 2 Q. B. D. 575; 46 L. J. Q. B. 607; 37 L. T. 22 560
O'Brien *v.* Bryant, 16 M. & W. 168; 16 L. J. Ex. 77; 4 D. & L. 341 172

PAGE

O'Brien *v.* Clement, 15 M. & W. 435; 15 L. J. Ex. 285; 3 D. & L. 676; 10 Jur. 395 . . . . . 265, 301, 493
—— 16 M. & W. 159, 166; 16 L. J. Ex. 76, 77; 4 D. & L. 343, 563 . . . . . 21, 23, 24
Oddy *v.* Lord George Paulet, 4 F. & F. 1009 . . 79, 227, 240, 286
Odger *v.* Mortimer, 28 L. T. 472 . . . . . 52, 557
O'Donoghue *v.* Hussey, Ir. R. 5 C. L. 124 . . 52, 168, 229, 230, 281
Ogden *v.* Turner, Holt, 40; 6 Mod. 104; 2 Salk. 696 . 54, 57, 59, 85
O'Keefe *v.* Cardinal Cullen, Ir. R. 7 C. L. 319 487
Oldham *v.* Peake, 2 Wm. Bl. 959; Cowp. 275 . . 55, 96, 121, 125, 323
Oliver *v.* Bentinck, 3 Taunt. 456 . . . . . 189, 196, 197, 257
Olmsted *v.* Miller, 1 Wend. 506 312
Onslow *v.* Horne, 2 W. Bl. 750; 3 Wils. 177 54, 70, 71, 139, 236, 293, 311
Onslow's Case, 9 Q. B. 219; 12 Cox, C. C. 358 447
Orpwood *v.* Barkes, or Parkes, 4 Bing. 261; 12 Moore, 492 . 79, 115, 597
Osborn *v.* London Dock Co., 10 Exch. 698; 24 L. J. Ex. 140 . . 504
Owens *v.* Woosman, L. R. 3 Q. B. 469; 9 B. & S. 243; 37 L. J. Q. B. 159; 16 W. R. 932; 18 L. T. 357 566
Oxford *et ux. v.* Cross, 4 Rep. 18 . . . . . 59, 85, 86

PADMORE *v.* Lawrence, 11 A. & E. 380; 3 P. & D. 209; 4 Jur. 458 220, 221, 274, 284, 285
Paine *v.* Mondford, Cro. Eliz. 747 56
Palmer *v.* Boyer, Owen, 17; Cro. Eliz. 342 74
—— *v.* Cohen, 2 B. & Ad. 966 355
—— *v.* Roberts, 22 W. R. 577, n.; 29 L. T. 403 566
Pannell *v.* Nunn (C. A.), 28 W. R. 940 560
Paris *v.* Levy, 9 C. B. N. S. 342; 30 L. J. C. P. 11; 7 Jur. N. S. 289; 9 W. R. 71; 3 L. T. 324; S. C. at Nisi Prius, 2 F. & F. 71 34, 51, 188
Parkes *v.* Prescott and another, L. R. 4 Ex. 169; 38 L. J. Ex. 105; 17 W. R. 773; 20 L. T. 537 . . . . . 156, 361, 362
Parkins and wife *v.* Scott and wife, 1 H. & C. 153; 31 L. J. Ex. 331; 8 Jur. N. S. 593; 10 W. R. 562; 6 L. T. 394 167, 323, 329, 330, 332
Parmiter *v.* Coupland, 6 M. & W. 105; 9 L. J. Ex. 202; 4 Jur. 701 27, 28, 40, 43, 95, 550
Parret *v.* Carpenter, Noy, 64; 2 Cro. Eliz. 502 73
Parsons *v.* Surgey, 4 F. & F. 247 . . . . . 243, 285
—— *v.* Tinling, 2 C. P. D. 119; 46 L. J. C. P. 230; 25 W. R. 255; 35 L. T. 851 . . . . . 335, 469
Pasquin's Case, cited 1 Camp. 351 307
Pashler *v.* Vincent, 8 Ch. D. 825; 27 W. R. 2 432
Pater, *In re*, 5 B. & S. 299; 33 L. J. M. C. 142; 12 W. R. 823; 10 L. T. 376. 429
—— *v.* Baker, 3 C. B. 831; 16 L. J. C. P. 124; 11 Jur. 370 138, 144, 271
Paterson's Case, 1 Brown (Scotch), 629 399
Pattison *v.* Jones, 3 M. & R. 101; 8 B. & C. 578 . . . 202, 209, 287
Payne, *Ex parte, In re* Cross, 11 Ch. D. 539, 550; 27 W. R. 808; 40 L. T. 563 564
—— *v.* Beuwmorris, 1 Lev. 248 . . . . . 72, 310
—— *v.* Courthope, 20 Sol. J. 724 487
Peacham's Case, Cro. Car. 125; 2 Cobbett's St. Tr. 870 411
Peake *v.* Oldham, Cowp. 275; 2 W. Bl. 959 . . 55, 96, 121, 125, 323
—— *v.* Pollard, Cro. Eliz. 214 94
Pearce *v.* Ornsby, 1 M. & Rob. 455 . . . . . 99, 296, 539

PAGE
Pearce v. Rogers, 2 F. & F. 137 471
—— v. Watts, L. R. 20 Eq. 492; 44 L. J. Ch. 492; 23 W. R. 771 477
Peard v. Jones, Cro. Car. 382 . . . . . 68, 74
Pearson v. Lemaitre, 5 M. & G. 700; 6 Scott, N. R. 607; 12 L. J. Q. B. 253; 7 Jur. 748 . . . . 99, 272, 274, 276, 296, 303, 551
Pemberton v. Colls, 10 Q. B. 461; 16 L. J. Q. B. 403; 11 Jur. 1011 72, 73, 295
Penfold v. Westcote, 2 Bos. & P. N. R. 335 109
Pennyman v. Rabanks, Cro. Eliz. 427; 1 Vin. Abr. 551 . . . 143
Peppiatt and wife v. Smith, 33 L. J. Ex. 239 . . . . . 506, 507
Perren v. Monmouthshire Ry. Co., 11 C. B. 855 491
Perry's (Captain) Case, 2 Dick. 794; 2 Atk. 469 429
Perryman v. Lister, L. R. 4 H. L. 521; 39 L. J. Ex. 177; 18 W. R. Dig. 14; 23 L. T. 269 . . . . . 214, 278
Peterborough (Lord) v. Williams, 2 Show. 506; or in Butts's ed. 650. 136
Pettibone v. Simpson, 66 Barb. 492 316
Pharmaceutical Society v. London and Provincial Supply Association, 4 Q. B. D. 313; 48 L. J. Q. B. 387; 27 W. R. 709; 40 L. T. 584 369
—— (C. A.) 5 Q. B. D. 310; 49 L. J. Q. B. 338; 28 W. R. 608; 42 L. T. 569 369
—— (H. L.) 5 App. Cas. 857; 49 L. J. Q. B. 736; 28 W. R. 957; 43 L. T. 389 369
Philips v. Badby, cited 4 Rep. 19 73
Phillimore v. Machon, 1 P. D. 481 . . . . . 402, 403
Phillips v. Barnet, 1 Q. B. D. 436; 45 L. J. Q. B. 277; 24 W. R. 345; 34 L. T. 177 152
—— v. Jansen, 2 Esp. 624 . . . . . 65, 75, 580
—— v. L. & S. W. Ry. Co., 4 Q. B. D. 406; 48 L. J. Q. B. 693; 27 W. R. 797; 40 L. T. 813 . . . 292
—— (C. A.) 5 Q. B. D. 78; 49 L. J. Q. B. 233; 28 W. R. 10; 41 L. T. 121 . . 292
—— v. Routh, L. R. 7 C. P. 287 511
—— and another v. Barron and another, W. N. 1876, p. 54; Bitt. 119; 20 Sol. J. 280; 60 L. T. Notes, 249 . 507
Phosphate Sewage Co. v. Hartmont, 25 W. R. 743 432
Pickering v. Stevenson, L. R. 14 Eq. 322; 41 L. J. Ch. 493; 20 W. R. 654; 26 L. T. 608 591
Picton v. Jackman, 4 C. & P. 257 . . . . . 206, 211, 279
Pierce v. Ellis, 6 Ir. C. L. R. 55 . . . . . 236, 241, 260
Pierpoint v. Cartwright, 5 C. P. D. 139; 28 W. R. 583; 42 L. T. 295 569
Pierrepoint's Case, Cro. Eliz. 308 59
Pine's (Hugh) Case, Cro. Car. 117 410
Pinero v. Goodlake, 15 L. T. 676 254
Pisani v. Lawson, 6 Bing. N. C. 90; 5 Scott, 418 . . . . 356, 467
Pitt v. Donovan, 1 M. & S. 639 142
Pitten v. Chatterburg, W. N. 1875, p. 248; Bitt. 62; 1 Charley, 106; 20 Sol. J. 139; 60 L. T. Notes, 122 508
Plum v. Normanton, Iron Co. W. N. 1876, p. 105; Bitt. 140; 20 Sol. J. 340; 60 L. T. Notes, 303 523
Plunket v. Gilmore, Fortescue, 211 8
Plunkett v. Cobbett, 2 Selw. N. P. 1042; 5 Esp. 136 274
Pocock v. Nash, Comb. 253 73
Poe v. Mondford, Cro. Eliz. 620 76
Poe's Case, 1 Vin. Abr. 440; 2 Buls. 206 . . . . . 122, 124

PAGE
Polini v. Gray, 11 Ch. D. 741; 28 W. R. 81; 40 L. T. 861 . . . 467
Pollard, *In re*, L. R. 2 P. C. 106; 5 Moore, P. C. C. N. S. 111; 17 W. R. Dig. 4 438
—— v. Green, Bristol Summer Assizes, 1880 452
—— v. Lyon, 1 Otto, (91 U. S.) 225 317
Pool v. Sacheverel, 1 P. Wms. 675 430
Poole v. Whitcomb, 12 C. B. N. S. 770 552
Popham v. Pickburn, 7 H. & N. 891; 31 L. J. Ex. 133; 8 Jur. N. S. 179; 10 W. R. 324; 5 L. T. 846 . . . . 165, 176, 261, 283
Poplett v. Stockdale, Ry. & Moo. 337 374
Potter v. Chambers, 4 C. P. D. 457; 48 L. J. C. P. 274; 27 W. R. 414 341
—— v. Cotton (C. A.) 5 Ex. D. 137; 49 L. J. Ex. 158; 28 W. R. 160; 41 L. T. 460 560
—— v. Home and Colonial Assurance Co., (not reported) . . 492
Powell v. Jones, 1 Lev. 297. . . . . 68, 75
Power v. Shaw, 1 Wils. 62 85
Pratt, *in re*, 7 A. & E. 27 580
—— v. Gardner, 2 Cush. (Mass.) 63 190
Preston v. Pinder, Cro. Eliz. 308 . . . . . 55, 123
Price v. Harris, 10 Bing. 331 557
—— v. Hutchison, L. R. 9 Eq. 534; 18 W. R. 204 431
—— v. Jenkings, Cro. Eliz. 865 471
Prickett v. Gratrex, 8 Q. B. 1020 445
Pridham v. Tucker, Yelv. 153; Hob. 126; Cart. 214 114
Prinne v. Howe, 1 Brown Parl. C. 64 71
Prior and another v. Wilson, 1 C. B. N. S. 95 . . . . . 80, 225
Proby v. Marquess of Dorchester, 1 Lev. 148 136
Prosser v. Rowe, 2 C. & P. 422 178
Proud v. Hawes, Cro. Eliz. 171; Hob. 140 75
Prowse v. Loxdale, 3 B. & S. 896; 32 L. J. Q. B. 227 545
Prudential Assurance Co. v. Knott, L. R. 10 Ch. 142; 44 L. J. Ch. 192; 23 W. R. 249; 31 L. T. 866 . . . . . 13, 15, 436, 454
Prudhomme v. Fraser, 2 A. & E. 645 339
Pudsey Coal Gas Co. v. Corporation of Bradford, L. R. 15 Eq. 167; 42 L. J. Ch. 293; 21 W. R. 286; 28 L. T. 11 31
Purcell v. Sowler, 1 C. P. D. 781; (C. A.) 2 C. P. D. 215; 46 L. J. C. P. 308; 25 W. R. 362; 36 L. T. 416 . . . 41, 46, 165, 260, 283
Purdey v. Stacey, 5 Burr. 2698 70
Purnell v. G. W. Ry. Co. and Harris, (C. A.) 1 Q. B. D. 636; 45 L. J. Q. B. 687; 24 W. R. 720, 909; 35 L. T. 605 557
Pybus v. Scudamore, Arn. 464 529
Pye v. Wallis, Carter, 55 63

Quin v. Hession, 4 L. R. (Ir.) 35; 40 L. T. 70 . . 230, 307, 494

Rafael v. Ongley, 24 W. R. 857; 34 L. T. 124 460
Rainy v. Bravo, L. R. 4 P. C. 287; 20 W. R. 873 . . . . 471, 536
—— v. Justices of Sierra Leone, 8 Moo. P. C. 47 439
Ralph v. Carrick, 11 Ch. D. 873; 28 W. R. 67; 40 L. T. 505 . . 564
Ram v. Lamley, Hutt. 113 193
Ramadge v. Ryan, 9 Bing, 333; 2 M. & Sc. 421 . . . . . 76, 559
Ramsay, *In re*, L. R. 3 P. C. 427; 7 Moo. P. C. N. S. 263 439
Ramsdale v. Greenacre, 1 F. & F. 61 . . . . . 67, 69, 80, 473

PAGE

Ramsden *v.* Brearley (on demurrer), L. R. 10 Q. B. 147; 44 L. J. Q. B. 46; 23 W. R. 294; 32 L. T. 24 346
—— (as to interrogatories), 33 L. T. 322; W. N. 1875, p. 199; 1 Charley, 96; Bitt. Addenda; 20 Sol. J. 30 . 514
Ratcliff *v.* Michael, Cro. Jac. 331 118
Rawlings *et ux. v.* Norbury, 1 F. & F. 341 111
Rea, *In re* John, 2 L. R. Ir. 429; 14 Cox, C. C. 139 447
—— 4 L. R. Ir. 345; 14 Cox, C. C. 256 443
Read's Case, Cro. Eliz. 645 127
Read *v.* Ambridge, 6 C. & P. 308 109
Reade *v.* Woodroffe, 24 Beav. 421 510
Redman *v.* Pyne, 1 Mod. 19 65
Redondo *v.* Chaytor (C. A.), 4 Q. B. D. 453; 48 L. J. Q. B. 697; 27 W. R. 701; 40 L. T. 797 356
Redston *v.* Eliot, Cro. Eliz. 638; 1 Roll. Abr. 49 121
Reeve *v.* Holgate, 2 Lev. 62 124
Reignald's Case, Cro. Car. 563 . . . . . 77, 124
Rendall *v.* Hayward, 5 Bing. N. C. 422 559
Republic of Costa Rica *v.* Erlanger, 1 Ch. D. 171; 45 L. J. Ch. 145; 24 W. R. 151; 1 Charley, 111 502
Republic of Liberia *v.* Roye, 1 App. Cas. 139; 45 L. J. Ch. 297; 24 W. R. 697; 34 L. T. 145 431
Restell and wife *v.* Steward, (1) W. N. 1875, p. 231; 1 Charley, 87; Bitt. 46; 20 Sol. J. 99; 60 L. T. Notes, 87 . 479, 481
—— (2) W. N. 1875, p. 249; 1 Charley, 89; Bitt. 65; 20 Sol. J. 140; 60 L. T. Notes, 123 . . 485
Revis *v.* Smith, 18 C. B. 126; 25 L. J. C. P. 195; 2 Jur. N. S. 614 . 191, 193
R. *v.* Abingdon (Lord), 1 Esp. 226 . 154, 186, 236, 259, 268, 385, 387
— *v.* Aickles, 1 Leach, 330 536
— *v.* Alme and Nutt, 3 Salk. 224; 1 Lord Raym. 486 377
— *v.* Almon, 5 Burr. 2686 . . . . . 161, 363, 364, 414
— *v.* —— Wilmot's Notes of Opinions and Judgments, p. 253 429, 437
— *v.* Amphlit, 4 B. & C. 35; 6 D. & R. 125 . . . . 152, 159, 531
— *v.* Annet, 3 Burn Ec. L. 386 (9th edition) 399
— *v.* Archer, 2 T. R. 203 n. 589
— *v.* Aspinall, 2 Q. B. D. 48; 46 L. J. M. C. 145; 25 W. R. 283; 36 L. T. 297 586
— *v.* Atwood, Cro. Jac. 421 399
— *v.* Aunger, 12 Cox. C. C. 407 593
— *v.* Baker, 1 Mod. 35 440
— *v.* Baldwin, 8 A. & E. 168 . . . . . 591, 592
— *v.* Barker, 1 F. & F. 326 581
— *v.* Barnard, *Times*, Dec. 17, 1878, and Jan. 13, 1879 . 387, 540, 593
— *v.* Bate, 1 Dougl. 387 . . . . . 534, 592
— *v.* Baxter, 3 Mod. 69 104
— *v.* Bedford, Mich. 12 Ann., cited in 2 Str. 789 . . . . 417, 420
— *v.* Beere, 12 Mod. 219; Holt. 422; Carth. 409; 2 Salk. 417, 646; 1 Ld. Raym. 414 . . . . . 152, 386, 417, 418, 533, 580
— *v.* Benfield, 9 Burr. 285 587
— *v.* Bickerton, 1 Stra. 498 592
— *v.* Birmingham and Gloucester Ry. Co., 3 Q. B. 223; 10 L. J. M. C. 136 577
— *v.* Bliss (Clerk), K. B. MSS. 5 Geo. I. Roll. 733; Sid. 219 . . 417
— *v.* Bolton, 1 Q. B. 73 443

PAGE
R. v. Boxall, 4 A. & E. 513 578
— v. Bradlaugh and Besant, 2 Q. B. D. 569; 46 L. J. M. C. 286; 25 W. R. Dig. 91 . . . . . 6, 587
—— (C. A.) 3 Q. B. D. 607; 48 L. J. M. C. 5; 26 W. R. 410; 38 L. T. 118; 14 Cox, C. C. 68 574
— v. Brewster, Dig. L. L. 76 . . . . . 420, 421
— v. Brooke, 2 T. R. 190 595
— v. Brown (Dr.), 11 Mod. 86; Holt, 425 . . . 23, 116, 411, 421
— v. Budd, 5 Esp. 230 582
— v. Bunts, 2 T. R. 683 589
— v. Burdett, 4 B. & Ald. 95, 314 . . . . 154, 386, 388, 398, 417, 419, 574, 575, 581, 589
— v. Burford, 1 Ventris, 16 441
— v. Burks, 7 T. R. 4 575
— v. Burn, 7 A. & E. 190 . . . . . 441, 593
— v. Canning, 19 St. Tr. 370 581
— v. Canterbury, Archbishop of, 11 Q. B. 649 403
— v. Carden, Sir Robert, 5 Q. B. D. 1; 49 L. J. M. C. 1; 28 W. R. 133; 41 L. T. 504; 14 Cox, C. C. 359 . . . 43, 390, 573
— v. Carlile, Mary, 3 B. & Ald. 167 . . . . 250, 351, 384, 399
— v. Carlile, Richard, 3 B. & Ald. 161; 1 Chit. 451 . 384, 399, 401, 532
— v. Casey, 13 Cox, C. C. 614 578
— v. Castro, L. R. 9 Q. B. 219; 12 Cox, C. C. 358 . . . 430, 433
— v. Caudwell, 2 Den. C. C. 372, n. 588
— v. Chipping Sodbury, 3 N. & M. 104 579
— v. Christian, 12 L. J. M. C. 26 580
— v. Clement, 4 B. & Ald. 218 . . . . . 249, 258, 429, 431, 434
— v. Clendon, 2 Str. 789 398
— v. Clerk, 1 Barnard. 304 . . . . . 130, 359, 387, 413
— v. Cobbett [1804], 29 Howell's St. Tr. 1 . . . . 10, 417, 418
— v. Cockshaw, 2 N. & Man. 378 594
— v. Coghlan, 4 F. & F. 316 379
— v. Cohen and Jacob, 1 Stark. 516 585
— v. Collins, 9 C. & P. 456 . . . . . 415, 416, 417, 418, 419
— v. Cooper, 8 Q. B. 533; 15 L; J. Q. B. 206 . 25, 155, 333, 361, 363, 386, 581
— v. Creevey, 1 M. & S. 273 . . . . . 186, 236, 250, 259, 268
— v. Cripps, *Times*, Nov. 4th and 18th, 1880 573
— v. Critchley, 4 T. R. 129 n. 376
— v. Cruse *et ux.*, 2 Moo. C. C. 53; 8 C. & P. 541 351
— v. Cuthell, 27 Howell's St. Tr. 642 . . . . . 10, 386
— v. Darby, 3 Mod. 139; Comb. 65; Carth. 14 . . . . 376, 441
— v. Davison, 4 B. & Ald. 329 429
— v. Dean of St. Asaph, 3 T. R. 428 n.; 4 Dougl. 73; 21 St. T. 1043 10, 377, 585, 586
— v. De Berenger, 3 M. & S. 67 378
— v. D'Eon, 1 Wm. Bl. 501; 3 Burr. 1514; Dig. L. L. 88 . . . 383
— v. Dewhurst, 5 B. & Ad. 405 579
— v. Dodd, 2 Sess. Cas. 33 . . . . . 161, 363
— v. Dover, 2 Harg. St. Tr. 457 159
— v. Drury and others, 18 L. J. M. C. 189; 3 C. & K. 190 . . . 587
— v. Duffy, 9 Ir. L. R. 329; 2 Cox, C. C. 45 . . . . . 390, 583
— v. Dugdale, 1 E. & B. 425; 22 L. J. M. C. 59; 17 Jur. 546; Dears. C. C. 64 405

PAGE
R. v. Eaton, 31 How. St. Tr. 927 398
— v. Edgar, 2 Sess. Cas. 29 ; 5 Bac. Abr. 199 98
— v. Enes (1732), Andr. 229 ; 4 Bac. Abr. Libel, A. (2), p. 452 . 226
— v. Evans and another, 8 Dowl. 451 . . . . . 424, 435
— v. Eve and Parlby, 5 A. & E. 780 ; 1 N. & P. 229 . . 593, 594
— v. Eyre, Leeds Assizes, *Times*, Nov. 6, 1880 584
— v. Farr, 1 Keb. 629 . . . . . 72, 440
— v. Faulkner, 2 Mont. and Ayr. 321, 322 . . . . . 429, 437
— v. Fisher and others, 2 Camp. 563 255
— v. Fleet, 1 B. & Ald. 379 255
— v. Foulkes, 1 L. M. & P. 720 ; 20 L. J. M. C. 196 578
— v. Fowler and Sexton, 4 B. & Ald. 273 588
— v. Franceys, 2 A. & E. 49 . . . . . 531, 591
— v. Francis, L. R. 2 C. C. R. 128 ; 43 L. J. M. C. 97 ; 22 W. R. 663 ; 30 L. T. 503 272
— v. Francklin, 9 St. Tr. 255 ; 17 Howell's St. Tr. 626 . . 414, 417
— v. Garret, Sir Baptist Hicks' Case, Hob. 215 ; Popham, 139 . . 116
— v. Gathercole, 2 Lewin, C. C. 237 . . . . . 126, 376, 377
— v. Girdwood, 1 Leach, 169 ; East, P. C. 1120 . . . . . 581, 583
— v. Goldsmith, L. R. 2 C. C. R. 79 ; 42 L. J. M. C. 94 ; 21 W. R. 791 ; 28 L. T. 881 586
— v. Goldstein, Manasseh, 3 Brod. & B. 201 ; 7 Moore, 1 ; 10 Price, 88 ; R. & R. C. C. 473 . . . . . 470, 574
— v. Gordon, 2 Leach, 581 530
— v. Lord Geo. Gordon, 22 Howell's St. Tr. 177 . . . 383, 427
— v. Granfield, 12 Mod. 98 441
— v. Grant and others, 5 B. & Ald. 101 ; 3 N. & M. 106 . . . 584
— v. Gray, 10 Cox, C. C. 184 381
— v. Gregory, 8 A. & E. 907 381
— v. Griffin, 1 Sess. Cas. 257 377
— v. Gutch, Fisher, and Alexander, Moo. & Malk. 433 . 161, 364, 386
— v. Hall, 1 Str. 416 . . . . . 399, 535
— v. Halpin, 9 B. & C. 65 ; 4 M. & R. 8 589
— v. Harrison, 3 Keb. 841 ; Ventr. 324 ; Dig. L. L. 66 . . 420, 421
— v. Hart, 1 Wm. Bl. 386 232
— v. Hart and White, 30 How. St. Tr. 1168, 1345 ; 10 East, 94 . . 428
— v. Harvey and Chapman, 2 B. & C. 257 . . . 385, 414, 584
— v. Haswell and Bate, 1 Doug. 387 . . . . . 534, 592
— v. Head and Marks, *Times*, Oct. 27th & 28th, 1879 24
— v. Hetherington, 5 Jur. 529 . . . . . 399, 588
— v. Hicklin, L. R. 3 Q. B. 371 ; 37 L. J. M. C. 89 ; 16 W. R. 801 ; 18 L. T. 395 ; 11 Cox, C. C. 19 . . . 6, 250, 399, 404, 407
— v. Higgins, 2 East, 5 378
— v. Hobhouse, 2 Chit. 210 424
— v. Hoggan, *Times*, Nov. 4th, 1880 577
— v. Holbrook and others, 3 Q. B. D. 60 ; 47 L. J. Q. B. 35 ; 26 W. R. 144 ; 37 L. T. 530 ; 13 Cox C. C. 650 159, 363, 364, 365, 385, 583
4 Q. B. D. 42 ; 48 J. L. Q. B. 113 ; 27 W. R. 313 ; 39 L. T. 536 ; 14 Cox C. C. 185 . . . 159, 363, 364, 365, 385, 583
— v. Holland, 4 T. R. 457 577
— v. Holt, 5 T. R. 436 . . . . . 384, 582, 584, 587
— v. Horne, 11 St. Tr. 264 ; Cowp. 672 ; 20 Howell's St. Tr. 651 104, 417, 575, 595, 651
— v. Hunt and Leigh Hunt, 31 Howell's St. Tr. 408 417

PAGE
R. v. Hunt and others, 3 B. & Ald. 444 579
— v. Ilive, Dig. L. L. 83 399
— v. Ingram, 1 Salk. 384 351
— v. James, 5 B. & Ald. 894 434
— v. Jeffe, 15 Vin. Abr. 89 428
— v. Jenour, 7 Mod. 400 377
— v. Jewell, 7 E. & B. 140; 26 L. J. Q. B. 177 578
— v. Johnson, Hon. Robt., 6 East, 583; 2 Smith, 591; 29 How. St. Tr. 103 578
—— 7 East, 65; 3 Smith, 94; 29 Howell St. Tr. 103 417, 581
— v. Jolliffe, 4 T. R. 285 381
— v. Jones, 1 Stra. 185 . . . . . 431, 576
— v. Joule, 5 A. & E. 539 579
— v. Kearsley, Dig. L. L. 69 414
— v. Kinnersley, 1 Wm. Bl. 294 381
— v. Knell, 1 Barnard. 305 . . . . . 359, 387, 413, 617
— v. Knight, Bac. Abridg. A. 2 (Libel) 242
— v. Labouchere (Lambri's Case), 14 Cox, C. C. 419 . . . 392, 583
— v. Lambert and Perry, 2 Camp. 398; 31 How. St. Tr. 340 27, 99, 414, 582
— v. Langley, 2 Lord Raymond, 1029; 2 Salk. 697; 6 Mod. 125; Holt, 654 . . . . . 441, 445
— v. Larkin, Dears. C. C. 365; 23 L. J. M. C. 125 . . . 586, 587
— v. Larrieu, 7 A. & E. 277 380
— v. Latimer, 15 Q. B. 1077; 20 L. J. Q. B. 129; 15 Jur. 314 590, 595
— v. Lawrence, 12 Mod. 311 417
— v. Lawson, 1 Q. B. 486 381
— v. Leafe, Andrews, 226 441
— v. Ledger, *Times*, Jan. 14, 1880 . . . . . 50, 399
— v. Lee, 12 Mod. 514 444
—— 5 Esp. 123 244
— v. Lefroy, *Ex parte* Jolliffe, L. R. 8 Q. B. 134; 42 L. J. Q. B. 121; 21 W. R. 332; 28 L. T. 132 . . . . . 441, 442, 446
— v. Liverpool (Mayor of) and others, 41 L. J. Q. B. 175; 20 W. R. 389; 26 L. T. 101 591
— v. Llanfaethly, 2 E. & B. 940; 23 L. J. M. C. 33; 17 Jur. 1123 . 536
— v. Lofield, 2 Barnard, 128 . . . . . 253, 255
— v. Lovett, 9 C. & P. 462 . . . . 154, 155, 333, 386, 415, 417, 533
— v. Lowe and Clements, 8 Exch. 697; 22 L. J. Ex. 262 . . . 356
— v. Mann, 4 M. & S. 337 585
— v. Marsden, 4 M. & S. 164 575
— v. Marshall, 4 E. & B. 475 . . . . . 382, 593
— v. Martin, 2 Camp. 100 582
— v. Matthews, 15 How. St. Tr. 1323 104
— v. Mayo, 1 Keb. 508; 1 Sid. 144 440
— v. Mein, 3 T. R. 597 592
— v. Moore, 3 B. & Ad. 188 326
— v. Morton, 1 Dowl. N. S. 543 579
— v. Moxon, 2 Mod. St. Tr. 356 399
— v. Newhouse, 22 L. J. Q. B. 127; 1 L. & M. 129 590
— v. Newman, 1 El. & Bl. 268; 22 L. J. Q. B. 156; Dears. C. C. 85; 17 Jur. 617; 3 C. & K. 252 . 171, 174, 549, 584, 588, 649
—— 1 E. & B. 558; 22 L. J. Q. B. 156 . . . . 584, 649
— v. *Nottingham Journal*, 9 Dowl. 1042 380
— v. Nun, 10 Mod. 186 441

PAGE
R. v. Nutt (Eliz.), [1728] 1 Barnard. 306; Fitzg. 47 . . 161, 363, 413
— v. Nutt (Richard) [1754], Dig. L. L. 68 421
— v. Oastler, L. R. 9 Q. B. 132; 43 L. J. Q. B. 42; 22 W. R. 490; 29 L. T. 830 579
— v. Odgers, 2 Moo. & Rob. 479 577
— v. Onslow and others, L. R. 9 Q. B. 219; 12 Cox C. C. 358 430, 448
— v. Orme and Nutt, 1 Lord Raym. 486; 3 Salk. 224 . . . 377
— v. Osborn, 2 Barnard. 138, 166; Kel. 230 . . . . 377, 381
— v. Owen, 18 Howell's St. Tr. 1203, 1228; Dig. L. L. 67 . 417, 423
— v. Paine, Samuel, 5 Mod. 163 . . . . . 6, 154, 387
— v. Paine, Thomas, 22 Howell's St. Tr. 358 421
— v. Palmer, 5 E. & B. 1024 579
— v. Paty, 2 Ld. Raym. 1108 . . . . . 424, 435
— v. Peacham, Cro. Car. 125; 2 Cobbett's St. Tr. 870 411
— v. Peltier, 28 How. St. Tr. 617 . . . . . 357, 383
— v. Penny, 1 Ld. Raymond, 153 441
— v. Philipps, 6 East, 464 377
— v. Pigott, 11 Cox, C. C. 44 . . . . . 421, 584
— v. Plumer, Russ. & Ry. 164 581
— v. Pocock, 2 Str. 1157 441
— v. Pooley (Bodmin, 1857) 398
— v. Rainer, 2 Barnard. 293; Dig. L. L. 125 422
— v. Rea (1), 2 L. R. Ir. 429; 14 Cox, C C. 139 447
— v. — (2), 4 L. R. Ir. 345; 14 Cox. C. C. 256 443
— v. Redman, L. R. 1 C. C. R. 12; 39 L. J. M. C. 89 379
— v. Reeves, Peake's Add. Cas. 84 . . . . . 27, 416, 420, 423
— v. Revel, 1 Str. 420 . . . . . 440, 441
— v. Rogers, 2 Ld. Raymond, 777; 7 Mod. 28 . . . . 428, 441, 445
— v. Rosenberg, *Times*, Oct. 27th and 28th, 1879 . . . . . 23, 24
— v. Salisbury, 1 Ld. Raym. 341 192
— v. Saunders, Sir T. Raym. 201 23
— v. Seton, 7 T. R. 373 580
— v. Seymore, Winchester Spring Assizes, 1880 179
— v. Shebbeare, 3 T. R. 430, n. 377, 413
— v. Shipley (Dean of St. Asaph), 4 Dougl. 73; 3 T. R. 428, n.; 21 St. Tr. 1043 . . . . . 10, 377, 585, 586
— v. Sidney, 9 How. St. Tr. 817 . . . . . 386, 411
— v. Skinner, Lofft. 55 . . . . . 189, 191, 192
— v. Skipworth. L. R. 9 Q. B. 230; 12 Cox, C. C. 371 . 428, 430, 433
— v. Slaney, 5 C. & P. 213 . . . . . 534, 580, 581
— v. Smithson, 4 B. & Ad. 862 594
— v. Southerton, 6 East, 126 379
— v. Spencer, 8 Dowl. 127 579
— v. Spragg and another, 2 Burr. 929 588
— v. Stanger, L. R. 6 Q. B. 352; 40 L. J. Q. B. 96; 19 W. R. 640; 24 L. T. 266 . . . . . 532, 591, 592
— v. Steel, 1 Q. B. D. 482; 45 L. J. Q. B. 391; 24 W. R. 638; 34 L. T. 283; 13 Cox, C. C. 159 595
—— (C. A.) 2 Q. B. D. 37; 46 L. J. M. C. 1; 25 W. R. 34; 35 L. T. 534 595
— v. Steward, 2 B. & Ad. 12 534
— v. Stockdale, 22 Howell's St. Tr. 238 423
— v. Sullivan, 11 Cox, C. C. 44 . . . . 27, 45, 415, 421, 427, 585
— v. Sutton, 4 M. & S. 548 582
— v. Taylor, 3 B. & C. 502; 5 D. & R. 422 577

PAGE
R. v. Taylor, 1 Ventr. 293 ; 3 Keb. 607 . . . . . 397, 399
— v. Templar, 1 Nev. & P. 91 579
— v. Thomas, 4 M. & S. 442 578
— v. Topham, 4 T. R. 126 . . . . . 376, 384, 385, 576, 586
— v. Townsend, 4 F. & F. 1089 ; 10 Cox, C. C. 356 390
— v. Truelove, 5 Q. B. D. 336 ; 49 L. J. M. C. 57 ; 28 W. R. 413 ; 42 L. T. 250 ; 14 Cox, C. C. 408 406
— v. Truscott, (not reported) 392, 534
— v. Tucker, Ry. & M. 134 582
— v. Tutchin, 5 St. Tr. 527 ; 14 Howell's St. Tr. 1095 ; 2 Ld. Raym. 1061 ; 1 Salk. 50 ; 6 Mod. 268 . . . . 104, 377, 416, 417, 575
— v. Unwin, 7 Dowl. 578 580
— v. Veley, 4 F. & F. 1117 229
— v. Vint, 27 How. St. Tr. 627 383
— v. Waddington (1800), 1 East, 143 . . . . . 378, 587
— v. —— (1822), 1 B. & C. 26 . . . . . 398, 401
— v. Walter, 3 Esp. 21 . . . . . 159, 364, 386
— v. Ward, 10 Cox, C. C. 42 379
— v. Watson (1808), 1 Camp. 215 581
— v. Watson, James (1817), 2 Stark. 116 535
— v. Watson and others (1788), 2 T. R. 199 . . . 97, 381, 428, 535, 581
— v. Webster, 3 T. R. 388 592
— v. Wegener, 2 Stark. 245 . . . . . 383, 575, 580
— v. Weltje, 2 Camp. 142 440
— v. Whalley and others, L. R. 9 Q. B. 219 ; 12 Cox, C. C. 358 430, 448
— v. White and others, 1 Camp. 359 . . . . . 45, 381, 427
— v. Whitehouse and Tench, Dears. C. C. 1 588
— v. Wiatt, 8 Mod. 123 . . . . . 161, 386
— v. Wilkes, 4 Burr. 2527 ; 2 Wils. 151 . 399, 404, 414, 574, 577, 595
— v. Willett, 6 T. R. 294 591
— v. Williams, 5 B. & Ald. 595 . . . . . 381, 592
— v. —— 26 How. St. Tr. 656 . . . . . 6, 397, 399, 401
— v. —— Loft. 759 589
— v. —— 2 Roll. Rep. 88 411
— v. —— John, Dig. L. L. 69 414
— v. —— Sir Wm. (1686), 2 Shower, 471 ; Comb. 18 ; 13 How. St. Tr. 1370 187
— v. Wilson, 14 L. J. M. C. 3 580
— v. —— 2 Moo. C. C. 52 123
— v. —— 4 T. R. 487 589
— v. Winterbotham, 22 How. St. Tr. 875 421
— v. Withers, 3 T. R. 428 . . . . . 585, 589
— v. Woodfall, 5 Burr. 2661 . . . . . 414, 585
— v. Woolmer, 12 A. & E. 422 592
— v. Woolston, 2 Str. 834 ; Fitzgib. 66 ; 1 Barnard. 162 . 397, 398, 399
— v. *World, The*, 13 Cox, C. C. 305 594
— v. Wrennum, Pop. 135 428
— v. Wright, 8 T. R. 293 . . . . . 187, 243, 259, 382
— v. Wrightson, 2 Salk. 698 ; 11 Mod. 166 ; 2 Roll. Rep. 78 ; 4 Inst. 181 440
— v. Yates, 12 Cox, C. C. 233 . . . . . 379, 575
Reynolds v. Harris, 3 C. B. N. S. 279 ; 28 L. J. C. P. 26 341
Rhodes v. Bryant, 2 F. & F. 265 465
—— v. Liverpool Investment Co., 4 C. P. D. 425 569
Rice v. Pidgeon, Comb. 161 80

PAGE
Richards *v.* Morgan, 4 B. & S. 641 ; 33 L. J. Q. B. 114 ; 12 W. R. 162 ; 9 L. T. 662 518
—— *v.* Richards, 2 M. & Rob. 557 . . . . 165, 231, 233, 306
Richardson *v.* Allen, 2 Chit. 657 123
—— *v.* Willis, L. R. 8 Ex. 69 ; 42 L. J. Ex. 15, 68 ; 27 L. T. 828 ; 12 Cox, C. C. 298, 351 590
Richmond (Duke of) *v.* Costelow, 11 Mod. 235 136
Riding *v.* Smith, 1 Ex. D. 91 ; 45 L. J. Ex. 281 ; 24 W. R. 487 ; 34 L. T. 500 . . . . . 78, 84, 86, 91, 314, 315, 329, 330, 349, 359
Riley *v.* Byrne, 2 B. & Ad. 779 550
—— *v.* Lewis, 1 Vin. Abr. 396 85
Risk Allah Bey *v.* Johnstone, 18 L. T. 620 . . . . 300, 547, 560
—— *v.* Whitehurst and others, 18 L. T. 615 . . 45, 252, 297
Roach *v.* Garvan, Read & Huggonson, 2 Atk. 469 ; 2 Dick. 794 . . 123, 130, 429, 454
Roberts *v.* Brown, 10 Bing. 519 ; 4 M. & Scott, 407 ; 6 C. & P. 757 . 177, 255, 528
—— *v.* Camden, 9 East, 93 . . . . . 56, 57, 97, 125
—— *v.* Evans, 7 Ch. D. 830 ; 47 L. J. Ch. 469 ; 26 W. R. 280 ; 38 L. T. 99 346
—— *v.* Herbert, Sid. 97 ; S. C., *sub nom.* Cans *v.* Roberts, 1 Keb. 418 . . . . . 59, 85
—— and wife *v.* Roberts, 5 B. & S. 384 ; 33 L. J. Q. B. 249 ; 10 Jur. N. S. 1027 ; 12 W. R. 909 ; 10 L. T. 602 . 86, 312, 325
Robertson *v.* M'Dougall, 4 Bing. 670 ; 1 M. & P. 692 ; 3 C. & P. 259 237, 281
—— *v.* Wylde, 2 M. & Rob. 101 . . . . . 270, 297
Robinson *v.* Jermyn, 1 Price, 11 25
—— *v.* Jones, 4 L. R. Ir. 391 . . . . 151, 240, 283, 284, 532
—— *v.* Marchant, 7 Q. B. 918 ; 15 L. J. Q. B. 134 ; 10 Jur. 156 8, 78, 324. 365, 367
Robinson's Case, 1 Brown, 643 399
Robshaw *v.* Smith, 38 L. T. 423 . . . . . 204, 205, 207, 615
Rodriguez *v.* Tadmire, 2 Esp. 721 305
Rogers *v.* Clifton (Sir Gervas), 3 B. & P. 587 . . . 203, 232, 268, 275
—— *v.* Gravat, Cro. Eliz. 571 59
Rolin and another *v.* Steward, 14 C. B. 595 ; 23 L. J. C. P. 148 ; 18 Jur. 576 ; 2 C. L. R. 759 8
Rollins *v.* Hinks, L. R. 13 Eq. 355 ; 41 L. J. Ch. 358 ; 20 W. R. 287 ; 26 L. T. 56 144
Ross *v.* Lawrence, (1651) Sty. 263 470
Rotherham *v.* Priest, 49 L. J. C. P. 104 ; 28 W. R. 277 ; 41 L. T. 588 495
Roupell *v.* Parsons, 24 W. R. 269 ; 34 L. T. 56 553
Rourke *v.* White Moss Colliery Co., (C. A.) 1 C. P. D. 556, 562 . . 564
Routh *v.* Webster, 10 Beav. 561 15
Rowcliffe *v.* Edmonds *et ux.*, 7 M. & W. 12 ; 4 Jur. 684 56
Rowe *v.* Roach, 1 M. & S. 304 472
Ruckley *v.* Kiernan, 7 Ir. C. L. R. 75 281
Ruel *v.* Tatnell, 29 W. R. 172 ; 43 L. T. 507 . . 81, 102, 113, 540
Runkle *v.* Meyers, 3 Yeates, (Penn.) 518 164
Runtz *v.* Sheffield, (C. A.) 4 Ex. D. 150 ; 48 L. J. Ex. 385 ; 40 L. T. 539 499
Russell *et ux. v.* Corne, 1 Salk. 119 ; 6 Mod. 127 ; 2 Ld. Raym. 1031 . 348
—— (Sir William) *v.* Ligon, 1 Roll. Abr. 46 ; 1 Vin, Abr. 423 . . 56
—— and another *v.* Webster, 23 W. R. 59 . . . . 33, 105, 370

PAGE
Rustell *v.* Macquister, 1 Camp. 49 n. 273
Rutherford *v.* Evans, 6 Bing. 451; 8 L. J. Old S. C. P. 86; 4 M. & P. 163; 4 C. & P. 74 . . . 23, 69, 329, 330, 471, 531
—— *v.* Wilkie, 41 L. T. 435 342
Rutter *v.* Chapman, 8 M. & W. 38 551
Ryalls *v.* Leader and others, L. R. 1 Ex. 296; 4 H. & C. 555; 35 L. J. Ex. 185; 12 Jur. N. S. 503; 14 W. R. 838; 14 L. T. 563 . . 248

St. Nazaire Co., *In re*, 12 Ch. D. 88; 27 W. R. 854; 41 L. T. 110 . 337
Salmon *v.* Isaac, 20 L. T. 885 . . . . . 194, 251, 269
Saltash, Corporation of, *v.* Goodman and another, 43 L. T. 464; W. N. 1880, p. 167 563
Salter *v.* Brown, Cro. Car. 436; 1 Roll. Abr. 37 . . . . . 58, 85
Sampson *v.* Mackay, L. R. 4 Q. B. 643; 10 B. & S. 694; 38 L. J. Q. B. 245; 17 W. R. 883; 20 L. T. 807 334
Sanderson *v.* Caldwell, 45 N. Y. 398 71
Sandford *v.* Bennett, 24 New York, 20 355
Sands *v.* Child and others, 3 Lev. 352 359
Saner *v.* Bilton, 11 Ch. D. 416; 48 L. J. Ch. 545; 27 W. R. 472; 40 L. T. 134 342
Saull *v.* Browne, L. R. 9 Ch. 364 510
Saunders *v.* Bate, 1 H. & N. 402 . . . . . 470, 537
—— *v.* Edwards, 1 Sid. 95 . . . . . 106, 456
—— *v.* Jones, (C. A.) 7 Ch. D. 435; 47 L. J. Ch. 440; 26 W. R. 226; 37 L. T. 395, 769 . . . . . 506, 512
—— *v.* Mills, 3 M. & P. 520; 6 Bing. 213 . . 159, 176, 253, 303
Savage *v.* Robery, 5 Mod. 392; 2 Salk. 694 . . . . . 61, 80
Savile *v.* Jardine, 2 H. Bl. 531 . . . . . 61, 80, 82, 295
Saville *et ux. v.* Sweeny, 1 N. & M. 254; 4 B. & Ad. 514 . . . 349
Saxby v. Easterbrook, 3 C. P. D. 339; 27 W. R. 188 . 13, 16, 454
Saye & Seal, (Viscount), *v.* Stephens, Ley, 82; Cro. Car. 135 . 135, 455
Sayer *v.* Begg, 15 Ir. C. L. R. 458 232
Scarll *v.* Dixon, 4 F. & F. 250 . . . 211, 223, 224, 239, 271, 287
Scot *et ux. v.* Hilliar, Lane. 98; 1 Vin. Abr. 440 . . . . 55, 123
Scott *v.* Royal Wax Candle Co., 1 Q. B. D. 404; 45 L. J. Q. B. 586; 24 W. R. 668; 34 L. T. 683. 461
—— *v.* Shepherd, 1 Sm. L. C. 8th edition, 466; 2 Wm. Bl. 892; 3 Wils. 403 329
—— *v.* Stansfield, L. R. 3 Ex. 220; 37 L. J. Ex. 155; 16 W. R. 911; 18 L. T. 572 . . . . . 189, 497
Seaman *v.* Bigg, Cro. Car. 480 77
—— *v.* Netherclift, 1 C. P. D. 540; 45 L. J. C. P. 798; 24 W. R. 884; 34 L. T. 878 . . 188, 191, 192, 484, 534
—— (C. A.), 2 C. P. D. 53; 46 L. J. C. P. 128; 25 W. R. 159; 35 L. T. 784 . . . . . 189, 191, 192, 584, 534
Senior *v.* Medland, 4 Jur. N. S. 1039 . . . . 229, 236, 279, 282
Seven Bishops' Case, 4 St. Tr. 300 . . . . . 534, 581
Sewers, Commissioners of, *v.* Glasse, L. R. 15 Eq. 302; 42 L. J. Ch. 345; 21 W. R. 520; 28 L. T. 433 506
Seymour *v.* Butterworth, 3 F. & F. 372 . . . . . 43, 44
—— *v.* Coulson (C. A.), 28 W. R. 664 569
Shackell *v.* Rosier, 3 Scott, 59; 2 Bing. N. C. 624 . . . 359, 374
Shaw *v.* Hope, 25 W. R. 729 562
—— *v.* Shaw, 31 L. J. Pr. & Matr. 35; 2 Sw. & Tr. 515; 6 L. T. 477 430
—— *v.* Thompson, Cro. Eliz. 609 56

PAGE
Sheahan *v.* Ahearne, 9 Ir. Rep. C. L. 412 . . . . . 90, 474
Shepheard *v.* Whitaker, L. R. 10 C. P. 502; 32 L. T. 402; 23 W. R. Dig. 73 . . . . . 7, 31, 153, 362
Sheriff of Surrey, *In re*, 2 F. & F. 234, 237 . . . . . 431, 433
Sheward *v.* Earl of Lonsdale, 5 C. P. D. 47; 28 W. R. 324; 42 L. T. 54 . . . . . 508, 533
Shipley *v.* Todhunter, 7 C. & P. 680 . . . . . 154, 235, 281
Sibley *v.* Tomlins, 4 Tyr. 90 . . . . . 67, 81, 108
Sibthorpe's Case, W. Jones, 366; Roll. Abr. 76 72
Siddons *v.* Lawrence, 3 Q. B. D. 100; 4 Ex. D. 177; 48 L. J. Q. B. 161, 446; 27 W. R. 191, 247; 39 L. T. 608; 40 L. T. 795 . . 336
Sidnam *v.* Mayo, 1 Roll. Rep. 427; 1 Roll. Abr. 49 125
Sidney's (Algernon) Case, 9 How. St. Tr. 817 . . . . 386, 411
Silver Lead Ore Co., *In re*, 10 Ch. D. 307, 312 565
Simmonds *v.* Dunne, Ir. R. 5 C. L. 358 . . . . 200, 242, 279, 484
Simmons *v.* Sweete, Cro. Eliz. 78 441
Simpson *v.* Downs, 16 L. T. 391 241
—— *v.* Fogo, 32 L. J. Ch. 249; 1 H. & M. 195; 1 J. & H. 18; 11 W. R. 418; 8 L. T. 61; 9 Jur. N. S. 403; 1 N. R. 422 439
—— *v.* Robinson, 12 Q. B. 511; 18 L. J. Q. B. 73; 13 Jur. 187 178, 275, 297, 542
Sims *v.* Prosser, 15 M. & W. 151 464
Sivier *v.* Harris, W. N. 1876, p. 22; Bitt. 98; 20 Sol. J. 240; 60 L. T. Notes, 213 507
Skinner *v.* Kitch, L. R. 2 Q. B. 393; 36 L. J. M. C. 322; 15 W. R. 830; 16 L. T. 413 149
—— *v.* Shoppee *et ux.* 6 Bing. N. C. 131; 8 Scott, 275 339
Skipworth's Case, L. R. 9 Q. B. 230; 12 Cox C. C. 371 . 428, 430, 433
Slade *v.* Tucker, 14 Ch. D. 824; 49 L. J. Ch. 644; 28 W. R. 807; 43 L. T. 49 518
Slater *v.* Franks, Hob. 126 111
Slocomb's Case, Cro. Car. 442 119
Sloman *v.* Governor of New Zealand, 1 C. P. D. 563; 46 L. J. C. P. 185; 25 W. R. 86; 35 L. T. 454; Bitt. 15 460
Slowman *v.* Dutton, 10 Bing. 402 106
Smith, *Ex parte*, *In re* Bishop, 13 Ch. D. 110; 49 L. J. Bkcy. 1; 28 W. R. 174; 41 L. T. 388 432
—— *v.* Andrews, 1 Roll. Abr. 54; Hob. 117 75
—— *v.* Ashley, 52 Mass. (11 Met.) 367 . . . . 159, 387, 617
—— *v.* Berg, 25 W. R. 606; 36 L. T. 471 515
—— *v.* Dobbin, 3 Ex. D. 338; 47 L. J. Ex. 65; 26 W. R. 122; 37 L. T. 777 462
—— *v.* Flynt, Cro. Jac. 300 58
—— *v.* Harrison, 1 F. & F. 565 . . . . . 297, 497
—— *v.* Hodgeskins, Cro. Car. 276 . . . . . 221, 267
—— *v.* Knowelden, 2 M. & Gr. 561 . . . . . 471, 537
—— *v.* Lakeman, 26 L. J. Ch. 305; 2 Jur. N. S. 1202; 28 L. T. Old S. 98 430
—— *v.* Mathews, 1 M. & Rob. 151 . . . . 80, 168, 231, 233, 276
—— *v.* Parker, 13 M. & W. 459; 14 L. J. Ex. 52; 2 D. & L. 394 . 171
—— *v.* Scott, 2 C. & K. 580 . . . . . 248, 304
—— *v.* Spooner, 3 Taunt. 246 141
—— *v.* Taylor, 1 B. & P. N. R. 196 530
—— *v.* Thomas, 2 Scott, 546; 4 Dowl. 333; 2 Bing. N. C. 372; 1 Hodges, 353 . . . . . 291, 484

PAGE

Smith *v.* Ward, Cro. Jac. 674 109
—— *v.* Wood, 3 Camp. 323 . . . . . 168, 232
—— and others *v.* Richardson, 4 C. P. D. 112; 48 L. J. C. P. 140; 27 W. R. 230; 40 L. T. 256; Willes, 20 . . . 499, 549
Snag *v.* Gee, 4 Rep. 16 62
—— *v.* Gray, 1 Roll. Abr. 57; Cro. Entr. 22 74
Sneesby *v.* Lanc. & York. Ry. Co., L. R. 9 Q. B. 263; 43 L. J. Q. B. 69; 22 W. R. Dig. 206; 30 L. T. 492 327
—— (C. A.) 1 Q. B. D. 42; 45 L. J. Q B. 41; 24 W. R. 99; 33 L. T. 372 327
Snell *v.* Webling, 2 Lev. 150; 1 Ventr. 276 124
Snowdon *v.* Smith, 1 M. & S. 286 305
Snyder *v.* Andrews, 6 Barbour (New York), 43 152
Soane *v.* Knight, Moo. & Mal. 74, 187 49
Solomon *v.* Lawson, 8 Q. B. 823; 15 L. J. Q. B. 253; 10 Jur. 796 . 31, 119, 127, 132, 470, 471
Solomons and others *v.* Medex, 1 Stark. 191 . . . . . 324, 367
Somers *v.* Holt, 3 Dowl. 506 356
—— *v.* House, Holt, 39 . . . . . 55, 96
Somerville *v.* Hawkins, 10 C. B. 583; 20 L. J. C. P. 131; 15 Jur. 450; 16 L. T. Old S. 283 . . . . . 202, 226, 270, 544
Southam *v.* Allen, Sir T. Raym., 231 . . . . . 79, 205, 206
Southee *v.* Denny, 1 Ex. 196; 17 L. J. Ex. 151 76
Southey *v.* Sherwood, 2 Mer. 435 . . . . . 14, 674
Southwark & Vauxhall Water Co. *v.* Quick, 3 Q. B. D. 315; 47 L. J. Q. B. 258; 26 W. R. 328, 341; 38 L. T. 818 518
Spackman *v.* Gibney, Bristol Spring Assizes, 1878 . . 484, 535, 607
Spall *v.* Massey, 2 Stark. 559 8
Sparling *v.* Haddon, 9 Bing. 11; 2 Moo. & Sc. 14 531
Speaker of the Legislative Assembly of Victoria *v.* Glass, L. R. 3 P. C. 560; 40 L. J. P. C. 17; 24 L. T. 317 425
Speck *v.* Phillips, 7 Dowl. 470 304
Spencer *v.* Amerton, 1 M. & Rob. 470 237
Spill *v.* Maule, L. R. 4 Ex. 232; 38 L. J. Ex. 138; 17 W. R. 805; 20 L. T. 675 . . . . . 235, 271, 280, 282
Spiller *v.* Paris Skating Rink Co. W. N. 1880, p. 228 527
Sprightly *v.* Dunch, 3 Burr. 1116 464
Springhead Spinning Co. *v.* Riley, L. R. 6 Eq. 551; 37 L. J. Ch. 889; 16 W. R. 1138; 19 L. T. 64 . . . . . 14, 15, 149, 358
Spurr *v.* Hall, 2 Q. B. D. 615; 46 L. J. Q. B. 693; 26 W. R. 678; 37 L. T. 313 492
Squire *v.* Johns, Cro. Jac. 585 126
Stace *v.* Griffith, L. R. 2 P. C. 420; 6 Moore, P. C. C. N. S. 18; 20 L. T. 197 . . . . . 212, 536
Stainbank *v.* Beckett, Bart. Weekly Notes, 1879, p. 203 481
Stainton *et ux. v.* Jones, 2 Selw. N. P. 1205; 1 Dougl. 380 n. . 59, 85
Stamp and wife *v.* White and wife, Cro. Jac. 600 . . . . . 62, 96
Standard Discount Co. *v.* La Grange (C. A.), 3 C. P. D. 71; 47 L. J. C. P. 3; 26 W. R. 25; 37 L. T. 372 562
Stanhope *v.* Blith, 4 Rep. 15 . . . . . 60, 61, 82, 123
Stanley *v.* Boswell, 1 Roll. Abr. 55 71
—— *v.* Webb, 4 Sandf. (N. Y.) 21 99
Stannus *v.* Finlay, Ir. R. 8 C. L. 264 . . . . . 483, 550
Stanton *v.* Smith, 2 Ld. Raym. 1480; 2 Str. 762 . . . . . 70, 78
Staples *v.* Young, 2 Ex. D. 324; 25 W. R. 304 342

PAGE
Stapleton *v.* Frier, Cro. Eliz. 251 . . . . . 56, 121
Stebbing *v.* Warner, 11 Mod. 255 . . . . . 61, 122
Steele *v.* Brannan, L. R. 7 C. P. 261 ; 41 L. J. M. C. 85 ; 20 W. R. 607 ; 26 L. T. 509 . . . . . 6, 250, 399, 407, 408
Stein *v.* Tabor, 31 L. T. 444 509
Stennel *v.* Hogg, 1 Wms. Saunders, 228 586
Stern *v.* Sevastopulo, 14 C. B. N. S. 737 ; 32 L. J. C. P. 268 ; 11 W. R. 862 ; 10 Jur. N. S. 317 ; 8 L. T. 538 503
Sterry *v.* Foreman, 2 C. & P. 592 . . . . . 310, 322
Steuart *v.* Gladstone, 7 Ch. D. 394 ; 47 L. J. Ch. 154 ; 26 W. R. 277 ; 37 L. T. 575 527
Stevens v. Sampson, 5 Ex. D. 53 ; 49 L. J. Q. B. 120 ; 28 W. R. 87 ; 41 L. T. 782 . . . . . 186, 194, 209, 257, 269, 276
Steward *v.* Young, L. R. 5 C. P. 122 ; 39 L. J. C. P. 85 ; 18 W. R. 492 ; 22 L. T. 168 . . . . . 142, 145, 226
Stiles *v.* Nokes, 7 East, 493 ; S. C. *sub nom.* Carr *v.* Jones, 3 Smith, 491 . . . . . 24, 46, 176, 255
Stirling *v.* Du Barry, (C. A.) 5 Q. B. D. 65 ; 28 W. R. 404 . . . 499
Stober *v.* Green, 1 Brownl. & Golds. 5 80
Stockdale *v.* Hansard (1837), 7 C. & P. 731 ; 2 M. & Rob. 9 ; (1839) 9 A. & E. 1 ; 2 P. & D. 1 ; 3 Jur. 905. 187, 423, 424, 425, 435
(1840) 11 A. & E. 253 ; 8 Dowl. 148, 522 . . . 187
—— *v.* Onwhyn, 5 B. & C. 173 ; 7 D. & R. 625 ; 2 C. & P. 163 . 374
—— *v.* Tarte, 4 A. & E. 1016 . . . . . 170, 253
Stocken *v.* Collin, 7 M. & W. 515 ; 10 L. J. Ex. 227 581
Stockley *v.* Clement, 4 Bing. 162 ; 12 Moore, 376 . . . . 127, 226
Stockton Iron Furnace Co., *In re* (C. A)., 10 Ch. D. 335, 348 ; 48 L. J. Ch. 417 ; 27 W. R. 433 ; 40 L. T. 19 563
Stokes *v.* Grant and others, 4 C. P. D. 25 ; 27 W. R. 397 ; 40 L. T. 36 . . . . . 477, 496
Stone *v.* Cooper, 2 Denio, (N. Y.) 293 . . . . . 71, 112
—— *v.* Smalcombe, Cro. Jac. 648 122
—— *v.* Yeovil (Mayor of), 1 C. P. D. 691 ; 45 L. J. C. P. 657 ; 24 W. R. 1073 ; 34 L. T. 874 317
—— (C. A.) 2 C. P. D. 99 ; 46 L. J. C. P. 137 ; 25 W. R. 240 ; 36 L. T. 279 . . 317
Stoner v. Audeley, Cro. Eliz. 250 124
Stooke *v.* Taylor, 5 Q. B. D. 569 ; 49 L. J. Q. B. 857 ; 29 W. R. 49 ; 43 L. T. 208 342
Storey *v.* Challands, 8 C. & P. 234 . . . . . 206, 208, 209, 311
Strauss *v.* Francis (No. 1), 4 F. & F. 939 ; (No. 2), *ib.*, 1107 ; 15 L. T. 674 . . . . . 48, 545, 550
—— L. R. 1 Q. B. 379 ; 35 L. J. Q. B. 133 ; 12 Jur. N. S. 486 ; 14 W. R. 634 ; 14 L. T. 326 . . . 550
Street *v.* Licensed Victuallers' Society, 22 W. R. 553 . . 99, 252
Strode *v.* Holmes, Style, 338 ; 1 Roll. Abr. 58 71
Stuart *v.* Lovell, 2 Stark. 93 . . . . . 49, 99, 273, 296
Stubbs *v.* Marsh, 15 L. T. 312 355
Stuckley *v.* Bullhead, 4 Rep. 16 70
Sturla *v.* Freccia, 11 Ch. D. 741 ; 28 W. R. 81 ; 40 L. T. 861 . . 467
Sturton (Lord) *v.* Chaffin, Moore, 142 125
Suegos' Case, Hetl. 175 76
Sugg *v.* Silber, 1 Q. B. D. 362 ; 45 L. J. Q. B. 460 ; 24 W. R. 640 ; 34 L. T. 682 523
Summers *v.* City Bank, L. R. 9 C. P. 580 ; 43 L. J. C. P. 261 . 32, 81, 319

PAGE
Surman v. Shelleto, 3 Burr. 1688 80
Surrey, re the Sheriff of, 2 F. & F. 234 . . . . . 431, 433
Sutton v. Johnstone, 1 T. R. 493 195
—— v. Plumridge, 16 L. T. 741 212
Swann v. Vines, Nov. 1877, cited, 37 L. T. 469 535
Swansea (Mayor of) v. Quirke, 5 C. P. D. 106; 49 L. J. C. P. 57; 28 W. R. 371; 41 L. T. 758 502
Sweetapple v. Jesse, 2 N. & M. 36; 5 B. & Ad. 27 114
Swithin et ux. v. Vincent et ux., 2 Wils. 227 . . . . . 351, 371
Sydenham v. Man, Cro. Jac. 407 537
Sykes v. Sykes, L. R. 4 C. P. 645; 38 L. J. C. P. 281; 17 W. R. 799; 20 L. T. 663 566
Symmons v. Blake, 2 C. M. & R. 416; 1 M. & Rob. 477; 4 Dowl. 263; 1 Gale, 182 . . . . . 99, 273, 296

TAAFFE v. DOWNES, 3 Moo. P. C. C. 36 n. 189
Tabart v. Tipper, 1 Camp. 350 . . . . . 37, 536
Tait v. Culbertson, 57 Barb. 9 372
Talbot v. Case, Cro. Eliz. 823 62
Talbutt v. Clark, 2 M. & Rob. 312 . . . . . 159, 303
Tardrew v. Brook, 5 B. & Ad. 880 550
Tarleton v. McGawley, Peake, 270 . . . . . 31, 149, 322
Tarpley v. Blabey, 2 Bing. N. C. 437; 2 Scott, 642; 1 Hodges, 414 155, 276, 307, 361, 533
Tasburgh v. Day, Cro. Jac. 484 138
Tate v. Humphrey, 2 Camp. 73 n. 277
Taylor v. Batten (C. A.) 4 Q. B. D. 85; 48 L. J. Q. B. 72; 27 W. R. 106; 39 L. T. 408 521
—— v. Carr, 3 Up. Can. Q. B. Rep. 306 71
—— v. Cass, L. R. 4 C. P. 614; 17 W. R. 860; 20 L. T. 667 . . 337
—— v. Hall, 2 Str. 1189 63
—— v. Hawkins, 16 Q. B. 308; 20 L. J. Q. B. 313; 15 Jur. 746 203, 232, 269, 281, 285
—— v. How, Cro. Eliz. 861; 1 Vin. Abr. 464 71
—— v. Jones, 1 C. P. D. 87; 45 L. J. C. P. 110; 34 L. T. 131 . 499
—— v. Neri, 1 Esp. 386 322
—— v. Perkins, Cro. Jac. 144; 1 Roll. Abr. 44 . . . . 63, 126
—— v. Perr, 1 Roll. Abr. 44 . . . . . 63, 66
—— v. Starkey, Cro. Car. 192 75
Taylor's Case, 8 Ch. D. 643; 47 L. J. Ch. 701; 26 W. R. 601; 38 L. T. 587 563
Teacy v. McKenna, Ir. Rep. 4 C. L. 374 . . . . . 23, 94
Tempest v. Chambers, 1 Stark. 67 . . . . . 57, 125
Terry v. Hooper, 1 Lev. 115 80
Terwilliger v. Wands, 3 Smith (17 N. Y. R.), 54 . . . 20, 313, 332
Tetley v. Easton, 25 L. J. C. P. 293 509
Theodor Körner, The, 3 P. D. 162; 47 L. J. P. M. 85; 38 L. T. 818 519
Theyer v. Eastwick, 4 Burr. 2032 . . . . . 59, 85
Thomas v. Churton, 2 B. & S. 475; 31 L. J. Q. B. 139; 8 Jur. N. S. 795 189
—— v Jackson, 3 Bing. 104; 10 Moore, 425 80
—— v. Rumsey, 6 Johns. (N. Y.) 26 458
—— v. Williams; 14 Ch. D. 864; 49 L. J. Ch. 605; 28 W. R. 983; 43 L. T. 91 . . . . . 16, 334, 454
Thompson v. Bernard, 1 Camp. 48 109

PAGE
Thompson *v.* Nye, 16 Q. B. 175 ; 20 L. J. Q. B. 85 ; 15 Jur. 285 . 305
—— *v.* Shackell, Moo. & Mal. 187 49
—— *v.* Twenge, 2 Roll. Rep. 433 78
Thorley *v.* Lord Kerry, 4 Taunt. 355 ; 3 Camp. 214, n. . . . 5, 22
Thorley's Cattle Food Co. *v.* Massam, (interloc.) 6 Ch. D. 582 ; 46 L. J. Ch. 713 . . . . . 15, 16, 148
—— (before Malins, V. C.) 14 Ch. D. 763 ; 28 W. R. 295 ; 41 L. T. 542 . . 15, 16, 148
—— (C. A.) 14 Ch. D. 781 ; 28 W. R. 966 ; 42 L. T. 851 . . . . . 15, 16, 148
Thorn *v.* Blanchard, 5 Johns. (Amer.) 508 193
Thornton *v.* Stephen, 2 M. & Rob. 45 545
Thorpe *v.* Macaulay, 5 Madd. 230 . . . . . 516, 527
Thurman *v.* Wild, 11 A. & E. 453 489
Tibbott *v.* Haynes, Cro. Eliz. 191 56
Tibbs *v.* Browne, 2 Grant (Penns.), 39 347
—— *v.* Smith, 3 Salk. 325 ; Sir T. Raym. 33 122
Tichborne *v.* Mostyn, L. R. 7 Eq. 55 n. ; 15 W. R. 1072 ; 17 L. T. 5 429
—— *v.* Tichborne, 39 L. J. Ch. 398 ; 18 W. R. 621 ; 22 L. T. 55 429
Tidman *v.* Ainslie, 10 Ex. 63 . . . . . 165, 174
Tighe *v.* Cooper, 7 El. & Bl. 639 ; 26 L. J. Q. B. 215 ; 3 Jur. N. S. 716 ; 5 W. R. Dig. 195 . . . . . 173, 487
—— *v.* Wicks, 33 Up. Can. Q. B. Rep. 470 . . . . . 66, 73
Tildesley *v.* Harper, (C. A.) 10 Ch. D. 393 ; 48 L. J. Ch. 495 ; 27 W. R. 249 ; 39 L. T. 552 499
Tilk *v.* Parsons, 2 C. & P. 201 314
Todd *v.* Hastings, 2 Sand. 307 80
—— *v.* Hawkins, 2 M. & Rob. 20 ; 8 C. & P. 88 . 212, 235, 268, 484
Tomlinson *v.* Brittlebank, 4 B. & Ad. 630 ; 1 N. & M. 455 . . 106
Toogood *v.* Spyring, 1 C. M. & R. 181 ; 4 Tyr. 582 . 217, 226, 242, 288
Tottentham *v.* Barry, 12 Ch. D. 797 ; 48 L. J. Ch. 641 ; 28 W. R. 389 462
Townshend (Lord) *v.* Hughes (Dr.), 2 Mod. Rep. 150 73, 96, 126, 136, 317, 320, 558
Tozer *v.* Mashford, 6 Ex. 539 ; 20 L. J. Ex. 225 . . . . 57, 125
Traill *v.* Denham, *Times*, May 4th, 1880 99
Treat *v.* Browning, 4 Connecticut, 408 164
Trenton Insurance Co. *v.* Perrine, 3 Zab. 402 (Zabriskie, New Jersey) 368
Tripp *v.* Thomas, 3 B. & C. 427 . . . . . 293, 464, 543
Trotman *v.* Dunn, 4 Camp. 211 191
Trowell *v.* Shenton, (C. A.) 8 Ch. D. 318, 321 ; 47 L. J. Ch. 738 ; 26 W. R. 837 ; 38 L. T. 369 562
Trumbull *v.* Gibbons, 3 City Hall Recorder, 197 . . . . 152, 153
Tuam (Archbishop of) *v.* Robeson, 5 Bing. 17 ; 2 M. & P. 32 . . 28
Tucker's Case, Ry. & M. 134 582
Tunicliffe *v.* Moss, 3 C. & K. 83 . . . . . 329, 330
Tupling *v.* Ward and others, 6 H. & N. 749 ; 30 L. J. Ex. 222 ; 9 W. R. 482 ; 7 Jur. N. S. 314 ; 4 L. T. 20 504
Turnbull *v.* Bird, 2 F. & F. 508 44
Turner, *Ex parte*, 3 Mont. D. & De G. 523, 551, 558 430
—— *v.* Heyland, 4 C. P. D. 432 ; 48 L. J. C. P. 535 ; 27 W. R. Dig. 63 ; 41 L. T. 556 . . . . . 337, 338, 570
—— *v.* Meryweather, 7 C. B. 251 ; 18 L. J. C. P. 155 ; 13 Jur. 683 103, 128, 529
—— (Exch. Ch.) 19 L. J. C. P. 10 . . 103, 128, 529

PAGE
Turner *v.* Ogden, 2 Salk. 696; 6 Mod. 104; Holt, 40 . 54, 57, 59. 85
—— *v.* Stirling, 2 Ventr. 26 139
—— *v.* Sullivan and others, 6 L. T. 130 251
Tuson *v.* Evans, 12 A. & E. 733 . . . . . 227, 281
Tutchin's Case, 5 St. Tr. 527; 14 How. St. Tr. 1095; 2 Lord Raym. 1061; 1 Salk. 50; 6 Mod. 268 . . 104, 377, 416, 417, 575
Tutty *v.* Alewin, 11 Mod. 221 . . . . . 68, 76
Twycross *v.* Grant, (C. A.) 4 C. P. D. 40; 47 L. J. Q. B. 676; 27 W. R. 87; 39 L. T. 618 . . 355, 522
W. N. 1875, pp. 201, 229; 1 Charley, 114, 115; Bitt. 10, 38; 20 Sol. J. 54, 97; 60 L. T. Notes, 49, 84 . 355, 522
Tyne Alkali Co. *v.* Lawson, 36 L. T. 100; W. N. 1877, p. 18 . . 336

Underwood *v.* Parks, 2 Str. 1200 305
Union Bank of London *v.* Manby, 13 Ch. D. 239; 49 L. J. Ch. 106; 28 W. R. 23; 41 L. T. 393 516
Upton *v.* Pinfold, Comyn, 267 118
Usill *v.* Hales, —— *v.* Brearley, —— *v.* Clarke, } 3 C. P. D. 319; 47 L. J. C. P. 323; 26 W. R. 371; 38 L. T. 63 . . . . . 244, 248

Vandenburg *v.* Truax, 4 Denio, N. Y. 464 322
Vandersee *v.* McGregor, 12 Wend. 546 270
Van Sandau, *Ex parte*, 1 Phillips, 445 438
—— *v.* Turner, 6 Q. B. 773 438
Vaughan *v.* Ellis, Cro. Jac. 213 140
Vaux's Case, 4 Rep. 45*a* 587
Vernon *v.* Vernon, 40 L. J. Ch. 118; 19 W. R. 404; 23 L. T. 697 . 429, 434
Vessey *v.* Pike, 3 C. & P. 512 304
Vicars *v.* Wilcox, 8 East, 1; 2 Sm. L. C. 553 (8th edit.) . . 322, 326
—— *v.* Worth, 1 Str. 471 . . . . . 59, 84, 85, 131
Victoria Assembly (Speaker of) *v.* Glass, L. R. 3 P. C. 560; 40 L. J. P. C. 17; 24 L. T. 317 425
Villeboisnet *v.* Tobin and others, L. R. 4 C. P. 184; 38 L. J. C. P. 146; 17 W. R. 322; 19 L. T. 603 504
Villers *v.* Monsley, 2 Wils. 403 . . . . . 22, 63
Vine, *Ex parte*, *in re* Wilson, 8 Ch. D. 364; 26 W. R. 582; 38 L. T. 730 354
Vines *v.* Serell, 7 C. & P. 163 298
Viney, *Ex parte*, (C. A.) 4 Ch. D. 794; 46 L. J. Bank. 80; 25 W. R. 364; 36 L. T. 43 563
Vivian *v.* Willet, Sir T. Raym. 207; 3 Salk. 326 . . . . 78, 125

Wadsworth *v.* Bentley, 23 L. J. Q. B. 3; 1 B. C. Cases (L. & M.) 203; 2 C. L. R. 127; 17 Jur. 1077 456
Wagstaffe *v.* Anderson and others, 39 L. T. 332 519
Waithman *v.* Weaver, 11 Price, 257 n.; D. & R. N. P. C. 10 . . 305
Wakelin *v.* Morris, 2 F. & F. 26 295
Wakley *v.* Cooke & Healey, 4 Ex. 511; 19 L. J. Ex. 91 . 30, 171, 485
—— *v.* Healey, 7 C. B. 591; 18 L. J. C. P. 241 . . 22, 29, 130
—— *v.* Healey & Cooke, 4 Ex. 53; 18 L. J. Ex. 426 . . 69, 126
—— *v.* Johnson, Ry. & M. 422 307
Walcot *v.* Walker, 7 Ves. 1 374
Waldegrave (Sir William) *v.* Agas, Cro. Eliz. 191 . . . . 56, 131

PAGE
Walden *v.* Mitchell, 2 Ventr. 265 . . . . . 58, 70
Walker *v.* Brogden, 17 C. B. N. S. 65 ; 11 Jur. N. S. 671 ; 13 W. R. 809 ; 12 L. T. 495 . . . . . 47, 529
Wallace, *Re*, L. R. 1 P. C. 283 ; 36 L. J. P. C. 9 ; 15 W. R. 533 ; 14 L. T. 286 436
—— *v.* Carroll, 11 Ir. C. L. R. 485 204
Wallingford *v.* Mutual Society, (H. L.) 5 App. Cas. 685 ; 50 L. J. C. P. 49 ; 43 L. T. 258 522
Wallis *v.* Hepburn, 3 Q. B. D. 84 n. 522
Walls or Watts *v.* Rymes, 2 Lev. 51 ; 1 Vent. 213 ; 3 Salk. 325 . . 60
Walsham *v.* Stainton, 2 H. & M. 1 ; 12 W. R. 199 518
Walter *v.* Beaver, 3 Lev. 166 558
—— *v.* Brogden, 19 C. B. N. S. 65 28
Ward *v.* Reynolds, Pasch. 12 Anne B. R. ; cited Cowp. 278 . . 97, 126
—— *v.* Sinfield, 43 L. T. 253 546
—— *v.* Smith, 6 Bing. 749 ; 4 M. & P. 595 ; 4 C. & P. 302 . 154, 365, 533
—— *v.* Weeks, 7 Bing. 211 ; 4 M. & P. 796 . 61, 82, 164, 167, 329, 330
Warden *v.* Bailey, 4 Taunt. 67 195
Ware, *In re, Ex parte* Drake, 5 Ch. D. 866 ; 46 L. J. Ch. 105 ; 25 W. R. 641 ; 36 L. T. 677 456
Warman *v.* Hine, 1 Jur. 820 . . . . . 27, 29, 170, 276
Warne *v.* Chadwell, 2 Stark. 457 273
Warr *v.* Jolly, 6 C. & P. 497 . . . . . 168, 232, 233
Warren *v.* Warren, 1 C. M. & R. 250 ; 4 Tyr. 850 . 154, 199, 242, 279, 533
Warton *v.* Gearing, 1 Victoria L. R. Cases at Law, 122 . . . 65, 75
Warwick *v.* Foulkes, 12 M. & W. 508 . . . . . 178, 274
Wason, *Ex parte*, L. R. 4 Q. B. 573 ; 38 L. J. Q. B. 302 ; 40 L. J. M. C. 168 ; 17 W. R. 881 186
—— *v.* Walter, L. R. 4 Q. B. 73 ; 8 B. & S. 671 ; 38 L. J. Q. B. 34 ; 17 W. R. 169 ; 19 L. T. 409 34, 40, 43, 186, 236, 243, 246, 258, 259, 618
Waterer *v.* Freeman, Hob. 267 142
Waterfield *v.* Chichester (Bishop of), 2 Mod. 118 257
Waters *v.* Waters, 24 W. R. 190 460
Watkin *v.* Hall, L. R. 3 Q. B. 396 ; 37 L. J. Q. B. 125 ; 16 W. R. 857 ; 18 L. T. 561 . . . . 101, 162, 164, 165, 174, 175, 177
Watson, *In re*, Shaw's Cases (Scotch), No. 6 430
—— *v.* Clerke, Comb. 138 85
—— *v.* McCann, 6 L. R. Ir. 21 566
—— *v.* Vanderlash, Hetl. 71 . . . . . 76, 77
Watt *v.* Ligertwood and another, L. R. 2 Sc. App. 261 433
Watts *v.* Fraser and another, 7 C. & P. 369 ; 7 Ad. & E. 223 ; 1 M. & Rob. 449 ; 2 N. & P. 157 ; 1 Jur. 671 ; W. W. & D. 451 152, 159, 307, 362, 532
—— *v.* Rymes, 2 Lev. 51 ; 1 Ventr. 213 ; 3 Salk. 325 122
Weatherston *v.* Hawkins, 1 T. R. 110 232
Weaver *v.* Lloyd, 2 B. & C. 678 ; 1 C. & P. 295 ; 4 D. & R. 230 169, 170, 545
Web *v.* Poor, Cro. Eliz. 569 62
Webb *v.* East, (C. A.) 5 Ex. D. 23, 108 ; 49 L. J. Ex. 250 ; 28 W. R. 229, 336 ; 41 L. T. 715 . . . . . 518, 519
—— *v.* England, 29 Beav. 44 477
—— *v.* Mansel, (C. A.) 2 Q. B. D. 117 ; 25 W. R. 389 563
Webster *v.* Whewall, 15 Ch. D. 120 ; 49 L. J. Ch. 704 ; 28 W. R. 951 ; 42 L. T. 868 . . . . . 516, 520

PAGE
Weir *v.* Hoss, 6 Alabama, 881 154
Weiss *v.* Whittemore, 38 Mich. 366 320
Wellesley's (Mr. Long) Case, 2 Russ. & My. 639 . . . . . 431, 448
Welply *v.* Buhl, (C. A.) 3 Q. B. D. 80, 253; 47 L. J. Q. B. 151; 26 W. R. 300; 38 L. T. 115 566
Welsh Steam Colliery Co. *v.* Gaskell, 36 L. T. 352 520
Wenman *v.* Ash, 13 C. B. 836; 22 L. J. C. P. 190; 17 Jur. 579; 1 C. L. R. 592 . . . . . 152, 264
Western Counties Manure Co. *v.* Lawes Chemical Manure Co., L. R. 9 Ex. 218; 43 L. J. Ex. 171; 23 W. R. 5 . 33, 91, 145, 148, 476, 634
Westman *v.* Aktiebolaget, &c., Co., 1 Ex. D. 237; 45 L. J. Ex. 327; 24 W. R. 405 357
West of England and South Wales Bank *v.* Nicholls, 6 Ch. D. 613 . 510
Weston *v.* Beeman and another, 27 L. J. Ex. 57 361
—— *v.* Dobniet, Cro. Jac. 432 193
Wetherhead *v.* Armitage, 2 Lev. 233; 3 Salk. 328; Freem. 277; 2 Show. 18 . . . . . 67, 77, 84
Whalley's Case, L. R. 9 Q. B. 219; 12 Cox, C. C. 358 . . 430, 448
Wharton *v.* Brook, Ventr. 21 . . . . . 77, 84
Wheatcroft *v.* Mousley, 11 C. B. 677 529
Wheeler *v.* Haynes, 9 A. & E. 286; 1 P. & D. 55; 1 W. W. & H. 645 104
Whistler *v.* Hancock, 3 Q. B. D. 83; 45 L. J. Q. B. 460; 24 W. R. 640; 34 L. T. 682 522
—— *v.* Ruskin, *Times*, Nov. 26 & 27, 1878 . . . . . 38, 49
White *v.* Tyrrell (2), 5 Ir. C. L. R. 498 487
White *et ux. v.* Harwood *et ux.*, Style, 138; Vin. Abr. Baron & Feme, Aa. 352
Whiteley *v.* Adams, 15 C. B. N. S. 392; 33 L. J. C. P. 89; 10 Jur. N. S. 470; 12 W. R. 153; 9 L. T. 483 . . . . . 198, 466
Whitfield *v.* Powel, 12 Mod. 248 63
—— and others *v.* S. E. Ry. Co., El. Bl. & El. 115; 27 L. J. Q. B. 229; 4 Jur. N. S. 688 . . . . . 151, 240, 283, 369
Whittington *v.* Gladwin, 5 B. & C. 180; 2 C. & P. 146 . . . 78, 79
Wilby *v.* Elston, 8 C. B. 142; 18 L. J. C. P. 320; 7 D. & L. 143; 13 Jur. 706 85
—— *v.* Henman, 2 Cr. & M. 658 523
Wilk's Case, 1 Roll. Abr. 51 108
Williams *v.* Beaumont, 10 Bing. 260; 3 M. & Scott, 705 . 32, 368, 369
—— *v.* Callender, Holt, N. P. 307 305
—— *v.* Gardiner, 1 M. & W. 245; 1 Tyrw. & Gr. 578 . 103, 125
—— *v.* Hill, 19 Wend. 305 312
—— *v.* Johns, 1 Mer. 303, n. 431
—— *v.* Stott, 1 C. & M. 675; 3 Tyr. 688 . . . . . 55, 62
Williams's Case, 2 Rolle R. 88 411
Williamson *v.* Freer, L. R. 9 C. P. 393; 43 L. J. C. P. 161; 22 W. R. 878; 30 L. T. 332 . . . . . 151, 240, 283, 285, 532
Willis *v.* Maclachlan, 1 Ex. D. 376; 45 L. J. Ex. 689; 24 W. R. Dig. 104; 35 L. T. 218 447
Wilson, *In re, Ex parte* Vine, 8 Ch. D. 364; 26 W. R. 582; 38 L. T. 730 354
Wilson *v.* Church, 9 Ch. D. 552; 26 W. R. 735; 39 L. T. 413 . 501, 564
(C. A.) 11 Ch. D. 576; 48 L. J. Ch. 690; 27 W. R. 843; 12 Ch. D. 454; 28 W. R. 284; 41 L. T. 501 . . . . . 501, 564

PAGE

Wilson *v.* Collins, 5 C. & P. 373 . . . . . 240, 283, 286
—— *v.* Goit, 3 Smith (17 N. Y. R.), 445 . . 21, 313, 325, 328, 350
—— *v.* Reed and others, 2 F. & F. 149 . . . . . 43, 295, 372
—— *v.* Robinson, 7 Q. B. 68 ; 14 L. J. Q. B. 196 ; 9 Jur. 726 . 178, 212, 274
Wilson's (Carus) Case, 7 Q. B. 984 . . . 429, 433, 435, 439, 443, 444
Wilton *v.* Brignell, W. N. 1875, p. 239 ; 1 Charley, 105 ; Bitt. 56 ; 20 Sol. J. 121 ; 60 L. T. Notes, 104 . . . . . 507, 515
Wingard *v.* Cox, W. N. 1876, p. 106 ; Bitt. 144 ; 20 Sol. J. 341 ; 60 L. T. Notes, 304 479
Wiseman *v.* Wiseman, Cro. Jac. 107 130
Wolverhampton New Waterworks Co. *v.* Hawksford, 5 C. B. N. S. 703 ; 28 L. J. C. P. 198 515
Wood *v.* Adam, 6 Bing. 481 470
—— *v.* Brown, 6 Taunt. 169 ; 1 Marsh. 522 470
—— *v.* Jones, 1 F. & F. 301 505
Woodard *v.* Dowsing, 2 Man. & Ry. 74 . . . . . 28, 283
Woodfall's Case, 5 Burr. 2661 588
Woodgate *v.* Ridout, 4 F. & F. 202 . . . . 29, 45, 46, 253, 539
Woodruff *v.* Westley, 1 Vin. Abr. 463 71
Woods *v.* Woods, 2 Curt. 516 403
Woodward *v.* Lander, 6 C. & P. 548 . . . . . 217, 223, 281
Woolmer *v.* Latimer, 1 Jur. 119 305
Woolnoth *v.* Meadows, 5 East, 463 ; 2 Smith, 28 . . 56, 97, 124, 163
Wootton *v.* Wootton, W. N. 1869, p. 175 338
Wren and another *v.* Weild, L. R. 4 Q. B. 730 ; 10 B. & S. 51 ; 38 L. J. Q. B. 88, 327 ; 20 L. T. 277 . . . . . 144, 496
Wrennum's Case, Pop. 135 428
Wright *v.* Clements, 3 B. & Ald. 503 470
—— *v.* Goodlake, 34 L. J. Ex. 82 507
—— *v.* Moorhouse, Cro. Eliz. 358 71
—— *v.* Woodgate, 2 C. M. & R. 573 ; 1 Tyr. & G. 12 ; 1 Gale, 329 211, 270, 535
Wyatt *v.* Gore, 1 Holt, N. P. 299 . . . . . 538, 549

Yarborough *v.* Bank of England, 16 East, 6 368
Yarmouth (Mayor of), *Ex parte*, 1 Cox, C. C. 122 440
Yates *v.* Lansing, 5 Johns. 283 ; 9 Johns. 395 (Amer.) 189
Yeates *et ux. v.* Reed *et ux.*, 4 Blackf. (Indiana), 463 354
Yetts *v.* Foster, (C. A.) 3 C. P. D. 437 ; 26 W. R. 745 ; 38 L. T. 742 . 555
Young *v.* Hickens, 6 Q. B. 606 31
—— and others *v.* Macrae, 3 B. & S. 264 ; 32 L. J. Q. B. 6 ; 11 W. R. 63 ; 9 Jur. N. S. 539 ; 7 L. T. 354 . 33, 145, 146, 147, 148
Yrisarri *v.* Clement, 4 L. J. Old S. C. P. 128 ; 3 Bing. 432 ; 11 Moore, 308 ; 2 C. & P. 223 . . . . . 24, 69, 530

Zenobio *v.* Axtell, 6 T. R. 162 ; 3 M. & S. 116. . . 110, 470, 574

TABLE OF STATUTES CITED.

*** *The Statutes marked with an asterisk will be found printed in full in Appendix C, post, pp.* 664—683.

	PAGE
*3 Ed. I. Stat. Westminster I. c. 34	133, 135, 417, 422, 427
25 Ed. III. c. 2	411
*2 Rich. II. St. 1, c. 5	73, 134, 135, 417, 422, 427
*12 Rich. II. c. 11	135, 417, 422, 427
1 Ed. VI. c. 1, s. 1	400
2 & 3 Ed. VI. c. 1, s. 2	400
3	400
1 & 2 Ph. & M. c. 13	447
1 Eliz. c. 1, s. 6	402
2, s. 2	400
3	400
5 Eliz. c. 4	201
13 Eliz. c. 12, s. 2	401
18 Eliz. c. 3	58
1 Jac. I. c. 11	59
3 Jac. I. c. 21	401
21 Jac. I. c. 16	335, 456
s. 3	455
19, s. 7	456
*13 Car. II. Stat. I. c. 1, s. 3	422
13 & 14 Car. II. c. 33	11
14 Car. II. c. 4, s. 1	401
17 Car. II. c. 8	355
29 Car. II. c. 7, s. 6	460
9, s. 1	402
2	402
1 Jac. II. c. 17	11
1 W. & M. Sess. 2, c. 2	186
3 W. & M. c. 10	57
*9, s. 4.	59
*4 W. & M. c. 18, s. 1	591, 595, 666
5 & 6 W. & M. c. 11, s. 3	578
8 & 9 Wm. III. c. 11, s. 6	355
9 Wm. III. c. 35 [c. 32 in the Statutes at Large]	401
4 & 5 Anne, c. 3 (al. c. 16), s. 19	456
5 Anne, c. 8, s. 23	135
6 Anne, c. 7, (al. 41), s. 1	411
2	422
10 Anne, c. 19, s. 113	12
4 Geo. I. c. 11	59
6 Geo. I. c. 19, s. 2.	444
7 Geo. II. c. 8, s. 1.	81
9 Geo. II. c. 5, s. 3.	59
*32 Geo. III. c. 60 (Fox's Libel Act)	12, 94, 667
s. 1	585
3	585
4	586
36 Geo. III. c. 7	411
38 Geo. III. c. 71, s. 17	159
*39 Geo. III. c. 79, s. 29	12, 531, 668
48 Geo. III. c. 58. s. 1	595
53 Geo. III. c. 127, s. 3.	402
160	401
57 Geo. III. c. 6	411
60 Geo. III. and 1 Geo. IV. c. 4, s. 1	579, 669
2	579, 670
*8, s. 1	394, 409, 412
2	412
3	412
4	412
3 Geo. IV. c. 40, s. 3	407
*5 Geo. IV. c. 83, s. 4	407, 670
6 Geo. IV. c. 50, s. 30	579
c. 119	12

	PAGE
7 Geo. IV. c. 64, s. 20	582
7 & 8 Geo. IV. c. 28, s. 2	576
9 Geo. IV. c. 22, s. 7	248, 255
32, s. 3	171
11 Geo. IV. and 1 Wm. IV. c. 73, s. 1	412
2 & 3 Wm. IV. c. 93	447
3 & 4 Wm. IV. c. 42, s. 7	456
40	438
6 & 7 Wm. IV. c. 76	12
s. 6	531
s. 8	531, 532
13	531
*19	513, 514, 515, 532, 671
c. 96, s. 6	178
7	161
7 Wm. IV. & 1 Vict. c. 23	412
*1 & 2 Vict. c. 38, s. 2	407, 671
105, s. 1	396
*2 & 3 Vict. c. 12, s. 2	12, 672
71, s. 49	406
*3 & 4 Vict. c. 9	187, 672
Appendix B.	466
c. 24, s. 2	334, 335
86, s. 3	223
5 & 6 Vict. c. 38	404
s. 1	574
c. 97, s. 4	453
122, s. 42	248
6 & 7 Vict. c. 68, s. 1	401
14	13
*Lord Campbell's Act, c. 96, s. 1	299, 465, 568, 674
2	299, 301, 465, 487, 491, 497, 568
3	378
4	379, 572, 573, 580
5	379, 390
6	178, 388, 576, 577, 589
7	363, 364, 365, 385, 583
8	590, 595, 596
7 & 8 Vict. c. 84	143
8 Vict. c. 16, s. 135	461
18, s. 134	461
20, s. 138	461
*8 & 9 Vict. c. 75, s. 2	300, 487, 677
*9 & 10 Vict. c. 33, s. 1	531, 678
c. 95, s. 58	335, 453, 565
73	568
88	343, 569
113	445
cxxvi.	569
11 & 12 Vict. c. 12, s. 1	411
*s. 3	410, 412, 678
c. 42, s. 1	573
11 & 12 Vict. c. 42, s. 9	573
78, s. 2	586
5	587
12 & 13 Vict. c 101, s. 2	445
14 & 15 Vict. c. 93, s. 9	446
100, s. 1	574, 577, 582
2	577
3	577
24	582
25	577, 582, 586
29	404
15 & 16 Vict. c. 76 (Common Law Procedure Act, 1852)	325
s. 11	459
16	461
29	463
40	325, 347
*61	101, 115, 120, 128, 471, 473, 575, 679
70	491, 492
109	528
112	528
142	354
(Schedule B., form 33)	103
16 & 17 Vict. c. 30, s. 4	578
5	578
6	579
9	525
17 & 18 Vict. c. 34, s. 1	526
c. 125 (C. L. P. Act, 1854)	513
s. 24	546
25	546
27	533, 580
51	501
103	580
18 Vict. c. 27	12
*18 & 19 Vict. c. 41.	17, 59, 87, 679
s. 1	403
55, s. 35	425
19 & 20 Vict. c. 16, s. 1	579
47	369
97, s. 12	456
108, s. 23	453, 565
20 & 21 Vict. c. 43	407
s. 4	407
*c. 83	405, 680
s. 1	12
85, s. 21	346
25	351
26	351
21 & 22 Vict. c. 90, s. 27	531
22 & 23 Vict. c. 17	571

	PAGE
23 & 24 Vict. c. 28 . . .	81
90, s. 27 .	531
126, s. 19 .	370
24 & 25 Vict. c. 94, s. 8 . .	576
96, s. 46 .	379
47 .	379
c. 134 (Bankruptcy Act, 1861) ss. 101, 102	248
25 & 26 Vict. c. 89, s. 62 .	461
27 & 28 Vict. c. 47, s. 2 . .	379
28 Vict. c. 36, s. 16 . .	446
28 & 29 Vict. c. 18, s. 4 . .	583
5 . .	583
8 . .	580
30 & 31 Vict. c. 35, s. 2 . .	571
3 . .	572
142, .	335, 341
s. 5 .	334, 335, 337
7 . .	569
10 .	300, 343, 468, 469, 566, 569
29 . .	570
31 & 32 Vict. c. 54, s. 5 . .	356
32 & 33 Vict. c. 24 . . .	12
s. 1 . .	513
Sched. 1 .	513, 531
2 .	513
68, s. 4 .	396
71, s. 19 .	437
77 .	437
33 & 34 Vict. c. 9, ss. 30—34 .	421
49, s. 1 . .	397
77, s. 18 .	528
79, s. 20 .	407
c. 93, (Married Women's Property Act, 1870) .	324, 346, 349, 350
33 & 34 Vict. c. 93, s. 1 .	81, 87, 349
11 .	81, 349
c. 99 . .	12, 513
34 & 35 Vict. c. 112 . .	546
s. 18 .	546
36 & 37 Vict. c. 66 (Judicature Act, 1873) . . .	325
s. 24, subs. 7 . .	514
25, subs. 8 . .	15
11 .	505, 517
s. 39 . . .	437
46 . . .	553
49 . . .	562
60 . . .	454
67	325, 334, 468, 570
37 & 38 Vict. c. 50 (Married Women's Property Act Amendment Act, 1874)	324, 351
s. 2 .	351, 352, 491
5 . . .	351
38 Vict. c. 14, s. 2 . . .	421
38 & 39 Vict. c. 63 (Sale of Food & Drugs Act, 1875) .	54
c. 77 (Judicature Act, 1875) . .	344
s. 22	551, 553, 554
s. 33 . .	335
Appendix A., form No. 3 .	357
„ C., Forms of Pleadings, No. 14 .	372
c. 86, s. 17	201
39 & 40 Vict. c. 59 (Appellate Jurisdiction Act, 1876) .	565
s. 17	553, 554
42 & 43 Vict. c. 59, s. 3 . .	356
*43 & 44 Vict. c. 41 (Burial Laws Amendment Act, 1880), s. 7 . .	401, 682

TABLE OF RULES AND ORDERS CITED.

JUDICATURE ACT (1875), 38 & 39 VICT. c. 77.

		PAGE
Order	II. rule 2	343
„	III. „ 2	459
„	IV. „ 1	459
	„ 2	459
	„ 2*a*	459
	„ 3*a*	454, 459
„	V. „ 1	454, 462
	„ 4*a*	556, 561
„	VI. „ 1	460
„	VIII. „ 1	459
„	IX. „ 1	460
	„ 1*a*	567
	„ 2	460
	„ 3	461
	„ 4	461
	„ 5	461
	„ 6	461
	„ 6*a*	461
	„ 7	461, 568
	„ 13	460, 462, 464, 567, 568
	„ 14	567
„	X.	460
„	XI.	357
	„ 1	460
	„ 2	356
	„ 4	463
„	XII. „ 1	462
	„ 2	462
	„ 3	462
	„ 4	567
	„ 5	462, 567
	„ 6*a*	462, 567
	„ 6*b*	463

		PAGE
Order	XII. rule 7	463, 567
	„ 8	463
	„ 9	463
	„ 12	366, 463
	„ 12*a*	366, 463
	„ 15	463
„	XIII. „ 1	353, 354
	„ 2	463
	„ 5*a*	462
	„ 6	464, 568
„	XVI. „ 1	365, 370, 465, 568
	„ 2	568
	„ 3	366, 371, 568
	„ 4	371
	„ 6	371
	„ 8	346
	„ 10	366
	„ 10*a*	366
	„ 13	344
	„ 17	481
	„ 18	481
	„ 19	481
	„ 20	481
	„ 21	481
„	XVII. „ 1	458, 466
	„ 2	366
	„ 4	325, 347, 458, 465
	„ 5	465
	„ 6	365, 458, 465
	„ 7	458, 466
	„ 8	458, 466

			PAGE
Order	XVII.	rule 9 .	458, 466
„	XIX.	„ 2 .	343, 495
		„ 3 .	344, 372, 491
		„ 4 .	120, 470, 473, 488
		„ 5 .	474
		„ 11 . .	482
		„ 14 . .	496
		„ 16 . .	480
		„ 17 .	482, 483
		„ 18 . .	484
		„ 20	480, 482
		„ 21 . .	497
		„ 22 . .	482
		„ 24 . .	470
		„ 28 . .	472
		„ 30 . .	446
		„ 31 . .	446
„	XX.		481, 495, 554
		„ 2 . .	567
		„ 3 . .	567
		„ 4	300, 568
„	XXI.	„ 1 . .	469
		„ 1c .	469
„	XXII.	„ 1 . .	495
		„ 9 . .	372
„	XXIII.	. .	524
„	XXIV.	„ 1	498, 500
		„ 2 . .	498
		„ 3 .	498, 500
„	XXV.	. .	522
„	XXVI.	. .	522
„	XXVII.	„ 1	479, 480, 481, 492, 493, 496, 498, 537
		„ 2 . .	498
		„ 3 . .	498
		„ 4 . .	500
		„ 5 . .	500
		„ 6	496, 537, 545
		„ 7 . .	498
		„ 9 . .	500
		„ 10 . .	500
		„ 11 . .	459
„	XXVIII.	. .	569
		rule 1 . .	477
		„ 2 . .	478
		„ 5 . .	478
		„ 6 . .	479
		„ 7 . .	478
		„ 8 . .	479
		„ 9 . .	479

			PAGE
Order	XXVIII.	rule 10 . .	479
		„ 11 . .	479
		„ 12 .	478, 479
		„ 13 . .	479
„	XXIX.	„ 1 . .	474
		„ 4 . .	496
		„ 5 . .	496
		„ 12 . .	500
		„ 14 . .	465
„	XXX.	. . .	301
		„ 1 .	300, 465, 491, 493, 501
„	XXXI.	„ 2 .	343, 503
		„ 5 .	509, 512
		„ 7 . .	512
		„ 8 . .	509
		„ 10 . .	515
		„ 11 . .	516
		„ 12 . .	515
		„ 13 . .	517
		„ 14 . .	520
		„ 16 . .	520
		„ 17 . .	521
		„ 18 . .	521
		„ 20 .	432, 522
		„ 21 . .	521
		„ 22 .	432, 521
		„ 23 .	511, 547
„	XXXV.	„ 12 .	455, 466
		„ 13 .	455, 466
„	XXXVI.	„ 2 . .	569
		„ 3 . .	500, 523, 524
		„ 4 .	500, 523
		„ 4a .	500, 523
		„ 8 . .	523
		„ 9 . .	523
		„ 10 . .	523
		„ 11 . .	523
		„ 12 . .	523
		„ 13 .	523, 525
		„ 14 . .	523
		„ 15 . .	523
		„ 17a .	523
		„ 18 . .	529
		„ 20 . .	529
		„ 21 . .	529
		„ 22 . .	552
		„ 22a	552, 554
		„ 24 . .	552
		„ 33 . .	438
„	XXXVII.	rule 1 . .	526
		„ 3a . .	511
		„ 3b .	511
		„ 3c . .	511

			PAGE
Order XXXVII.	rule	3*d*	511
	„	3*e*	511
	„	3*f*.	511
	„	3*g*	511
	„	4	526
	„	46	566
„ XXXIX.			554
	„	1*a*	557
			560, 561
	„	1*b*	556
	„	2	557
	„	3	557
	„	5	557
„ XL.	„	2	554
	„	3	553
	„	4*a*	554, 562
	„	9	562
	„	10	554, 556
„ XLI.	„	1	552
	„	6	545
„ XLII.	„	2	432
	„	4	432
	„	5	432
	„	8	367
	„	15	552
	„	20	432
	„	22	554
„ XLIV.			432, 438
	„	2	433
„ L.	„	1	355
	„	2	346, 351

			PAGE
Order LI.	rule	4	466
„ LIII.	„	2	562
	„	3	562
	„	4	499, 553
„ LIV.	„	2	521
	„	4	499
	„	6*a*	499
„ LV.			336, 338
	„	1	334, 469, 553, 570
	„	3	467
„ LVII.	„	3	499
	„	6*a*	495
„ LVIIA.			553, 554
„ LVIII.	„	1	551
	„	2	562
	„	3	563
	„	4	562, 563
	„	5	564
	„	5*a*	556, 565
	„	6	564
	„	7	564
	„	8	563
	„	10	560
	„	12	565
	„	13	565
	„	15	560, 562
	„	16	564
	„	17	564
„ LIX.	„	2	537, 545

PART I.

THE LAW OF LIBEL AND SLANDER.

CHAPTER I.

INTRODUCTORY.

No man may disparage the reputation of another. Every man has a right to have his good name maintained unimpaired. This right is a *jus in rem*, a right absolute and good against all the world.

Words which produce any perceptible injury to the reputation of another are called DEFAMATORY.

6 Defamatory words, if false, are actionable.

False defamatory words, if written and published, constitute a libel; if spoken, a slander.

Words which merely *might tend* to produce injury to the reputation of another are not defamatory, and even though false are not actionable, unless as a matter of fact some appreciable injury has followed from their use.

On the other hand, words which on the face of them *must* be injurious to the reputation of the person to whom they refer, are clearly defamatory, and, if false, are actionable, without proof that any particular damage has followed from their use.

Illustrations.

To say "A. is a coward," or "a liar," or "a rascal," is not defamatory, unless it can be proved that some one seriously believed and acted on the

assertion, to the prejudice of A. Such words, though false, are not actionable without some evidence to show that A.'s reputation has as a matter of fact been actually impaired thereby. *De minimis non curat lex.*

To say of B. :—"He forged his master's signature to a cheque for £100," is clearly defamatory, and, if false, actionable. It must injure B.'s reputation to bring such a specific charge against him.

In any given case, the fact that the words employed by the defendant have perceptibly injured the plaintiff's reputation may be either

(i.) presumed from the nature of the words themselves; or,

(ii.) proved by evidence of their consequences.

(i.) It will be presumed from the nature of the words themselves,

(*a*) If the words, being written and published or printed and published, are in any way disparaging to the plaintiff or tend to bring him into ridicule and contempt.

(*b*) If the words, being spoken,

(1.) charge the plaintiff with the commission of some indictable offence;

(2.) impute to the plaintiff a contagious disorder tending to exclude him from society;

(3.) are spoken of the plaintiff in the way of his profession or trade; or disparage him in an office of public trust.

In all these cases the words are said to be actionable *per se*, because on the face of them they clearly must have injured the plaintiff's reputation.

(ii.) But in all other cases of spoken words, the fact that the plaintiff's reputation has been injured thereby, must be proved at the trial by evidence of the consequences that directly resulted from their utterance. Such evidence is called "Evidence of *special* damage," as distinguished from that *general* damage which the law

assumes, without express proof, to follow from the employment of words actionable *per se.*

Illustrations.

To say of A. "He is a forger and a felon;" or "He hath the French pox;" to call a physician a quack, a tradesman a bankrupt, or a lawyer a knave; to say of a magistrate that he is a corrupt judge; is in each case actionable without proof of special damage. *A fortiori*, if the words be written, or printed, and published.

But to call a man a cheat, a rogue, and a swindler, or to call a woman an adulteress, is not actionable, without proof of special damage, if the words be spoken only; but is actionable *per se*, if the accusation be reduced into writing and published to the world.

Thus the presumption that words are defamatory arises much more easily in cases of libel than in cases of slander. Many words which if printed and published would be presumed to have injured the plaintiff's reputation, will not be actionable *per se*, if merely spoken. The reasons for this distinction are obvious:—

1. *Vox emissa volat; litera scripta manet.* The written or printed matter is permanent, and no one can tell into whose hands it may come. Every one now can read. The circulation of a newspaper is enormous, especially if it be known to contain libellous matter. And even a private letter may turn up in after years, and reach persons for whom it was never intended, and so do incalculable mischief. Whereas a slander only reaches the immediate bystanders, who can observe the manner and note the tone of the speaker,—who have heard the antecedent conversation which may greatly qualify his assertion,—who probably are acquainted with the speaker, and know what value is to be attached to any charge made by him; the mischief is thus much less in extent, and the publicity less durable.

2. A slander may be uttered in the heat of a moment, and under a sudden provocation; the reduction into writing, and the publication, of a libel show greater deliberation and malice.

3. A third reason is sometimes given, that a libel is more likely to lead to a breach of the peace. But I doubt if this is so. A man would be more tempted to personally chastise a

villain who slandered him to his face, than a libeller who lampooned him in the papers. Even if it were so, it would tend to explain why libel is a crime and slander not, rather than to account for the distinction just pointed out between the evidence required in the respective civil actions. For this is a further important difference between Slander and Libel: that for every libel criminal proceedings may be taken by way of information or indictment, if the person defamed does not desire damages: whereas a slander, unless it be blasphemous, seditious, or obscene, is not criminal at all.

Neither do the first two reasons assigned appear any more satisfactory to Mr. Starkie than this last one does to me. He urges with great force in his Commentary prefixed to "Folkard on Slander and Libel," 4th edition, p. 28, that the distinction taken by our law between slander and libel in this respect "must be regarded as an absolute peremptory rule, not founded on any obvious reason or principle. If damage is to be presumed from publishing such a charge in writing, why is not some damage also to be presumed from publishing the fact orally? The extent of publicity, and quantity of damage to be presumed in the one case rather than in the other, is obviously casual and uncertain, and rather affects the measure and *quantum* of damages than any principle of civil liability." And so again on p. 31, "the extent of mischief merely affects the *quantum* of damages, and not the right of action." But with all deference to the learned author, the mischief complained of is the injury to the plaintiff's reputation and not the pecuniary damage he has suffered; and in discussing whether *any* such injury has been inflicted to *any* appreciable degree surely the mode and extent of the publication of the defamatory words are relevant matters for enquiry. The expression "*quantum* of damages" when applied to this question is misleading; for it implies that *some* damages at least are clearly due, and that the only question is how much. Whereas, once grant that even *nominal* damages are due and *cadit quæstio:* there is no longer any distinction between slander and libel, as soon as it is admitted that the action lies. It is precisely where it is not clear that any injury at all has been inflicted, where no pecuniary damage is proved, and the Court is doubting if any right of action exists, that the distinction adverted to arises.

The Courts, in the absence of any evidence of special damage, must either nonsuit the plaintiff, or say, "From the nature of the words used, and the circumstances in which they were uttered or published, we can see that they *must* have injured the plaintiff's reputation." And they are more inclined, and rightly more inclined, to take the latter course when the words are printed and published to the world than where they are merely uttered to a few. Anyhow the distinction has been recognised in English law by Hale, C.B., in *King* v. *Lake*, 2 Vent. 28, Hardres, 470; by Lord Hardwicke, C.J., in *Bradley* v. *Methwyn* (1737), Selw. N.P., 982, and by Lord Mansfield, C.J., in *Thorley* v. *Lord Kerry*, 4 Taunt. 355, 3 Camp. 214, n., and in numerous other cases, and is far too well established to be ever shaken.

The intention or motive with which the words were employed is as a rule immaterial. If the defendant has in fact injured the plaintiff's reputation, he is liable, although he did not intend so to do, and had no such purpose in his mind when he spoke or wrote the words. Every man must be presumed to intend and to know the natural and ordinary consequences of his acts: and this presumption (if indeed it is ever rebuttable) is not rebutted merely by proof that at the time he uttered or published the words the defendant did not attend to or think of their natural or probable consequences, or hoped or expected that these consequences would not follow. Such proof can only go to mitigate the damages.

Sometimes, however, it is a man's duty to speak fully and freely, and without thought or fear of the consequences; and then the above rule does not apply. The words are privileged by reason of the occasion on which they were employed; and no action lies therefor, unless it can be proved that the defendant was actuated by some special spite or some wicked and malicious motive. (See *post*, Chapters VIII. and IX.) But in all other cases (although the pleader invariably alleges that the words were spoken

or published falsely *and maliciously*) malice in fact need never be proved at the trial; the words are actionable, if false and defamatory, although spoken or published accidentally or inadvertently, or with an honest belief in their truth.

Illustrations.

The Protestant Electoral Union published a book called "The Confessional Unmasked." Their motive in so doing was "not only innocent but praiseworthy," viz. :—to promote the spread of the Protestant religion, by exposing the abuses of the Roman Catholic system; but certain passages in the book were necessarily obscene. *Held* that its publication was a misdemeanour. All copies which the defendant had for sale were ordered to be destroyed as obscene books. Neither the law nor the religion of England permits anyone to "do evil that good may come."

R. v. *Hicklin*, L. R. 3 Q. B. 371; 37 L. J. M. C. 89; 16 W. R. 801; 18 L. T. 395; 11 Cox C. C. 19.

Steele v. *Brannan*, L. R. 7 C. P. 261; 41 L. J. M. C. 85; 20 W. R. 607; 26 L. T. 509.

And see *R.* v. *Bradlaugh & Besant*, 2 Q. B. D. 569; 46 L. J. M. C. 286.

If a man deliver *by mistake* a paper out of his study where he has just written it; he will it seems be liable to an action, if the paper prove libellous, although he never intended to publish that paper, but another innocent one.

Note to *Mayne* v. *Fletcher*, 4 M. & Ry. 312; cf. *R.* v. *Paine*, 5 Mod. 167.

The plaintiff told a laughable story against himself in company: the defendant published it in the newspaper to amuse his readers, assuming that the plaintiff would not object. The plaintiff recovered damages, £10.

Cook v. *Ward*, 6 Bing. 409; 4 M. & P. 99.

For though he told it of himself to his friends, he by no means courted public ridicule. And that the publication was "*only in jest*," has long been held no defence.

Where a clergyman in a sermon recited a story out of Fox's Martyrology, that one Greenwood being a perjured person and a great persecutor, had great plagues inflicted upon him, and was killed by the hand of God; whereas in truth, he never was so plagued, and was himself actually present at that discourse,—the words being delivered only as a matter of history, and not with any intention to slander, it was adjudged for the defendant.

Greenwood v. *Prick*, Cro. Jac. 91, cited in 1 Camp. 270; and also in *R.* v. *Williams*, 13 How. St. Tr. 1387.

But Lord Denman and the court of Q. B. said most positively in *Hearne* v. *Stowell*, 12 A. & E. 726, that this case is not law. Mr. Greenwood would therefore in the present day have recovered at least nominal damages.

A barrister, editing a book on the Law of Attorneys, referred to a case, *Re Blake*, reported in 30 Law Journal Q. B. 32, and stated that Mr. Blake was struck off the rolls for misconduct. He was in fact only suspended for two years, as appeared from the Law Journal report. The publishers were held liable for this carelessness, although of course neither they nor the writer bore Mr. Blake any malice. Damages £100.

Blake v. *Stevens and others*, 4 F. & F. 232 ; 11 L. T. 543.

The printers of a newspaper by a mistake in setting up in type the announcements from the *London Gazette*, placed the name of the plaintiff's firm under the heading "First Meetings under the Bankruptcy Act" instead of under "Dissolutions of Partnership." An ample apology was inserted in the next issue : no damage was proved to have followed to the plaintiff : and there was no suggestion of any malice. In an action for libel against the proprietor of the paper, the jury awarded the plaintiff £50 damages. *Held* that the publication was libellous, and that the damages awarded were not excessive.

Shepheard v. *Whitaker*, L. R. 10 C. P. 502 ; 32 L. T. 402.

False defamatory words then, if spoken, constitute a slander : if written and published, a libel. The word "written" includes any printed, painted, or any other permanent representation not transient in its nature as are spoken words.

The writing may be on paper, parchment, copper, wood, or stone, or on any kind of substance in fact ; and may be made with any instrument, pen and ink, blacklead-pencil (*Geary* v. *Physic*, 5 B. & C. 238), or in chalk, &c. A picture or effigy may also be a libel, or any other mark or sign exposed to view and conveying a defamatory meaning. (5 Rep. 125.)

A libel is defined in the Civil Code of the State of New York, s. 29, 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."

By s. 30 of the same code, a slander is defined to be "a false and unprivileged publication, other than libel,

which . . . . by natural consequence causes . . . . damage."

Illustrations.

A caricature or scandalous painting is a libel. *Anon.* 11 Mod. 99.
Austin v. *Culpepper*, 2 Show. 313; Skin. 123.
Du Bost v. *Beresford*, 2 Camp. 511.

A chalk mark on a wall may be a libel, and as the wall cannot conveniently be brought into Court, secondary evidence may be given of the inscription.
Mortimer v. *M'Callan*, 6 M. & W. 58.
See *Spall* v. *Massey and others*, 2 Stark. 559.

A statue may be a libel; so is fixing up a gallows against a man's door.
Hawkins' Pleas of the Crown, 8th edition, 542.; 5 Rep. 125, *b*.

Hieroglyphics, a rebus, an anagram, or an allegory may be a libel.

Ironical praise may be a libel.

A man's reputation may also be injured by the deed or action of another without his using any words; and for such an injury he has an action on the case; but such cases are not within the scope of the present treatise.

Illustrations.

A banker having in his hands sufficient funds belonging to his customer dishonours his cheque: the customer may recover substantial damages, without proof of any special damage; for it is clear that such an act must injure the customer's reputation for solvency.
Marzetti v. *Williams*, 1 B. & Ad. 415.
Robinson v. *Marchant*, 7 Q. B. 918; 15 L. J. Q. B. 134; 10 Jur. 156.
Rolin and another v. *Steward* P. O., 14 C. B. 595; 23 L. J. C. P. 148; 18 Jur. 576; 2 C. L. R. 759.

Defendant caused plaintiff's goods to be seized on an unfounded claim for debt; the neighbours consequently deemed the plaintiff insolvent. The plaintiff was held entitled to substantial damages.
Brewer v. *Dew and another*, 11 M. & W. 625.
Bracegirdle v. *Orford*, 2 Maule & S. 77.

The defendant set up a lamp on the wall adjoining the plaintiff's dwelling-house and kept it burning in the daytime, thereby inducing the passers-by to believe that plaintiff's house was a brothel. This was held to be a trespass to the wall and being permanent in its nature also a libel in effigy.
Jefferies v. *Duncombe*, 2 Camp. 3; 11 East, 226.
Spall v. *Massey*, 2 Stark. 559.
Plunket v. *Gilmore*, Fortescue, 211.

And so as to "riding Skimmington," "rough music," burning in effigy, and other modes of holding a man up to public obloquy without especial *words* of defamation,

See *Sir William Bolton* v. *Dean*, cited in *Austin* v. *Culpepper*, Skin. 123 ; 2 Show. 313.

Mason v. *Jennings*, Sir T. Raym. 401.

Cropp v. *Tilney*, 3 Salk. 226.

So too in actions of false imprisonment and malicious prosecution, the jury may award damages for the injury done to the plaintiff's reputation by the charge made against him, and by his being marched in custody through the public streets ; although in the former, the gist of the action is the direct trespass to the *person*, and in the latter the maliciously setting the law in motion without reasonable or probable cause.

In Roman law there are many instances given in which a man's reputation was assailed, not by words, but by acts. *E.g.* :

(i.) By refusing to accept a solvent person as surety for a debt, intending thereby to impute that he is insolvent. (D. 2, 8, 5, 1.)

(ii.) By claiming a debt that is not due, or seizing a man's goods for a fictitious debt, with intent to injure his credit. (Gai. III. 220 ; Just. Inst. IV. iv. 1 ; D. 47, 10, 15, 33.)

(iii.) By claiming a person as your slave, knowing him to be free. (D. 47, 10, 12, & 22.)

(iv.) By forcing your way into the house of another. (D. 47, 10, 23, & 44.)

(v.) By persistently following about a matron or young girl respectably dressed, or a youth still wearing the prætexta, such constant pursuit being an imputation on their chastity. (Gai. III. 220 ; Just. Inst. IV. iv. 1 ; D. 47, 10, 15, 15—22.)

(vi.) By needlessly fleeing for refuge to the statue of the emperor, thereby making it appear that some one was unlawfully oppressing you. (D. 48, 16, 28, 7) ; though it is difficult to see in this case how it was determined who was the right plaintiff.

The person defamed has a civil remedy to recover damages, and in some cases he can also proceed criminally by way of information or indictment, and have the defamer punished as an offender against the state. But there is now no method of anticipating or preventing a libel or a slander; there is no longer any censorship of the press in this country. Any man is free to speak or to write and publish whatever he chooses of another,

subject only to this, that he must take the consequences, should a jury deem his words defamatory. This is what is meant by "the liberty of the press."

"The liberty of the press," says Lord Mansfield, in *R.* v. *Dean of St. Asaph*, 3 T. R. 431, n., "consists in printing without any previous licence, subject to the consequences of law." Lord Ellenborough says in *R.* v. *Cobbett*, 29 Howell's St. Tr. 49: "The law of England is a law of liberty, and consistently with this liberty, we have not what is called an *imprimatur*; there is no such preliminary licence necessary; but if a man publish a paper, he is exposed to the penal consequences, as he is in every other act, if it be illegal." Lord Kenyon shortly puts it thus in *R.* v. *Cuthell*, 27 Howell's St. Tr. 675: "A man may publish anything which twelve of his countrymen think is not blamable."

But it was by no means always so in England. It was quickly perceived that the printing press may be as great a power for evil as for good. And whenever any large proportion of any nation is disaffected towards the Government, to allow a free press is almost impossible.

(i.) The first plan adopted by our English monarchs was to keep all the printing presses in their own hands, and allow no one to *print* anything except by special Royal licence. All printing presses were thus kept under the immediate supervision of the King in Council, and regulated by proclamations and decrees of the Star Chamber by virtue of the King's Prerogative. In 1557 the Stationers' Company of London was formed. The exclusive privilege of printing and publishing in the English dominions was thus given to ninety-seven London stationers and their successors by regular apprenticeship, and the Company was empowered to seize all publications by men outside their guild. Later, by a decree of the Star Chamber in 1586, one printing press was allowed to each University.

(ii.) Not content with this government monopoly of the "Art and mysterie of Printing," which continued, in theory at all events, till 1637, Queen Elizabeth, in 1559, determined to have

all books read over by loyal bishops and privy councillors before they were allowed to go to the official press. In 1586 the Star Chamber enacted that all books should be read over in manuscript, and licensed by either the Archbishop of Canterbury or the Bishop of London, save law books, which were to be read and licensed by the Chief Justice of either Bench or the Lord Chief Baron (a practice which continued down to the middle of the last century; see the prefaces to Burrows' and Douglas' Reports). Subsequently the Master of the Revels usurped the right of revising poems and plays, and the Vice-Chancellors of the Universities were allowed for convenience sake to license books to be printed at the University presses. It was soon found impossible to restrict the number of printing-presses in the country, and the government therefore insisted all the more vehemently that no book should be *published* without a previous licence. By the Star Chamber decree dated July 11th, 1637, all printed books were required to be submitted to the licensers and entered upon the registers of the Stationers' Company before they could be published; if this was not done, the printer was to be fined, and for ever disabled from exercising the art of printing, and his press and all copies of the unlicensed book forfeited to the Crown. The old word "*Imprimatur*"="let it be *printed*," was still used to denote the consent of the licenser to its *publication*. After the abolition of the Star Chamber, the Long Parliament issued two orders, March 9th, 1642, and June 14th, 1643, very similar in effect to the decree of the Star Chamber last mentioned. Against these orders Milton published his noble but ineffectual protest, the "Areopagitica" (November 24th, 1644). The censorship of the press continued in England till 1695, and then its abolition was rather accidental than otherwise. (*See* Macaulay's "History of England," c. xix., vol. iii., pp. 399—405; 13 & 14 Car. II., c. 33; Proclamation of May 17th, 1680; 1 Jac. II., c. 17.)

(iii.) A third plan is to allow any book to be printed and published without any supervision or licence; but as soon as the attention of the Government is called to its harmful tendencies, to seize all the stock at the publishers and booksellers, and prevent the publisher from issuing any further copies. The Lord Lieutenant was till the year 1875 empowered to do this in Ireland, should any work appear to him

seditious. Magistrates in England may deal thus with books proved to be obscene by virtue of Lord Campbell's Act (20 & 21 Vict., c. 83). The Court of Chancery and the House of Lords have occasionally by injunction forbidden the further publication of libels which they deemed contempts of court. But in all other cases, neither the Crown nor any court of law can restrain the indiscriminate sale or distribution of any work, however pernicious they may deem it to be.

(iv.) Our present law permits any one to say, write, and publish what he pleases; but if he make a bad use of this liberty, he must be punished. If he unjustly attack an individual, the person defamed may sue for damages; if, on the other hand, the words be written or printed, or if treason or immorality be thereby inculcated, the offender can be tried for the misdemeanour either by information or indictment. In order that the criminal might be easily detected, it was enacted in 1712 that no person, under a penalty of £20, should sell or expose for sale any pamphlet without the name and place of abode of some known person by or for whom it was printed or published, written or printed thereon. (10 Anne, c. 19, s. 113, repealed in 1871 by the 33 & 34 Vict., c. 99.) A similar enactment as to newspapers, 6 & 7 Will. IV., c. 76, was also repealed by the 32 & 33 Vict., c. 24. And now every paper or book which is meant to be published or dispersed must bear on it the name and address of the printer (2 & 3 Vict., c. 12, s. 2); and the printer must for six calendar months carefully preserve at least one copy of each paper printed by him, and write thereon the name and address of the person who employed and paid him to print it (39 Geo. III., c. 79, s. 29). Newspapers were indeed formerly regarded with great jealousy by the Government, and subjected to heavy duties. Under Charles II. and James II. the *London Gazette* (a small sheet appearing twice a week, every Monday and Thursday) was the only paper permitted to publish political news. Even their size was regulated by statute. The 6 Geo. IV., c. 119, first allowed newspapers to be printed on paper of any size. Moreover, till the 18 Vict., c. 27, they had to be printed on stamped paper. But in spite of all such petty restrictions, our press has been, ever since the passing of Fox's Libel Act, 32 Geo. III., c. 60, the freest in the world.

The only vestige remaining of such censorship is the control of the Lord Chamberlain over plays. By the Theatres Regulation Act, 1843 (6 & 7 Vict. c. 68), s. 14, it is enacted that it shall be lawful for the Lord Chamberlain for the time being, whenever he shall be of opinion that it is fitting for the preservation of good manners, decorum, or of the public peace so to do, to forbid the acting or presenting any stage play, or any act, scene, or part thereof, or any prologue or epilogue, or any part thereof, anywhere in Great Britain, or in such theatres as he shall specify, and either absolutely or for such time as he shall think fit.

No injunction can be obtained to prohibit the publication or republication of any libel, or to restrain its sale. *Prudential Assurance Co.* v. *Knott*, L. R. 10 Ch. 142; 44 L. J. Ch. 192; 23 W. R. 249; 31 L. T. 866. The matter must first go before a jury, who are to decide whether the words complained of are libellous or not. The Crown has no authority to restrain the press; and the courts, whether of Law or of Equity, cannot, till after verdict, issue any injunction in respect of any libels, save such as are contempts of Court. (*Saxby* v. *Easterbrook*, 3 C. P. D. 339; 27 W. R. 188.)

There has been a strange conflict of authority on this point. As long ago as 1742, it was clearly laid down in *Roach* v. *Read and another*, 2 Atk. 469; 2 Dick. 794, that Courts of Equity had no jurisdiction over actions of libel and slander, whether public or private, except as contempts of their own Courts. The Courts of Common Law had at that time no power to grant injunctions at all. No doubt in the early days of arbitrary prerogative the Court of Star Chamber occasionally restrained the publication of works alleged to be seditious. But Scroggs was impeached for attempting to introduce the practice into the King's Bench. However, in *Du Bost* v. *Beresford*, 2 Camp. 512, Lord Ellenborough, in deciding that a libellous picture could have no legal value as a work of art, said: "Upon an application to the Lord

Chancellor, he would have granted an injunction against its exhibition, and the plaintiff was both civilly and criminally liable for having exhibited it." This, however, was a mere *obiter dictum*, and is said to have greatly surprised all practitioners in the Courts of Equity; it was expressly disavowed by Lord Campbell in the case of the *Emperor of Austria* v. *Day and Kossuth*, 3 De G. F. & J. 217, 239; 7 Jur. N. S. 639; 30 L. J. Ch. 690. It is, however, stated in the note to *Southey* v. *Sherwood*, 2 Mer. p. 441, that in a case of *Burnett* v. *Chetwood*, Lord Chancellor Parker granted an injunction to restrain the printing and publishing of a translation into English of a book written in Latin, and which he thought had better remain in Latin; "he looked upon it," he said, "that this Court had a superintendency over all books, and might in a summary way restrain the printing or publishing [of] any that contained reflections on religion or morality." The application was apparently made by an executor in order to protect his copyright in a book written by his testator; but the whole report is of very doubtful authority, being merely a note of the case extracted from a manuscript volume of uncertain authorship. See also *Gurney* v. *Longman*, 13 Ves. 493, 507; *Bathurst* v. *Kearsley*, *ib.*, 494. In *Clark* v. *Freeman*, 11 Beav. 112; 17 L. J. Ch. 142; 12 Jur. 149, Lord Langdale, M.R., laid it down most clearly that a Court of Equity would not interfere by injunction to prevent the publication of a libel, saying that if it did so it would be "reviving the criminal jurisdiction of the Star Chamber." And in *Fleming* v. *Newton*, 1 H. L. C. 363, Lord Cottenham was most distinctly of opinion that, whatever niceties might be shown to exist in Scotch law, such an interference with the liberty of the press was contrary to every principle of English law. See also the observations of Lord Eldon in *Gee* v. *Pritchard*, 2 Swan. 413, and of Sir L. Shadwell in *Martin* v. *Wright*, 6 Sim. 297.

In this state of the authorities, Malins, V.C., in *Springhead Spinning Co.* v. *Riley*, L. R. 6 Eq. 551; 37 L. J. Ch. 889; 16 W. R. 1138; 19 L. T. 64, and *Dixon* v. *Holden*, L. R. 7 Eq. 488; 17 W. R. 482; 20 L. T. 357, introduced an exception to the rule; for he decided that a Court of Equity had jurisdiction to restrain the publication of any document, which tended to the destruction or deterioration of the plaintiff's property, or

even of the plaintiff's professional reputation by which property is acquired. This decision professed to follow that of Lord Langdale, M.R., in *Routh* v. *Webster*, 10 Beav. 561, in which case an injunction was granted to restrain, not indeed a libel, for there was none, but an improper and unauthorized use by the defendants of the plaintiff's name as a trustee of the defendant's joint-stock company. In a subsequent case, *Mulkern* v. *Ward*, L. R. 13 Eq. 619; 41 L. J. Ch. 464; 26 L. T. 831, Wickens, V.C., commented very strongly on the decision in *Dixon* v. *Holden*, as introducing a "wholly new" rule, and one contrary to the previous decisions; and refused the injunction therein prayed for, as a violation of the liberty of the press. See also *James* v. *James*, L. R. 13 Eq. 421; 41 L. J. Ch. 253; 26 L. T. 568; *Clover* v. *Royden*, L. R. 17 Eq. 190; 43 L. J. Ch. 665; 22 W. R. 254; 29 L. T. 639; and the American cases of *Brandreth* v. *Lance*, 8 Paige 24; and *Hoyt* v. *McKenzie*, 3 Barb. Ch. R. 320.

All doubts on the point were finally set at rest by the Court of Appeal in *Prudential Assurance Co.* v. *Knott*, L. R. 10 Ch. 142; 44 L. J. Ch. 192; 23 W. R. 249; 31 L. T. 866; where a very strong Court (Lord Cairns, L.C., and James and Mellish, L.JJ.), decided that the Court of Chancery has no jurisdiction to restrain the publication of a libel as such, even if it is injurious to property; and expressly overruled *Dixon* v. *Holden* and *Springhead Spinning Co.* v. *Riley*. This decision was followed by the Court of Appeal in *Fisher and Co.* v. *Apollinaris Co.*, L. R. 10 Ch. 297; 44 L. J. Ch. 500; 23 W. R. 460; 32 L. T. 628, and in Ireland in *Hammersmith Skating Rink Co.* v. *Dublin Skating Rink Co.*, 10 Ir. R. Eq. 235. Vice-Chancellor Malins, however, appears to remain of the same opinion still; for in *Thorley's Cattle Food Co.* v. *Massam*, 6 Ch. D. 582; 46 L. J. Ch. 713, he decided that the decision of the Court of Appeal was in some way controlled or overruled by sub-s. 8 of s. 25 of the Judicature Act, 1873, which had come into force in the meantime. But it has since been most clearly laid down by James, L.J., that that sub-section in no way alters the principles on which a Court of Equity should act in granting injunctions; *Day* v. *Brownrigg*, 10 Ch. D. 307; 48 L. J. Ch. 173; 27 W. R. 217; 39 L. T. 226, 553; *Gaskin* v. *Balls*, 13

Ch. D. 324; 28 W. R. 552. And Lord Coleridge, C.J., appears to be of the same opinion in 3 C. P. D. 343. The decision of Malins, V.C., on the interlocutory application in *Thorley's Cattle Food Co.* v. *Massam*, must therefore be considered to be overruled, as well as his previous decision in *Dixon* v. *Holden*; and the Master of the Rolls has, according to Lindley, J., 3 C. P. D. 342, refused to follow it (probably in *Hinrichs* v. *Berndes*, Weekly Notes for 1878, p. 11).

But these decisions in no way interfere with what is obviously quite a different matter—the right of the plaintiff to claim an injunction on his writ in addition to damages, such injunction to be granted by the judge only *after* the jury have found the publication complained of to be a libel. Libel or no libel is pre-eminently a question for a jury, but after they have once decided it, the judge may, if he is of opinion that any repetition of the libel would be injurious to the plaintiff's property, grant an injunction restraining any repetition thereof, *Saxby* v. *Easterbrook*, 3 C. P. D. 339; 27 W. R. 188. *Thorley's Cattle Food Co.* v. *Massam*, 28 W. R. 295; 41 L. T. 542; (C. A.) 14 Ch. D. 763; 28 W. R. 966; 42 L. T. 851; *Thomas* v. *Williams*, 14 Ch. D. 864; 49 L. J. Ch. 605; 28 W. R. 983; 43 L. T. 91. See also the remarks of Lord Langdale, M.R., in *Clark* v. *Freeman*, 11 Beav. 117, 8; and of the present Master of the Rolls in *Hinrichs* v. *Berndes*, Weekly Notes for 1878, p. 11.

As to what libels amount to contempt of Court, see *post*, c. XVII., Seditious Libels.

CHAPTER II.

DEFAMATORY WORDS.

WORDS which produce any appreciable injury to the reputation of another are called DEFAMATORY.

Diffamare est in malâ famâ ponere (Bartol.). The question in each case therefore is: Has the reputation of this individual plaintiff been appreciably impaired in consequence of the words employed by the defendant? No general rule can be laid down stating absolutely and beforehand what words are defamatory and what not. Words which would seriously injure A.'s reputation might do B.'s no harm. Each case must be decided on its own facts.

Defamation was formerly an ecclesiastical offence, cognizable only in the spiritual court; and then defamatory words would be such as the ecclesiastical court would punish. But all such suits were abolished by the 18 & 19 Vict. c. 41. So now it is convenient to use the word "Defamation" as a general term embracing both "Slander" and "Libel."

If in any given case the words employed by the defendant have appreciably injured the plaintiff's reputation, then the plaintiff has suffered an *injuria*, which is actionable without proof of any damage. Every man has a right to be protected from defamation, as much as from assault or bodily harm. "His reputation is his property, and if possible more valuable than other property" (*per* Malins, V. C., in *Dixon* v. *Holden*, L. R. 7 Eq. 492; 17 W. R. 482; 20 L. T. 357); and just as

any invasion of a man's property is actionable without proof of any pecuniary loss, so is any disparagement of his reputation. Every man has a right to his good name, a right which no one may violate. And such a right is a *real* right; all men are bound to forbear from all such imputations against him as would amount to injuries to his reputation (2 Austin's Jurisprudence, p. 51). "It was the rule of Holt, C.J., to make words actionable whenever they *sound to the disreputation of the person* of whom they were spoken, and this was also Hale's and Twisden's rule, and I think it a very good rule." (*Per* Fortescue, J., in *Button* v. *Heyward*, 8 Mod. 24, referring perhaps to *Baker* v. *Pierce*, 6 Mod. 24.)

Whenever these words clearly "sound to the disreputation" of the plaintiff, there is no need of further proof, they are defamatory on the face of them, and actionable *per se*. The injury to the reputation is the gist of the action, and wherever that is clear, there is no need to inquire whether there is any injury to the pocket as well. But where it is by no means clear from the words themselves that they *must* have injured the plaintiff's reputation, there the Court requires proof of some special damage to show that as a matter of fact the words have in this case impaired the plaintiff's good name. Proof of this kind is, as we have seen, required more frequently in actions of slander than of libel. Words which are merely uncivil, words of idle abuse, are clearly no ground for an action, unless it can be shown that in fact some appreciable damage to the plaintiff has followed from their use. *De minimis non curat lex.*

Mr. Townshend, the author of a learned American treatise on Slander and Libel, appears to me to fall into an error on this point. He devotes a whole chapter to maintaining "that pecuniary loss to the plaintiff is the gist of the action for slander

or libel. If the language published has not occasioned the plaintiff pecuniary loss (actual or implied), then no action can be maintained" (c. iv. § 57). Surely he might as well contend that the gist of an action of assault and battery was the doctor's bill the plaintiff had to pay. Is it not clear that injury to the plaintiff's reputation is the gist of the action, and special damage is but evidence of that injury? Every man has an absolute right to have his person, his property, and his reputation preserved inviolate. Bacon commences his tract on the Use of the Law by this express declaration:—"The Use of the Law consisteth principally in these three things:

"1. To secure men's persons from death and violence.

"2. To dispose the property of their goods and lands.

"3. For preservation of their good names from shame and infamy. . . . .

"If any man beat, wound or maime another, or give false scandalous words that may touch his credit, the Law giveth thereupon an action of the case, for the slander of his good name; and an action of Battery, or an appeale of Maime, by which recompence shall be recovered, to the value of the hurt, dammage or danger." Mr. Townshend would reduce Bacon's three uses of the law to two; for he implies that the law will not redress a mere injury to the reputation unless it be accompanied by an injury to the person or the property of the plaintiff. Bacon merely requires that the words should "touch the plaintiff's credit;" where it is not obvious that the words must have that result, then the plaintiff must bring evidence of some material loss which will show that his credit has in fact been touched.

And how does Mr. Townshend get over the fact that in nine cases of defamation out of every ten the plaintiff is never called on to prove that "pecuniary loss" which he maintains to be the gist of the action? He has recourse to that time-honoured expedient, a legal fiction. He insists "that, where the law does protect reputation, it does so indirectly, by means of a fiction—an assumption of pecuniary loss. In theory, the action for slander or libel is always for the pecuniary injury, and not for the injury to the reputation. There are many such fictions introduced into the administration of the law, by means of which, without changing the rule of law, the law is, in effect, changed."

That there be many such fictions is surely no ground for increasing their number by inventing a fresh one. And what an absurdity such a fiction would be. If I assert that the Prime Minister stole a penny bun, the law will solemnly presume, says Mr. Townshend, that the Prime Minister thereupon instantly incurred a money loss of, say, £50. And how capricious is this fiction. For had I been content with calling the Prime Minister a liar, the law would not presume the loss of a farthing. Such a fiction also is opposed to the history of our law; for we know that in Anglo-Saxon and in Norman times an exaggerated value was set on a man's reputation. Evidence of a prisoner's good character would insure his acquittal of any crime. In short, all that is required by our common law is that the injury to a man's reputation should be appreciable, *i.e.*, capable of being assessed by a jury. And so no action lies for mere words of vulgar abuse, or for words which have inflicted no substantial injury on the plaintiff's reputation, on the principle *De minimis non curat lex.*

It is the more strange that Mr. Townshend should have made such an error; because the language of the Judges in his own country is clear and express. Thus the Court of Appeals in New York lays down the law most distinctly in the following words: "The action for slander is given by the law as a remedy for 'injuries affecting a man's reputation or good name by malicious, scandalous, and slanderous words tending to his damage and derogation.'—3 Bl. Com. 123. It is injuries affecting the reputation only which are the subject of the action." And then after referring to some examples of special damage, the Court continues: "These instances are sufficient to illustrate the kind of special damage that must result from defamatory words not otherwise actionable to make them so; they are damages produced by, or through, impairing the reputation. . . . The words must be defamatory in their nature; and must in fact disparage the character; and this disparagement must be evidenced by some positive loss arising therefrom directly and legitimately as a fair and natural result. . . . . The special damages must flow from impaired reputation. . . . . The loss of character must be a substantive loss, one which has actually taken place." *Terwilliger* v. *Wands*, 3 Smith (17 N. Y. R.) 59, 63. It is clear from these expressions and also from

the judgment in *Wilson* v. *Goit*, in the same volume, p. 443, that the Court of Appeals in New York considered that the loss of reputation was the gist of the action, and that special damage is but evidence of loss of reputation, and is necessary only where without some such evidence it would not be clear that the plaintiff's reputation had in fact been impaired.

PART I.

LIBEL.

In cases of libel, any words will be presumed defamatory which expose the plaintiff to hatred, contempt, ridicule, or obloquy, which tend to injure him in his profession or trade, or cause him to be shunned or avoided by his neighbours.

"Everything, printed or written, which reflects on the character of another, and is published without lawful justification or excuse, is a libel, whatever the intention may have been." (*Per* Parke, B., in *O'Brien* v. *Clement*, 15 M. & W. 435.) The words need not necessarily impute disgraceful conduct to the plaintiff; it is sufficient if they render him contemptible or ridiculous. (*Cropp* v. *Tilney*, 3 Salk. 226; *Villers* v. *Monsley*, 2 Wils. 403.)

Any written words are defamatory which impute to the plaintiff that he has been guilty of any crime, fraud, dishonesty, immorality, vice, or dishonourable conduct, or has been accused or suspected of any such misconduct; or which suggest that the plaintiff is suffering from any infectious disorder; or which have a tendency to injure him in his office, profession, calling, or trade. And so too are all words which hold the plaintiff up to contempt, hatred, scorn, or ridicule, and which, by thus engendering an evil opinion of him in the minds of right-thinking men, tend to deprive him of friendly intercourse and society.

A libel need not necessarily be in writing or printing. Any caricature or scandalous printing, or effigy, will constitute a libel. (5 Rep. 125*b*.; Anon. 11 Mod. 99; *Austin* v. *Culpepper*, 2 Show. 313; Skin. 123; *Jefferies* v. *Duncombe*, 11 East, 226; *Du Bost* v. *Beresford*, 2 Camp. 511.) But it must be something permanent in its nature, not fleeting, as are spoken words.

It appears to be impossible to define a libel with any greater precision or lucidity. I proceed at once therefore to give instances.

Illustrations.

It is libellous to write and publish of a man that he is—

"an infernal villain,"

Bell v. *Stone*, 1 B. & P. 331;

"an impostor,"

Cooke v. *Hughes*, R. & M. 112.

Campbell v. *Spottiswoode*, 3 B. & S. 769; 32 L. J. Q. B. 185; 9 Jur. N. S. 1069; 11 W. R. 569; 8 L. T. 201;

"a hypocrite,"

Thorley v. *Lord Kerry*, 4 Taunt. 355; 3 Camp. 214 n.;

"a frozen snake,"

Hoare v. *Silverlock* (No. 1, 1848), 12 Q. B. 624; 17 L. J. Q. B. 306; 12 Jur. 695;

"a rogue and a rascal,"

Per Gould, J., in *Villers* v. *Monsley*, 2 Wils. 403;

"a dishonest man,"

Per cur. in *Austin* v. *Culpepper*, Skin. 124; 2 Show. 314;

"a mere man of straw,"

Eaton v. *Johns*, 1 Dowl. (N. S.) 602;

"an itchy old toad,"

Villers v. *Monsley*, 2 Wils. 403;

"a desperate adventurer," association with whom "would inevitably cover" gentlemen "with ridicule and disrepute,"

Wakley v. *Healey*, 7 C. B. 591; 18 L. J. C. P. 241;

that "he grossly insulted two ladies,"

Clement v. *Chivis*, 9 B. & C. 172; 4 M. & R. 127;

that "he is unfit to be trusted with money,"

Cheese v. *Scales*, 10 M. & W. 488; 12 L. J. Ex. 13; 6 Jur. 958;

that "he is insolvent and cannot pay his debts,"

Metropolitan Omnibus Co. v. *Hawkins*, 4 H. & N. 146; 28 L. J. Ex. 201; 5 Jur. N. S. 226; 7 W. R. 265; 32 L. T. (Old S.) 281;

that "he was once in difficulties," though it is stated that such difficulties are now at an end,

Cox v. *Lee*, L. R. 4 Ex. 284; 38 L. J. Ex. 219;

that he is "the most artful scoundrel that ever existed," "is in every person's debt," and that "his ruin cannot be long delayed," and that "he is not deserving of the slightest commiseration,"

Rutherford v. *Evans*, 6 Bing. 451 ; 8 L. J. (Old S.) C. P. 86 ;

that he is "at the head of a gang of swindlers," that he is "a common informer, and has been guilty of deceiving and defrauding divers persons with whom he had dealings,"

I'Anson v. *Stuart*, 1 T. R. 748 ; 2 Smith's L. C. 6th ed. 57 ;
R. v. *Saunders*, Sir Thos. Raym. 201 ;

that the plaintiff sought admission to a club and was black-balled, and bolted the next morning without paying his debts,

O'Brien v. *Clement*, 16 M. & W. 159 ; 16 L. J. Ex. 76 ; 4 D. & L. 343.

So it is libellous to write and publish of a landlord that he put in a distress in order to help his insolvent tenant to defraud his creditors.

Haire v. *Wilson*, 9 B. & C. 643 ; 4 M. & R. 605.

It is libellous for a defendant to write a letter charging his sister with having unnecessarily made him a party to a Chancery suit, and adding "it is a pleasure to her to put me to all the expense she can."

Fray v. *Fray*, 17 C. B. N. S. 603 ; 34 L. J. C. P. 45 ; 10 Jur. N. S. 1153.

It is libellous to write of a lady applying for relief from a charitable society, that her claims are unworthy, and that she spends all the money given her by the benevolent in printing circulars filled with abuse of the society's secretary.

Hoare v. *Silverlock* (No. 1, 1848), 12 Q. B. 624 ; 17 L. J. Q. B. 306 ; 12 Jur. 695.

To state in writing that the plaintiff is insane, or that her mind is affected is libellous, if false.

Morgan v. *Lingen*, 8 L. T. 800.

Ironical praise may be a libel ; *e.g.*, calling an attorney "an honest lawyer."

Boydell v. *Jones*, 4 M. & W. 446 ; 7 Dowl. 210 ; 1 H. & H. 408.
R. v. *Brown*, 11 Mod. 86 ; Holt, 425.
Sir Baptist Hicks' Case, Hob. 215 ; Poph. 139.

It is libellous to impute to a Presbyterian "gross intolerance" in not allowing his hearse to be used at the funeral of his Roman Catholic servant.

Teacy v. *McKenna*, Ir. R. 4 C. L. 374.

It is *primâ facie* libellous to charge the plaintiff with ingratitude even though the facts on which the charge is based be stated, and they do not bear it out.

Cox v. *Lee*, L. R. 4 Ex. 284 ; 38 L. J. Ex. 219.

It is libellous to state in a newspaper of a young nobleman that he drove over a lady and killed her and yet attended a public ball that very evening (although this only amounts to a charge of unfeeling conduct).

Churchill v. *Hunt*, 1 Chit. 480 ; 2 B. & A. 685.

It is libellous to write and publish of a lady of high rank that she has her photograph taken incessantly, morning, noon, and night, and receives a commission on the sale of such photographs.

R. v. *Rosenberg*, *Times* for Oct. 27th, 28th, 1879.

It is a libel to impute or imply that a grand jury have found a true bill against the plaintiff for any crime.

Harvey v. *French*, 1 Cr. & M. 11.

It is libellous to publish a highly coloured account of judicial proceedings, mixed with the reporter's own observations and conclusions upon what passed in Court, containing an insinuation that the plaintiff had committed perjury.

Stiles v. *Nokes*, 7 East, 493 ; same case *sub nomine Carr* v. *Jones*, 3 Smith, 491.

It is libellous to write and publish of the editor of a paper that he is "a convicted felon" and "a felon editor ;" even although the fact is that he was convicted of felony, and underwent a term of imprisonment with hard labour.

Leyman v. *Latimer and others*, 3 Ex. D. 15, 352 ; 46 L. J. Ex. 765 ; 47 L. J. Ex. 470 ; 25 W. R. 751 ; 26 W. R. 305 ; 37 L. T. 360, 819.

It is libellous to write about the plaintiff's "defalcations."

Bruton v. *Downes*, 1 F. & F. 668.

It is libellous to write and publish of a man that a certain notorious prostitute is "under his patronage or protection."

More v. *Bennett* (1872), 48 N. Y. R. (3 Sickel), 472.

Or of a married man that his conduct towards his wife is so cruel that she was compelled to summon him before the magistrates.

Hakewell v. *Ingram*, 2 C. L. Rep. (1854), p. 1397.

It is libellous "to paint a man playing at cudgels with his wife."

Per Lord Holt, C. J., in *Anon.* 11 Mod. 99.

See *Du Bost* v. *Beresford*, 2 Camp. 511.

It is a libel on a married lady to assert that her husband is petitioning for a divorce from her.

R. v. *Rosenberg*, } *Times* for Oct. 27th, 28th, 1879.
R. v. *Head & Marks*, }

It is libellous to call a manufacturer a "truckmaster," for this implies that he has been guilty of practices in contravention of the Truck Act.

Homer v. *Taunton*, 5 H. & N. 661 ; 29 L. J. Ex. 318 ; 8 W. R. 499 ; 2 L. T. 512.

It is libellous to charge in writing a man with having cheated at dice or on the turf, although all gambling and horse-racing transactions are illegal or at least void.

Greville v. *Chapman*, 5 Q. B. 731 ; 13 L. J. Q. B. 172 ; 8 Jur. 189 ; D. & M. 553.

Yrisarri v. *Clement*, 3 Bing. 432 ; 11 Moore, 308 ; 2 C. & P. 223.

It is libellous to call a man a "black-leg" or a "black-sheep." But there should be an averment that these words mean a person guilty of habitually cheating and defrauding others.

McGregor v. *Gregory*, 11 M. & W. 287 ; 12 L. J. Ex. 204 ; 2 D. N. S. 769.

O'Brien v. *Clement*, 16 M. & W. 166 ; 16 L. J. Ex. 77.

And see *Barnett* v. *Allen*, 1 F. & F. 125 ; 27 L. J. Ex. 412 ; 4 Jur. N. S. 488 ; 3 H. & N. 376.

It is libellous to write and publish of the plaintiff the following words: "Digby has had a tolerable run of luck. He keeps a well-spread sideboard, but I always consider myself in a family hotel when my legs are under his table, for the bill is sure to come in sooner or later, though I rarely dabble in the mysteries of écarté or any other game. The fellow is as deep as Crockford, and as knowing as the Marquis. I do dislike this leg-al profession."

Digby v. *Thompson and another*, 4 B. & Ad. 821; 1 N. & M. 485.

It is libellous to write and publish of a clergyman that he poisoned foxes on the estate of Sir M. S., in a fox-hunting county, and had been hung up in effigy in consequence of such "dastardly behaviour."

R. v. *Cooper*, 8 Q. B. 533; 15 L. J. Q. B. 206.

Foulger v. *Newcomb*, L. R. 2 Ex. 327; 36 L. J. Ex. 169; 15 W. R. 1181; 16 L. T. 595.

It is libellous to publish in a newspaper a story of the plaintiff calculated to make him ludicrous, though he had previously told the same story of himself.

Cook v. *Ward*, 6 Bing. 409; 4 M. & P. 99.

But it is not defamatory to write of another that he is "Man Friday."

Forbes v. *King*, 1 Dowl. 672; 2 L. J. Ex. 109.

For, as Lord Denman, C. J., observes in *Hoare* v. *Silverlock* (No. 1, 1848), 12 Q. B. 626; 17 L. J. Q. B. 308: "That imputed no crime at all. The 'Man Friday,' we all know, was a very respectable man, although a black man, and black men have not been denounced as criminals yet." The law is otherwise in the United States.

King v. *Wood*, 1 N. & M. (South Car.) 184.

Where the defendants posted up in a public club-room the following notice: "The Rev. J. Robinson and Mr. J. K., inhabitants of this town, not being persons that the proprietors and annual subscribers think it proper to associate with, are excluded this room;" this was held no libel.

Robinson v. *Jermyn*, 1 Price, 11.

It is not libellous to publish in a newspaper that the plaintiff has sued his mother-in-law in the County Court.

Cox v. *Cooper*, 12 W. R. 75; 9 L. T. 329.

The following words are no libel (in their obvious and natural meaning at all events):—"Society of Guardians for the Protection of Trade against Swindlers and Sharpers. I am directed to inform you that the persons using the firm of Goldstein & Co. are reported to this Society as improper to be proposed to be balloted for as members thereof." The judgment would have been otherwise, had there been an averment that it was the custom of the society to designate swindlers and sharpers by the term "improper persons to be members of this society."

Goldstein v. *Foss*, 6 B. & C. 154 (in Ex. Ch.) 4 Bing. 489; 2 C. & P. 252; 2 Y. & J. 146; 1 M. & P. 402.

It is not a libel to write and publish in the *Times*:—"We are requested to state that the honorary secretary of the Tichborne Defence Fund is not and never was a captain in the Royal Artillery as he has been erroneously described," for these words do not impute that the plaintiff had so represented himself.

Hunt v. *Goodlake*, 43 L. J. C. P. 54; 29 L. T. 472.

It is not defamatory to write and publish of the plaintiff words implying that he endeavoured to suppress dissension and discourage sedition in Ireland; for, though such words might injure him in the minds of criminals and rebels, they would not tend to lower him in the estimation of right-thinking men.

Mawe v. *Pigott*, Ir. R. 4 C. L. 54.

And see *Clay* v. *Roberts*, 9 Jur. N. S. 580; 11 W. R. 649; 8 L. T. 397.

So a notice sent by a landlord to his tenants:—"Messrs Henty & Sons hereby give notice that they will not receive in payment any cheques drawn on any of the branches of the Capital and Counties Bank," is not defamatory.

Capital & Counties Bank v. *Henty & Sons*, 28 W. R. 490; 42 L. T. 314; (C. A.) 5 C. P. D. 514; 49 L. J. C. P. 830; 28 W. R. 851.

The plaintiff was a certificated art master, and had been master at the Walsall Science and Art Institute. His engagement there ceased in June, 1874, and he then started, and became master of, another school which was called "The Walsall Government School of Art," and was opened in August. In September the following advertisement appeared in the Walsall Observer, signed by the defendants as chairman, treasurer, and secretary of the Institute respectively:—"Walsall Science and Art Institute. The public are informed that Mr. Mulligan's connection with the institute has ceased, and that he is not authorised to receive subscriptions on its behalf." Held that this was no libel; and that no innuendo could make it so: for the words were not capable of a defamatory meaning.

Mulligan v. *Cole and others*, L. R. 10 Q. B. 549; 44 L. J. Q. B. 153; 33 L. T. 12.

If the words are not reasonably susceptible of any defamatory meaning, the Court will hold the statement of claim bad on demurrer; or if there be no demurrer, the judge at the trial will stop the case. But if the words are reasonably susceptible of two constructions, the one an innocent, the other a libellous construction, then it is a question for the jury which construction is the proper one; and in such a case if the defendant demurs, his demurrer will be overruled (*Jenner and another* v. *A'Beckett*, L. R. 7 Q. B. 11; 41 L. J. Q. B. 14; 20 W. R. 181; 25 L. T. 464); if the judge at the trial nonsuits, the Court will order a new trial. (*Hart and another* v. *Wall*, 2 C. P. D. 146; 46 L. J. C. P. 227; 25 W. R. 373.)

The jury should always read the alleged libel through before deciding that its tendency is injurious. A word

at the end may alter the whole meaning. (See *Hunt* v. *Algar*, 6 C. & P. 245, *post*, p. 100.) So if in one part appears something to the plaintiff's discredit, in another something to his credit, "the bane" and "the antidote" should be taken together. The jury should not dwell on isolated passages, but judge of the publication as a whole. (*Per* Lord Ellenborough, C. J., in *R.* v. *Lambert & Perry*, 2 Camp. 398; 31 How. St. Tr. 340; per Lord Kenyon, C. J., in *R.* v. *Reeves*, Peake Add. Cas. 84; per Fitzgerald, J., in *R.* v. *Sullivan*, 11 Cox C. C. 58.)

Illustration.

The report of a trial for libel contained some strong observations against the plaintiff, which were indeed a necessary part of the report, as the defendant had justified. At the end it was stated that the jury found a verdict for the plaintiff for £30. *Held* that the publication taken as a whole was not injurious to the plaintiff.

Chalmers v. *Payne*, 2 C. M. & R. 156; 5 Tyrw. 766; 1 Gale, 69.

It is libellous to impute to any one holding an office that he has been guilty of improper conduct in that office or has been actuated by wicked, corrupt, or selfish motives, or is incompetent for the post. So it is libellous to impute to a member of any of the learned professions that he does not possess the technical knowledge necessary for the proper practice of such profession, or that he has been guilty of professional misconduct. And it is not necessary (as it is in cases of slander, *post*, p. 69) that the person libelled should at the time still hold that office or exercise that profession: it is actionable to impute past misconduct when in office. (*Parmiter* v. *Coupland*, 6 M. & W. 108; *Boydell* v. *Jones*, 4 M. & W. 446; *Warman* v. *Hine*, 1 Jur. 820; *Goodburne* v. *Bowman*, 9 Bing. 532.)

In cases of slander there is a curious distinction drawn between offices of profit merely and offices of honour, such as that

of justice of the peace; and it has been held that merely to impute incompetency or want of ability (as distinct from a want of integrity or impartiality) to a justice of the peace is not actionable, see p. 70. There is no authority, however, for supposing that an action of libel would not lie, if such words were printed and published.

Illustrations.

It is libellous to write and publish of a Protestant archbishop that he attempted to convert a Catholic priest by offers of money and of preferment in the Church of England and Ireland.

Archbishop of Tuam v. *Robeson and another*, 5 Bing. 17; 2 M. & P. 32.

It is libellous to write and publish of an ex-mayor and a justice of the peace that during his mayoralty he was guilty of partiality and corruption and displayed ignorance of his duties; and this notwithstanding the public nature of the offices he held.

Parmiter v. *Coupland*, 6 M. & W. 105; 9 L. J. Ex. 202; 4 Jur. 701.

Goodburne v. *Bowman*, 9 Bing. 532.

It is libellous to write and publish of a clergyman that he came to the performance of divine service in a towering passion, and that his conduct is calculated to make infidels of his congregation.

Walter v. *Brogden*, 19 C. B. N. S. 65.

Gathercole v. *Miall*, 15 M. & W. 319; 10 Jur. 337; 15 L. J. Ex. 179.

But see *Kelly* v. *Tinling*, L. R. 1 Q. B. 699; 35 L. J. Q. B. 231; 12 Jur. N. S. 940; 14 W. R. 51; 13 L. T. 255.

It is libellous to write and publish of 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, however, that the matter is to be taken up seriously."—*Bucks Chronicle.*

Edwards v. *Bell and others*, 1 Bing. 403.

As to a Roman Catholic priest, see

Hearne v. *Stowell*, 12 A. & E. 719; 4 P. & D. 696; 6 Jur. 458.

A body of trustees of a certain charity can sue jointly for a libellous letter published in the Wisbeach Chronicle imputing to them improper management of the charity funds.

Booth v. *Briscoe* (C. A.), 2 Q. B. D. 496; 25 W. R. 838.

Parish Officers, &c.

It is libellous to charge an overseer of a parish with "oppressive conduct" towards the paupers.

Woodard v. *Dowsing*, 2 M. & Ry. 74.

A placard stating of a certain overseer that when out of office he advocated low rates, when in office he advocated high rates, and that the defendant would not trust him with £5 of his property, is a libel.

Cheese v. *Scales*, 10 M. & W. 488.

It is libellous to accuse a vestry clerk with having in any way misapplied the money of the parish.

May v. *Brown*, 3 B. & C. 113.

It is libellous to charge a guardian of the poor with having been during the preceding year "a great defaulter" in his account.

Warman v. *Hine*, 1 Jur. 820.

It is libellous to charge the clerk to the justices of a borough with corruption.

Blagg v. *Sturt*, 10 Q. B. 899; 16 L. J. Q. B. 39; 11 Jur. 101.

It is libellous to impute habitual drunkenness and neglect of his duties to a certificated master mariner.

Coxhead v. *Richards*, 2 C. B. 569; 15 L. J. C. P. 278; 10 Jur. 984.

Harwood v. *Green*, 2 C. & P. 141.

Irwin v. *Brandwood*, 2 H. & C. 960; 33 L. J. Ex. 257; 9 L. T. 772; 10 Jur. N. S. 370; 12 W. R. 438.

Medical Men.

To advertise falsely that certain quack medicines were prepared by a physician of eminence is a libel upon such physician.

Clark v. *Freeman*, 11 Beav. 112; 17 L. J. Ch. 142; 12 Jur. 149.

But it is no libel to write and publish of a physician that he has met homœopathists in consultation; although it be averred in the declaration that to do so would be a breach of professional etiquette.

Clay v. *Roberts*, 9 Jur. (N. S.) 580; 11 W. R. 649; 8 L. T. 397.

Barristers.

To write and publish falsely of a barrister that he edited the third edition of a law-book is actionable, if the book is proved to be full of inaccuracies which would seriously prejudice the plaintiff's reputation.

Archbold v. *Sweet*, 1 Moo. & Rob. 162; 5 C. & P. 219.

To write and publish of a barrister that he is "a quack lawyer and a mountebank" and "an impostor" is actionable.

Wakley v. *Healey*, 7 C. B. 591; 18 L. J. C. P. 241.

Solicitors and Attorneys.

It is libellous to compare the conduct of an attorney in a particular case to that of the celebrated firm of Quirk, Gammon & Snap in "Ten Thousand a Year."

Woodgate v. *Ridout*, 4 F. & F. 202.

A correct report in the *Observer* of certain legal proceedings was headed "Shameful conduct of an attorney." *Held* that the heading was a libel, even though all that followed was protected.

Clement v. *Lewis*, 3 Br. & Bing. 297; 3 B. & Ald. 702; 7 Moore, 200.

The libel complained of was headed—"How Lawyer B. treats his clients," followed by a report of a particular case in which one client of Lawyer B.'s had been badly treated. That particular case was proved to be correctly reported, but this was held insufficient to justify the heading which implied that Lawyer B. *generally* treated his clients badly.

Bishop v. *Latimer*, 4 L. T. 775.

Libel complained of, that the plaintiff, a proctor, had three times been suspended from practice for extortion. Proof that he had once been so suspended was held insufficient.

Clarkson v. *Lawson*, 6 Bing. 266, 587; 3 M. & P. 605; 4 M. & P. 356.

Blake v. *Stevens and others*, 4 F. & F. 232; 11 L. T. 543.

It is libellous to impute to a solicitor "disgraceful conduct" in having at an election disclosed confidential communications made to him professionally.

Moore v. *Terrell and others*, 4 B. & Ad. 870; 1 N. & M. 559.

Journalists.

It is libellous to impute to the editor and proprietor of a newspaper that in advocating the sacred cause of the dissemination of Christianity among the Chinese, he was an impostor, anxious only to put money into his own pocket by extending the circulation of his paper; and that he had published a fictitious subscription list with a view to induce people to contribute.

Campbell v. *Spottiswoode*, 3 B. & S. 769; 32 L. J. Q. B. 185; 9 Jur. N. S. 1069; 11 W. R. 569; 8 L. T. 201.

It is libellous to call the editor of a newspaper "a libellous journalist."

Wakley v. *Cooke & Healey*, 4 Exch. 511; 19 L. J. Ex. 91.

It is libellous to write and publish that a newspaper has a separate page devoted to the advertisements of usurers and quack doctors, and that the editor takes respectable advertisements at a cheaper rate if the advertisers will consent to their appearing in that page.

Russell and another v. *Webster*, 23 W. R. 59.

It is not libellous for one newspaper to call another "the most vulgar, ignorant and scurrilous journal ever published in Great Britain;" but it is libellous to add "it is the lowest now in circulation; and we submit the fact to the consideration of advertisers;" for that affects the sale of the paper and the profits to be made by advertising.—(Lord Kenyon, C.J.)

Heriot v. *Stuart*, 1 Esp. 437.

Any written words are libellous which impeach the credit of any merchant or trader by imputing to him bankruptcy, insolvency, or even embarrassment either past, present, or future, or which impute to him fraud or dishonesty or any mean and dishonourable trickery in the conduct of his business, or which in any other

method are prejudicial to him in the way of his employment or trade.

"The law has always been very tender of the reputation of tradesmen, and therefore words spoken of them in the way of their trade will bear an action that will not be actionable in the case of another person, and if bare words are so, it will be stronger in the case of a libel in a public newspaper which is so diffusive." *Per curiam* in *Harman* v. *Delany*, 2 Str. 898; 1 Barnard. 289; Fitz. 121.

Competition between rival traders is allowed to any extent, so long as only lawful means are resorted to. *Pudsey Coal Gas Co.* v. *Corporation of Bradford*, L. R. 15 Eq. 167; 42 L. J. Ch. 293; 21 W. R. 286; 28 L. T. 11. But force and violence must not be used (*Young* v. *Hickens*, 6 Q. B. 606), nor threats (*Tarleton and others* v. *McGawley*, Peake, 270), nor imputations of fraud or dishonesty.

Illustrations.

The printers of a newspaper, by a mistake in setting up in type the announcements from the *London Gazette*, placed the name of the plaintiff's firm under the heading "First Meetings under the Bankruptcy Act" instead of under "Dissolutions of Partnership." An ample apology was inserted in the next issue: no damage was proved to have followed to the plaintiff: and there was no suggestion of any malice. In an action for libel against the proprietors of the paper, the jury awarded the plaintiff £50 damages. *Held* that the publication was libellous, and that the damages awarded were not excessive.

Shepheard v. *Whitaker*, L. R. 10 C. P. 502; 32 L. T. 402.

[N.B.—The chief clerk thought £10 sufficient in a very similar case, *Stubbs* v. *Marsh*, 15 L. T. 312.]

It is libellous to advertise that a certain optician is "a licensed hawker" and "a quack in spectacle secrets."

Keyzor and another v. *Newcomb*, 1 F. & F. 559.

It is a libel to write and publish of a licensed victualler that his licence has been refused; as it suggests that he had committed some breach of the licensing laws.

Bignell v. *Buzzard*, 3 H. & N. 217; 27 L. J. Ex. 355.

It is libellous to write and publish of the defendant that he regularly supplies bad and unwholesome water to ships, whereby the passengers are made ill.

Solomon v. *Lawson*, 8 Q. B. 823; 15 L. J. Q. B. 253; 10 Jur. 796.

But for one tradesman merely to puff up his own goods, and decry those of his rival, is no libel; unless fraud or dishonesty be imputed.

Evans v. *Harlow*, 5 Q. B. 624; 13 L. J. Q. B. 120; 8 Jur. 571; D. & M. 507.

Heriot v. *Stuart*, 1 Esp. 437, *ante*, p. 30.

Partners may sue jointly for a libel defamatory of the partnership.

Le Fanu v. *Malcolmson*, 1 H. L. C. 637; 8 Ir. L. R. 418.

Haythorn v. *Lawson*, 3 C. & P. 196.

Ward v. *Smith*, 6 Bing. 749; 4 C. & P. 302; 4 M. & P. 595.

So a company or corporation can sue even one of their own members for a libel relating to their management of their business.

Williams v. *Beaumont*, 10 Bing. 260; 3 Moore & Sc. 705.

Eastwood v. *Holmes*, 1 F. & F. 347.

Metropolitan Omnibus Co. v. *Hawkins*, 4 H. & N. 87; 28 L. J. Ex. 201; 5 Jur. N. S. 226; 7 W. R. 265; 32 L. T. (Old S.) 281.

A married woman trading under her own name according to the custom of London may sue as a trader, without joining her husband, for a libel on her in the way of her trade.

Per Brett, J., in *Summers* v. *City Bank*, L. R. 9 C. P. 583; 43 L. J. C. P. 261.

Sometimes also an attack upon a thing may be defamatory of the owner of that thing, or of others immediately connected with it. But this is only so where an attack upon the thing is also an indirect attack upon the individual. If the words do not touch the personal character or professional conduct of the individual, they are not defamatory *of him*, and no action lies (unless the words fall within the rules relating to *Slander of Title*; see *post*, c. V.) But to impute that the goods which the defendant sells or manufactures are adulterated to his knowledge, is a distinct charge against the defendant of fraud and dishonesty in his trade.

A declaration alleged that the plaintiffs were manufacturers of bags, and had manufactured a bag which they called the "Bag of Bags," and the defendant printed and published, concerning the plaintiffs in their business, the words following:—"As we have not seen the Bag of Bags, we cannot say that it is useful, or that it is portable, or that it is elegant. All these it may be, but the only point we can deal with is the title, which we think very silly, very slangy, and very vulgar; and which has been forced upon the notice

of the public *ad nauseam.*" On demurrer, Lush, J., held that the words could not be deemed libellous, either upon the plaintiffs or upon their mode of conducting their business. But Mellor and Hannen, JJ., thought that it was a question for the jury whether the words went beyond the limits of fair criticism, and whether or not they were intended to disparage the plaintiffs in the conduct of their business.

Jenner and another v. *A'Beckett*, L. R. 7 Q. B. 11; 41 L. J. Q. B. 14; 20 W. R. 181; 25 L. T. 464.

The defendant published an advertisement in these words:—"Whereas there was an account in the *Craftsman* of John Harman, gunsmith, making guns of two feet six inches to exceed any made by others of a foot longer (with whom it is supposed he is in fee), this is to advise all gentlemen to be cautious, the said gunsmith *not daring to engage with any artist in town*, nor ever did make such an experiment (except out of a leather gun), as any gentleman may be satisfied of at the Cross Guns in Longacre." *Held* a libel on the plaintiff in the way of his trade. Verdict for the Plaintiff. Damages £50.

Harman v. *Delany*, 2 Stra. 898; 1 Barnard. 289, 438; Fitz. 121.

A declaration alleged that the plaintiff carried on the trade of an engineer, and sold in the way of his trade goods called "self-acting tallow syphons or lubricators," and that the defendant published of the plaintiff in his said trade and as such inventor as follows:—"This is to caution parties employing steam power from a person, offering what he calls self-acting tallow syphons or lubricators, stating that he is the sole inventor, manufacturer and patentee, thereby monopolizing high prices at the expense of the public. R. Harlow (the defendant) takes this opportunity of saying that such a patent does not exist, and that he has to offer an improved lubricator, which dispenses with the necessity of using more than one to a steam engine, thereby constituting a saving of 50 per cent. over every other kind yet offered to the public. Those who have already adopted the lubricators against which R. H. would caution, will find that the tallow is wasted instead of being effectually employed as professed." *Held* no libel on the plaintiff, either generally, or in the way of his trade, but only a libel on the lubricators, and therefore not actionable without proof of special damage.

Evans v. *Harlow*, 5 Q. B. 624; 13 L. J. Q. B. 120; 8 Jur. 571; D. & M. 507.

So where one tradesman merely asserts that his own goods are superior to those of some other tradesman, no action lies unless the words be published falsely and maliciously and special damage has ensued.

Young and others v. *Macrae*, 3 B. & S. 264; 32 L. J. Q. B. 6; 11 W. R. 63; 9 Jur. N. S. 539; 7 L. T. 354.

Western Counties Manure Co. v. *Lawes Chemical Manure Co.*, L. R. 9 Ex. 218; 43 L. J. Ex. 171; 23 W. R. 5.

A libel on the management of a newspaper is a libel on its proprietors, jointly, in the way of their trade, and therefore actionable without special damage.

Russell and another v. *Webster*, 23 W. R. 59.

To write and publish that a ship is unseaworthy may be a libel on its captain. "It is like saying of an innkeeper that his wine or his tea is poisoned."

Ingram v. *Lawson*, 6 Bing. N. C. 212; 8 Sc. 471, 478; 4 Jur. 151; 9 C. & P. 326.

To advertise falsely that certain quack medicines were prepared by an eminent physician, is a libel upon such physician.

Clark v. *Freeman*, 11 Beav. 112; 17 L. J. Ch. 142; 12 Jur. 149.

It is libellous falsely to impute to a bookseller that he publishes immoral or absurd poems.

Tabart v. *Tipper*, 1 Camp. 350.

It is libellous falsely to write and publish of professional vocalists that they had advertised themselves to sing at certain music-halls songs which they had no right to sing in public.

Hart and another v. *Wall*, 2 C. P. D. 146; 46 L. J. C. P. 227; 25 W. R. 373.

But comments, however severe, on the advertisements or handbills of a tradesman, will not be libellous, if the jury find that they are fair and temperate comments not wholly undeserved on a matter to which public attention was expressly invited by the plaintiff.

Paris v. *Levy*, 9 C. B. N. S. 342; 30 L. J. C. P. 11; 9 W. R. 71; 3 L. T. 324; 2 F. & F. 71.

Morrison and another v. *Harmer and another*, 3 Bing. N. C. 759; 4 Scott, 524; 3 Hodges, 108.

Fair and bonâ fide Comment.

Every one has a right to comment on matters of public interest and general concern, provided he does so fairly and with an honest purpose. Such comments are not libellous, however severe in their terms, unless they are written intemperately and maliciously. Every citizen has full freedom of speech on such subjects, but he must not abuse it.

This branch of the law is of but recent growth. Cockburn, C. J., says in *Wason* v. *Walter*, L. R. 4 Q. B. 93, 94:—

"Our law of libel has, in many respects, only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognised. Comments on government, on ministers and officers

of state, on members of both Houses of Parliament, on judges and other public functionaries, are now made every day, which half a century ago would have been the subject of actions or ex officio informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that, though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties?"

The right to comment upon the public acts of public men is the right of every citizen, and is not the peculiar privilege of the press. (*Kane* v. *Mulvany*, Ir. R. 2 C. L. 402.) But newspaper writers, though in strict law they stand in no better position than any other person, are generally allowed greater latitude by juries. For it is in some measure the duty of the press to watch narrowly the conduct of all government officials, and the working of all public institutions, to comment freely on all matters of general concern to the nation, and to fearlessly expose abuses.

It has often been said in *nisi prius* cases, that fair and honest criticism in matters of public concern is "*privileged*." But this does not mean that such words are "privileged by reason of the occasion" in the strict legal sense of that term. The defence really is, that the words are not defamatory; that criticism is no libel. This is very clearly pointed out by Blackburn, J., in *Campbell* v. *Spottiswoode*, 3 B. & S. 769; 32 L. J. Q. B. 185; 9 Jur. N. S. 1069; 11 W. R. 569; 8 L. T. 201.

If such criticism was privileged in the strict sense of the word, it would in every case be necessary for the plaintiff to prove actual malice, however false and however injurious the strictures may have been; while the defendant would only have to prove that he honestly believed the charges himself in order to escape all liability; and this clearly is not the law. Comment and criticism on matters of public interest stand on a different

footing from reports of judicial or Parliamentary proceedings. Such reports are privileged, so long as they are fair and accurate *reports* and nothing more. But so soon as there is any attempt at comment, the privilege is lost. In short, report and comment are two distinct and separate things. Fair reports are privileged, while fair comments on matters of public interest are no libels at all.

Illustrations.

Condemnation of the foreign policy of the Government, however sweeping, is no libel.

Animadversions, however severe, on the use made by the vestry of the money of the ratepayers, is not libellous, unless corruption or embezzlement be imputed to individual vestrymen.

Criticism, however trenchant, on any new poem or novel, or on any picture exhibited in a public gallery, is no libel.

But to maliciously pry into the private life of any poet, novelist, artist, or statesman, is indefensible.

Criticism.

Every one of the public is entitled to pass an opinion on everything which in any way invites public attention. Those of the public whose opinion on such matters is best worth having are called critics. From their education, ability, or experience, they can judge with precision (which is the true meaning of the word to *criticize*), and their opinion, therefore, is entitled to respect. Their criticism may be commendatory, but it is, perhaps, more generally unfavourable. Still, so long as it continues to be criticism at all, it is not defamatory. Where defamation commences, true criticism ends.

True criticism differs from defamation in the following particulars:—

1. Criticism deals only with such things as invite public attention, or call for public comment.

2. Criticism never attacks the individual, but only his *work*. Such work may be either the policy of a government, the action of a member of Parliament, a public

entertainment, a book published, or a picture exhibited. In every case the attack is on a man's *acts*, or on some *thing*, and not upon the man himself. A true critic never indulges in personalities.

3. True criticism never imputes or insinuates dishonourable motives (unless justice absolutely requires it, and then only on the clearest proofs).

4. The critic never takes advantage of the occasion to gratify private malice, or to attain any other object beyond the fair discussion of matters of public interest, and the judicious guidance of the public taste.

Every one has a right to publish such fair and candid criticism, even "although the author may suffer loss from it. Such a loss the law does not consider as 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." * * * "Reflection upon personal character is another thing. Show me an attack upon the moral character of the plaintiff, or any attack upon his character unconnected with his authorship, and I should 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." (*Per* Lord Ellenborough in the celebrated case of *Sir John Carr* v. *Hood*, 1 Camp. 355, *n.*) So in *Tabart* v. *Tipper*, 1 Camp. 351, the same learned Judge says: "Liberty of criticism must be allowed, or we should neither have purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication, therefore, I shall never consider as a libel, which has for its object, not to injure the reputation of any individual, but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality." "God forbid,"

exclaims Alderson, B. in *Gathercole* v. *Miall*, 15 M. & W. 340, "God forbid that you should not be allowed to comment on the acts of all mankind, provided you do it justly and truly." "A critic must confine himself to criticism, and not make it the veil for personal censure, nor allow himself to run into reckless and unfair attacks merely from the love of exercising his power of denunciation." (*Per* Huddleston, B., in *Whistler* v. *Ruskin*; *Times* for Nov. 27th, 1878.)

But all comments must be fair and honest. Matters of public interest must be discussed temperately. Wicked and corrupt motives should never be wantonly assigned. And it will be no defence that the writer, at the time he wrote, honestly believed in the truth of the charges he was making, if such charges be made recklessly, unreasonably, and without any foundation in fact. (*Campbell* v. *Spottiswoode*, 3 F. & F. 421; 3 B. & S. 769; 32 L. J. Q. B. 185; 11 W. R. 569; 9 Jur. N. S. 1069; 8 L. T. 201.) Some people are very credulous, especially in politics; and can readily believe any evil of their opponents. There must therefore be some foundation in fact for the charges made; the writer must bring to his task some degree of moderation and judgment.

Slight unintentional errors, on the other hand, will be excused. If a writer in the course of temperate and legitimate criticism falls into error as to some detail, or draws an incorrect reference from the facts before him, and thus goes beyond the limits of strict truth, such inaccuracies will not cause judgment to go against him, if the jury are satisfied, after reading the whole publication, that it was written honestly, fairly, and with regard to what truth and justice require. "It is not to be expected that a public journalist will always be infallible." (*Per* Cockburn, C. J., 2 F. & F. 216.)

But the critic must confine himself to the merits of the work before him. He must not follow the plaintiff into his domestic life, or attack his private character. He must carefully examine the production before him, and then honestly state his true opinion of it.

So long as a writer confines himself to comments on the public conduct of public men, the mere fact that motives have been unjustly assigned for such conduct is not of itself sufficient to destroy this defence, though of course it will tell strongly in favour of the plaintiff. "A line must be drawn," says Cockburn, C.J., in *Campbell* v. *Spottiswoode*, 3 B. & S. 776, 7; 32 L. J. Q. B. 199; 8 L. T. 201, "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 . . . ." "I think the fair position in which the law may be settled is this: That where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations on his motives, which arise fairly and legitimately out of his conduct, so that a jury shall say that the criticism was not only honest but also well founded, an action is not maintainable. 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."

Illustrations.

An article in the *Saturday Review* imputed to the plaintiff, the editor and part proprietor of the *British Ensign*, that in advocating the propagation of

Christianity among the Chinese his purpose was merely to increase the circulation of his own paper, and so put money into his own pocket; that he was an impostor, and that he put forth a list of fictitious subscribers in order to delude others into subscribing. The jury found that the writer honestly believed the imputations contained in the article to be well-founded, but the Court held that the limits of fair criticism had been undoubtedly exceeded.

Campbell v. *Spottiswoode*, 3 F. & F. 421; 32 L. J. Q. B. 185; 3 B. & S. 769; 9 Jur. N. S. 1069; 11 W. R. 569; 8 L. T. 201.

Two sureties were proposed for the Berwick election petition: neither of whom had any connection with the borough. Affidavits were put in to show that one of them was an insufficient surety, being embarrassed in his affairs. The *Times* set out these affidavits and added the remarks, "But why, it may be asked, does this cockney tailor take all this trouble, and subject himself to all this exposure of his difficulties and embarrassments? He has nothing to do with the borough of Berwick-upon-Tweed or its members. How comes it then that he should take so much interest in the job? There can be but one answer to these very natural and reasonable queries: *he is hired for the occasion.* The affair in fact is a foul job throughout, and it is only by such aid that it can possibly be supported." In an action brought on the whole article, the defendant pleaded that the publication was a correct report of certain legal proceedings, "together with a fair and *bonâ fide* commentary thereon." But the jury thought the comment was not fair and gave the plaintiff damages £100.

Cooper v. *Lawson*, 8 A. & E. 746; 1 P. & D. 15; 1 W. W. & H. 601; 2 Jur. 919.

The plaintiff was ex-mayor of Winchester. The *Hampshire Advertiser* imputed to him partiality and corruption and ignorance of his duties as mayor and justice of the peace for the borough. *Held* that though some words which are clearly libellous of a private person may not amount to a libel when spoken of a person holding a public capacity, still any imputation of unjust or corrupt motives is equally libellous in either case.

Parmiter v. *Coupland*, 6 M. & W. 105; 9 L. J. Ex. 202; 4 Jur. 701.

But when an attack is made on the policy of Her Majesty's Government or on the public conduct of any high officer of State, it appears now that wicked or at least selfish, motives *may* be imputed, so long as they are not recklessly and maliciously imputed.

Per Martin, B., in *Harle* v. *Catherall*, 14 L. T. 801.

Per Cockburn, C.J., in *Wason* v. *Walter*, L. R. 4 Q. B. 93; 38 L. J. Q. B. 34; 17 W. R. 169; 19 L. T. 416; 8 B. & S. 730.

And in *Campbell* v. *Spottiswoode*, *ante*, p. 39.

The defendants, the printers and publishers of the *Manchester Courier*, published in their paper a report of the proceedings at a meeting of the board of guardians for the Altrincham Poor-Law Union, at which charges were made against the medical officer of the union workhouse at Knutsford,

of neglecting to attend the pauper patients when sent for. Such charges proved to be utterly unfounded; they were made in the absence of the medical officer, without any notice having been given him. *Held* that the matter was one of public interest; but that the report was not privileged by the occasion, although it was admitted to be a correct account of what passed at the meeting; that it was obviously unfair to the plaintiff that such *ex parte* statements should be published in the local papers; that the editor should therefore have exercised his discretion and excluded the report altogether; and the plaintiff recovered 40*s.* damages and costs.

Purcell v. *Sowler* (C.A.), 2 C. P. D. 215; 46 L. J. C. P. 308; 25 W. R. 362; 36 L. T. 416.

What are matters of public interest?

The public conduct of every public man is a matter of public concern:—

"A clergyman with his flock, an admiral with his fleet, a general with his army, and a judge with his jury, are all subjects of public discussion. Whoever fills a public position renders himself open thereto. He must accept an attack as a necessary, though unpleasant, appendage to his office." (*Per* Bramwell, B., in *Kelly* v. *Sherlock*, L. R. 1 Q. B. 689; 35 L. J. Q. B. 209; 12 Jur. N. S. 937.)

All political, legal, and ecclesiastical matters therefore are matters of public concern. So is the conduct of every vestry, town council, board of guardians, &c. For, although these may be matters of *local* interest principally, still this rule applies, so long as they are not *private* matters. Anything that is a public concern to the inhabitants of Birmingham or Manchester is a matter of public interest within the meaning of the rule. See the remarks of Cockburn, C.J., in *Cox* v. *Feeney*, 4 F. & F. 13. And again in *Purcell* v. *Sowler*, 2 C. P. D. 218, the same learned judge says: "But it seems to me that whatever is matter of public concern when administered in one of the government departments, is matter of public concern when administered by the subordinate authorities of a particular district. It is one of the

characteristic features of the government of this country that, instead of being centralized, many important branches of it are committed to the conduct of local authorities. Thus the business of counties, and that of cities and boroughs, is, to a great extent, conducted by local and municipal government. It is not, therefore, because the matter under consideration is one which in its immediate consequences affects only a particular neighbourhood that it is not a matter of public concern. The management of the poor and the administration of the poor-law in each local district are matters of public interest. In this management the medical attendance on the poor is matter of infinite moment, and consequently the conduct of a medical officer of the district may be of the greatest importance in that particular district, and so may concern the public in general."

Matters of public interest may be conveniently grouped under the following heads :—

1. Affairs of state;
2. The administration of justice;
3. Public institutions and local authorities;
4. Ecclesiastical matters;
5. Books, pictures, and architecture;
6. Theatres, concerts, and other public entertainments;
7. Other appeals to the public.

1. *Affairs of State.*

The conduct of all public servants, the policy of the Government, our relations with foreign countries, all suggestions of reforms in the existing laws, all bills before Parliament, the adjustment and collection of taxes, and all other matters which touch the public welfare, are clearly matters of public interest, which come within the preceding rule. "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." (*Per* Parke, B., in *Parmiter* v. *Coupland*, 6 M. & W. 108.) Those who fill "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." (*Per* Cockburn, C.J., in *Seymour* v. *Butterworth*, 3 F. & F. 376, 7; and see the *dicta* of the judges in *R.* v. *Sir R. Carden*, 5 Q. B. D. 1; 49 L. J. (M. C.) 1; 28 W. R. 133; 41 L. T. 504.)

Illustrations.

The presentation of a petition to Parliament impugning the character of one of Her Majesty's judges, and praying for an inquiry, and for his removal from office should the charge prove true, is a matter of high public concern, on which all newspapers may comment, and in severe terms. So is the debate in the House on the subject of such petition.

Wason v. *Walter*, L. R. 4 Q. B. 73; 38 L. J. Q. B. 34; 17 W. R. 169; 19 L. T. 409; 8 B. & S. 730.

A writer in a newspaper may comment on the fact that corrupt practices extensively prevailed at a parliamentary election; but may not give the names of individuals as guilty of bribery, unless he can prove the truth of the charge to the letter.

Wilson v. *Reed and others*, 2 F. & F. 149.

The presentation of a petition to Parliament against quack doctors is matter for public comment.

Dunne v. *Anderson*, 3 Bing. 88; Ry. & Moo. 287; 10 Moore, 407.

Evidence given before a Royal Commission is matter *publici juris*, and everyone has a perfect right to criticise it.

Per Wickens, V.C., in *Mulkern* v. *Ward*, L. R. 13 Eq. 622; 41 L. J. Ch. 464; 26 L. T. 831.

So is evidence taken before a Parliamentary Committee on a local gas bill.

Hedley v. *Barlow*, 4 F. & F. 224.

A report of the Board of Admiralty upon the plans of a naval architect,

submitted to the Lords of the Admiralty for their consideration, is a matter of national interest.

Henwood v. *Harrison*, L. R. 7 C. P. 606; 41 L. J. C. P. 206; 20 W. R. 1000; 26 L. T. 938.

The appointment of a Roman Catholic to be Calendarer of State Papers is a matter of public concern.

Turnbull v. *Bird*, 2 F. & F. 508.

The plaintiff, who was a Q.C. and a Member of Parliament, was appointed recorder of Newcastle. The defendant's paper, the *Law Magazine and Review*, thereupon discussed the desirability of giving such an appointment to a member of the House of Commons, and declared that it was a reward for his having steadily voted with his party. Cockburn, C. J., directed the jury that a public writer was fairly entitled to comment on the distribution of Government patronage; but that he was not entitled to assert that there had been a corrupt promise or understanding that the plaintiff would be thus rewarded, if he always voted according to order. Verdict for the plaintiff; damages 40*s*.

Seymour v. *Butterworth*, 3 F. & F. 372.

2. *Administration of Justice.*

The administration of the law, the verdicts of juries, the conduct of suitors and their witnesses, are all matters of lawful comment as soon as the trial is over. Any comment pending action is a contempt of court, by whomsoever made; it is especially so where the comment is supplied by one of the litigants or his solicitor or counsel. (*Daw* v. *Eley*, L. R. 7 Eq. 49; 38 L. J. Ch. 113; 17 W. R. 245.)

In former days, where a trial lasted more than one day, newspapers were sometimes forbidden to publish any report of the trial from day to day; they were ordered to reserve their whole report till the case was ended. But it is now clear that daily reports of the progress of the trial are unobjectionable, if fair and impartial. (*Lewis* v. *Levy*, E. B. & E. 537; 27 L. J. Q. B. 282; 4 Jur. N. S. 970.) But report is very different from comment. No observations on the case are permitted during its progress, lest the minds of the jury (and indeed of the judge) should be thereby biassed.

But as soon as the case is over, every one has "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." (*Per* Fitzgerald, J., in *R.* v. *Sullivan*, 11 Cox C. C. 57.) "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." (Cockburn, C.J., in *Woodgate* v. *Ridout*, 4 F. & F. 223.)

Illustrations.

It is not a fair comment on a criminal trial, to suggest that the prisoner, though acquitted, was really guilty.

Lewis v. *Walter*, 4 B. & Ald. 605.

Risk Allah Bey v. *Whitehurst and others*, 18 L. T. 615.

A newspaper may comment upon the hearing of a charge of felony and the evidence produced thereat, and discuss the conduct of the magistrates in dismissing the charge without hearing the whole of the evidence; but it may not proceed to disclose "evidence which might have been adduced" and thus argue from facts not in evidence before the magistrates that the accused was really guilty of the felony. Verdict for the plaintiff. Damages £25.

Hibbins v. *Lee*, 4 F. & F. 243; 11 L. T. 541.

And see *Helsham* v. *Blackwood*, 11 C. B. 111; 20 L. J. C. P. 187; 15 Jur. 861.

R. v. *White and another*, 1 Camp. 359.

It is not a fair comment on any legal proceedings to insinuate that a particular witness committed perjury in the course of them.

Roberts v. *Brown*, 10 Bing. 519 ; 4 Moo. & S. 407.
Stiles v. *Nokes*, S. C. *Carr* v. *Jones*, 7 East, 493 ; 3 Smith, 491.
Littler v. *Thompson*, 2 Beav. 129.
Felkin v. *Herbert*, 33 L. J. Ch. 294 ; 10 Jur. N. S. 62 ; 12 W. R. 241, 332 ; 9 L. T. 635.

A newspaper may comment on the evidence given by any particular witness in any inquiry on a matter of public interest ; but may not go the length of declaring such evidence to be "maliciously or recklessly false." Verdict for the plaintiff. Damages £250.

Hedley v. *Barlow*, 4 F. & F. 224.

The *Morning Post* published an article on a trial which had greatly excited public attention ; giving a highly coloured account of the conduct of the attorneys on one side, concluding with the sweeping condemnation : —"Messrs. Quirk, Gammon, and Snap were fairly equalled, if not outdone," alluding to the notorious firm of pettifoggers in "Ten Thousand a Year." This account of plaintiff's conduct was taken almost verbatim from the speech of counsel on the other side, and no allusion was made to the evidence subsequently produced to rebut his statements. Verdict for the plaintiff. Damages £1000.

Woodgate v. *Ridout*, 4 F. & F. 202.

3. *Public Institutions and Local Authorities.*

The working of all public institutions, such as colleges, hospitals, asylums, homes, is a matter of public interest, especially where such institutions appeal to the public for subscriptions, or are supported by the rates, or are, like our five Universities, national property. The management of local affairs by the various local authorities, *e.g.*, town-councils, schoolboards, vestries, boards of guardians, boards of health, &c., is a matter of public, though it may not be of universal, concern.

Illustrations.

"The management of the poor and the administration of the poor-law in each local district are matters of public interest." *Per* Cockburn, C. J., in *Purcell* v. *Sowler*, 2 C. P. D. 218 ; 46 L. J. C. P. 308 ; 25 W. R. 362 ; 36 L. T. 416.

The official conduct of a way-warden may be freely criticized in the local press.

Harle v. *Catherall*, 14 L. T. 801.

The Charity Commissioners sent an inspector to inquire into the working of a medical college at Birmingham. He made a report containing passages defamatory of the plaintiff, one of the professors. The mismanagement of the college continued, and increased. The warden at last filed a bill to administer the funds in Chancery. Thereupon the defendant, the proprietor of a local paper, procured an official copy of the report of the inspector, and published it *verbatim* in his paper. This was nearly three years after the report had been written. The plaintiff contended that this was a wanton revival of stale matter which could not be required for public information ; but Cockburn, C. J., left it to the jury to say whether public interest in the matter had not rather increased than declined in the interval. Verdict for the defendant.

Cox v. *Feeney*, 4 F. & F. 13.

4. *Ecclesiastical Affairs.*

A bishop's government of his diocese, a rector's management of his parish, or of the parochial school, are matters of public interest. So is the manner in which "public worship" is celebrated in the Established Church. But an unobtrusive charitable organization privately established by the rector in the parish is not a fit subject for public comment.

Illustrations.

The press may comment on the fact that the incumbent of a parish has, contrary to the wishes of the churchwarden, allowed books to be sold in the church during service, and cooked a chop in the vestry after the service was over.

Kelly v. *Tinling*, L. R. 1 Q. B. 699 ; 35 L. J. Q. B. 231 ; 14 W. R. 51 ; 13 L. T. 255 ; 12 Jur. N. S. 940.

But where a vicar started a clothing society in his parish, expressly excluding all Dissenters from its benefits, it was held that this was essentially a private society, the members of which might manage it as they pleased, without being called to account by anyone outside : and that therefore a Dissenting organ was not justified in commenting on the limits which the vicar had imposed on the desire of his parishioners to clothe the poor.

Gathercole v. *Miall*, 15 M. & W. 319 ; 15 L. J. Ex. 179 ; 10 Jur. 337.

And see *Walker* v. *Brogden*, 19 C. B. N. S. 65 ; 11 Jur. N. S. 671 ; 13 W. R. 809 ; 12 L. T. 495.

Booth v. *Briscoe*, (C. A.) 2 Q. B. D. 496 ; 25 W. R. 838.

The court in *Gathercole* v. *Miall*, were equally divided on the question whether sermons preached in open church, but not printed and published,

were matter for public comment. If the sermon itself dealt with matters of public interest, I apprehend it might be.

5. *Books, pictures, &c.*

"A man who publishes a book challenges criticism." (*Per* Cockburn, C.J., in *Strauss* v. *Francis*, 4 F. & F. 1114; 15 L. T. 675.) Therefore all fair and honest criticism on any published book is not libellous, unless the critic goes out of his way to attack the private character of the author. So too it is not libellous fairly and honestly to criticise a painting publicly exhibited, or the architecture of any public building, however strong the terms of censure used may be.

Illustrations.

The *Athenæum* published a critique on a novel written by the plaintiff, describing it as "the very worst attempt at a novel that has ever been perpetrated," and commenting severely on "its insanity, self-complacency, and vulgarity, its profanity, its indelicacy (to use no stronger word), its display of bad Latin, bad French, bad German, and bad English," and its abuse of persons living and dead. After Erle, C. J., had summed up the case, the plaintiff withdrew a juror.

Strauss v. *Francis* (No. 1), 4 F. & F. 939.

See *Sir John Carr* v. *Hood*, 1 Camp. 355, n.

The *Athenæum* thereupon published another article stating their reason for consenting to the withdrawal of a juror, which was in fact that they considered the plaintiff would have been unable to have paid them their costs, had they gained a verdict. The plaintiff thereupon brought another action which was tried before Cockburn, C. J., and the jury found a verdict for the defendants.

Strauss v. *Francis* (No. 2), 4 F. & F. 1107; 15 L. T. 674.

It is doubtful how far a book printed for private circulation only, may be criticized. *Per* Pollock, C.B., in

Gathercole v. *Miall*, 15 M. & W. 334; 15 L. J. Ex. 179; 10 Jur. 337.

A comic picture of the author of a book, *as author*, bowing beneath the weight of his volume, is no libel; though a personal caricature of him as he appeared in private life would be.

Sir John Carr v. *Hood*, 1 Camp. 355, n.

The articles which appear in a newspaper and its general tone and style may be the subject of adverse criticism, as well as any other literary

production; but no attack should be made on the private character of any writer on its staff.

Heriot v. *Stuart*, 1 Esp. 437.
Stuart v. *Lovell*, 2 Stark. 93.
Campbell v. *Spottiswoode*, 3 F. & F. 421; 32 L. J. Q. B. 185; 3 B. & S. 769; 9 Jur. N. S. 1069; 11 W. R. 569; 8 L. T. 201.

The greatest art critic of the day wrote and published in *Fors Clavigera* an article on the pictures in the Grosvenor Gallery, in which the following passage occurred: "Lastly, the mannerisms and errors of these pictures (alluding to the pictures of Mr. Burne Jones), whatever may be their extent, are never affected or indolent. The work is natural to the painter, however strange to us, and is wrought with the utmost conscience of care, however far to his own or our desire the result may yet be incomplete. Scarcely as much can be said for any other pictures of the modern school; their eccentricities are almost always in some degree forced, and their imperfections gratuitously, if not impertinently, indulged. For Mr. Whistler's own sake, no less than for the protection of the purchaser, Sir Coutts Lindsay ought not to have admitted works into the gallery in which the ill-educated conceit of the artist so nearly approached the aspect of wilful imposture. I have seen and heard much of cockney impudence before now, but never expected to hear a coxcomb ask 200 guineas for flinging a pot of paint in the public's face." The jury considered the words "wilful imposture" as just overstepping the line of fair criticism, and found a verdict for the plaintiff; damages one farthing. Each party had to pay his own costs.

Whistler v. *Ruskin*. *Times* for Nov. 26th and 27th, 1878.
Thompson v. *Shackell*, Moo. & Mal. 187.

The plaintiff was a professor of architecture in the Royal Academy. The defendant published an account of a new order of architecture called "the Bœotian," said to be invented by the plaintiff, whom he termed "the Bœotian professor." He set forth several absurd principles as the rules of this new order, illustrating them by examples of buildings all of which were the works of the plaintiff. The jury, under the direction of Lord Tenterden, C. J., found a verdict for the defendant.

Soane v. *Knight*, Moo. & Mal. 74.

6. *Theatres, Concerts, and Public Entertainments.*

All theatrical and musical performances, flower-shows, public balls, &c., may be freely criticized, provided that the comments be not malevolent or flagrantly unjust.

Illustrations.

A gentleman wholly unconnected with the stage got up what he called "a Dramatic Ball." The company was disorderly and far from select. No

actor or actress of any reputation was present at the ball, or took any share in the arrangements. The *Era*, the special organ of the theatrical profession, published an indignant article, commenting severely on the conduct of the prosecutor in starting such a ball for his own profit, and particularly in calling such an assembly "a Dramatic Ball." Criminal proceedings were taken against the editor of the *Era*, but the jury found him Not guilty.

R. v. *Ledger, Times* for Jan. 14th, 1880.

And see *Dibdin* v. *Swan and Bostock*, 1 Esp. 28.

A newspaper commenting on a flower-show, denounced one exhibitor by name as "a beggarly soul," "famous in all sorts of dirty work," and spoke of "the tricks by which he and a few like him used to secure prizes" as being now "broken in upon by some judges more honest than usual." Such remarks are clearly *not* fair criticism on the flower-show.

Green v. *Chapman*, 4 Bing. N. C. 92; 5 Scott, 340.

The plaintiff, the proprietor of Zadkiel's Almanac, had a ball of crystal by means of which he pretended to tell what was going on in the other world. The *Daily Telegraph* published a letter which stated that the plaintiff had "gulled" many of the nobility with this crystal ball, that he took money for "these profane acts, and made a good thing of it." Cockburn, C. J., directed the jury that a newspaper might expose what it deemed an imposition on the public; but that this letter amounted to a charge that the plaintiff had made money by wilful and fraudulent misrepresentations, a charge which should not be made without fair grounds. Verdict for the plaintiff. Damages one farthing.

Morrison v. *Belcher*, 3 F. & F. 614.

7. *Other Appeals to the Public.*

Whenever a medical man brings forward some new method of treatment, and advertises it largely as the best or only cure for some particular disease, or for all diseases at once, he may be said to invite public attention. So when a tradesman distributes handbills or circulars, he challenges public criticism. A newspaper writer is justified in warning the public against such advertisers, and in exposing the absurdity of their professions, provided he does so fairly and with reasonable moderation and judgment.

Again, where a man appeals to the public by writing letters to the newspaper, either to expose what he deems abuses, or to call attention to his own particular grievances, he cannot complain if the editor inserts other

letters in answer to his own, refuting his charges, and denying his facts. A man who has commenced a newspaper warfare, cannot complain if he gets the worst of it. But if such answer goes further, and touches on fresh matter in no way connected with the plaintiff's original letter, or unnecessarily assails the plaintiff's private character, then it ceases to be an *answer;* it becomes a counter-charge, and if defamatory will be deemed a libel.

So too, when a man comes prominently forward in any way, and acquires for a time a *quasi*-public position, he cannot escape the necessary consequence, the free expression of public opinion. Whoever seeks notoriety, or invites public attention, is said to challenge public criticism; and he cannot, if that criticism be less favourable than he anticipated, resort to the law courts.

Illustrations.

A medical man who had obtained a diploma and the degree of M.D. from America advertised most extensively a new and infallible cure for consumption. The *Pall Mall Gazette* published a leading article on the subject of such advertisements, in which they called the advertiser a quack and an impostor, and compared him to "scoundrels who pass bad coin." The jury gave the plaintiff one farthing damages.

Hunter v. *Sharpe*, 4 F. & F. 983; 15 L. T. 421.

And see *Morrison and another* v. *Harmer and another*, 3 Bing. N. C. 759; 4 Scott, 524; 3 Hodges, 108.

A marine store dealer extensively circulated a handbill setting forth the high prices he was prepared to give for kitchen stuff, rags, bones, oilcloth, brass, copper, lead, plated metals, horsehair, and old clothes. An alderman sitting as magistrate at Guildhall denounced this handbill as offering great inducements to servants to rob their masters. The alderman's remarks, together with the handbill itself *verbatim*, were published in the *Daily Telegraph*, with a heading "Encouraging Servants to Rob their Masters;" and also a leading article in the same strain. The jury under the direction of Erle, C. J., found a verdict for the defendant.

Paris v. *Levy*, 9 C. B. N. S. 342; 30 L. J. C. P. 11; 3 L. T. 324; 9 W. R. 71; 7 Jur. N. S. 289; and (at Nisi Prius) 2 F. & F. 71.

And see *Eastwood* v. *Holmes*, 1 F. & F. 347.

Jenner and another v. *A'Beckett*, L. R. 7 Q. B. 11; 41 L. J. Q. B. 14; 20 W. R. 181; 25 L. T. 464.

Two clergymen were engaged in a controversy; one, the plaintiff, wrote

a pamphlet; subsequently he published a "collection of opinions of the press" on his own pamphlet, including an inaccurate or garbled extract from an article which had appeared in the defendant's newspaper. The defendant thereupon felt it his duty in justice to the other clergyman to publish an article in his newspaper exposing the inaccuracy of the extract as given by the plaintiff, and accusing him of purposely adding some passages and suppressing others, so as to entirely alter the sense. Erle, C. J., pointed out to the jury that the defendant was maintaining the truth, and that although he was led into exaggerated language, the plaintiff had also used exaggerated language himself. Verdict for the defendant.

Hibbs v. *Wilkinson*, 1 F. & F. 608.

But where the editor of the *Lancet* attacked the editor of a rival paper, *The London Medical and Physical Journal*, by rancorous aspersions on his private character, the plaintiff recovered a verdict, damages £5.

Macleod v. *Wakley*, 3 C. & P. 311.

So wherever a man calls public attention to his own grievances or those of his class, whether by letters in a newspaper, by speeches at public meetings, or by the publication of pamphlets, he must expect to have his assertions challenged, the existence of his grievances denied, and himself ridiculed and denounced.

Odger v. *Mortimer*, 28 L. T. 472.
Kœnig v. *Ritchie*, 3 F. & F. 413.
R. v. *Veley*, 4 F. & F. 1117.
O'Donoghue v. *Hussey*, Ir. R. 5 C. L. 124.
Dwyer v. *Esmonde*, 2 L. R. (Ir.) 243.

But where the defendant in answering a letter which the plaintiff has sent to the paper, does not confine himself to rebutting the plaintiff's assertions, but retorts upon the plaintiff by inquiring into his antecedents, and indulging in other uncalled for personalities, the defendant will be held liable; for such imputations are neither a proper answer to, nor a fair comment on, the plaintiff's speech or letter.

Murphy v. *Halpin*, Ir. R. 8 C. L. 127.

Three clergymen of the Church of England residing near Swansea, being Conservatives, chose to attend a meeting of the supporters of the Liberal candidate for Swansea; they behaved in an excited manner, hissed and interrupted the speakers, and had eventually to be removed from the room by two policemen. *Held* that such conduct might fairly be commented on in the local newspapers; and that even a remark that "appearances were certainly consistent with the belief that they had imbibed rather freely of the cup that inebriates" was not, under the circumstances, a libel.

Davis v. *Duncan*, L. R. 9 C. P. 396; 43 L. J. C. P. 185; 22 W. R. 575; 30 L. T. 464.

PART II.

SLANDER.

WORDS which are clearly defamatory when written and published may not be actionable when merely spoken; for then other considerations apply. The reasons for the distinction have been already discussed, *ante*, pp. 3—5, c. I. Spoken words are defamatory whenever special damage has in fact resulted from their use. Spoken words are also defamatory when the imputation cast by them on the plaintiff is on the face of it so injurious that the Court will presume, without any proof, that his reputation must be impaired thereby. And the Court will so presume in three cases:—

I. Where the words charge the plaintiff with the commission of some indictable offence; or,

II. Impute to him a contagious or infectious disease tending to exclude him from society; or,

III. Are spoken of him in the way of his office, profession, or trade.

In no other case are spoken words defamatory, unless they have caused some special damage to the plaintiff.

I. *Where the words impute an indictable offence.*

Spoken words, which impute that the plaintiff has been guilty of an indictable offence, are actionable without proof of special damage. If the offence imputed be not indictable, but only punishable summarily before a magistrate by penalty or fine, the words will not be actionable *per se.*

If, however, there be any offences which are not indictable, but for which a magistrate can inflict imprisonment with hard labour in the first instance (not merely in default of payment of a fine imposed), I apprehend that to impute such an offence to the plaintiff would be actionable *per se.* Words imputing to a licensed victualler that he had been guilty of an offence against the Licensing Acts would be actionable as spoken of him in the way of his trade: and so would words spoken of a dairyman or grocer falsely alleging that he had been convicted under the Sale of Food and Drugs Act, 1875. Holt, C. J., in *Ogden* v. *Turner*, 6 Mod. 104; Holt, 40; 2 Salk. 696, lays it down that every charge of treason or felony is actionable, but not every charge of misdemeanour, only of such as entail a "scandalous" and "infamous" punishment. But what misdemeanours are included in the terms "scandalous" or "infamous," or, rather, what misdemeanours are *not* included? The epithets appear to me to mean nothing more than that the charge must be of such a nature that, if believed, it would impair the reputation of the person accused. If so, this would include all indictable misdemeanours, except, perhaps, such semi-civil proceedings as an indictment for the obstruction or non-repair of a highway. The word "infamous" clearly cannot now be taken in its strictest legal sense to signify a punishment which renders the person convicted incapable of giving evidence in the law courts. (See the remarks of Grey, C. J., in *Onslow* v. *Horne*, 3 Wils. 186; 2 W. Bl. 753.) In *Lady Cockaine's case*, Cro. Eliz. 49, the argument of the judge seems to imply that words are actionable which impute to the plaintiff an act which would be cause to bind her over to good behaviour: but I can find no other authority for such a doctrine.

Illustrations.

A general charge of felony is actionable, though it does not specify any particular felony. *E.g.:*

"If you had had your deserts, you would have been hanged before now."
Donne's Case, Cro. Eliz. 62.

"He deserves to have his ears nailed to the pillory."
Jenkinson v. *Mayne*, Cro. Eliz. 384; 1 Vin. Abr. 415.

"You have committed an act for which I can transport you."
Curtis v. *Curtis*, 10 Bing. 477; 3 M & Scott, 819; 4 M. & Scott, 337.

"You have done many things for which you ought to be hanged, and I will have you hanged."
Francis v. *Roose*, 3 M. & W. 191; 1 H. & H. 36.

So are all charges of specific felonies. *E.g.:*

Assault with intent to rob:—
Lewknor v. *Cruchley and wife*, Cro. Car. 140.

Attempt to murder:—
Scot et ux. v. *Hilliar*, Lane, 98; 1 Vin. Abr. 440.
Preston v. *Pinder*, Cro. Eliz. 308.

Attempt to rob:—
Sir Harbert Croft v. *Brown*, 3 Buls. 167.

Bigamy:—
Heming et ux. v. *Power*, 10 M. & W. 564.
Delany v. *Jones*, 4 Esp. 190.

Burglary:—
Somers v. *House*, Holt, 39.

Demanding money with menaces:—
Neve v. *Cross*, Sty. 350.

Embezzlement:—
Williams v. *Stott*, 1 C. & M. 675; 3 Tyrw. 688.

Forgery:—
Baal v. *Baggerley*, Cro. Car. 326.
Jones v. *Herne*, 2 Wils. 87.

Larceny:—
Foster v. *Browning*, Cro. Jac. 688.
Baker v. *Pierce*, 2 Ld. Raym. 959; Holt, 654; 6 Mod. 23; 2 Salk. 695.
Slowman v. *Dutton*, 10 Bing. 402.
Tomlinson v. *Brittlebank*, 4 B. & Ad. 630; 1 N. & M. 455.

Manslaughter:—
Ford v. *Primrose*, 5 D. & R. 287.
Edsall v. *Russell*, 4 M. & G. 1090; 5 Scott, N. R. 801; 2 D. N. S. 641; 12 L. J. C. P. 4; 6 Jur. 996.

Murder:—
Peake v. *Oldham*, Cowp. 275; S. C. *Sub nom. Oldham* v. *Peake*, 2 W. Bl. 959.
Button v. Hayward, 8 Mod. 24.

Receiving stolen goods, knowing them to have been stolen :—

Brigg's Case, God. 157.

Clarke's Case de Dorchester, 2 Rolle's Rep. 136.

Alfred v. *Farlow*, 8 Q. B. 854; 15 L. J. Q. B. 258; 10 Jur. 714.

Robbery :—

Lawrence v. *Woodward*, Cro. Car. 277; 1 Roll. Abr. 74.

Rowcliffe v. *Edmonds et ux.*, 7 M. & W. 12; 4 Jur. 684.

Treason :—

Sir William Waldegrave v. *Ralph Agas*, Cro. Eliz. 191.

Stapleton v. *Frier*, Cro. Eliz. 251.

Fry v. *Carne*, 8 Mod. 283.

Unnatural offences :—

Woolnoth v. *Meadows*, 5 East, 463; 2 Smith, 28.

Colman v. *Godwin*, 3 Dougl. 90; 2 B. & C. 285 (n).

So it is actionable without proof of special damage to charge another with the commission of the following misdemeanours :—

Bribery and corruption :—

Bendish v. *Lindsay*, 11 Mod. 194.

Conspiracy :—

Tibbott v. *Haynes*, Cro. Eliz. 191.

Keeping a bawdy-house :—

Anonymous, Cro. Eliz. 643.

Brayne v. *Cooper*, 5 M. & W. 249.

Huckle v. *Reynolds*, 7 C. B. N. S. 114.

Libel :—

Sir William Russell v. *Ligon*, 1 Roll. Abr. 46; 1 Vin. Abr. 423.

Perjury :—

Ceeley v. *Hoskins*, Cro. Car. 509.

Holt v. *Scholefield*, 6 T. R. 691.

Roberts v. *Camden*, 9 East, 93.

Even in an ecclesiastical Court,

Shaw v. *Thompson*, Cro. Eliz. 609.

Soliciting another to commit a crime :—

Sir Thomas Cockaine and wife v. *Witnam*, Cro. Eliz. 49.

Leversage v. *Smith*, Cro. Eliz. 710.

Tibbott v. *Haynes*, Cro. Eliz. 191.

Passie v. *Mondford*, Cro. Eliz. 747.

But see *Eaton* v. *Allen*, 4 Rep. 16; Cro. Eliz. 684.

Subornation of perjury :—

Guerdon v. *Winterstud*, Cro. Eliz. 308.

Harris v. *Dixon*, Cro. Jac. 158.

Bridges v. *Playdel*, Brownl. & Golds. 2.

Harrison v. *Thornborough*, 10 Mod. 196; Gilbert's Cases in Law & Eq. 114.

Where the words impute merely a trespass in pursuit of game, punishable primarily by fine alone, no action lies without proof of special damage,

although imprisonment in the pillory may be inflicted in default of payment of the fine (3 Wm. & M. c. 10).

Ogden v. *Turner* (1705), 6 Mod. 104 ; Salk. 696 ; Holt, 40.

[Certain *dicta* in this case which appear to go further, were disapproved of by Grey, C. J., in 3 Wils. 186, and must be now considered as bad law.]

Where the words imputed an offence against the Fishery Acts, punishable only by fine and forfeiture of the nets and instruments used : *Held* that no action lay without proof of special damage.

McCabe v. *Foot*, 18 Ir. Jur. (Vol. xi. N. S.) 287 ; 15 L. T. 115.

To state that criminal proceedings are about to be taken against the plaintiff (*e.g.*, that the Attorney-General had directed a certain attorney to prosecute him for perjury) is actionable, although the speaker does not expressly assert that the plaintiff is guilty of the charge.

Roberts v. *Camden*, 9 East, 93.

Tempest v. *Chambers*, 1 Stark. 67.

Contrà, *Harrison* v. *King*, 4 Price, 46; 7 Taunt. 431 ; 1 B. & Ald. 161.

Words which merely impute a criminal intention, not yet put into action, are not actionable. Guilty thoughts are not a crime. But as soon as any step is taken to carry out such intention, as soon as any overt act is done, an *attempt* to commit a crime has been made : and every attempt to commit an indictable offence is at common law a misdemeanour, and in itself indictable. To impute such an attempt is therefore clearly actionable.

Harrison v. *Stratton*, 4 Esp. 217.

Words which merely disclose a suspicion that is in the speaker's mind, and which the bystanders could not understand as conveying any definite charge of felony, are not actionable.

Tozer v. *Mashford*, 6 Ex. 539 ; 20 L. J. Ex. 225.

It is not necessary that the words should accuse the plaintiff of some fresh, undiscovered crime, so as to put him in jeopardy or cause his arrest. Of course, if such consequences have followed, they may be alleged as special damage; but where such consequences are impossible, the words are still actionable. Thus, to call a man a returned convict, or otherwise to falsely impute that he has been tried and convicted of a criminal offence, is actionable without special damage.

For it is at least quite as injurious to the plaintiff's reputation, to say that he has in fact been convicted, as to say that he will be, or ought to be, convicted. Many think that such state-

ments should be actionable, even when *true*, if they are maliciously or unnecessarily volunteered. See *post*, p. 179, c. VII.

Illustrations.

It is actionable without proof of special damage to say of the plaintiff—

that he had been in Launceston gaol and was burnt in the hand for coining,

Gainford v. *Tuke*, Cro. Jac. 536;

that he "was in Winchester gaol, and tried for his life, and would have been hanged, had it not been for Leggatt, for breaking open the granary of farmer A. and stealing his bacon." [Note that here the speaker appears to admit that the plaintiff was acquitted, but still asserts that he was in fact guilty.]

Carpenter v. *Tarrant*, Cas. temp. Hardwicke, 339.

"He was a thief and stole my gold." It was argued here that "was" denotes time past; so that it may have been when he was a child, and therefore no larceny; or in the time of Queen Elizabeth, since when there had been divers general pardons: *Sed per cur.*: "it is a great scandal to be once a thief; for *pœna potest redimi, culpa perennis erit.*"

Boston v. *Tatam*, Cro. Jac. 623.

It is actionable to call a man "thief" or "felon," even though he once committed larceny, if after conviction he was pardoned either under the Great Seal or by some general statute of pardon.

Cuddington v. *Wilkins*, Hobart, 67, 81; 2 Hawk. P. C. c. 37, s. 48.

Leyman v. *Latimer and others*, 3 Ex. D. 15, 352; 46 L. J. Ex. 765; 47 L. J. Ex. 470; 25 W. R. 751; 26 W. R. 305; 37 L. T. 360, 819.

It is actionable to call a man falsely "a returned convict."

Fowler v. *Dowdney*, 2 M. & Rob. 119.

In dealing with old cases on this point, care must be taken to remember the state of the criminal law as it existed at the date of publication.

Illustrations.

So long as the 18 Eliz. c. 3 was in force, it was actionable to charge a woman with being the mother, a man with being the putative father, of a bastard child, chargeable to the parish.

Anne Davis's Case, 4 Rep. 17; 2 Salk. 694; 1 Roll. Abr. 38.

Salter v. *Browne*, Cro. Car. 436; 1 Roll. Abr. 37.

So long as the penal statutes against Roman Catholics were in force it was actionable to say "He goes to mass," or "He harboured his son, knowing him to be a Romish priest."

Walden v. *Mitchell*, 2 Ventr. 265.

Smith v. *Flynt*, Cro. Jac. 300.

Secus, before such statutes were passed.

Pierepoint's Case, Cro. Eliz. 308.

So in many old cases such words as "She is a witch" were held actionable, the statute, 1 Jac. I. c. 11, being then in force. But that statute is now repealed by the 9 Geo. II. c. 5, s. 3, which also expressly provides that no action shall lie for charging another with witchcraft, sorcery, or any such offence.

Rogers v. *Gravat*, Cro. Eliz. 571.

Dacy v. *Clinch*, Sid. 53.

It was formerly the custom of the City of London, of the borough of Southwark, and also, it is said, of the city of Bristol, to cart whores. Hence to call a woman "whore" or "strumpet" in one of those cities is actionable, if the action be brought in the City Courts, which take notice of their own customs without proof. But no action will lie in the Superior Courts at Westminster for such words, because such custom has never been certified by the Recorder, and would now be difficult to prove.

Oxford et ux. v. *Cross* (1599), 4 Rep. 18.

Hassell v. *Capcot* (1639), 1 Vin. Abr. 395; 1 Roll. Abr. 36.

Cooke v. *Wingfield*, 1 Str. 555.

Roberts v. *Herbert*, Sid. 97; 1 Keble, 418.

Stainton et ux. v. *Jones*, 2 Selw. N. P. 1205 (13th edn.); 1 Dougl. 380, n.

Theyer v. *Eastwick*, 4 Burr. 2032.

Brand and wife v. *Roberts and wife*, 4 Burr. 2418.

Vicars v. *Worth*, 1 Str. 471.

So it was in 1602 held not actionable to say:—"Thou hast received stolen swine, and thou knowest they were stolen;" for receiving is not a common law offence, unless it amounts to comforting and assisting the felon as an accessory after the fact. But ever since 3 Wm. & Mary, c. 9, s. 4, and 4 Geo. I. c. 11, such words would be clearly actionable.

Dawes v. *Bolton* or *Boughton*, Cro. Eliz. 888; 1 Roll. Abr. 68.

Cox v. *Humphrey*, Cro. Eliz. 889.

A charge of deer stealing would be actionable now, though in 1705 it was held not actionable, because it was subject only to a penalty of £30.

Ogden v. *Turner*, Salk. 696; Holt, 40; 6 Mod. 104.

So now it would of course be actionable to accuse a man of secreting a will: though such an accusation was held not actionable in

Godfrey v. *Owen*, Palm. 21; 3 Salk. 327.

Where a vicar of a parish falsely declared that the plaintiff, a parishioner, was excommunicated, it was held an action lay; possibly because the person excommunicated was at that date liable to imprisonment under the writ *de excommunicato capiendo;* but there seems to have been some allegation of special damage in the declaration.

Barnabas v. *Traunter*, 1 Vin. Abr. 396.

But an accusation of adultery, fornication, &c., was never ground for an action in the civil courts. The person accused had a remedy in the spiritual courts till the 18 & 19 Vict. c. 41; now he has none.

The charge must be clearly that of an indictable offence, although it need not be stated with all the precision of an indictment. If merely fraud, dishonesty, immorality, or vice, be imputed, no action lies without proof of special damage. And even where words of specific import are employed (such as "thief" or "traitor"), still, if the defendant can satisfy the jury that they were not intended to impute any specific crime, but merely as general terms of abuse, and meant no more than "rogue" or "scoundrel," and were so understood by all who heard the conversation, no action lies. But if the bystanders reasonably understand the words as definitely charging the plaintiff with the commission of some specific crime, an action lies.

Illustrations.

"You forged my name:" these words are actionable, although it is not stated to what deed or instrument.

Jones v. *Herne*, 2 Wils. 87.

Overruling *Anon.* 3 Leon. 231; 1 Roll. Abr. 65.

To say that a man is "forsworn" or "has taken a false oath" is not a sufficiently definite charge of perjury; for there is no reference to any judicial proceeding. But to say "Thou art forsworn in a Court of record" is a sufficient charge of perjury; for this will be taken to mean that he was forsworn while giving evidence in a Court of record before the lawfully appointed judge thereof on some point material to the issue before him.

Stanhope v. *Blith* (1585), 4 Rep. 15.

Holt v. *Scholefield*, 6 T. R. 691.

Ceely v. *Hoskins*, Cro. Car. 509.

To say "I have been robbed of three dozen winches; you bought two, one at 3*s.*, one at 2*s.*; you knew well when you bought them that they cost me three times as much making as you gave for them, and that they could not have been honestly come by," is a sufficient charge of receiving stolen goods, knowing them to have been *stolen*. [An indictment which merely alleged that the prisoner knew the goods were not honestly come by would be bad. *R.* v. *Wilson*, 2 Mood. C. C. 52.]

Alfred v. *Farlow*, 8 Q. B. 854; 15 L. J. Q. B. 258; 10 Jur. 714.

"He is a pick-pocket; he picked my pocket of my money," was once held an insufficient charge of larceny.

Walls or *Watts* v. *Rymes*, 2 Lev. 51; 1 Ventr. 213; 3 Salk. 325.

But now this would clearly be held sufficient.

Baker v. *Pierce*, 2 Ld. Raym. 959; Holt, 654; 6 Mod. 23; 2 Salk. 695.

Stebbing v. *Warner*, 11 Mod. 255.

"He has defrauded a mealman of a roan horse" held not to imply a criminal act of fraud; as it is not stated that the mealman was induced to part with his property by means of any false pretence.

Richardson v. *Allen*, 2 Chit. 657.

So none of the following words are actionable without proof of special damage :—

"Cheat" :—

Savage v. *Robery*, 2 Salk. 694; 5 Mod. 398.

Davis v. *Miller et ux*, 2 Str. 1169.

"Swindler":—

Savile v. *Jardine*, 2 H. Bl. 531.

Black v. *Hunt*, 2 L. R. Ir. 10.

Ward v. *Weeks*, 7 Bing. 211; 4 M. & P. 796.

"Rogue," "rascal," "villain," &c.:—

Stanhope v. *Blith*, 4 Rep. 15.

"Runagate":—

Cockaine v. *Hopkins*, 2 Lev. 214.

"Cozener":—

Brunkard v. *Segar*, Cro. Jac. 427; Hutt. 13; 1 Vin. Abr. 427.

"Common-filcher":—

Goodale v. *Castle*, Cro. Eliz. 554.

"Welcher":—

Blackman v. *Bryant*, 27 L. T. 491.

Nor are the words "gambler," "black-leg," "black-sheep," unless it can be shown that the bystanders understood the words to imply "a cheating gambler punishable by the criminal law."

Barnett v. *Allen*, 3 H. & N. 376; 27 L. J. Ex. 412; 1 F. & F. 125; 4 Jur. N. S. 488.

If the crime imputed be one of which the plaintiff could not by any possibility be guilty, and all who heard the imputation knew that he could not by any possibility be guilty thereof, no action lies, for the plaintiff is never in jeopardy, nor is his reputation in any way impaired. (Buller's N. P. 5.)

Illustrations.

Words complained of:—"Thou hast killed my wife." Everyone who heard the words knew at the time that defendant's wife was still

alive: they could not therefore understand the word "kill" to mean "murder."

Snag v. *Gee*, 4 Rep. 16, as explained by Parke, B., in *Heming* v. *Power*, 10 M. & W. 569.

And see *Web* v. *Poor*, Cro. Eliz. 569.

Talbot v. *Case*, Cro. Eliz. 823.

Dacy v. *Clinch*, Sid. 53.

Jacob v. *Mills*, 1 Ventr. 117; Cro. Jac. 343.

It is no slander to say of a churchwarden that he stole the bell-ropes of his parish church; for they are officially his property; and a man cannot steal his own goods.

Jackson v. *Adams*, 2 Bing. N. C. 402; 2 Scott, 599; 1 Hodges, 339.

So it is not actionable for A. to charge a man who is not A.'s clerk or servant with embezzling A.'s money; for no indictment for embezzlement would lie. [But surely this can only be the case where the bystanders are aware of the exact relationship between A. and the plaintiff.]

Williams v. *Stott*, 1 C. & M. 675; 3 Tyrw. 688.

But where a married woman said, "You stole my faggots," and it was argued for the defendant that a married woman could not own faggots, and therefore no one could steal faggots of hers: the Court construed the words according to common sense and ordinary usage to mean, "You stole my husband's faggots."

Stamp and wife v. *White and wife*, Cro. Jac. 600.

Charnel's Case, Cro. Eliz. 279.

When the charge is made *bonâ fide* while giving the plaintiff into custody or prosecuting him according to law, it will be privileged; see *post*, c. VIII., pp. 220, 221.

II. *Where the words impute a contagious disease.*

Words imputing to the plaintiff that he has an infectious or contagious disease are actionable without proof of special damage. For the effect of such an im-

putation is naturally to exclude the plaintiff from society. Such disease may be either leprosy, venereal disease, or, it seems, the plague (*Villers* v. *Monsley*, 2 Wils. 403); but not the itch, the falling sickness, or the small-pox; there is not such terror of infection in the latter cases. The words must distinctly impute that the plaintiff has the disease at the time of publication: an assertion that he *has had* such a disease would clearly be no ground for his being shunned. (*Carslake* v. *Mapledoram*, 2 T. R. 473; *Taylor* v. *Hall*, 2 Str. 1189.)

Any words which the hearers would naturally understand as conveying that the plaintiff then has such a disease are sufficient. Many distinctions are drawn in old cases about the pox, a word which may imply either the actionable syphilis, or the more harmless small-pox. It has been decided that "he has the pox" (*simpliciter*) shall be taken to mean "he has the small-pox;" but that if any other words be used referring to the effects of the disease, or the way in which it was caught, or even the medicine taken to cure it, these may be referred to as determining which pox was meant.

Illustrations.

To say of a person, "He hath the falling sickness" is not actionable unless it be spoken of him in the way of his profession or trade.

Taylor v. *Perr* (1607), Rolle's Abr. 44.

To say to the plaintiff, "Thou art a leprous knave," is actionable.

Taylor v. *Perkins* (1607), Cro. Jac. 144; Rolle's Abr. 44.

To say of the plaintiff that "He hath the pox" is actionable, whenever the word "wench" or "whore" occurs in the same sentence.

Brook v. *Wise* (1601), Cro. Eliz. 878.
Pye v. *Wallis* (1658), Carter, 55.
Grimes v. *Lovel*, 12 Mod. 242.
Whitfield v. *Powel*, 12 Mod. 248.
Clifton v. *Wells*, 12 Mod. 634.
Bloodworth v. *Grey*, 7 M. & Gr. 334; 8 Scott, N. R. 9.

III. *Words which are spoken of the plaintiff in the way of his profession or trade; or disparage him in an office of public trust.*

Such words are actionable without proof of any special damage. It *must* injure the plaintiff's reputation to disparage him in his very means of livelihood. Where the Court sees that the words spoken affect the plaintiff in his office, profession, or trade, and directly tend to prejudice him therein, they ask for no further proof of damage. But it must always be averred on the record that the words were spoken of the plaintiff in relation to his office, profession, and trade, and that he held such office, or was actively engaged in such profession or trade, at the time the words were spoken. (*Bellamy* v. *Burch*, 16 M. & W. 590.)

The office held by the plaintiff need not be one of profit; it may be merely confidential and honorary, as that of a justice of the peace. Which is a fresh proof that the gist of an action of slander is the injury to the plaintiff's reputation, and not any presumed pecuniary loss. It would be impossible to presume that a justice of the peace loses any money by being falsely charged with corruption or extortion; for there is no emolument attached to his office: yet he may recover heavy damages for the slander. So, too, a physician or a barrister may sue for any slander imputing professional misconduct, although in contemplation of law their fees are mere gratuities.

Illustrations.

It is actionable without proof of special damage :—

To say that a judge gives corrupt sentences.

Cæsar v. *Curseny*, Cro. Eliz. 305.

To say that a clergyman had been guilty of gross immorality and had appropriated the sacrament money.

Highmore v. *Earl and Countess of Harrington*, 3 C. B. N. S. 142.

To say of an attorney that he deserved to be struck off the roll.

Phillips v. *Jansen*, 2 Esp. 624.

Warton v. *Gearing*, 1 Vict. L. R. C. L. 122.

To say of a watchmaker, "he is a bungler, and knows not how to make a good watch."

Redman v. *Pyne*, 1 Mod. 19.

To in any way impute insolvency or bankruptcy to any merchant or trader.

Arne v. *Johnson*, 10 Mod. 111.

Davis v. *Lewis*, 7 T. R. 17.

But it by no means follows that *any* words spoken to the disparagement of an officer, professional man, or trader, will *ipso facto* be actionable *per se*. Words to be actionable on this ground, "must *touch* the plaintiff in his office, profession, or trade:" that is, they must be shown to have been spoken of the plaintiff in relation thereto, and to be such as would prejudice him therein. They must impeach either his skill or knowledge, or his official or professional conduct. It is true that his special office or situation need not be expressly referred to, if the charge made be such as must necessarily affect it. And in determining whether the words used would necessarily affect the plaintiff in his office, profession, or trade, regard must be had to the rank and position of the plaintiff, and to the mental and moral requirements of the office he holds. Words may be actionable if spoken of a clergyman or a barrister, which would not be actionable of a trader or a clerk.

Thus, where integrity and ability are essential to the due conduct of plaintiff's office, words impugning the integrity or ability of the plaintiff are clearly actionable without any express mention of that office; for they distinctly imply that he is unfit to continue therein. But where the plaintiff does not hold any situation of trust or confidence, words which merely convey a general imputation of dishonesty, or charge

him with some misconduct not connected with his special profession or trade, will not be actionable.

Illustrations.

To impute immorality or adultery to a beneficed clergyman is actionable; for it is ground of deprivation.

Gallwey v. *Marshall*, 9 Exch. 294; 23 L. J. Ex. 78; 2 C. L. R. 399.

Not so in the case of a physician.

Ayre v. *Craven*, 2 A. & E. 2; 4 Nev. & M. 220.

Or a staymaker.

Brayne v. *Cooper*, 5 M. & W. 249.

Or a clerk to a gas company.

Lumby v. *Allday*, 1 C. & J. 301; 1 Tyrw. 217.

To say of a superintendent of police that "he has been guilty of conduct unfit for publication" is not actionable, unless the words were spoken of him with reference to his office.

James v. *Brook*, 9 Q. B. 7; 16 L. J. Q. B. 17; 10 Jur. 541.

It is actionable to impute *habitual* drunkenness to a beneficed clergyman.

Dod v. *Robinson*, Al. 63.

Or to a master mariner in command of a vessel.

Irwin v. *Brandwood*, 2 H. & C. 960; 33 L. J. Ex. 257; 9 L. T. 772; 10 Jur. N. S. 370; 12 W. R. 438.

Or to a schoolmaster.

Brandrick v. *Johnson*, 1 Vict. L. R. C. L. 306.

It would not be actionable where sobriety was not an essential qualification for the post. And to state that a clergyman or a schoolmaster was drunk on one particular occasion, and that neither in church nor in school, would not be actionable; as that alone would not necessitate his removal from his office.

Tighe v. *Wicks*, 33 Up. Can. Q. B. Rep. 470.

Brandrick v. *Johnson*, 1 Vict. L. R. C. L. 306.

And see *Hume* v. *Marshall*, *Times*, Nov. 26th, 1877.

To say of an attorney that "he hath the falling sickness" is actionable, without special damages, because that disables him in his profession.

Taylor v. *Perr* (1607), 1 Roll. Abr. 44.

But it is not actionable to say of an attorney, "He has defrauded his creditors and has been horsewhipped off the course at Doncaster;" for it is no part of his professional duties to attend horse-races.

Doyley v. *Roberts*, 3 Bing. N. C. 835; 5 Scott, 40; 3 Hodges, 154.

To say of a livery-stable-keeper:—"You are a regular prover under bankruptcies, a regular bankrupt maker," is not actionable; for it is not a charge against him in the way of his trade.

Angle v. *Alexander*, 7 Bing. 119; 1 Cr. & J. 143; 4 M. & P. 870; 1 Tyrw. 9.

But it is actionable without proof of special damage to say of a game-

keeper that "he trapped three foxes;" for that would be misconduct in a gamekeeper.

Foulger v. *Newcomb*, L. R. 2 Ex. 327; 36 L. J. Ex. 169; 15 W. R. 1181; 16 L. T. 595.

So to say of an auctioneer, "You are a deceitful rascal, a villain, and a liar. I would not trust you with an auctioneer's licence. You robbed a man you called your friend; and, not satisfied with £10, you robbed him of £20 a fortnight ago," was held actionable by Cockburn, C. J., in

Ramsdale v. *Greenacre*, 1 F. & F. 61.

And see *Bryant* v. *Loxton*, 11 Moore, 344.

But to say of a land speculator, "He cheated me of 100 acres of land," was held in Canada not to touch him in his trade and therefore not actionable.

Fellowes v. *Hunter*, 20 Up. Can. Q. B. 382.

See *Sibley* v. *Tomlins*, 4 Tyrw. 90, *post*, p. 80.

To call a dancing mistress "an hermaphrodite" is not actionable; for girls are taught dancing by men as often as by women.

Wetherhead v. *Armitage*, 2 Lev. 233; 3 Salk. 328; Freem. 277; 2 Show. 18.

To say of the keeper of a restaurant, "You are an infernal rogue and swindler," was held not to be actionable without proof of special damage; as not of themselves necessarily injurious to a restaurant keeper; for, as the Supreme Court of Victoria remarked, "in fact there might be very successful restaurant-keepers, who were both rogues and swindlers."

Brady v. *Youlden*, Kerferd and Box's Digest of Victoria Cases, 709; Melbourne Argus Reports, 6 Sept. 1867.

So to call a carpenter "a rogue," or a cooper "a varlet and a knave," is clearly not actionable *per se;* for the words do not touch them in their trades.

Lancaster v. *French*, 2 Str. 797.

Cotes v. *Ketle*, Cro. Jac. 204.

A declaration alleged that the defendant falsely and maliciously spoke of the plaintiff, a working stone-mason, "He was the ringleader of the nine hours' system," and "He has ruined the town by bringing about the nine hours' system," and "He has stopped several good jobs from being carried out, by being the ringleader of the system at Llanelly," whereby the plaintiff was prevented from obtaining employment in his trade at Llanelly:—*Held*, on demurrer, that, the words not being in themselves defamatory, nor connected by averment or by implication with the plaintiff's trade, and the alleged damage not being the natural or reasonable consequence of the speaking of them, the action could not be sustained.

Miller v. *David*, L. R. 9 C. P. 118; 43 L. J. C. P. 84; 22 W. R. 332; 30 L. T. 58.

Again, where a special kind of knowledge is essential to the proper conduct of a particular profession, denying that the plaintiff possesses such special knowledge will

be actionable, if the plaintiff belongs to that particular profession, but not otherwise.

Illustrations.

It has been held actionable without special damage :—

To say of a barrister, "He is a dunce, and will get little by the law" [though here it was argued for the defendant that Duns Scotus was "a great learned man;" that though to call a man "a dunce" might, in ordinary parlance, imply that he was dull and heavy of wit, yet it did not deny him a solid judgment; and that to say "he will get little by the law" might only mean that he did not wish to practise].

Peard v. *Jones* (1635), Cro. Car. 382.

To say of an attorney, "He has no more law than Master Cheyny's bull," or "He has no more law than a goose."

Baker v. *Morfue*, vel *Morphew*, Sid. 327; 2 Keble, 202.

[According to the report in Keble, an objection was taken in this case on behalf of the defendant, that it was not averred in the declaration, "that Cheyny had a bull, *sed non allocatur*, for the scandal is the greater, if he had none." And the Court adds a solemn *quære* as to saying "He has no more law than the man in the moon," feeling no doubt a difficulty as to ascertaining the precise extent of that individual's legal acquirements. But see *Day* v. *Buller*, 3 Wils. 59, *post*, p. 75, where the Court strangely decides that it is defamatory to say of an attorney that "he is no more a lawyer than the devil!"]

To say of an attorney :—"He cannot read a declaration."

Powell v. *Jones*, 1 Lev. 297.

To say of a physician that "he is no scholar," "because no man can be a good physician, unless he be a scholar."

Cawdrey v. *Highley, al. Tythay*, Cro. Car. 270; Godb. 441.

To say of the deputy of Clarencieux, king-at-arms, "He is a scrivener and no herald."

Brooke v. *Clarke*, Cro. Eliz. 328; 1 Vin. Abr. 464.

To say of a midwife, "Many have perished for her want of skill."

Flowers' Case, Cro. Car. 211.

To charge an apothecary with having caused the death of a child by administering to it improper medicines.

Edsall v. *Russell*, 4 M. & Gr. 1090; 5 Scott N. R. 801; 2 Dowl. N. S. 641; 12 L. J. C. P. 4; 6 Jur. 996.

Tutty v. *Alewin*, 11 Mod. 221.

Where an architect is engaged to execute certain work, it is a libel upon him in the way of his profession to write to his employers asserting that he has no experience in that particular kind of work, and is therefore unfit to be entrusted with it.

Botterill and another v. *Whytehead*, 41 L. T. 588.

But since no special learning or ability is expected of a justice of the peace it is not actionable to call him "fool," "ass," "blockhead," or any

other words merely imputing want of natural cleverness or ignorance of law. But words which impute to him corruption, dishonesty, extortion, or sedition are actionable of course.

Bill v. *Neal*, 1 Lev. 52.

How v. *Prin*, Holt, 652; 2 Salk. 694; 2 Ld. Raym. 812; 7 Mod. 107; 1 Bro. Parl. C. 64.

Aston v. *Blagrave*, 1 Str. 617; 8 Mod. 270; Fort. 206; 2 Ld. Raym. 1369.

The plaintiff must always aver on the pleadings that he was carrying on the profession or trade, or holding the office, at the time the words were spoken. Sometimes this is admitted by the slander itself, and if so, evidence is of course unnecessary in proof of this averment. (*Yrisarri* v. *Clement*, 2 C. & P. 223; 3 Bing. 432.) But in other cases, unless it is admitted on the pleadings, evidence must be given at the trial of the special character in which plaintiff sues. As a rule, it is sufficient for plaintiff to prove that he was acting in the office or actively engaged in the profession or trade without proving any appointment thereto, or producing a diploma or other formal qualification. *Omnia presumuntur rite esse acta.* (*Rutherford* v. *Evans*, 4 C. & P. 79; 6 Bing. 451; *Berryman* v. *Wise*, 4 T. R. 366; *Cannell* v. *Curtis*, 2 Bing. N. C. 228.) But there is an exception to this rule where the very slander complained of imputes to a medical or legal practitioner that he is a quack or impostor, not legally qualified for practice: here the plaintiff must be prepared to prove his qualification strictly by producing diplomas or certificates duly sealed, signed, and stamped. (*Collins* v. *Carnegie*, 3 N. & M. 703; 1 Ad. & E. 695; *Moises* v. *Thornton*, 8 T. R. 303; *Wakley* v. *Healey & Cooke*, 4 Exch. 53; 18 L. J. Ex. 426.)

Whether or no the words were spoken of the plaintiff in the way of his business, is a question for the jury to determine at the trial. (*Per* Cockburn, C.J., in *Ramsdale* v. *Greenacre*, 1 F. & F. 61.) There should always be an averment in the statement of claim that the words

were so spoken; though, where the words are clearly of such a nature as necessarily to affect the plaintiff in his office or business, the omission of such an averment will not be fatal. (*Stanton* v. *Smith*, 2 Ld. Raym. 1480; 2 Str. 762; *Jones* v. *Littler*, 7 M. & W. 423; 10 L. J. Ex. 171.)

It will be well to deal more particularly with certain special offices and professions.

Persons holding any Office of Confidence and Trust.

Words which impute a want of integrity to any one holding an office of confidence or trust, whether an office of profit or not, are clearly actionable *per se*. So if the words employed have a natural tendency to cause the plaintiff to be removed from his office, as by imputing insufficiency or gross incompetency, or habitual negligence of his duties. But where the words merely impute want of ability, without ascribing to the plaintiff any wicked or dishonest conduct; there no action lies (at all events, where the office is honorary as in the case of a justice of the peace). (*Per* Holt, C. J., in *Howe* v. *Prin*, Holt, 653; 2 Salk. 694.)

As the danger of plaintiff's losing his office is the gist of the action, it is essential that plaintiff should hold the office at the time the words were spoken. (*Per* De Grey, C. J., in *Onslow* v. *Horne*, 3 Wils. 188; 2 W. Bl. 753, overruling the *dictum* of Pollexfen, C. J., in *Walden* v. *Mitchell*, 2 Vent. 266.)

Illustrations.

It is actionable without proof of special damage :—

To accuse a Royal Commissioner of taking bribes.

Moor v. *Foster*, Cro. Jac. 65.

Purdy v. *Stacey*, Burr. 2698.

To say of a justice of the peace, "Mr. Stuckley covereth and hideth felonies, and is not worthy to be a Justice of the Peace;" "for it is against his oath and the office of a Justice of Peace, and a good cause to put him out of the commission."

Stuckley v. *Bullhead*, 4 Rep. 16.

And see *Sir John Harper* v. *Beamond*, Cro. Jac. 56.

Sir Miles Fleetwood v. *Curl*, Cro. Jac. 557; Hob. 268.

To say of a justice of the peace that "he is a Jacobite and for bringing in the Prince of Wales and Popery;" for this implies that he is disaffected

to the established Government and should be removed from office immediately.

How v. *Prin* (1702), Holt, 652 ; 7 Mod. 107 ; 2 Ld. Raym. 812; 2 Salk. 694. Affirmed in House of Lords *sub nom. Prinne* v. *Howe*, 1 Brown's Parly. Cases, 64.

To insinuate that a justice of the peace takes bribes or "perverts justice to serve his own turn."

Cæsar v. *Curseny*, Cro. Eliz. 305.
Carn v. *Osgood*, 1 Lev. 280.
Alleston v. *Moor*, Hetl. 167.
Masham v. *Bridges*, Cro. Car. 223.
Isham v. *York*, Cro. Car. 15.
Beamond v. *Hastings*, Cro. Jac. 240.
Aston v. *Blagrave*, 1 Str. 617 ; 8 Mod. 270 ; 2 Ld. Raym. 1369 ; Fort. 206.

To say to a churchwarden, "Thou art a cheating knave and hast cheated the parish of £40."

Strode v. *Holmes* (1651), Styles, 338 ; 1 Roll. Abr. 58.
Woodruff v. *Weolley*, 1 Vin. Abr. 463.

To call an escheator, attorney, or other officer of a Court of Record, an "extortioner."

Stanley v. *Boswell*, 1 Roll. Abr. 55.

To say of a town-clerk that he hath not performed his office according to law.

Fowell v. *Cowe*, Rolle's Abr. 56.
Wright v. *Moorhouse*, Cro. Eliz. 358.

To say of a constable :—"He is not worthy the office of constable."

Taylor v. *How*, Cro. Eliz. 861 ; 1 Vin. Abr. 464.

In America it has been held actionable to charge a member of a nominating convention of a political party with having been influenced by a bribe.

Hand v. *Winton*, 38 N. Y. 122.
And see *Sanderson* v. *Caldwell*, 45 N. Y. 398.
Dolloway v. *Turrell*, 26 Wend. (N. Y.), 383.
Stone v. *Cooper*, 2 Denio (N. Y.), 293.

So too in Canada, where the plaintiff was charged with being a public robber—innuendo, that he, plaintiff, had defrauded the public in his dealings with them ; it was held not necessary for plaintiff to aver that he is in any office, trade, or employment in which he could have defrauded the public.

Taylor v. *Carr*, 3 Up. Can. Q. B. Rep. 306.

But it is *not* actionable without proof of special damage :—

To impute insincerity to a Member of Parliament.

Onslow v. *Horne*, 3 Wils. 177 ; 2 W. Bl. 750.

To say of a justice of the peace, "He is a fool, an ass, and a beetle-headed justice ;" for these are but general terms of abuse and disclose no ground for removing the plaintiff from office.

Bill v. *Neal*, 1 Lev. 52.
Sir John Hollis v. *Briscow et ux.*, Cro. Jac. 58.

To say of a justice of the peace, "He is a logger-headed, a slouch-headed, bursen-bellied hound."

R. v. *Farre*, 1 Keb. 629.

To say of a justice of the peace, "He is a blood-sucker and sucketh blood:" "for it cannot be intended what blood he sucketh."

Sir Christopher Hilliard v. *Constable*, Cro. Eliz. 306.

Clergymen and Ministers.

Words are actionable if spoken of a beneficed clergyman which would not be actionable if spoken of one without cure of souls. (*Gallwey* v. *Marshall*, 9 Ex. 294; 23 L. J. Ex. 78; 2 C. L. R. 399.) But it does not follow that all words which tend to bring a beneficed clergyman into disrepute, or which merely impute that he has done something wrong, are actionable without special damage. The reason always assigned for this distinction between beneficed clergymen and others is that the charge, if true, would be ground of degradation or deprivation. (*Drake* v. *Drake*, 1 Roll. Abr. 58; *Dod* v. *Robinson* (1648), Aleyn, 63; *Pemberton* v. *Colls*, 10 Q. B. 461; 16 L. J. Q. B. 403; 11 Jur. 1011.) The imputation must therefore be such as, if true, would tend to prove the plaintiff unfit to continue in his office, and therefore tend more or less directly to proceedings being taken by the Bishop. If the plaintiff holds any chaplaincy, lectureship, or readership, from which he might be removed, he will come within the same rules as a beneficed clergyman. (*Payne* v. *Beauvmorris*, 1 Lev. 248.) But a clergyman without any preferment or office stands on the same footing as a dissenting minister, and must prove that some pecuniary damage has followed from the speaking of the words. (See *Hartley* v. *Herring*, 8 T. R. 130.)

Illustrations.

It is actionable without proof of special damage:—

To say of a parson that "he had two wives;" for though bigamy was not made felony till 1603, still in 1588 it was "cause of deprivation."

Nicholson v. *Lyne*, Cro. Eliz. 94.

To say that "he is a drunkard, a whoremaster, a common swearer, a common liar, and hath preached false doctrine, and deserves to be degraded;" for "the matters charged are good cause to have him degraded, whereby he should lose his freehold."

Dod v. *Robinson* (1648), Aleyn, 63.

Dr. Sibthorpe's Case, W. Jones, 366; Rolle's Abr. 58.

To say "He preacheth lyes in the pulpit;" "*car ceo est bon cause de deprivation.*"

Drake v. *Drake* (1652), Roll. Abr. 58; 1 Vin. Abr. 463.

[These cases clearly overrule *Parret* v. *Carpenter*, Noy 64; 2 Cro. Eliz. 502, wherein it was held that an action could lie only in the spiritual court for saying of a parson:—"Parret is an adulterer, and hath had two children by the wife of J. S., and I will cause him to be deprived for it." See the remarks of Pollock, C.B., 23 L. J. Ex. 80.]

To say to a parson, "Thou hast made a seditious sermon and moved the people to sedition to-day."

Philips, B.D. v. *Badby* (1582), cited in *Bittridge's Case*, 4 Rep. 19.

To say of a parson, "He preaches nothing but lies and malice in the pulpit;" for the words are clearly spoken of him in the way of his profession.

Crauden v. *Walden*, 3 Lev. 17.

And see *Pocock* v. *Nash*, Comb. 253.

Musgrave v. *Bovey*, Str. 946.

To say to a clergyman, "Thou art a drunkard," is not of itself actionable; but it is submitted that to impute to a clergyman habitual drunkenness, or drunkenness whilst engaged in the discharge of his official duties, would be actionable.

Cucks v. *Starre*, Cro. Car. 285.

Tighe v. *Wicks*, 33 Upper Canada Q. B. Rep. 470.

To charge a clergyman with immorality and misappropriation of the sacrament money is clearly actionable. Damages £750.

Highmore v. *Earl and Countess of Harrington*, 3 C. B. N. S. 142.

And of course to charge a clergyman with having indecently assaulted a woman on the highway is actionable.

Evans v. *Gwyn*, 5 Q. B. 844.

To say of a beneficed clergyman that he drugged the wine he gave the speaker and so fraudulently induced him to sign a bill of exchange for a large amount is actionable without proof of special damage; but it is not actionable merely to say of a beneficed clergyman "he pigeoned me."

Pemberton v. *Colls*, 10 Q. B. 461; 16 L. J. Q. B. 403; 11 Jur. 1011.

To charge a clergyman with incontinence is not actionable, unless he hold some benefice or preferment, or some post of emolument, such as preacher, curate, chaplain or lecturer.

Gallwey v. *Marshall*, 23 L. J. Ex. 78; 9 Exch. 294; 2 C. L. R. 399.

To say of one who had been a linendraper, but at time of publication was a dissenting minister, that he was guilty of fraud and cheating when a linendraper, is no slander of the plaintiff in his office of dissenting minister.

Hopwood v. *Thorn*, 8 C. B. 293; 19 L. J. C. P. 94; 14 Jur. 87.

To say of a bishop that "he is a wicked man" is actionable without special damage. *Per* Scroggs, J., in *Townshend* v. *Dr. Hughes*, 2 Mod. 160.

But this is only because the Statute of Scandalum Magnatum, 2 Rich. II. st. 1, c. 5, expressly mentions "prelates." See *post*, p. 134, and note to 10 Q. B. p. 469.

Barristers-at-Law.

It is quite clear that barristers and physicians may sue for words touching them in their profession, although their fees are honorary. [The loss of a gratuity is special damage: see *post*, c. X.]

Illustrations.

The plaintiff was a barrister and gave counsel to divers of the king's subjects. The defendant said to J. S. (the plaintiff's father-in-law), concerning the plaintiff:—"He is a dunce and will get little by the law." J. S. replied, "Others have a better opinion of him." The defendant answered, "He was never but accounted a dunce in the Middle Temple." *Held* that the words were actionable, though no special damage was alleged. Damages, one hundred marks.

Peard v. *Jones*, Cro. Car. 382.

So it is actionable to say of a barrister:—

"Thou art no lawyer; thou canst not make a lease; thou hast that degree without desert; they are fools who come to thee for law."

Bankes v. *Allen*, Rolle's Abr. 54.

Or, "He hath as much law as a Jackanapes. (N.B.—The words are not "*no more* law *than* a Jackanapes.")

Palmer v. *Boyer*, Owen, 17; Cro. Eliz. 342, cited with approval in *Broke's Case*, Moore, 409.

[And see *Cawdrey* v. *Tetley*, Godb. 441, where it is said that had the words been, "He has no more *wit* than a Jackanapes," no action would have lain; wit not being essential to success at the bar, according to F. Pollock, 2 Ad. & E. 4.];

Or, "He has deceived his client, and revealed the secrets of his cause."

Snag v. *Gray*, 1 Roll. Abr. 57; Co. Entr. 22.

Or, "He will give vexatious and ill counsel, and stir up a suit and milk her purse, and fill his own large pockets."

King v. *Lake*, 2 Ventr. 28; Hardres, 470.

Solicitors and Attornies.

It is actionable without special damage:—

To say of an attorney, "He is a very base rogue and a cheating knave, and doth maintain himself his wife and children by his cheating."

Anon. (1638), Cro. Car. 516.

See *Jenkins* v. *Smith*, Cro. Jac. 586.

To say of an attorney that "he hath the falling sickness;" for that disables him in his profession.

Taylor v. *Perr* (1607), 1 Rolle's Abr. 44.

To say of an attorney, "What, does he pretend to be a lawyer? He is no

more a lawyer than the devil;" or any other words imputing gross ignorance of law.

Day v. *Buller*, 3 Wils. 59.

Baker v. *Morfue*, Sid. 327; 2 Keb. 202; *ante*, p. 68.

Powell v. *Jones*, 1 Lev. 297, *ante*, p. 68.

To say of an attorney, "He is only an attorney's clerk, and a rogue; he is no attorney," or any words imputing that he is not a fully qualified practioner.

Hardwick v. *Chandler*, Stra. 1138.

To say of an attorney, "He is an *ambidexter*," *i.e.*, one who being retained by one party in a cause, and having learnt all his secrets, goes over to the other side, and acts for the adversary. Such conduct was subject for a *qui tam* action under an old penal statute: see Rastell's Entries, p. 2, Action sur le case vers Attorney, 3.

Annison v. *Blofield*, Carter, 214; 1 Roll. Abr. 55.

To impute that he will betray his clients' secrets and overthrow their cause.

Martyn v. *Burlings*, Cro. Eliz. 589.

To charge an attorney with barratry, champerty, or maintenance.

Boxe v. *Barnaby*, 1 Roll. Abr. 55; Hob. 117.

Proud v. *Hawes*, Cro. Eliz. 171; Hob. 140.

Taylor v. *Starkey*, Cro. Car. 192.

To say of an attorney:—"He stirreth up suits, and once promised me, that if he did not recover in a cause for me, he would take no charges of me;" "because stirring up suits is barratry, and undertaking a suit, no purchase no pay, is maintenance."

Smith v. *Andrews*, 1 Roll. Abr. 54; Hob. 117.

To assert that an attorney has been guilty of professional misconduct and ought to be struck off the rolls.

Byrchley's Case, 4 Rep. 16.

Phillips v. *Jansen*, 2 Esp. 624.

Warton v. *Gearing*, 1 Vict. L. R. C. L. 122.

But it is not actionable to say of an attorney, "He has defrauded his creditors and has been horsewhipped off the course at Doncaster;" for it is no part of his professional duties to attend horse-races, and his creditors are not his clients.

Doyley v. *Roberts*, 3 Bing. N. C. 835; 5 Scott, 40; 3 Hodges, 154.

Nor to abuse him in general terms, such as "cheat," "rogue," or "knave;" though to say, "You cheat your clients," would be actionable.

Alleston v. *Moor*, Het. 167.

And see *Bishop* v. *Latimer*, 4 L. T. 775.

Physicians and Surgeons.

Any words imputing to a practising medical man misconduct or incapacity in the discharge of his professional duties is actionable *per se*.

Illustrations.

Thus it is actionable without proof of special damage :—

To accuse any physician, surgeon, accoucheur, midwife, or apothecary, with having caused the death of any patient through his ignorance or culpable negligence.

Poe v. *Mondford*, Cro. Eliz. 620.
Tuttey v. *Alewin*, 11 Mod. 221.
Watson v. *Vanderlash*, Hetl. 71.
Southee v. *Denny*, 1 Exch. 196 ; 17 L. J. Ex. 151.
Edsall v. *Russell*, 4 M. & Gr. 1090 ; 12 L. J. C. P. 4 ; 5 Scott, N. R. 801 ; 2 Dowl. N. S. 641 ; 6 Jur. 996.

To call a practising medical man "a quack-salver," or "an empiric," or a "mountebank."

Allen v *Eaton*, 1 Roll. Abr. 54.
Goddart v. *Haselfoot*, 1 Viner's Abr. (S.a.), pl. 12 ; 1 Roll. Abr. 54.

To say that "his character is so bad, that none of the medical men here will meet him."

Southee v. *Denny*, 1 Exch. 196.
But see *Clay* v. *Roberts*, 9 Jur. N.S. 580 ; 11 W.R.649 ; 8 L.T.397.
Ramadge v. *Ryan*, 9 Bing. 333 ; 2 M. & Sc. 421.

But it is not actionable :—

To say of a surgeon, "He did poison the wound of his patient ;" without some averment that this was improper treatment of the wound ; for else "it might be for the cure of it."

Suegoe's Case, Hetl. 175.

Nor to call a person who practises medicine, or surgeon, without full legal qualification, "a quack," or "an impostor ;" for the law only protects *lawful* employments.

Collins v. *Carnegie*, 1 A. & E. 695 ; 3 N. & M. 703.

Nor to charge a physician with adultery unconnected with his professional conduct. It would be otherwise if he had been accused of seducing, or committing adultery with, one of his patients.

Ayre v. *Craven*, 2 A. & E. 2 ; 4 N. & M. 220.

Dawes intended to employ the plaintiff, a surgeon and accoucheur, at his wife's approaching confinement ; but the defendant told Dawes that the plaintiff's female servant had had a child by the plaintiff : Dawes consequently decided not to employ the plaintiff : Dawes told his mother and his wife's sister what defendant had said ; and consequently the plaintiff's practice fell off considerably among Dawes' friends and acquaintance and others. The fee for one confinement was a guinea. *Held* that the action lay, special damage being proved ; that the plaintiff was entitled to more than the one guinea damages ; that the jury should give him such sum as they considered Dawes' custom was worth to him ; but that the jury clearly could not in this action give him anything for the general decline of his business.

Dixon v. *Smith*, 5 H. & N. 450 ; 29 L. J. Ex. 125.

So, to impute incompetency to any one practising an art, as a dentist, a schoolmaster, a land surveyor, or an architect, is actionable *per se*.

Illustrations.

Thus it is actionable without proof of special damage :—

To say of a schoolmaster, "Put not your son to him, for he will come away as very a dunce as he went."

Watson v. *Vanderlash*, Hetl. 71.

Or to accuse a schoolmaster of *habitual* drunkenness.

Brandrick v. *Johnson*, 1 Vict. L. R. C. L. 306.

Or to say of an architect engaged to restore a church, that he has no experience in church work.

Botterill and another v. *Whytehead*, 41 L. T. 588.

Or to say of a land surveyor, in the way of his trade, "Thou art a cozener and a cheating knave, and that I can prove."

London v. *Eastgate*, 2 Rolle's Rep. 72.

But it has actually been held not actionable to impute prostitution to a schoolmistress.

Wetherhead v. *Armitage*, 2 Lev. 233 ; 2 Show. 18 ; Freem. 277 ; 3 Salk. 328.

Per Twisden, J., in *Wharton* v. *Brook*, Ventr. 21 ; but see the remarks of Lord Denman, C. J., in *Ayre* v. *Craven*, 2 A. & E. 2 ; 4 N. & M. 220.

Traders.

So if the plaintiff carry on any trade recognised by the law, or be engaged in any lawful employment, however humble, an action lies for any words which affect him in the way of such trade or employment, and prejudice him therein. But the words must relate to his employment, and "touch" him therein.

Illustrations.

Thus, it is actionable without proof of special damage :—

To say of a clerk or servant that he had "cozened his master."

Seaman v. *Bigg*, Cro. Car. 480.

Reignald's Case (1640), Cro. Car. 563.

To say of a servant girl that she had had a miscarriage, and had lost her place in consequence.

Connors v. *Justice*, 13 Ir. C. L. R. 451.

To say of a gamekeeper that he trapped three foxes ; for that would be clearly a breach of his duties as gamekeeper.

Foulger v. *Newcomb*, L. R. 2 Ex. 327 ; 36 L. J. Ex. 169 ; 15 W. R. 1181 ; 16 L. T. 595.

To say to an innkeeper :—"Thy house is infected with the pox, and thy wife was laid of the pox;" for even if small-pox only was meant, still "it was a discredit to the plaintiff, and guests would not resort" to his house. Damages £50.

Levet's Case, Cro. Eliz. 289.

And see the remarks of Kelly, C. B., in *Riding* v. *Smith*, 1 Ex. D. 94; 45 L. J. Ex. 281; 24 W. R. 487; 34 L. T. 500.

But it is not actionable *per se* :—

To say of a livery-stable keeper :—"You are a regular prover under bankruptcies, a regular bankrupt maker;" for it is not a charge against him in the way of his trade.

Angle v. *Alexander*, 7 Bing. 119; 1 Cr. & J. 143; 4 M. & P. 870; 1 Tyrw. 9.

Nor to say to a clerk to a gas-company :—"You are a fellow, a disgrace to the town, unfit to hold your situation for your conduct with whores."

Lumby v. *Allday*, 1 C. & J. 301; 1 Tyrw. 217.

And see *James* v. *Brook*, 9 Q. B. 7; 16 L. J. Q. B. 17; 10 Jur. 541.

Nor to impute to a staymaker that his trade is maintained by the prostitution of his shopwoman.

Brayne v. *Cooper*, 5 M. & W. 249.

But see *Riding* v. *Smith*, 1 Ex. D. 91; 45 L. J. Ex. 281; 24 W. R. 487; 34 L. T. 500.

The law guards most carefully the credit of all merchants and traders; any imputation on their solvency, any suggestion that they are in pecuniary difficulties, or are attempting to evade the operation of any Bankruptcy Act is therefore actionable *per se*.

Illustrations.

Thus it is actionable without proof of special damage :—

To impeach the credit of any merchant or tradesman by imputing to him bankruptcy or insolvency, either past, present or future.

Johnson v. *Lemmon*, 2 Rolle's Rep. 144.

Thompson v. *Twenge*, 2 Rolle's Rep. 433.

Vivian v. *Willet*, Sir Thomas Raymond, 207; 3 Salk. 326.

Stanton v. *Smith*, Ld. Raymond, 1480; 2 Str. 762.

Whittington v. *Gladwin*, 5 B. & C. 180; 2 C. & P. 146.

Robinson v. *Marchant*, 7 Q. B. 918; 15 L. J. Q. B. 134; 10 Jur. 156.

Harrison v. *Bevington*, 8 C. & P. 708.

Gostling v. *Brooks*, 2 F. & F. 76.

Brown v. *Smith*, 13 C. B. 596; 22 L. J. C. P. 151; 17 Jur. 807; 1 C. L. R. 4.

To say to a tailor, "I heard you were run away," *sc.* from your creditors.

Davis v. *Lewis*, 7 T. R. 17.

And see *Dobson* v. *Thornistone*, 3 Mod. 112.

Chapman v. *Lamphire*, 3 Mod. 155.

Arne v. *Johnson*, 10 Mod. 111.

Harrison v. *Thornborough*, 10 Mod. 196; Gilb. Cas. 114.

To say of a brewer that he had been arrested for debt. And this although no express reference to his trade was made at time of publication, for such words must necessarily affect his credit therein.

Jones v. *Littler*, 7 M. & W. 423; 10 L. J. Ex. 171.

To assert that the plaintiff had once been bankrupt in another place, when carrying on another trade; for that may still affect him here in his present trade.

Leycroft v. *Dunker*, Cro. Car. 317.

Hall v. *Smith*, 1 M. & S. 287.

Figgins v. *Cogswell*, 3 M. & S. 369.

To say of any trader :—"He is not able to pay his debts."

Drake v. *Hill*, Sir T. Raym. 184; 2 Keble, 549; 1 Lev. 276; Sid. 424.

Hooker v. *Tucker*, Holt, 39.

Morris v. *Langdale*, 2 Bos. & Pull. 284.

Orpwood v. *Barkes* (vel *Parkes*), 4 Bing. 261; 12 Moore, 492.

To impute insolvency to an innkeeper, even though at that date innkeepers were not subject to the bankruptcy laws.

Whittington v. *Gladwin*, 5 B. & C. 180; 2 C. & P. 146.

Southam v. *Allen*, Sir T. Raym. 231.

So if the defendant's words impute to the plaintiff dishonesty and fraud in the conduct of his trade, such as knowingly selling inferior articles as superior, or wilfully adulterating his wares; they will be actionable *per se*. Though all *bonâ fide* complaints by a customer of the goods supplied to him are of course privileged. (*Crisp* v. *Gill*, 29 L. T. (Old S.), 82; *Oddy* v. *Lord Geo. Paulet*, 4 F. & F. 1009.) If the words merely impugn the goods the plaintiff sells, they are not actionable unless they fall within the rules relating to Slander of Title, *post*, c. V.; for they are but an attack on a thing, not on a person. (*Fenn* v. *Dixe* (1638), 1 Roll. Abr. 58; *Evans* v. *Harlow*, 5 Q. B. 624; 13 L. J. Q. B. 120; *Harman* v. *Delany*, 2 Str. 898; Fitz. 121; 1 Barnard. 289, 438.) But often an attack on a commodity may be also an indirect attack upon its vendor; *e.g.* if fraud or dishonesty be imputed to him in offering it for sale. (See *Jenner* v. *A'Beckett*, L. R. 7 Q. B. 11; 41 L. J. Q. B. 14; 20 W. R. 181; 25 L. T. 464; *Burnet* v. *Wells* (1700), 12 Mod. 420; *Clark* v. *Freeman*, 11 Beav. 112; 17 L. J. Ch. 142; 12 Jur. 149.)

Illustrations.

Thus it is actionable without proof of special damage :—

To say of a trader :—"He is a cheating knave, and keeps a false debt-book."

Crawfoot v. *Dale*, 1 Vent. 263 ; 3 Salk. 327.
Overruling *Todd* v. *Hastings*, 2 Saund. 307.

Or that he uses false weights or measures.

Griffiths v. *Lewis*, 7 Q. B. 61 ; 14 L. J. Q. B. 197 ; 9 Jur. 370 ; 8 Q. B. 841 ; 15 L. J. Q. B. 249 ; 10 Jur. 711.
Bray v. *Ham*, 1 Brownlow & Golds. 4.
Stober v. *Green*, ib. 5.
Prior v. *Wilson*, 1 C. B. N. S. 95.

To say to a cornfactor, "You are a rogue and a swindling rascal, you delivered me 100 bushels of oats, worse by 6*s*. a bushel than I bargained for."

Thomas v. *Jackson*, 3 Bing. 104 ; 10 Moore, 425.

To say of a tradesman that he adulterates the goods he sells.

Jesson v. *Hayes* (1636), Roll. Abr. 63.

To say of a contractor :—"He used the old materials," when his contract was for new, is actionable, with proper innuendoes.

Baboneau v. *Farrell*, 15 C. B. 360 ; 24 L. J. C. P. 9 ; 1 Jur. N. S. 114 ; 3 C. L. R. 142.
Sir R. Greenfield's Case, Mar. 82 ; 1 Viner's Abr. 465.
See *Smith* v. *Mathews*, 1 Moo. & Rob. 151.

To say of an auctioneer or appraiser who had valued goods for the defendant, "He is a damned rascal, he has cheated me out of £100 on the valuation."

Bryant v. *Loxton*, 11 Moore, 344.
Ramsdale v. *Greenacre*, 1 F. & F. 61, *ante*, p. 67.

To say of a butcher that he changed the lamb bought of him for a coarse piece of mutton.

Crisp v. *Gill*, 29 L. T. Old Series, 82.
Rice v. *Pigeon*, Comb. 161.

But to call a tradesman "a rogue," or "a cheat," or "a cozener," is *not* actionable, unless it can be shown that the words refer to his trade. To impute distinctly that he cheats or cozens *in his trade* is actionable.

Johns v. *Gittings*, Cro. Eliz. 239.
Cotes v. *Kettle*, Cro. Jac. 204.
Terry v. *Hooper*, 1 Lev. 115.
Savage v. *Robery*, 5 Mod. 398 ; 2 Salk. 694.
Surman v. *Shelleto*, 3 Burr. 1688.
Bromefield v. *Snoke*, 12 Mod. 307.
Savile v. *Jardine*, 2 H. Bl. 531.
Lancaster v. *French*, 2 Stra. 797.
Davis v. *Miller et ux.*, 2 Stra. 1169.
Fellowes v. *Hunter*, 20 Up. Can. Q. B. 382.
Brady v. *Youlden*, Melbourne Argus R., *an*

[N.B.—*Lancaster* v. *French* appears to go a little further than the other cases cited : but if so, it must be taken to be so far overruled by them.]

So to say to a pork butcher, "Who stole Fraser's pigs? You did, you bloody thief, and I can prove it—you poisoned them with mustard and brimstone," was held not actionable (the jury having found that the words were not intended to impute felony) ; for there was nothing to show that they were spoken of the plaintiff in relation to his trade.

Sibley v. *Tomlins*, 4 Tyrwhitt, 90.

So to say of a grocer, "His shop is in the market," is not actionable, in the primary sense of the words at all events.

Ruel v. *Tatnell*, 29 W. R. 172 ; 43 L. T. 507.

It must be averred and proved that the plaintiff carried on his trade at the time the words were spoken ; else the words cannot be spoken of him in the way of such trade. *Bellamy* v. *Burch*, 16 M. & W. 590. Moreover the trade or employment must be one recognised by the law as a legitimate means of earning one's living.

Illustrations.

A stock-jobber could not sue for words spoken of him in the way of his trade, so long as that trade was illegal within the 7 Geo. II. c. 8, s. 1 (Sir John Barnard's Act ; now repealed by 23 & 24 Vict. c. 28.)

Morris v. *Langdale*, 2 Bos. & Pull. 284.

Collins v. *Carnegie*, 1 A. & E. 695 ; 3 N. & M. 703.

If the plaintiff avers that he carries on two trades, it will be sufficient to prove that he carries on *one*, if the words can affect him in that one.

Figgins v. *Cogswell*, 3 M. & S. 369.

Hall v. *Smith*, 1 M. & S. 287.

Where insolvency is imputed to one member of a firm, either he *or* the firm may sue, for it is a reflection on the credit of both.

Harrison v. *Bevington*, 8 C. & P. 708.

Cook and another v. *Batchellor*, 3 Bos. & Pul. 150.

Foster and others v. *Lawson*, 3 Bing. 452 ; 11 Moore, 360.

A married woman, carrying on a separate trade according to the custom of London, or within the meaning of the Married Women's Property Act, 1870, s. 1, may by s. 11 sue without joining her husband for any tort affecting such separate trade or her credit therein.

Summers v. *City Bank*, L. R. 9 C. P. 580 ; 43 L. J. C. P. 261.

IV. *Words actionable only by reason of special damage.*

No other words are actionable without proof of special damage. Thus, to accuse a man of fraud, dishonesty, immorality, or any vicious and dishonourable (but not criminal) conduct, is not actionable, unless it has produced as its natural and necessary consequence some pecuniary loss to the plaintiff.

Illustrations.

Thus the following words are not actionable without proof of special damage :—

"Thou art a scurvey bad fellow."

Fisher v. *Atkinson*, 1 Roll. Abr. 43.

"A rogue, a villain, and a varlet," (for these, and words of the like kind, are to be considered as "words of heat.")

Per Cur. in *Stanhope* v. *Blith*, 4 Rep. 15.

"A runagate rogue."

Cockaine v. *Hopkins*, 2 Lev. 214.

"A common filcher."

Goodale v. *Castle*, Cro. Eliz. 554.

"A cozening knave."

Brunkard v. *Segar*, Cro. Jac. 427 ; Hutt. 13 ; 1 Vin. Abr. 427.

"Welcher."

Blackman v. *Bryant*, 27 L. T. 491.

"You are a swindler."

Savile v. *Jardine*, 2 H. & Bl. 531.

Black v. *Hunt*, 2 L. R. Ir. 10.

"He is a rogue and a swindler ; I know enough about him to hang him."

Ward v. *Weeks*, 7 Bing. 211 ; 4 M. & P. 796.

"He is a rogue, and has cheated his brother-in-law of upwards of £2000."

Hopwood v. *Thorn*, 8 C. B. 293 ; 19 L. J. C. P. 94 ; 14 Jur. 87.

To say "You cheat everybody, you cheated me, you cheated Mr. Saun-

ders," is not actionable unless it be spoken of the plaintiff in the way of his profession or trade.

Davis v. *Miller et ux.*, 2 Str. 1169.

To call a man a "blackleg" is not actionable unless it can be shown that word was understood by the bystanders to mean "a cheating gambler liable to be prosecuted as such."

Barnett v. *Allen*, 3 H. & N. 376; 4 Jur. N. S. 488; 27 L. J. Ex. 412; 1 F. & F. 125.

In an American case the difficulty caused by absence of special damage was surmounted by suing in trespass:—A man who, instead of walking along the street, stops on the pavement opposite the plaintiff's freehold shop using insulting and abusive language towards the plaintiff, and persists in such conduct though requested to move on, is a trespasser, and the jury in an action of trespass may award substantial damages, though no special damages be proved, and although the abusive words be not actionable *per se*; *Adams* v. *Rivers*, 11 Barbour (New York) Reports, 390. For as one of the public he was only entitled to use the highway for passing and repassing. *Dovaston* v. *Payne*, 2 Sm. Lg. Cas. (8th ed.), p. 142. And evidence of his language while committing a trespass is properly admitted to show in what spirit the act was done. *Merest* v. *Harvey*, 5 Taunt. 442. "Where a wrongful act is accompanied by words of contumely and abuse, the jury are warranted in taking that into consideration and giving retributory damages." *Per* Byles, J., in

Bell v. *Midland Ry. Co.*, 10 C. B. N. S. 287, 308; 30 L. J. C. P. 273; 9 W. R. 612; 4 L. T. 293.

Words imputing immoral conduct, profligacy, adultery, &c., even when spoken of one holding an office or carrying on a profession or business, will not be actionable, unless they "touch him" in that office, profession, or business. Thus, if alleged of a beneficed clergyman they will be actionable, because if the charge were true it would be ground for degradation or deprivation, as it would prove him unfit to hold his benefice or to continue in the active duties of his profession. (*Gallwey* v. *Marshall*, 9 Ex. 294; 23 L. J. Ex. 78.) But if the same words were spoken of a trader, or even of a physician or a schoolmistress, they would not be actionable without proof of special damage, as they do not necessarily affect the plaintiff in relation to his trade or profession. The imputation must be connected with the professional duties of the plaintiff.

Illustrations.

Words imputing adultery to a physician were laid to have been spoken "of him in his profession," but there was nothing in the declaration to connect the imputation with the plaintiff's professional conduct. *Held* that the words were not actionable without special damage.

Ayre v. *Craven*, 2 A. & E. 2; 4 N. & M. 220.

To impute prostitution to a schoolmistress is not actionable. *Per* Twisden, J., in

Wharton v. *Brook*, Ventr. 21.

Wetherhead v. *Armitage*, 2 Lev. 233; 2 Show. 18; Freem. 277; 3 Salk. 328.

And words imputing immorality to a trader or his clerk are not actionable without special damage.

Lumby v. *Allday*, 1 Cr. & J. 301; 1 Tyrwh. 217.

Nor are words imputing to a staymaker that his trade is maintained by the prostitution of his shopwoman.

Brayne v. *Cooper*, 5 M. & W. 249.

But now see *Riding* v. *Smith*, 1 Ex. D. 91; 45 L. J. Ex. 281; 24 W. R. 487; 34 L. T. 500.

Words imputing unchastity or adultery to a woman, married or unmarried, however gross and injurious they may be, are not actionable; unless she can prove that they have directly caused her special damage.

As to what constitutes special damage, see the stringent rules laid down in c. X., *post*, pp. 308—333.

The only exception is in the case of actions brought in the local Courts of the city of London, the borough of Southwark (Sid. 97), and it is said of the city of Bristol, for words spoken within the jurisdiction of those Courts. It was formerly the custom in those localities to cart and whip whores, tingling a basin before them. Hence to call a woman "whore" or "strumpet" (*Cook* v. *Wingfield*, 1 Str. 555) or "bawd" (1 Vin. Abr. 396) or her husband a "cuckold" (*Vicars* v. *Worth*, 1 Str. 471) was supposed to be an imputation of a criminal offence to the female plaintiff and therefore actionable. But no action will lie in any of the superior Courts at Westminster for such words, since the custom has never been certified by the Recorder and must therefore be strictly proved. It was found impossible to prove such a custom in 1782, and it would

be still more difficult to do so in the present day. The City Courts used formerly to take judicial notice of their own custom; but I doubt if they would do so now, the custom being entirely extinct. See *Oxford et ux.* v. *Cross* (1599), 4 Rep. 18; *Hassell* v. *Capcot* (1639), 1 Vin. Abr. 395; 1 Roll. Abr. 36; *Cook* v. *Wingfield*, 1 Str. 555; *Watson* v. *Clerke*, Comb. 138, 139; *Stainton et ux.* v. *Jones*, 2 Selw. N. P. 1205 (13th ed.); notes [14] and [96] to 1 Dougl. by Frere, p. 380; *Theyer* v. *Eastwick*, 4 Burr. 2032; *Brand and wife* v. *Roberts and wife*, 4 Burr. 2418; *Rily* v. *Lewis*, 1 Vin. Abr. 396; *Vicars* v. *Worth*, 1 Str. 471; *Hodgkins et ux.* v. *Corbet et ux.* 1 Str. 545; *Roberts* v. *Herbert*, Sid. 97; S. C. nom. *Cans* v. *Roberts*, 1 Keble, 418.

Illustrations.

To say of a young woman that she had a bastard is not actionable without proof of special damage; "because it is a spiritual defamation, punishable in the spiritual court."

Per Holt, C.J., in *Ogden* v. *Turner*, Holt, 40; 6 Mod. 104; 2 Salk. 696.

To call a woman "a whore," or "a strumpet" is not actionable, except by special custom if the action be tried in the cities of London and Bristol. "To maintain actions for such brabling words is against law."

Oxford et ux. v. *Cross* (1599), 4 Rep. 18.

Gascoigne et ux. v. *Ambler*, 2 Ld. Raym. 1004.

Power v. *Shaw*, 1 Wils. 62.

It is not actionable to call a woman a "bawd,"

Hollingshead's Case (1632), Cro. Car. 229.

Hixe v. *Hollingshed* (1632), Cro. Car. 261.

unless it be in the City of London.

Rily v. *Lewis* (1640), 1 Vin. Abr. 396.

The words "You are living by imposture; you used to walk St. Paul's Churchyard for a living,"—spoken of a woman with the intention of imputing that she was a swindler and a prostitute,—are not actionable without special damage.

Wilby v. *Elston*, 8 C. B. 142; 18 L. J. C. P. 320; 13 Jur. 706; 7 D. & L. 143.

So to say of a married man that he has "had two bastards and should have kept them" is not actionable, though it is averred that by reason of such words "discord arose between him and his wife, and they were likely to have been divorced."

Barmund's Case, Cro. Jac. 473.

Salter v. *Browne*, Cro. Car. 436; 1 Roll. Abr. 397.

The defendant told a married man that his wife was "a notorious liar" and "an infamous wretch," and had been all but seduced by Dr. C. of Roscommon before her marriage. The husband consequently refused to live with her any longer. *Held*, no action lay.

Lynch v. *Knight and wife*, 9 H. L. C. 577; 8 Jur. N. S. 724; 5 L. T. 291.

Where the defendant asserted that a married woman was guilty of adultery, and she was consequently expelled from the congregation and bible society of her religious sect, and was thus prevented from obtaining a certificate, without which she could not become a member of any similar society. *Held*, no action lay.

Roberts and wife v. *Roberts*, 5 B. & S. 384; 33 L. J. Q. B. 249; 10 Jur. N. S. 1027; 12 W. R. 909; 10 L. T. 602.

[It does not appear that the case as to excommunication, *Barnabas* v. *Traunter*, 1 Vin. Abr. 396, *ante*, p. 59, was cited to the Court.]

The defendant falsely imputed incontinence to a married woman. In consequence of his words she lost the society and friendship of her neighbours, and became seriously ill and unable to attend to her affairs and business, and her husband incurred expense in curing her, and lost the society and assistance of his wife in his domestic affairs. *Held* that neither husband nor wife had any cause of action.

Allsop and wife v. *Allsop*, 5 H. & N. 534; 29 L. J. Ex. 315; 8 W. R. 449; 6 Jur. N. S. 433; 36 L. T. O. S. 290.

Riding v. *Smith*, 1 Ex. D. 91; 45 L. J. Ex. 281; 24 W. R. 487; 34 L. T. 500.

on slander of woman act.

Our law on this point has often been denounced by learned Judges. "I may lament the unsatisfactory state of our law according to which the imputation by words however gross, on an occasion however public, upon the chastity of a modest matron or a pure virgin, is not actionable without proof that it has actually produced special temporal damage to her," says Lord Campbell, L. C., in *Lynch* v. *Knight and wife*, 9 H. L. C. 593; 5 L. T. 291. "Instead of the word 'unsatisfactory' I should substitute the word 'barbarous,'" says Lord Brougham, p. 594. See also the remarks of Willes, C. J., in *Jones* v. *Herne*, 2 Wils. 87; and of Cockburn, C. J., Compton and Blackburn, JJ., in *Roberts and wife* v. *Roberts*, 5 B. & S. 384; 33 L. J. Q. B. 249; 10 Jur. N. S. 1027; 12 W. R. 909; 10 L. T. 602.

Two explanations may be assigned for the undesirable state of our law on this point. (1.) In the days when our common law was formed, every one was much more accustomed than

they are at present to such gross language, and epithets such as "whore" were freely used as general terms of abuse without seriously imputing any specific act of unchastity. (2.) The spiritual Courts had jurisdiction over such charges, and though they could not award damages to the plaintiff, they could punish the defendant for the benefit of his soul; but all actions in the ecclesiastical Courts for defamatory words were abolished by the 18 & 19 Vict. c. 41, and no attempt was made to substitute any remedy in the ordinary courts of law. In Scotland and in many of the States of America a verbal imputation of unchastity is actionable without proof of special damage.

The hardship is increased by the rules relating to special damage, which are peculiarly stringent in the case of a married woman. That her husband has sustained special damage in consequence of the words will not avail for her. And unless she carry on a separate trade or business of her own under the Married Women's Property Act, 1870, it is almost impossible for her to sustain any special damage to herself, for all her property is in law her husband's. That she loses the society of her friends is no special damage; and in *Lynch* v. *Knight and wife*, 9 H. L. C. 577, Lord Wensleydale denied that the loss of the *consortium* of her husband could constitute special damage. The only object of insisting on proof of special damage is to secure that the plaintiff's reputation has in fact been seriously impaired. And in many of these cases it is clear that this was so. What more convincing proof of loss of reputation could be adduced than the fact proved by Mrs. Roberts that she was expelled from the congregation, and not allowed to continue a member of her religious sect. Yet in that case it was held no action lay. Surely it is high time that some alteration should be made in our law on this point.

All words, if published without lawful occasion, are actionable, if they have in fact produced special damage to the plaintiff, such as the law does not deem too remote. "Any words by which a party has a special damage" are actionable. (Comyn's Digest, Action upon the Case for Defamation, D. 30.) "Undoubtedly all

words are actionable, if a special damage follows." (Per Heath, J., in *Moore* v. *Meagher*, 1 Taunt. 44.)

It is usual to qualify the generality of the above rule by adding a proviso, "provided the words themselves be in their nature defamatory." But as "defamatory words" have at the commencement of this chapter been defined as "words which in any given case have appreciably injured the plaintiff's reputation," I do not like to use the phrase "words in their nature defamatory." It is not defamatory to say of a pork butcher, "he knows no law: he cannot draw a lease;" it is defamatory so to speak of a solicitor. You cannot therefore lay down *a priori* any hard and fast rule as to which words are in their nature defamatory, and which are not so. Each case must depend on its own circumstances.

No doubt in an action of defamation the words must be defamatory. If that be all that is meant by the above proviso, I will gladly incorporate it into the above rule together with my definition of words defamatory: when the rule would run thus:—"All words, if published without lawful occasion, are actionable, if it be proved, by evidence of special damage not too remote, that they have in fact injured the plaintiff's reputation; and in such cases the action is called an action of defamation" (using that phrase to include both libel and slander). The converse of this rule will be "No words can be the subject of an action of defamation, however maliciously published, and although they have caused actual damage to the plaintiff, unless it is also proved that the plaintiff's reputation has in fact been thereby injured."

But though an action of defamation will not lie, it by no means follows that some other action will not lie. Wherever a defendant speaks words of whatever nature, maliciously intending to do some injury to the plaintiff thereby, and the words have their desired effect and do actually produce damage to the plaintiff, here there is that actionable "concurrence of loss and injury," spoken of by Lord Campbell, L. C., in *Lynch* v. *Knight and wife*, 9 H. L. C. 589; and an ordinary action on the case will lie, if not an action of libel or slander.

The head-note in *Kelly* v. *Partington*, 5 B. & Ad. 645, is the direct traverse of the above proposition:—"Held that the words were not defamatory in their nature, and therefore not actionable, even though followed by special damage." But *Kelly* v. *Partington* is, if I may say so, a silly case. It turned on a slip in the pleadings. The defendant said of the plaintiff, "She secreted 1*s.* 6*d.* under the till," and then added significantly "These are not times to be robbed." This was clearly an insinuation of felony. Verdict for the plaintiff, damages 1*s.* On taxation the master declined to allow the plaintiff more costs than damages. The plaintiff's counsel, Sir John Campbell, S. G., thereupon argued that the second count was not actionable without proof of special damage; and succeeded in getting a rule for his costs. For it turned out that the pleader had run the words together so that it appeared on the record that the charge against the plaintiff was this: "She secreted 1*s.* 6*d.* under the till; stating, these are not times to be robbed." There was no innuendo stating whose money it was, but there was an allegation of special damage that in consequence one Stenning had refused to take the plaintiff into his service. The Court was therefore pleased to take the words as spoken in praise of the plaintiff, *i.e.*, as importing merely that the plaintiff exercised great caution and was very careful of her own money, even of small amounts of it. Sir James Scarlett took advantage of this flaw and succeeded in arresting judgment. For it followed, of course, that Stenning's refusal to take the plaintiff into his service, because the defendant had praised her, was unreasonable, and *not* the natural or necessary consequence of the defendant's words. And the only *decision* in the case was that the special damage was too remote; and a very harsh decision this seems to be, in these days when pleadings are so easily amended. The Solicitor General could not now go back and argue that the words amounted to a charge of felony and were actionable *per se;* for on the argument of the previous rule he had been only too successful in proving that the words were not actionable without proof of special damage. He was driven therefore to contend that, if praise produced special damage, praise was actionable; an argument with which the Court appeared much amused. Littledale, J.,

puts him a case (p. 648), "Suppose a man had a relation of a penurious disposition, and a third person knowing that it would injure him in the opinion of that relation, tells the latter a generous act which the first had done, by which he induces the relation not to leave him money, would that be actionable?" And Sir John Campbell answers, "If the words were spoken falsely with intent to injure, they would be actionable." And surely he is right; though one sees the strange position the plaintiff would be compelled to adopt. He would have to come forward in Court and declare, "I am not generous, I am really very mean." It would be difficult also to prove the intent with which the words were spoken. But if a malicious intent be clear, the damage is not too remote, for the defendant contemplated it; and the speaking of the words was wrongful because done maliciously, falsely, and with intent to injure the plaintiff; so here is *et damnum et injuria*. Lord Denman's judgment, be it observed, turned almost entirely on the absence of any innuendo; that of Taunton, J., on the remoteness of the damage; while Littledale and Patteson, JJ., concurred in a proposition, which, with all submission, I cannot understand, that "to make the speaking of the words wrongful, they must in their nature be defamatory," p. 651. If in a small country town where political or religious feeling runs very high, I maliciously disseminate a report, false to my knowledge, that a certain tradesman is a radical or a dissenter, knowing that the result will be to drive away his customers, and intending and desiring that result, then, if such result follows, surely I am liable for damages in an action on the case, if not in an action of slander. And yet such words are not in their nature defamatory; for many, I understand, glory in such titles. This decision (or *dictum*) in *Kelly* v. *Partington*, was approved and adopted in *Sheahan* v. *Ahearne*, 9 Ir. Rep. C. L. 412 (1875). But there, too, this was not the real ground of the judgment of the Court; their decision turned on a variance between the words as pleaded and the evidence at the trial. In *Miller* v. *David*, L. R. 9 C. P. 126; 43 L. J. C. P. 84; 22 W. R. 332; 30 L. T. 58, on the other hand, the Court treat the point as still, at least, an open question:—"It is not necessary to consider the question which was suggested on the argument,

whether words not in themselves actionable or defamatory, spoken under circumstances and to persons likely to create damage to the subject of the words, are, when the damage follows, ground of action. The judgment of Lord Wensleydale in *Lynch* v. *Knight and wife*, 9 H. L. C. 600, appears in favour of the affirmative of this question. But it is not necessary for us, for the reasons given, to express any opinion upon it." Again, in *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.*, L. R. 9 Exch. 223; 43 L. J. Ex. 171; Pollock, B., cites with approval and acts upon "the general rule laid down as to such actions in Comyns' Digest, where it is said that an action lies when special damage is shown." So, too, in *Riding* v. *Smith*, 1 Ex. Div. 96, Huddleston, B., says, "The declaration when amended would stand thus: that the plaintiff carried on business as a grocer and draper, and was assisted in the conduct of his business by his wife, and that the defendant falsely and maliciously published of the plaintiff's wife in relation to the business that she had committed adultery, whereby the plaintiff was injured in his business and sustained special damage. I think it clear that on a declaration so framed an action might be maintained." The name of the wife as a party to the action had been previously struck out; and the words were not defamatory of the husband, for they in no way refer to him. And in the same case (p. 94), Kelly, C. B., says, "Here the statement was that the wife of the plaintiff was guilty of adultery, and it is the natural consequence of such a statement that persons should cease to resort to the shop. Supposing the statement made not to be slander, but something else calculated to injure the shopkeeper in the way of his trade, as for instance a statement that one of his shopmen was suffering from an infectious disease, such as scarlet fever, this would operate to prevent people coming to the shop; and whether it be slander or some other statement which has the effect I have mentioned, an action can, in my opinion, be maintained on the ground that it is a statement made to the public which would have the effect of preventing their resorting to the shop and buying goods of the owner." And see *Level's case*, Cro. Eliz. 289, *ante*, p. 77; and *Green* v. *Button*, 2 C. M. & R. 707, *post*, p. 149.

I conclude, therefore, that if a defendant either knows or

ought to know that certain special damage will follow from his words, and speaks those words, desiring and intending that such damage shall follow, or recklessly indifferent whether such damage follows or not therefrom, then if the words be false, and if such damage does in fact follow directly from their use, an action on the case will lie against him for such damage, whatever be the nature of the words.

CHAPTER III.

CONSTRUCTION AND CERTAINTY.

CONSTRUCTION is the correct interpretation of words, the giving them their true meaning, the method of ascertaining the sense in which they were understood by those who first heard or read them.

What meaning the speaker *intended* to convey is immaterial in all actions of defamation. He may have spoken without any intention of injuring the plaintiff's reputation, but if he has in fact done so, he must compensate the plaintiff. He may have meant one thing and said another: if so, he is answerable for so inadequately expressing his meaning. Or he may have used ambiguous language which to his mind was harmless, but to which the bystanders attributed a most injurious meaning: if so he is liable for the injudicious phrase he selected. What was passing in his own mind is immaterial, save in so far as his hearers could perceive it at the time. Words cannot be construed according to the *secret* intent of the speaker. (*Hankinson* v. *Bilby*, 16 M. & W. 445; 2 C. & K. 440.)

The question is always: How would ordinary Englishmen, previously unacquainted with the matter, fairly understand the words? We must assume that they give to ordinary English words their ordinary English meaning, to local or technical phrases their local and technical meaning. That being done, what meaning

would the whole passage convey to an unbiassed mind?

This is clearly rather a question for the jury than for the judge. And accordingly by the 32 Geo. 3, c. 60 (Fox's Libel Act) it is expressly provided that in all criminal proceedings for libel, the jury are to decide the question of libel or no libel, subject to the direction of the judge. In civil proceedings for libel, the practice is the same (*Baylis* v. *Lawrence*, 11 A. & E. 920; 3 Perry & D. 526, 4 Jur. 652), save that here if the judge thinks that the words cannot possibly bear a defamatory meaning, he may shorten the proceedings by a nonsuit. "It is only when the judge is satisfied that the publication *cannot* be a libel, and that, if it is found by the jury to be such, their verdict will be set aside, that he is justified in withdrawing the question from their cognizance." (*Per* Kelly, C. B., L. R. 4 Exch. 288; and see *Fray* v. *Fray*, 17 C. B. N. S. 603; 34 L. J. C. P. 45; 10 Jur. N. S. 1153; *Teacy* v. *McKenna*, Ir. R. 4 C. L. 374; *Hunt* v. *Goodlake*, 43 L. J. C. P. 54; 29 L. T. 472.)

If, however, the judge considers that words are reasonably susceptible of a defamatory meaning as well as an innocent one, it will then be a question for the jury which meaning the words would convey to ordinary Englishmen who heard or read them without any previous knowledge of the circumstances to which they relate. (*Hankinson* v. *Bilby*, 16 M. & W. 442; 2 C. & K. 440.) The judge is in no way bound to state to the jury his own opinion on the point; it would, in fact, be wrong for him to lay down as a matter of law, that the publication complained of was, or was not, a libel. (*Baylis* v. *Lawrence*, 11 A. & E. 920.) The proper course is for the judge to define what is a libel in point of law, and to leave it to the jury to say whether the publica-

tion in question falls within that definition. (*Parmiter* v. *Coupland and another*, 6 M. & W. 105; 9 L. J. Ex. 202; 4 Jur. 701.) And this is a question pre-eminently for the jury; whichever way they find, the Court will not disturb the verdict, if the question was properly left to them.

So too in cases of slander, the judge usually decides whether the words are, or are not, actionable *per se*, and whether the special damage assigned is, or is not, too remote. If the defendant's words cannot reasonably bear the meaning ascribed to them by the innuendo, and the judge thinks the words without that meaning are not actionable, he will stop the case. So, too, if the words even with the alleged meaning are not actionable (though pleaders seldom err on that side). But in all other cases, where there is any reasonable doubt as to the true construction of the words, the judge leaves the question to the jury. All circumstances which were apparent to the bystanders at the time the words were uttered should be put in evidence, so as to place the jury as much as possible in the position of such by-standers; and then it is for the jury to say what meaning such words would fairly have conveyed to their minds. And their finding is final and conclusive on the point; the Court will not disturb the verdict, unless it be plainly perverse.

Formerly, however, the practice was very different. After a verdict for the plaintiff, the defendant constantly moved in arrest of judgment, on the ground that a defamatory meaning was not shown on the record with sufficient precision; or, as it soon came to be, on the ground that it was just possible, in spite of the record, to give the words an innocent construction. For it was said to be a maxim that words were to be taken *in mitiori sensu*, whenever there were two senses in which they could be taken. And in these early times the Courts thought it their

duty to discourage actions of slander. They would therefore give an innocent meaning to the words complained of, if by any amount of legal ingenuity such a meaning could be put upon them; and would altogether disregard the plain and obvious signification which must have been conveyed to bystanders ignorant of legal technicalities. Thus where a married woman falsely said, "You have stolen my goods," and the jury found a verdict for the defendant, the Court entered judgment for the plaintiff on the ground that a married woman could have no goods of her own, and that therefore the words conveyed no charge of felony (*Anon.* Pasch. 11 Jac. I.; 1 Roll. Abr. 746; now overruled by *Stamp and wife* v. *White and wife*, Cro. Jac. 600). Again, where the words complained of were, "He hath delivered false evidence and untruths in his answer to a bill in Chancery," it was held that no action lay; for though every answer to a bill in Chancery was on oath, and was a judicial proceeding, still in most Chancery pleadings "some things are not material to what is in dispute between the parties," and "it is no perjury, although such things are not truly answered!" *Mitchell* v. *Brown*, 3 Inst. 167; 1 Roll. Abr. 70. For further instances of such refinements, see *Peake* v. *Pollard*, Cro. Eliz. 214; *Cox* v. *Humphrey*, *ib.* 889; and *Holland* v. *Stoner*, Cro. Jac. 315.

But in the days of Charles II., the Court of Common Pleas decided in a case of *scandalum magnatum* (*Lord Townshend* v. *Dr. Hughes*, 2 Mod. 159) that "words should not be construed either in a rigid or mild sense, but according to the general and natural meaning, and agreeable to the common understanding of all men." And this decision soon became law. See *Somers* v. *House*, Holt 39; and *Burges* v. *Bracher*, 8 Mod. 238. In 1722, Fortescue, J., declared in *Button* v. *Hayward et ux.*, 8 Mod. 24:—"The maxim for expounding words *in mitiori sensu*, has for a great while been exploded, near fifty or sixty years." In *Peake* v. *Oldham*, Cowper, 277, 8, Lord Mansfield commented severely on the constant practice of moving in arrest of judgment after verdict found:—"What? After verdict, shall the Court be guessing and inventing a mode in which it might be barely possible for these words to have been spoken by the defendant, without meaning to charge the plaintiff with being guilty of murder? Certainly not. Where

it is clear that words are defectively laid, a verdict will not cure them. But where, from their general import, they appear to have been spoken with a view to defame a party, the Court ought not to be industrious in putting a construction upon them, different from what they bear in the common acceptation and meaning of them." And his Lordship quoted a *dictum* of Parker, C. J., in *Ward* v. *Reynolds*, Pasch. 12 Anne B. R. to the same effect. So in *Harrison* v. *Thornborough*, 10 Mod. 197; the Court says:—"The rule 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." See also the remarks of De Grey, C.J., in *R.* v. *Horne*, 2 Cowp. 682—689; of Buller, J., in *R.* v. *Watson and others*, 2 T. R. 206; and the judgments in *Woolnoth* v. *Meadows*, 5 East, 463; 2 Smith, 28.

And such is now the law. The Courts no longer strain to find an innocent meaning for words *primâ facie* defamatory, neither will they put a forced construction on words which may fairly be deemed harmless. "Formerly," says Lord Ellenborough in 2 Camp. 403, "it was the practice to say that words were to be taken in the more lenient sense; but that doctrine is now exploded: they are not to be taken in the more lenient or more severe sense, but in the sense which fairly belongs to them."

And, again, in *Roberts* v. *Camden*, 9 East, 95; the same learned judge says:—"The rule which once prevailed that words are to be understood *in mitiori sensu* has been long ago superseded; and words are now to be 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." Now, therefore, the only question for the judge or the Court is whether the words are *capable* of the defamatory meaning attributed to them; if they are, then it is for the jury to decide what is in fact the true construction.

So long as the defendant's words are not absolutely unintelligible, a jury will judge of the meaning as well as other readers or hearers. All perplexity and obscurity will disappear under the narrow examination which the

words will receive in a court of law. It matters not whether the defamatory words be in English or in any other language that is understood in England, whether they be spelt correctly or incorrectly, whether the phrase be grammatical or not, whether cant or slang terms be employed or the most elegant and refined diction. (*R.* v. *Edgar*, 2 Sess. Cas. 29; 5 Bac. Abr. 199.) The insinuation may be indirect, and the allusion obscure; it may be put as a question or as an "on dit"; the language may be ironical, figurative, or allegorical. Still, if there be a meaning in the words at all, the Court will find it out, even though it be disguised in a riddle or in hieroglyphics. In all such cases it will be a question for the jury what meaning would the bystanders put upon the words.

And before answering that question the jury should well weigh all the circumstances of the case, the occasion of speaking, the relationship between the parties, &c. Especially they should consider the words as a whole, not dwelling on isolated passages, but giving its proper weight to every part. The sting of a libel may sometimes be contained in a word or sentence placed as a heading to it. The defendant will often be held liable merely in consequence of such prefix, where, without it, he would have had a perfect answer to the action. So, too, a word added at the end may altogether vary the sense of the preceding passage. The defendant is, therefore, entitled to have the whole of the alleged libel read as part of plaintiff's case. (*Cooke* v. *Hughes*, R. & M. 112.) And for the purpose of showing that the publication is no libel, the defendant in his turn may give in evidence other passages in the same publication plainly referring to the subject of the libel, and fairly connected with it, in order to prove that his intention was not such as was imputed to him, and that the expressions in dispute

will not bear the construction sought to be given them. (*R.* v. *Lambert and Perry*, 2 Camp. 400; 31 Howell St. Tr. 340.) But according to Pollock, C.B., in *Darby* v. *Ouseley*, 25 L. J. Ex. 229; 1 H. & N. 1; 2 Jur. N. S. 497, it is essential that such other passages should be connected with, construe, modify, control, qualify, or explain the alleged libellous statements, and be entirely relevant to them.

So, too, with a slander; very often the words immediately preceding or following may much modify those relied on by the plaintiff. (*Bittridge's case*, 4 Rep. 19; *Thomson* v. *Bernard*, 1 Camp. 48.) Evidence may even be given of other libels or slanders published by the defendant of the plaintiff, when the language sued on is ambiguous, and some extrinsic evidence is necessary to explain it; but such evidence is not admissible where the meaning of the words is clear and undisputed. (*Stuart* v. *Lovell*, 2 Stark. 93; *Pearce* v. *Ornsby*, 1 M. & Rob. 455; *Symmons* v. *Blake*, *ib.* 477; 2 C. M. & R. 416; 4 D. P. C. 263; 1 Gale, 182; *Traill* v. *Denham*, *Times* for May 4th, 1880.) And when such evidence is admitted, the jury should always be cautioned not to give any damages in respect of it. (*Per* Tindal, C.J., in *Pearson* v. *Lemaitre*, 5 M. & Gr. 720; 12 L. J. Q. B. 253; 7 Jur. 748; 6 Scott, N. R. 607.)

Illustrations.

The *Observer* gave a correct account of some proceedings in the Insolvent Debtors' Court, but it was headed "Shameful Conduct of an Attorney." The rest of the report was held privileged; but the plaintiff recovered damages for the heading.

Clement v. *Lewis*, 3 Br. & B. 297; 7 Moore, 200; 3 B. & Ald. 702. And see *Mountney* v. *Watton*, 2 B. & Ad. 673.

Bishop v. *Latimer*, 4 L. T. 775.

Boydell v. *Jones*, 4 M. & W. 446; 7 D. P. C. 210; 1 H. & H. 408.

Harvey v. *French*, 1 Cr. & M. 11; 2 M. & Scott, 591; 2 Tyr. 585.

Lewis v. *Levy*, E. B. & E. 537; 27 L. J. Q. B. 282; 4 Jur. N. S. 970.

Street v. *Licensed Victuallers Society*, 22 W. R. 553.

Stanley v. *Webb*, 4 Sandf. (N. Y.) 21.

An action was brought for an alleged libel, published in the *True Sun* 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" was only added for the purpose of making an argument at a future day, then it would not take away the effect of the libel. Verdict for the plaintiff. Damages, one farthing.

Hunt v. *Algar*, 6 C. & P. 245.

Of the Innuendo.

In arriving at the meaning of the defendant's words, the Court and jury are often materially assisted by an averment in the plaintiff's Statement of Claim, called an *innuendo*. This is a statement by the plaintiff of the construction which he puts upon the words himself, and which he will endeavour to induce the jury to adopt at the trial. Where a defamatory meaning is apparent on the face of the libel itself, no innuendo is necessary : though even there the pleader occasionally inserts one to heighten the effect of the words. But where the words *primâ facie* are not actionable, an innuendo is essential to the action. It is necessary to bring out the latent injurious meaning of the defendant's words; and such innuendo must distinctly aver that the words bear a specific actionable meaning. (*Cox* v. *Cooper*, 12 W. R. 75; 9 L. T. 329.)

It is the office of an innuendo to define the defamatory meaning which the plaintiff sets on the words; to show

how they come to have that defamatory meaning; and also to show how they relate to the plaintiff, whenever that is not clear on the face of them. But an innuendo may not introduce new matter, or enlarge the natural meaning of words. It must not put upon the defendant's words a construction which they will not bear. If the words are *incapable* of the meaning ascribed to them by the innuendo, and are *primâ facie* not actionable, the declaration will be held bad on demurrer; or if there be no demurrer, the judge at the trial will stop the case. If, however, the Court or the judge think the words are *capable* of the meaning ascribed to them, however improbable it may appear that they were in fact so understood, then it must be left to the jury to say whether such is or is not their true meaning. (*Hunt* v. *Goodlake*, 43 L. J. C. P. 54; 29 L. T. 472; *Broome* v. *Gosden*, 1 C. B. 728.)

An innuendo now requires no prefatory averment to support it. (Common Law Procedure Act, 1852, s. 61.) The libel or slander sued on must of course be set out *verbatim* in the Statement of Claim. (*Harris* v. *Warre*, 4 C. P. D. 125; 48 L. J. C. P. 310; 27 W. R. 461; 40 L. T. 429.) The innuendo usually follows it immediately. And such a declaration is to be considered as two counts under the old system of pleading, one with an innuendo and one without. And if the plaintiff can show a good cause of action, either with or without the alleged meaning, his statement of claim will be sufficient. (*Per* Blackburn, J., in *Watkin* v. *Hall*, L. R. 3 Q. B. 402; 37 L. J. Q. B. 125; 16 W. R. 857; 18 L. T. 561.)

The defendant is in no way embarrassed by the presence of the innuendo in the Statement of Claim: in fact it is to him an advantage. He can either deny that he ever spoke the words, or he can admit that he spoke them, but deny that they conveyed that meaning. He can also assert that the words he spoke were true, either

with or without the alleged meaning. It will then be for the jury to say whether the plaintiff's construction of the words is borne out by the evidence. If not, the plaintiff may fall back upon the words themselves, and urge that, taken in their natural and obvious signification, they are actionable *per se* without the alleged meaning, and that therefore his unproved innuendo may be rejected as surplusage. (*Harvey* v. *French*, 1 Cr. & M. 11; 2 M. & Scott, 591; 2 Tyrw. 585.) But he cannot at the close of the trial resort to another construction of the words different both from their *primâ facie* meaning and from that pointed by the innuendo; if he win a verdict in this way, the Court will grant a new trial on the ground of surprise. (*Hunter* v. *Sharpe*, 4 F. & F. 983; 15 L. T. 421; *Ruel* v. *Tatnell*, 29 W. R. 172; 43 L. T. 507.) The plaintiff cannot in the middle of the case start a fresh innuendo not on the record; he must abide by the construction he put on the words in his Statement of Claim, or else rely on their natural and obvious import. If the jury negative his innuendo, and the words are not actionable in their natural and primary sense, judgment must be for the defendant. (*Brembridge* v. *Latimer*, 12 W. R. 878; 10 L. T. 816; *Maguire* v. *Knox*, 5 Ir. C. L. R. 408.)

Illustrations.

"He hath forsworn himself." These words are not in themselves a sufficient imputation of perjury, because he is not said to have sworn falsely while giving evidence in Court. But an innuendo "before the justice of assize" is clearly bad; for it is not an *explanation* of defendant's words, but an *addition* to them.

Anon. 1 Roll. Abr. 82.

Holt v. *Scholefield*, 6 T. R. 691.

A libel alleged that a gentleman was on a certain night hocussed and robbed of £40, in the plaintiff's public-house. An innuendo "meaning thereby that the said public-house was the resort of, and frequented by, felons, thieves, and depraved and bad characters," after verdict for the defendant, was held too wide.

Broome v. *Gosden*, 1 C. B. 728.

Clarke's Case de Dorchester (1619), 2 Rolle's Rep. 136.

"There is strong reason for believing that a considerable sum of money was transferred by power of attorney obtained by undue influence;" an innuendo "meaning as a fact that the plaintiff had by undue influence procured the money to be transferred," was held not too wide; for such would be the meaning conveyed to readers by the defendant's insinuation.

Turner v. *Meryweather*, 7 C. B. 251; 18 L. J. C. P. 155; 13 Jur. 683; 19 L. J. C. P. 10.

Williams v. *Gardiner*, 1 M. & W. 245; 1 Tyrw. & Gr. 578.

Libel complained of:—"He has become so inflated with self-importance by the few hundreds made in my service—God only knows whether honestly or otherwise—that," &c. Innuendo, "meaning thereby to insinuate that the plaintiff had conducted himself in a dishonest manner in the service of the defendant." The Court refused to disturb a verdict for the plaintiff.

Clegg v. *Laffer*, 3 Moore & Sc. 727; 10 Bing. 250.

The defendant said, "Master Barham did burn my barn with his own hands, and none but he." At that date it was not felony to burn a barn, unless it were either full of corn or parcel of a mansion-house. An innuendo, "a barn full of corn," was held too wide. "That is not," says De Grey, C. J., commenting on this case in Cowp. 684, "an *explanation* of what was said before, but an *addition* to it. But if in the introduction it had been averred, that the defendant had a barn full of corn, and that in a discourse about the barn, the defendant had spoken the words charged in the libel of the plaintiff; an innuendo of its being the barn full of corn would have been good. For by coupling the innuendo in the libel with the introductory averment, 'his barn full of corn,' it would have made it compleat."

Barham's Case, 4 Rep. 20: Yelv. 21.

See *Capital and Counties Bank* v. *Henty and Sons*, 28 W. R. 490; 5 C. P. D. 514; 49 L. J. C. P. 830; 42 L. T. 314; (C. A.) 28 W. R. 851.

Words complained of:—"He is a regular prover under bankruptcies." An innuendo, "the defendant meaning thereby that the plaintiff had proved and was in the habit of proving fictitious debts against the estates of bankrupts, with the knowledge that such debts were fictitious," is now all that is necessary.

C. L. P. Act, 1852, Sched. B., form 33.

Not so formerly.

Angle v. *Alexander*, 7 Bing. 119; 1 Cr. & J. 143; 1 Tyrw. 9; 4 M. & P. 870, *ante*, p. 78.

The alleged libel was as follows:—"Notice,—any person giving information where any property may be found belonging to H. G. (meaning the plaintiff), a prisoner in the King's Bench prison, but residing within the rules thereof, shall receive five per cent. upon the goods recovered, for their trouble, by applying at Mr. L.," &c. Innuendo, that the plaintiff had been and was guilty of concealing his property with a fraudulent and unlawful intention. *Held*, on general demurrer, that the innuendo, unsup-

ported by any prefatory averment, was too large; and that the words, in themselves, were not actionable.

Gompertz v. *Levy*, 9 A. & E. 282; 2 Jur. 1013; 1 P. & D. 214; 1 W. W. & H. 728.

Wheeler v. *Haynes*, 9 A. & E. 286, note; 1 W. W. & H. 645; 1 P. & D. 55.

Capel and others v. *Jones*, 4 C. B. 259; 11 Jur. 396.

Day v. *Robinson*, 1 A. & E. 554; 4 N. & M. 884.

Adams v. *Meredew*, 2 Y. & J. 417; 3 Y. & J. 219.

But all these cases are overruled by the C. L. P. Act, 1852, s. 61, as interpreted in

Hemmings v. *Gasson*, E. B. & E. 346; 27 L. J. Q. B. 252; 4 Jur. N. S. 834.

An information was filed against a Nonconformist minister for a libel upon "the bishops" contained in a book, called "A Paraphrase upon the New Testament." An innuendo, "the bishops *of England*," was held to be allowable, if from the nature of the libel this was clearly what was meant.

R. v. *Baxter* (1685), 3 Mod. 69.

The libel accused a gentleman of saying, "He could see no probability of the war's ending with France, until the little gentleman on the other side of the water was restored to his rights." Innuendo, "the Prince of Wales," allowed to be good; in fact the Court thought the meaning was clear without any innuendo.

Anon. (1707), 11 Mod. 99.

R. v. *Matthews* (1719), 15 How. St. Tr. 1323.

Libel:—"The mismanagements of the navy have been a greater tax upon the merchants than the duties raised by government." An innuendo, "the royal navy of this kingdom," held not too wide.

R. v. *Tutchin* (1704), 14 How. St. Tr. 1095; 5 St. Tr. 527; 2 Ld. Raym. 1061; Salk. 50; 6 Mod. 268.

R. v. *Horne* (1777), Cowp. 672; 11 St. Tr. 264; 20 How. St. Tr. 651.

Words may be:—

(1) obviously defamatory;

(2) ambiguous: that is, words which, though *primâ facie* defamatory, are still on the face of them susceptible of an innocent meaning;

(3) neutral; *i.e.*, words which are meaningless till some explanation is given; such are slang expressions, words in a foreign language, words used in some special, local, technical, or customary sense;

(4) *primâ facie* innocent; but capable of a defamatory meaning;

(5) Obviously innocent; words which *cannot* be construed so as to convey any imputation on the plaintiff.

To these different classes of words special rules of pleading, evidence, and construction apply.

1. *Words obviously defamatory.*

Here no innuendo is necessary. No parol evidence is admissible at the trial to explain the meaning of the words. The judge will direct the jury as a matter of law that the words are actionable, and that they must find for the plaintiff. The defendant cannot be heard to say that he did not intend to injure the plaintiff's reputation, if he has in fact done so. Should the jury perversely refuse to follow the judge's direction, a new trial will be granted. (*Levi* v. *Milne*, 4 Bing. 195; 12 Moore 418.)

But the defendant may plead circumstances which made it clear at the time he spoke or wrote that the words were not used in their ordinary signification. He may thus take the words out of this class into class 2, words *primâ facie* defamatory. It will then be a question for the jury how the bystanders understood the words. But such question only arises where the words are susceptible of the innocent meaning which the defendant seeks to place on them, and where also the circumstances which qualify the injurious words were known to the bystanders at the time.

Illustrations.

It is libellous, without any innuendo, to write and publish that a newspaper has a separate page devoted to the advertisements of usurers and quack doctors, and that the editor takes respectable advertisements at a cheaper rate if the advertisers will consent to their appearing in that page. The Court, however, expressed surprise at the absence of some such innuendo as "meaning thereby that the plaintiff's paper was an ill-conducted and low-class journal."

Russell and another v. *Webster*, 23 W. R. 59.

Where a libel called the plaintiff a "truckmaster," and the defendant justified; but no evidence was given at the trial as to the meaning of the word; the Court held after some hesitation that, though the word was not to be found in any English dictionary, its meaning was sufficiently clear to sustain the action, there being a statute called "The Truck Act."

Homer v. *Taunton*, 5 H. & N. 661; 29 L. J. Ex. 318; 8 W. R. 499; 2 L. T. 512.

To write and publish that a certain woman is a prostitute, and that "she is, I understand, under the patronage or protection of" the plaintiff, was held actionable in the Court of Appeals in New York, although there was no innuendo averring that she was under the plaintiff's protection for immoral purposes.

More v. *Bennett* (1872), 48 N. Y. R. (3 Sickel), 472;

reversing the judgment of the Supreme Court below, reported, 33 How. Pr. R. 180; 48 Barbour, N. Y. 229.

It is libellous to write and publish these words:—"Threatening letters. The Middlesex grand jury have returned a true bill against a gentleman of some property named French." And no innuendo is necessary to explain the meaning of the words; for they can only import that the grand jury had found a true bill against French for the misdemeanour of sending threatening letters.

Harvey v. *French*, 1 Cr. & M. 11; 2 M. & Scott, 591; 2 Tyrw. 585.

Allegorical terms of well-known import are libellous *per se*, without innuendoes to explain their meaning; *e.g.*, imputing to a person the qualities of the "frozen snake," or calling him "Judas."

Hoare v. *Silverlock* (No. 1, 1848), 12 Q. B. 624; 17 L. J. Q. B. 306; 12 Jur. 695.

Words complained of:—"Thou art a thief:" no innuendo at all is necessary, as larceny is clearly imputed.

Blumley v. *Rose*, 1 Roll. Abr. 73.

Slowman v. *Dutton*, 10 Bing. 402.

If the words can be understood as imputing an indictable offence, no innuendo is necessary. And, if it were, an innuendo, "meaning thereby that the plaintiff had been guilty of an indictable offence," is sufficient without specifying what particular indictable offence is meant.

Kinnahan v. *McCullagh*, Ir. R. 11 C. L. 1.

Saunders v. *Edwards*, Sid. 95.

Francis v. *Roose*, 3 M. & W. 191; 1 H. & H. 36.

To say, "He robbed John White," is *primâ facie* clearly actionable. But the defendant may show, if he can, that that is not the sense in which they were fairly understood by bystanders who listened to the whole conversation, though previously unacquainted with the matter to which the words sued on relate.

Tomlinson v. *Brittlebank*, 4 B. & Adol. 630; 1 Nev. & Man. 455.

Hankinson v. *Bilby*, 16 M. & W. 442; 2 C. & K. 440.

Martin v. *Loeï*, 2 F. & F. 654.

2. *Words* primâ facie *defamatory.*

Here, too, no innuendo is necessary, and no parol evidence is admissible at the trial to explain the meaning of the words. The judge will direct the jury that the words are *primâ facie* actionable.

But the defendant may plead circumstances which made it clear at the time that the words were not used by him in their ordinary signification. He may plead that the words were uttered merely in a joke, and were so understood by all who heard them; or that the words were part of a longer conversation, the rest of which limits and explains the words sued on; or any other facts which tend to show that they were uttered with an innocent meaning, and so understood by the bystanders. And if such a defence be pleaded, parol evidence may be given of the facts alleged. And then it becomes a question for the jury whether the facts as pleaded are substantially proved, and whether they do put on the words a colour different from what they would *primâ facie* bear. It is generally difficult, however, to induce the jury to adopt the defendant's harmless view of his own language.

But the defendant may not plead or give in evidence any facts which were not known to the bystanders at the time the words were uttered. The defendant's secret intent in uttering the words is immaterial. (*Hankinson* v. *Bilby*, 16 M. & W. 445; 2 C. & K. 440.)

The defendant is allowed thus to give evidence of all "the surrounding circumstances," in order to place the jury so far as possible in the position of bystanders, that they may judge how the words would be understood on the particular occasion. But though evidence of such extrinsic facts is admitted, parol evidence merely to explain away the words used, to show that they did not for once bear their ordinary signification, is inadmissible. A witness cannot be called to say "*I* should not

have understood defendant to make any imputation whatever on the plaintiff." The jury know what ordinary English means, and need no witness to inform them.

The leading case on this point is one cited in the *Lord Cromwell's Case* (1578), 4 Rep. 13, 14. (At least, it appears to be a decided case, not a mere illustration.) "If a man brings an action on the case for calling the plaintiff murderer, the defendant will say, that he was talking with the plaintiff concerning unlawful hunting, and the plaintiff confessed that he killed several hares with certain engines; to which the defendant answered and said, "Thou art a murderer" (innuendo the killing of the said hares). . . . . Resolved by the whole Court, that the justification was good. For in case of slander by words, the sense of the words ought to be taken, and the sense of them appears by the cause and occasion of speaking of them; for *sensus verborum ex causâ dicendi accipiendus est et sermones semper accipiendi sunt secundum subjectam.* . . . And it was said, God forbid that a man's words should be by such strict and grammatical construction taken by parcels against the manifest intent of the party upon consideration of all the words, which import the true cause and occasion which manifest the true sense of them; *quia quæ ad unum finem loquuta sunt, non debent ad alium detorqueri:* and, therefore, in the said case of murder, the Court held the justification good; and that the defendant should never be put to the general issue, when he confesses the words and justifies them, or confesses the words, and by special matter shows that they are not actionable."

Illustrations.

Words complained of:—"You stole my apples." The defendant cannot be allowed to state that he only meant to say, "You have tortiously removed my apples under an unfounded claim of right." The bystanders could not possibly have understood from the word used that a civil trespass only was imputed.

Deverill v. *Hulbert* (Jan. 25th, 1878), *ex relatione mea.*

But where the words complained of are, "Thou art a thief; for thou tookest my beasts by reason of an execution, and I will hang thee," no action lies, for it is clear that the whole sentence taken together imports only a charge of trespass.

Wilk's Case, 1 Roll. Abr. 51.

Sibley v. *Tomlins*, 4 Tyrw. 90.

Where words are used which clearly import a criminal charge (as, "You thief," or "You traitor,") it is still open to the defendant to show if he can that he used them merely as vague terms of general abuse, and that the bystanders must have understood him as meaning nothing more than "You rascal," or "You scoundrel." When such words occur in a string of non-actionable epithets, or in a torrent of general vulgar abuse, the jury may reasonably infer that no felony was seriously imputed. If, however, the jury put the harsher construction on defendant's language, no new trial will be granted; for it is a question entirely for them.

Minors v. *Leeford*, Cro. Jac. 114.
Smith v. *Ward*, Cro. Jac. 674.
Penfold v. *Westcote*, 2 Bos. & P. N. R. 335.

Where the defendant said to the plaintiff in the presence of others, "You are a thief, a rogue, and a swindler," it was held that the defendant could not call a witness to explain the particular transaction which he had in his mind at the time, since he did not in any way expressly refer to it in the presence of his hearers.

Martin v. *Loeï*, 2 F. & F. 654.
Read v. *Ambridge*, 6 C. & P. 308.
Hankinson v. *Bilby*, 16 M. & W. 442; 2 C. & K. 440.

But where the defendant said:—"Thomson is a damned thief; and so was his father before him, and I can prove it;" but added, "Thomson received the earnings of the ship, and ought to pay the wages," Lord Ellenborough held that the latter words qualified the former and showed no felony was imputed; the person to whom the words were spoken being the master of the ship and acquainted with all the circumstances referred to.

Thomson v. *Bernard*, 1 Camp. 48.
Bittridge's Case, 4 Rep. 19.
Cristie v. *Cowell*, Peake, 4.
Day v. *Robinson*, 1 A. & E. 554; 4 N. & M. 884.

3. *Neutral Words.*

Where the defendant has used only ordinary English words, the judge can decide at once whether they are *primâ facie* actionable or not. But where the words are in a foreign language, or are technical or provincial terms, an innuendo is absolutely necessary to disclose an actionable meaning. So, too, an innuendo is essential where ordinary English words are not in the particular instance used in their ordinary English signification, but in some peculiar sense.

Where the words are spoken in a foreign language

the original words should be set out in the Statement of Claim, and then an exact translation should be added. (*Zenobio* v. *Axtell*, 6 T. R. 162; 3 M. & S. 116.) In the case of slander an averment was formerly required to the effect that those who were present understood that language. (*Fleetwood* v. *Curl*, Cro. Jac. 557; Hob. 268.) And though such an averment is no longer necessary, the fact must still be proved at the trial. For if words be spoken in a tongue altogether unknown to the hearers, no action lies (*Jones* v. *Davers* (*vel Dawkes*) (1597), Cro. Eliz. 496; 1 Roll. Abr. 74); for no injury is done to the plaintiff's reputation. But if a single bystander understood them, that is enough. Where, however, the words are spoken in the vernacular of the place of publication (as Welsh words spoken in Wales) it will be presumed that the bystanders understood them. At the trial the correctness of the translation must be proved by a sworn interpreter.

So at the trial whenever the words used are not ordinary English, but local, technical, provincial, or obsolete expressions, or slang or cant terms, evidence is admissible to explain their meaning, provided such meaning has been properly alleged in the Statement of Claim. But when the words are well-known and perfectly intelligible English, the Court will give them their ordinary English meaning, unless it is in some way shown that that meaning is inapplicable. This may appear from the words themselves; for in some cases to give them their ordinary English meaning would make nonsense of them. But if in their ordinary English meaning the words would be intelligible, facts must be given in evidence to show that they may have been used in a particular sense on this particular occasion. After that has been done a bystander may be asked, "What did you understand by the expression used?" But without such a foundation

being first laid, the question is not allowable. (*Daines* v. *Hartley*, 3 Exch. 200; 18 L. J. Ex. 81; 12 Jur. 1093.)

Illustrations.

Words complained of:—"You are a bunter." No innuendo: Willes, J., nonsuited the plaintiff, on the ground that the word had no meaning at all, and could not therefore be defamatory in ordinary acceptation; and he refused to allow the plaintiff to be asked, what the word "bunter" meant. *Aliter*, had there been an innuendo averring a defamatory sense to the word "bunter."

Rawlings et ux. v. *Norbury*, 1 F. & F. 341.

Words spoken to an attorney:—"Thou art a daffidowndilly." Innuendo, meaning thereby that he is an "ambidexter," *i.e.*, one who takes a fee from both sides, and betrays the secrets of his client. *Held* that an action lay; 1 Roll. Abr. 55.

Annison v. *Blofield*, Carter, 214; 1 Roll. Abr. 55.

It is actionable to say of a stockjobber that, "He is a lame duck;" innuendo, "meaning thereby that the plaintiff had not fulfilled his contracts in respect of the said stocks and funds," (stockjobbing being now legalised by the 23 & 24 Vict. c. 28).

Morris and Langdale, 2 Bos. & Pull. 284.

The word "Welcher" requires an innuendo to explain its meaning.

Blackman v. *Bryant*, 27 L. T. 491.

The defendant charged the plaintiff, a pawnbroker and silversmith, with the unfair and dishonourable practice of "duffing;" innuendo, furbishing up damaged goods and pledging them with other pawnbrokers as new.

Hickinbotham v. *Leach*, 10 M. & W. 361; 2 Dowl. N. S. 270.

The words, "He is mainsworn," were spoken in one of the northern counties where "mainsworn" is equivalent to "perjured," (forsworn with his *hand* on the book). *Held* actionable.

Slater v. *Franks*, Hob. 126.

And see *Coles* v. *Haveland*, Cro. Eliz. 250; Hob. 12.

A. and B. were partners, and were conversing with the defendant. A. said they held some bills on the plaintiff's firm; the defendant said:—"You must look out sharp that they are met by them." At the trial, B. was called as a witness, and stated these facts. The counsel for the plaintiff then proposed to ask B.:—"What did you understand by that?" But the question was objected to, and disallowed by the judge (Pollock, C. B.) in that form, and the counsel would put it in no other shape. The jury found a verdict for the defendant; and the Court of Exchequer refused to grant a new trial.

Daines and another v. *Hartley*, 3 Exch. 200; 18 L. J. Ex. 81; 12 Jur. 1093.

The defendant, the editor of a newspaper, owed plaintiff money under an

award, and wrote and published in his newspaper these words :—"The money will be forthcoming on the last day allowed by the award, but we are not disposed to allow him to put it into Wall-street for shaving purposes before that period." "Shaving" in New York means, (i.) discounting bills or notes; (ii.) fleecing men of their goods or money by overreaching, extortion, and oppression. The declaration contained no innuendo alleging that the words were used in the second defamatory sense. *Held* no libel, on demurrer.

Stone v. *Cooper* (1845), 2 Denio (N. Y.), 293.

4. *Words* primâ facie *innocent, but capable of a defamatory meaning.*

Wherever the defendant's words are capable both of a harmless and an injurious meaning, it will be a question for the jury to decide which meaning the hearers or readers would on the occasion in question have reasonably given to the words. Here an innuendo is essential to show the latent injurious meaning. Without an innuendo, there would be no cause of action shown on the record. And such innuendo should be carefully drafted; for on it the plaintiff must take his stand at the trial. He cannot during the course of the case adopt a fresh construction. He may, it is true, fall back on the natural and obvious meaning of the words: but that we assume here not to be actionable. And such innuendo must be specific; it must distinctly aver a definite actionable meaning. A general averment, such as, "using the words in a defamatory sense," or "for the purpose of creating an impression unfavourable to the plaintiff," would be insufficient. (*Cox* v. *Cooper*, 12 W. R. 75; 9 L. T. 329.)

The words, too, must be reasonably susceptible of the defamatory meaning put upon them by the innuendo, or the Statement of Claim will be demurrable; or if there be no demurrer, the judge at the trial should stop the

case. In fact the words in that case belong rather to Class 5, for they are *incapable* of a defamatory meaning.

If, however, the words, though *primâ facie* innocent, are reasonably susceptible of a defamatory meaning, then it is a question for the jury in which meaning would bystanders or readers have reasonably understood them. In such a case, if the defendant demurs to the Statement of Claim, his demurrer will be overruled (*Jenner and another* v. *A'Beckett*, L. R. 7 Q. B. 11; 41 L. J. Q. B. 14; 20 W. R. 181; 25 L. T. 464); if the judge at the trial nonsuits the plaintiff, the Court will order a new trial. (*Hart and another* v. *Wall*, 2 C. P. D. 146; 46 L. J. C. P. 227; 25 W. R. 373.)

When it is clear that the words complained of are not defamatory in their primary sense, there will still be a further question:—Were there any facts known both to speaker and hearer which would reasonably lead the latter to understand the words in a secondary and a defamatory sense? And this is a question for the jury, if there be any evidence to go to them of such facts. (*Capital & Counties Bank* v. *Henty & Sons* (C. A.), 5 C. P. D. 514; 49 L. J. C. P. 830; 28 W. R. 851; *Ruel* v. *Tatnell*, 29 W. R. 172; 43 L. T. 507.)

It will be of no avail for the defendant to urge (except in mitigation of damages) that he meant the words in the innocent sense, if the jury are satisfied that ordinary readers or bystanders would have certainly understood them in the other sense. The jury will consider the whole of the circumstances of the case, the occasion of publication, the relationship between the parties, &c. Also whenever the words of a libel are ambiguous, or the intention of the writer equivocal, subsequent libels are admissible in evidence to explain the meaning of the first, or to prove the innuendoes, even although such subsequent libel be written after action brought. The

decision of the jury on the question is final and conclusive.

The plaintiff may also aver in his Statement of Claim that the words were spoken ironically; and it will then be a question for the jury *quo animo* the words were used.

Illustrations.

"He is a healer of felons;" innuendo, a concealer of felons. *Held* actionable.

Pridham v. *Tucker*, Yelv. 153; Hob. 126; Cart. 214.

"He has set his own premises on fire." These words are *primâ facie* innocent; but may become actionable, if it be averred that the house was insured, and that the words were intended to convey to the hearers that the plaintiff had purposely set fire to his own premises with intent to defraud the insurance office.

Sweetapple v. *Jesse*, 5 B. & Ad. 27; 2 N. & M. 36.

"She secreted one and sixpence under the till, stating, 'These are not times to be robbed.'" No innuendo. There being nothing to show that the 1*s.* 6*d.* was not her own money, the Court arrested judgment; for, though special damage was alleged, it was not the necessary and natural consequence of the words, as set out in the declaration.

Kelly v. *Partington*, 5 B. & Ad. 645; 3 N. & M. 116.

The plaintiff, Mary Griffiths, was a butcher and had a son Matthew. Words spoken by defendant:—"Matthew uses two balls to his mother's steelyard;" innuendo, "meaning that plaintiff by Matthew, her agent and servant, used improper and fraudulent weights in her said trade, and defrauded and cheated in her said trade." After verdict for the plaintiff, *held* that the words, as stated and explained, were actionable.

Griffiths v. *Lewis*, 7 Q. B. 61; 8 Q. B. 841; 14 L. J. Q. B. 197; 15 L. J. Q. B. 249; 9 Jur. 370; 10 Jur. 711.

To say that the plaintiff is "Man Friday" to another is not actionable, without an innuendo averring that the term imputed undue subserviency and self-humiliation.

Forbes v. *King*, 2 L. J. Ex. 109; 1 Dowl. 672.

See *Woodgate* v. *Ridout*, 4 F. & F. 202.

Words complained of:—"The old materials have been relaid by you in the asphalte work executed in the front of the Ordnance Office, and I have seen the work done." Innuendo, "that the plaintiff had been guilty of dishonesty in his trade by laying down again the old asphalte which had before been used at the entrance of the Ordnance Office, instead of new asphalte according to his contract;" and this innuendo was held not too large. Verdict for the plaintiff. Damages, 40*s.*

Baboneau v. *Farrell*, 15 C. B. 360; 24 L. J. C. P. 9; 3 C. L. R. 42; 1 Jur. N. S. 114.

An action was brought for the following libel on the plaintiff in the way of his trade :—"Society of Guardians for the Protection of Trade against Swindlers and Sharpers. I am directed to inform you that the persons using the firm of Goldstein and Co. are reported to this Society as improper to be proposed to be balloted for as members thereof." After verdict for the plaintiff, the Court arrested judgment, because there was no averment that it was the custom of the Society to designate swindlers and sharpers by the term "improper persons to be members of this Society." [There was an innuendo, "meaning thereby that the plaintiff was a swindler and a sharper, &c.," which would be sufficient now ; but before the C. L. P. Act, 1852, s. 61, an innuendo required a prefatory averment to support it.] The words in their natural and obvious meaning were held to be no libel.

Goldstein v. *Foss*, 6 B. & C. 154 ; 1 M. & P. 402; 2 Y. & J. 146; 9 D. & R. 197 ; (in Ex. Ch.) 4 Bing. 489 ; 2 C. & P. 252.

Capel and others v. *Jones*, 4 C. B. 259 ; 11 Jur. 396.

To say of a merchant, "He hath eaten a spider," Mr. Justice Wild said was "actionable with a proper averment what the meaning is." But the report does not vouchsafe any explanation as to what the meaning was.

Franklyn v. *Butler*, Pasch. 11 Car. I., cited in *Annison* v. *Blofield*, Carter, 214.

The words, "'Ware hawk there ; mind what you are about," will, with proper averments, amount to a charge of insolvency against the plaintiff, a trader ; and be therefore actionable.

Orpwood v. *Barkes* (vel *Parkes*), 4 Bing. 261 ; 12 Moore, 492.

The defendant said to an upholsterer :—"You are a soldier ; I saw you in your red coat doing duty ; your word is not to be taken." These words are *primâ facie* not actionable ; but it was explained that there was then a common practice for tradesmen to sham enlisting so as to avoid being arrested for debt. The words were therefore held actionable as damaging the credit of a trader.

Arne v. *Johnson*, 10 Mod. 111.

Gostling v. *Brooks*, 2 F. & F. 76.

The defendant said of the plaintiff :—"Foulger trapped three foxes in Ridler's wood." These words are *primâ facie* not actionable. But the declaration averred that the plaintiff was a gamekeeper, that it is the duty of a gamekeeper not to kill foxes, that the plaintiff was employed expressly on the terms that he would not kill foxes, and that no one who killed foxes would be employed as a gamekeeper. *Held*, on demurrer, a good declaration ; for the words, so explained, clearly imputed to the plaintiff misconduct in his office or occupation, and were therefore actionable without proof of special damage.

Foulger v. *Newcomb*, L. R. 2 Ex. 327; 36 L. J. Ex. 169 ; 15 W. R. 1181 ; 16 L. T. 595.

A landlord sent to his tenants a notice :—"Messrs. Henty & Sons hereby give notice that they will not receive in payment any cheques drawn on any of the branches of the Capital and Counties Bank." Innuendo, "meaning thereby that the plaintiffs were not to be relied upon to meet the cheques drawn upon them, and that their position was such that they

were not to be trusted to cash the cheques of their customers." *Held* that the words in their primary sense were not libellous; and that as no evidence was offered of facts known to the tenants which could reasonably induce them to understand the words in the defamatory sense ascribed to them by the innuendo, there was no question for the jury, and the judge should have stopped the case.

Capital and Counties Bank v. *Henty and Sons* (C. A.), 5 C. P. D. 514; 49 L. J. C. P. 830; 28 W. R. 851 [reversing the decision of the C. P. D., 28 W. R. 490; 42 L. T. 314].

Ironical praise may be a libel; *e.g.*, calling an attorney "an honest lawyer."

Boydell v. *Jones*, 4 M. & W. 446; 1 H. & H. 408; 7 Dowl. 210.

It is actionable to say ironically:—"*You* will not play the Jew or the hypocrite."

R. v. *Garret* (*Sir Baptist Hicks' Case*), Hob. 215; Popham, 139.

Ironical advice to the Lord Keeper by a country parson, "to be as wise as Lord Somerset, to manage as well as Lord Haversham, to love the church as well as the Bishop of Salisbury," &c., is actionable.

R. v. *Dr. Brown*, 11 Mod. 86; Holt, 425.

5. *Words incapable of a defamatory meaning.*

But where the words can bear but one meaning, and that is obviously not defamatory, then no innuendo or other allegation on the pleadings can make the words defamatory; the Statement of Claim is demurrable; and should the defendant not see fit to demur, still the judge at the trial will nonsuit the plaintiff and not permit the case to go to the jury. No parol evidence is admissible to explain the meaning of ordinary English words, in the absence of special circumstances showing that in the case before the Court the words do not bear their usual signification. "It is not right to say that a judge is to affect not to know what everybody else knows—the ordinary use of the English language." (*Per* Brett, J., 1 C. P. D. 572.) The fact that actual damage has in fact followed from the publication is immaterial in considering what is the true construction of the libel. (*Per* Lord Coleridge, C.J., 2 C. P. D. 150.)

Illustrations.

Words complained of:—"He was the ringleader of the nine hours' system." "He has ruined the town by bringing about the nine hours' system," &c. The declaration contained no innuendo, and no sufficient averment that the words were spoken of the plaintiff in the way of his trade, and on demurrer, was held bad.

Miller v. *David*, L. R. 9 C. P. 118; 43 L. J. C. P. 84; 22 W. R. 332; 30 L. T. 58.

Words complained of:—"We are requested to state that the honorary secretary of the Tichborne Defence Fund is not and never was a captain in the Royal Artillery as he has been erroneously described." Innuendo, that the plaintiff was an impostor, and had falsely and fraudulently represented himself to be a captain in Royal Artillery. Bovill, C.J., held that the words were not reasonably capable of the defamatory meaning ascribed to them by the innuendo, and nonsuited the plaintiff. *Held* that the nonsuit was right.

Hunt v. *Goodlake*, 43 L. J. C. P. 54; 29 L. T. 472.

The plaintiff was a certificated art master, and had been master at the Walsall Science and Art Institute. His engagement there ceased in June, 1874, and he then started, and became master of, another school which was called "The Walsall Government School of Art," and was opened in August. In September the following advertisement appeared in the Walsall *Observer*, signed by the defendants as chairman, treasurer and secretary of the Institute respectively:—"Walsall Science and Art Institute. The public are informed that Mr. Mulligan's connection with the Institute has ceased, and that he is not authorized to receive subscriptions on its behalf." The declaration set out this advertisement with an innuendo,—"meaning thereby that the plaintiff falsely assumed and pretended to be authorized to receive subscriptions on behalf of the said Institute." At the trial Quain, J., directed a nonsuit on the ground that the advertisement was not capable of the defamatory meaning attributed by the innuendo:—*Held* that the nonsuit was right; that the advertisement was not capable of any defamatory meaning.

Mulligan v. *Cole and others*, L. R. 10 Q. B. 549; 44 L. J. Q. B. 153; 33 L. T. 12.

Certainty.

But even where the meaning of the defendant's words is clear or has been ascertained, the question remains:—Has he said enough? Was the imputation sufficiently definite to injure the plaintiff's reputation? Is it clear that it is the plaintiff to whom he referred? Unless these questions can be answered in the affirmative, no action lies. There must be a specific imputation cast on the person suing.

This is clearly only a part of the construction of the words; but it is convenient to collect the cases under a separate head, which may be denoted by the well-known pleading phrase Certainty. Often the only question of construction arising in a case may be one of certainty.

The Court formerly expected to be assisted in dealing with these questions by a variety of minute averments in the plaintiff's declaration. Thus, it was necessary that there should be a *colloquium*, an averment that the defendant was speaking of the plaintiff, as well as constant innuendoes in the statement of the words themselves, "he (meaning thereby the plaintiff)." So, too, many other allegations were required describing the locality, the relationship between the various persons mentioned, and all the surrounding circumstances necessary to fully understand the defendant's words. And these matters could not properly be proved at the trial unless they were set out on the record; or if they were, and the plaintiff had a verdict, the Court would subsequently arrest judgment, on the ground that it did not appear clearly on the face of the record that the words were actionable. And this technicality was carried to an absurd extent. Thus, where the defendant said, "Thou art a murderer, for thou art the fellow that didst kill Mr. Sydnam's man," the Court of Exchequer Chamber, on error brought, arrested judgment, because there was no averment that any man of Mr. Sydnam's had in fact been killed. *Barrons* v. *Ball* (1614), Cro. Jac. 331. See *Ratcliff* v. *Michael*, *ib.*, and *Upton* v. *Pinfold*, Comyn, 267. (Had the words been "*and* thou art,"

instead of "*for* thou art," the plaintiff would probably have been allowed to recover. See *Minors* v. *Leeford*, Cro. Jac. 114.) Again, in *Ball* v. *Roane* (1593), Cro. Eliz. 308, the words were :—"There was never a robbery committed within forty miles of Wellingborough, but thou hadst thy part in it." After a verdict for the plaintiff, the Court arrested judgment, "because it was not averred there *was* any robbery committed within forty miles, &c., for otherwise it is no slander." So in *Foster* v. *Browning* (1625), Cro. Jac. 688, where the words were, "Thou art as arrant a thief as any is in England," the Court arrested judgment, because the plaintiff had not averred "that there was any thief in England." See also *Johnson* v. *Sir John Aylmer*, Cro. Jac. 126 ; *Sir Thomas Holt* v. *Astrigg*, Cro. Jac. 184 ; *Slocomb's Case*, Cro. Car. 442. But the climax was reached in a case cited in *Dacy* v. *Clinch* (1661), Sid. 53, where the defendant had said to the plaintiff, "As sure as God governs the world, or King James this kingdom, you are a thief." After verdict for the plaintiff, the defendant moved in arrest of judgment, on the ground that there was no averment on the record that God did govern the world, or King James this kingdom. But here the Court drew the line, and held that "these things were so apparent," that neither of them need be averred. And even in the present century, instances of similar technicality are not wanting, though their absurdity is not so flagrant. Thus, in *Solomon* v. *Lawson*, 8 Q. B. 823 ; 15 L. J. Q. B. 253 ; 10 Jur. 796, the libel consisted of two letters to the *Times ;* the first made a charge generally on "the authorities" at St. Helena ; the second letter brought it home to the plaintiff in particular. Neither letter was thus a complete libel in itself. In the first count of the declaration the first letter was fully set out ; in the second count *both* letters were set out *verbatim.* The first count was held bad, because it set out only half the libel. The second count was also held bad, because the pleader in setting out the first letter for the second time had introduced it with the words "in *substance* as follows." The Court decided that it ought to have been set out *verbatim :* so it was ; but because the pleader *said* he had only set out the substance, judgment was arrested. Lord Denman would, it seems, have given judgment for the plaintiff, had the pleader used the word "*tenour*," instead of "*substance.*" So,

too, in *Angle* v. *Alexander*, 7 Bing. 119; 1 Cr. & J. 143; 4 M. & P. 870; 1 Tyrw. 9; the words were thus set out with innuendoes in the declaration, "You (meaning the said plaintiff) are a regular prover under bankruptcy (meaning that the said plaintiff was accustomed to prove fictitious debts under commissions of bankruptcy); you are a regular bankrupt maker; if it was not for some of your neighbours, your shop would look queer." And the Court arrested judgment because there was no prefatory averment that the defendant had been accustomed to employ the words "prover under bankruptcy," in the meaning set out in the innuendo. See also *Goldstein* v. *Foss and another*, 6 B. & C. 154; 4 Bing. 489; 9 D. & R. 197; 2 C. & P. 252; 1 M. & P. 402; 2 Y. & J. 146; and other cases cited, *ante*, p. 104.

But now, by s. 61 of the Common Law Procedure Act, 1852, the *colloquium* and all other such frivolous averments are rendered unnecessary; and Order XIX. r. 4, requires that only material facts need be stated in the pleadings. The pleader must judge what facts are material; and he will also insert averments, which, though not essential, will help to make the case clear, by explaining what is to follow (as in *Foulger* v. *Newcomb*, L. R. 2 Ex. 327; 36 L. J. Ex. 169; 15 W. R. 1181; 16 L. T. 595). But where the plaintiff is suing for words spoken of him in the way of his office, profession, or trade, there it is absolutely necessary to aver that at the time when the words were spoken the plaintiff held such office or carried on such profession or trade. And there should also be an averment that the words were spoken by the defendant with reference to such office, profession, or trade.

1. *Certainty of the imputation.*

Where words are sought to be made actionable, as charging the plaintiff with the commission of a crime, we have seen that an indictable offence must be specifically imputed. It will not be sufficient to prove words which only amount to an accusation of fraudulent, dishonest, vicious, or immoral conduct, so long as it is not criminal; or of a mere intention to commit a crime, not evidenced

by any overt act. But still it is not necessary that the alleged crime should be stated with all the technicality or precision of an indictment; if the crime be imputed in the ordinary language usually employed to denote it in lay conversation. All that is requisite is that the by-standers should clearly understand that the plaintiff is charged with the commission of a specific crime. "The meaning of the words is to be gathered from the vulgar import, and not from any technical legal sense." (*Per* Buller, J., in *Colman* v. *Godwin*, 3 Dougl. 91; 2 B. & C. 285 (n.)).

Illustrations.

Treason.

The following words have been held sufficiently definite to constitute a charge of treason, or at least of sedition, and therefore actionable :—

Thy master is "no true subject."

Waldegrave v. *Agas*, Cro. Eliz. 191.

Sed quære, *Fowler* v. *Aston*, Cro. Eliz. 268 ; 1 Roll. Abr. 43.

"He consented to the late rebels in the North."

Stapleton v. *Frier*, Cro. Eliz. 251.

"Thou art a rebel, and all that keep thee company are rebels, and thou art not the Queen's friend."

Redston v. *Eliot*, Cro. Eliz. 638 ; 1 Roll. Abr. 49.

"Thou art an enemy to the State."

Charter v. *Peter*, Cro. Eliz. 602.

"He has the Pretender's picture in his room, and I saw him drink his health. And he said he had a right to the Crown."

Fry v. *Carne* (1724), 8 Mod. 283.

How v. *Prin* (1702), Holt, 652 ; 7 Mod. 107 ; 2 Ld. Raym. 812; 2 Salk. 694 ; 1 Brown Py. C. 64.

But to say merely "Thou art a rebel," was adjudged not actionable.

Fountain v. *Rogers* (1601), Cro. Eliz. 878.

Murder.

So it is a sufficient charge of murder to say :—

"Thou hast killed thy master's cook."

Cooper v. *Smith*, Cro. Jac. 423 ; 1 Roll. Abr. 77.

"I am thoroughly convinced that you are guilty of the death of Daniel Dolly, and rather than you should want a hangman, I will be your executioner."

Peake v. *Oldham*, Cowp. 275 ; 2 Wm. Bl. 959.

But it is not sufficient to say :—

"Hext seeks my life." "Because he may seek his life lawfully upon just cause."

Hext v. *Yeomans*, 4 Rep. 15.

"He was the cause of the death of Dowland's child," because a man might innocently cause the death of another by accident or misfortune.

Miller v. *Buckdon*, 2 Buls. 10.

"Thou wouldst have killed me," for here a murderous *intention* only is imputed.

Dr. Poe's Case, 1 Vin. Abr. 440, cited in 2 Buls. 206.

Forgery.

The following words have been held a sufficient charge of forgery :—

"This is a counterfeit warrant made by Mr. Stone."

Stone v. *Smalcombe*, Cro. Jac. 648.

"Thou hast forged a privy seal, and a commission." *Per cur.* "'A commission' shall be intended the king's commission, under the privy seal."

Baal v. *Baggerley*, Cro. Car. 326.

"You forged my name," although it is not stated to what deed or instrument.

Jones v. *Herne*, 2 Wils. 87.

Overruling *Anon*, 3 Leon. 231 ; 1 Roll. Abr. 65.

Larceny.

The following words are a sufficient charge of larceny :—

"Baker stole my box-wood, and I will prove it." It was argued that it did not appear from the words that the box-wood was not growing ; and that to cut down and remove growing timber is a trespass only, not a larceny. But Holt, C.J., gave judgment for the plaintiff.

Baker v. *Pierce*, 6 Mod. 234 ; 2 Salk. 695 ; Holt, 654 ; 2 Ld. Raym. 959.

Overruling *Mason* v. *Thompson*, Hutt, 38.

"Thou hast stolen our bees, and thou art a thief." After verdict it was contended that larceny cannot be committed of bees, unless they be hived ; but the Court held that the subsequent words "thou art a thief" showed that the larceny imputed was of such bees as could be stolen.

Tibbs v. *Smith*, 3 Salk. 325 ; Sir Thos. Raym. 33.

Minors v. *Leeford*, Cro. Jac. 114.

So a charge of being "privy and consenting to" a larceny is actionable.

Mot et ux. v. *Butler*, Cro. Car. 236.

"He is a pickpocket ; he picked my pocket of my money," was once held an insufficient charge of larceny.

Watts v. *Rymes*, 2 Lev. 51 ; 1 Ventr. 213 ; 3 Salk. 325.

But now this would clearly be held sufficient.

Baker v. *Pierce*, *supra*.

Stebbing v. *Warner*, 11 Mod. 255.

Receiving Stolen Goods.

To say "I have been robbed of three dozen winches; you bought two, one at 3*s.*, one at 2*s.*; you knew well when you bought them that they cost me three times as much making as you gave for them, and that they could not have been honestly come by," is a sufficient charge of receiving stolen goods, knowing them to have been *stolen*.

[An indictment which merely alleged that the prisoner knew the goods were not honestly come by would be bad. *R.* v. *Wilson*, 2 Mood. C. C. 52.]

Alfred v. *Farlow*, 8 Q. B. 854; 15 L. J. Q. B. 258; 10 Jur. 714.
Clarke's Case de Dorchester, 2 Rolle's Rep. 136.
King v. *Bagg*, Cro. Jac. 331.

Bigamy.

Mrs. Heming was sister to Mr. Alleyne. The defendant said:—"It has been ascertained beyond all doubt that Mr. Alleyne and Mrs. Heming are not brother and sister, but man and wife." *Held* that it was open to the jury to construe this as a charge of bigamy, as well as of incest.

Heming and wife v. *Power*, 10 M. & W. 564.

Perjury.

"You are forsworn" without more, is insufficient.

Stanhope v. *Blith* (1585), 4 Rep. 15.
Holt v. *Scholefield*, 6 T. R. 691.
Hall v. *Weedon*, 8 D. & R. 140.

But to say they "did not scruple to turn affidavit-men," is sufficient.

Roach v. *Reed and Huggonson* (1742), 2 Atk. 469; 2 Dick. 794.

"Thou art forsworn in a court of record, and that I will prove!" was held sufficient; though it was argued after verdict that he might only have been talking in the court-house and so forsworn himself; but the Court held that the words would naturally mean forsworn while giving evidence in some judicial proceeding in a court of record.

Ceely v. *Hoskins*, Cro. Car. 509.

False Pretences.

The words "He has defrauded a mealman of a roan horse," held not to imply a criminal act of fraud; as it is not stated that the mealman was induced to part with his property by means of any false pretence.

Richardson v. *Allen*, 2 Chit. 657.

Attempt to Commit a Felony.

The following words were held sufficient:—

"He sought to murder me and I can prove it."

Preston v. *Pinder*, Cro. Eliz. 308.

"She would have cut her husband's throat and did attempt it."

Scot et ux. v. *Hilliar*, Lane, 98; 1 Vin. Abr. 440.

The following insufficient :—

"Thou wouldst have killed me."

Dr. Poe's Case, cited in *Murrey's Case*, 2 Buls. 206 ; 1 Vin. Abr. 440.

"Sir Harbert Croft keepeth men to rob me."

Sir Harbert Croft v. *Brown*, 3 Buls. 167.

"He would have robbed me."

Stoner v. *Audely*, Cro. Eliz. 250.

For here no overt act is charged, and mere intention is not criminal.

Other instances of a criminal charge indirectly made will be found in

Snell v. *Webling*, 2 Lev. 150 ; 1 Vent. 276.

Clerk v. *Dyer*, 8 Mod. 290.

Woolnoth v. *Meadows*, 5 East, 463 ; 2 Smith, 28.

Where words clearly refer to the plaintiff's office and his conduct therein, or otherwise clearly touch and injure him therein, it is unnecessary that the defendant should expressly name his office or restrict his words thereto; it shall be intended that he was speaking of him in the way of his office or trade.

Illustrations.

To say of a clerk, "He cozened his master" is actionable, though the defendant did not expressly state that the cozening was done in the execution of the clerk's official duties ; that will be intended.

Reignald's Case (1640), Cro. Car. 563.

Reeve v. *Holgate* (1672), 2 Lev. 62.

To say of a trader, "he has been arrested for debt" is actionable, though no express reference be made to his trade at the time of publication ; for such words must necessarily affect his credit in his trade.

Jones v. *Littler*, 7 M. & W. 423 ; 10 L. J. Ex. 171.

It is not necessary that the defendant should in so many words expressly state the plaintiff has committed a particular crime. So, where a charge is made against a trader, it need not be conveyed in positive and direct language. Any words which distinctly assume or imply the plaintiff's guilt, or raise a strong suspicion of it in the minds of the hearers, are sufficient. But words merely imputing to the plaintiff a criminal intention or

design are not actionable, so long as no criminal act is directly or indirectly assigned. So, too, words of mere suspicion, not amounting to a charge of felony, are not actionable.

Illustrations.

The following words have been held to convey an imputation with sufficient certainty and precision :—

"I believe all is not well with Daniel Vivian ; there be many merchants who have lately failed, and I expect no otherwise of Daniel Vivian ;" for this is a charge of present pecuniary embarrassment.

Vivian v. *Willet*, 3 Salk. 326 ; Sir Thos. Raym. 207.

"Two dyers are gone off, and for aught I know Harrison will be so too within this twelvemonth."

Harrison v. *Thornborough*, 10 Mod. 196 ; Gilb. Cas. 114.

"He has become so inflated with self-importance by the few hundreds made in my service—God only knows whether honestly or otherwise ;" for this is an insinuation of embezzlement.

Clegg v. *Laffer*, 3 Moore & Sc. 727 ; 10 Bing. 250.

"I think in my conscience if Sir John might have his will, he would kill the king ;" for this is a charge of compassing the king's death.

Sidnam v. *Mayo*, 1 Roll. Rep. 427 ; Cro. Jac. 407.

Peake v. *Oldham*, Cowp. 275 ; 2 Wm. Bl. 959, *ante*, p. 121.

To state that criminal proceedings are about to be taken against the plaintiff (*e.g.*, that the Attorney-General had directed a certain attorney to prosecute him for perjury,) is actionable, although the speaker does not expressly assert that the plaintiff is guilty of the charge.

Roberts v. *Camden*, 9 East, 93.

Tempest v. *Chambers*, 1 Stark. 67.

Bell v. *Byrne*, 13 East, 554.

Contrà *Harrison* v. *King*, 4 Price, 46 ; 7 Taunt. 431 ; 1 B. & Ald. 161.

So where the defendant on hearing that his barns were burnt down, said, "I cannot imagine who it should be but the Lord Sturton."

Lord Sturton v. *Chaffin* (1563), Moore, 142.

But where the defendant said, "I have a suspicion that you and B. have robbed my house, and therefore I take you into custody," the jury found that the words did not amount to a direct charge of felony, but only indicated what was passing in defendant's mind.

Tozer v. *Mashford*, 6 Ex. 539 ; 20 L. J. Ex. 225.

Williams v. *Gardiner*, 1 M. & W. 245 ; 1 Tyr. & Gr. 578.

No action lies for such words as "Thou deservest to be hanged," for here no fact is asserted against the plaintiff.

Hake v. *Molton*, Roll. Abr. 43.

Cockaine v. *Hopkins*, 2 Lev. 214.

But it is actionable to say :—"I am of opinion that such a Privy Coun-

cillor is a traitor," or "I think such a judge is corrupt." *Per* Wyndham and Scroggs, JJ., and North, C.J., in

Lord Townshend v. *Dr. Hughes*, 2 Mod. 166.

So too if the charge incidentally slips into a conversation on another matter, an action lies; as where the defendant said:—"Mr. Wingfield, you never thought well of me since Graves did steal my lamb;" and it was held that Graves could sue.

Graves' Case, Cro. Eliz. 289.

Or, "I dealt not so unkindly with you, when you stole my sack of corn."

Cooper v. *Hawkeswell*, 2 Mod. 58.

A libellous charge may be insinuated in a question: *e.g.*, "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." Alderson, B., directed the jury that if they thought the defendant by asking the question meant to *assert* the facts insinuated, the passage was a libel.

R. v. *Gathercole*, 2 Lew. C. C. 255.

So a slander may be conveyed in a question and answer or in a series of questions and answers.

Gainford v. *Tuke* (1620), Cro. Jac. 536.
Haywood v. *Nayler* (1636), 1 Roll. Abr. 50.
Ward v. *Reynolds* (1714), cited Cowp. 278.

A libellous charge may be sufficiently conveyed by a mere adjective.

"Thou art a leprous knave."

Taylor v. *Perkins*, Cro. Jac. 144; 1 Roll. Abr. 44.

"He is a bankrupt knave," spoken of a trader.

Squire v. *Johns*, Cro. Jac. 585.

"Thou art a broken fellow."

Anon, Holt, 652.

"He is perjured," or "mainsworn."

Croford v. *Blisse*, 2 Buls. 150.

"A libellous journalist," a phrase which will be taken to mean that the plaintiff *habitually* publishes libels in his paper, not that he *once* published *one* libel merely.

Wakley v. *Cooke and Healey*, 4 Exch. 511; 19 L. J. Ex. 91.

So, if the plaintiff is obviously only repeating gossip, not asserting the charge as a fact within his own knowledge.

"I heard you had run away" (*sc.* from your creditors).

Davis v. *Lewis*, 7 T. R. 17.

"Thou art a sheep-stealing rogue, and Farmer Parker told me so."

Gardiner v. *Atwater*, Sayer, 265.

"One told me that he heard say that Mistress Meggs had poisoned her first husband."

Meggs v. *Griffith* (vel *Griffin*), Cro. Eliz. 400; Moore, 408.

Read's Case, Cro. Eliz. 645.

"Did you not hear that C. is guilty of treason."

Per cur. in *Earl of Northampton's Case*, 12 Rep. 134.

2. *Certainty as to the Person defamed.*

The defamatory words must refer to some ascertained or ascertainable person, and that person must be the plaintiff.

If the words used really contain no reflection on any particular individual, no averment or innuendo can make them defamatory.

Illustration.

"Suppose the words to be 'a murder was committed in A.'s house last night;' no introduction can warrant the innuendo 'meaning that B. committed the said murder;' nor would it be helped by the finding of the jury for the plaintiff. For the Court must see that the words do not and cannot mean it, and would arrest the judgment accordingly. *Id certum est, quod certum reddi potest.*" *Per* Lord Denman, C.J., in

Solomon v. *Lawson*, 8 Q. B. 837; 15 L. J. Q. B. 257; 10 Jur. 796.

"If a man wrote that all lawyers were thieves, no particular lawyer could sue him, unless there is something to point to the particular individual." *Per* Willes, J., in

Eastwood v. *Holmes*, 1 F. & F. 349.

To assert that an acceptance is a forgery is no libel on the drawer, unless it somehow appear that it was he who was charged with forging it.

Stockley v. *Clement*, 4 Bing. 162; 12 Moore, 376.

The defendant in a speech commented severely on the discipline of the Roman Catholic church, and the degrading punishments imposed on penitents. He read from a paper an account given by three policemen of the severe penance imposed on a poor Irishman. It appeared incidentally from this report that the Irishman had told the policemen that his priest would not administer the Sacrament to him till the penance was performed. The plaintiff averred that he was the Irishman's priest, but it did not appear how enjoining such a penance on an Irishman would affect the character of a Roman Catholic priest. The alleged libel was in no other way connected with the plaintiff. *Held* no libel, and no slander, of the plaintiff.

Hearne v. *Stowell*, 12 A. & E. 719; 6 Jur. 458; 4 P. & D. 696.

Though the words used may at first sight appear only to apply to a class of individuals, and not to be specially defamatory of any particular member of that class, still an action may be maintained by any one individual of that class who can satisfy the jury that the words referred especially to himself. The words must be capable of bearing such special application, or the judge should stop the case. And there must be an averment in the Statement of Claim, that the words were spoken of the plaintiff. The plaintiff may also aver extraneous facts, if any, showing that he was the person expressly referred to.

Formerly it was absolutely necessary, as we have seen, to overload the pleadings with averments, such as, that the defendant was talking to J. S. about the plaintiff and about the plaintiff's conduct in and about a certain matter; and that in the course of such conversation he spoke of and concerning the plaintiff, and of and concerning the said matter, the words following—that is to say, &c. A great many other details had to be formally set out in order to support the subsequent brief innuendo, "he (meaning the plaintiff)." And then, too, the introductory averments had to be properly connected with the innuendo; or their presence was of no avail. *Clement* v. *Fisher*, 7 B. & C. 459; 1 M. & R. 281. But now all such pitfalls are removed by Common Law Procedure Act, 1852, s. 61. No such averments are any longer necessary; the innuendo alone is sufficient. "The old decisions which support the argument that an innuendo cannot be allowed to make persons certain who were uncertain before, are not now sustainable." *Per* Coltman, J., in *Turner* v. *Meryweather*, 7 C. B. 251; 18 L. J. C. P. 155; 13 Jur. 683; and in error, 19 L. J. C. P. 10. And the decision of the jury on the point is final. After a verdict for the plaintiff, the defendant can no longer argue that it does not sufficiently appear to whom the words relate.

And this is no breach of the rule that the office of the innuendo is to explain and not to extend the sense of the defamatory matter. For here the innuendo does not extend

the meaning, it only points out the particular individual to whom the matter in itself defamatory does in fact apply.

So, if the words spoken or written, though plain in themselves, apply equally well to more persons than one, evidence may be given both of the cause and occasion of publication, and of all the surrounding circumstances affecting the relation between the parties, and also of any statement or declaration made by the defendant as to the person referred to. The plaintiff may also call at the trial his friends or those acquainted with the circumstances, to state that on reading the libel they at once concluded that it was aimed at the plaintiff. (*Bourke* v. *Warren*, 2 C. & P. 307; *Broome* v. *Gosden*, 1 C. B. 728.) If the application to a particular individual can be generally perceived, the publication is a libel on him, however general its language may be. "Whether a man is called by one name, or whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done, as would be done if his name and Christian name were ten times repeated." (*Per* Lord Campbell, C.J., in *Le Fanu and another* v. *Malcolmson*, 1 H. L. C. 668.)

Where the libel consists of an effigy, picture, or caricature, care should be taken to show by proper innuendoes and averments, the libellous nature of the representation and its especial reference to the plaintiff. It is often in such cases difficult for the plaintiff to prove that he is the person caricatured.

Illustrations.

Words complained of:—"We would exhort the medical officers to avoid the traps set for them by desperate adventurers, (innuendo, thereby meaning the plaintiff among others,) who, participating in their efforts, would inevitably cover them with ridicule and disrepute." The jury

found that the words were intended to apply to the plaintiff. Judgment accordingly for the plaintiff.

Wakley v. *Healey*, 7 C. B. 591 ; 18 L. J. C. P. 241.

A newspaper article imputed that "in some of the Irish factories" cruelties were practised upon the workpeople. Innuendo "in the factory of the plaintiffs" who were manufacturers. The jury were satisfied that the newspaper was referring especially to the plaintiffs' factory, and found a verdict for the plaintiffs, and the House of Lords held the declaration good.

Le Fanu and another v. *Malcolmson*, 1 H. L. C. 637 ; 13 L. T. 61 ; 8 Ir. L. R. 418.

If asterisks be put instead of the name of the party libelled, it is sufficient that those who know the plaintiff should be able to gather from the libel that he is the person meant ; it is not necessary that all the world should understand it, so long as the meaning of the paragraph is clear to the plaintiff's acquaintances.

Bourke v. *Warren*, 2 C. & P. 307.

Some libellous verses were written about "L——y, the Bum ;" the Court was satisfied in spite of the finding of the jury that the words related to the plaintiff, a sheriff's officer.

Levi v. *Milne*, 4 Bing. 195 ; 12 Moore, 418.

"All the libellers of the kingdom know now that printing initial letters will not serve the turn, for that objection has been long got over." *Per* Ld. Hardwicke in

Roach v. *Read and Huggonson* (1742), 2 Atk. 470 ; 2 Dick. 794.

There appeared in *Mist's Weekly Journal* an account professedly of certain intrigues, &c. at the Persian Court, really, at the English. The late King George I. was described under the name of "Merewits," George II. appeared as "Esreff," the Queen as "Sultana," whilst a most engaging portrait was drawn of the Pretender under the name of "Sophi." It was objected on behalf of the prisoner that there was no evidence that the author intended his seemingly harmless tale to be thus interpreted and applied : but the Court held that they must give it the same meaning as the generality of readers would undoubtedly put upon it.

R. v. *Clerk* (1729), 1 Barnard, 304.

If the defendant says "A. or B." committed such a felony, both A. and B., or either of them can sue, for both are brought into suspicion.

Anon. 1 Rol. Abr. 81.

In *Falkner* v. *Cooper* (1678), Carter, 55, the Court was divided on this point. "You or Harrison hired one Bell to forswear himself." Harrison can sue.

Harrison v. *Thornborough*, 10 Mod. 196 ; Gilb. Cas. in Law and Eq. 114.

If a man says "My brother," or "my enemy" is perjured, and hath only one brother or one enemy, such brother or enemy can sue ; but if he says "One of my brothers is perjured," and he hath several brothers, no one of them can sue [without special circumstances to show to which one he referred].

Jones v. *Davers*, Cro. Eliz. 497 ; 1 Roll. Abr. 74.

Wiseman v. *Wiseman*, Cro. Jac. 107.

So if a man says to the plaintiff's servant, "Thy master Brown hath robbed me," Brown can sue; for it shall not be intended that the person addressed had more than one master of the name of Brown. So if the defendant had said, "Thy master," *simpliciter;* or to a son, "Thy father," to a wife, "Thy husband."

Per Haughton, J., in *Lewis* v. *Walter* (1617), 3 Bulstr. 226.
Brown v. *Low* or *Lane*, Cro. Jac. 443; 1 Roll. Abr. 79.
Waldegrave v. *Agas*, Cro. Eliz. 191.

But if the defendant said to a master, "One of thy servants hath robbed me," in the absence of special circumstances no one could sue; for it is not apparent who is the person slandered. So where a party in a cause said to three men who had just given evidence against him: 'One of you three is perjured," no action lies.

Sir John Bourn's Case, cited Cro. Eliz. 497.

Where the defendant said to his companion B.:—"He that goeth before thee is perjured," the plaintiff can sue, if he aver and prove that he was at that moment walking before B.

Aish v. *Gerish*, 1 Roll. Abr. 81.

A libel was published on a "diabolical character," who, "like Polyphemus, the man-eater, has but one eye, and is well known to all persons acquainted with the name of a certain noble circumnavigator." The plaintiff had but one eye, and his name was I'Anson; so it was clear that he was the person referred to.

I'Anson v. *Stuart*, 1 T. R. 748; 2 Smith's Lg. Cas. (6th ed.), 57, [omitted in 7th and 8th eds.]
Fleetwood v. *Curl*, Cro. Jac. 557; Hob. 268.

Words defamatory of A. may in some cases be also indirectly defamatory of B.

Illustrations.

Where a married man was called "cuckold" in the City of London, his wife could sue; for it was tantamount to calling her "whore."

Vicars v. *Worth*, 1 Stra. 471.
Hodgkins et ux. v. *Corbet et ux.*, 1 Stra. 545.

Slander addressed to plaintiff's wife:—"You are a nuisance to live beside of. You are a bawd; and your house is no better than a bawdy-house." *Held* that the plaintiff could maintain the action without joining his wife, and without proving special damage; because if in fact his wife did keep a bawdy-house, the plaintiff could be indicted for it.

Huckle v. *Reynolds*, 7 C. B. (N. S.), 114.

Where the words *primâ facie* apply only to a *thing*, and not to a person, still if the owner of the thing can

show that the words substantially reflect upon him, he may sue, without giving proof of special damage and without proving express malice.

Illustration.

To write and publish that plaintiff's ship is unseaworthy and has been sold to the Jews to carry convicts, is a libel upon the plaintiff in the way of his business, as well as upon his ship.

Ingram v. *Lawson*, 6 Bing. N. C. 212; 4 Jur. 151; 9 C. & P. 326; 8 Scott, 471.

Solomon v. *Lawson*, 8 Q. B. 823; 15 L. J. Q. B. 253; 10 Jur. 796, and other cases cited, *ante*, pp. 32—34.

CHAPTER IV.

SCANDALUM MAGNATUM.

By virtue of certain ancient statutes, words which would not be actionable, if spoken of an ordinary subject, are actionable, if spoken of a peer of the realm, or of a judge, of any of the great officers of the Crown, even without proof of any special damage.

It has been maintained that this privilege existed at the common law, independently of any statute; and passages are generally cited from Reports in support of this opinion. But in the passages relied on, Lord Coke appears to me to be referring to criminal, and not to civil proceedings. And such a distinction between nobles and commoners appears to me alien to the spirit of our common law.

The following are the statutes referred to:—"Forasmuch as there have been oftentimes found in the country devisors of tales, whereby discord or occasion of discord, hath many times arisen between the King and his people, or great men of this realm; for the damage that hath and may thereof ensue; it is commanded, that from henceforth none be so hardy to tell or publish any false news or tales, whereby discord, or occasion of discord or slander, may grow between the King and his people, or the great men of the realm; and he that doth so, shall be taken and kept in prison, until he hath brought him into the court, which was the first author of the tale." (3 Edw. I. Stat. Westminster I. c. 34.)

"Item, of devisors of false news, and of horrible and false lyes, of prelates, dukes, earls, barons, and other nobles and great men of the realm, and also of the chancellor, treasurer, clerk of the privy seal, steward of the King's house, justices of the one bench or of the other, and of other great officers of the realm, of things which by the said prelates, lords, nobles and officers aforesaid, were never spoken, done, nor thought, in great slander of the said prelates, lords, nobles, and officers, whereby debates and discords might arise betwixt the said lords, or between the lords and the commons, which God forbid, and whereof great peril and mischief might come to all the realm, and quick subversion and destruction of the said realm, if due remedy be not provided: It is straitly defended upon grievous pain, for to eschew the said damages and perils, that from henceforth none be so hardy to devise, speak, or to tell any false news, lyes, or such other false things, of prelates, lords, and of other aforesaid, whereof discord or any slander might rise within the same realm; and he that doth the same shall incur and have the pain another time ordained thereof by the Statute of Westminster the First, which will, that he be taken and imprisoned till he have found him of whom the word was moved." (2 Rich. II. St. I. c. 5.)

"Item, whereas it is contained, as well in the Statute of Westminster the First, as in the statute made at Gloucester, the second year of the reign of our lord the King that now is, that none be so hardy to invent, to say, or to tell any false news, lies, or such other false things, of the prelates, dukes, earls, barons, and other nobles and great men of the realm, and also of the chancellor, treasurer, clerk of the privy seal, the steward of the King's house, the justice of the one bench or of the other, and other great officers of the realm, and he that

doth so shall be taken and imprisoned, till he hath found him of whom the speech shall be moved: It is accorded and agreed in this Parliament, that when any such is taken and imprisoned, and cannot find him by whom the speech be moved, as before is said, that he be punished by the advice of the council, notwithstanding the said statutes." (12 Rich. II. c. 11.)

Although by these statutes no *civil* remedy is expressly given, yet the violation of these provisions entitles the great men of the realm to sue for damages, on the well-known principle, that if A. does an act expressly prohibited by statute, whereby B. is prejudiced, A. must compensate B. for such private injury. A. will also be liable to imprisonment for contempt on the information of the Attorney-General.

All peers, whether of Great Britain or of Scotland (5 Anne, c. 8, s. 23), are within the statute; including a viscount, though such a title of honour was unknown when the statute was passed, *Viscount Say & Seal* v. *Stephens*, Cro. Car. 135; Ley, 82. The King himself is within the 3 Edw. I. c. 34 (12 Rep. 133); but not within 2 Rich. II. st. 1, c. 5, not being "a great man" of his own realm (Cromp. Author. 19, 35). A peeress is not within either statute (Cromp. Author. 34). A baron of the Exchequer (and now any judge of the Supreme Court of Judicature) is within the statutes. Of course the rank or dignity which entitles the plaintiff to sue in *Scandalum Magnatum* must have been attained before the words complained of were published.

Although the words of the statute are "horrible and false lies," yet they have been strained to cover words which in no way affect the life or dignity of the peer, but which are merely uncivil expressions, expressing general disesteem for his lordship. For it is alleged that such expressions, though not likely to result in general discord, and the "quick subversion of the

realm," yet impugn and vilify the honour of the nobles, and tend to provoke to a breach of the peace. [But see the remarks of Atkins, J., in 2 Mod. 161—165. *Lord Townshend* v. *Dr. Hughes.*] The words also were supposed to echo through the kingdom, being spoken of a peer of the realm; and the plaintiff, therefore, had this further privilege that he could lay the venue where he pleased, and was not bound like an ordinary plaintiff to try in the county where the words were spoken.

Illustration.

Words complained of:—"I value my Lord Marquess of Dorchester no more than I value the dog at my foot." *Held* that the action was well laid in *Scandalum Magnatum*, the plaintiff being a Marquess. But a private person would have had no action for such words without proof of special damage, as they merely show the esteem in which the defendant held him.

Proby v. *Marquess of Dorchester* (in error), 1 Levinz, 148.

Lord Falkland v. *Phipps*, 2 Comyns, 439; 1 Vin. Abr. 549.

But the civil proceeding under these statutes is now quite obsolete. This may be, as alleged in Russell on Crimes, 5th ed., vol. iii., p. 203, n., because the nobility prefer "to waive their privileges in any action of slander, and to stand upon the same footing, with respect to civil remedies, as their fellow subjects." Or it may possibly be due to the decision in *Lord Peterborough* v. *Williams*, 2 Shower, 506, or in Butt's ed., p. 650, that in *scandalum magnatum* no costs are to be given to the plaintiff, though the verdict be for him. I believe no such action has been brought since 1710. (*The Duke of Richmond* v. *Costelow*, 11 Mod. 235.)

CHAPTER V.

SLANDER OF TITLE, OR WORDS CONCERNING THINGS.

WORDS cannot be defamatory unless they directly affect some *person;* either in his individual capacity, or in his office, profession, or trade. Sometimes no doubt an attack on a thing may be an indirect attack upon an individual; and may therefore be actionable, as defamatory of him. Thus where the defendant said of the plaintiff: "He is a cheat; he has nothing but rotten goods in his shop;" this was rightly held a slander on the plaintiff in the way of his trade (*Burnet* v. *Wells* (1700) 12 Mod. 420); for the words clearly imputed that the defendant was aware of the unsatisfactory nature of his wares, and yet continued to foist them on the public. So to charge a tradesman with wilfully adulterating the goods he sells is clearly an attack on *him* as well as on his goods, and would therefore be actionable without special damage. (*Jesson* v. *Hayes* (1636) Roll. Abr. 63. See also *Ingram* v. *Lawson*, 6 Bing. N. C. 212; 8 Scott, 478, and other cases cited, *ante* pp. 32—34.)

But wholly apart from these cases there is a branch of the law (generally known by the inappropriate but convenient name—Slander of Title) which permits an action to be brought against any one who maliciously decries the plaintiff's goods or some other thing belonging to him, and thereby produces special damage to the

plaintiff. This is obviously no part of the law of defamation, for the plaintiff's reputation remains uninjured; it is really an action on the case for maliciously acting in such a way as to inflict loss upon the plaintiff. All the preceding rules dispensing with proof of malice and special damage are therefore wholly inapplicable to cases of this kind. Here, as in all other actions on the case, there must be *et damnum et injuria*. The *injuria* consists in the unlawful words maliciously spoken, and the *damnum* is the consequent money loss to the plaintiff.

I. *Slander of title proper.*

Where the plaintiff possesses an estate or interest in any real or personal property, an action lies against any one who maliciously comes forward and falsely denies or impugns the plaintiff's title thereto, if thereby damage follows to the plaintiff. (*Pater* v. *Baker*, 3 C. B. 869; 16 L. J. C. P. 124; 11 Jur. 370.)

The statement must be *false;* if there be such a flaw in the title as the defendant asserted, no action lies. And the statement must be *malicious;* if it be made in the *bonâ fide* assertion of defendant's own right, real or supposed, to the property, no action lies. But whenever a man unnecessarily intermeddles with the affairs of others with which he is wholly unconcerned, such officious interference will be deemed malicious and he will be liable, if damage follow. Lastly, *special damage* must be proved, and shown to have arisen from defendant's words. And for this it is generally necessary for the plaintiff to prove that he was in act of selling his property either by public auction or private treaty, and that the defendant by his words prevented an intending purchaser from bidding or completing. (*Tasburgh* v. *Day;* Cro. Jac. 484; *Lowe* v. *Harewood*; Sir W. Jones, 196; Cro. Car. 140.) So proof that plaintiff

wished to let his lands and that the defendant prevented an intending tenant from taking the lease will be sufficient. But a mere apprehension that plaintiff's title might be drawn in question, or that the neighbours placed a lower value on plaintiff's lands in their own minds in consequence, the same not being offered for sale, will not be sufficient evidence of damage. "This action lieth not but by reason of the prejudice in the sale." (*Per* Fenner, J., in *Bold* v. *Bacon*, Cro. Eliz. 346.) The special damage must always be such as naturally or reasonably arises from the use of the words. *Haddon* v. *Lott*, 15 C. B. 411; 24 L. J. C. P. 49: *see post*, c. X.

It makes no difference whether the defendant's words be spoken or written or printed; save as affecting the damages, which should be larger where the publication is more permanent or extensive, as by advertisement. (*Malachy* v. *Soper & another*, 3 Bing. N. C. 371; 3 Scott, 723; 2 Hodges, 217.)

The property may be either real or personal; and the plaintiff's interest therein may be either in possession or reversion. It need not be even a *vested* interest, so long as it is anything that is saleable or that has a market value.

In one or two old cases it seems to have been held that no actual present damage need be proved. "The law gives an action for but a possibility of damage, as an action lies for calling an heir-apparent, 'bastard.'" *Per* Wylde, J., in *Turner* v. *Sterling* (1671), 2 Vent. 26; Anon. 1 Roll. Abr. 37. See *Humfreys* v. *Stanfield* or *Stridfield* (1638), Cro. Car. 469; Godb. 451; Sir Wm. Jones, 388; 1 Roll. Abr. 38. *Banister* v. *Banister*, 4 Rep. 17. But even in *Turner* v. *Sterling*, Vaughan, C.J., says:—"I take it that 'tis not actionable to call a man bastard while his father is alive; the books are cross in it." 2 Vent. 28. Both *dicta* were merely *obiter*. And in *Onslow* v. *Horne*, 3 Wils. 188; 2 W. Bl. 753, De Grey, C. J.,

says :—"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." There is no case precisely in point since 1638; but the tendency of all modern decisions is against the view of Wylde, J., which must now, I think, be deemed obsolete.

There is clearly no reason why a man who has no estate in the lands, but only a mere expectancy, should be allowed an action, whilst he in whom an estate is vested must prove special damage or be nonsuited. Of course, if the heir-apparent has in fact been disinherited in consequence of defendant's words, the special damage is clear and the action lies.

Illustrations.

Lands were settled on D. in tail, remainder to the plaintiff in fee. D. being an old man and childless, plaintiff was about to sell his remainder to A., when the defendant interfered and asserted that D. had issue. A. consequently refused to buy. *Held* that the action lay.

Bliss v. *Stafford*, Owen, 37 ; Moore, 188 ; Jenk. 247.

The plaintiff's father being tenant-in-tail of certain lands, which he was about to sell, the purchaser offered the plaintiff a sum of money to join in the assurance so as to estop him from attempting to set aside the deed, should he ever succeed to the estate tail ; but the defendant told the purchaser that the plaintiff was a bastard, wherefore he refused to give the plaintiff anything for his signature. *Held* that the plaintiff had a cause of action, though he was the youngest son of his father, and his chance of succeeding therefore remote.

Vaughan v. *Ellis*, Cro. Jac. 213.

Plaintiff succeeded to certain lands as heir-at-law; the defendant asserted that he was a bastard ; plaintiff was in consequence put to great expense to defend his title.

Elborow v. *Allen*, Cro. Jac. 642.

The defendant falsely represented to the bailiff of a manor that a sheep of the plaintiff was an estray, in consequence of which it was wrongfully seized. *Held* that an action on the case lay against him.

Newman v. *Zachary*, Aleyn 3.

The plaintiff was desirous to sell his lands to any one who would buy them, when the defendant said that the plaintiff had mortgaged all his lands for £100, and that he had no power to sell or let the same. No special damage being shown, judgment was stayed. It was not proved that any one intending to buy plaintiff's lands heard defendant speak the words.

Manning v. *Avery* (1674), 3 Keb. 153 ; 1 Vin. Abr. 553.

The plaintiff was possessed of tithes which he desired to sell ; the defendant falsely and maliciously said :—"His right and title thereunto is nought, and I have a better title than he." As special damage it was

alleged that the plaintiff "was likely to sell, and was injured by the words; and that by reason of the defendant's speaking the words, the plaintiff could not recover his tithes." *Held* insufficient.

Cane v. *Golding* (1649), Style, 169, 176.

Law v. *Harwood* (1629), Sir Wm. Jones, 196; Palm. 529; Cro. Car. 140.

The plaintiff was the assignee of a beneficial lease, which he expected would realize £100. But the defendant, the superior landlord, came to the sale, and stated publicly:—"The whole of the covenants of this lease are broken, and I have served notice of ejectment; the premises will cost £70 to put them in repair." In consequence of this statement the property fetched only 35 guineas. Rolfe, B., left to the jury only one question, Was the defendant's statement true or false? and they found a verdict for the plaintiff; damages, £40. But the Court of Exchequer granted a new trial on the ground that two other questions ought to have been left to the jury as well:—Was the statement or any part of it made maliciously? and, Did the special damage arise from such malicious statement or from such part of it as was malicious?

Brook v. *Rawl*, 4 Exch. 521; 19 L. J. Ex. 114.

And see *Smith* v. *Spooner*, 3 Taunt. 246.

Milman v. *Pratt*, 2 B. & C. 486; 3 D. & R. 728.

The plaintiff held 160 shares in a silver mine in Cornwall, which he said were worth £100,000. Tollervey and Hayward each filed a bill in Chancery against the plaintiff and others claiming certain shares in the mine, and praying for an account and an injunction, and for the appointment of a receiver. To these bills plaintiff demurred. Before the demurrers came on for hearing, a paragraph appeared in the defendant's newspaper to the effect that the demurrers had been overruled, that an injunction had been granted, that a receiver had been duly appointed, and had actually arrived at the mine; all of which was quite untrue. A verdict having been obtained for the plaintiff, damages £5; the Court of Common Pleas arrested judgment on the ground that there was no sufficient allegation of special damage, and this, although the declaration contained averments to the effect that "the plaintiff is injured in his rights; and the shares so possessed by him, and in which he is interested, have been and are much depreciated and lessened in value; and divers persons have believed and do believe that he has little or no right to the shares, and that the mine cannot be lawfully worked or used for his benefit; and that he hath been hindered and prevented from selling or disposing of his said shares in the said mine, and from working and using the same in so ample and beneficial a manner as he otherwise would have done."

Malachy v. *Soper and another*, 3 Bing. N. C. 383; 3 Scott, 723; 2 Hodges, 217.

And see *Hart and another* v. *Wall*, 2 C. P. D. 146; 46 L. J. C. P. 227; 25 W. R. 373, *ante*, p. 34.

It is not actionable for any man to assert his own

rights at any time. And even where the defendant fails to prove such right on investigation, still if at the time he spoke he *bonâ fide* supposed such right to exist, no action lies. (*Carr* v. *Duckett*, 5 H. & N. 783; 29 L. J. Ex. 468.) Hence, whenever a man claims a right or title in himself, it is not enough for the plaintiff to prove that he had no such right; he must also give evidence of express malice (*Smith* v. *Spooner*, 3 Taunt. 246); that is, he must also attempt to show that the defendant could not honestly have believed in the existence of the right he claimed, or at least that he had no reasonable or probable cause for so believing. If there appear no reasonable or probable cause for his claim of title, still the jury are not bound to find malice; the defendant may have acted stupidly, yet from an innocent motive. (*Pitt* v. *Donovan*, 1 M. & S. 648; *Steward* v. *Young;* L. R. 5 C. P. 122; 39 L. J. C. P. 85; 18 W. R. 492; 22 L. T. 168; *Clark* v. *Molyneux*, 3 Q. B. D. 237; 47 L. J. Q. B. 230; 26 W. R. 104; 37 L. T. 694.) But in all cases where it appears that the defendant at the time he spoke knew that what he said was false, the jury should certainly find malice; lies which injure another cannot be told *bonâ fide*. (*Waterer* v. *Freeman*, Hob. 266.)

The law is the same where the defendant is an agent or attorney, and claims for his principal or client a title which he honestly believes him to possess. (*Hargrave* v. *Le Breton*, 4 Burr. 2422; *Steward* v. *Young*, L. R. 5 C. P. 122; 39 L. J. C. P. 85; 18 W. R. 492; 22 L. T. 168.) So where a man *bonâ fide* asserts a title in his father or other near relative to whom he or his wife is heir apparent. (*Pitt* v. *Donovan*, 1 M. & S. 639; *Gutsole* v. *Mathers*, 1 M. & W. 495; 5 Dowl. 69; 2 Gale, 64; 1 Tyrw. & Gr. 694.) But where the defendant makes no claim at all for himself or any connection of his, but

asserts a title in some one who is a stranger to him; here he clearly is meddling in a matter which is no concern of his; and such officious and unnecessary interference will be deemed malicious. (*Pennyman* v. *Rabanks*, Cro. Eliz. 427; 1 Vin. Abr. 551. See Jenkins's Centuries, 247.)

"If some portions of the statement which a person makes are *bonâ fide*, but others are *malâ fide*, and occasion injury to another, the injured party cannot recover damages unless he can distinctly trace the damage as resulting from that part which is made *malâ fide*." (*Per* Parke, B., in *Brook* v. *Rawl*, 4 Ex. 524.) So if part be true and part false, *ib.* 523.

Illustrations.

Plaintiff had purchased the manor and castle of H. in fee from Lord Audley, and was about to demise them to Ralph Egerton for a term of twenty-two years, when the defendant, a widow, said, "I have a lease of the castle and manor of H. for ninety years;" and she showed him what purported to be a lease from a former Lord Audley to her husband for a term of ninety years. This lease was a forgery; but the defendant was not aware of it. *Held* that no action lay for slander of title; for the defendant had claimed a right to the property herself. It would have been otherwise had she known the lease was a forgery.

Sir G. Gerard v. *Dickenson*, 4 Rep. 18; Cro. Eliz. 197.
And see Fitzh. Nat. Brev. 116 B. & D.
Lovett v. *Weller*, 1 Roll. 409.

If the defendant asserts that plaintiff is a bastard, and that he himself is the next heir, no action lies.

Banister v. *Banister* (1683), 4 Rep. 17.
Cane v. *Golding* (1649), Styles, 169, 176.

The plaintiff put up for sale by public auction eight unfinished houses in Agar Town. The defendant, a surveyor of roads appointed under the 7 & 8 Vict. c. 84, had previously insisted that these houses were not being built by the plaintiff in conformity with the Act. He now attended the sale and stated publicly, "My object in attending the sale is, to inform purchasers, if there are any present, that I shall not allow the houses to be finished until the roads are made good. I have no power to compel the purchasers to complete the roads; but I have power to prevent them from completing the houses until the roads are made good." In consequence only two of the carcasses were sold; and they realized only £35 each, instead of £65. The jury found a verdict for the plaintiff for £18 12*s*. But the Court of C. P. held that there was no evidence of malice to go to the jury. For malice is not to be inferred from the circumstance of the

defendant having acted upon an incorrect view of his duty, founded upon an erroneous construction of the statute.

Pater v. *Baker*, 3 C. B. 831 ; 16 L. J. C. P. 124 ; 11 Jur. 370.
Hargrave v. *Le Breton*, 4 Burr. 2422.

The plaintiff was the widow and administratrix of her deceased husband, and advertised a sale of some of his property. Defendant, an old friend of the husband, thereupon put an advertisement in the papers offering a reward for the production of the will of the deceased. The defendant subsequently called on the solicitor of the deceased, and was assured by him there was no will ; but, in spite of this, the defendant attended at the sale and made statements which effectually prevented any person present from bidding. After waiting twelve months, the plaintiff again put the same property up for sale, and defendant again stopped the auction. Cockburn, C. J., left it to the jury to say whether, after the interview with the plaintiff's solicitor, defendant could still possess an honest and reasonable belief that the deceased had left a will. The jury found that he had not that belief. Verdict for the plaintiff. Damages, £54 7s.

Atkins v. *Perrin*, 3 F. & F. 179.

The defendant had a subsisting patent for the manufacture of spooling machines ; so had the plaintiff. The defendant wrote to certain manufacturers, customers of the plaintiff, warning them against using the plaintiff's machine, on the ground that it was an infringement of the defendant's patent. *Held* that "the action could not lie unless the plaintiff affirmatively proved that the defendant's claim was not a *bonâ fide* claim in support of a right which, with or without cause, he fancied he had, but a *malâ fide* and malicious attempt to injure the plaintiff by asserting a claim of right against his own knowledge that it was without any foundation." Evidence to show that the defendant's patent, though subsisting, was void for want of novelty, was not admitted, as being irrelevant in this action.

Wren v. *Weild*, L. R. 4 Q. B. 730, 737 ; 10 B. & S. 51 ; 38 L. J. Q. B. 88, 327 ; 20 L. T. 277.
And see *Dicks* v. *Brooks*, 15 Ch. D. 22 ; 49 L. J. Ch. 812 ; 29 W. R. 87 ; 40 L. T. 710 ; 43 L. T. 71.
Hammersmith Skating Rink Co. v. *Dublin Skating Rink Co.*, 10 Ir. R. Eq. 235.

But a patentee is not entitled to publish statements that he intends to institute legal proceedings in order to deter persons from purchasing alleged infringements of his patent, unless he does honestly intend to follow up such threats by really taking such proceedings.

Rollins v. *Hinks*, L. R. 13 Eq. 355 ; 41 L. J. Ch. 358 ; 20 W. R. 287 ; 26 L. T. 56.
Axmann v. *Lund*, L. R. 18 Eq. 330 ; 43 L. J. Ch. 655 ; 22 W. R. 789.
Halsey v. *Brotherhood*, 15 Ch. D. 514 ; 49 L. J. Ch. 786 ; 29 W. R. 9 ; 43 L. T. 366.

A. died possessed of furniture in a beer-shop. His widow, without taking out administration, continued in possession of the beer-shop for three or four years, and then died, having whilst so in possession conveyed

all the furniture by bill of sale to her landlords by way of security for a debt she had contracted with them. After the widow's death, the plaintiff took out letters of administration to the estate of A., and informed the defendant, the landlords' agent, that the bill of sale was invalid, as the widow had no title to the furniture. Subsequently the plaintiff was about to sell the furniture by auction, when the defendant interposed to forbid the sale, and said that he claimed the goods for his principals under a bill of sale. On proof of these facts, in an action for slander of title, the plaintiff was nonsuited. *Held* that the mere fact of the defendant's having been told before the sale that the bill of sale was invalid, was no evidence of malice to be left to the jury, and that the plaintiff was therefore properly nonsuited.

Steward v. *Young*, L. R. 5 C. P. 122; 39 L. J. C. P. 85; 18 W. R. 492; 22 L. T. 168.

And see *Blackham* v. *Pugh*, 2 C. B. 611; 15 L. J. C. P. 290.

II. *Slander of Goods manufactured or sold by another.*

"An untrue statement, disparaging a man's goods, published without lawful occasion, and causing him special damage, is actionable." This is laid down as a general principle by Bramwell, B., in *Western Counties Manure Company* v. *Lawes Chemical Manure Company*, L. R. 9 Ex. 218, 222; 43 L. J. Ex. 171; 23 W. R. 5; and it applies although no imputation is cast on the plaintiff's private or professional character. Nor in the opinion of the same learned Judge is it necessary to prove actual malice; it is sufficient if it be made "without reasonable cause."

At the same time it is not actionable for a man to commend his own goods; or to advertize that he can make as good articles as any other person in the trade. (*Harman* v. *Delany*, 2 Str. 898; 1 Barnard. 289; Fitz. 121.)

In *Evans* v. *Harlow* (1844), 5 Q. B. 624; 13 L. J. Q. B. 120; Dav. & M. 507, which appears to be the earliest case of this kind, no special damage was alleged; and the only point decided was that the words were not a libel on the plaintiff in the way of his trade, and that therefore no action lay. The Court did not expressly decide that, had special damage been

alleged, the declaration would have been good, though Patteson, J., was clearly of that opinion, as appears from his remarks on p. 633. These remarks were cited to the Court in the next case of the kind, *Young* v. *Macrae*, 3 B. & S. 264; 32 L. J. Q. B. 6; 11 W. R. 63; 9 Jur. N. S. 539; 7 L. T. 354. But there the libel did not impute that the plaintiff's oil was bad in itself, but merely alleged that it was inferior to that of the defendant; and, again, it was held that no action lay. Blackburn, J., asks (3 B. & S. 269):—"Is there any case where an action has been maintained for slander, written or verbal of *goods*, unless where the slander is of the *title* to them, and special damage has resulted?" But the *dicta* of the other judges fully bear out the head-note:—"*Semble*, that if a person falsely and maliciously disparages an article which another manufactures or vends, and special damage results therefrom, an action will lie, although in so doing no imputation was cast on the personal or professional character of the manufacturer or vendor." And this *semble* may now, I think, be considered as settled law, since the decision in *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.*, *supra*.

It is unfortunate that in the report of *Young* v. *Macrae*, in the Law Journal (32 Q. B. p. 8), Cockburn, C.J., is represented as stating:—"I am very far from saying that if a trader maliciously, and falsely *to his own knowledge*, publishes matter disparaging an article manufactured or sold by another, even if he makes no reflection upon the character, trade, or profession of that other, and if special damage followed, that there would not be an actionable libel; for a most grievous wrong might be done in that way, and the person injured ought to have a remedy by an action." The words "falsely to his own knowledge" seem to imply that fraud or misrepresentation is essential to the cause of action; and it is on the authority of this passage, no doubt, that I find it stated in Addison on Torts (3rd ed., p. 787; 4th ed., p. 796; 5th ed., p. 184): "Disparaging criticisms by one tradesman upon the goods of a rival tradesman are not actionable, unless it is proved that they have been *maliciously and fraudulently made, and were false to the knowledge of the party at the time they were made.*" But in no other place in the Law Journal Report is there any hint that a *scienter* must be proved, although the Lord Chief Justice

gives several instances during the argument and later in his judgment, in which in his opinion an action would lie. That the statement was false to the knowledge of the defendant is cogent evidence of malice; but surely any other evidence of malice would be sufficient. In Best & Smith, the passage cited above is given as follows:—"I am far from saying 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. For although none of us are familiar with such actions, still we can see that a most grievous wrong might be done in that way, and it ought not to be without remedy;" (3 B. & S. 269). And so in the Law Times Reports (7 L. T. 355), the words are merely "falsely and maliciously;" in the Jurist (9 Jur. N. S. 539) merely "a disparaging notice;" though the Weekly Reporter (11 W. R. 63) contains in addition to "falsely and maliciously," the words "by statements he knows to be false." In *Western Counties Manure Co.* v. *Lawes Manure Co.*, the declaration before the Court did not contain any averment "as the defendants well knew." See the whole pleadings in the Appendix. I conclude, therefore, in spite of the passage cited above from Addison on Torts, that the defendant's knowledge of the falsity of his statements at the time he makes them, is immaterial in this action, save as aggravating the damages.

In *Thomas* v. *Williams*, 14 Ch. D. 864; 49 L. J. Ch. 605; 28 W. R. 983; 43 L. T. 91, Fry, J., decided that to entitle a plaintiff to an injunction to restrain a libel injurious to trade it was not necessary that he should prove actual damage.

Illustrations.

The defendant published an advertisement, denying that the plaintiff held any patent for the manufacture of "self-acting tallow syphons or lubricators," and cautioning the public against such lubricators as wasting the tallow. No special damage was alleged. *Held* that the words were not a libel on the plaintiff either generally, or in the way of his trade, but were only a reflection upon the goods sold by him, which was not actionable without special damage.

Evans v. *Harlow*, 5 Q. B. 624; 13 L. J. Q. B. 120; Dav. & M. 507; 8 Jur. 571; *ante*, p. 33.

"If a man makes a false statement with respect to the goods of A., in comparing his own goods with those of A., and A. suffers special damage, will not an action lie?" *Per* Cockburn, C. J., in

Young and others v. *Macrae*, 32 L. J. Q. B. 8;

and counsel answers, "Certainly it would."

"If a man were to write falsely that what another man sold as Turkish rhubarb was three parts brickdust, and special damage could be proved, it might be actionable." *Per* Cockburn, C. J., in

Young and others v. *Macrae*, 32 L. J. Q. B. 7.

The defendant published a certificate by a Dr. Muspratt, who had compared the plaintiff's oil with the defendant's, and deemed it inferior to the defendant's. It was alleged that the certificate was false, and that divers customers of the plaintiff's after reading it had ceased to deal with the plaintiff and gone over to the defendant. *Held* that the plaintiff's oil, even if inferior to the defendant's, might still be very good; and that the falsity was alleged too generally, and that therefore no action lay. It was consistent with the declaration that every word said about the plaintiff's oil should be true, and the only falsehood the assertion that defendant's was superior to it, which would not be actionable. "It is not averred that the defendant falsely represented that the oil of the plaintiffs had a reddish-brown tinge, was much thicker, and that it had a more disagreeable odour. If that had been falsely represented, and special damage had ensued, an action might have been maintained."

Young and others v. *Macrae*, 3 B. & S. 264; 32 L. J. Q. B. 6; 11 W. R. 63; 9 Jur. N. S. 539; 7 L. T. 354.

The defendants falsely and without lawful occasion published a detailed analysis of the plaintiffs' artificial manure and of their own, in which the plaintiffs' manure was much disparaged and their own extolled. Special damage having resulted, *held* that the action lay.

Western Counties Manure Co. v. *Lawes Chemical Manure Co.*, L. R. 9 Ex. 218; 43 L. J. Ex. 171; 23 W. R. 5.

See *Thorley's Cattle Food Co.* v. *Massam*, 6 Ch. D. 582; 46 L. J. Ch. 713; 14 Ch. D. 763; 28 W. R. 295, 966; 41 L. T. 542; 42 L. T. 851.

The defendant stated in Ireland that the plaintiff's ship was unseaworthy, consequently her crew refused to proceed to sea in her, and a negociation for the sale of her fell through. The ship was in England. But it was held that this fact would not give an English Court jurisdiction.

Casey v. *Arnott*, 2 C. P. D. 24; 46 L. J. C. P. 3; 25 W. R. 46; 35 L. T. 424.

There are many other cases in which words produce special damage to the plaintiff without in any way affecting his reputation; and for such words if spoken without lawful occasion an action on the case will lie, provided the damage be the necessary or probable con-

sequence of the words, within the meaning of the strict rules laid down in c. X., pp. 321—333. But as such cases are clearly beyond the scope of the present treatise, I merely subjoin a few instances.

Illustrations.

If a man menace my tenants at will, of life and member, *per quod* they depart from their tenures, an action upon the case will lie against him, but the menace without their departure is no cause of action.

Conesby's Case, Year Book, 9 Hen. VII., pp. 7, 8 ; 1 Roll. Abr. 108.

If defendant threatens the plaintiff's workmen, so that they do not dare to go on with their work, whereby the plaintiff loses the selling of his goods, an action lies.

Garret v. *Taylor* (1621), Cro. Jac. 567 ; 1 Roll. Abr. 108.

Tarleton and others v. *McGawley*, Peake, 270.

And see *Springhead Spinning Co.* v. *Riley*, L. R. 6 Eq. 551 ; 37 L. J. Ch. 889 ; 16 W. R. 1138 ; 19 L. T. 64.

Skinner v. *Kitch*, L. R. 2 Q. B. 393 ; 36 L. J. M. C. 322; 15 W. R. 830 ; 16 L. T. 413.

"If a man should lie in wait and fright the boys from going to school, that schoolmaster might have an action for the loss of his scholars." *Per* Holt, C. J., in

Keble v. *Hickeringill*, 11 East, 576, n.

The defendant wrongfully and maliciously caused certain persons who had agreed to sell goods to the plaintiff to refuse to deliver them, by asserting that he had a lien upon them, and ordering those persons to retain the goods until further orders from him, he well knowing at the time that he had no lien. *Held* that the action was maintainable, though the persons who had the goods were under no legal obligation to obey the orders of the defendant, and their refusal was their own spontaneous act.

Green v. *Button*, 2 C. M. & R. 707.

CHAPTER VI.

PUBLICATION.

PUBLICATION is the communication of the defamatory words to some third person. It is essential to the plaintiff's case that the defendant's words should be *expressed;* the law permits us to think as badly as we please of our neighbours so long as we keep our uncharitable thoughts to ourselves. Merely composing a libel is not actionable unless it be published. And it is no publication when the words are only communicated to the person defamed; for that cannot injure his reputation. A man's reputation is the estimate in which others hold him; not the opinion which he has of himself. The attempt to diminish our friend's good opinion of himself, though possibly unpleasant to him, is yet generally ineffectual, and is certainly not actionable, unless someone else overhears. There must be a communication by the defendant to some third person, other than the plaintiff. (*Barrow* v. *Lewellin*, Hob. 62.) And the communication, whether it be in words, or by signs, gestures, or caricature, must be *intelligible* to such third person. If the words used be in the vernacular of the place of publication, it will be presumed that such third persons understood them, until the contrary be proved. And it will be presumed that they understood them in the sense which such words properly bear in their ordinary signification, unless any reason appear for assigning

them a different meaning. Making it known to *one* individual is a sufficient "publishing," provided that that one is not the person defamed. Such publication must of course be prior to the date of the issuing of the writ.

Illustrations.

To shout defamatory words on a desert moor where no one can hear you is not a publication; but if anyone chances to hear you, it is a publication, although you thought no one was by.

To utter defamatory words in a foreign language is not a publication, if no one present understands their meaning; but if defamatory words be written in a foreign language, there will be a publication as soon as ever the writing comes into the hands of anyone who does understand that language, or who gets them explained or translated to him.

Sending a letter through the post to the plaintiff, properly addressed to him, and fastened in the usual way, is no publication; and the defendant is not answerable for anything the plaintiff may choose to do with the letter after it has once safely reached his hands.

Barrow v. *Lewellin*, Hob. 62.

In an American case the plaintiff, after so receiving a libellous letter from the defendant, sent for a friend of his and also for the defendant; he then repeated the contents of the letter in their presence, and asked the defendant if he wrote that letter; the defendant, in the presence of the plaintiff's friend, admitted that he had written it. *Held*, no publication *by the defendant* to the plaintiff's friend.

Fonville v. *Nease*, Dudley, S. C. 303.

But it is otherwise if a message be sent to the plaintiff by telegraph; the contents of the telegram are necessarily communicated to all the clerks through whose hands it passes. So with a postcard.

Whitfield and others v. *S. E. Ry. Co.*, E. B. & E. 115; 27 L. J. Q. B. 229; 4 Jur. N. S. 688.

Williamson v. *Freer*, L. R. 9 C.P. 393; 43 L. J. C. P. 161; 22 W. R. 878; 30 L. T. 332.

Robinson v. *Jones*, 4 L. R. Ir. 391.

So where the defendant knew that the plaintiff's letters were always opened by his clerk in the morning, and yet sent a libellous letter addressed to the plaintiff, which was opened and read by the plaintiff's clerk lawfully and in the usual course of business. *Held*, a publication by the defendant to the plaintiff's clerk.

Delacroix v. *Thevenot*, 2 Stark. 63.

So where the defendant, before posting the letter to the plaintiff, had it copied. *Held*, a publication by the defendant to his own clerk who copied it.

Keene v. *Ruff*, 1 Clarke (Iowa), 482.

So where the defendant wrote a letter to the plaintiff himself, but read it to a friend before posting it.

Snyder v. *Andrews*, 6 Barbour (New York), 43.

McCombs v. *Tuttle*, 5 Blackford (Indiana), 431.

The delivery of a newspaper containing the libel to the proper officer of the Commissioners of Stamps and Taxes for revenue purposes is a sufficient publication of the libel; although the proprietor of the paper was required by law so to deliver it; for the stamp officer "would at all events have an opportunity of reading" the libel.

R. v. *Amphlit*, 4 B. & C. 35; 6 D. & R. 125.

So the delivery of a manuscript to be printed is a sufficient publication; even though the author repent and suppress all the printed copies. For the compositor must hear it read.

Baldwin v. *Elphinston*, 2 W. Bl. 1037.

[This may be considered a somewhat harsh decision, as the compositor does not attend to the substance of the manuscript, but sets it up in copy mechanically; but it has recently been acted on in America.

Trumbull v. *Gibbons*, 3 City Hall Recorder, 97.

And see *Watts* v. *Fraser and another*, 7 Ad. & E. 223; 7 C. & P. 369; 1 M. & Rob. 449; 2 N. & P. 157; 1 Jur. 671; W. W. & D. 451.

Lawless v. *The Anglo-Egyptian Cotton and Oil Co.*, L. R. 4 Q. B. 262; 10 B. & S. 226; 38 L. J. Q. B. 129; 17 W. R. 498.

Lake v. *King*, 1 Lev. 241; 1 Saund. 131; Sid. 414; 1 Mod. 58.]

But merely to be in possession of a copy of a libel is no crime, unless some publication thereof ensue.

R. v. *Beere*, Carth. 409; 12 Mod. 219; Holt, 422; Salk. 417; 1 Rav. 414.

And see 11 Hargrave's St. Tr. 322, sub *Entick* v. *Carrington*.

Although husband and wife are generally to be considered one person in actions of tort as well as of contract (*Phillips* v. *Barnet*, 1 Q. B. D. 436), still the plaintiff's wife is sufficiently a third person to make a communication to her of words defamatory of her husband, a publication in law. *Wenman* v. *Ash*, 13 C. B. 836; 22 L. J. C. P. 190; 1 C. L. R. 592; 17 Jurist, 579. And it is submitted that similarly a communication to the husband of a charge against his wife is a sufficient publication. The doubt suggested by Jervis, C. J., in *Wenman* v. *Ash*, must mean that he considered a communication to the husband of a report prejudicial to his wife was *primâ facie* privileged as being a friendly act; not that it was no publication. The converse case of the defendant and his wife has never been decided in England. Is it a publication if a man tells his wife

what he thinks of his neighbours? Possibly such a communication would be deemed to enjoy the same privilege as that which is supposed to attach to matters divulged by a Roman Catholic to his priest under the seal of confession. The question seems never to have arisen in England; probably because in every such case there has been an immediate and undoubted publication of the same slander, or an exaggerated version thereof, by the wife to some third person; for which the husband would be equally answerable in damages, and which would be easier to prove. In America there is a *dictum*, that the delivery of a libel by the author to his wife "in confidence" is privileged. (*Trumbull* v. *Gibbons*, 3 City Hall Recorder, 97.)

The plaintiff must prove a publication by the defendant *in fact*. That the third person had the opportunity of reading the libel is not sufficient, if the jury are satisfied that he did not in fact avail himself thereof. Even though it is clear that the defendant desired and intended publication.

Illustrations.

The defendant wrote a letter and gave it to B. to deliver to the plaintiff. It was folded, but not sealed. B. did not read it; but conveyed it direct to the plaintiff. *Held*, no publication.

Clutterbuck v. *Chaffers*, 1 Stark. 471.

Day v. *Bream*, 2 Moo. & Rob. 54.

The defendant threw a sealed letter addressed to the plaintiff, "or C.," into M.'s enclosure. M. picked it up and delivered it unopened to the plaintiff himself, who alone was libelled. No publication.

Fonville v. *Nease*, Dudley, S. C. 303 (American).

Posting up a libellous placard and taking it down again before anyone could read it, is no publication; but if it was exhibited long enough for anyone to read it, then it is a question of fact for the jury whether anyone actually did read it.

So it is no defence that the third person was not intended to overhear the slander or to read the libel, if in fact he has done so. An accidental or inadvertent communication is quite sufficient. (See *Shepheard* v. *Whitaker*, L. R. 10 C. P. 502; 32 L. T. 402; c. I. *ante*, p. 7.)

Illustrations.

The defendant by mistake directed and posted a libellous letter to the plaintiff's employer instead of to the plaintiff himself. *Held* a publication.

Fox v. *Broderick*, 14 Ir. C. L. Rep. 453.

Rev. Samuel Paine sent his servant to his study for a certain paper which he wished to show to Brereton; the servant by mistake brought a libellous epitaph on Queen Mary, which Paine inadvertently handed to Brereton, supposing it to be the paper for which he sent; and Brereton read it aloud to Dr. Hoyle. This would probably be deemed a publication by Paine to Brereton in a civil case—(Note to *Mayne* v. *Fletcher*, 4 Man. & Ry. 312); but would not be sufficient in a criminal case.

R. v. *Paine* (1695), 5 Mod. 163.

For in a criminal case it is essential that there should be a guilty intention.

R. v. *Lord Abingdon*, 1 Esp. 228.

See also *Brett* v. *Watson*, 20 W. R. 723.

Blake v. *Stevens*, 4 F. & F. 232; 11 L. T. 543.

But if I compose or copy a libel, and keep the manuscript in my study, intending to show it to no one, and it is *stolen* by a burglar and published by him; it is submitted that there is no publication by me, either in civil or criminal proceedings.

See *Weir* v. *Hoss*, 6 Alabama, 881.

But it would be a publication by me, if through any default of mine it got abroad, whether through my negligence or folly.

As soon as the manuscript of a libel has passed out of the defendant's possession and control, it is deemed to be published, so far as the defendant is concerned (*Per* Holroyd, J., in *R.* v. *Burdett*, 4 B. & Ald. 143); provided it does not pass immediately and unread into the possession and control of the plaintiff.

Illustrations.

A letter is published as soon as posted, and in the place where it is posted, if it is ever opened anywhere by any third person.

Ward v. *Smith*, 6 Bing. 749; 4 M. & P. 595; 4 C. & P. 302.

Clegg v. *Laffer*, 3 Moore & Scott, 727; 10 Bing. 250.

Warren v. *Warren*, 4 Tyr. 850; 1 C. M. & R. 250.

Shipley v. *Todhunter*, 7 C. & P. 680.

So "if I send a manuscript to the printer of a periodical publication, and do not restrain the printing and publishing of it, and he does print and publish it in that publication, I am the publisher," and as such liable to an action. *Per* Lord Erskine in

Burdett v. *Abbot*, 5 Dow, H. L. 201; 14 East, 1.

See also *R.* v. *Lovett*, 9 C. & P. 462.

Every one who requests, procures, or commands another to publish a libel is answerable as though he published it himself. And such request need not be express, but may be inferred from the defendant's conduct in sending his manuscript to the editor of a magazine, or making a statement to the reporter of a newspaper, with the knowledge that they will be sure to publish it, and without any effort to restrain their so doing. And it is not necessary that the defendant's communication be inserted *verbatim;* so long as the sense and substance of it appear in print.

This rule is of great value in cases where the words employed are not actionable when spoken; but are so if written. Here though the proprietor of the newspaper is of course liable for printing them, still it is more satisfactory if possible to make the author of the scandal defendant. An action of slander will not lie; but if he spoke the words under such circumstances as would ensure their being printed, or if in any other way he requested or contrived their publication in the paper, he is liable in an action of libel as the actual publisher. *Qui facit per alium facit per se.*

Illustrations.

If a manuscript in the handwriting of the defendant be sent to the printer or publisher of a magazine, who prints and publishes it, the defendant will be liable for the full damages caused by such publication, although there is no proof offered that he expressly directed the printing and publishing of such manuscript.

Bond v. *Douglas*, 7 C. & P. 626.

R. v. *Lovett*, 9 C. & P. 462.

Burdett v. *Abbot*, 5 Dow, H. L. 201; 14 East, 1.

And this is so, although the editor has cut the article up, omitting the most libellous passages and only publishing the remainder.

Tarpley v. *Blabey*, 2 Bing. N. C. 437; 2 Scott, 642; 1 Hodges, 414.

So where Cooper told the editor several good stories against the Rev. J. K. and asked the editor to "show Mr. K. up;" and subsequently the editor published the substance of them in the newspaper; this was held a publication by Cooper, although the editor knew of the facts from other quarters as well.

R. v. *Cooper*, 15 L. J. Q. B. 206; 8 Q. B. 533.

And see *Adams* v. *Kelly*, Ry. & Moo. 157; and the judgments of Byles and Mellor, J.J., in the next case, L. R. 4 Ex. 181—186.

At the meeting of the board of guardians, at which reporters were present, it was stated that the plaintiff had turned his daughter out of doors, and that she consequently had been admitted into the workhouse and had become chargeable to the parish. Ellis, one of the guardians, said, "I hope the local press will take notice of this very scandalous case," and requested the chairman, Prescott, to give an outline of it. This Prescott did, remarking, "I am glad gentlemen of the press are in the room, and I hope they will give publicity to the matter." Ellis added, "And so do I." From the notes taken in the room the reporters prepared a condensed account which appeared in the local newspapers, and which, though partly in the reporters' own language, was substantially a correct report of what took place at the meeting. *Held* by the majority of the Court of Exchequer Chamber (Montague Smith, Keating and Hannen, J.J., Byles and Mellor, J.J., dissenting) that Martin, B., was wrong in directing the jury that there was no evidence to go to the jury that Prescott and Ellis had directed the publication of the account which appeared in the papers. [N.B.—Of the six judges concerned, three were of one opinion, three of the other.]

Parkes v. *Prescott and another*, L. R. 4 Ex. 169; 38 L. J. Ex. 105; 17 W. R. 773; 20 L. T. 537.

But though merely composing a libel without publishing it is not actionable, merely publishing it, not having composed it, *is* actionable. "The mere delivery of a libel to a third person by one conscious of its contents amounts to a publication and is an indictable offence." (*Per* Wood, B., in *Maloney* v. *Bartley*, 3 Camp. 213.) "If one reads a libel, that is no publication of it; or if he hears it read, it is no publication of it; for before he reads or hears it, he cannot know it to be a libel; or if he hears or reads it, and laughs at it, it is no publication of it; or if he writes a copy of it, and does not publish it to others, it is no publication of the libel; but if after he has read or heard it, he repeats it, or any part of it, in the hearing of others, or after that he knows it to be a libel, he reads it to others, that is an unlawful publication of it." (*Per* Lord Coke in *John Lamb's Case*, 9 Rep. 60.)

Every one who prints or publishes a libel may be sued by the person defamed; and to such an action it is no defence that another wrote it; it is no defence that it was printed or published by the desire or procurement

of another, whether that other be made a defendant to the action or not. All concerned in publishing the libel or in procuring it to be published are equally responsible with the author. And printing the libel or causing it to be printed is *primâ facie* evidence of publication. (*Burdett* v. *Abbot*, 5 Dow, H. L. 201; *Baldwin* v. *Elphinston*, 2 W. Bl. 1037.) If the libel appear in a newspaper, the proprietor, the editor, the printer, and the author, are all liable to be sued, either separately or together. And that one has been already sued is no defence to an action brought against any of the others in respect of the same libel. (*Frescoe* v. *May*, 2 F. & F. 123.) Nor should the fact that such actions are pending be taken into consideration by the jury in assessing the damage arising from the publication by the present defendant. (*Harrison* v. *Pearce*, 1 F. & F. 567; 32 L. T. (Old S.) 298.) In all cases of joint publication each defendant is liable for all the ensuing damage. And there is no contribution between tort-feasors. So that the proprietor of a paper sued jointly with his careless editor or with the actual composer of the libel cannot compel either of his co-defendants to recoup him the damages, which he has been compelled to pay the plaintiff. (*Colburn* v. *Patmore*, 1 C. M. & R. 73; 4 Tyr. 677.)

But if there be two distinct and separate publications of the same libel, a defendant who was concerned in the first publication, but wholly unconnected with the second, would not be liable for any damages which he could prove to have been the consequence of the second publication and in no way due to the first.

And here I will cite the remarks of Best, C. J., in *De Crespigny* v. *Wellesley*, 5 Bing. pp. 402—406). "If a man receives a letter with authority from the author to publish it, the person receiving it will not be justified, if it contains libellous matter, in inserting it in the newspapers. No authority from a third

person will defend a man against an action brought by a person who has suffered from an unlawful act. If the receiver of a letter publish it without authority, he is, from his own motion, the wilful circulator of slander. . . . . 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 properly estimated. But if the report is to be spread over the world by means of the press, the malignant falsehoods 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. . . . . Before he gave it general notoriety by circulating it in print, he should have been prepared to prove its truth to the letter; for he had no more right to take away the character of the plaintiff, without being able to prove the truth of the charge that he had made against him, than to take his property without being able to justify the act by which he possessed himself of it. Indeed, if we reflect on the degree of suffering occasioned by loss of character, and compare it with that occasioned by loss of property, the amount of the former injury far exceeds that of the latter."

Illustrations.

A man may thus be guilty both of libel and of slander at the same moment and by the same act; as, by reading to a public meeting a defamatory paper written by another.

Hearne v. *Stowell*, 12 A. & E. 719; 6 Jur. 458; 4 P. & D. 696.

Hudson brought the manuscript of a libellous song to Morgan to have 1000 copies printed; Morgan printed 1000 and sent 300 to Hudson's shop. Hudson gave several copies to a witness who sung it about the streets. It did not appear in whose writing the manuscript was; but probably not in Hudson's. *Held* that both Hudson and Morgan had published the libel.

Johnson v. *Hudson and Morgan*, 7 A. & E. 233; 1 H. & W. 680.

By the 38 Geo. III., c. 71, s. 17 (now repealed), the proprietor of every newspaper was required to send a copy of every issue to the Stamp Office for Revenue purposes; *held* that the delivery of a copy to the officer at the Stamp Office was a sufficient publication of a libel contained in it to render the proprietor liable to an action, "as the officer of the Stamp Office would at all events have an opportunity of reading the libel himself."

R. v. *Amphlit*, 4 B. & C. 35; 6 D. & R. 125.

Mayne v. *Fletcher*, 9 B. & C. 382; 4 Man. & Ry. 312.

The proprietor of a newspaper is always liable for whatever appears in its columns; although the publication may have been made without his knowledge and in his absence.

R. v. *Walter*, 3 Esp. 21.

But now in criminal cases, see 6 & 7 Vict. c. 96, s. 7.

R. v. *Holbrook and others*, 3 Q. B. D. 60; 4 Q. B. D. 42; 47 L. J. Q. B. 35; 48 L. J. Q. B. 113; 26 W. R. 144; 27 W. R. 313; 37 L. T. 530; 39 L. T. 536.

So is the master printer.

R. v. *Dover*, 6 How. St. Tr. 547.

So, in England, the acting editor is always held liable.

Watts v. *Fraser and another*, 7 C. & P. 369; 7 Ad. & E. 223; 1 M. & Rob. 449; 2 N. & P. 157; 1 Jur. 671; W. W. & D. 451.

In America, however, though the proprietor and printer of a paper are always held liable, the editor is, it would seem, allowed to plead as a defence that the libel was inserted without his orders and against his will.

The Commonwealth v. *Kneeland*, Thacher's C. C. 346.

Or without any knowledge on his part that the article was a libel on any particular individual.

Smith v. *Ashley* (1846), 52 Mass. (11 Met.) 367.

The proprietor of a newspaper is liable even for an advertisement inserted and paid for by Bingham; although the plaintiff is bringing another action against Bingham at the same time.

Harrison v. *Pearce*, 1 F. & F. 567; 32 L. T. (Old S.) 298.

"If you look upon the editor as a person who has published a libellous advertisement incautiously, of course he is liable." *Per* Pollock, C.B., in

Keyzor and another v. *Newcomb*, 1 F. & F. 559.

If a country newspaper copy and publish a libellous article from a London newspaper, the country paper makes the article its own, and is liable for all damages resulting from its publication in the country. The fact that it had previously appeared in the London paper is no defence, though it may tend to mitigate the damages.

Saunders v. *Mills*, 3 M. & P. 520; 6 Bing. 213.

Talbutt v. *Clark*, 2 M. & Rob. 312.

Evidence that the plaintiff had in a previous action recovered damages against the London paper for the same article is altogether inadmissible; as in that action damages were given only for the publication of the libel in London.

Creevy v. *Carr*, 7 C. & P. 64.

And see *Hunt* v. *Algar and others*, 6 C. & P. 245.

If I compose a libel and leave it in my desk among my papers, and my clerk surreptitiously takes a copy and sends it to the newspapers, it is submitted that he alone is liable for the damage caused thereby. I am liable only to such damages as the jury may award for the negligent though unintentional publication to my clerk. For although he could not have taken a copy, had I not first written the libel, still the subsequent republication of it is my clerk's own independent act, for the consequences of which he alone is liable. *Secus*, if I in any way encouraged or contrived his taking a copy, knowing that he would be sure to publish it in the newspapers.

So again every sale or delivery of a written or printed copy of a libel is a fresh publication; and every person who sells or gives away a written or printed copy of a libel may be made a defendant, unless, indeed, he can satisfy the jury that he was ignorant of the contents. The *onus* of proving this lies on the defendant, and where he has made a large profit by selling a great many copies of a libel, it will be very difficult to persuade the jury that he was not aware of its libellous nature. (*Chubb* v. *Flannagan*, 6 C. & P. 431.) In every other respect it makes no difference in law whether the delivery of the copy was by public sale or merely by confidentially showing the libel to a friend. Each is equally a publication. But the jury will, in estimating the damages, attach great importance to the mode of publication: as an indiscriminate public sale of the libel must inflict much more serious injury on the plaintiff's reputation. The defendant could not afterwards recall or contradict his statements, did he desire to do so. (See *per* Lord Denman, C. J., 9 A. & E. 149.)

Illustrations.

The plaintiff's agent, with a view to the action, called at the office of the defendant's newspaper, and made them find for him a copy of the paper that had appeared seventeen years previously, and bought it. *Held* that this was a fresh publication by the defendant, and that the action lay in spite of the Statute of Limitations.

Duke of Brunswick v. *Harmer*, 14 Q. B. 185; 19 L. J. Q. B. 20; 14 Jur. 110; 3 C. & K. 10.

A porter who, in the course of business, delivers parcels containing libellous hand-bills, is not liable in an action for libel, if shown to be ignorant of the contents of the parcel,

Day v. *Bream*, 2 M. & Rob. 54,

for he is but doing his duty in the ordinary way.

A servant carries a libellous letter for his master, addressed to C. It is his duty not to read it. If he does read it, that is a publication by his master to him, although he was never intended to read it. If after reading it he delivers it to C. then this is a publication by the servant to C., for which the person libelled, not being C., can sue either the master, or the servant, or both. If the servant never reads it, but simply delivers it as he was bidden, then he is not liable to any action, unless he either knew or ought to have known that he was being employed illegally. If he either knew or ought to have known, then it is no defence for him to plead "I was only obeying orders."

The defendant kept a pamphlet shop; she was sick and upstairs in bed; a libel was brought into the shop without her knowledge, and subsequently sold by her servant on her account. She was held criminally liable for the act of her servant, on the ground that "the law presumes that the master is acquainted with what his servant does in the course of his business."

R. v. *Dodd*, 2 Sess. Cas. 33.

Nutt's Case, Fitzg. 47; 1 Barnard, 306.

But later judges would not be so strict; the sickness upstairs, if properly proved by the defendant, would now be held an excuse.

R. v. *Almon*, 5 Burr. 2686.

R. v. *Gutch, Fisher, and Alexander*, Moo. & Mal. 433.

And in *criminal* cases, see 6 & 7 Vict. c. 96, s. 7.

A rule was granted calling on Wiatt to show cause why he should not be attached for selling a book containing a libel on the Court of King's Bench. The book was in Latin. On filing an affidavit that he did not understand Latin, and on giving up the name of the printer from whom he obtained it, and the name of the author, the rule was discharged.

R. v. *Wiatt* (1722), 8 Mod. 123.

Every repetition of a slander is a wilful publication of it, rendering the speaker liable to an action. "Tale-bearers are as bad as tale-makers." * It is no defence that the speaker did not originate the scandal, but heard

* MRS. CAN. "But surely you would not be quite so severe on those who only repeat what they hear?"

SIR PET. "Yes, Madam, I would have law merchant for them too; and in all cases of slander currency whenever the drawer of the lie was not to be found, the injured parties should have a right to come on any of the indorsers."—*The School for Scandal.*

it from another, even though it was a current rumour and he *bonâ fide* believed it to be true. (*Watkin* v. *Hall*, L. R. 3 Q. B. 396; 37 L. J. Q. B. 125; 16 W. R. 857; 18 L. T. 561.) It is no defence that the speaker at the time named the person from whom he heard the scandal. (*M'Pherson* v. *Daniels*, 10 B. & C. 270; 5 M. & R. 251.)

This proposition, it is submitted, correctly states the existing law on the point; but it would certainly not have been accepted as clear law in the last century. Great difficulty was presented by the fourth resolution in *Lord Northampton's Case* (in the Star Chamber, 1613), 12 Rep. 134, which runs as follows:—"In a private action for slander of a common person, if J. S. publish that he hath heard J. N. say, that J. G. was a traitor or thief; in an action of the case, if the truth be such, he may justify. But if J. S. publish that he hath heard generally without a certain author, that J. G. was a traitor or thief, there an action *sur le case* lieth against J. S. for this, that he hath not given to the party grieved any cause of action against any, but against himself who published the words, although that in truth he might hear them; for otherwise this might tend to a great slander of an innocent; for if one who hath *lœsam phantasiam*, or who is a drunkard, or of no estimation, speak scandalous words, if it should be lawful for a man of credit to report them generally that he had heard scandalous words, without mentioning of his author, that would give greater colour and probability that the words were true in respect of the credit of the reporter, than if the author himself should be mentioned."

Now in the first place, the reason here assigned for the distinction obviously applies only to cases in which the originator of the scandal is of less credit than the retailer of it, and is known to be so by those to whom it is retailed. If those who hear the tale repeated know nothing of the person cited as the authority for it, it is to them precisely as if the name were omitted altogether, and it had been told as an *on dit*. If, on the other hand, the person named as the author of the assertion is of greater credit and respectability than the reporter, vouching his authority clearly does the plaintiff's reputation a greater

injury than if no name had been given at all. And even in the case where the author of the story is well known to be a person of no credit, how does that excuse the defendant's act in repeating it? It appears to me to make it all the worse; he cannot even plead:—"I had it on good authority and reasonably believed it true." By the mere repetition of it the defendant endorses and gives credit to the tale, although he states that he heard it from A. B. Moreover, it is the defendant who sets the tale in circulation, and those who hear it from him will repeat it everywhere, and cite as their authority, not A. B., but the defendant whom we presume to be of greater respectability and credit. And generally, on principle, "because one man does an unlawful act to any person, another is not to be permitted to do a similar act to the same person. Wrong is not to be justified, or even excused, by wrong." *Per* Best, C. J., in *De Crespigny* v. *Wellesley*, 5 Bing. 404.

Moreover, the twelfth volume of Reports is a book of questionable authority; it was issued after Lord Coke's death, compiled by someone else from papers which Lord Coke had neither digested nor intended for the press. See the remarks of Mr. Hargrave, 11 St. Tr. 301; of Holroyd, J., in *Lewis* v. *Walter*, 4 B. & Ald. 614; and of Parke, J., in *M'Pherson* v. *Daniels*, 10 B. & C. 275; 5 M. & R. 251.

The fourth resolution, as reported, appears inconsistent with the preceding resolution, the third; and also with the many decisions in the case. And even if it be correctly reported, it is but an *obiter dictum*, for the Star Chamber had no jurisdiction over private slander, and the case before them was one of *scandalum magnatum*, which branch of the law is governed by special statutes of its own. See *ante*, pp. 133—136.

Still so great was the weight justly given to every word of my Lord Coke, that this resolution was assumed to be law in *Crawford* v. *Middleton*, 1 Lev. 82; *Davis* v. *Lewis*, 7 T. R. 17; and *Woolnoth* v. *Meadows*, 5 East, 463; 2 Smith, 28. The last two cases decided that at all events it is too late to name the author of the report for the first time in the plea of justification; he must be named at time of publication to raise any ground of defence under this resolution.

In *Maitland* v. *Goldney* (1802), 2 East, 426, Lord Ellenborough intimated that the doctrine did not apply where the

reporter knew that his informant, whom he named, had *retracted* the charge since making it, or where for any other reason the reporter at the time of repeating the tale knew it was false, and unfounded. Next, in *Lewis* v. *Walter* (1821), 4 B. & Ald. 615, Holroyd and Best, J.J., expressed an opinion that the rule had been laid down too largely in the *Earl of Northampton's Case*, and ought to be qualified by confining it to cases where there is a fair and just reason for the repetition of the slander (that is, I presume, to cases where the repetition is privileged). Then, in February, 1829, the Court of Common Pleas decided that in actions of *libel* there was no such rule. *De Crespigny* v. *Wellesley*, 5 Bing. 392, in which case Best, C. J., says:—"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." And lastly, in *M'Pherson* v. *Daniels*, 10 B. & C. 263; 5 M. & R. 251 (Michaelmas, 1829) the rule in *Lord Northampton's Case* was directly challenged and expressly overruled; and it was held that for a defendant to prove that he said at the time that he heard the tale from A., and that A. did in fact tell it to the defendant, was no justification. It must be proved that the defendant repeated the story on a justifiable occasion, and in the *bonâ fide* belief in its truth [and that is a defence of privilege, see *Bromage* v. *Prosser*, 4 B. & C. 247; 6 D. & R. 296; 1 C. & P. 475, *post*, c. VIII.]. This decision has been approved of and followed in *Ward* v. *Weeks*, 7 Bing. 211; 4 M. & P. 796; and in *Watkin* v. *Hall*, L. R. 3 Q. B. 396; 37 L. J. Q. B. 125; 16 W. R. 857; 18 L. T. 561.

And in America the law appears to be the same. *Jarnigan* v. *Fleming*, 43 Miss. 711; *Treat* v. *Browning*, 4 Connecticut, 408; *Runkle* v. *Meyers*, 3 Yeates (Pennsylvania), 518; *Dole* v. *Lyon*, 10 Johns. (New York) 447; *Inman* v. *Foster*, 8 Wend. 602.

Illustrations.

Woor told Daniels that M'Pherson's horses had been seized from the coach on the road, that he had been arrested, and that the bailiffs were in

his house. Daniels went about telling everyone "Woor says that M'Pherson's horses have been seized from the coach on the road, that he himself has been arrested, and that the bailiffs are in his house." *Held* that Daniels was liable to an action by M'Pherson for the slander, although he named Woor at the time as the person from whom he had heard it; that it was no justification to prove that Woor did in fact say so: defendant must go further and prove that what Woor said was true.

M'Pherson v. *Daniels*, 10 B. & C. 263; 5 M. & R. 251.

The defendant said to the plaintiff in the presence of others:—"Thou art a sheep-stealing rogue, and Farmer Parker told me so." *Held* that an action lay.

Gardiner v. *Atwater*, Say. 265.

Lewes v. *Walter* (1617), 3 Bulstr. 225; Cro. Jac. 406, 413; Rolle's Rep. 444.

Meggs v. *Griffith*, Cro. Eliz. 400; Moore, 408.

The defendant said to the plaintiff, a tailor, in the presence of others:—"I heard you were run away," *scilicet*, from your creditors. *Held* that an action lay.

Davis v. *Lewis*, 7 T. R. 17.

Mr. and Mrs. Davies wrote a libellous letter to the Directors of the London Missionary Society, and sent a copy to the defendant, who published extracts from it in a pamphlet. The defendant stated that the letter was written by Mr. and Mrs. Davies, and at the time he wrote the pamphlet he believed all the statements made in the letter to be true. *Held* no justification for his publishing it.

Tidman v. *Ainslie* (1854), 10 Exch. 63.

And see *Mills and wife* v. *Spencer and wife* (1817), Holt, N. P. 533.

McGregor v. *Thwaites* (1824), 3 B. & C. 24; 4 D. & R. 695.

A rumour was current on the Stock Exchange that the chairman of the S. E. Ry. Co. had failed; and the shares in the company consequently fell; thereupon the defendant said, "You have heard what has caused the fall —I mean, the rumour about the S. Eastern chairman having failed?" *Held* that a plea that there was in fact such a rumour was no answer to the action.

Watkin v. *Hall*, L. R. 3 Q. B. 396; 37 L. J. Q. B. 125; 16 W. R. 857; 18 L. T. 561.

See *Richards* v. *Richards*, 2 Moo. & Rob. 557.

If at a meeting of a board of guardians charges were made against the plaintiff, this does not justify the owner of a newspaper in publishing them to the world: it is no justification to plead that such charges were in fact made, and that the alleged libel was an impartial and accurate report of what took place at such meeting.

Purcell v. *Sowler*, 1 C. P. D. 781; 2 C. P. D. 215; 46 L. J. C. P. 308; 25 W. R. 362; 36 L. T. 416.

Davison v. *Duncan*, 7 E. & B. 229; 26 L. J. Q. B. 104; 3 Jur. N. S. 613; 5 W. R. 253; 28 L. T. (Old S.) 265.

Popham v. *Pickburn*, 7 H. & N. 891; 31 L. J. Ex. 133; 8 Jur. N. S. 179; 10 W. R. 324; 5 L. T. 846.

And here note a great distinction between libel and slander. The actual publisher of a libel may be an innocent porter or messenger, a mere hand, unconscious of the nature of his act; and for which therefore his employers shall be held liable, and not he. Whereas in every case of the republication of a slander, the publisher acts consciously and voluntarily; the repetition is his own act. Therefore if I am in any way concerned in the making or publishing of a libel, I am liable for all the damage that ensues to the plaintiff from its publication. But if I slander A., I am only liable for such damages as result directly from that one utterance by my own lips. If B. hears me and chooses to carry the tale to A.'s master, that is B.'s own act; and should A.'s master in consequence dismiss him from his employment, B. alone is answerable for that, and not I. In an action against me such special damage would be too remote. For each publication of a slander is a distinct and separate act, and every person repeating it becomes an independent slanderer, and he alone is answerable for the consequences of his own unlawful act.

Thus, by the law of England as it at present stands, the person who invents a lie and maliciously sets it in circulation may sometimes escape punishment altogether, while a person who is merely injudicious may be liable to an action through repeating a story which he believed to be the truth, as he heard it told frequently in good society. For if I originate a slander against you of such a nature that the words are not actionable *per se*, the utterance of them is no ground of action, unless special damage follows. If I myself tell the story to your employer, who thereupon dismisses you, you have an action against me; but if I only tell it to your friends and relations and no pecuniary damage ensues from my own communication of it to any one, then no action lies against me; although the story is sure to get round to your master sooner or later. The unfortunate man whose lips actually utter the slander to your master, is the

only person that can be made defendant; for it is his publication alone which is actionable as causing special damage. See *post*, c. X., Special Damage. But this apparent hardship only arises where the words are not actionable without proof of special damage. Where the words are actionable *per se*, the jury find the damages *generally*, and will judge from the circumstances which of the various defendants is most to blame.

There are two apparent exceptions to this rule:

I. Where by communicating a slander to A., the defendant puts A. under a moral necessity to repeat it to some other person immediately concerned; here, if the defendant knew the relation in which A. stood to this other person, he will be taken to have contemplated this result when he spoke to A. In fact, here A.'s repetition is the natural and necessary consequence of the defendant's communication to A.

II. Where there is evidence that the defendant though he spoke only to A., intended and desired that A. should repeat his words, or expressly requested him to do so: here the defendant is liable for all the consequences of A.'s repetition of the slander; for A. thus becomes the agent of the defendant. (As to Principal and Agent, see Law of Persons, c. XII., *post*, pp. 360—365.)

Illustrations.

Weeks was speaking to Bryce of the plaintiff and said, "He is a rogue and a swindler; I know enough about him to hang him." Bryce repeated this to Bryer as Weeks' statement. Bryer consequently refused to trust the plaintiff. *Held* that the judge was right in nonsuiting the plaintiff: for the words were not actionable *per se*; and the damage was too remote.

Ward v. *Weeks*, 7 Bing. 211; 4 M. & P. 796.

The defendant's wife charged Mrs. Parkins with adultery. She indignantly told her husband, her natural protector: he was unreasonable enough to insist upon a separation in consequence. *Held*, that for the separation the defendant was not liable.

Parkins et ux. v. *Scott et ux.* 1 H. & C. 153; 31 L. J. Ex. 331; 8 Jur. N. S. 593; 10 W. R. 562; 6 L. T. 394.

See *Dixon* v. *Smith*, 5 H. & N. 450; 29 L. J. Ex. 125.

H. told Mr. Watkins that the plaintiff, his wife's dressmaker, was a

woman of immoral character; Mr. Watkins naturally informed his wife of this charge, and she ceased to employ the plaintiff. *Held* that the plaintiff's loss of Mrs. Watkins's custom was the natural and necessary consequence of the defendant's communication to Mr. Watkins.

Derry v. *Handley*, 16 L. T. 263.
See *Gillett* v. *Bullivant*, 7 L. T. (Old S.) 490.
Kendillon v. *Maltby*, 1 Car. & Marsh. 402.

It has sometimes been held on the principle of *Volenti non fit injuria*, that if the only publication proved at the trial be one brought about by the plaintiff's own contrivance, the action must fail. Thus, in *King* v. *Waring et ux.* 5 Esp. 15, Lord Alvanley decided, that if a servant, knowing the character which his master will give him, procures a letter to be written, not with a fair view of inquiring the character, but to procure an answer upon which to ground an action for a libel, no such action can be maintained. So in *Smith* v. *Wood*, 3 Camp. 323, where the plaintiff, hearing that defendant had in his possession a copy of a libellous caricature of the plaintiff, sent an agent who asked to see the picture, and the defendant showed it him at his request, Lord Ellenborough ruled that this was no sufficient evidence of publication and nonsuited the plaintiff.

But these cases so far as the question of *publication* merely is concerned, must be taken to be overruled by *The Duke of Brunswick* v. *Harmer*, 14 Q. B. 185; 19 L. J. Q. B. 20; 14 Jur. 110; 3 C. & K. 10. Whether or no the plaintiff's conduct in himself provoking or inviting the publication on which he afterwards bases his action may amount to a ground of privilege as excusing the publication made, is a different question, which will be discussed *post*, pp. 230—233. See *Warr* v. *Jolly*, 6 C. & P. 497; *Smith* v. *Mathews*, 1 M. & Rob. 151; *Griffiths* v. *Lewis*, 7 Q. B. 61; 14 L. J. Q. B. 197; 9 Jur. 370; 8 Q. B. 841; 15 L. J. Q. B. 249; 10 Jur. 711; *Force* v. *Warren*, 15 C. B. N. S. 806; *O'Donoghue* v. *Hussey*, Ir. R. 5 C. L. 124; *Dwyer* v. *Esmonde*, 2 L. R. Ir. 243. And indeed in many of the older cases the judges say, "there is no sufficient publication to support an action for a libel," when they mean in modern parlance that the publication was privileged by reason of the occasion. See judgment of Best, J., in *Fairman* v. *Ives*, 5 B. & Ald. 646; 1 D. & R. 252; 1 Chit. 85.

CHAPTER VII.

JUSTIFICATION.

THE truth of any defamatory words is, if pleaded, a complete defence to any action of libel or slander (though alone it is not a defence in a criminal trial). The *onus*, however, of proving that the words are true lies on the defendant. The falsehood of all defamatory words is presumed in the plaintiff's favour, and he need give no evidence to show they are false; but the defendant can rebut this presumption by giving evidence in support of his plea that the words are true in substance and in fact. If the jury are satisfied that the words are true, they must find for the defendant, though they feel sure that he spoke the words spitefully and maliciously. On the other hand, if the words are false, the jury must find for the plaintiff, although they are satisfied that the defendant *bonâ fide* and reasonably believed the words to be true at the time he uttered them.

But the whole libel must be proved true, not a part merely. The justification must be as broad as the charge, and must justify the precise charge. If any material part be not proved true, the plaintiff will recover damages in respect of such part. (*Weaver* v. *Lloyd*, 1 C. & P. 295; 2 B. & C. 678; 4 D. & R. 230; *Ingram* v. *Lawson*, 5 Bing. N. C. 66; 6 Scott, 775; 7 Dowl. 125; 1 Arn. 387; 3 Jur. 73; 6 Bing. N. C. 212; 8 Scott, 471; 4 Jur. 151; 9 C. & P. 326.) Thus where

a libellous paragraph in a newspaper is introduced by a libellous heading, it is not enough to prove the truth of the facts stated in the paragraph, defendant must also prove the truth of the heading. (*Mountney* v. *Watton*, 2 B. & Ad. 673; *Chalmers* v. *Shackell*, 6 C. & P. 475.)

But where the gist of the libel consists of one specific charge which is proved to be true, defendant need not justify every expression which he has used in commenting on the plaintiff's conduct. Nor, if the substantial imputation be proved true, will a slight inaccuracy in one of its details prevent defendant's succeeding, provided such inaccuracy in no way alters the complexion of the affair, and would have no different effect on the reader than that which the literal truth would produce. (*Alexander* v. *N.E. Rail. Co.*, 34 L. J. Q. B. 152; 11 Jur. N. S. 619; 13 W. R. 651; 6 B. & S. 340; cf. *Stockdale* v. *Tarte*, 4 A. & E. 1016; *Blake* v. *Stevens*, 4 F. & F. 239; 11 L. T. 544.) If epithets or terms of general abuse be used which do not add to the sting of the charge, they need not be justified; (*Edwards* v. *Bell*, 1 Bing. 403; *Morrison* v. *Harmer*, 3 Bing. N. C. 767; 4 Scott, 533; 3 Hodges, 108;) but if they insinuate some further charge in addition to the main imputation, or imply some circumstance substantially aggravating such main imputation, then they must be justified as well as the rest. (*Per* Maule, J., in *Helsham* v. *Blackwood*, 11 C. B. 129; 20 L. J. C. P. 192; 15 Jur. 861.) In such a case it will be a question for *the jury* whether the *substance* of the libellous statement has been proved true to their satisfaction, or whether the fact not justified amounts to a separate charge or imputation against the plaintiff, substantially distinct from the main charge or gist of the libel, or at least amounts to a material aggravation of such main charge. (*Warman* v. *Hine*, 1 Jur. 820; *Weaver* v. *Lloyd*, 2 B. & C. 678; 4 D. & R. 230; 1 C. & P. 295.

Behrens v. *Allen*, 8 Jur. N. S. 118; 3 F. & F. 135.) "It would be extravagant," says Lord Denman (in *Cooper* v. *Lawson*, 8 Ad. & E. 753; 1 P. & D. 15; 1 W. W. & H. 601; 2 Jur. 919;) "to say that in cases of libel *every* comment upon facts requires a justification. But a comment may introduce independent facts, a justification of which is necessary. A comment may be the mere shadow of the previous imputation; but if it infers a new fact, the defendant must abide by that inference of fact, and the fairness of the comments must be decided upon by the jury." And see *Lefroy* v. *Burnside*, 4 L. R. Ir. 556.

So in criminal cases, if the whole of the plea of justification be not proved, the Crown will be entitled to a verdict. (*R.* v. *Newman*, 1 E. & B. 268, 558; 22 L. J. Q. B. 156; Dears. C. C. 85; 17 Jur. 617; 3 C. & K. 252.)

Illustrations.

The editor of one newspaper called the editor of another "a felon editor." Justification that the plaintiff had been convicted of felony and sentenced to twelve months' imprisonment. The Court of Appeal held the plea bad for not averring that the plaintiff was still enduring the punishment when the words were uttered; for that by the 9 Geo. IV. c. 32, s. 3, a person who has been convicted of felony and who has undergone the full punishment is in law no longer a felon.

Leyman v. *Latimer*, 3 Ex. D. 15, 352; 47 L. J. Ex. 470; 25 W. R. 751; 26 W. R. 305; 37 L. T. 360, 819; 14 Cox, C. C. 51.

Words complained of that the plaintiff was a "libellous journalist." Proof that he had libelled one man, who had recovered from him damages £100, held insufficient.

Wakley v. *Cooke and Healey*, 4 Ex. 511; 19 L. J. Ex. 91.

Libel complained of:—that no boys had for the last seven years received instruction in the Free Grammar School at Lichfield of which plaintiff was head master, and that the decay of the school seemed mainly attributable to the plaintiff's violent conduct. Plea of justification that no boys had in fact received instruction in the school for the last seven years, and that the plaintiff had been guilty of violent conduct towards several of his scholars, was held bad on special demurrer, because it wholly omitted to connect the decay of the school with the alleged violence, and therefore left the second part of the libel unjustified.

Smith v. *Parker*, 13 M. & W. 459; 14 L. J. Ex. 52; 2 D. & L. 394.

The plaintiff, an architect, had been employed by a certain committee to superintend and carry out the restoration of Skirlaugh Church; thereupon the defendant, who had no manner of interest in the question of the employment of plaintiff to execute the work, wrote a letter to a member of the committee saying: "I see that the restoration of Skirlaugh Church has fallen into the hands of an architect who is a Wesleyan and can have no experience in church work. Can you not do something to avert the irreparable loss which must be caused if any of the masonry of this ancient gem of art be ignorantly tampered with?" In an action for libel the defendant by way of justification alleged "that the facts contained in the letter are true, and the opinions expressed in it, whether right or wrong, were honestly held and expressed by the defendant," and in his particulars under this plea "that the plaintiff cannot show experience in church work, *i.e.*, of the kind which in the opinion of the defendant was requisite."

Held, that the letter was a libel on the plaintiff in the way of his profession or calling.

That the justification set up was no justification at all, because the letter obviously meant that the plaintiff could show no experience in the work in which he had been employed by the committee to execute. Verdict for the plaintiffs. Damages £50.

Botterill and another v. *Whytehead*, 41 L. T. 588.

Libel complained of:—that the plaintiff had "*bolted*," leaving some of the tradesmen of the town to lament the fashionable character of his entertainment. Proof that he had *quitted* the town leaving some of his bills unpaid, held insufficient.

O'Brien v. *Bryant*, 16 M. & W. 168; 16 L. J. Ex. 77; 4 D. & L. 341.

Libel complained of:—that the plaintiff, having challenged his opponent to a duel, spent the whole of the night preceding in practising with his pistol, and killed his opponent, and was therefore guilty of murder. Proof that the plaintiff had killed his opponent, and had been tried for murder, held insufficient. For the charge of pistol practising was considered a separate and substantial charge, and it was not justified.

Helsham v. *Blackwood*, 11 C. B. 128; 20 L. J. C. P. 187; 15 Jur. 861.

The libel complained of was headed—"How Lawyer B. treats his clients," followed by a report of a particular case in which *one* client of Lawyer B. had been badly treated. That particular case was proved to be correctly reported, but this was held insufficient to justify the heading, which implied that Lawyer B. *generally* treated his clients badly.

Bishop v. *Latimer*, 4 L. T. 775.

See also *Mountney* v. *Walton*, 2 B. & Ad. 673.

Chalmers v. *Shackell*, 6 C. & P. 475.

Clement v. *Lewis and others*, 3 Brod. & Bing. 297; 7 Moore, 200; 3 B. & Ald. 702.

Libel complained of—that the plaintiff, a proctor, had three times been

suspended from practice, for extortion. Proof that he had *once* been so suspended, was held insufficient.

Clarkson v. *Lawson*, 6 Bing. 266 ; 3 M. & P. 605 ; 6 Bing, 587 ; 4 M. & P. 356.

See also *Johns* v. *Gittings*, Cro. Eliz. 239.

Goodburne v. *Bowman and others*, 9 Bing. 532.

Clarke v. *Taylor*, 2 Bing. N. C. 654 ; 3 Scott, 95 ; 2 Hodges, 65.

Blake v. *Stevens and others*, 4 F. & F. 232 ; 11 L. T. 543.

But when the libel complained of exposed the "homicidal tricks of those impudent and ignorant scamps who had the audacity to pretend to cure all diseases with one kind of pill"—asserted that "several of the rotgut rascals had been convicted of manslaughter and fined and imprisoned for killing people with enormous doses of their universal vegetable boluses," and characterised the plaintiffs' system as "one of wholesale poisoning ;" and it was proved at the trial "that the plaintiff's pills when taken in large doses, as recommended by the plaintiffs, were highly dangerous, deadly and poisonous," and "that two persons had died in consequence of taking large quantities of them ; and that the people who had administered these pills were tried, convicted, and imprisoned for the manslaughter of these two persons,"—this was held a sufficient justification, although the expressions "scamps," "rascals," and "wholesale poisoning" had not been fully substantiated : the main charge and gist of the libel being amply sustained.

Morrison v. *Harmer*, 3 Bing. N. C. 767; 4 Scott, 533 ; 3 Hodges, 108.

Edsall v. *Russell*, 4 M. & Gr. 1090 ; 5 Scott, N. R. 801 ; 2 Dowl. N. S. 641 ; 12 L. J. C. P. 4 ; 6 Jur. 996.

The libel complained of was a notice published by a railway company to the effect that the plaintiff had been convicted of riding in a train for which his ticket was not available, and was sentenced to be fined £1, or to three weeks' imprisonment in default of payment. Proof that he had been so convicted and fined £1, and sentenced to a fortnight's imprisonment in default of payment, held sufficient ; as the error could not have made any difference in the effect which the notice would produce on the mind of the public.

Alexander v. *N. E. R. Co.*, 34 L. J. Q. B. 152 ; 11 Jur. N. S. 619 ; 13 W. R. 651 ; 6 B. & S. 340.

But see *Gwynn* v. *S. E. R. Co.*, 18 L. T. 738.

Biggs v. *G. E. R. Co.*, 16 W. R. 708 ; 18 L. T. 482.

See also *Lay* v. *Lawson*, 4 Ad. & E. 795.

Edwards v. *Bell and others*, 1 Bing. 403.

Tighe v. *Cooper*, 7 E. & B. 639 ; 26 L. J. Q. B. 215 ; 3 Jur. N. S. 716.

This rule that the whole of the libel must be justified to enable the defendant to succeed applies to all cases of reported speeches or repetitions of slander. Thus, if the libel complained of be, "A.B. said that the plaintiff

had been guilty of fraud, etc.," it is of no avail to plead that A.B. did in fact make that statement on the occasion specified. Each repetition is a fresh defamation, and the defendant by repeating A.B.'s words has made them his own, and is legally as liable as if he had invented the story himself. The only plea of justification which will be an answer to the action must not merely allege that A.B. did in fact say so, but must go on to aver with all necessary particularity that every word which A.B. is reported to have said is true in substance and in fact. In short, a previous publication by another of the same defamatory words is no justification for their repetition. (See *ante*, c. VI., Publication, pp. 161—168.) Still less is it any evidence of their truth. (*R.* v. *Newman*, 1 E. & B. 268, 558; 3 C. & K. 252; Dears. C. C. 85; 22 L. J. Q. B. 156; 17 Jur. 617.)

The opposite doctrine was laid down in the Earl of Northampton's case, but the fourth resolution in that case never professed to apply to actions of libel, but to actions for slander only; and even in actions of slander it must now be taken not to be law. (See *De Crespigny* v. *Wellesley*, 5 Bing. 392; 2 M. & P. 695; *Tidman* v. *Ainslie*, 10 Ex. 66; *M'Pherson* v. *Daniels*, 10 B. & C. 270; 5 M. & R. 251; *Watkin* v. *Hall*, L. R. 3 Q. B. 396; 37 L. J. Q. B. 125; 16 W. R. 857; 18 L. T. 561.)

This rule sometimes works an apparent hardship upon newspaper proprietors who, in the ordinary course of their business have presented to the public a full, true, and impartial account of what really took place at a public meeting, considering no doubt that thereby they were merely doing their duty. But the consequence of publishing in the papers calumnies uttered at some political meeting, or at a vestry board, might be most injurious to the person calumniated. The original slander might not be actionable *per se*, or the communication may be privileged, so that no action lies against the speaker; moreover the meeting may have been thinly attended, and the audience may have known that the speaker was not worthy of credit. But it would be a terrible thing for the person defamed

if such words could therefore be printed and published to all the world, and remain in a permanent form recorded against him, without any remedy being permitted him for the injury caused by their extended circulation. See the remarks of Lord Campbell in *Davison* v. *Duncan*, 7 E. & B. 231; 26 L. J. Q. B. 106; 3 Jur. N. S. 613; 5 W. R. 253; 28 L. T. (Old S.) 265; and the recommendation of the Select Committee of the House of Commons, discussed *post*, pp. 261—263.

Illustrations.

Woor told Daniels that M'Pherson was insolvent; Daniels went about telling his friends "Woor says M'Pherson is insolvent." Proof that Woor had in fact said so was held no answer to the action. Daniels was liable in damages unless he could also prove the truth of Woor's assertion.

M'Pherson v. *Daniels*, 10 B. & C. 263; 5 M. & R. 251.

A rumour was current on the Stock Exchange that the chairman of the S. E. R. Co. had failed; and the shares of the company consequently fell; thereupon the defendant said, "You have heard what has caused the fall—I mean, the rumour about the S. Eastern chairman having failed?" *Held* that a plea that there was in fact such a rumour was no answer to the action.

Watkin v. *Hall*, L. R. 3 Q. B. 396; 37 L. J. Q. B. 125; 16 W. R. 857; 18 L. T. 561.

Richards v. *Richards*, 2 Moo. & Rob. 557.

At a meeting of the West Hartlepool Improvement Commissioners, one of the commissioners made some defamatory remarks as to the conduct of the former secretary of the Bishop of Durham in procuring from the Bishop a licence for the chaplain of the West Hartlepool cemetery. These remarks were reported in the local newspaper; and the secretary brought an action against the owner of the newspaper for libel. A plea of justification, alleging that such remarks were in fact made at a public meeting of the commissioners, and that the alleged libel was an impartial and accurate report of what took place at such meeting, was held bad on demurrer.

Davison v. *Duncan*, 7 E. & B. 229; 26 L. J. Q. B. 104; 3 Jur. N. S. 613; 5 W. R. 253; 28 L. T. (Old S.), 265.

The defendants, the printers and publishers of the *Manchester Courier*, published in their paper a report of the proceedings at a meeting of the Board of Guardians for the Altrincham Poor-Law Union, at which *ex parte* charges were made against the medical officer of the Union Workhouse at Knutsford, of neglecting to attend the pauper patients when sent for. *Held* that the matter was one of public interest; but that the report was not privileged by the occasion, although it was admitted to be a *bonâ fide* and a correct account of what passed at the meeting; and the plaintiff recovered 40*s.* damages and costs.

Purcell v. *Sowler*, 1 C. P. D. 781; affirmed on appeal, 2 C. P. D. 215; 46 L. J. C. P. 308; 25 W. R. 362; 36 L. T. 416.

See also *Pierce* v. *Ellis*, 6 Ir. C. L. R. 64.

So also a newspaper proprietor will be held liable for publishing a report made to the vestry by their medical officer of health, even although the vestry are required by Act of Parliament sooner or later to publish such report themselves.

Popham v. *Pickburn*, 7 H. & N. 891 ; 31 L. J. Ex. 133 ; 8 Jur. N. S. 179 ; 10 W. R. 324 ; 5 L. T. 846.

See also *Charlton* v. *Watton*, 6 C. & P. 385.

So even in reports of judicial proceedings, which are generally held privileged, if the reporter merely sets out the facts as stated by counsel for one party, and does not give the evidence, or merely says that all that counsel stated was proved, a justification that counsel did in fact say so, and that all he stated was in fact proved, is insufficient ; the evidence should be set out, and the charges made in the counsel's speech should also be justified.

Lewis v. *Walter*, 4 B. & Ald. 605.

Saunders v. *Mills*, 3 M. & P. 520 ; 6 Bing. 218.

See also *Flint* v. *Pike*, 4 B. & C. 473 ; 6 D. & R. 528 ; and the remarks of Lord Campbell in

Lewis v. *Levy*, E. B. & E. 544 ; 4 Jur. N. S. 970 ; 27 L. J. Q. B. 282.

It is libellous to publish a highly-coloured account of judicial proceedings, mixed with the reporter's own observations and conclusions upon what passed in Court, containing an insinuation that the plaintiff had committed perjury : and it is no justification to pick out such parts of the libel as contain an account of the trial, and to plead that such parts are true and accurate, leaving the extraneous matter altogether unjustified.

Stiles v. *Nokes*, 7 East. 493 ; same case *sub nomine Carr* v. *Jones*, 3 Smith, 491.

At the same time a defendant may in mitigation of damages justify as to one particular part of the libel, provided such part contains imputations distinct from the rest. (*Per* Tindal, C.J., in *Clarke* v. *Taylor*, 2 Bing. N. C. 668; 3 Scott, 95; 2 Hodges 65.) So he may justify as to one part, and demur or plead privilege to the rest, or deny that he ever spoke or published the rest of the words. But in all these cases the part selected must be severable from the rest so as to be intelligible by itself, and must also convey a distinct and separate imputation against the plaintiff. (*McGregor* v. *Gregory*, 11 M. & W. 287; 12 L. J. Ex. 204 ; 2 D. N. S. 769 ; *Churchill* v. *Hunt*, 2 B. & Ald. 685 ; 1 Chit. 480 ;

Roberts v. *Brown*, 10 Bing. 519; 4 M. & Scott, 407; *Biddulph* v. *Chamberlayne*, 17 Q. B. 351.)

Again, where the words are laid with an innuendo in the Statement of Claim, the defendant may justify the words, either with or without the meaning alleged in such innuendo; or he may do both. (*Watkin* v. *Hall*, L. R. 3 Q. B. 396; 37 L. J. Q. B. 125; 16 W. R. 857; 18 L. T. 561.) That is, he may deny that the plaintiff puts the true construction on his words, and assert that, if taken in their natural and ordinary meaning, his words will be found to be true; or he may boldly allege that the words are true, even in the worst signification that can be put upon them. But it seems that a defendant may not put a meaning of his own on the words, and say that in that sense they are true; for if he deny that the meaning assigned to his words in the Statement of Claim is the correct one, he must be content to leave it to the jury at the trial to determine what meaning the words naturally bear. (*Brembridge* v. *Latimer*, 12 W. R. 878; 10 L. T. 816.) In Ireland the defendant must justify the innuendo as well as the words. (*Hort* v. *Reade*, Ir. R. 7 C. L. 551.)

A justification must always be specially pleaded, and it must be pleaded with sufficient particularity to enable plaintiff to know precisely what is the charge he will have to meet. (*I'Anson* v. *Stuart*, 1 T. R. 748; 2 Sm. Lg. Cases, 6th ed. 57 (omitted in last edition)). A plea, which professes to justify the whole libel, but in effect justifies only a part, is a bad plea, and demurrable. A plea of justification is always construed strictly (*Leyman* v. *Latimer*, 3 Ex. D. 15, 352), and it must set forth issuable facts. (*Jones* v. *Stevens*, 11 Price, 235; *Newman* v. *Bailey*, 2 Chit. 665; *Holmes* v. *Catesby*, 1 Taunt. 543.)

"The plea ought to state the charge with the same precision as in an indictment." (*Per* Alderson, B., in

Hickinbotham v. *Leach*, 10 M. & W. 363; 2 D. N. S. 270.) And at the trial it must be proved as strictly as an indictment for the offence it imputes. Indeed, it is said that if words amount to a charge of felony, and the defendant justifies and the jury find the plea proved, the plaintiff may at once be put upon his trial before a petty jury, without the necessity of any bill being found by a grand jury. (*Per* Lord Kenyon in *Cook* v. *Field*, 3 Esp. 134. See the note to *Prosser* v. *Rowe*, 2 C. & P. 422; *Johnson* v. *Browning*, 6 Mod. 217.)

And the Court will not assist the defendant to obtain evidence in support of his plea of justification. (*Metropolitan Saloon Omnibus Co.* v. *Hawkins*, 4 H. & N. 87, 146; 28 L. J. Ex. 201; 7 W. R. 265; 32 L. T. (Old S.) 281; 5 Jur. N.S. 226.) For the defendant has no right to take away the character of the plaintiff, unless he is in a position to prove the truth of the charge he has made.

Placing such a plea on the record is evidence of malice on the part of the defendant, and may be relied upon as such by the plaintiff in aggravation of damages, if the defendant either abandons the plea at the trial or fails to prove it. (*Warwick* v. *Foulkes*, 12 M. & W. 508; *Wilson* v. *Robinson*, 7 Q. B. 68; 14 L. J. Q. B. 196; 9 Jur. 726; *Simpson* v. *Robinson*, 12 Q. B. 511; 18 L. J. Q. B. 73; 13 Jur. 187.)

In a criminal case it is not sufficient to prove the truth of the libel; the defendant must also prove that it was for the public benefit that the matters charged should be published (6 & 7 Vict. c. 96, s. 6, *post*, p. 389). And indeed before 1843 the truth of the libel was no defence at all to an indictment; the maxim prevailed, "the greater the truth, the greater the libel." Yet it was always otherwise with a civil action; there the truth was always a complete bar to the action. The benefit or detriment to the public, it was said, is in no way in issue in a civil trial;

the plaintiff is seeking to recover damages to put in his own pocket—damages for injury done to a character to which he had no right or title. And no doubt in the vast majority of cases there is great force in this argument. It is right that culprits should appear in their true colours, lest honest men be beguiled, "*peccata enim nocentium nota esse et oportere et expedire.*"—*Paulus.* And some men may be deterred from committing an act of dishonesty or immorality by the knowledge that, if discovered, it may always be brought up against them, wherever they go, to the end of their lives. But in other cases where a man has retrieved his character by long years of good behaviour, it is clearly *morally* wrong for one who knows of his early delinquencies to come and blast the reputation which he has fairly earned. Should not an action lie, where the plaintiff's antecedents have been maliciously raked up and wantonly published to the world, without any benefit to society? Prisoners constantly complain that it is impossible for them to earn a livelihood by honest labour on coming out of prison, because as soon as they obtain employment anywhere, the police inform their master of the fact of their previous conviction, and they are at once discharged. And in a recent case, *R.* v. *Seymore*, Winchester Spring Assizes, 1880, counsel intimated that it was the rule in the West of England for policemen so to do. But Mr. Justice Hawkins at once "expressed his opinion that it was not the duty of the police to do so. The police, he considered, ought to be the friends of released criminals and help them to return to an honest life. That they should go and inform those who had given a convict employment of the fact of his having been convicted was simply to drive the convict into crime again. He was aware that this was done in many parts of the country, but, he for his part thought that it should not be. It was an unnecessary, an officious, and a cruel act; and the result of it was that once a man was convicted he was branded for the rest of his life, and a return to honesty was made most difficult for him."—*Times*, for April 23rd, 1880. No doubt it is part of the punishment of a criminal that he can never escape from his misdeeds; but, nevertheless, to unduly proclaim them is malicious and uncharitable. Railway companies used formerly to placard the names and addresses of offenders against their bye-laws; but lately they have adopted a more merciful but

equally deterrent form of announcement:—"*A passenger* was convicted," &c. On the whole, however, I do not advocate any change in the law in this respect. No law can be framed which cannot be made to press harshly on individuals under exceptional circumstances and in the hands of uncharitable persons. And as a rule the strictness with which a defendant is made to prove his plea of justification, is a sufficient protection to a plaintiff: for if a man is really malicious in making a statement, he is almost sure to go beyond the truth, and say too much.

In Rome the truth of the libel was undoubtedly a defence both to criminal and to civil proceedings. "Eum qui nocentem infamavit non esse bonum æquum ob eam rem condemnari." Pauli Sent. V. 4. So in Horace, Sat. II. 1. 83, 5:

> "bona [carmina] si quis
> Judice condiderit laudatur Cæsare: si quis
> Opprobriis dignum laceraverit, integer ipse."

The rescript of Diocletian and Maximian to Victorinus is sometimes cited as an authority against this view; but it appears to me to have nothing to do with the subject. It seems that Victorinus had in the course of his official duty charged a man with homicide, and he writes to know if he had thereby made himself liable to an action when his term of office had expired. The emperors' reply is as follows:—"Impp. Diocletianus et Maximianus A.A. Victorino. Si non convicii consilio te aliquid injuriosum dixisse probare potes, *fides veri* a calumniâ te defendit. Si autem in rixam inconsulto calore prolapsus homicidii convicium objecisti, et ex eo die annus excessit, cum injuriarum actio annuo tempore prescripta sit ob injuriæ admissum conveniri non potes. P. P. vi. Id. Jul. ipsis iv. et iii. A. A. conss." (A. D. 290). Krueger's Codex (ed. 1877), p. 855. Here the words *fides veri* have generally been understood by the commentators to mean "proof of the truth of the charge;" and hence they have inferred that the truth was not of itself a defence; the defendant had to prove something more, viz., that the imputation was made *sine animo conviciandi*. The ingenious author of the note to Starkie's Commentary, p. 20, however, translates the passage thus:—If you really spoke the words *non convicii consilio*, then proof of the truth of this will

exculpate you; *this* being the fact that you spoke *non convicii consilio*, so that the passage would mean merely:—"proof that you spoke without malicious intent is a bar to the action." See *post*, p. 184. But it is very harsh to make *probare potes* and *fides veri* refer to the same piece of proof. I venture to think that Victorinus had heard on good authority that the man had been guilty of homicide, and, believing the charge to be true, objected to his promotion to some higher office; and I would translate the passage:—"If you spoke without any malicious intent, your own honest belief in the truth of the charge will be a good defence; but if in a sudden quarrel, and in the heat of the moment you called him homicide without any ground for the accusation (inconsulto calore), why, then, you must rely on the Statute of Limitations." If I am right, then, this rescript does not refer to Justification, but rather comes under the defence of Privilege, which will be dealt with in the next chapter.

CHAPTER VIII.

PRIVILEGED OCCASIONS.

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

Illustrations.

I am called as a witness, and sworn to speak the truth, the whole truth, and nothing but the truth. I may do so without fear of any legal liability, even though I am thus compelled to defame my neighbour.

I am asked for a character of my late servant by one to whom he has applied for a situation. I may state in reply all I know against him without being liable to an action; provided I do so honestly and truthfully to the best of my ability.

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

Privileged occasions are of two kinds:—

(i.) Those absolutely privileged.
(ii.) Those in which the privilege is but qualified.

In the first class of cases it is so much to the public interest that the defendant should speak out his mind fully and freely, that all actions in respect of words spoken thereon are absolutely forbidden, even though it be alleged that the words were spoken falsely, knowingly, and with express malice. But this complete immunity is confined to cases where the public service, or the due administration of justice, requires it, *e.g.*, words spoken in Parliament; reports of military officers on military matters to their military superiors; everything said by a judge on the bench, by a witness in the box, &c. &c. In all these cases the privilege afforded by the occasion is an absolute bar to any action.

In less important matters, however, where the interests of the public do not demand that the speaker should be freed from *all* responsibility, but merely require that he should be protected so far as he is speaking honestly for the common good, in these the privilege is said not to be *absolute* but *qualified* only; and the

plaintiff will recover damages in spite of the privilege, if he can prove that the words were not used *bonâ fide* but that the defendant availed himself of the privileged occasion wilfully and knowingly to defame the plaintiff.

Illustrations.

If a witness in the box volunteers a defamatory remark, quite irrelevant to the cause in which he is sworn, with a view of gratifying his own vanity, and of injuring the professional reputation of the plaintiff, still no action lies against such witness; the words are still absolutely privileged; for they were spoken in the box.

Seaman v. *Netherclift*, 1 C. P. D. 540; 45 L. J. C. P. D. 798; 24 W. R. 884; 34 L. T. 878; 2 C. P. D. 53; 46 L. J. C. P. 128; 25 W. R. 159; 35 L. T. 784.

But if I maliciously give a good servant a bad character in order to prevent her "bettering herself," and so to compel her ro return to my own service, the case is thereby taken out of the privilege, and the servant may recover heavy damages.

In Roman law an intention to injure the plaintiff was essential to the action for *injuria* (D. 47. 10. 3, 3 & 4). Hence they never presumed malice; the plaintiff had to prove that the defendant expressly intended to impair his good name. Thus if an astrologer or soothsayer in the *bonâ fide* practice of his art, denounces A. as a thief when he is an honest man, A. has no action; for the astrologer only committed an honest mistake. But it would be otherwise if the soothsayer did not really believe in his art, but pretended, after some jugglery, to arrive at A.'s name from motives of private enmity (D. 47. 10. 15. 13). That being so, it was unnecessary for the Romans to have any law as to *qualified* privilege; unless there was some evidence of malice the plaintiff was in every case non-suited. But neither did they allow any *absolute* privilege; on express malice proved the plaintiff recovered. Even the fact that the libel was contained in a petition sent to the Emperor was no protection (D. 47. 10. 15. 29). Two adversaries in litigation were of course allowed great latitude; a certain amount ot mutual defamation being essential to the conduct of the case and so not malicious: but even here moderation had to be observed (Pauli Sent. V. iv. 15). The Roman plan had at least the merit of simplicity.

Whether the communication is, or is not, privileged by reason of the occasion, is a question for the judge alone, where there is no dispute as to the circumstances under which it was made. (*Stace* v. *Griffith*, L. R. 2 P. C. 420; 6 Moore, P. C. C. N. S. 18; 20 L. T. 197.) If there be any doubt as to these circumstances, the jury must find what the circumstances in fact were, or what the defendant honestly believed them to be, if that be the point to be determined; and then, on their findings, the judge decides whether the occasion was privileged or not. If the occasion was not privileged, and the words are defamatory and false, the judge will direct a verdict for the plaintiff. If the occasion was absolutely privileged, judgment will at once be given for the defendant. If, however, the judge decides that the occasion was one of qualified privilege only, the plaintiff must then, if he can, give evidence of actual malice on the part of the defendant. If he gives no such evidence, it is the duty of the judge to nonsuit him, or to direct a verdict for the defendant. If he does give any evidence of malice sufficient to go to the jury, then it is a question for the jury whether or no the defendant was actuated by malicious motives. (See *post*, c. IX. Malice.)

PART I.

I. OCCASIONS ABSOLUTELY PRIVILEGED.

As a rule, when words are published on a privileged occasion, the privilege given them by the occasion is only *qualified*, that is the plaintiff can still be heard to say that the defendant did not act under the privilege, that he did not intend honestly to discharge a duty, but

maliciously availed himself of the privileged occasion to injure the plaintiff's reputation. But in certain cases the privilege is absolute, and no action lies for words uttered on such an occasion. There are not many such cases, nor is it desirable that there should be many. The Courts refuse to extend their number. (*Stevens* v. *Sampson*, 5 Exch. D. 53; 49 L. J. Q. B. 120; 28 W. R. 87; 41 L. T. 782.) In all of them the immunity is afforded on the ground that it is "advantageous for the public interests that such persons should not in any way be fettered in their statements."

(i.) *Parliamentary Proceedings.*

No member of either House of Parliament is in any way responsible in a court of justice for anything said in the House. (Bill of Rights, 1 Wm. & Mary, st. 2, c. 2.) And no indictment will lie for an alleged conspiracy by members of either House to make speeches defamatory of the plaintiff. (*Ex parte Wason*, L. R. 4 Q. B. 573; 38 L. J. Q. B. 302; 40 L. J. (M. C.) 168; 17 W. R. 881.) But this privilege does not extend outside the walls of the House. Therefore, if a member publishes to the world the speech he delivered in his place in the House, he will be liable to an action as any private individual would be. (*R.* v. *Lord Abingdon*, 1 Esp. 226; *R.* v. *Creevey*, 1 M. & S. 273.) Though no doubt if a member of the House of Commons merely printed his speech for private circulation among his constituents there might be a conditional privilege attaching to it, in the absence of any malicious intent to injure the plaintiff. (*Per* Lord Campbell in *Davison* v. *Duncan*, 7 E. & B. 233; 26 L. J. Q. B. 107, and Cockburn, C.J., in *Wason* v. *Walter*, L. R. 4 Q. B. 95; 8 B. & S. 730; 38 L. J. Q. B. 42; 17 W. R. 169; 19 L. T. 416.)

But at common law, even if the whole House ordered the publication of parliamentary reports and papers, no privilege attached. (*R.* v. *Williams* (1686), 2 Shower, 471; Comb. 18 (see, however, the comments on this case in *R.* v. *Wright* (1799), 8 T. R. 293); *Stockdale* v. *Hansard* (1839), 2 Moo. and Rob. 9; 7 C. & P. 731; 9 A. & E. 1—243; 2 P. & D. 1; 3 Jur. 905; 8 Dowl. 148, 522.) But now, by Stat. 3 & 4 Vict. c. 9, all reports, papers, votes, and proceedings, ordered to be published by either House of Parliament, are made absolutely privileged, and all proceedings at law, civil or criminal, will be stayed at once on the production of a certificate that they were published by order of either House. (See the Act in Appendix.) The only case under the Act is the second case of *Stockdale* v. *Hansard* (1840), 11 A. & E. 253, 297.

Reports in the newspapers of Parliamentary proceedings are conditionally, not absolutely privileged. (See *post*, p. 257.)

A petition to Parliament is absolutely privileged, although it contain false and defamatory statements. (*Lake* v. *King*, 1 Saund. 131; 1 Lev. 240; 1 Mod. 58; Sid. 414.) So is a petition to a committee of either House. (See *Kane* v. *Mulvany*, Ir. R. 2 C. L. 402.) But a publication of such a petition to others not members of the House is of course not privileged.

(ii.) *Judicial Proceedings.*

No action will lie for defamatory statements made or sworn in the course of a judicial proceeding before any Court of competent jurisdiction. Everything that a judge says on the bench, or a witness in the box, or counsel in arguing, is absolutely privileged, so long as it is in any way connected with the inquiry. So are all

documents necessary to the conduct of the cause, such as pleadings, affidavits, and instructions to counsel. This immunity rests on obvious grounds of public policy and convenience.

A judge of a superior Court has an absolute immunity, and no action can be maintained against him, even though it be alleged that he spoke maliciously, knowing his words to be false, and also that his words were irrelevant to the matter in issue before him, and wholly unwarranted by the evidence. It is essential to the highest interests of public policy to secure the free and fearless discharge of high judicial functions. (*Floyd* v. *Barker*, 12 Rep. 24.)

The judge of an inferior Court of record enjoys the same immunity in this respect as the judge of a superior Court, so long as he has jurisdiction over the matter before him. For any act done in any proceeding in which he either knows, or ought to know, that he is without jurisdiction, he is liable as an ordinary subject. (*Houlden* v. *Smith*, 14 Q. B. 841; *Calder* v. *Halket*, 3 Moo. P. C. C. 28.) And so he would be for words spoken after the cause is at an end. (*Paris* v. *Levy*, 9 C. B. N. S. 342; 30 L. J. C. P. 11; 7 Jur. N. S. 289; 9 W. R. 562; 3 L. T. 324; 6 L. T. 394.) A justice of the peace, however, does not enjoy quite so wide an immunity. An action will lie against him for defamatory words irrelevant to the matter in issue before him if they be spoken maliciously and without reasonable or probable cause. (See *Kirby* v. *Simpson*, 10 Exch. 358; *Gelen* v. *Hall*, 2 H. & N. 379.) But if the conduct of the plaintiff be a matter relevant to the enquiry, and the proceedings are within the jurisdiction of the magistrate, he may express his opinion of such conduct with the utmost freedom and no action will lie. (See the remarks of Lord Coleridge, C.J., in *Seaman* v. *Netherclift*, 1 C. P. D. 544; 45 L. J. C. P. 798; 24 W. R. 884; 34 L. T. 878.)

Illustrations.

No action will lie against a judge of one of the superior Courts for any judicial act, though it be alleged to have been done maliciously and corruptly.

Fray v. *Blackburn*, 3 B. & S. 576.
See *Floyd* v. *Barker*, 12 Rep. 24.
Groenvelt v. *Burwell*, 1 Ld. Raym. 454, 468; 12 Mod. 388.
Dicas v. *Lord Brougham*, 6 C. & P. 249; 1 M. & R. 309.
Taaffe v. *Downes*, 3 Moo. P. C. C. 36, n.
Kemp v. *Neville*, 10 C. B. N. S. 523; 31 L. J. C. P. 158; 4 L. T. 640.

No action lies against a judge for unjustly censuring and denouncing a counsel then engaged in the cause before him, even although it be alleged that it was done from motives of private malice.

Miller v. *Hope*, 2 Shaw, Sc. App. Cas. 125.

A County Court judge, while sitting in Court and trying an action in which the plaintiff was defendant, said to him :—"You are a harpy, preying on the vitals of the poor." The plaintiff was an accountant and scrivener. *Held*, that no action lay for words so spoken by the defendant in his capacity as County Court judge, although they were alleged to have been spoken falsely and maliciously and without any reasonable or probable cause or any foundation whatever, and to have been wholly irrelevant to the case before him.

Scott v. *Stansfield*, L. R. 3 Ex. 220; 37 L. J. Ex. 155; 16 W. R. 911; 18 L. T. 572.

No action lies against a coroner for anything he says in his address to the jury impanelled before him, however defamatory, false, or malicious it may be; unless the plaintiff can prove that the statement was wholly irrelevant to the inquisition and not warranted by the occasion, the Coroner's Court being "a Court of Record of very high authority."

Thomas v. *Churton*, 2 B. & S. 475; 31 L. J. Q. B. 139; 8 Jur. N. S. 795.
See also *Yates* v. *Lansing*, 5 Johns. 283; 9 Johns. 395 (American).

A chairman of Quarter Sessions may denounce the grand jury as "a seditious, scandalous, corrupt, and perjured jury."

R. v. *Skinner*, Lofft. 55.

The judgment of a court-martial containing defamatory matter is absolutely privileged, though it is not a court of record.

Jekyll v. *Sir John Moore*, 2 B. & P. N. R. 341; 6 Esp. 63.
Home v. *Bentinck*, 2 B. & B. 130; 4 Moore, 563.
Oliver v. *Bentinck*, 3 Taunt. 456.

A magistrate commented severely on the conduct of a policeman which came under his judicial notice, and in consequence the policeman was dismissed from the force. *Held*, that no action lay, unless there was clear

proof both of express malice and of the absence of all reasonable and probable cause. *Per* Lord Denman, C. J., in

Kendillon v. *Maltby*, 2 M. & Rob. 438; Car. & Mar. 402; 1 Dow. & Clark, 495.

See also *Allardice* v. *Robertson*, 1 Dow. N. S. 514; 1 Dow. & Clark, 495; 6 Shaw & Dun. 242; 7 Shaw & Dun. 691; 4 Wil. & Shaw, App. Cas. 102.

Pratt v. *Gardner*, 2 Cushing (Massachusetts), 63.

But a magistrate's clerk has no right to make any observation on the conduct of the parties before the court; and no such observation will be privileged.

Delegal v. *Highley*, 3 Bing. N. C. 950; 5 Scott, 154; 3 Hodges, 158; 8 C. & P. 444.

Counsel engaged in a cause are privileged to speak any words, however defamatory, that are in accordance with their instructions and are pertinent to the matter in question. They may draw any inferences from the facts given in evidence, and make any imputations, however calumnious: but they ought not to make reckless charges of which they can give no evidence. For strong and exaggerated words they cannot be called in question, unless the charge conveyed by such words be wholly unjustified by the evidence before the Court. (*Brook* v. *Sir Henry Montague* (1606), Cro. Jac. 90; *Mackay* v. *Ford*, 5 H. & N. 792; 29 L. J. Ex. 404; 6 Jur. N. S. 587; 8 W. R. 586; *Hodgson* v. *Scarlett*, 1 B. & Ald. 232.) The law, in fact, trusts a barrister "with a privilege in respect of liberty of speech which is in practice bounded only by his own sense of duty." (*Per* Erle, C.J., 32 L. J. C. P. 147, 8.)

An attorney acting as an advocate in a county court enjoys the same immunity as counsel. (*Mackay* v. *Ford*, 5 H. & N. 792.) So with a proctor in an ecclesiastical court. (*Higginson* v. *Flaherty*, 4 Ir. C. L. R. 125.) The party himself, because of his ignorance of the proper mode of conducting a case, is allowed even greater latitude. (*Per* Holroyd, J., in *Hodgson* v. *Scarlett*, 1 B. &

Ald. 244.) Any observation made by one of the jury during the trial is equally privileged, provided it is pertinent to the enquiry. (*R.* v. *Skinner*, Lofft. 55.) And so is any presentment by a grand jury.

A witness in the box is absolutely privileged in answering all the questions asked him by the counsel on either side; and even if he volunteers an observation (a practice much to be discouraged) still if it has reference to the matter in issue, or fairly arises out of any question asked him by counsel, though only going to his credit, such observation will also be privileged. (*Seaman* v. *Netherclift*, 1 C. P. D. 540; 2 C. P. D. 53; 46 L. J. C. P. 128.) But a remark made by a witness in the box, wholly irrelevant to the matter of enquiry, uncalled for by any question of counsel, and introduced by the witness maliciously for his own purposes, would not be privileged, and would also probably be a contempt of court. So, of course an observation made by a witness while waiting about the Court, before or after he has given his evidence, is not privileged. (*Trotman* v. *Dunn*, 4 Camp. 211; *Lynam* v. *Gowing*, 6 L. R. Ir. 259.) Nor is a private letter written to the judge to influence his decision. (*Gould* v. *Hume*, 3 C. & P. 625.) Such a letter is strictly a contempt of court.

Every affidavit sworn in the course of a judicial proceeding before a Court of competent jurisdiction is absolutely privileged, and no action lies therefor, however false and malicious may be the statements made therein. (*Revis* v. *Smith*, 18 C. B. 126; 25 L. J. C. P. 195; *Henderson* v. *Broomhead*, 4 H. & N. 569; 28 L. J. Ex. 360; 5 Jur. N. S. 1175.) So are all pleadings, and instructions to counsel. (*See Bank of British North America* v. *Strong*, 1 App. Cas. 307; 34 L. T. 627.) So are articles of the peace exhibited against the plaintiff. The only exception is where an affidavit is sworn reck-

lessly and maliciously before a Court that has no jurisdiction in the matter, and no power to entertain the proceeding. (*Buckley* v. *Wood*, 4 Rep. 14; Cro. Eliz. 230; *R.* v. *Salisbury*, 1 Ld. Raym. 341; *Lewis* v. *Levy*, E. B. & E. 554; 27 L. J. Q. B. 282; 4 Jur. N. S. 490.) In all other cases the plaintiff's only remedy is to indict the deponent for perjury, if he dare. (*Doyle* v. *O'Doherty*, Car. & Mar. 418; *Astley* v. *Younge*, 2 Burr. 807.) The Court will however, sometimes order scandalous matter in such an affidavit to be expunged. (*Christie* v. *Christie*, L. R. 8 Ch. 499; 42 L. J. Ch. 544; 21 W. R. 493; 28 L. T. 607.) But even for matter thus expunged, no action can be brought. (*Kennedy* v. *Hilliard*, 10 Ir. C. L. R. 195; 1 L. T. 578.)

In short, "neither party, witness, counsel, jury, or judge can be put to answer civilly or criminally for *words spoken in office*." (*Per* Lord Mansfield in *R.* v. *Skinner*, Lofft. 55.)

Illustrations.

Defendant, an expert in handwriting, gave evidence in the Probate Court in the trial of *Davies* v. *May*, that, in his opinion, the signature to the will in question was a forgery. The jury found in favour of the will, and the presiding judge made some very disparaging remarks on defendant's evidence. Soon afterwards defendant was called as a witness in favour of the genuineness of another document, on a charge of forgery before a magistrate. In cross-examination he was asked whether he had given evidence in the suit of *Davies* v. *May*, and whether he had read the judge's remarks on his evidence. He answered, "Yes." Counsel asked no more questions, and defendant insisted on adding, though told by the magistrate not to make any further statement as to *Davies* v. *May*: "I believe that will to be a rank forgery, and shall believe so to the day of my death." An action of slander for these words having been brought by one of the attesting witnesses to the will: *held*, that the words were spoken by defendant as a witness, and had reference to the inquiry before the magistrate, as they tended to justify the defendant, whose credit as a witness had been impugned; and that the defendant was therefore absolutely privileged.

Seaman v. *Netherclift*, 1 C. P. D. 540; 45 L. J. C. P. 798; 24 W. R. 884; 34 L. T. 878; (C. A.) 2 C. P. D. 53; 46 L. J. C. P. 128; 25 W. R. 159; 35 L. T. 784.

A servant summoned his master before a Court of Conscience for a week's

wages. The master said: "He has been transported before, and ought to be transported again. He has been robbing me of nine quartern loaves a week." Lord Ellenborough held the remark absolutely privileged, if the master spoke them in opening his defence to the Court; but otherwise if he spoke them while waiting about the room and not for the purpose of his defence.

Trotman v. *Dunn*, 4 Camp. 211. [N.B.—The latter part of the headnote to this case is misleading.]

A charge of felony made by the defendant when applying in due course to a justice of the peace for a warrant to apprehend the plaintiff on that charge is absolutely privileged.

Ram v. *Lamley*, Hutt. 113.

See *Johnson* v. *Evans*, 3 Esp. 32.

Weston v. *Dobniet*, Cro. Jac. 432.

Dancaster v. *Hewson*, 2 Man. & R. 176.

Defamatory communications made by witnesses or officials to a Court-martial, or to a Court of Inquiry instituted under articles of war, are absolutely privileged.

Keighley v. *Bell*, 4 F. & F. 763.

Dawkins v. *Lord Rokeby*, L. R. 8 Q. B. 255; 42 L. J. Q. B. 63; 21 W. R. 544; 4 F. & F. 806; 28 L. T. 134; L. R. 7 H. L. 744; 45 L. J. Q. B. 8; 23 W. R. 931; 33 L. T. 196.

No action will lie for defamatory expressions against a third party, contained in an affidavit made and used in the proceedings in a cause, though such statements be false, to the knowledge of the party making them, and introduced out of malice.

Henderson v. *Broomhead*, 28 L. J. Ex. 360; 4 H. & N. 569; 5 Jur. N. S. 1175.

Astley v. *Younge*, 2 Burr. 807; 2 Ld. Kenyon, 536.

Revis v. *Smith*, 18 C. B. 126; 25 L. J. C. P. 195; 2 Jur. N. S. 614.

Hartsock v. *Reddick*, 6 Blackf. (Indiana), 255.

If application be *bonâ fide* made to a Court which the defendant by a pardonable error honestly believes to have a jurisdiction which it has not, the privilege will not be lost merely by reason of this error.

Buckley v. *Wood*, 4 Rep. 14; Cro. Eliz. 230.

McGregor v. *Thwaites*, 3 B. & C. 24; 4 D. & R. 695.

Thorn v. *Blanchard*, 5 Johns. 508.

But in other cases an affidavit made voluntarily when no cause is pending, or made *coram non judice*, is not privileged as a judicial proceeding.

Maloney v. *Bartley*, 3 Camp. 210.

An attorney's bill of costs is in no sense a judicial proceeding, though delivered under a judge's order, and can claim no privilege.

Bruton v. *Downes*, 1 F. & F. 668.

Reports of judicial proceedings are not *absolutely* privileged, however fair

and accurate they may be; the plaintiff may still prove that the reporter acted maliciously in sending the report to the newspaper.

Stevens v. *Sampson*, 5 Exch. D. 53; 49 L. J. Q. B. 120; 28 W. R. 87; 41 L. T. 782.

Salmon v. *Isaac*, 20 L. T. 885.

(iii.) *Naval and Military affairs, &c.*

A similar immunity, resting also on obvious grounds of public policy, is accorded to all reports made by a military officer to his military superiors in the course of his duty, and to evidence given by any military man to a court martial or other military court of enquiry; it being essential to the welfare and safety of the State that military discipline should be maintained without any interference by civil tribunals. In short, "all acts done in the honest exercise of military authority are privileged." The law is, of course, the same as to the navy. Naval and military matters are for naval and military tribunals to determine, and not the ordinary civil courts. (*Hart* v. *Gumpach*, L. R. 4 P. C. 439; 9 Moore P. C. C. N. S. 241; 42 L. J. P. C. 25; 21 W. R. 365; *Dawkins* v. *Lord Paulet*, L. R. 5 Q. B. 94; 39 L. J. Q. B. 53; 18 W. R. 336; 21 L. T. 584; *Dawkins* v. *Lord Rokeby*, L. R. 7 H. L. 744; 45 L. J. Q. B. 8; 23 W. R. 931; 33 L. T. 196; 4 F. & F. 806.) A similarly absolute privilege extends to all acts of State, and to the official notification thereof in the *London Gazette*, to all State papers, and to all advice given to the Crown by its ministers.

Illustrations.

A military Court of Inquiry may not be strictly a judicial tribunal, but where such Court has been assembled under the orders of the General Commanding-in-Chief in conformity with the Queen's Regulations for the government of the army, a witness who gives evidence thereat stands in the same situation as a witness giving evidence before a judicial tribunal, and

all statements made by him thereat, whether orally or in writing, having reference to the subject of the inquiry, are absolutely privileged.

Dawkins v. *Lord Rokeby*, L. R. 7 H. L. 744 ; 45 L. J. Q. B. 8 ; 23 W. R. 931 ; 33 L. T. 196 ; in the Exch. Ch. L. R. 8 Q. B. 255.

And see *Keighley* v. *Bell*, 4 F. & F. 763.

Home v. *Bentinck*, 2 B. & B. 130 ; 4 Moore, 563.

The defendant, being the plaintiff's superior officer, in the course of his military duty forwarded to the Adjutant-General certain letters written by the plaintiff, and at the same time, also in accordance with his military duty, reported to the Commander-in-Chief on the contents of such letters, using words defamatory of the plaintiff. It was alleged that the defendant did so maliciously, and without any reasonable, probable or justifiable cause, and not in the *bonâ fide* discharge of his duty as the plaintiff's superior officer. *Held*, on demurrer, by the majority of the Court of Q. B. (Mellor and Lush, J.J.), that such reports being made in the course of military duty were absolutely privileged, and that the civil courts had no jurisdiction over such purely military matters. Cockburn, C.J., dissented on the grounds that it never could be the duty of a military officer falsely, maliciously and without reasonable and probable cause to libel his fellow-officer, that the courts of common law have jurisdiction over all wilful and unjust abuse of military authority, and that it would not in any way be destructive of military discipline or of the efficiency of the army to submit questions of malicious oppression to the opinion of a jury.

Dawkins v. *Lord Paulet*, L. R. 5 Q. B. 94 ; 39 L. J. Q. B. 53 ; 18 W. R. 336 ; 21 L. T. 584.

[N.B.—There was no appeal in this case. The arguments of Cockburn, C.J., deserve the most careful attention. In *Dawkins* v. *Lord Rokeby*, *supra*, the decision of the House of Lords turned entirely on the fact that the defendant was a witness. Neither Kelly, C.B. nor any of the Law Lords (except perhaps Lord Penzance,) rest their judgment on the incompetency of a court of common law to inquire into purely military matters. The Court of Exchequer Chamber no doubt express an opinion that "questions of military discipline and military duty alone are cognisable only by a military court, and not by a court of law," (L. R. 8 Q. B. 271.) But after referring to "the eloquent and powerful reasoning of L.C.J. Cockburn in *Dawkins* v. *Lord F. Paulet*," the Court goes on to express its satisfaction that the question "is yet open to final consideration before a court of the last resort." However in a court of first instance, at all events, it must now be taken to be the law that the civil courts of common law can take no cognisance of *purely* military or *purely* naval matters (*Sutton* v. *Johnstone* (1785), 1 T. R. 493 ; *Grant* v. *Gould* (1792), 2 Hen. Bl. 69 ; *Barwiss* v. *Keppel* (1766), 2 Wils. 314) ; but wherever the *civil* rights of a person in the military or naval service are affected by any alleged oppression or injustice at the hands of his superior officers or any illegal action on the part of a military or naval tribunal, there the civil courts may interfere. *Re Mansergh*, 1 B. & S. 400 ; 30 L. J. (Q. B.), 296 ; *Warden* v. *Bailey*, 4 Taunt. 67.]

But *private letters* written by the commanding officer of the regiment to his immediate superior on military matters, as distinct from his official reports, are *not* absolutely privileged; but the question of malice should be left to the jury.

Dickson v. *Earl of Wilton*, 1 F. & F. 419.

Dickson v. *Combermere*, 3 F. & F. 527.

[N.B.—If this be not the distinction, these cases must be taken to be overruled by the cases cited above. See L. R. 8 Q. B. 272-3.]

By a general order it was declared that all unemployed Indian officers ineligible for public employment by reason of misconduct or physical or mental inefficiency should be removed to the pension list. Under this order the plaintiff was removed to the pension list and a notification of such removal was published in the *Indian Gazette*. *Held*, on demurrer, that no action lay either for the removal of the plaintiff, or for the official publication of the fact: although special damage was alleged.

Grant v. *Secretary of State for India*, 2 C. P. D. 445; 25 W. R. 848; 37 L. T. 188.

See *Doss* v. *Secretary of State for India in Council*, L. R. 19 Eq. 509; 23 W. R. 773; 32 L. T. 294.

And *Oliver* v. *Lord Wm. Bentinck*, 3 Taunt. 456.

PART II.

II. QUALIFIED PRIVILEGE.

CASES of qualified privilege may be grouped under three heads:

I. Where circumstances cast upon the defendant the duty of making a communication to a certain other person, to whom he makes such communication in the *bonâ fide* performance of such duty.

II. Where the defendant has an interest in the subject matter of the communication, and the person to whom he communicates it has a corresponding interest.

III. Fair and impartial reports of the proceedings of any Court of Justice or of Parliament.

In all these instances, if the communication has been made fairly, impartially, without exaggeration or the introduction of irrelevant calumniatory matter, the communication is held privileged. The first two classes are often stated as one, and cases may frequently occur, which may seem to fall in either or both of them. But the distinction which I propose to draw between them is this:—in the first class of cases, the defendant makes the communication, perhaps to an entire stranger, generally to one with whom he has had no previous concern; and he does so because he feels it to be his duty so to do. The person to whom he makes the communication is under no corresponding obligation; and generally has no common interest with the defendant in the matter. The defendant's duty would be the same to whomsoever the communication had to be made.

In the second class of cases, however, there must have been an intimate relationship or connexion already established between the defendant and the person to whom he makes the communication, and it is because of this relationship that the communication is privileged. The same words, if uttered to another person with whom the defendant had no such connexion, would not be privileged.

The third class of cases might be included in either of the two preceding, for it is the duty of a newspaper reporter to present to the public fair and impartial reports of such proceedings, while on the other hand, as one of the public, he has a common interest with the public in ensuring that such proceedings should be reported with accuracy and uniformity.

Bonâ fide comments on matters of public interest, which are sometimes treated as a fourth class of privileged communications, have been dealt with under the head of Defamatory Words, c. II., *ante*, pp. 34–52.

I. WHERE CIRCUMSTANCES EXIST, OR ARE REASONABLY BELIEVED BY THE DEFENDANT TO EXIST, WHICH CAST UPON HIM THE DUTY OF MAKING A COMMUNICATION TO A CERTAIN OTHER PERSON, TO WHOM HE MAKES SUCH COMMUNICATION IN THE *BONÂ FIDE* PERFORMANCE OF SUCH DUTY.

The duty may either be one which the defendant owes to society or one which he owes to his family or to himself. It will be convenient therefore to treat these cases in the following order:—

A. Communications made in pursuance of a duty owed to society.

(i.) Characters of servants.

(ii.) Other confidential communications of a private nature.

(iii.) Information given to any public officer imputing crime or misconduct to others.

B. Communications made in self-defence.

(iv.) Statements necessary to protect the defendant's private interests.

(v.) Statements provoked or invited by previous words or acts of the plaintiff.

In all these cases the duty referred to need not be one binding at law: any "moral or social duty of imperfect obligation" will be sufficient. (*Per* Lord Campbell in *Harrison* v. *Bush*, 5 E. & B. 344; 25 L. J. Q. B. 25.) And it is sufficient that the defendant should honestly believe that he has a duty to perform in the matter, although it may turn out that the circumstances were not such as he reasonably concluded them to be. (*Whiteley* v. *Adams*, 15 C. B. N. S. 392; 33 L. J. C. P. 89; 12 W. R. 153; 9 L. T. 483; 10 Jur. N. S. 470.)

It is a question of *bona fides*, in determining which the Court will look at the circumstances as they presented themselves to the mind of the defendant at the time of publication; supposing of course that he is guilty of no laches, and does not wilfully shut his eyes to any source of information. If indeed there were means at hand for ascertaining the truth of the matter, of which the defendant neglects to avail himself and chooses rather to remain in ignorance when he might have obtained full information, there will be no pretence for any claim of privilege.

Above all, the defendant must at the date of the communication, implicitly believe in its truth. If a man knowingly makes a false charge against his neighbour, he cannot claim privilege. It never can be his duty to circulate lies.

"For, to entitle matter, otherwise libellous, to the protection which attaches to communications made in the fulfilment of a duty, *bona fides*, or, to use our own equivalent, honesty of purpose, is essential; and to this, again, two things are necessary; 1, that the communication be made not merely in the course of duty, that is, on an occasion which would justify the making it, but also from a sense of duty; 2, that it be made with a belief of its truth." (*Per* Cockburn, C.J., in *Dawkins* v. *Lord Paulet*, L. R. 5 Q. B. at p. 102.)

And even where the defendant, acting under a strong sense of duty, makes a communication which he reasonably believes to be true, still he must be careful not to be led away by his honest indignation into exaggerated or unwarrantable expressions. For the privilege extends to nothing which is not justified by the occasion. Thus a letter may be privileged as to one part and not as to the rest. (*Warren* v. *Warren*, 1 C. M. & R. 251; 4 Tyr. 850; *Huntley* v. *Ward*, 6 C. B. N. S. 514; 1 F. & F.

552; 6 Jur. N. S. 18; *Simmonds* v. *Dunne*, Ir. R. 5 C. L. 358.)

And even where the expressions employed are allowable in all respects, still the mode of publication may take them out of the privilege. Confidential communications should not be shouted across the street for all passers-by to hear. Nor should they be committed to a post card or a telegram, which others will read. They should be sent in a letter properly sealed and fastened. If the words be spoken, the defendant must be careful in whose presence he speaks. He should choose a time when no one else is by except those to whom it is his duty to make the statement. It is true that the accidental presence of some third person, unsought by the defendant, will not take the case out of the privilege; but it would be otherwise if the defendant purposely sought an opportunity of making a communication *primâ facie* privileged in the presence of the very persons who were most likely to act upon it to the prejudice of the plaintiff. (See *post*, c. IX. Malice.)

A. Communications made in pursuance of a duty owed to society.

(i.) *Characters of servants.*

The instance that occurs most frequently in ordinary life of this first class of privileged communications is where the defendant is asked as to the character of his former servant, by one to whom he or she has applied for a situation. A duty is thereby cast upon the former master to state fully and honestly all that he knows either for or against the servant; and any communication, made in the performance of this duty, is clearly privileged for the sake of the common convenience of

society, even though it should turn out that the former master was mistaken in some of his statements. But if the master, knowing that the servant deserves a good character, yet, having some grudge against him, or from some other malicious motive, deliberately states what he knows to be false, and gives his late servant a bad character, then such a communication is not a performance of the duty, and therefore is not privileged. There is, in fact, in such a case, evidence of express malice which "takes the case out of the privilege."

No one is bound to give a character to his servant when asked for it. (*Carrol* v. *Bird*, 3 Esp. 201.) The old statute 5 Eliz. c. 4, which required a master in certain cases to satisfy two justices of the peace that he had reasonable and sufficient cause for putting away his servant, has long been obsolete, and now is wholly repealed by the 38 & 39 Vict. c. 86, s. 17. But if any character is given, it must be one fully warranted by the facts, and not prompted by unworthy motives.

If, after a favourable character has been given, facts come to the knowledge of the former master which induce him to alter his opinion, it is his duty to inform the person to whom he gave the character of his altered opinion. Hence a letter written to retract a favourable character previously given, will also be privileged. (*Gardner* v. *Slade*, 13 Q. B. 796; 18 L. J. Q. B. 334; 13 Jur. 826; *Child* v. *Affleck & wife*, 9 B. & C. 403; 4 M. & R. 338.)

So again if I take a servant with a good character given her by B., and am sadly disappointed in her, I may write and inform B. that she does not deserve the character he gave her, so that he may refrain from recommending her to others; and such a letter would be privileged. (*Dixon* v. *Parsons*, 1 F. & F. 24.) But see the dicta in *Fryer* v. *Kinnersley*, 15 C. B. N. S. 429;

33 L. J. C. P. 96; 10 Jur. N. S. 441. A master may also warn his present servants against associating with a former servant whom he has discharged, and state his reasons for dismissing him. (*Somerville* v. *Hawkins*, 10 C. B. 590; 20 L. J. C. P. 131; 15 Jur. 450.)

But if I happen to hear that a discharged servant of mine is about to enter the service of B., it may be questioned whether it is my duty to write off at once and inform B. of the servant's misconduct. It is certainly safer to wait till B. applies to me for the servant's character. Eagerness to prevent a former servant obtaining another place has the appearance of malice, and if it were found that I wrote systematically to every one to whom the plaintiff applied for work, the jury would probably give damages against me. On the other hand, if B. was an intimate friend or a relation of mine, and there was no other evidence of malice except that I *volunteered* the information, the occasion would still be privileged. In short when a master "volunteers to give the character, stronger evidence will be required that he acted *bonâ fide*, than in the case where he has given the character after being required so to do." (*Per* Littledale, J., in *Pattison* v. *Jones*, 8 B. & Cr. p. 586.)

Illustrations.

After a mercantile firm has given to one of its clerks a general recommendation by means of which he obtains a situation, if a partner subsequently discover facts which alter his opinion of that clerk's character, it is his duty to communicate the new facts and his change of opinion to the new employer of that clerk, in order to guard against his being misled by the previous recommendation of the firm.

Fowles v. *Bowen*, 3 Tiffany (30 N. Y. R.), 20.

Sir Gervas Clifton never made any complaint of his butler's conduct while he was with him; but he suddenly dismissed him without notice and without a month's wages. The butler (naturally, but illegally) refused to leave the house without a month's wages; a violent altercation took place, and eventually a policeman was sent for who forcibly ejected the butler. Sir Gervas subsequently gave the butler a very bad character, in too strong

terms, and making some charges against him which were wholly unfounded. Verdict for the plaintiff. Damages, £20. New trial refused.

Rogers v. *Clifton*, 3 B. & P. 587.

The defendant on being applied to for the character of the plaintiff, who had been his saleswoman, charged her with theft. He had never made such a charge against her till then; he told her that he would say nothing about it if she resumed her employment at his house; subsequently he said that if she would acknowledge the theft he would give her a character. *Held*, that there was abundant evidence that the charge of theft was made *malâ fide*, with the intention of compelling plaintiff to return to defendant's service. Damages, £60.

Jackson v. *Hopperton*, 16 C. B. N. S. 829; 12 W. R. 913; 10 L. T. 529.

If a master about to dismiss his servant for dishonesty calls in a friend to hear what passes, the presence of such third person does not take away privilege from words which the master then uses, imputing dishonesty.

Taylor v. *Hawkins*, 16 Q. B. 308; 20 L. J. Q. B. 313; 15 Jur. 746.

Where a master discharged his footman and cook, and they asked him his reason for doing so, and he told the footman, in the absence of the cook, that "he and the cook had been robbing him;" and told the cook, in the absence of the footman, that he had discharged her "because she and the footman had been robbing him." *Held*, that these were privileged communications as respected the absent parties, as well as those to whom they were respectively made.

Manby v. *Witt*, } 18 C. B. 544; 25 L. J. C. P. 294; 2 Jur.
Eastmead v. *Witt* } N. S. 1004.

(ii.) *Other confidential communications of a private nature.*

(*a*) *Answers to confidential inquiries.*

The principles which apply to characters given to servants, govern also all other answers to private and confidential inquiries.

If the owner of a vacant farm ask me as to the character of a person applying to become his tenant, my answer would be privileged. So if a friend of mine comes down into the country to live near me, and asks my advice as to the tradesmen, or doctor, he shall employ, I may tell him my opinion of the various trades-

men, or doctors, in the locality, without fear of an action for slander.

In short, whenever in answering an inquiry the defendant is acting *bonâ fide* in the discharge of any legal, moral, or social duty, his answer will be privileged. "Every one owes it as a duty to his fellow men to state what he knows about a person, when inquiry is made." (*Per* Grove, J., in *Robshaw* v. *Smith*, 38 L. T. 423. And see *Lentner* v. *Merfield* (C. A.); *Times* for May 6th, 1880.)

So too it is a duty every one owes to society to assist in the discovery of a criminal, and to afford all information which will lead to his conviction. "It is a perfectly privileged communication, if a party who is interested in discovering a wrong doer, comes and makes inquiries and a person in answer makes a discovery, or a *bonâ fide* communication which he knows, or believes to be true, although it may possibly affect the character of a third person." (*Per* Parke, B., in *Kine* v. *Sewell*, 3 M. & W. 302.)

And when once such a confidential inquiry is set on foot, all subsequent interviews between the parties will be privileged, so long as what takes place thereat is still relevant to the original inquiry. (*Beatson* v. *Skene*, 5 H. & N. 838; 29 L. J. Ex. 430; 6 Jur. N. S. 780; 2 L. T. 378; *Hopwood* v. *Thorn*, 8 C. B. 293; 19 L. J. C. P. 94; 14 Jur. 87; *Wallace* v. *Carroll*, 11 Ir. C. L. R. 485.)

Of course the defendant must honestly believe in the truth of the charge he makes at the time he makes it. And this implies that he must have *some* ground for the assertion: it need not be a conclusive or convincing ground: but no charge should ever be made recklessly and wantonly, even in confidence. The inquirer should be put in possession of all you know, and of your means of knowledge; if your only means of knowledge is hear-

say, tell him so: do not state a rumour as a fact; and in repeating a rumour, be careful not to heighten its colour or exaggerate its extent. If the only information you possess is contained in a letter, it is best to give him the letter and leave him to draw his own conclusions. (*Coxhead* v. *Richards*, 2 C. B. 569; 15 L. J. C. P. 278; 10 Jur. 984; *Robshaw* v. *Smith*, 38 L. T. 423.) Do not speak with the air of knowing of your own knowledge every word you say to be the fact, when you are merely repeating gossip or hazarding a series of reckless assertions. If time allows, and means of inquiry exist, you should make some attempt to sift the charge, before you spread it. In short, confidential advice should be given seriously and conscientiously: it should be manifest that you do not take a pleasure in maligning the plaintiff, but are compelled to do so in the honest discharge of a painful duty.

And, above all, the answer must be pertinent to the inquiry. If I am asked the plaintiff's name or address, I must not commence to disparage the plaintiff's credit, conduct, family or wares. In fact, the reply must be an answer to the question or reasonably induced thereby and not irrelevant information gratuitously volunteered. (*Southam* v. *Allen*, Sir T. Raym. 231; *Huntley* v. *Ward*, 6 C. B. N. S. 514.) It is for the jury in each case to determine whether what passed was or was not relevant to the inquiry, and whether or no the information was given confidentially.

Illustrations.

If a friend tells me he wants a good solicitor to act for him, and asks my opinion of Smith, I am justified in telling him all I know for or against Smith. But if a stranger asked me in the train: "Is not that gentleman a solicitor?" I should not, it is submitted, be privileged in replying: "Yes, but he ought to have been struck off the rolls long ago."

If A. is about to have dealings with B., but first comes to C. and confidentially asks him his opinion of B., C.'s answer is privileged. "Every one

is quite at liberty to state his opinion *bonâ fide* of the respectability of a party thus inquired about." *Per* Lord Denman in

Storey v. *Challands*, 8 C. & P. 234.

Plaintiff had been tenant to the defendant; a wine-broker went to defendant to ask him plaintiff's present address. Defendant commenced to abuse the plaintiff. The broker said: "I don't come to enquire about his character, but only for his address; I have done business with him before." But the defendant continued to denounce the plaintiff as a swindler, adding however, "I speak in confidence." The broker thanked defendant for his remarks and declined in future to trust the plaintiff. *Held*, that it was rightly left to the jury to say if defendant spoke *bonâ fide* or maliciously.

Picton v. *Jackman*, 4 C. & P. 257.

Southam v. *Allen*, Sir T. Raymond, 231.

Watkins met the defendant in Brecon, and addressing him said, "I hear that you say the bank of Bromage and Snead at Monmouth has stopped. Is it true?" Defendant answered, "Yes, it is. I was told so. It was so reported at Cricklewell, and nobody would take their bills, and I came to town in consequence of it myself." *Held*, that if the defendant understood Watkins to be asking for information by which to regulate his conduct, and spoke the words merely by way of honest advice, they were *primâ facie* privileged.

Bromage v. *Prosser*, 4 B. & Cr. 247; 1 C. & P. 475; 6 D. & R. 296.

The defendant was asked to sign a memorial, the object of which was to retain the plaintiff as trustee of a charity from which office he was about to be removed. The defendant refused to sign, and on being pressed for his reasons, stated them explicitly. *Held*, a privileged communication.

Cowles v. *Potts*, 34 L. J. Q. B. 247; 11 Jur. N. S. 946; 13 W. R. 858.

The plaintiff had been a Major-General commanding a corps of irregular troops during the war in the Crimea. Complaint having been made of the insubordination of the troops, the corps commanded by the plaintiff was placed under the superior command of General Vivian. The plaintiff then resigned his command, and General Vivian directed General Shirley to inquire and report on the state of the corps, and particularly referred him for information on the matter to the defendant, who was General Vivian's private secretary and civil commissioner. All communications made by the defendant to General Shirley touching the corps and the plaintiff's management of it are privileged, if the jury find that the defendant at the time honestly believed that he was acting within the scope of his duty in making them.

Beatson v. *Skene*, 5 H. & N. 838; 29 L. J. Ex. 430; 6 Jur. N. S. 780; 2 L. T. 378.

Hopwood v. *Thorn*, 8 C. B. 293; 19 L. J. C. P. 94; 14 Jur. 87.

A., B., and C. are brother officers in the same regiment. A. meets B. and says, "I have learned that C. has been guilty of an atrocious offence: I wish to consult you whether I should divulge it—whether I should speak

of it to the commanding officer." Such remark and the discussion that ensued would be privileged, if *bonâ fide*. *Per* Pigot, C.B., in

Bell v. *Parke*, 10 Ir. C. L. R. 284. [The decision in the case turned on the language of the plea.]

The plaintiff was a London merchant who had had business relations with the London and Yorkshire Bank (Limited). The defendant, the manager of that bank, on being applied to by one Hudson for information about the plaintiff, showed Hudson an anonymous letter which the bank had received about the plaintiff, and which contained the libel in question. *Held*, that handing Hudson the letter in confidence was a privileged communication. Grove, J., in refusing a rule for a new trial made the following remarks :— "The defendant did not act as a volunteer, but was applied to for information. When applied to he did give such information as he possessed. He might have refused to give that information. He had no legal duty cast upon him to give any opinion. But he was entitled to give his opinion when asked, and *à fortiori*, as it seems to me, to show any letters he had received bearing on the subject. If one man shows another a letter, he leaves him to estimate what value attaches to it; whereas any opinion he gives might be based on very insufficient grounds. It is better to state facts than to give an opinion. Everyone owes it as a duty to his fellow-men to state what he knows about a person, when inquiry is made; otherwise no one would be able to discern honest men from dishonest men. It is highly desirable, therefore, that a privilege of this sort should be maintained. An anonymous letter is usually a very despicable thing. But anonymous letters may be very important, not by reason of what they say, but because they lead to inquiry, which may substantiate what they have said. It seems to me, therefore, that he was fully entitled to show this anonymous letter for what it was worth."

Robshaw v. *Smith*, 28 L. T. 423.

(*b*) *Confidential communications not in answer to a previous inquiry.*

In the cases just quoted stress is laid on the fact that the defendant did not volunteer the information, but was expressly applied to for it. This is always no doubt a very material fact in the defendant's favour; but it is never alone decisive. Many occasions are privileged in which no application is made to the defendant, but he himself takes the initiative; while, on the other hand, as we have seen, many answers to inquiries will not necessarily be privileged, even if given confidentially. The question in every case is this :—Were the circum-

stances such that an honest man might reasonably suppose it his duty to act as the defendant has done in this case? And the circumstances may be such that it is clearly the duty of a good citizen to go at once to the person most concerned and tell him everything, without waiting for him to come and inquire. It may well be that he has no suspicions, and never would inquire into the matter unless warned. (See *post*, pp. 213–219.)

But in cases where neither life nor property is in imminent and obvious peril, there the circumstance that the defendant was applied to for the information, and did not volunteer it, will materially affect the issue. Where the matter is not of great or immediate importance, interference on my part may be considered officious and meddlesome; although, under the same circumstances, every one would at once admit that it would have been my duty to give all the information in my power, had I been applied to for it. An answer to a confidential inquiry may be privileged where the same information if volunteered would be actionable. Thus I am not justified in standing at the door of a tradesman's shop and voluntarily defaming his character to his intending customers. But if an intending customer comes to me and inquires as to the respectability or credit of that tradesman, it is my duty to tell him all I know. (*Storey* v. *Challands*, 8 C. & P. 234.)

In cases then in which there can be a doubt as to the defendant's duty to speak, the fact that he was applied to for the information will tell strongly in his favour. In cases where his duty to speak was clear without that, the fact that he was applied to is immaterial.

Illustrations.

Both the Marquis of Anglesey and his agent told the defendant, the tenant of Haywood Park Farm, to inform them if he saw or heard anything

wrong respecting the game. The defendant heard that the gamekeeper was selling the game, and believing the fact to be so, wrote and informed the Marquis. *Held*, that the letter was privileged; but Parke, J., intimated that if the defendant had not been previously directed to communicate anything he thought going wrong, the letter would have been unauthorised and libellous.

Cockayne v. *Hodgkisson*, 5 C. & P. 543.

See *King* v. *Watts*, 8 C. & P. 615.

If a master, hearing that a discharged servant is seeking to enter M.'s service, writes to M. of his own accord to give the servant a bad character, and thus forestalls any inquiry by M.; it will at all events require stronger evidence to prove that he acted *bonâ fide* than it would had he waited for M. to write and enquire.

Pattison v. *Jones*, 8 B. & C. 578; 3 M. & R. 101.

Horsford was about to deal with the plaintiff, when he met the defendant who said at once, without his opinion being asked at all, "If you have anything to do with Storey, you will live to repent it; he is a most unprincipled man," &c. Lord Denman directed a verdict for the plaintiff, because the defendant began by making the statement, without waiting to be asked.

Storey v. *Challands*, 8 C. & P. 234.

Nash selected plaintiff to be his attorney in an action. Defendant, apparently a total stranger, wrote to Nash to deprecate his so employing the plaintiff. This was held to be clearly *not* a confidential communication. Damages, 1*s*.

Godson v. *Home*, 1 B. & B. 7; 3 Moore, 223.

At the hearing of a County Court case, *Nettlefold* v. *Fulcher*, Fulcher's solicitor commented severely on the conduct of the plaintiff, Nettlefold's debt collector. Not content with that, Fulcher's solicitor sent a full report of the case to the *Marylebone Gazette*, including his remarks on the plaintiff. The jury found that this report was substantially fair and accurate, but that it was sent to the newspaper "with a certain amount of malice." The Court upheld this finding, laying especial stress upon the fact that the defendant was a volunteer, and not an ordinary reporter for that paper.

Stevens v. *Sampson*, 5 Ex. D. 53; 49 L. J. Q. B. 120; 28 W. R. 87; 41 L. T. 782.

(*c*) *Communications made in discharge of a duty arising from a confidential relationship existing between the parties.*

In what cases then will a defendant be privileged in going of his own accord to the person concerned, and giving him information which he has not asked for? This is often a difficult question to answer. But in one

class of cases it is clear that it is not only excusable, but that it is imperative on the defendant so to do; and that is where there exists between the parties such a confidential relation as to throw on the defendant the duty of protecting the interests of the person concerned.

Thus it is clearly the duty of my steward, bailiff, foreman, or housekeeper, to whom I have entrusted the management of my lands, business, or house, to come and tell me if they think anything is going wrong, and not to wait till my own suspicions are aroused, and I myself begin asking questions. So my family solicitor may voluntarily write and inform me of anything which he thinks it is to my advantage to know, without waiting for me to come down to his office and enquire. But it would be dangerous for another solicitor, whom I had never employed, to volunteer the same information; for till I retain him in the matter, there is no confidential relation existing between us. So a father, guardian, or an intimate friend may warn a young man against associating with a particular individual; or may warn a lady not to marry a particular suitor; though in the same circumstances it might be considered officious and meddlesome, if a mere stranger gave such a warning. So if the defendant is in the army or in a government office, it would be his duty to inform his official superiors of any serious misconduct on the part of his subordinates; for the defendant is in some degree answerable for the faults of those immediately under his control. But it does not follow that, if A. and B. are officers or clerks of equal rank and standing, it is the duty of A. to tell tales of B., except in self-defence; for A.'s superiors expect him to do his own work merely and have not invested him with any authority or control over B. (See *Bell* v. *Parke*, 10 Ir. C. L. R. 284; 11 Ir. C. L. R. 413.)

A *confidential relationship* then clearly exists where the

parties are principal and agent, solicitor and client, guardian and ward, partners, or even intimate friends: in short wherever any trust or confidence is reposed by the one in the other. Or, changing the point of view, we may say that it will be the duty of A. to volunteer information to B., whenever B. could justly reproach A. for his silence if he did not volunteer such information.

Merely labelling a letter "*Private and confidential*," or merely stating "*I speak in confidence*," will not make a communication confidential in the legal sense of that term, if there be in fact no relationship between the parties which the law deems confidential. (*Picton* v. *Jackman*, 4 C. & P. 257.)

Illustrations.

My regular solicitor may unasked give me any information concerning third persons of which he thinks it to my interest that I should be informed, even although he is not at the moment conducting any legal proceedings for me.

Davis v. *Reeves*, 5 Ir. C. L. R. 79.

A solicitor who is conducting a case for a minor may inform his next friend of the minor's misconduct.

Wright v. *Woodgate*, 2 C. M. & R. 573; 1 Tyr. & G. 12; 1 Gale, 329.

Rumours being in circulation prejudicial to the character of the plaintiff, a dissenting minister, he courted inquiry, and appointed A. to sift the matter thoroughly. It was agreed that the defendant should represent the malcontent portion of the congregation, and state the case against the plaintiff to A. A confidential relationship being thus established between the defendant and A., all that took place between them, whether by word of mouth or in writing, so long as the enquiry lasted, and relative thereto, was held to be privileged.

Hopwood v. *Thorn*, 8 C. B. 293; 19 L. J. C. P. 94; 14 Jur. 87.

A report by the Comptroller of the Navy to the Board of Admiralty upon the plans and proposals of a naval architect is clearly privileged. *Per* Grove, J., in

Henwood v. *Harrison*, L. R. 7 C. P. 606; 41 L. J. C. P. 206; 20 W. R. 1000; 26 L. T. 938.

A timekeeper employed on public works, on behalf of a public department, wrote a letter to the secretary of the department, imputing fraud to the contractor. Blackburn, J., directed the jury that if they thought the letter was written in good faith and in the discharge of the defendant's duty to his employers, it was privileged, although written to the wrong person.

Scarll v. *Dixon*, 4 F. & F. 250.

A relation or intimate friend may confidentially advise a lady not to marry a particular suitor, and assign reasons, provided he really believes in the truth of the statements he makes.

Todd v. *Hawkins*, 2 M. & Rob. 20; 8 C. & P. 888.

The defendant and Tinmouth were joint owners of *The Robinson*, and engaged the plaintiff as master; in April, 1843, defendant purchased Tinmouth's share; in August, 1843, defendant wrote a business letter to Tinmouth, claiming a return of £150, and incidentally libelled the plaintiff. *Held*, a privileged communication, as the defendant and Tinmouth were still in confidential relationship.

Wilson v. *Robinson*, 7 Q. B. 68; 14 L. J. Q. B. 196; 9 Jur. 726.

The defendant, a linendraper, dismissed his apprentice without sufficient legal excuse: he wrote a letter to her parents, informing them that the girl would be sent home, and giving his reasons for her dismissal. Cockburn, C.J., held this letter privileged; as there was clearly a confidential relationship between the girl's master and her parents.

James v. *Jolly*, Bristol Summer Assizes, 1879, *ex relatione meâ*.

See *Fowler and wife* v. *Homer*, 3 Camp. 294.

The officers and men of the garrison of St. Helena gave an entertainment at the theatre, at which considerable noise and disturbance took place. The commanding officer was informed that this was caused by the plaintiff, who was said to have been drunk. The plaintiff was an assistant master in the Government School. The commanding officer reported the circumstances to the colonial secretary of the island, and the plaintiff was in consequence suspended from his appointment. Verdict for the plaintiff disapproved and set aside, and judgment arrested.

Stace v. *Griffith*, L. R. 2 P. C. 420; 6 Moore, P. C. C. N. S. 18; 20 L. T. 197.

Sutton v. *Plumridge*, 16 L. T. 741.

It is the duty of an under-master in a College School to inform the head-master that reports have been for some time in circulation imputing habits of drunkenness to the second-master.

Hume v. *Marshall* (Cockburn, C.J.), *Times* of Nov. 26, 1877.

But where, after an election, the agent of the defeated candidate wrote a letter to the agent of the successful candidate, asserting that the plaintiff and another (both members of the successful candidate's committee) had bribed a particular voter, the letter was held not to be privileged, as there was no confidential relation existing between the two agents.

Dickeson v. *Hilliard and another*, L. R. 9 Exch. 79; 43 L. J. Ex. 37; 22 W. R. 372; 30 L. T. 196.

A circular letter sent by the secretary to the members of a society for the protection of trade against sharpers and swindlers, is not a privileged communication.

Getting v. *Foss*, 3 C. & P. 160.

See *Goldstein* v. *Foss*, 2 C. & P. 252; 6 B. & C. 154; 4 Bing. 489; 2 Y. & J. 146; 4 D. & R. 197; 1 M. & P. 402.

Humphreys v. *Miller*, 4 C. & P. 7.

(*d*) *Information volunteered when there is no confidential relationship existing between the parties.*

Where neither the defendant himself, nor any one with whom he has confidential relations, is interested in the subject matter of the communication, it is very difficult to define what circumstances will be sufficient to impose on him the duty of volunteering information to the prejudice of the plaintiff. There is no rule of law on the point. It is a question rather of moral or social ethics. Unless the judge is clearly of opinion that there are no circumstances to raise a suggestion of privilege, he will in every such case leave it to the jury to determine whether the defendant acted *bonâ fide* in the execution of what he honestly believed to be his duty. The jury must not ask themselves merely—"Should we have acted as the defendant has done in such circumstances?" for different people act differently in similar perplexities. Moreover the matter has been thoroughly investigated before it comes before the jury, and what to the defendant at the time seemed matter of serious suspicion has all been explained away in court. The jury must place themselves in the position of the defendant at the time these suspicious circumstances were brought to his knowledge, when first the question arose in his mind:—"Ought I not to inform A. of these matters which so nearly concern him?" It may well be that another man would have said, "It is no concern of mine," and would do nothing (which is always the safer course). But if the defendant honestly felt that he could not conscientiously allow A. to continue in secure ignorance, that he *must* communicate to him the rumour he had heard, and if he had reasonable grounds for so feeling, that is sufficient. It is not necessary that the reports which reach the defendant should be true, or

that he should thoroughly investigate them. Hearsay is sufficient reasonable and probable cause in the absence of malice (*Maitland* v. *Bramwell*, 2 F. & F. 623; *Coxhead* v. *Richards*, 2 C. B. 569; 15 L. J. C. P. 278; *Lister* v. *Perryman*, L. R. 4 H. L. 521; 39 L. J. Ex. 177; 23 L. T. 269); unless the defendant ought for any reason to have known that his informant was unreliable, and his story undeserving of belief.

The defendant is entitled to judgment if the jury find that he reasonably acted under an honest sense of duty, desiring to serve the person most concerned, and not from any self-seeking motive. But there must be some circumstances proved before them, showing that such a sense of duty was reasonably possible. It is not sufficient for the defendant merely to swear: "I acted under a sense of duty." The defendant is not to be punished for merely being over-conscientious; but on the other hand it is clear law that a man is not justified in repeating information he has received prejudicial to the plaintiff, merely because he sincerely believes it to be true. (*Botterill* v. *Whytehead*, 41 L. T. 588.)

It might be argued that in using the words "*reasonably*" and "if he had *reasonable* grounds for so feeling," I am running counter to *Clark* v. *Molyneux*, 3 Q. B. D. 237; 47 L. J. Q. B. 230; 26 W. R. 104; 36 L. T. 466; 37 L. T. 694. But I think that decision is confined to cases of clear privilege, where the only question is as to evidence of express malice. Here we are dealing with the previous question, privilege or no privilege.

The law on the point cannot be better expressed than in the following passage:—"Where a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts, then if he *bonâ fide* and without malice does tell them it is a privileged communication." (*Per* Blackburn, J., in

Davies v. *Snead*, L. R. 5 Q. B. 611; 39 L. J. Q. B. 202; 23 L. T. 609.) The only difficulty is in any given case to determine whether it had or had not become right in the interests of society that the defendant should act as he did.

In some cases the judge decides this point without the help of the jury by ruling that no *primâ facie* case of privilege has at all been established. And undoubtedly it is the province of the judge to decide whether a communication is privileged or not, when the facts are undisputed. But it is submitted that in cases where the defendant alleges that he acted under an honest, though mistaken, sense of duty, the judge should take the opinion of the jury on the question of *bona fides*, unless he feels certain that no other reasonable man, *except* the defendant, would have felt it his duty to act as the defendant did in similar circumstances.

In *Bennett* v. *Deacon*, 2 C. B. 628; 15 L. J. C. P. 289, the Court of Common Pleas were equally divided on the question whether the judge was right in ruling that the communication could not be privileged, and leaving no question to the jury as to the defendant's *bona fides*. In *Coxhead* v. *Richards*, 2 C. B. 569; 15 L. J. C. P. 278; 10 Jur. 984, the judge *had* left the question to the jury, and the same Court was equally divided as to whether he was right in so doing. In each case, therefore, the rule dropped, and the verdict stood, and, as in the former case the verdict had necessarily been for the plaintiff, owing to the judge's ruling, and in the latter case it was for the defendant, the law now stands in this somewhat contradictory state:— A man may not give a tradesman a *bonâ fide* caution not to trust the plaintiff, though the facts stated be within defendant's own knowledge; he must wait till the tradesman applies to him for his advice; but, on the other hand, a man may inform a shipowner of his captain's misconduct, though he does not know it of his own knowledge but only through others. The very similar case of *Harwood* v. *Green*, 3 C. & P. 141, *post*, p. 288,

was not cited in the argument of *Coxhead* v. *Richards*; in that case it was decided that a letter written to *Lloyd's* by a lieutenant in the navy as to the misconduct of the captain of a transport ship on board which the lieutenant had been superintendent was *not* a privileged communication. So too it is difficult to distinguish *Brooks* v. *Blanshard*, 1 Cr. & Mees. 779; 3 Tyrw. 844; from *Harris* v. *Thompson*, 13 C. B. 333. In both cases the communication appears to have been volunteered. In *Harnett* v. *Vise and wife*, 5 Ex. D. 307; 29 W. R. 7, the judge and the jury took opposite views of the defendants' conduct.

If such differences of opinion appear in the reported decisions of the Law Courts, how much greater must be the perplexity of a defendant uneducated in casuistry who suddenly finds himself called upon to solve a doubtful problem in social morality.

It appears to be clear that if the defendant reasonably supposes that human life would be seriously imperilled by his remaining silent he may volunteer information to those thus endangered, or to their master, though he be not himself personally concerned (see *per* Cresswell, J., 2 C. B. 605). So if the money or goods of the person to whom he speaks would be in great and obvious danger of being stolen or destroyed. So too it appears that the defendant may, without being applied to for the information, acquaint a master with the misconduct of his servants, if instances thereof have come under the especial notice of the defendant and have been concealed from the master's eye. But in most other cases the defendant runs a great risk in volunteering statements which afterwards turn out to be inaccurate, unless indeed he is himself personally interested in the matter, or compelled to interfere by the fiduciary relationship in which he stands to some person concerned. Although the defendant may feel sure that if he were in his neighbour's place, he should be most grateful for the information conveyed, still he must recollect that it may

eventually turn out, that in endeavouring to avert a fancied injury to that neighbour, he has really inflicted an undoubted and undeserved injury on the plaintiff.

Illustrations.

A. and *B.* are tenants to the same landlord with similar clauses in their respective leases. *A.* has reason to believe that *B.* is breaking his covenants, committing waste, violating the rotation of crops, &c. The landlord is away abroad. It is submitted on the authority of *Cockayne* v. *Hodgkisson*, 5 C. & P. 543, *ante*, p. 208, that it is *not* the duty of *A.* to write and inform the landlord of his suspicions, and that therefore such a letter would not be privileged; unless the landlord had in some way set *A.* in authority over *B.*

A housemaid thinks the cook is robbing their master. It is not her duty to speak at once on bare suspicion merely; but as soon as she sees something which reasonably appears to her inconsistent with the cook's innocence, she will be privileged, it is submitted, in giving information thereof to her master.

Communications confidentially made to a master as to the conduct of his servants, by one who has had an opportunity of noticing certain malpractices on their part, are privileged.

Cleaver v. *Sarraude*, 1 Camp. 268.

Kine v. *Sewell*, 3 M. & W. 297.

Amann v. *Damm*, 8 C. B. N. S. 597; 29 L. J. C. P. 313; 7 Jur. N. S. 47; 8 W. R. 470.

The occupier of a house may complain to the landlord of the workmen he has sent to repair the house.

Toogood v. *Spyring*, 1 C. M. & R. 181; 4 Tyrw. 582.

If a report be current in a parish as to the disgraceful conduct of the incumbent, bringing scandal on the church, a good churchman may inform the Bishop of the diocese thereof, although he does not reside in the district and is not personally interested.

James v. *Boston*, 2 C. & K. 4.

A letter written by a private individual to the chief secretary of the Post-Master General complaining of the misconduct of an official under the authority of the Post-Master General, is privileged, if made *bonâ fide* and without malice, even though some of the charges made in the letter may not be true, and though the defendant stood in no relation, past or present, either to the plaintiff or to the Post Office authorities.

Blake v. *Pilfold*, 1 Moo. & Rob. 198.

Woodward v. *Lander*, 6 C. & P. 548.

The first mate of a merchant ship, wrote a letter to the defendant, an old and intimate friend, stating that he was placed in a very awkward position owing to the drunken habits, &c., of the captain, and saying:—"How shall

I act? It is my duty to write to Mr. Ward (the owner of the ship), but my doing so would ruin" the captain and his wife and family. The defendant, after much deliberation and consultation with other nautical friends, thought it his duty to show the letter to Ward, who thereupon dismissed the captain. The defendant knew nothing of the matter except from the mate's letter. The Court of C. P. was equally divided on the question whether so showing the letter was privileged; and therefore the verdict for the defendant stood.

Coxhead v. *Richards*, 2 C. B. 569; 15 L. J. C. P. 278; 10 Jur. 984. Approved by Willes, J., in

Amann v. *Damm*, 8 C. B. N. S. 597; 29 L. J. C. P. 313.

And see *Harwood* v. *Green*, 3 C. & P. 141; *post*, p. 288.

Defendant met Clark in the road, and asked him if he had sold his timber yet. Clark replied that Bennett (plaintiff) was going to have it. Defendant asked if he was going to pay ready-money for it, and being answered in the negative, said, "Then you'll lose your timber; for Bennett owes me about £25, and I am going to arrest him next week for my money, and your timber will help to pay my debt." Clark consequently declined to sell the timber to the plaintiff. Plaintiff really did owe defendant about £23. Coltman, J., directed the jury that the caution was altogether unprivileged because *volunteered*: and they therefore found a verdict for the plaintiff, damages 40*s*. The Court of C. P. were equally divided on the question whether the judge was right in his direction, and therefore the verdict for the plaintiff stood.

Bennett v. *Deacon*, 2 C. B. 628; 15 L. J. C. P. 289.

See *King* v. *Watts*, 8 C. & P. 615.

A. and *B.* were shareholders in the same railway company. *B.* was also a River Commissioner. The plaintiff had been engineer to the railway company and was seeking to be elected engineer to the River Commissioners. Shortly before the election, *A.* voluntarily wrote to *B.* that the plaintiff's mismanagement or ignorance had cost the railway company several thousand pounds. The plaintiff lost the appointment in consequence. *Held not* a privileged communication.

Brooks v. *Blanshard*, 1 Cr. & Mees. 779; 3 Tyrw. 844.

The defendant was a director of two companies; of one of which the plaintiff was secretary, of the other auditor. The plaintiff was dismissed from his post as secretary of the first company for alleged misconduct. Thereupon the defendant, at the next meeting of the board of the second company, informed his co-directors of this fact, and proposed that he should also be dismissed from his post of auditor of the second company. *Held* a privileged communication.

Harris v. *Thompson*, 13 C. B. 333.

Dawes told the defendant that he intended to employ the plaintiff as surgeon and accoucheur at his wife's approaching confinement; the defendant thereupon advised him not to do so, on account of the plaintiff's alleged immorality. Martin, B., thought this was a privileged communication, though it was volunteered.

Dixon v. *Smith*, 29 L. J. Ex. 125; 5 H. & N. 450.

The defendant, a parishioner, mentioned to her rector a report, widely current in the parish, that the rector and his solicitor were grossly mismanaging a trust estate, and defrauding the widow and orphans, &c. The solicitor brought an action for the slander. The jury found that she did so in the honest belief that it was a benefit to the rector to inform him of the report in order that he might clear his character. The Court held that the statement was clearly privileged so far as the rector was concerned, and that as the statement was not divisible it must also be privileged with regard to the plaintiff.

Davies v. *Snead*, L. R. 5 Q. B. 611 ; 39 L. J. Q. B. 202 ; 23 L. T. 609.

Information given to a vicar absent on the continent as to rumours affecting the moral character of the curate he has left in charge is privileged : so is similar information given verbally to the absent vicar's solicitor, with a view to his informing the vicar, should he think it right to do so : so is similar information given to a neighbouring vicar who has asked the curate in charge to preach for him.

Clark v. *Molyneux*, 3 Q. B. D. 237 ; 47 L. J. Q. B. 230 ; 26 W. R. 104 ; 36 L. T. 466 ; 37 L. T. 694 ; 14 Cox, C. C. 10.

The plaintiff, an architect, had been employed by a certain committee to superintend and carry out the restoration of Skirlaugh Church ; thereupon the defendant, who was a clergyman residing in the county, but who had no manner of interest in the question of the employment of the plaintiff to execute the work, wrote a letter to a member of the committee saying, " I see that the restoration of Skirlaugh Church has fallen into the hands of an architect who is a Wesleyan and can have no experience in church work. Can you not do something to avert the irreparable loss which must be caused if any of the masonry of this ancient gem of art be ignorantly tampered with ? " The letter was clearly a libel on the plaintiff in the way of his profession or calling. Bramwell, L.J., thought it was privileged, because the restoration was a matter of public interest, and one in which a neighbouring clergyman would be especially interested ; but a special jury found that there was evidence of malice in the unfair expressions employed and gave the plaintiffs £50 damages. But Kelly, C.B., on a motion for a new trial, declared that he was " at a loss to see what privilege the defendant possessed, under the circumstances of the case, to interfere between the committee and the plaintiffs in respect of the contract between them ; the defendant being neither the patron, nor the minister of the church, nor a member of the committee appointed to effect its restoration, nor even a parishioner."

[It did not appear that the defendant was even a subscriber to the restoration fund.]

Botterill and another v. *Whytehead*, 41 L. T. 588.

(iii.) *Information given to any public officer imputing crime or misconduct to others.*

It is a duty which every one owes to society and to the State to assist in the investigation of any alleged misconduct, and to promote the detection of any crime. And this duty does not arise merely when confidential inquiries are made. If facts come under my knowledge which lead me reasonably to conclude that a crime has been, or is about to be, committed, it is my duty at once to give information to the police. "For the sake of public justice, charges and communications which would otherwise be slanderous, are protected if *bonâ fide* made in the prosecution of an inquiry into a suspected crime." (*Per* Coleridge, J., in *Padmore* v. *Lawrence*, 11 A. & E. 382. See *Johnson* v. *Evans*, 3 Esp. 32.) But such charges must be made in the honest desire to promote the ends of justice, and not with any spiteful or malicious feeling against the person accused, nor with the purpose of obtaining any indirect advantage to the accuser. Nor should serious accusations be made recklessly or wantonly; they must always be warranted by some circumstances reasonably arousing suspicion. And they should not be made before more persons, nor in stronger language, than necessary.

Illustrations.

Mensel sent his servant, the plaintiff, to the defendant's shop on business; while there, the plaintiff had occasion to go into an inner room. Shortly after he left, a box was missed from that inner room. No one else had been in the room except the plaintiff. The defendant thereupon went round to Mr. Mensel's, and calling him aside into a private room, told him what had happened, adding that the plaintiff must have taken the box. Later on, the plaintiff came to the defendant's house, and the defendant repeated the accusation to him; but, an English girl being present, defendant was careful to speak in German. Both communications were held privileged, if made without actual malice and in the *bonâ fide* belief of their truth.

Amann v. *Damm*, 8 C. B. N. S. 597; 29 L. J. C. P. 313; 7 Jur. N. S. 47; 8 W. R. 470.

Defendant accused the plaintiff, in the presence of a third person, of stealing his wife's brooch; plaintiff wished to be searched; defendant repeated the accusation to two women, who searched the plaintiff and found nothing. Subsequently it was discovered that defendant's wife had left the brooch at a friend's house. *Held*, that the mere publication to the two women did not destroy the privilege attaching to charges, if made *bonâ fide*; but that all the circumstances should have been left to the jury who should determine whether or no the charge was made recklessly and unwarrantably, and repeated before more persons than necessary.

Padmore v. *Lawrence*, 11 A. & E. 380; 4 Jur. 458; 3 P. & D. 209.

Fowler and Wife v. *Homer*, 3 Camp. 294.

Plaintiff assaulted the defendant on the highway; defendant, meeting a constable, requested him to take charge of the plaintiff, and the constable refusing to arrest the plaintiff unless the defendant would charge him with felony, the defendant did so; *held*, on demurrer to the defendant's plea setting up these circumstances, that they did not render the charge of felony a privileged publication.

Smith v. *Hodgeskins*, Cro. Car. 276.

Plaintiff was defendant's shopman in Plymouth till Nov. 5th, 1834, when he left and went to London, receiving from the plaintiff a good character for steadiness, honesty and industry. Early in December defendant found one of his female servants in possession of some of his goods. When charged with stealing them, she said that the plaintiff gave them to her. Thereupon the defendant, though he knew the girl was of bad character, went to the plaintiff's relations in Plymouth and charged him with felony, and eventually induced them to give him fifty pounds to say no more about the matter. *Held* that the charge of felony was not made *bonâ fide*, with a just intention to promote investigation or prosecution, but with a view to a compromise, and was altogether unprivileged; and that no question as to malice in fact should have been left to the jury.

Hooper v. *Truscott*, 2 Bing. N. C. 457; 2 Scott, 672.

So, too, it is the duty of all who witness any misconduct on the part of a magistrate or any public officer to bring such misconduct to the notice of those whose duty it is to inquire into and punish it; and, therefore, all petitions and memorials complaining of such misconduct, if prepared *bonâ fide* and forwarded to the proper authorities, are privileged. And it is not necessary that the informant or memorialist should be in any way personally aggrieved or injured: for all persons have an interest in the pure administration of justice and the efficiency of

our public offices in all departments of the State. So with ecclesiastical matters; all good churchmen are concerned to prevent any scandal attaching to the Church. If, however, the informant be the person immediately affected by the misconduct complained of, he can claim privilege also on the ground that he is acting in self-defence. (See the next class of cases, p. 225.) Every communication is privileged which is made "*bonâ fide* with a view to obtain redress for some injury received, or to prevent or punish some public abuse. . . . This privilege, however, must not be abused; for if such a communication be made maliciously and without probable cause, the pretence under which it is made, instead of furnishing a defence, will aggravate the case of the defendant." (*Per* Best, J., in *Fairman* v. *Ives*, 5 B. & Ald. 647, 8.) And a defendant will be taken to have acted maliciously, if he eagerly seizes on some slight and frivolous matter, and without any inquiry into the merits, without even satisfying himself that the account of the matter that has reached him is correct, hastily concludes that a great public scandal has been brought to light which calls for the immediate intervention of the Crown.

Illustrations.

A memorial to the Home Secretary or to the Lord Chancellor, complaining of misconduct on the part of a county magistrate and praying for his removal from the commission of the peace, is privileged.

Harrison v. *Bush*, 5 E. & B. 344; 25 L. J. Q. B. 25, 99; 1 Jur. N. S. 846; 2 Jur. N. S. 90.

So is a petition to the House of Commons charging the plaintiff with oppression and extortion in his office of Vicar-General to the Bishop of Lincoln, although the petition was printed, and copies distributed amongst the members.

Lake v. *King*, 1 Lev. 240; 1 Saund. 131; Sid. 414; 1 Mod. 58.

The defendant deemed it his duty as a churchman to write to the Bishop of London informing him that a report was current in the parish of Bethnal Green that a stand-up fight had occurred in the schoolroom of St. James the Great between the plaintiff, the incumbent, and the

schoolmaster, during school hours. The letter was held privileged under the Church Discipline Act, 3 & 4 Vict. c. 86, s. 3; although the defendant did not live in the district of which the plaintiff was incumbent but in an adjoining district of the same parish.

James v. *Boston*, 2 C. & K. 4.

A letter written to the Postmaster-General, or to the Secretary to the General Post-Office, complaining of misconduct in a postmaster, is not a libel, if it was written as a *bonâ fide* complaint, to obtain redress for a grievance that the party really believed he had suffered; and particular expressions are not to be too strictly scrutinized, if the intention of the defendant was good.

Woodward v. *Lander*, 6 C. & P. 548.
Blake v. *Pilfold*, 1 Moo. & Rob. 198.

But in seeking redress, the defendant must be careful to apply to some person who has jurisdiction to entertain the complaint, or power to redress the grievance. Statements made to some stranger who has nothing to do with the matter cannot be privileged. But still if the defendant applies to the wrong person, through some natural and honest mistake as to the respective functions of various state officials, such slight and unintentional error will not take the case out of the privilege. (*Scarll* v. *Dixon*, 4 F. & F. 250.) If however he recklessly makes statements to some one whom he ought to have known was altogether unconcerned with the matter, the privilege is lost. The person whose aid is invoked must have some jurisdiction, direct or indirect, to redress the grievance or some duty or interest in connection therewith.

So too where the informant is himself the person aggrieved, he should be very careful not to be led away by his just indignation into misstating facts, or employing language which is clearly too violent for the occasion.

Illustrations.

"A petition to the king upon matters in which the Crown cannot directly interfere," is privileged.

Per Best, J., 5 B. & Ald. 648.

An elector of Frome petitioned the Home Secretary, stating that the plaintiff, a magistrate of the borough, had made speeches inciting to a breach of the peace, and praying an inquiry and that the Home Secretary should advise Her Majesty to remove the plaintiff from the commission of the peace,—such petition was held to be privileged, although it should more properly have been addressed to the Lord Chancellor.

Harrison v. *Bush*, 5 E. & B. 344 ; 25 L. J. Q. B. 25, 99 ; 1 Jur. N. S. 846 ; 2 Jur. N. S. 90.

Scarll v. *Dixon*, 4 F. & F. 250, *ante*, p. 211.

The plaintiff was about to be sworn in as a paid constable, by the justices, when the defendant, a parishioner, made a statement against the plaintiff's character in the hearing of several by-standers. *Held* that even if such statement ought rather to have been made to the vestry, who drew up the list of constables whom the justices were to swear in, still it was privileged, if made *bonâ fide* in furtherance of the ends of justice.

Kershaw v. *Bailey*, 1 Ex. 743 ; 17 L. J. Ex. 129.

A letter to the Secretary at War, with the intent to prevail on him to exert his authority to compel the plaintiff (an officer in the army) to pay a debt due from him to defendant, was held privileged, although the Secretary at War had no *direct* power or authority to order the plaintiff to pay his debt. "It was an application," says Best, J., "for the redress of a grievance, made to one of the king's ministers, who, as the defendant honestly thought, had authority to afford him redress."

Fairman v. *Ives*, 5 B. & Ald. 642 ; 1 Chit. 85 ; 1 D. & R. 252.

But where the defendant wrote a letter to the Home Secretary complaining of the conduct of the plaintiff, a solicitor, as clerk to the borough magistrates, this was held not to be privileged, because Sir James Graham had no power or jurisdiction whatever over the plaintiff. There was moreover evidence of malice.

Blagg v. *Sturt*, 10 Q. B. 899 ; 16 L. J. Q. B. 39 ; 8 L. T. (Old S.), 135 ; 11 Jur. 101.

The plaintiff was a teacher in a district school ; the inhabitants of the district prepared a memorial charging the plaintiff with drunkenness and immorality, which they sent to the local superintendent of Schools. It ought strictly to have been sent to the trustees of that particular school in the first instance, and such trustees would then, if they thought fit, in due course forward it to the local superintendent for him to take action upon it. *Held* that the publication was still *primâ facie* privileged, although by a mistake easily made, it had been sent to the wrong quarter in the first instance.

McIntyre v. *McBean*, 13 Up. Canada Q. B. Rep. 534.

(B.) COMMUNICATIONS MADE IN SELF-DEFENCE.

(iv.) *Statements necessary to protect defendant's private interests.*

The duty which compels the defendant to make the communication may in special circumstances be a duty which he owes to himself, or which a due regard to his own interest renders necessary. But in such cases it must clearly appear not only that some such communication was necessary, but also that the defendant was compelled to employ the libellous words complained of. If he could have done all that his duty or interest demanded without libelling or slandering the plaintiff, then the words were not uttered in the due performance of any duty and are therefore not privileged. Thus, it is very seldom necessary in self-defence to impute evil motives to others. Above all, the defendant should never charge his adversary with fraud, unless prepared with the most conclusive evidence; for once a charge of fraud is made, it must be proved to the letter. (*Prior & another* v. *Wilson*, 1 C. B. N. S. 95.)

So too in cases where some such communication is necessary and proper in the protection of the defendant's interests, the privilege may be lost if the extent of its publication be excessive. I am not entitled to write to the *Times* because some one has cast a slur on me at a private meeting of the board of guardians; in fact by so doing I take the surest method of disseminating the charge against myself. So with an advertisement inserted in a newspaper, defamatory of the plaintiff; if such advertisement be necessary to protect the defendant's interest, or if advertising was the only way of effecting the defendant's object, and such object is a lawful one, then the circumstances excuse the extensive

publication. But if it was not necessary to advertise at all, or if the defendant's object could have been equally well effected by an advertisement which did not contain the words defamatory of the plaintiff, then the extent given to the announcement is evidence of malice to go to the jury; (*Brown* v. *Croome*, 2 Stark. 297; and *Lay* v. *Lawson*, 4 A. & E. 795, overruling, or at least explaining *Delany* v. *Jones*, 4 Esp. 191. And see *Stockley* v. *Clement*, 4 Bing. 162; 12 Moore, 376, and *R.* v. *Enes* (1732), Andr. 229; Bacon's Abr. Libel A. (2), p. 452.)

Illustrations.

The plaintiff, a trader, employed an auctioneer to sell off his goods, and otherwise conducted himself in such a way that his creditors reasonably concluded that he had committed an act of bankruptcy. One of them, the defendant, thereupon sent the auctioneer a notice not to pay over the proceeds of the sale to the plaintiff, "he having committed an act of bankruptcy." *Held* by the majority of the Court of C. P. that this notice was privileged, as being made in the honest defence of defendant's own interests.

Blackham v. *Pugh*, 2 C. B. 611; 15 L. J. C. P. 290.

So where an agent in temperate language claims a right for his principal, or a solicitor for his client.

Hargrave v. *Le Breton*, Burr. 2422.

Steward v. *Young*, L. R. 5 C. P. 122; 39 L. J. C. P. 85; 18 W. R. 492; 22 L. T. 168.

The defendant had dismissed the plaintiff from his service on suspicion of theft, and, upon the plaintiff coming to his counting-house for his wages, called in two other of his servants, and addressing them in the presence of the plaintiff, said—"I have dismissed that man for robbing me: do not speak to him any more, in public or in private, or I shall think you as bad as him."—*Held* a privileged communication, on the ground that it was the duty, and also the interest, of the defendant to prevent his servants from associating with such a person.

Somerville v. *Hawkins*, 10 C. B. 583; 20 L. J. C. P. 131; 16 L. T. (Old S.) 283; 5 Jur. 450.

And see *Manby* v. *Witt* } 18 C. B. 544; 25 L. J. C. P. 294;
Eastmead v. *Witt* } 2 Jur. N. S. 1004.

The occupier of a house may complain to the landlord or his agent of the workmen he has sent to repair the house.

Toogood v. *Spyring*, 1 C. M. & R. 181; 4 Tyrw. 582.

Kine v. *Sewell*, 3 M. & W. 297.

A customer may call and complain to a tradesman of the goods he

supplies and the manner in which he conducts his business: but he should be careful to make the complaint in the hearing of as few persons as possible, and in moderate language.

Oddy v. *Ld. Geo. Paulett*, 4 F. & F. 1009.

Crisp v. *Gill*, 29 L. T. (Old S.) 82.

Defendant claimed rent of plaintiff; plaintiff's agent told defendant that plaintiff denied his liability; defendant thereupon wrote to the agent, alleging facts in support of his claim, and adding, "this attempt to defraud me of the produce of the land is as mean as it is dishonest." *Held* that the publication, in these terms, was not privileged, for one can claim a debt without imputing fraud, and that the judge was justified in directing the jury that it was a libel.

Tuson v. *Evans*, 12 A. & E. 733.

Lord Denman in delivering the judgment of the Court, said, "Some remark from the defendant on the refusal to pay the rent was perfectly justifiable, because his entire silence might have been construed into an acquiescence in that refusal, and so might have prejudiced his case upon any future claim; and the defendant would, therefore, have been privileged in denying the truth of the plaintiff's statement. But, upon consideration, we are of opinion that the learned Judge was quite right in considering the language actually used as not justified by the occasion. Anyone, in the transaction of business with another, has a right to use language *bonâ fide*, which is relevant to that business, and which a due regard to his own interest makes necessary, even if it should directly, or by its consequences, be injurious or painful to another; and this is the principle on which privileged communication rests; but defamatory comments on the motives or conduct of the party with whom he is dealing do not fall within that rule. It was enough for the defendant's interest, in the present case, to deny the truth of the plaintiff's assertion: to characterise that assertion as an attempt to defraud, and as mean and dishonest, was wholly unnecessary."

And see *Robertson* v. *McDougall*, 4 Bing. 670; 1 M. & P. 692; 3 C. & P. 259.

Jacob v. *Lawrence*, 4 L. R. Ir. 579; 14 Cox, C. C. 321.

The defendant owed the plaintiff £6 10*s*.; the plaintiff told his attorney to write and demand the money, and threaten proceedings. The defendant in reply wrote to the attorney denouncing the proceeding as a "miserable attempt at imposition," and proceeded to discuss the plaintiff's "transactions in business matters generally," asserting that "his disgusting tricks are looked upon by all respectable men with scorn." Williams, J., ruled that the letter was not privileged and the Court of C. P. upheld this ruling. Damages one farthing; the jury expressly found that there was no malice; but the judge certified for costs on the express ground that there was.

Huntley v. *Ward*, 1 F. & F. 552; 6 C. B. N. S. 514; 6 Jur. N. S. 18.

The defendant was Clerk of the Peace of the County of Kent, and as such it was his duty to have the register of county voters printed

the expense of such printing being allowed by the justices in Quarter Sessions. In 1854 the defendant employed a new printer, who charged less for the job; the defendant wrote a letter to the Finance Committee of the justices stating his reasons for the change, and added that to continue to pay the charges made by his former printer, the plaintiff, would be "to submit to what appears to have been an attempt to extort money by misrepresentation." *Held* that the rest of the letter was privileged, as it was proper and necessary for the defendant to explain to the Finance Committee what he had done; but that the words imputing improper motives to the plaintiff were uncalled for and malicious. Damages £50.

Cooke v. *Wildes*, 5 E. & B. 328; 24 L. J. Q. B. 367; 1 Jur. N. S. 610; 3 C. L. R. 1090.

Defendant having lost certain bills of exchange, published a handbill, offering a reward for their recovery, and adding that he believed they had been embezzled by his clerk. His clerk at that time still attended regularly at his office. *Held* that the concluding words of the handbill were quite unnecessary to defendant's object, and were a gratuitous libel on the plaintiff. Damages £200.

Finden v. *Westlake*, Moo. & Malk. 461.

See *Mulligan* v. *Cole*, L. R. 10 Q. B. 549; 44 L. J. Q. B. 153; 33 L. T. 12.

Capital and Counties Bank v. *Henty and Sons*, (in C. P. D.), 28 W. R. 490; 42 L. T. 314; (C. A.) 5 C. P. D. 514; 49 L. J. C. P. 830; 28 W. R. 851.

Delivery to a third person for service on the plaintiff of a statutory notice under the Insolvent Act of 1869 (Nova Scotia) is *primâ facie* privileged, being in the nature of a legal proceeding.

Bank of British North America v. *Strong*, 1 App. Cas. 307; 34 L. T. 627.

(v.) *Statements provoked by a previous attack by plaintiff on defendant.*

Every man has a right to defend his character against false aspersion. It may be said that this is one of the duties which he owes to himself and to his family. Therefore communications made in fair self-defence are privileged. If I am attacked in a newspaper, I may write to that paper to rebut the charges, and I may at the same time retort upon my assailant, where such retort is a necessary part of my defence or fairly arises

out of the charges he has made against me. (*O'Donoghue* v. *Hussey*, Ir. R. 5 C. L. 124.) A man who himself commenced a newspaper war cannot subsequently come to the Court as a plaintiff, to complain that he has had the worst of the fray. But even in rebutting an accusation, the defendant may not of course state what he knows at the time to be untrue, or intrude unnecessarily into the private life or character of his assailant. The privilege extends only to such retorts as the plaintiff has himself provoked. See *post*, p. 306.

Illustrations.

At a vestry meeting called to elect fresh overseers, the plaintiff accused the defendant, one of the outgoing overseers, of neglecting the interests of the vestry, and not collecting the rates; the defendant retorted that the plaintiff had been bribed by a railway company. *Held* that the retort was a mere *tu quoque*, in no way connected with the charge made against him by the plaintiff, and was therefore not privileged; for it was not made in self-defence.

Senior v. *Medland*, 4 Jur. N. S. 1039.

And see *Huntley* v. *Ward*, 6 C. B. N. S. 514; 6 Jur. N. S. 18; 1 F. & F. 552.

Murphy v. *Halpin*, Ir. R. 8 C. L. 127.

The plaintiff was a policy-holder in an insurance company, and published a pamphlet accusing the directors of that company of fraud. The directors published a pamphlet in reply, 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. Cockburn, C.J., held the directors' pamphlet *primâ facie* privileged; and directed the jury in the following words:—"If you are of opinion that it was published *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." Verdict for the defendants.

Kœnig v. *Ritchie*, 3 F. & F. 413.

R. v. *Veley*, 4 F. & F. 1117.

The defendant was a candidate for the County of Waterford. Shortly before the election the Kilkenny Tenant Farmers' Association published in *Freeman's Journal* an address to the constituency describing the defendant as "a true type of a bad Irish landlord—the scourge of the country," and charging him with various acts of tyranny and oppression towards his

tenants, and especially towards the plaintiff, one of his former tenants. The defendant, thereupon, published, also in *Freeman's Journal*, an address to the constituency, answering the charges thus brought against him, and in so doing, necessarily libelled the plaintiff. *Held* that such an address, being an answer to an attack, was *primâ facie* privileged.

Dwyer v. *Esmonde*, 2 L. R. (Ir.) 243, reversing the decision of the Court below; Ir. R. 11 C. L. 542.

See also *O'Donoghue* v. *Hussey*, Ir. R. 5 C. L. 124.

The plaintiff, a barrister, attacked the Bishop of Sodor and Man before the House of Keys in an argument against a private bill, imputing to the bishop improper motives in his exercise of church patronage. The bishop wrote a charge to his clergy refuting these insinuations, and sent it to the newspapers for publication. *Held* that under the circumstances the bishop was justified in sending the charge to the newspaper, for an attack made in public required a public answer.

Laughton v. *Bishop of Sodor and Man*, L. R. 4 P. C. 495; 42 L. J. P. C. 11; 9 Moore, P. C. C. N. S. 318; 21 W. R. 204; 28 L. T. 377.

See *Hibbs* v. *Wilkinson*, 1 F. & F. 608.

Hemmings v. *Gasson*, E. B. & E. 346; 27 L. J. Q. B. 252; 4 Jur. N. S. 834.

Such previous attacks might also be matter for a counterclaim.

Quin v. *Hession*, 40 L. T. 70; 4 L. R. (Ir.) 35.

Statements invited by the plaintiff.

Closely akin to retorts provoked by the plaintiff's own attack, are communications procured by the plaintiff's own contrivance. If the only publication that can be proved is one made by the defendant to the plaintiff or to some agent of the plaintiff, and it is clear that such publication was procured *malâ fide* with a view to the action, and not in the ordinary course of business or of social intercourse, then such a publication will be held privileged; for the plaintiff brought it on himself. But this rule only applies to cases in which there had been no previous publication by the defendant of the same words or libel. (*Duke of Brunswick* v. *Harmer*, 14 Q. B. 185; 19 L. J. Q. B. 20; 14 Jur. 110; 3 C. & K. 10.)

It makes a great difference if the report originated with the defendant, and what he has himself previously said produces the

plaintiff's inquiry. (*Per* Lord Lyndhurst in *Smith* v. *Mathews*, 1 Moo. & Rob. 151.) If in answer to such an inquiry the defendant does no more than acknowledge having uttered the words, no action can be brought for the acknowledgment: the party injured must sue for the words previously spoken, and use the acknowledgment as proof that those words had been spoken. But if besides saying "Yes" to the question asked, he repeats the words in the presence of a third person, asserting his belief in the accusation and that he can prove it; such a statement is slanderous and is not privileged, although elicited by the plaintiff's question. See *Griffiths* v. *Lewis*, 7 Q. B. 61; 14 L. J. Q. B. 199, in which case Lord Denman remarks: "Injurious words having been uttered by the defendant respecting the plaintiff, the plaintiff was bound to make inquiry on the subject. When she did so, instead of any satisfaction from the defendant, she gets only a repetition of the slander. The real question comes to this, does the utterance of slander once give the privilege to the slanderer to utter it again whenever he is asked for an explanation? It is the constant course, when a person hears that he has been calumniated, to go, with a witness, to the party who, he is informed, has uttered the injurious words, and say, 'Do you mean in the presence of witnesses to persist in the charge you have made?' And it is never wise to bring an action for slander unless some such course has been taken. But it never has been supposed, that the persisting in and repeating the calumny, in answer to such a question, which is an aggravation of the slander, can be a privileged communication; and in none of the cases cited has it ever been so decided." And see *Richards* v. *Richards*, 2 Moo. & Rob. 557; *Force* v. *Warren*, 15 C. B. (N.S.) 806. If, however, the second occasion on which the words were spoken is clearly privileged and justifiable, the mere fact that defendant had previously spoken them will not of itself destroy the privilege; the plaintiff must rely on the first utterance: that *may* be privileged as well, *Kine* v. *Sewell*, 3 M. & W. 297. This rule is sometimes cited as an instance of the maxim "*Volenti non fit injuria*," and is then not classed as a ground of privilege, but would rather be stated thus:—That if the only publication proved at the trial be one brought about by the plaintiff's own contrivance, this is no sufficient evidence of

publication, and the plaintiff must be nonsuited. Such was the ruling of Lord Ellenborough in *Smith* v. *Wood*, 3 Camp. 323; but this is inconsistent with *Duke of Brunswick* v. *Harmer*, 14 Q. B. 185; and in *Warr* v. *Jolly*, 6 Car. & P. 497, it was expressly held that a communication purposely procured by the plaintiff *was privileged.*

Illustrations.

"If a servant, knowing the character which his master will give of him procures a letter to be written, not with a fair view of inquiring the character, but to procure an answer upon which to ground an action for a libel, no action can be maintained." *Per* Lord Alvanley in

King v. *Waring et ux.*, 5 Esp. 15.

The defendant discharged the plaintiff, his servant, and when applied to by another gentleman, gave him a bad character. The plaintiff's brother-in-law, Collier, thereupon repeatedly called on the defendant to inquire why he had dismissed the plaintiff: and at last the defendant wrote to Collier stating his reasons specifically. The plaintiff sued out a writ the same day the letter was written. *Held*, by Lord Mansfield, C.J., and Butler, J., that no action lay on such letter, as the defendant was evidently entrapped into writing it.

Weatherston v. *Hawkins*, 1 T. R. 110.

See also *Taylor* v. *Hawkins*, 16 Q. B. 308; 20 L. J. Q. B. 313.

R. v. *Hart*, 1 Wm. Black. 386; and the remarks of Lord Alvanley, C.J., in

Rogers v. *Clifton*, 3 B. & P. 592.

A witness (whom we must presume to have been an agent of the plaintiff's, though it is not so stated in the report) heard that the defendant had a copy of a libellous print, went to defendant's house, and asked to see it; the defendant thereupon produced it, and pointed out the figure of the plaintiff and the other persons caricatured. Lord Ellenborough nonsuited the plaintiff, as there was no other publication proved.

Smith v. *Wood*, 3 Camp. 323.

The plaintiff had been in partnership with his brother-in-law, Pinhorn, as a linendraper at Southampton; but gave up business and became a dissenting minister. Rumours reached his congregation that he had cheated his brother-in-law in the settlement of the accounts on his retirement from the partnership. The plaintiff challenged inquiry and invited the malcontents in the congregation to appoint some one to thoroughly sift the matter. The malcontents appointed the defendant, and the plaintiff appointed the Rev. Robert Ainslie. *Held*, that all communications between the defendant and Ainslie relative to the matter were privileged, as being made with the sanction and concurrence of the plaintiff.

Hopwood v. *Thorn*, 8 C. B. 293; 19 L. J. C. P. 94; 14 Jur. 87.

And see *Sayer* v. *Begg*, 15 Ir. C. L. R. 458.

In answer to plaintiff's inquiry as to a rumour against himself, defendant told him, in the presence of a third party, what some one had said to his (defendant's) wife. There was no proof that the defendant had ever uttered a word on the subject till he was applied to by the plaintiff. *Held* that the answer was privileged.

Warr v. *Jolly*, 6 Car. & P. 497, as explained by Lord Denman in *Griffiths* v. *Lewis*, 7 Q. B. 67; 14 L. J. Q. B. 199; 9 Jur. 370.

And see *Richards* v. *Richards*, 2 Moo. & Rob. 557.

The plaintiff was a builder and contracted to build certain schoolrooms at Bermondsey. The defendant started a false report that in the building the plaintiff had used inferior timber; the report reached the plaintiff, who thereupon suspended the work and demanded an inquiry; and the committee of the school employed defendant to survey the work and report. He reported falsely that inferior timber was used. Lord Lyndhurst directed the jury that if they believed that the reports which produced the inquiry originated with the defendant, the defendant's report to the committee was not privileged. Verdict for the plaintiff.

Smith v. *Mathews*, 2 Moo. & Rob. 151.

Barton, a friend of the defendant, employed a builder, the plaintiff's master, to build a house for him: the defendant informed Barton that the plaintiff while at work on his house had stolen some quarterings. Barton complained to the master builder, who came down to the defendant's to inquire into the circumstances. A repetition of the charge made then to the plaintiff's master without malice was held privileged, and as the plaintiff had not called Barton to prove the original remark, the jury found for the defendant, and a new trial was refused.

Kine v. *Sewell*, 3 M. & W. 297.

But note that the statement made to Barton would, if proved, have been privileged also, although voluntary, as he was the owner of the property alleged to have been stolen.

II. WHERE THE DEFENDANT HAS AN INTEREST IN THE SUBJECT-MATTER OF THE COMMUNICATION, AND THE PERSON TO WHOM THE COMMUNICATION IS MADE, HAS A CORRESPONDING INTEREST.

In such a case every communication honestly made in order to protect such common interest is privileged by reason of the occasion.

Such common interest is generally a *pecuniary* one; as that of two customers of the same bank, two directors of the same company, two creditors of the same debtor. But it may also be *professional*, as in the case of two officers in the same corps, or masters in the same school, anxious to preserve the dignity and reputation of the body to which they both belong. In short, it may be any interest arising from the joint exercise of any legal right or privilege, or from the joint performance of any duty imposed or recognised by the law. Thus two executors of the same will, two trustees of the same settlement, have a common interest, though not a pecuniary one, in the management of the trust estate. So the ratepayers of a parish have a common interest in the selection of fit and proper constables to serve in the parish, their salary being paid out of the rates. So relations by blood or marriage have a common interest in their family concerns. But beyond this there is no privilege. The "common interest" must be one which the law recognises and appreciates. No privilege attaches to gossip, however interesting it may be to both speaker and hearers. The law never sanctions mere vulgar curiosity or officious intermeddling in the concerns of others. To be within the privilege, the statement must be such as the occasion warrants and must be made *bonâ fide* to protect the private interests

both of the speaker and of the person addressed. If in fact the defendant had no other interest in the matter beyond that which any other educated person would naturally feel, interference on his part would be officious and unprivileged. (*Botterill & another* v. *Whytehead*, 41 L. T. 588.)

Illustrations.

The defendant and Messrs. Wright and Co., his bankers, were both interested in a concern, the management of which the bankers had entrusted to the plaintiff, their solicitor. A confidential letter written by the defendant to Messrs. Wright and Co., charging the plaintiff with professional misconduct in the management of such concern was held privileged by Lord Ellenborough.

McDougall v. *Claridge*, 1 Camp. 267.

A creditor of the plaintiff may comment on the plaintiff's mode of conducting his business to the man who is surety to that creditor for the plaintiff's trade debts.

Dunman v. *Bigg*, 1 Camp. 269, n.

Where A. & B. have a joint interest in a matter, a letter, written by A. to induce B. to become a party to a suit relating thereto, is privileged though it may refer to the plaintiff in angry terms.

Shipley v. *Todhunter*, 7 C. & P. 680.

A creditor was appointed trustee in liquidation of the debtor's estate, the debtor continuing to manage his former business for the benefit of the estate. A letter written by the trustee to another creditor, commenting in very severe terms on the debtor's conduct, is privileged.

Spill v. *Maule*, L. R. 4 Exch. 232 ; 38 L. J. Ex. 138 ; 17 W. R. 805 ; 20 L. T. 675.

A person interested in the proceeds of a sale may give notice to the auctioneer not to part with them to the plaintiff, who ordered the sale, on the ground that he has committed an act of bankruptcy.

Blackham v. *Pugh*, 2 C. B. 611 ; 15 L. J. C. P. 290.

So the son-in-law of a lady has sufficient interest in whom she marries to justify him in warning her not to marry the plaintiff, if he honestly believes him, however erroneously, to be of bad character.

Todd v. *Hawkins*, 8 C. & P. 88 ; 2 M. & Rob. 20.

So, too, a bishop's charge to his clergy is *primâ facie* privileged, although it contain calumniatory matter.

Laughton v. *Bishop of Sodor and Man*, L. R. 4 P. C. 495 ; 42 L. J. P. C. 11 ; 21 W. R. 204 ; 28 L. T. 377 ; 9 Moore, P. C. C. N. S. 318.

So the reports of the directors and auditors of a company printed and circulated among the shareholders are privileged.

Lawless v. *Anglo-Egyptian Cotton Co.*, L. R. 4 Q. B. 262 ; 10 B. & S. 226 ; 38 L. J. Q. B. 129 ; 17 W. R. 498.

A communication from a firm of brewers to the tenants of their public-

houses, refusing to accept any longer in payment cheques drawn on a particular bank is *primâ facie* privileged.

Capital and Counties Bank v. *Henty and Sons* (in C. P. D.); 28 W. R. 490; 42 L. T. 314; (C. A.) 5 C. P. D. 514; 49 L. J. C. P. 830; 28 W. R. 851.

Defendant was a life governor of a public school to which the plaintiff supplied butchers' meat; defendant told the steward of the school, whose duty it was to examine the meat, that defendant had been known to sell bad meat. *Held* a privileged communication.

Humphreys v. *Stillwell*, 2 F. & F. 590.

And see *Crisp* v. *Gill*, 29 L. T. (Old S.) 82.

A Member of Parliament gave notice that he would ask in the House of Commons why the plaintiff, a colonel in the army, had been dismissed; thereupon the defendant, the plaintiff's superior officer, who had been instrumental in procuring his discharge, called on the Member, whom he knew well, to explain the true facts of the case. Lord Campbell considered the occasion *primâ facie* privileged; but the jury found it was done maliciously, and awarded the plaintiff £200 damages.

Dickson v. *Earl of Wilton*, 1 F. & F. 419.

A *bonâ fide* communication between a Member of Parliament and his constituents on a matter of political or local interest is privileged; such as a report of any speech of his, circulated privately among his constituents for their information. *Per* Lord Campbell, C.J., and Crompton, J., in

Davison v. *Duncan*, 7 E. & B. 233; 26 L. J. Q. B. 107.

And Cockburn, C.J., in

Wason v. *Walter*, L. R. 4 Q. B. 95; 8 B. & S. 730; 38 L. J. Q. B. 42; 17 W. R. 169; 19 L. T. 416.

But it would be otherwise if a member of Parliament published his speech to all the world with the malicious intention of injuring the plaintiff.

R. v. *Lord Abingdon*, 1 Esp. 226.

R. v. *Creevey*, 1 M. & S. 273.

If a parish officer seek re-election, charges made against him at the parish meeting for the nomination of officers as to his previous conduct in the office, are privileged, if made *bonâ fide*.

George v. *Goddard*, 2 F. & F. 689.

Kershaw v. *Bailey*, 1 Ex. 743; 17 L. J. Ex. 129.

See *Senior* v. *Medland*, 4 Jur. N. S. 1039.

Pierce v. *Ellis*, 6 Ir. C. L. R. 55.

Bennett v. *Barry*, 8 L. T. 857.

Harle v. *Catherall*, 14 L. T. 801.

But as to a personal attack on the private character of a candidate at parliamentary election, see

Duncombe v. *Daniell*, 8 C. & P. 222; 2 Jur. 32; 1 W. W. & H. 101.

Sir Thomas Charges v. *Roue*, 3 Lev. 30.

How v. *Prin*, Holt, 652; 7 Mod. 107; 2 Salk. 694; 2 Ld. Raym. 812; affirmed in the House of Lords, *sub nomine Prinn* v. *Howe*, 1 Brown's Parly. Cas. 64.

Onslow v. *Horne*, 3 Wils. 177; 2 W. Bl. 750.

Harwood v. *Sir J. Astley*, 1 N. R. 47.

A parish meeting was called to investigate the accounts of the parish constable; one ratepayer was unable to attend, so he wrote a letter to be read to the meeting concerning the constable and his accounts. This letter was held *primâ facie* privileged. For had he attended the meeting and made the same charge orally, such speech would have been privileged.

Spencer v. *Amerton*, 1 Moo. & Rob. 470.

Several fictitious orders for goods had been sent in the defendant's name to a tradesman, who thereupon delivered the goods to the defendant. The defendant returned the goods, and being shown the letters ordering them, wrote to the tradesman that in his opinion the letter was in the plaintiff's handwriting. *Held* that this expression of opinion was privileged, as both defendant and the tradesman were interested in discovering the culprit.

Croft v. *Stevens*, 7 H. & N. 570; 31 L. J. Ex. 143; 10 W. R. 272; 5 L. T. 683.

The defendant had a dispute with the Newry Mineral Water Company, which they agreed to refer to "some respectable printer who should be indifferent between the parties," as arbitrator. The manager of the company nominated the plaintiff, a printer's commercial traveller. The defendant declined to accept him as arbitrator, and when pressed for his reason, wrote a letter to the manager stating that the plaintiff had formerly been in the defendant's employment, and had been dismissed for drunkenness. The plaintiff, thereupon, brought an action on the letter as a libel concerning him in the way of his trade. *Held* that the letter was privileged, as both parties were interested in the selection of a proper arbitrator.

Hobbs v. *Bryers*, 2 L. R. Ir. 496.

But a judge of the Bankruptcy Court and an opposing creditor have no such common interest in the case of an insolvent debtor as to render privileged a letter written by the creditor to the judge previously to the hearing of the case. Writing such a letter is indeed a contempt of Court.

Gould v. *Hulme*, 3 C. & P. 625.

But where a large number of persons have an interest more or less remote in the matter, defendant will not be privileged in informing them all by circular or otherwise, unless there was no other way of effecting his object. Thus in the case of most societies there is a council, or a managing committee, or a manager, or a body of trustees; and communications made confidentially to them will be privileged which would not be privileged, if addressed in the first instance to the whole body of subscribers. "Such a communication as the present (a charge against the medical officer of a Poor Law Union) ought to be confined in the first instance to

those whose duty it is to investigate the charges." (*Per* Mellish, L. J., in *Purcell* v. *Sowler*, 2 C. P. D. at p. 221.)

A communication can scarcely be called confidential which is addressed to some two or three hundred people at once. Thus the mere fact that I subscribe to a charity does not entitle me to canvass the private character, and discuss the private concerns, of the medical man employed by the charity, and so cause his past life to become a topic of general conversation in the town; although any representation made to the managing committee would be privileged; and if absolutely necessary to the success of the charity, I might after due notice given to the medical man, appeal from the decision of the committee to the general body of subscribers. (*Martin* v. *Strong*, 5 A. & E. 535, as explained in *Kine* v. *Sewell*, 3 M. & W. 297.)

Illustrations.

A letter written by a subscriber to a charity to the committee of management of the charity concerning the conduct of their secretary in the management of the funds of the charity is *primâ facie* privileged.

Maitland v. *Bramwell*, 2 F. & F. 623.

See also *Hartwell* v. *Vesey*, 3 L. T. 275.

Any statement made by a director of a company to his fellow directors, as to the conduct and character of their auditor, is privileged, though it relates to his conduct with reference to another company, of which he was secretary and not auditor.

Harris v. *Thompson*, 13 C. B. 333.

But it would seem that a similar statement, if made by one private shareholder in the company to another, would not be privileged.

Brooks v. *Blanshard*, 1 Cr. & Mees. 779; 3 Tyrw. 844.

Defendant, who was a sergeant in a volunteer corps, of which plaintiff also was a member, represented to the committee by whom the general business of the corps was conducted, that plaintiff was an unfit person to be permitted to continue a member of the corps; that he was the executioner of the French king, &c. Lord Ellenborough held the communication privileged.

Barbaud v. *Hookham*, 5 Esp. 109.

See *Bell* v. *Parke*, 10 Ir. C. L. R. 284; 11 Ir. C. L. R. 413.

But for one member of a charitable institution to send round to all the sub-

scribers a circular calling on them "to reject the unworthy claims of Miss Hoare," and stating that "she squandered away the money which she did obtain from the benevolent in printing circulars abusive of Commander Dickson," the secretary of the institution, is libellous, and not privileged.

Hoare v. *Silverlock* (No. 1; 1848), 12 Q. B. 624; 17 L. J. Q. B. 306; 12 Jur. 695.

"There may be a thousand subscribers to a charity," observes Lord Denman in *Martin* v. *Strong*, 5 Ad. & E. 538. "Such a claim of privilege is too large."

And *à fortiori*, if the words be spoken in the presence of strangers wholly uninterested in the matter, the communication loses all privilege. The defendant in all these cases must be careful that the publication "does not go beyond the occasion," that is, that his words should be confined to those who are concerned to hear them. Words of admonition or of confidential advice should be given privately. It is true that the accidental presence of some third person will not alone take the case out of the privilege, if it was unavoidable or happened in the usual course of business affairs. But if the defendant purposely contrives that a stranger should be present, who has no right to be present, and who in the natural course of things would not be present, all privilege is lost. (*Kershaw* v. *Bailey*, 1 Ex. 743; 17 L. J. Ex. 129; *Scarll* v. *Dixon*, 4 F. & F. 250.)

So too in making a communication which is only privileged by reason of its being made to a person interested in the subject-matter thereof, the defendant must be careful not to branch out into extraneous matters with which such person is unconcerned. The privilege only extends to that portion of the communication in respect of which the parties have a common interest or duty.

The defendant must also be careful to avoid the use of exaggerated expressions; for the privilege may be lost by the use of violent language when it is clearly uncalled for. (*Fryer* v. *Kinnersley*, 15 C. B. N. S. 422; 33 L. J. C. P. 96; 10 Jur. N. S. 441; 12 W. R. 155;

9 L. T. 415; *Senior* v. *Medland*, 4 H. & N. 843; 4 Jur. N. S. 1039.)

And especially in cases where a rumour reaches the defendant, of which he feels it his duty to inform others who are equally interested with himself in its subject-matter, he should be very careful to report it precisely as he heard it, without any addition or exaggeration. (*Bromage* v. *Prosser*, 4 B. & Cr. 247; 6 Dowl. & R. 296.)

In short whenever the mode and extent of a privileged publication are more injurious to the plaintiff than necessary, this may be evidence of malice in the publisher. Though the words themselves would be privileged if addressed only to the few individuals concerned, yet the privilege may be lost if the defendant deliberately chooses to publish them to the general public, or to any one who had no corresponding interest in the communication. Confidential communications should not be shouted across the street for all the world to hear. (*Wilson* v. *Collins*, 5 C. & P. 373; *Oddy* v. *Lord George Paulet*, 4 F. & F. 1009.) Defamatory remarks, if written at all, should be sent in a private letter properly sealed and fastened up: not written on a postcard, or sent by telegram; for two strangers at least read every telegram, many more most postcards. (*Williamson* v. *Freer*, L. R. 9 C. P. 393; 43 L. J. C. P. 161; *Whitfield* v. *S. E. R. Co.*, E. B. & E. 115; *Robinson* v. *Jones*, 4 L. R. Ir. 391.)

Letters as to the plaintiff's private affairs should not be published in the newspaper, however meritorious the writer's purpose may be: unless indeed there is no other way in which the writer can efficiently effect his purpose and discharge the duty which the law has cast upon him. So with an advertisement inserted in a newspaper, defamatory of the plaintiff; if such advertisement be necessary to protect the defendant's interest, or if advertising was the only way of effecting the defendant's

object, and such object is a legal one, then the circumstances excuse the extensive publication. But if it was not necessary to advertise at all, or if the defendant's object could have been equally well effected by an advertisement which did not contain the words defamatory of the plaintiff, then the extent given to the announcement is evidence of malice to go to the jury. (*Brown* v. *Croome*, 2 Stark, 297; and *Lay* v. *Lawson*, 4 A. & E. 795, overruling *Delany* v. *Jones*, 4 Esp. 191.) To deliberately give any unnecessary publicity to statements defamatory of another, raises at least a suspicion of malice.

Illustrations.

Defendant made a speech at a public meeting called to petition Parliament, and subsequently handed a copy of what he had said to the reporters for publication in the newspapers; such publication was held to be in excess of the privilege.

Pierce v. *Ellis*, 6 Ir. C. L. R. 55.

A personal attack on the private life and character of a candidate at a parliamentary election, published by a voter in the newspapers, is not privileged. "However large the privilege of electors may be," said Lord Denman, C.J., "it is extravagant to suppose that it can justify the publication to all the world of facts injurious to a person who happens to stand in the situation of a candidate."

Duncombe v. *Daniell*, 8 C. & P. 222; 2 Jur. 32; 1 W. W. & H. 101.

A letter sent to a newspaper by members of the Town Council and published therein, charging certain contractors for the erection of the Borough Gaol with "scamping" their work, is not privileged; although preferring the same charge at a meeting of the Town Council probably would have been.

Simpson v. *Downs*, 16 L. T. 391.

But see *Harle* v. *Catherall*, 14 L. T. 801.

The defendant, the tenant of a farm, required some repairs to be done at his house; the landlord's agent sent up two workmen, the plaintiff and Taylor. They made a bad job of it; the plaintiff undoubtedly got drunk while on the premises; and the defendant was convinced from what he heard that the plaintiff had broken open his cellar-door and drunk his cider. Two days afterwards the defendant met the plaintiff and Taylor together, and charged the plaintiff with breaking open the cellar-door, getting drunk, and spoiling the job. He repeated this charge later in the same day to Taylor alone in the absence of the plaintiff, and also to the landlord's agent. *Held*, that the communication to the landlord's agent was clearly privileged, as both were interested in the repairs being properly done; that the statement made to the plaintiff in Taylor's presence was also privileged, if not malicious; but

that the repetition of the statement to Taylor in the absence of the plaintiff was unauthorised and officious, and therefore not protected, although made in the belief of its truth.

Toogood v. *Spyring*, 1 C. M. & R. 181 ; 4 Tyrw. 582.

Proof that defendant industriously circulated the libel will be some evidence of malice.

Gathercole v. *Miall*, 15 M. & W. 319 ; 15 L. J. Ex. 179 ; 10 Jur. 337.

A shareholder in a railway company summoned a meeting of shareholders, and also invited reporters for the press to attend. Charges which he made at such meeting against one of the directors for his conduct of the affairs of the company, held *not* privileged, because persons not shareholders were present.

Parsons v. *Surgey*, 4 F. & F. 247.

But where the auditors of a company reported that the manager's accounts were badly kept, and that there was a large deficiency not accounted for ; and at the general meeting this report with others was submitted to the shareholders, and the meeting resolved that they should be printed and circulated among the shareholders, which was done. *Held* that the privilege attaching to such reports was not lost merely by the necessary publication of them to the compositors, &c., in the ordinary course of printing.

Lawless v. *Anglo-Egyptian Cotton Co.*, L. R. 4 Q. B. 262 ; 10 B. & S. 226 ; 38 L. J. Q. B. 129 ; 17 W. R. 498.

And see *Davis* v. *Cutbush and others*, 1 F. & F. 487.

Lake v. *King*, 1 Lev. 240 ; 1 Saund. 131 ; Sid. 414 ; 1 Mod. 58.

The plaintiff and defendant were jointly interested in property in Scotland, to the manager of which the defendant wrote a letter principally about the property and the conduct of the plaintiff with reference thereto, but also containing a charge against the plaintiff with reference to his conduct to his mother and aunt. *Held* that though the part of the letter about the defendant's conduct as to the property might be confidential and privileged, such privilege could not extend to the part of the letter about the plaintiff's conduct to his mother and aunt.

Warren v. *Warren*, 1 C. M. & R. 250 ; 4 Tyr. 850.

Simmonds v. *Dunne*, Ir. R. 5 C. L. 358.

If a clergyman or parish priest, in the course of a sermon, "make an example" of a member of his flock by commenting on his misconduct, and either naming him, or alluding to him in unmistakable terms ; his words will not be privileged, although they were uttered *bonâ fide* in the honest desire to reform the culprit and to warn the rest of his hearers ; and although the congregation would probably be more interested in this part of the discourse than in any other. If the words be actionable, the clergyman must justify.

Magrath v. *Finn*, Ir. R. 11 C. L. 152.

Kinnahan v. *McCullagh*, *ib.* 1.

R. v. *Knight* (1736), Bacon's Abr. A. 2 (Libel).

Gilpin v. *Fowler*, 9 Ex. 615 ; 23 L. J. Ex. 152 ; 18 Jur. 293.

And see *Greenwood* v. *Prick*, Cro. Jac. 91, as overruled by Lord Denman, 12 A. & E. 726, *ante*, p. 6.

III. Privileged Reports.

(i.) *Reports of Judicial Proceedings.*

Every impartial and accurate report of any proceeding in a public law court is privileged, unless the court has itself prohibited the publication, or the subject-matter of the trial be unfit for publication.

This rule applies to all proceedings in any court of justice, superior or inferior, of record or not of record. "For this purpose no distinction can be made between a court of *piepoudre* and the House of Lords sitting as a court of justice. (*Per* Lord Campbell in *Lewis* v. *Levy*, E. B. & E. 537; 27 L. J. Q. B. 287; 4 Jur. N. S. 970.) And in the case of a magistrate or of justices sitting in petty session, it is immaterial whether the application be made to them *ex parte* or not. It appears to be also immaterial whether the matter be one over which they have jurisdiction or not, and whether they dispose of the case finally or send it for trial to the assizes.

The reason for this privilege is thus stated by Lawrence, J., in *R.* v. *Wright*, 8 T. R. 298. "The general advantage to the country in having these proceedings made public more than counterbalances the inconvenience to private persons whose conduct may be the subject of such proceedings." Cockburn, C. J., uses language almost identical in *Wason* v. *Walter*, L. R. 4 Q. B. 87; 8 B. & S. 730; 38 L. J. Q. B. 34; 17 W. R. 169; 19 L. T. 418.

It is only since 1878 that the law has extended so wide an

immunity to reports of proceedings before police magistrates or justices of the peace. Thus, while *Lewis* v. *Levy* decided that a report of a preliminary investigation before a magistrate was privileged if the result was that the summons was dismissed and the person accused discharged, still *Duncan* v. *Thwaites*, 3 B. & C. 556; 5 D. & R. 447, is an express authority for holding such a report unprivileged, if the accused be ultimately sent to take his trial before a jury. The reason for the distinction is that in the former case the decision is final, and the investigation at an end; in the latter the examination was preliminary merely, and the minds of the future jury might be influenced by the publication.

Again, there is an obvious distinction between an *ex parte* application, where the accused has no opportunity of defending himself, and a full trial where both parties address the court by their counsel or solicitors, and call what witnesses they please. There are even *dicta* of certain eminent judges which would seem to deny any privilege to fair and accurate reports of *ex parte* proceedings in the superior Courts. (*Per* Maule, J., in *Hoare* v. *Silverlock* (No. 2, 1850), 9 C. B. 23; 19 L. J. C. P. 215; and Abbott, C. J., in *Duncan* v. *Thwaites*, 3 B. & C. 556.) But *Curry* v. *Walter*, 1 Bos. & P. 525; 1 Esp. 456, is an express decision that such reports *are* privileged, a case which was at one time doubted, but is now clear law. And now the decision in *Usill* v. *Hales* settles the law, and extends immunity to all *bonâ fide* and correct reports of all proceedings in a magistrate's court, whether *ex parte* or otherwise; and such cases as *R.* v. *Lee*, 5 Esp. 123, must be considered to be overruled, in so far at all events as they lay down any general rule to the effect that it is unlawful to publish any report of *ex parte* proceedings.

A third distinction was as to matters *coram non judice*. It might well be contended that where a magistrate listens to a slanderous complaint, and gives some advice as to a matter wholly outside his jurisdiction, he is not discharging any magisterial function nor acting in any judicial capacity. It is as though the conversation took place in some private citizen's drawing-room. And to this effect was the decision in *McGregor* v. *Thwaites*, 3 B. & C. 24; 4 D. & R. 695. But this decision is practically overruled by *Usill* v. *Hales*, in which case Lord Coleridge took

a distinction (3 C. P. D. 324) between "inherent want of jurisdiction on account of the nature of the complaint" and "what may be called resulting want of jurisdiction because the facts do not make out the charge." His Lordship assumed that the application was for a summons or order under the Masters and Workmen's Act, an application, that is, which the magistrate would have had jurisdiction to grant, had the facts when investigated proved to warrant such a course. On that assumption, it follows, of course, that the magistrate had jurisdiction to listen to the application, until the facts stated to him made it clear that he had no power to grant the redress applied for. But in the libel there is no word as to the Masters and Workmen's Act; it would seem rather that the applicants were desirous of inverting the usual order of things, and of prosecuting their employer for embezzlement. No doubt in this case it was the duty of the magistrate to listen to the applicant until it became clear from what he said that the magistrate had no jurisdiction over the subject-matter of the complaint. But surely it is equally the duty of the magistrate so far to listen to every applicant. And an ordinary newspaper reporter can hardly be expected to accurately distinguish between a magistrate's "inherent want of jurisdiction" and that which is merely "resulting." Lopes, J., on the other hand, takes a broader ground :—"The cases," he says (3 C. P. D. 329), "are clear to show that want of jurisdiction will not take away the privilege, if is maintainable on other grounds." (*Buckley* v. *Wood*, 4 Rep. 146; Cro. Eliz. 230; *Lake* v. *King*, 1 Saund. 131; *Fairman* v. *Ives*, 5 B. & Ald. 642.) I think we may conclude that newspapers may safely report in future everything that takes place in open court, even though the magistrate should prove to have no jurisdiction.

It is not clear, however, that the case of *Usill* v. *Hales* disposes of the first distinction taken in *Duncan* v. *Thwaites*, 3 B. & C. 556, that a fair report of a magistrate's decision is privileged when it finally disposes of the matter of the application, but is not privileged where the inquiry is but a preliminary one, and the prisoner is committed to take his trial at the Assizes or the Central Criminal Court. Lord Campbell in *Lewis* v. *Levy*, E. B. & E. 561; 27 L. J. (Q B.) 290, appears anxious not to overrule *Duncan* v. *Thwaites*, on this point at

all events: for he is careful to lay down the rule that the privilege attaching to fair and correct reports of proceedings taking place in a public Court of Justice, "extends to proceedings taking place publicly before a magistrate on the preliminary investigation of a criminal charge *terminating in the discharge by the magistrate of the party charged.*" In *Usill and Hales* the matter was *finally* disposed of by the magistrate; it was unnecessary therefore for the Court to decide the point. But the whole spirit of the decision is against this time-honoured distinction. Lord Coleridge frankly admits (p. 325):—"I do not doubt for my own part that if this argument had been addressed to a Court some sixty or seventy years ago, it might have met with a different result from that which it is about to meet with to-day." And then after referring to *R.* v. *Fleet*, 1 B. & Ald. 379, and *Duncan* v. *Thwaites*, the learned Judge continues:—"But we are not now living, so to say, within the shadow of those cases." And his Lordship quotes a passage from the judgment of the Court of Queen's Bench, in the case of *Wason* v. *Walter*, L. R. 4 Q. B. 93, as "a passage which upon the whole I should desire to adopt and adhere to:—'Whatever disadvantages attach to a system of unwritten law,—and of these we are fully sensible,—it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society and to the requirements and habits of the age in which we live, so as to avoid the inconveniences and injustice which arise where the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied. Our law of libel has in many respects only gradually developed itself into anything like satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognised. . . . . Even in quite recent days judges, in holding the publication of the proceedings of Courts of Justice lawful, have thought it necessary to distinguish what we call *ex parte* proceedings as a probable exception from the operation of the rule. Yet *ex parte* proceedings before magistrates, and even before this Court, as, for instance, on applications for criminal informations, are published every day; but such a thing as an action or indictment founded on a report of such an *ex parte* proceeding is unheard of; and

if any such action or indictment should be brought, it would probably be held that the true criterion of the privilege is not whether the report was or was not *ex parte*, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent of all intention to do injury to the reputation of the party affected." (L. R. 4 Q. B. 94: 3 C. P. D. 326.) Applying a similar argument, we know that reports of all proceedings before magistrates are published daily with impunity, whether such proceedings are finally disposed of by the magistrate, or whether the case is hereafter to come before a jury. Lopes, J., intimates that he thinks it doubtful how far the old authorities on this point might be followed in the present day (3 C. P. D. 329). I think, therefore, that if it is not already the law, it soon will be the law, that a newspaper reporter may report everything that occurs publicly in open court without fear of any action, provided only that his reports are fair and accurate, and not interspersed with comments of his own. "The law upon such a subject must bend to the approved usages of society, though still resting upon the same principle, that what is hurtful and indicates malice should be punished, and that what is beneficial and *bonâ fide* should be protected." (*Per* Lord Campbell, C.J., in *Lewis* v. *Levy*, E. B. & E. 560; 27 L. J. Q. B. 282; 4 Jur. N. S. 970.)

Illustrations.

The following passage appeared in the the *Daily News*, the *Standard*, and the *Morning Advertiser*, on the same morning:—"Three gentlemen, civil engineers, were among the applicants to the magistrate yesterday, and they applied for criminal process against Mr. Usill, a civil engineer, of Great Queen Street, Westminster. The spokesman stated that they had been engaged in the survey of an Irish railway by Mr. Usill, and had not been paid what they had earned in their various capacities, although from time to time they had received small sums on account; and, as the person complained of had been paid, they considered that he had been guilty of a criminal offence in withholding their money. Mr. Woolrych said it was a matter of contract between the parties; and, although on the face of the application, they had been badly treated, he must refer them to the County Court. Mr. Usill thereupon brought an action against the proprietor of each newspaper. The three actions were tried together before Cockburn, C.J., at Westminster, on November 15th, 1877. The learned judge told the jury that the only question for their consideration was whether or not the publication complained of was a fair and impartial report of what took place before

the magistrate; and that, if they found that it was so, the publication was privileged. The jury found that it was a fair report of what occurred, and accordingly returned a verdict for the defendant in each case. *Held* that the report was privileged, although the proceedings were *ex parte*, and although the magistrate decided that he had no jurisdiction over the matter.

Usill v. *Hales*
Usill v. *Brearley*
Usill v. *Clarke*
} 3 C. P. D. 319; 47 L. J. C. P. 323; 26 W. R. 371; 38 L. T. 63.

See *McGregor* v. *Thwaites*, 3 B. & C. 24.

Where judicial proceedings last more than one day, and their publication is not expressly forbidden by the Court, a report published in a newspaper every morning of the proceedings of the preceding day, is privileged, if fair and accurate; but all comment on the case must be suspended till the proceedings terminate.

Lewis v. *Levy*, E. B. & E. 537; 27 L. J. Q. B. 282; 4 Jur. N. S. 970.

A report of proceedings before a judge at chambers on an application under 5 & 6 Vict. c. 122, s. 42, to discharge a bankrupt out of custody, is privileged.

Smith v. *Scott*, 2 C. & K. 580.

Proceedings held in gaol before a registrar in bankruptcy, under the Bankruptcy Act, 1861, ss. 101, 102, upon the examination of a debtor in custody, are judicial and in a public Court. A fair report, therefore, of those proceedings is protected.

Ryalls v. *Leader and others*, L. R. 1 Ex. 296; 12 Jur. N. S. 503; 4 H. & C. 555; 35 L. J. Ex. 185; 14 W. R. 838; 14 L. T. 563.

A fair and accurate report of proceedings before the examiners appointed under 9 Geo. IV. c. 22, s. 7, to inquire into the sufficiency of the sureties offered on the trial of an election petition, was held privileged.

Cooper v. *Lawson*, 8 A. & E. 746; 1 W. W. & H. 601; 2 Jur. 919; 1 P. & D. 15.

The defendants presented a petition in the Croydon County Court to adjudicate the plaintiff a bankrupt; and to set aside a bill of sale which they alleged to be fraudulent. The County Court judge did not hear the case in open Court, but in his own room; the public, however, could walk in and out of the room at their pleasure during the hearing. *Held*, by Cockburn, C.J., at Nisi Prius that a fair report of what took place before the County Court judge in his room was *primâ facie* privileged.

Myers v. *Defries*, *Times*, July 23rd, 1877.

In Scotland there exists a public register of protested bills of exchange, established by statute, and the registration of such protests has by statute the effect of a "decreet," or final judgment of the Court of Session. The contents of this register being public property, the defendant published an accurate transcript thereof for the benefit of merchants. This was held privileged, as being but a list of judgments of the Court.

Fleming v. *Newton*, 1 H. L. C. 363.

But where the publisher of such a "Black List" left in it, as a still existing liability, a judgment which had been annulled and satisfied by payment, the Irish Court of Queen's Bench held that this inaccuracy destroyed all privilege.

McNally v. *Oldham*, 16 Ir. C. L. R. 298; 8 L. T. 604.
And see *Jones* v. *McGovern*, Ir. R. 1 C. L. 681.
Cosgrave v. *Trade Auxiliary Co.*, Ir. R. 8 C. L. 349.

There are however two cases in which reports of judicial proceedings, although fair and accurate, are not privileged, and are indeed illegal.

(i.) The first is where the Court has itself prohibited the publication, as it frequently did in former days. "Every court has the power of preventing the publication of its proceedings pending litigation." (*Per* Turner, L. J., in *Brook* v. *Evans*, 29 L. J. Ch. 616; 6 Jur. N. S. 1025; 8 W. R. 688.) But such a prohibition now is rare (and see *Levy* v. *Lawson*, E. B. & E. 560; 27 L. J. Q. B. 282.)

(ii.) The second is where the subject-matter of the trial is an obscene or blasphemous libel, or where for any other reason the proceedings are unfit for publication. It is not justifiable to publish even a fair and accurate report of such proceedings: for such report may itself be indictable as a criminal libel.

Illustrations.

On the trial of Thistlewood and others for treason, in 1820, Abbott, C.J. announced in open court that he prohibited the publication of any of the proceedings until the trial of all the prisoners should be concluded. In spite of this prohibition, the *Observer* published a report of the trial of the first two prisoners tried. The proprietor of the *Observer* was summoned for the contempt, and failing to appear, was fined £500.

R. v. *Clement*, 4 B. & Ald. 218.

Richard Carlile on his trial read over to the jury the whole of Paine's "Age of Reason" for selling which he was indicted. After his conviction, his wife published a full, true, and accurate account of his trial, entitled "The Mock Trial of Mr. Carlile," and in so doing republished the whole of the "Age of Reason" as a part of the proceedings at the trial. *Held* that the privilege usually attaching to fair reports of judicial proceedings did

not extend to such a colourable reproduction of a blasphemous book; and that it is unlawful to publish even a correct account of the proceedings in a court of justice, if such an account contain matter of a scandalous, blasphemous, or indecent nature.

R. v. *Mary Carlile* (1819), 3 B. & Ald. 167. See also the remarks of Bayley, J., in

R. v. *Creevey*, 1 M. & S. 281.

The Protestant Electoral Union published a book, called "The Confessional Unmasked," intended to show the pernicious influence exercised by Roman Catholic priests in the confessional over the minds and consciences of the laity. This was condemned as obscene in *R.* v. *Hicklin*, L. R. 3 Q. B. 360; 37 L. J. M. C. 89; 16 W. R. 801; 18 L. T. 395; 11 Cox, C. C. 19. The Union thereupon issued an expurgated edition, for selling which one George Mackey was tried at the Winchester Quarter Sessions on Oct. 19th, 1870, when the jury, being unable to agree as to the obscenity of the book were discharged without giving any verdict. The Union thereupon published "A Report of the Trial of George Mackey," in which they set out the full text of the second edition of "The Confessional Unmasked;' although it had not been read in open court, but only taken as read, and certain passages in it referred to. A police magistrate thereupon ordered all copies of this "Report of the Trial of George Mackey" to be seized and destroyed as obscene books. *Held* that his decision was correct.

Steele v. *Brannan*, L. R. 7 C. P. 261; 41 L. J. M. C. 85; 20 W. R. 607; 26 L. T. 509.

The report must be an impartial and accurate account of what really occurred at the trial; else no privilege will attach. It is the duty of the judge to exclude irrelevant evidence; if therefore such evidence be given in court and appear in the report, this is not the fault of the reporter. (*Ryalls* v. *Leader*, L. R. 1 Ex. 300; 35 L. J. Ex. 185; 14 W. R. 838; 12 Jur. N. S. 503; 14 L. T. 563.) The sworn evidence of the witnesses should be relied on, rather than the speeches of advocates. Counsel are frequently instructed to open to the jury facts which they fail to prove in evidence. If such an unsubstantiated statement be reported at all, the reporter should add, "but this the plaintiff failed to prove:" but it would be better to avoid all allusion to the matter. Especial care should be taken to report accurately the summing up of the learned judge, especially if the case be of more than transitory interest. In many cases a

report has escaped the charge of partiality on the ground that it contained an accurate report of the judge's summing up of the case to the jury. (*Milissich* v. *Lloyds*, 46 L. J. C. P. 404; 36 L. T. 423; *Chalmers* v. *Payne*, 2 C. M. & R. 156; 5 Tyrw. 766; 1 Gale, 69.)

Of course the report need not be *verbatim;* it may be abridged or condensed; but it must not be partial or garbled. It need not state all that occurred *in extenso;* but if it omit any fact which would have told in the plaintiff's favour, it will be a question for the jury whether the omission is material. Thus the entire suppression of the evidence of one witness may render the report unfair. (*Duncan* v. *Thwaites*, 3 B. & C. 580.) But a report will be privileged if it is "*substantially* a fair account of what took place" in court. (*Per* Lord Campbell, C. J., in *Andrews* v. *Chapman*, 3 C. & K. 289.) "It is sufficient to publish a fair abstract." (*Per* Mellish, L. J., in *Milissich* v. *Lloyds*, 46 L. J. C. P. 405; *Per* Byles, J., in *Turner* v. *Sullivan and others*, 6 L. T. 130.)

The privilege is not confined to reports in a newspaper or law magazine. It attaches equally to fair and accurate reports issued for any lawful reason in pamphlet form or in any other fashion. Though of course if there be any other evidence of malice, the mode and extent of publication will be taken into consideration with such other evidence on that issue. (*Milissich* v. *Lloyds*, 46 L. J. C. P. 404; *Salmon* v. *Isaac*, 20 L. T. 885.)

Nor does it matter by whom the report is published; the privilege is the same, as a matter of law, for a private individual as for a newspaper. (*Per* Brett, L.J., 46 L. J. C. P. 407.) "I do not think the public press has any peculiar privilege." (*Per* Bramwell, L.J., 5 Ex. D. 56.)

If a publication purports to be a report of a trial, it will, it seems, be assumed in favour of the defendant that such a trial really took place: unless the plaintiff

adduces some evidence to the contrary. "We cannot suppose, without proof, that the occurrence of such a trial was mere invention, or that newspapers publish reports of merely imaginary trials." (*Per* Alderson, B., in *Chalmers* v. *Payne*, 5 Tyrw. 769; 2 C. M. & R. 159; 1 Gale, 69.)

Where the report is clearly absolutely fair and there is no suggestion of malice, the judge should stop the case and direct a verdict for the defendant: *e.g.* where the report is *verbatim* or nearly so; or corresponds in all material particulars with a report taken by an impartial shorthand writer. (*Per* Brett, L.J., in *Milissich* v. *Lloyds*, 46 L. J. C. P. 407.) But if anything be omitted in the report which could make any appreciable difference in the plaintiff's favour, or anything erroneously inserted which could conceivably tell against him, then it is a question for the jury whether such deviations from absolute accuracy make the report unfair; and the judge at Nisi Prius should not direct a verdict for either party. (*Risk Allah Bey* v. *Whitehurst and others*, 18 L. T. 615; *Street* v. *Licensed Victuallers Society*, 22 W. R. 553.) The jury in considering the question should not dwell too much on isolated passages: they should consider the report as a whole. They should ask themselves what impression would be made on the mind of an unprejudiced reader who reads the report straight through, knowing nothing about the case beforehand. Slight errors may easily occur; and if such errors do not substantially alter the impression of the matter which the ordinary reader would receive, the jury should find for the defendant. If however there is a substantial misstatement of any material fact, and such misstatement is prejudicial to the reputation of the plaintiff, then the report is unfair and inaccurate, and the jury should find for the plaintiff.

Illustrations.

In a former action for libel brought by the plaintiff, the then defendant had justified. The report of this trial set out the libel in full, and gave the evidence for the defendant on the justification, concluding however by stating that the plaintiff had a verdict for £30. The jury, under the direction of Lord Abinger, took the "bane" and the "antidote" together and found a verdict for the defendant, on the ground that the report when taken altogether was not injurious to the plaintiff. And the Court refused a rule for a new trial.

Chalmers v. *Payne*, 5 Tyrw. 766 ; 1 Gale, 69 ; 2 C. M. & R. 156.
Dicas v. *Lawson*, *ib.*

The plaintiff and M. were convicted of a conspiracy to extort money from B. ; the report of the trial stated that the plaintiff had written a particular letter, which the plaintiff contended had not in fact been written by him, but by his fellow-conspirator, M. *Held*, that as the jury had convicted them of a common purpose, and the letter was written in furtherance of that common purpose and set out in the indictment as an overt act of the conspiracy, it made no difference which of the two wrote it : and that the error, if error it were, was immaterial.

Stockdale v. *Tarte and others*, 4 A. & E. 1016.
Alexander v. *N. E. R. Co.*, 6 B. & S. 340 ; 34 L. J. Q. B. 152 ; 13 W. R. 651 ; 11 Jur. N. S. 619.

A barrister, editing a book on the Law of Attorneys, referred to a case, *Re Blake*, reported in 30 L. J. Q. B. 32, and stated that Mr. Blake was struck off the rolls for misconduct. He was in fact only suspended for two years, as appeared from the *Law Journal* report. The publishers were held liable for this carelessness, although of course neither they nor the writer bore Mr. Blake any malice. Damages £100.

Blake v. *Stevens and others*, 4 F. & F. 232 ; 11 L. T. 543.
Gwynn v. *S. E. R. Co.*, 18 L. T. 738.
Biggs v. *G. E. R. Co.*, 16 W. R. 908 ; 18 L. T. 482.
R. v. *Lofeild*, 2 Barnard, 128.

Where the report of a trial gave none of the evidence, but only an abridgment of the speeches of counsel, and the defendant pleaded that it was still, *in substance*, a true report of the trial ; such plea was held bad on demurrer.

Flint v. *Pike*, 4 B. & Cr. 473 ; 6 D. & R. 528.
Kane v. *Mulvany*, Ir. R. 2 C. L. 402.

A report is not privileged which does not give the evidence, but merely sets out the circumstances "as stated by the counsel" for one party.

Saunders v. *Mills*, 6 Bing. 213 ; 3 M. & P. 520.
Woodgate v. *Ridout*, 4 F. & F. 202.

Still less will it be privileged, if after so stating the case the only account given of the evidence, is that the witnesses "proved all that had been stated by the counsel for the prosecution."

Lewis v. *Walter*, 4 B. & Ald. 605.

Where a report in the *Times* of a preliminary investigation before a magistrate set out at length the opening of the counsel for the prosecution, but entirely omitted the examination and cross-examination of the prosecutor, the only witness, merely saying that "his testimony supported the statement of his counsel," the jury found a verdict for the plaintiff. Damages £10.

Pinero v. *Goodlake*, 15 L. T. 676.

[N.B.—The headnote to this case is strangely misleading; the proceedings were not *ex parte*; the defendant, himself a solicitor, was present and cross-examined the witnesses. The important monosyllable "no" appears to be omitted in the report of the argument of Coleridge, Q.C. p. 677.]

Where the report of a criminal trial gave the speech for the prosecution, a brief *résumé* of the speech of the prisoner's counsel, who called no witnesses, and the whole of the Lord Chief Baron's summing up *in extenso*; but it did not give the evidence except in so far as it was detailed in the judge's summing up; Lord Coleridge, C.J., held the report necessarily unfair because incomplete, and refused to leave the question of fairness to the jury. But the Court of Appeal held that he was wrong in so doing; that it is sufficient to publish a fair abstract of the trial, and that the judge's summing up was presumably such an abstract; that the question of fairness must be left to the jury, and that therefore there must be a new trial.

Milissich v. *Lloyds* (C. A.), 46 L. J. C. P. 404; 36 L. T. 423; 13 Cox, C. C. 575.

No privilege attaches to the report of unsworn statements made by a bystander at an inquest.

Lynam v. *Gowing*, 6 L. R. Ir. 259.

The reporter must add nothing of his own. He must not state his opinion of the conduct of the parties, or impute motives therefor: above all he must not insinuate that a particular witness committed perjury. This is not a *report* of what occurred; it is the *comment* of the writer *on* what occurred, and to this no privilege attaches. Often no doubt such comments may be justified on another ground, that they are fair and *bonâ fide* criticism on a matter of public interest and are therefore not libellous. (See *ante*, c. II. pp. 44—46.) But such observations, to which quite different considerations apply, should not be mixed up with the history of the case. "If any comments are made, they should not be made as part of the report. The report should be confined to what takes

place in court, and the two things, report and comment, should be kept separate." (*Per* Ld. Campbell, C. J., in *Andrews* v. *Chapman*, 3 C. & K. 288.) And all sensational headings to reports should be avoided.

Illustrations.

The captain of a vessel was charged before a magistrate with an indecent assault upon a lady on board his own ship. The defendant's newspaper published a report of the case, interspersed with comments which assumed the guilt of the captain, commended the conduct of the lady and generally tended to inflame the minds of the public violently against the accused. *Held* that no privilege attached to such comments and that the report was neither fair nor dispassionate.

R. v. *Fisher and others*, 2 Camp. 563.
And see *R.* v. *Lee*, 5 Esp. 123.
R. v. *Fleet*, 1 B. & Ald. 379.

It is libellous to publish a highly-coloured account of criminal proceedings, mixed with the reporter's own observations and conclusions upon what passed in court, headed "Judicial Delinquency," and containing an insinuation that the plaintiff ("our hero") had committed perjury: and it is no justification to pick out such parts of the libel as contain an account of the trial, and to plead that such parts are true and accurate, leaving the extraneous matter altogether unjustified.

Stiles v. *Nokes*, 7 East, 493; same case *sub nomine Carr* v. *Jones*, 3 Smith, 491.

The report of a trial set out the speech for the counsel for the prosecution, and then added :—"The first witness was R. P., who proved all that had been stated by the counsel for the prosecution:" but owing to the absence of a piece of formal evidence in no way bearing on the merits of the case, "the jury, under the direction of the learned judge, were obliged to give a verdict of acquittal, to the great regret of a crowded court, on whom the statement and the evidence, so far as it went, made a strong impression of their guilt." *Held* that no privilege applied.

Lewis v. *Walter*, 4 B. & Ald. 605.
Roberts v. *Brown*, 10 Bing. 519; 4 Moo. & Sc. 407.

On an examination into the sufficiency of sureties on an election petition, under 9 Geo. IV. c. 22, s. 7, affidavits were put in to show that one of them (the plaintiff) was embarrassed in his affairs, and an insufficient surety. A newspaper report of the examination proceeded to ask why the plaintiff being wholly unconnected with the borough should take so much trouble about the matter. "There can be but one answer to these very natural and reasonable queries, *he is hired* for the occasion." *Held* that this question and answer formed no part of the report; and therefore enjoyed no privilege; and that it was properly left to the jury to say

whether they were a fair and *bonâ fide* comment on a matter of public interest in that borough. Verdict for the plaintiff. Damages £100.

Cooper v. *Lawson*, 8 A. & E. 746; 1 W. W. & H. 601; 2 Jur. 919; 1 P. & D. 15.

The *Observer* gave a true and faithful account of some proceedings in the Insolvent Debtors Court, but headed it with the words "Shameful conduct of an attorney." *Held* that for those words, as they were not justified, the plaintiff was entitled to recover.

Clement v. *Lewis*, (Exch. Ch.), 3 Br. & B. 297; 3 B. & Ald. 702; 7 Moore, 200.

Bishop v. *Latimer*, 4 L. T. 775.

A paragraph was headed "An honest lawyer," and stated that the plaintiff had been reprimanded by one of the Masters of the Queen's Bench, "for what is called sharp practice in his profession." *Held* libellous.

Boydell v. *Jones*, 4 M. & W. 446; 1 H. & H. 408; 7 Dowl. 210.

Flint v. *Pike*, 4 B. & C. 473; 6 D. & R. 528.

A report of the hearing of a charge of perjury before a magistrate, was headed "Wilful and Corrupt Perjury," and stated that the "evidence before the magistrate entirely negatived the story of the" plaintiff. The jury found a verdict for the defendant on the ground that it was a fair and correct report of what occurred at the hearing. But the Court set aside the verdict on this count, and entered a verdict for the plaintiff, with nominal damages.

Lewis v. *Levy*, E. B. & E. 537; 27 L. J. Q. B. 282; 4 Jur. N. S. 970.

The privilege attaching to fair and accurate reports may of course be rebutted by proof of actual malice. Reports of judicial proceedings are not absolutely privileged, by whomsoever published. (*Stevens* v. *Sampson*, 5 Exch. D. 53.) But it is of course very difficult to prove that an ordinary newspaper reporter has been actuated by express malice: whereas if one of the parties to a cause or his solicitor sent the report, this unusual conduct alone would be some evidence of malice, and the jury would start with a presumption that the report was biassed and unfair. (*See* the remarks of Wood, V.-C., in *Coleman* v. *West Hartlepool Harbour & Railway Cy.*, 2 L. T. 766; 8 W. R. 734.)

In these cases there are in fact two distinct questions for the

jury. (i.) Is the report fair and accurate? If so, it is *primâ facie* privileged; if not verdict for the plaintiff. (ii.) Was the report, though fair and accurate, published maliciously? Was it published solely to afford information to the public and for the benefit of society without any reference to the individuals concerned; or was it published with the malicious intention of injuring the reputation of the plaintiff? This second question of course only arises when the first has been already answered in the affirmative.

Illustrations.

A churchwarden obtained a writ of prohibition against the Bishop of Chichester on an affidavit which falsely stated the facts. He immediately had the writ translated into English, and dispersed 2000 copies of such translation all over the kingdom with a title-page alleging that by such writ "the illegality of oaths is declared," which was not the case. *Held*, "a most seditious libel."

Waterfield v. *Bishop of Chichester*, 2 Mod. 118.

In a County Court action, *Nettlefold* v. *Fulcher*, the defendant, a solicitor, appeared for Nettlefold, and commented severely on the conduct of the plaintiff, who was Fulcher's agent and debt collector. The defendant sent to the local newspapers a report of the case, which the jury found "was in substance a fair report;" but they also found that "it was sent with a certain amount of malice." Verdict for the plaintiff. Damages, 40*s*. On appeal, it was argued that the defendant was entitled to judgment on the first finding of the jury, and that the motive which the defendant had in sending the report was immaterial. But the Court of Appeal held that Cockburn, C.J. was right in directing judgment to be entered for the plaintiff.

Stevens v. *Sampson*, 5 Ex. D. 53; 49 L. J. Q. B. 120; 28 W. R. 87; 41 L. T. 782.

Where the Court of Directors resolved to dismiss the plaintiff, one of their officers, for misconduct, and the defendant, the Governor in Council of Fort St. George, published this sentence of dismissal, it was held that no action lay, if it was part of the defendant's official duty so to publish it.

Oliver v. *Lord Wm. Bentinck*, 3 Taunt. 456.

See *Grant* v. *Secretary of State for India*, 2 C. P. D. 445; 25 W. R. 848; 37 L. T. 188, *ante*, p. 196.

(ii.) *Reports of Parliamentary Proceedings.*

Every fair and accurate report of any proceeding in either House of Parliament or in any committee thereof, is privileged, even though it contain matter defamatory of an individual.

The analogy between such reports and those of legal proceedings is complete. Whatever would deprive a report of a trial of immunity, will equally deprive a report of parliamentary proceedings of all privilege.

There was for a long time great doubt on this subject, but the law is now clearly and most satisfactorily settled by the decision in *Wason* v. *Walter*, L. R. 4 Q. B. 73; 38 L. J. Q. B. 34; 17 W. R. 169; 19 L. T. 409. Such doubt was caused by the fact that there were standing orders of both Houses of Parliament prohibiting such publications; and it was argued with some force that no privilege could attach to any report which was published in contravention of such standing orders, and was therefore in itself a contempt of the House. We have seen (*ante*, p. 249) that when a learned judge expressly prohibits the publication of the proceedings before him, any report of them is a contempt and wholly unprivileged. (*R.* v. *Clement*, 4 B. & Ald. 218). And the earliest reports of parliamentary proceedings were only published in fear and trembling as "Debates in the Senate of Lilliput," with the names of the speakers disguised. And even for such reports Cave, the editor of the *Gentleman's Magazine*, was cited before the House of Lords for breach of privilege (April, 1747); and Johnson's pen ceased to indite ponderous speeches for "Whig dogs." But in 1749, Cave began again, and his reports now took the form of letters from an M.P. to a friend in the country. After 1752 they were avowedly printed as reports; but still only the initials of the speakers were given. As late as 1801 the printer and publisher of the *Morning Herald* were committed to the custody of Black Rod, for publishing an account of a debate in the House of Lords; but then such account was expressly declared to be "a scandalous misrepresentation" of what had really occurred. And now such standing orders are quite obsolete. Within the last four or five years the House of Commons has modified its rules as to the presence of "strangers:" while the House of Lords has appointed a commission to increase the facilities given to reporters, and this commission has actually suggested the removal of the woolsack to the other end of the House so as to enable their Lordships to be more distinctly heard.

A speech made by a member of Parliament in the House is of course absolutely privileged. If he subsequently causes his speech to be printed, and circulates it privately among his constituents, *bonâ fide* for their information on any matter of general or local interest, a qualified privilege would attach to such report; [in spite of an obsolete order of the House of Commons forbidding such publication, passed in 1641, and still a standing order of the House; 2 Commons' Journal, 209]. (*Per* Ld. Campbell, C. J., and Crompton, J., in *Davison* v. *Duncan*, 7 E. & B. 233; 26 L. J. Q. B. 107; and Cockburn, C. J., in *Wason* v. *Walter*, L. R. 4 Q. B. 95; 38 L. J. Q. B. 42; 19 L. T. 416.) But if a member of parliament publishes his speech to all the world with the malicious intention of injuring the plaintiff, he will be liable both civilly and criminally. (*R.* v. *Lord Abingdon*, 1 Esp. 226; *R.* v. *Creevey*, 1 M. & S. 273.)

Illustrations.

The defendant published the report of a select committee of the House of Commons which contained a paragraph charging an individual with holding views hostile to the government. But the Court refused to grant a criminal information on the express ground that the publication was a true copy of a proceeding in parliament.

R. v. *Wright* (1799), 8 T. R. 293.

The plaintiff induced Earl Russell to present a petition to the House of Lords charging a high judicial officer with having suppressed evidence before an election committee some thirty years previously. The charge was shown to be wholly unfounded, and the conduct of the plaintiff in presenting such a petition was severely commented on by the Earl of Derby and others in the debate which followed. The plaintiff sued the proprietor of the *Times* for reporting this debate. Cockburn, C.J., directed the jury that if they were satisfied that the report was faithful and correct, it was in point of law a privileged communication; and the Court of Queen's Bench subsequently discharged a rule *nisi* which had been obtained for a new trial on the ground of misdirection.

Wason v. *Walter*, L. R. 4 Q. B. 73; 8 B. & S. 671; 38 L. J. Q. B. 34; 17 W. R. 169; 19 L. T. 409.

The proceedings of any Committee of the House of Lords may be reported and commented on.

Kane v. *Mulvany*, Ir. L. R. 2 C. L. 402.

(iii.) *Other Reports.*

No other reports are privileged. If any one publishes an account of the proceedings of any meeting of a town-council, board of guardians, or vestry, of the shareholders in any company, of the subscribers to any charity, or of any public meeting, political or otherwise; and such account contains expressions defamatory of the plaintiff; the fact that it is a fair and accurate report of what actually occurred will not avail as a defence, though it may be urged in mitigation of damages. By printing and publishing the statements of the various speakers, he has made them his own; and must either justify and prove them strictly true, (c. VII.) or he may rely upon their being fair and *bonâ fide* comments on a matter of public interest.

Illustrations.

The defendants, the printers and publishers of the *Manchester Courier*, published in their paper a report of the proceedings at a meeting of the Board of Guardians for the Altrincham Poor Law Union, at which *ex parte* charges were made against the medical officer of the union workhouse at Knutsford, of neglecting to attend the pauper patients when sent for. *Held*, that the matter was one of public interest; but that the report was not privileged by the occasion, although it was admitted to be a *bonâ fide* and a correct account of what passed at the meeting; and the plaintiff recovered 40*s*. damages and costs.

Purcell v. *Sowler*, 1 C. P. D. 781; 2 C. P. D. 215; 46 L. J. C. P. 308; 25 W. R. 362; 36 L. T. 416.

A public meeting was called for the purpose of petitioning Parliament against the grant to the Roman Catholic College at Maynooth. The defendant made a telling speech at such meeting commenting severely on penances and other portions of the discipline of the Roman Catholic Church. Had the words been defamatory of the plaintiff, the Court held that they would not have been privileged, although the object of the meeting was legal, and the defendant's speech was pertinent to the occasion.

Hearne v. *Stowell*, 12 A. & E. 719; 4 P. & D. 696; 6 Jur. 458; *ante*, p. 127.

See *Pierce* v. *Ellis*, 6 Ir. C. L. R. 55.

At a meeting of the West Hartlepool Improvement Commissioners, one

of the Commissioners made some defamatory remarks as to the conduct of the former secretary of the Bishop of Durham in procuring from the Bishop a licence for the chaplain of the West Hartlepool Cemetery. These remarks were reported in the local newspaper, and the secretary brought an action against the owner of the newspaper for libel. A plea of justification alleging that such remarks were in fact made at a public meeting of the commissioners, and that the alleged libel was an impartial and accurate report of what took place at such meeting, was held bad on demurrer.

Davison v. *Duncan*, 7 E. & B. 229; 26 L. J. Q. B. 104; 3 Jur. N. S. 613; 5 W. R. 253; 28 L. T. (O. S.) 265.

So also a newspaper proprietor will be held liable for publishing a report made to the vestry by their medical officer of health, even although the vestry are required by Act of Parliament sooner or later to publish such report themselves.

Popham v. *Pickburn*, 7 H. & N. 891; 31 L. J. Ex. 133; 8 Jur. N. S. 179; 10 W. R. 324; 5 L. T. 846.

See also *Charlton* v. *Watton*, 6 C. & P. 385.

It is considered that this rule works a hardship upon newspaper proprietors, who in the ordinary course of their business have presented to the public a full, true and impartial account of what really took place at a public meeting, considering no doubt that thereby they were merely doing their duty. The Scotch Law on the subject is said to be less stringent than that of England or Ireland. The Select Committee of the House of Commons appointed to inquire into the Law of Libel "after careful consideration, have come to the conclusion that the balance of convenience requires that further protection should be given to such reports." They "accordingly recommend that any report published in any newspaper of the proceedings of a public meeting should be privileged, if such meeting was lawfully convened for a lawful purpose, and was open to the public, and if such report was fair and accurate, and published without malice, and if the publication of the matter complained of was for the public benefit." But they "are of opinion that such protection should not be available as a defence in any proceeding if the plaintiff or prosecutor can show that the defendant has refused to insert a reasonable letter, or statement of explanation or contradiction by or on behalf of such plaintiff or prosecutor."

But it appears to me that no adequate reasons are assigned for such a change in the law. The consequences of publishing

in the papers calumnies uttered at a public meeting are most serious. The original slander may not be actionable *per se*, or the communication may be privileged; so that no action lies against the speaker. Moreover the meeting may have been thinly attended, and the audience may have known that the speaker was not worthy of credit. But it would be a terrible thing for the person defamed if such words could be printed and published to all the world, merely because they were uttered under such circumstances at such a meeting. Charges recklessly made in the excitement of the moment will thus be diffused throughout the country, and will remain recorded in a permanent form against a perfectly innocent person. We cannot tell into whose hands a copy of that newspaper may come. Moreover additional importance and weight is given to such a calumny by its republication in the columns of a respectable paper. Many people will believe it merely because it is in print. There is in fact an immense difference between the injury done by such a slander and that caused by its extended circulation by the press. See the remarks of Lord Campbell in *Davison* v. *Duncan*, 7 E. & B. 231; 26 L. J. Q. B. 106; 3 Jur. N. S. 613; 5 W. R. 253; 28 L. T. (Old S.), 265; and of Best, C.J., in *De Crespigny* v. *Wellesley*, 5 Bing. 402—406, cited *ante*, pp. 157, 8, c. VI.

The Select Committee appear to me, if I may venture to say so, to have attached too much importance to the absence of malice, which generally characterises such reports, and too little importance to the damage inflicted on the plaintiff by the publication. Their proviso as to the insertion of the plaintiff's contradiction is clearly intended to protect reports published *bonâ fide* or inadvertently, as distinct from those published maliciously. But malice is in no way essential to an action of libel, except in cases of qualified privilege. It is surely anomalous to determine the question: "Was the occasion such as to create a privilege for the libel?" by reference to the subsequent conduct of the defendant. And it is, I think, but a poor satisfaction to a plaintiff to allow him to write "a reasonable letter of contradiction." Many who read the report would not read the plaintiff's letter, and those who did would probably not believe it; they would say: "Oh, of course he denies it." It would be difficult too to decide what

is and what is not "a *reasonable* letter" under such circumstances. And then the speaker at the meeting, or some friend of his, would be sure to write a letter in reply to the plaintiff's, re-asserting the truth of the original charge, and probably adding a judicious selection of fresh accusations, and this letter also the editor would be bound in fairness to insert. And thus would arise a newspaper warfare which would only prolong and aggravate the mischief caused by the report.

The existing law appears to me to afford sufficient protection to newspaper proprietors. They ought surely to be liable to a civil action, whenever they publish a report defamatory of the plaintiff on a matter in which the public have no interest or concern. The Select Committee do not desire to encourage any mischievous prying into the private affairs of others, for they add the express proviso "if the publication of the matter complained of was for the public benefit." If, however, the matter is one of public interest, then all fair and *bonâ fide* comments thereon are held not to be libellous, and no action lies. And surely if unfair and *malâ fide* comments appear in a newspaper, the owner ought to be held liable for the injury thus done by his subordinates. In criminal proceedings, newspaper proprietors can avail themselves of the defences allowed them by Lord Campbell's act, which appear to me sufficient for the purpose.

CHAPTER IX.

MALICE.

"In an ordinary action for a libel or for words, though evidence of malice may be given to increase the damages, it never is considered as essential, nor is there any instance of a verdict for the defendant on the ground of a want of malice." (*Per* Bayley, J., in *Bromage* v. *Prosser*, 1 C. & P. 475; 4 B. & C. 257; 6 Dowl. & R. 295; and *per* Mansfield, C. J., in *Hargrave* v. *Le Breton*, 4 Burr. 2425.) As we have seen, an accidental or inadvertent publication of defamatory words is ground for an action. Even a lunatic is liable for a libel. (*Per* Kelly, C. B., in *Mordaunt* v. *Mordaunt*, 39 L. J. Prob. & Matr. 59.) The Courts for this purpose look at the tendency of the publication, not at the intention of the publisher. (*Haire* v. *Wilson*, 9 B. & C. 643; 4 Man. & Ry. 605; *Fisher* v. *Clement*, 10 B. & C. 472; 5 Man. & Ry. 730.) The fact that the jury have expressly found in defendant's favour that he had no malicious intent, shall not avail him. (*Per* Maule, J., in *Wenman* v. *Ash*, 13 C. B. 845; 22 L. J. C. P. 190; 17 Jur. 579; 1 C. L. R. 592; *Huntley* v. *Ward*, 6 C. B. N. S. 514; 6 Jur. N. S. 18; 1 F. & F. 552; *Blackburn* v. *Blackburn*, 4 Bing. 395; 1 M. & P. 33, 63; 3 C. & P. 146;) for if he has in fact spoken words which have injured the plaintiff's reputation he must be taken to have intended the consequences naturally resulting therefrom.

In former days this rule was not so strictly enforced in actions of slander as of libel; the Courts in those days evincing a strong desire to discourage all actions of slander, except, perhaps, in cases where the words imputed a capital offence. Thus, where the defendant was sued for saying that he had heard that the plaintiff had been hanged for stealing a horse, and on the evidence it appeared that defendant spoke the words in genuine grief and sorrow at the news, Hobart, J., nonsuited the plaintiff on the express ground that the words were not spoken maliciously; *Crawford* v. *Middleton*, 1 Lev. 82. And see *Greenwood* v. *Prick*, cited Cro. Jac. 91, *ante*, p. 6. Now, however, the absence of malice could only be given in evidence in mitigation of damages; and the question whether the defendant acted maliciously or not, should never be left to the jury, unless the occasion be privileged. (*Haire* v. *Wilson*, 9 B. & C. 643; 4 Man. & Ry. 605. *Per* Lord Denman in *Baylis* v. *Lawrence*, 11 A. & E. 924; 3 P. & D. 529; 4 Jur. 652. *Per* Parke, B., in *O'Brien* v. *Clement*, 15 M. & W. 437.) The defendant's intention or motive in using the words is, in fact, immaterial.

If I have in fact wrongfully injured another's reputation, I must compensate him, although I may have acted from the noblest motives. Just as if I break A.'s window accidentally in the attempt to save a child from falling down a grating, I am still bound in law to pay A. the value of the broken pane. If, then, I have defamed A. without lawful excuse, that is, on an occasion *not* privileged, malice forms no part of the issue. (*Hooper* v. *Truscott*, 2 Scott, 672; 2 Bing. N. C. 457; *Godson* v. *Home*, 1 Br. & B. 7; 3 Moore, 223.)

It is true that the word "malicious" is usually inserted in every definition of libel or slander, that the pleader invariably introduces it into every statement of claim, and that the older cases contain many *dicta* to the effect that "*malice*" is essential to an action for libel or slander. But in all these cases the word "*malice*" is used in a special and technical sense; it denotes "*the absence of lawful excuse;*" in fact, to say that defamatory words are malicious in that sense means simply that they are unprivileged, not employed under circumstances which excuse them. But I have dropped this technical and fictitious use of the word altogether—a use which has been termed an "unfortunate" one by learned judges. (See 41 L. T. 590.) I

use the word malice in the popular and ordinary sense of the word; *i.e.*, to denote some ill-feeling towards the plaintiff or the public; some mean or crooked motive of which an honourable man would be ashamed. This is called "*express* malice" or "*actual* malice" in our older books. Using the word in this sense, I say that till the defendant pleads privilege, malice is no part of the issue. As soon as that plea is placed on the record, the plaintiff has to prove malice, but not before.

But as soon as the Judge rules that the words are privileged by reason of the occasion on which they were uttered or published, then (unless, indeed, the privilege be absolute), the question of malice becomes all-important. In the words of Lord Justice Brett in *Clark* v. *Molyneux*, (3 Q. B. D. 246, 247; 47 L. J. Q. B. 230; 26 W. R. 104; 37 L. T. 694):—"When there has been a writing or a speaking of defamatory matter, and the Judge has held—and it is for him to decide the question—that although the matter is defamatory the occasion on which it is either written or spoken is privileged, it is necessary to consider how, although the occasion is privileged, yet the defendant is not permitted to take advantage of the privilege. 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, but for an indirect and wrong motive. If the indirect and wrong motive suggested to take the defamatory matter out of the privilege is malice, then there are certain tests of malice. Malice does not mean malice in law, a term in pleading, but actual malice, that which is popularly called malice. If a man is proved to have stated that which he knew to be false,

no one need inquire further. Everybody assumes thenceforth that he was malicious, that he did do a wrong thing for some wrong motive. So if it be proved that out of anger, or for some other wrong motive, the defendant has stated as true that which he does not know to be true, and he has stated it whether it is true or not, recklessly, by reason of his anger or other motive, the jury may infer that he used the occasion, not for the reason which justifies it, but for the gratification of his anger or other indirect motive. The judgment of Bayley, J., in *Bromage* v. *Prosser*, 4 B. & C., at p. 255, treats of malice in law, and no doubt where the word 'maliciously' is used in a pleading, it means intentionally, wilfully. It has been decided that if the word 'maliciously' is omitted in a declaration for libel, and the words 'wrongfully' or 'falsely' substituted, it is sufficient, the reason being that the word 'maliciously,' as used in a pleading, has only a technical meaning; but here we are dealing with malice in fact, and malice then means a wrong feeling in a man's mind."

Malice may be defined as any indirect and wicked motive which induces the defendant to defame the plaintiff. If malice be proved, the privilege attaching to the occasion is lost at once.

Illustrations.

Plaintiff assaulted the defendant on the highway; the defendant met a constable and asked him to arrest the plaintiff. The constable refused to arrest the plaintiff unless he was charged with a felony. The defendant knowing full well that the plaintiff had committed a misdemeanour only, viz., the assault, charged him with felony, in order to get him locked up for the night. *Held* that the charge of felony was malicious, as being made from an indirect and improper motive.

Smith v. *Hodgeskins*, Cro. Car. 276.

A near relative, or even an intimate friend, may warn a lady not to marry a particular suitor, and assign his reasons for thus cautioning her, provided

this be done with a conscientious desire for her welfare, and in the *bonâ fide* belief that the charges made are true.

Todd v. *Hawkins*, 2 M. & Rob. 20 ; 8 C. & P. 888.

But if a total stranger wrote an anonymous letter to the lady ; or *à fortiori*, if a *rival* thus endeavoured to oust the plaintiff from the lady's affections, there would be evidence of malice to go to the jury.

The defendant on being applied to for the character of the plaintiff who had been his saleswoman, charged her with theft. He had never made such a charge against her till then ; he told her that he would say nothing about it, if she resumed her employment at his house ; subsequently, he said that if she would acknowledge the theft he would give her a character. *Held* that there was abundant evidence that the charge of theft was made *malâ fide*, with the intention of compelling plaintiff to return to defendant's service. Damages, £60.

Jackson v. *Hopperton*, 16 C. B. (N. S.) 829 ; 12 W. R. 913 ; 10 L. T. 529.

Rogers v. *Clifton*, 3 B. & P. 587.

The defendant made a charge of felony against his former shopman to his relatives during his absence in London, with a view of inducing them to compound the alleged felony, and not for the purpose of prosecution or investigation. He actually received £50 from plaintiff's brother as hush-money. *Held* that the charge of felony was altogether unprivileged.

Hooper v. *Truscott*, 2 Bing. N. C. 457 ; 2 Scott, 672.

Letters from the commanding officer of a regiment to his immediate superior, containing charges against the colonel in command ; and a conversation with a member of Parliament as to a question to be put in the House of Commons relative to the dismissal of the colonel on those charges, were held to be *primâ facie* privileged : but circumstances showing that the letters were written, not from a sense of duty, but from personal resentment on account of other matters, and that the object of the conversation was to prejudice the plaintiff by reason of such personal resentment—*held*, evidence of actual malice, taking away the privilege.

Dickson v. *The Earl of Wilton*, 1 F. & F. 419.

A speech made by a member of Parliament in the House is absolutely privileged ; but if he subsequently causes his speech to be printed, and published, with the malicious intention of injuring the plaintiff, he will be liable both civilly and criminally.

R. v. *Lord Abingdon*, 1 Esp. 226.

R. v. *Creevey*, 1 M. & S. 273.

The rector dismissed the parish schoolmaster for refusing to teach in the Sunday School. The schoolmaster opened another school on his own account in the parish. The rector published a pastoral letter warning all parishioners not to support "a schismatical school," and not to be partakers with the plaintiff "in his evil deeds," which tended "to produce disunion and schism," and "a spirit of opposition to authority." *Held* that there was some evidence to go to the jury that the rector cherished anger and malice against the schoolmaster.

Gilpin v. *Fowler*, 9 Ex. 615 ; 23 L. J. Ex. 152 ; 18 Jur. 293.

The defendants presented a petition in the Croydon County Court to adjudicate the plaintiff a bankrupt, and to set aside a bill of sale which they alleged to be fraudulent. The County Court judge heard the case in his own room, where no reporters were present, and decided that the bill of sale was fraudulent. After the case was over, the defendants sent for a reporter to the Greyhound Hotel, and gave him an account of the proceedings before the County Court judge, from which he drew up a report which appeared in several papers. The jury found that the report was "fair as far as it went;" but it did not state the fact that the plaintiff had announced his intention to appeal. *Held* that neither this omission, nor the fact that the report was furnished by one of the parties, instead of being taken by the reporter in the usual way, was, by itself, sufficient to destroy the privilege attaching to all fair reports of legal proceedings. *Per* Cockburn, C. J., at *Nisi Prius, Myers* v. *Defries, Times*, July 23rd, 1877. [But the jury being satisfied from the whole circumstances that the defendant furnished the report with the express intention of injuring the plaintiff, gave the plaintiff £250 damages on the first trial, and one farthing damages on the second. See *Myers* v. *Defries*, 4 Ex. D. 176; 5 Ex. D. 15, 180; 48 L. J. Ex. 446; 28 W. R. 406; 40 L. T. 795; 41 L. T. 695; from which it would seem the jury at all events considered that a man may not injure his enemy, even with a fair weapon.]

And see *Stevens* v. *Sampson*, 5 Exch. Div. 53; 49 L. J. Q. B. 120; 28 W. R. 87; 41 L. T. 782.

Salmon v. *Isaac*, 20 L. T. 885.

The *onus* of proving malice lies on the plaintiff; the defendant cannot be called on to prove he did *not* act maliciously, till some evidence of malice, more than a mere *scintilla*, has been adduced by the plaintiff. (*Taylor* v. *Hawkins*, 16 Q. B. 321; 15 Jur. 746; 20 L. J. Q. B. 313; *Cook and another* v. *Wildes*, 5 E. & B. 340; 24 L. J. Q. B. 367; 1 Jur. N. S. 610; 3 C. L. R. 1090; *Clark* v. *Molyneux* (C. A.), 3 Q. B. D. 237; 47 L. J. Q. B. 230; 26 W. R. 104; 37 L. T. 694; 14 Cox, C. C. 10; *Chillingworth* v. *Grimble* (C. A.), *Times*, for Nov. 7th, 1877.) And the plaintiff must prove express malice by some evidence besides that which merely proves the falsity of the statement. (*Caulfield* v. *Whitworth*, 16 W. R. 936; 18 L. T. 527.) That the defendant was mistaken in the words he spoke confidentially is, taken alone, no evidence of malice. This is so also in America; see *Lewis and Herrick* v. *Chapman* (Selden, J.), 2 Smith

(16 N. Y. R.), 369; *Vanderzee* v. *McGregor*, 12 Wend. 546; *Fowles* v. *Bowen*, 3 Tiffany (30 N. Y. R.) 20.

Malice may be proved by some *extrinsic* evidence of ill-feeling, or personal hostility between plaintiff and defendant; such as threats by defendant that he would rid the town of the plaintiff (*Blagg* v. *Sturt*, 10 Q. B. 904; 11 Jur. 101; 16 L. J. Q. B. 39); former libels or slanders on the plaintiff, &c. Such evidence must go to prove that the defendant himself was actuated by personal malice against the plaintiff. In an action against the *publisher* of a magazine, evidence that the *editor* or the author of any article, not being the publisher, had a spite against the plaintiff, is of course inadmissible. (*Robertson* v. *Wylde*, 2 Moo. & Rob. 101; *Clark* v. *Newsam*, 1 Ex. 131, 139; *Carmichael* v. *Waterford and Limerick Ry. Co.*, 13 Ir. L. R. 313.) But the plaintiff is not bound to prove malice by *extrinsic* evidence. (*Wright* v. *Woodgate*, 2 C. M. & R. 573; 1 Tyr. & G. 12; 1 Gale, 329;) he may rely on the words of the libel itself and on the circumstances attending its publication, as affording evidence of malice; or in case of slander on the exaggerated language used, and on the fact that third persons were present.

But in either case, if the evidence adduced is equally consistent with either the existence or non-existence of malice, the Judge should stop the case; for there is nothing to rebut the presumption which has arisen in favour of the defendant from the privileged occasion. (*Somerville* v. *Hawkins*, 10 C. B. 590; 20 L. J. C. P. 131; 15 Jur. 450; *Harris* v. *Thompson*, 13 C. B. 333.) Thus, if the only evidence of malice be the terms of the libel itself in reference to an act of the plaintiff's, and that act was in its nature equivocal, and would bear a construction compatible with *bona fides* in the defendant, then there is no evidence of malice to go to the jury.

(*Spill* v. *Maule*, L. R. 4 Ex. 232; 38 L. J. Ex. 138; 17 W. R. 805; 20 L. T. 675.)

A mere mistake innocently made through excusable inadvertence cannot in any case be evidence of malice. (*Harrison* v. *Bush*, 5 E. & B. 350; 1 Jur. N. S. 846; 25 L. J. Q. B. 25; *Brett* v. *Watson*, 20 W. R. 723; *Kershaw* v. *Bailey*, 1 Ex. 743; 17 L. J. Ex. 129; *Scarll* v. *Dixon*, 4 F. & F. 250; *Pater* v. *Baker*, 3 C. B. 831; 16 L. J. C. P. 124; 11 Jur. 370.)

I. *Extrinsic evidence of malice.*

Malice may be proved by extrinsic evidence showing that the defendant bore a long-standing grudge against the plaintiff, that there were former disputes between them, that defendant had formerly been in the plaintiff's employ, and that plaintiff had been compelled to dismiss him for misconduct, &c. &c. Anything defendant has ever said or done with reference to the plaintiff may be urged as evidence of malice. Indeed, it is very difficult to say what possible evidence is inadmissible on this issue. The plaintiff has to show what was in the defendant's mind at the time of publication, and of that no doubt the defendant's acts and words on that occasion are the best evidence. But if plaintiff can prove that at any other time, before or after, defendant had any ill-feeling against him, that is some evidence that the ill-feeling existed also at the date of publication; therefore all defendant's acts and deeds that point to the existence of any such ill-feeling at any date, are evidence admissible for what they are worth. In fact, whenever the state of a person's mind on a particular occasion is in issue, everything that can throw any light on the state of his mind then is admissible, although it happened on some

other occasion. (See *R.* v. *Francis*, L. R. 2 C. C. R. 128; and *Blake* v. *Albion Assurance Society*, 4 C. P. D. 94; 48 L. J. C. P. 169; 27 W. R. 321; 40 L. T. 211.)

Thus any other words written or spoken by the defendant of the plaintiff, either before or after those sued on, or even after the commencement of the action, are admissible to show the *animus* of the defendant; and for this purpose it makes no difference whether the words tendered in evidence be themselves actionable or not, or whether they be addressed to the same party as the words sued on or to some one else. (*Pearson* v. *Lemaitre*, 5 M. & Gr. 700; 12 L. J. Q. B. 253; 7 Jur. 748; 6 Scott, N. R. 607; *Mead* v. *Daubigny*, Peake, 168.) Such other words need not be connected with or refer to the libel or slander sued on; provided they in any way tend to show malice in defendant's mind at the time of publication. (*Barrett* v. *Long*, 3 H. L. C. 395; 7 Ir. L. R. 439; 8 Ir. L. R. 331.)

And not only are such other words admissible in evidence, but also all circumstances attending their publication, the mode and extent of their repetition, &c.; the more the evidence approaches proof of a systematic practice of libelling the plaintiff, the more convincing it will be. (*Bond* v. *Douglas*, 7 C. & P. 626; *Barrett* v. *Long*, 3 H. L. C. p. 414.) The jury no doubt should be told, whenever the other words so tendered in evidence are in themselves actionable, that they must not give damages in respect of such other words, because they might be the subject-matter of a separate action. (*Pearson* v. *Lemaitre*, *supra*); but the omission by the Judge to give such a caution will not amount to a misdirection. (*Darby* v. *Ouseley*, 1 H. & N. 1; 25 L. J. Ex. 227; 2 Jur. N. S. 497.) But the defendant is always at liberty to prove the truth of such other words so given in evidence; for he could not *plead* a justifica-

tion as to them, as they were not set out on the record. (*Stuart* v. *Lovell*, 2 Stark. 93; *Warne* v. *Chadwell*, 2 Stark. 457.)

It must be remembered that this evidence of former or subsequent defamation is only admissible to determine *quo animo* the words sued on were published; that is, they are only admissible when *malice in fact* is in issue. If there is no question of malice, no such other libels would be admissible, unless they had immediate reference to the libel sued on; and even then it would be better that they should be set out in the statement of claim. *Finnerty* v. *Tipper*, 2 Camp. 72; *Stuart* v. *Lovell*, 2 Stark. 93; *Defries* v. *Davis*, 7 C. & P. 112. For such other libels are clearly independent substantive causes of action, and should not be used unfairly to enhance the damages in this action. It has sometimes been held that even when malice is in issue other words could not be given in evidence if they themselves were actionable. *Pearce* v. *Ornsby*, 1 M. & Rob. 455; *Symmons* v. *Blake*, *ib.* 477; but these cases are expressly overruled, or explained away by Tindal, C.J., in 5 M. & Gr. 719, 720. And see the remarks of Lord Ellenborough in *Rustell* v. *Macquister*, 1 Camp. 49, n.; and of Jervis, C.J., in *Camfield* v. *Bird*, 3 C. & Kir. 56. And it is now clear law that whenever the intention of the defendant is *equivocal*, that is, whenever the question of malice or *bona fides* is properly about to be left to the jury, evidence of any previous or subsequent libel is admissible, even though it be more than six years prior to the libel sued on; and even though a former action has been brought for the libel now tendered in evidence and damages recovered therefor. *Symmons* v. *Blake*, 1 M. & Rob. 477; *Jackson* v. *Adams*, 2 Scott, 599. See also *Charlter* v. *Barret*, Peake, 32; *Lee* v. *Huson*, Peake, 223; *Jackson* v. *Adams*, 2 Scott, 599. The law is the same in America. *Fowles* v. *Bowen*, 3 Tiffany (30 N. Y. R.) 20.

So if the defendant reasserts the libel in numbers of his periodical appearing after the commencement of the action (*Chubb* v. *Westley*, 6 C. & P. 436); or in private letters written after action (*Pearson* v. *Lemaitre*, 5 M. &

Gr. 700); or if the defendant continues to sell copies of the libel at his shop up to two days before the trial (*Plunkett* v. *Cobbett*, 5 Esp. 136; *Barwell* v. *Adkins*, 2 Scott, N. R. 11; 1 M. & Gr. 807); these facts are admissible as evidence of deliberate malice, though no damages can be given in respect of them. A plea of justification may be such a reassertion of the libel or slander. No doubt where the words are privileged, the mere fact that a plea of justification was put on the record is not of itself evidence of malice sufficient to go to the jury. (*Wilson* v. *Robinson*, 7 Q. B. 68; *Caulfield* v. *Whitworth*, 16 W. R. 936; 18 L. T. 527; *Brooke* v. *Avrillon*, 42 L. J. C. P. 126.) But if there be other circumstances suggesting malice, the plaintiff's counsel may also comment on the justification pleaded: and indeed, in special circumstances, as where the defendant at the trial will neither abandon the plea, nor give any evidence in support of it, thus obstinately persisting in the charge to the very last without any sufficient reason, this alone may be sufficient evidence of malice. (*Warwick* v. *Foulkes*, 12 M. & W. 508; *Simpson* v. *Robinson*, 12 Q. B. 513; 18 L. J. Q. B. 73.)

The mere fact that the words are now proved or admitted to be false is no evidence of malice, unless evidence be also given by the plaintiff to show that the defendant knew they were false at the time of publication. (*Fountain* v. *Boodle*, 3 Q. B. 5; *Caulfield* v. *Whitworth*, 16 W. R. 936; 18 L. T. 527.) So if a false and groundless charge be made against the plaintiff, on a privileged occasion, but without reasonable or probable cause, this may be left to the jury, if there be any other circumstance suggesting malice (*Padmore* v. *Lawrence*, 11 A. & E. 380); but by itself, it is no evidence of malice. (*Clark* v. *Molyneux*, 3 Q. B. D. (C. A.) 237.) As a general rule, therefore, the plaintiff cannot give any

evidence of the falsity of the charge, unless a justification be pleaded; for such evidence is no proof of malice, and the truth of the charge is not in issue. (*Brown* v. *Croome*, 2 Stark. 297; *Cornwall* v. *Richardson*, 1 R. & M. 305; *Brine* v. *Bazalgette*, 3 Exch. 692; 18 L. J. Ex. 348.)

But where the parties have been living in the same house for a long time, as master and servant, and the master must have known the true character of his servant, and yet has given a false one, there the plaintiff is allowed to give general evidence of his good character, and to call other servants of the defendant to show that no complaints of misconduct were made against the plaintiff whilst he was in defendant's service; such evidence tending to show that defendant at the time he gave plaintiff a bad character, knew that what he was writing was untrue, and that is proof positive of malice. (*Fountain* v. *Boodle*, 3 Q. B. 5; 2 G. & D. 455; *Rogers* v. *Sir Gervas Clifton*, 3 B. & P. 587, *ante*, p. 202.)

Illustrations.

Where a master has given a servant a bad character, the circumstances under which they parted, any expressions of illwill uttered by the master then or subsequently, the fact that the master never complained of the plaintiff's misconduct whilst she was in his service, or when dismissing her would not specify the reason for her dismissal, and give her an opportunity of defending herself, together with the circumstances under which the character was given, and its exaggerated language, are each and all evidence of malice.

Kelly v. *Partington*, 4 B. & Adol. 700; 2 N. & M. 460.
Jackson v. *Hopperton*, 16 C. B. N. S. 829; 12 W. R. 913; 10 L. T. 529; *ante*, p. 268.
Rogers v. *Sir Gervas Clifton*, 3 B. & P. 387; *ante*, p. 202.

Defendant subsequently to the slander, admitted that there had been a dispute between himself and the plaintiff prior to the slander about a sum of £20 which the plaintiff claimed from the defendant. At the trial, also, the plaintiff offered to accept an apology and a verdict for nominal damages, if defendant would withdraw his plea of justification. The defendant refused to withdraw the plea, yet did not attempt to prove it. *Held* ample evidence of malice. Damages £40.

Simpson v. *Robinson*, 12 Q. B. 511; 18 L. J. Q. B. 73; 13 Jur. 187.

If it be proved that any material part of a charge is false [and that the defendant knew it was false at the time he made the imputation], or if the charge be made to an official who has no jurisdiction over the matter, this is evidence of malice.

Blagg v. *Sturt*, 10 Q. B. 899 ; 16 L. J. Q. B. 39 ; 11 Jur. 101 ; 8 L. T. (Old S.), 135 ; as explained by Williams, J., 13 C. B. 352.

It is *some* evidence of malice that plaintiff and defendant are rivals in trade, or that they competed together for some post, and plaintiff succeeded, and that then defendant, being disappointed, wrote the libel.

See *Warman* v. *Hine*, 1 Jur. 820 ; *Smith* v. *Mathews*, 1 Moo. & Rob. 151.

The defendant wrote a letter to be published in the newspaper. The careful editor struck out all the more outrageous passages, and published the remainder. The defendant's manuscript was admitted in evidence, and the obliterated passages read to the jury, to show the *animus* of the defendant.

Tarpley v. *Blaby*, 2 Scott, 642 ; 2 Bing. N. C. 437 ; 1 Hodges, 414.

Even though a report of judicial proceedings be correct and accurate, still if it be published from a malicious motive, whether by a newspaper reporter or any one else, the privilege is lost.

Stevens v. *Sampson*, 5 Exch. D. 53 ; 49 L. J. Q. B. 120 ; 28 W. R. 87 ; 41 L. T. 782.

A long practice by the defendant of libelling the plaintiff is cogent evidence of malice ; therefore other libels of various dates, some more than six years old, some published shortly before that sued on, are all admissible to show that the publication of the culminating libel sued on was malicious and not inadvertent.

Barrett v. *Long*, 3 H. L. C. 395 ; 7 Ir. L. R. 439 ; 8 Ir. L. R. 331.

A libel having appeared in a newspaper, subsequent articles in later numbers of the same newspaper, alluding to the action and affirming the truth of the prior libel, are admissible as evidence of malice.

Chubb v. *Westley*, 6 C. & P. 436.

Barwell v. *Adkins*, 1 M. & Gr. 807 ; 2 Sc. N. R. 11.

Mead v. *Daubigny*, Peake, 168.

So if there be subsequent insertions of substantially the same libel in other newspapers.

Delegal v. *Highley*, 8 C. & P. 444 ; 5 Scott, 154 ; 3 Bing. N. C. 950 ; 3 Hodges, 158.

So if the defendant persists in repeating the slander or disseminating the libel pending action. In *Pearson* v. *Lemaitre*, 5 M. & Gr. 700 ; 6 Scott, N. R. 607 ; 12 L. J. Q. B. 253 ; 7 Jur. 748 ; a letter was admitted which had been written subsequently to the commencement of the action, and fourteen months after the libel complained of. In *McLeod* v. *Wakley*, 3 C. & P. 311, Lord Tenterden admitted a paragraph published only two days before the trial.

Where the defendant verbally accused plaintiff of perjury, evidence that

subsequently to the slander defendant preferred an indictment against the plaintiff for perjury, which was ignored by the grand jury, was received as evidence that the slander was deliberate and malicious, although it was a fit subject for an action for malicious prosecution.

Tate v. *Humphrey*, 2 Camp. 73, n.

And see *Finden* v. *Westlake*, Moo. & Malkin, 461.

In an action for libel and slander on privileged occasions, the only evidence of malice was some vague abuse of the plaintiff, uttered by the defendant on the Saturday before the trial in a public-house at Rye. Such abuse had no reference to the slander or the libel or to the action. *Held*, that this evidence was admissible; but that the judge should have called the attention of the jury to the vagueness of the defendant's remarks in the public-house, to the fact that they were uttered many months after the alleged slander and libel, and that therefore they were but very faint evidence that the defendant bore the plaintiff malice at the time of the publication of the alleged slander and libel. A new trial was ordered. Costs to abide the event.

Hemmings v. *Gasson*, E. B. & E. 346; 27 L. J. Q. B. 252; 4 Jur. N. S. 834.

II. *Evidence of malice derived from the mode and extent of publication, the terms employed, &c.*

The plaintiff is not restricted to extrinsic evidence of malice; he may rely on the words of the libel itself and the circumstances attending its publication; or in the case of slander upon the exaggerated language used, on the fact that third persons were present who were not concerned in the matter, &c. &c. The fact that the defendant was mistaken in the information he gave is, as we have seen, no evidence of malice. The jury must look at the circumstances as they presented themselves to the mind of the defendant at the time of the publication; not at what are proved at the trial to have been the true facts of the case. It is a question of *bona fides*: Did the defendant honestly believe that he had a duty to perform in the matter, and act under a sense of that duty? That other men would not have so acted is immaterial. That shrewder men would have seen through the tangled web of facts, and have discovered that things were not as

they seemed, is absolutely immaterial. The question is, Did the actual defendant honestly believe what he said? not whether a reasonable man so placed would have believed it. (*Per* Brett, L. J. 3 Q. B. D. 248.) The defendant will not lose the privilege afforded by the occasion merely because his reasoning powers were defective. (*Per* Cotton, L. J., *ib.* 249.) "People believe unreasonable things *bonâ fide*," says O'Hagan, J., in *Fitzgerald* v. *Campbell*, 15 L. T. 75. Similarly, the fact that he relied upon hearsay evidence without seeking primary evidence is immaterial. (*Per* Lord Westbury in *Lister* v. *Perryman*, L. R. 4 H. L. 521; overruling (Exch. Ch.) L. R. 3 Exch. 197.) Men of business habitually act upon hearsay evidence in matters of the greatest importance. But this is supposing of course that the defendant is guilty of no laches, and does not wilfully shut his eyes to any source of information. If, indeed, there were means at hand for ascertaining the truth of the matter, of which the defendant neglects to avail himself and chooses rather to remain in ignorance when he might have obtained full information, this will be evidence of such wilful blindness as may amount to malice.

But if defendant at the time of publication knew that what he said was false, this is clear evidence of malice. A man who knowingly makes a false charge against his neighbour cannot claim privilege. It can never be his duty to circulate lies. And if the statement was made wantonly, without the defendant's knowing or caring whether it was true or false, such recklessness is considered as malicious as deliberate falsehood. (*Clark* v. *Molyneux*, 3 Q. B. D. 247; 47 L. J. Q. B. 230; 26 W. R. 104; 37 L. T. 694.) And of course if in writing or speaking on a privileged occasion, the defendant breaks out into irrelevant charges against the plaintiff, wholly

unconnected with the occasion whence the privilege is derived, such excess will be evidence of malice; or, speaking more accurately, such irrelevant charges are wholly unprivileged, and no question of actual malice arises as to them; unless defendant proves them true the verdict must go against him. (*Huntley* v. *Ward*, 6 C. B. N. S. 514; 6 Jur. N. S. 18; *Senior* v. *Medland*, 4 Jur. (N. S.) 1039; *Picton* v. *Jackman*, 4 C. & P. 257; *Simmonds* v. *Dunne*, Ir. R. 5 C. L. 358.) One part of a letter may be privileged; other parts of the same letter unprivileged. (*Warren* v. *Warren*, 1 C. M. & R. 251; 4 Tyr. 850.) And where the occasion is privileged, and it is clear that the defendant believed in the truth of the communication he made, and was acting under a sense of duty, the plaintiff's counsel may still rely upon the words employed, and the manner and mode of publication, as evidence of malice. A man honestly indignant may often be led away into exaggerated or unwarrantable expressions; or he may forget where and in whose presence he is speaking, or how and to whom his writing may be published. Clearly this is but faint evidence of actual malice; the jury will generally pardon a slight excess of righteous zeal. But the prior question is always: "Is there any evidence of malice to go to the jury?" It is much better for the defendant, if the judge will stop the case, as he ought to do if there be no more than a *scintilla* of evidence for them. But it is very difficult to say beforehand what will be deemed a mere *scintilla*, what more than a *scintilla*, in any given case. The same piece of evidence may make different impressions on the minds of different judges.

(i.) *Where the expressions employed are exaggerated and unwarrantable; but there is no other evidence of malice.*

"It is sometimes difficult to determine when defamatory words in a letter may be considered as *by themselves* affording evidence of malice." (*Per* Bramwell, L. J., 3 Q. B. D. 245.) But the test appears to be this. Take the facts as they appeared to the defendant's mind at the time of publication; are the terms used such as the defendant might have honestly and *bonâ fide* employed under the circumstances? If so the judge should stop the case. But if the expressions employed still appear uncalled for and in excess of the occasion, though taken in connection with what was in defendant's mind at the time, then it would seem that the defendant must have spoken recklessly or angrily, without weighing his words, and that is some evidence of malice to go to the jury. (*Clark* v. *Molyneux*, 3 Q. B. D. 247.) Thus, if the plaintiff's conduct was equivocal, and might honestly and *bonâ fide* be supposed by the defendant to be such as he described it, the mere fact that he used strong words in so describing it, is no evidence of malice to go to the jury. (*Spill* v. *Maule*, Exch. Ch., L. R. 4 Exch. 232; 17 W. R. 805; 20 L. T. 675; 38 L. J. Ex. 138.)

But where the language used in a libel is "much too violent for the occasion and circumstances to which it is applied;" or "utterly beyond and disproportionate to the facts;" or where improper motives are unnecessarily imputed, there is evidence of malice to go to the jury. (*Fryer* v. *Kinnersley*, 15 C. B. (N. S.) 422; 33 L. J. (C. P.) 96; 12 W. R. 155; 9 L. T. 415; *Gilpin* v. *Fowler*, 9 Ex. 615; 23 L. J. Ex. 152; 18 Jur. 293.)

And this is so especially in cases where a rumour prejudicial to the plaintiff has reached the defendant,

which he feels it his duty to report to those concerned, but in reporting it, he does not state the rumour as it reached him, but gives an exaggerated or highly coloured version of it. "*Inimici famam non ita, ut nata est, ferunt.*" Plaut. Persa II. i. 23. But in other cases, the tendency of the Courts is *not* to submit the language of privileged communications to too strict a scrutiny. "To hold all excess beyond the absolute exigency of the occasion to be evidence of malice would in effect greatly limit, if not altogether defeat that protection which the law throws over privileged communications." (*Per* Sir Robert Collier, L. R. 4 P. C. 508.) "The particular expressions ought not to be too strictly scrutinized, provided the intention of the defendant was good." (*Per* Alderson, B., in *Woodward* v. *Lander*, 6 C. & P. 550. And see *Taylor* v. *Hawkins*, 16 Q. B. 308; *Ruckley* v. *Kiernan*, 7 Ir. C. L. R. 75.) "That the expressions are angry is not enough; the jury must go further and see that they are malicious." (*Per* Tindal, C.J., in *Shipley* v. *Todhunter*, 7 C. & P. 680.)

Illustrations.

Defendant changed his printer, and on a privileged occasion stated in writing, as his reason for so doing, that to continue to pay the charges made by his former printer, the plaintiff, would be "to submit to what appears to have been an attempt to extort money by misrepresentation." *Held*, that these words imputing improper motives to the plaintiff were evidence of malice to go to the jury. Damages £50.

Cooke v. *Wildes*, 5 E. & B. 328; 24 L. J. Q. B. 367; 1 Jur. N. S. 610; 3 C. L. R. 1090.

O'Donoghue v. *Hussey*, Ir. R. 5 C. L. 124.

Plaintiff sued defendant on a bond; defendant in public, but on a privileged occasion, denounced the plaintiff for attempting to extort money from him. *Held*, that the words were in excess of the occasion.

Robertson v. *McDougall*, 4 Bing. 670; 1 M. & P. 692; 3 C. & P. 259.

See *Tuson* v. *Evans*, 12 A. & E. 733, *ante*, p. 227.

While the defendant was engaged in winding up the affairs of the plaintiff's firm, of which defendant was also a creditor, the plaintiff took from the cash-box a parcel of bills to the amount of £1264. Thereupon the defendant wrote to another creditor of the firm that the conduct of the

plaintiff "has been most disgraceful and dishonest, and the result has been to diminish materially the available assets of the estate." *Held*, that the occasion was privileged, and that, though the words were strong, they were, when taken in connection with the facts, such as might have been used honestly and *bonâ fide* by the defendant; for the plaintiff's conduct was equivocal, and might well be supposed by the defendant to be such as he described it: and that the judge was right in directing a verdict to be entered for the defendant, there being no other evidence of actual malice.

Spill v. *Maule* (Exch. Ch.); L. R. 4 Ex. 232; 38 L. J. Ex. 138 17 W. R. 805; 20 L. T. 675.

The defendant tendered to Brown at Crickhowell two £1 notes on the plaintiffs' bank; which Brown returned to him saying, there was a run upon that bank, and he would rather have gold. The defendant the very next day went into Brecon and told two or three people confidentially that the plaintiffs' bank had *stopped*, and that *nobody* would take their bills. *Held*, that this exaggeration of the report was *some* evidence of malice to go to the jury.

Bromage v. *Prosser*, 4 B. & Cr. 247; 6 D. & R. 296; 1 C. & P. 475.

And see *Senior* v. *Medland*, 4 Jur. (N. S.) 1039.

A gentleman told the second master of a school that he had seen one of the under-masters of the school on *one* occasion coming home at night "under the influence of drink," and desired him to acquaint the authorities with the fact. The second master subsequently stated to the governors that it was *notorious* that the under-master came home "almost *habitually* in a state of intoxication." There was no other evidence of malice. *Held*, that the Lord Chief Justice was right in not withdrawing the case from the jury.

Hume v. *Marshall*, *Times* for November 26th, 1877.

(ii.) *As to the method of communication employed.*

If the mode and extent of a privileged publication be more injurious to the plaintiff than necessary, this may be evidence of malice in the publisher. Though the words themselves would be privileged if addressed only to the few individuals concerned, yet the privilege may be lost if the defendant deliberately chooses to publish them to the general public, or to any one who has no corresponding interest in the communication. Letters as to plaintiff's private affairs should not be published in the newspapers, however meritorious the writer's motive may be. Confidential communications should not be shouted across the street for all the world to hear.

(*Wilson* v. *Collins*, 5 C. & P. 373.) Defamatory remarks, if written at all, should be sent in a private letter properly sealed and fastened up; not written on a postcard, or sent by telegraph; for two strangers at least read every telegram; many more most post-cards. (*Williamson* v. *Freer*, L. R. 9 C. P. 393; 43 L. J. C. P. 161; *Whitfield* v. *S. E. Ry. Co.*, E. B. & E. 115; *Robinson* v. *Jones*, 4 L. R. Ir. 391.) There is no privilege attaching even to correct and accurate reports of public meetings. (*Davison* v. *Duncan*, 7 E. & B. 231; 26 L. J. Q. B. 104; *Popham* v. *Pickburn*, 7 H. & N. 897; 31 L. J. Ex. 133; *Purcell* v. *Sowler*, 2 C. P. D. 215; 46 L. J. C. P. 308; 25 W. R. 362; 36 L. T. 416.) But where printing a report is the usual and necessary method of communication between the directors and shareholders, the privilege will not be lost merely because the compositors and journeymen printers employed were not shareholders. (*Lawless* v. *Anglo-Egyptian Cotton and Oil Co.*, L. R. 4 Q. B. 262.) So with an advertisement inserted in a newspaper defamatory of the plaintiff; if such advertisement be necessary to protect the defendant's interests, or if advertising was the only way of effecting the defendant's object, and such object is a legal one, then the circumstances excuse the extensive publication. But if it was not necessary to advertise at all, or if the defendant's object could have been equally well effected by an advertisement which did not contain the words defamatory of the plaintiff, then the extent given to the announcement is evidence of malice to go to the jury. (*Brown* v. *Croome*, 2 Stark. 297; and *Lay* v. *Lawson*, 4 A. & E. 795; overruling, or at least explaining, *Delany* v. *Jones*, 4 Esp. 191.) The law is the same as to posting libellous placards (*Cheese* v. *Scales*, 10 M. & W. 488); or having a libellous notice cried by the town crier. (*Woodard* v. *Dowsing*, 2 Man. & Ry. 74.)

So with a privileged oral communication, it is important to observe who is present at the time it is made. A desire should be shown to avoid all unnecessary publicity. It is true that the accidental presence of an uninterested bystander will not alone take the case out of the privilege, and there are some communications which it is wise to make in the presence of witnesses; but if it can be proved that defendant purposely chose a time for making the communication when others were by, whom he knew would act upon it, this may be *some* evidence of malice. The question for the jury in such cases is: Was the charge against the plaintiff made *bonâ fide*, and, if so, was it made before more persons or in stronger language than necessary? (*Padmore* v. *Lawrence*, 11 A. & E. 380; *Fowler and wife* v. *Homer*, 3 Camp. 294.)

Illustrations.

The defendant in a petition to the House of Commons charged the plaintiff with extortion and oppression in his office of vicar-general to the Bishop of Lincoln. Copies of the petition were printed and delivered to the members of the committee appointed by the House to hear and examine grievances, in accordance with the usual order of proceeding in the House. No copy was delivered to any one not a member of Parliament. *Held*, that the petition was privileged, although the matter contained in it was false and scandalous; and so were all the printed copies: for, though the printing was a publication to the printers and compositors, still it was the usual course of proceeding in Parliament; and it was not so great a publication as to have so many copies transcribed by several clerks.

Lake v. *King*, 1 Lev. 240; 1 Saund. 131; Sid. 414; 1 Mod. 58. See *Lawless* v. *Anglo-Egyptian Cotton and Oil Co.*, *Limited*, L. R. 4 Q. B. 262; 10 B. & S. 226; 38 L. J. Q. B. 129; 17 W. R. 498, *ante*, p. 242.

If libellous matter, which would have been privileged if sent in a sealed letter, be transmitted unnecessarily by telegraph, the privilege is thereby lost.

Williamson v. *Freer*, L. R. 9 C. P. 393; 43 L. J. C. P. 161; 22 W. R. 878; 30 L. T. 332.

An Irish Court will take judicial notice of the nature of a post-card, and will presume that others besides the person to whom it is addressed will read what is written thereon.

Robinson v. *Jones*, 4 L. R. Ir. 391.

Defendant having lost certain bills of exchange, published a handbill, offering a reward for their recovery, and adding that he believed they had been embezzled by his clerk. His clerk at that time still attended regularly at his office. *Held*, that the concluding words of the handbill were quite unnecessary to defendant's object, and were a gratuitous libel on the plaintiff. Damages £200.

Finden v. *Westlake*, Moo. & Malk. 461.

The justices were about to swear in the plaintiff as a paid constable, when defendant, a parishioner, came forward and stated that the plaintiff was an improper person to be a constable. *Held*, that the fact that several other persons besides the justices were present, as usual, did not destroy the privilege attaching to such *bonâ fide* remark.

Kershaw v. *Bailey*, 1 Ex. 743 ; 17 L. J. Ex. 129.

Where a master about to dismiss his servant for dishonesty calls in a friend to hear what passes, the presence of such third party will not destroy the privilege.

Taylor v. *Hawkins*, 16 Q. B. 308 ; 20 L. J. Q. B. 313 ; 15 Jur. 746.

Where a master discharged his footman and cook, and they asked him his reason for doing so, and he told the footman, in the absence of the cook, that "he and the cook had been robbing him," and told the cook in the absence of the footman that he had discharged her "because she and the footman had been robbing him." *Held*, that these were privileged communications as respected the absent parties, as well as those to whom they were respectively made.

Manby v. *Witt* } 18 C. B. 544 ; 25 L. J. C. P. 294 ; 2 Jur.
Eastmead v. *Witt* } N. S. 1004.

That defendant caused the libel to be industriously circulated is evidence of malice.

Gathercole v. *Miall*, 15 M. & W. 319 ; 15 L. J. Ex. 179 ; 10 Jur. 337.

A shareholder in a railway company himself invited reporters for the press to attend a meeting of the shareholders which he had summoned, and at which he made an attack against one of the directors. *Held*, that the privilege was lost thereby.

Parsons v. *Surgey*, 4 F. & F. 247.

And see *Davis* v. *Cutbush and others*, 1 F. & F. 487.

Defendant accused the plaintiff, in the presence of a third person, of stealing his wife's brooch ; plaintiff wished to be searched ; defendant repeated the accusation to two women, who searched the plaintiff and found nothing. Subsequently, it was discovered that defendant's wife had left the brooch at a friend's house. *Held*, that the mere publication to the two women did not destroy the privilege attaching to charges, if made *bonâ fide ;* but that all the circumstances should have been left to the jury.

Padmore v. *Lawrence*, 11 A. & E. 380 ; 4 Jur. 458 ; 3 P. & D. 209.

And see *Amann* v. *Damm*, 8 C. B. N. S. 597 ; 29 L. J. C. P. 313 ; 7 Jur. N. S. 47 ; 8 W. R. 470.

The defendant was a customer at the plaintiff's shop, and had occasion to complain of what he considered fraud and dishonesty in the plaintiff's conduct of his business; but instead of remonstrating quietly with him, the defendant stood outside the shop-door and spoke so loud as to be heard by every one passing down the street. The language he employed also was stronger than the occasion warranted. *Held* that there was evidence of malice to go to the jury. Damages 40*s*.

Oddy v. *Lord Geo. Paulet*, 4 F. & F. 1009.

And see *Wilson* v. *Collins*, 5 C. & P. 373.

The mere fact that the defendant *volunteered* the information is, when it stands alone, no evidence of malice; but if there be any other circumstances raising a presumption of malice, then it may weigh with the jury. In fact, if the judge and jury agree in thinking the defendant's interference was officious and uncalled for, the privilege is lost, and no inquiry need be made as to the existence of express malice.

In *Brooks* v. *Blanshard*, 1 Cr. & M. 779, 3 Tyrw. 844, Lord Lyndhurst, C. B., says, "It is not merely because a communication is confidential that it is privileged, if it is volunteered by the party making it." But in every case, whether volunteered or not, the question is, Was the communication fairly warranted by the exigency of the occasion? If so, the jury should find for the defendant, unless there be some other evidence of malice. No doubt it will often require a greater exigency to warrant the defendant in volunteering the information than in merely answering a confidential inquiry. But still in all cases where the duty to speak is clear, it is defendant's duty to go and tell the person concerned, if he does not come to the defendant. For it may well be that he has no suspicions, and will never come and inquire. But in cases where there can be any doubt as to defendant's duty to speak, there the fact that the defendant took the initiative may tell against him. Thus it is usual for a former master to give the character of a

servant *on application*, and not before. Hence if a master hears a discharged servant is applying for a place at M.'s house, and writes at once to M. to give the servant a bad character, the fact that the communication was uncalled for will be apt to tell against the master. M. would almost certainly have applied to the defendant for the information sooner or later; and the eagerness displayed in thus imparting it unasked will be commented on as a proof of malice, and if there be any other evidence of malice, however slight, may materially influence the verdict. But if there be no other evidence of malice, the communication is still privileged. (*Pattison* v. *Jones*, 8 B. & C. 578; *Fowles* v. *Bowen*, 3 Tiffany (30 N. Y. R.) 20; and see other cases cited, *ante*, pp. 202, 7, 9. The presumption in favour of the defendant arising from the privileged occasion remains, till it is rebutted by evidence of express malice; and evidence merely equivocal, that is, equally consistent with malice or *bona fides*, will do nothing towards rebutting the presumption. Also, when a communication is volunteered great care should be taken as to the person to whom it is addressed. No privilege attaches to a communication unnecessarily made to a person wholly unconcerned therewith. Thus in seeking redress for a grievance be sure to invoke the aid of some one who has some kind of jurisdiction in the matter. For though a *bonâ fide* mistake as to the respective functions of various state officials may easily be made by an uneducated or even an educated man, and will not therefore of itself be evidence of malice, still a statement volunteered to some one who has no possible duty or power to remedy the abuse complained of, will be clearly "in excess of the occasion." (See *Scarll* v. *Dixon*, 4 F. & F. 250; *Harrison* v. *Bush*, 5 E. & B. 344; 25 L. J. Q. B. 25; *Fairman* v. *Ives*, 5 B. & Ald. 642, *ante*, p. 224.)

Illustrations.

The defendant, the tenant of a farm, required some repairs to be done at his house; the landlord's agent sent up two workmen, the plaintiff and Taylor. They made a bad job of it; the plaintiff undoubtedly got drunk while on the premises; and the defendant was convinced from what he heard that the plaintiff had broken open his cellar-door and drunk his cider. Two days afterwards the defendant met the plaintiff and Taylor together, and charged the plaintiff with breaking open the cellar-door, getting drunk, and spoiling the job. He repeated this charge later in the same day to Taylor alone in the absence of the plaintiff, and also to the landlord's agent. *Held*, that the communication to the landlord's agent was clearly privileged as he was the plaintiff's employer; that the statement made to the plaintiff in Taylor's presence was also privileged, if made honestly and *bonâ fide;* and that the circumstance of its being made in the presence of a third person did not *of itself* make it unauthorized, and that it was a question to be left to the jury to determine from the circumstances, including the style and character of the language used, whether the defendant acted *bonâ fide*, or was influenced by malicious motives. But, that the statement to Taylor, in the absence of the plaintiff, was unauthorized and officious, and therefore not protected, although made in the belief of its truth, if it were in point of fact false.

Toogood v. *Spyring*, 1 Cr. M. & R. 181; 4 Tyr. 582.

A lieutenant in the navy was appointed by the Government agent or superintendent on board a transport ship, the *Jupiter*. He wrote a letter to the secretary at Lloyd's imputing misconduct and incapacity to the plaintiff, the master of the *Jupiter*. This was held altogether unprivileged; the information should have been given to the Government alone, by whom the defendant was employed.

Harwood v. *Green*, 3 C. & P. 141.

CHAPTER X.

DAMAGES.

Damages are of two kinds:—

(i.) General.
(ii.) Special.

General Damages are such as the law will presume to be the natural or probable consequences of the defendant's conduct.

Special Damages are such as the law will not *presume* to have been suffered, from the nature of the words themselves; they must therefore be specially claimed on the pleadings, and evidence of them must be given at the trial. Such damages depend upon the special circumstances of the case, upon the defendant's position, upon the conduct of third persons, &c. &c. Very probably they would not have been incurred, had the same words been spoken on another occasion, or to different hearers.

But in some cases special damage is also a necessary element in the cause of action. When on the face of them the words used by the plaintiff clearly must have injured the plaintiff's reputation, they are said to be actionable *per se;* and the plaintiff may recover a verdict for a substantial amount, without giving any evidence of actual pecuniary loss. But where the words are not on the face of them such as the courts will presume to be necessarily prejudicial to the

plaintiff's reputation, there evidence must be given to show that in fact some appreciable injury has in this case followed from their use. In short, where the words are not actionable *per se*, special damage must be alleged and proved, or the plaintiff will be nonsuited. The injury to the plaintiff's reputation is the gist of the action: he has to show that his character has suffered through the defendant's false assertions: and where there is no presumption in plaintiff's favour, he can only show this by giving evidence of some special damage.

It will be convenient to divide this chapter into the following heads:—

I.—General Damages.

II.—Evidence for the plaintiff in aggravation of damages:—

(i.) Malice.
(ii.) Extent of publication.
(iii.) Plaintiff's good character.

III.—Evidence for the defendant in mitigation of damages:—

(i.) Apology and amends.
(ii.) Absence of malice.
(iii.) Plaintiff's bad character.
(iv.) Provocation given by the plaintiff.
(v.) Absence of special damage.

IV.—Special Damage, where the words are not actionable *per se*.

V.—Special Damage, where the words are actionable *per se*.

VI.—Remoteness of damages.

I.—General Damages.

General Damages are such as the law will presume to be the natural or probable consequence of the defendant's conduct. They arise by inference of law; and need not therefore be proved by evidence. Such damages may be recovered wherever the immediate tendency of the words is to impair the plaintiff's reputation, although no actual pecuniary loss has in fact resulted.

Such general damages will only be presumed where the words are actionable *per se*. If any special damage has also been suffered, it should be set out on the pleadings; but, should plaintiff fail in proving it at the trial, he may still of course resort to and recover general damages. (*Cook* v. *Field*, 3 Esp. 133; *Smith* v. *Thomas*, 2 Bing. N. C. 372; 2 Scott, 546; 4 Dowl. 333; 1 Hodges, 353; *Brown* v. *Smith*, 13 C. B. 596; 22 L. J. C. P. 151; 17 Jur. 807; 1 C. L. R. 4; *Evans* v. *Harries*, 1 H. & N. 251; 26 L. J. Ex. 31.) If one single issue out of many be found in favour of the plaintiff the jury must proceed to assess damages. (*Clement* v. *Lewis*, 3 Brod. & B. 297; 7 Moore, 200; 3 B. & Ald. 702.)

The amount at which general damages are to be assessed lies almost entirely in the discretion of the jury; the courts will never interfere with the verdict merely because the amount is excessive. A new trial will only be granted where the verdict is so large as to satisfy the Court that it was perversely in excess or the result of some gross error on a matter of principle; it must be

shown that the jury either misconceived the case or acted under the influence of undue motives. In fact, although in theory, it is the duty of the jury to give such sum only as will fairly compensate the plaintiff for the injury he has sustained, yet, in practice, juries frequently, especially where the defendant has acted with clear and express malice, give *vindictive* damages, which are clearly meant not so much as a compensation to the plaintiff for his loss, as a punishment to the defendant for his misconduct. And it is, I think, a benefit to the community that a penalty should thus be imposed on an exhibition of spite and ill-will. (See *Emblen* v. *Myers*, 6 H. & N. 54; 30 L. J. Exch. 71; *Bell* v. *Midland Ry. Co.* 10 C. B. N. S. 287; 30 L. J. C. P. 273; 9 W. R. 612; 4 L. T. 493.) So, again, where the damages awarded appear strangely small, a new trial will not be granted, unless it is clearly shown that the jury wholly omitted to take into their consideration some element of damage (*Phillips* v. *London & S. W. Ry Co.*; 4 Q. B. D. 406; 48 L. J. Q. B. 693; 27 W. R. 797; 40 L. T. 813; (C. A.) 5 Q. B. D. 78; 49 L. J. Q. B. 233; 28 W. R. 10; 41 L. T. 121); or unless the smallness of the amount shows that the jury made a compromise, and did not really try the issues submitted to them. (*Falvey* v. *Stanford*, L. R. 10 Q. B. 54; 44 L. J. Q. B. 7; 23 W. R. 162; 31 L. T. 677; *Kelly* v. *Sherlock*, L. R. 1 Q. B. 686, 697; 35 L. J. Q. B. 209; 12 Jur. N. S. 937; *Forsdike and wife* v. *Stone*, L. R. 3 C. P. 607; 37 L. J. C. P. 301; 16 W. R. 976; 18 L. T. 722.)

The jury must assess the damages once for all: no fresh action can be brought for any subsequent damage. (*Fitter* v. *Veal*, 12 Mod. 542; B. N. P. 7; *Gregory and another* v. *Williams*, 1 C. & K. 568.) They should therefore take into their consideration every consequence which the words used would "have a natural tendency"

to produce; but not merely problematical or eventual damages that may possibly happen, or possibly may not. (*Per* De Grey, C. J., in *Onslow* v. *Horne*, 3 Wils. 188; 2 W. Bl. 753; Bayley, B., in *Lumby* v. *Allday*, 1 C. & J. 305; 1 Tyr. 217, and see *Doyley* v. *Roberts*, 3 Bing. N. C. 835; 5 Scott, 40; 3 Hodges, 154.) The jury also may fairly take into their consideration the rank and position in society of the plaintiff, the mode of publication, the extent of the circulation of the words complained of, the fact that the attack was entirely unprovoked, that the defendant could have easily ascertained that the charge he made was false, &c.

Even if no evidence be offered by the plaintiff as to damages, the jury are in no way bound to give *nominal* damages only; they may read the libel and give such substantial damages as will compensate the plaintiff for such defamation. (*Tripp* v. *Thomas*, 3 B. & C. 427.) And where the Statute of Limitations is relied on as a defence; but proof is given that one single copy has been sold by the defendant to an agent of the plaintiff within the last few months; the jury are not to limit the damages to the injury which the plaintiff may be supposed to have incurred from that single publication, but may give general damages for the original dissemination of the libel. (*Duke of Brunswick* v. *Harmer*, 14 Q. B. 185; 19 L. J. Q. B. 20; 14 Jur. 110; 3 C. & K. 10.)

A general loss of business by a trader in consequence of defamation is general damage which the law presumes; but no particular instances can be gone into, unless the customers' names be given in the statement of claim, or in the particulars; for this is special damage, and must therefore be laid specially. (*Ashley* v. *Harrison*, Peake, 256; 1 Esp. 48; *Delegal* v. *Highley*, 5 Scott, 154; 8 C. & P. 444; 3 Bing. N. C. 950.)

In cases of libel, every one concerned either in writing or publishing the libel, or in causing or procuring the libel to be written or published, is equally liable for all the damage consequent on that publication. They are all deemed publishers. Thus, if the libel appear in a newspaper, the proprietor, the editor, the printer, and the author, are all liable to be sued, either separately or together. And that one has been already sued is no defence to an action brought against any of the others in respect of the same libel. (*Frescoe* v. *May*, 2 F. & F. 123.) Nor should the fact that other actions are pending for the same libel be taken into consideration by the jury in assessing the damages arising from the publication by the present defendant. (*Harrison* v. *Pearce*, 1 F. & F. 567; 32 L. T. (Old S.) 298.) And there is no contribution between tort-feasors. So that the proprietor of a paper sued jointly with his careless editor or with the actual composer of the libel, cannot compel either of his co-defendants to recoup him the damages, which he has been compelled to pay the plaintiff. (*Colburn* v. *Patmore*, 1 C. M. & R. 73; 4 Tyr. 677.)

But if there be two distinct and separate publications of the same libel, a defendant who was concerned in the first publication, but wholly unconnected with the second, would not be liable for any damages which he could prove to have been the consequence of the second publication and in no way due to the first.

In cases of slander, on the other hand, the defendant is only liable for such damages as result directly from his own utterance. If another chooses to repeat what defendant has said, that is his own conscious and voluntary act, for the results of which he alone is responsible.

In former days, it was the rule that if there were several counts on different libels or slanders, and entire damages were

given, judgment would be arrested, and a *venire de novo* awarded, if a single count proved for any reason defective. In criminal cases the rule has always been the reverse, and the judgment stands if a single count prove good. The judges often expressed a wish that the rule in civil cases was the same as in criminal; but the authorities to the contrary were too clear and decisive. (*Savile* v. *Jardine*, 2 Hen. Bl. 531; *Holt* v. *Scholefield*, 6 T. R. 694; *Angle* v. *Alexander*, 7 Bing. 119; 1 Tyr. 9; 1 C. & J. 143; *Day* v. *Robinson*, 1 A. & E. 554; 4 N. & M. 884; *Pemberton* v. *Colls*, 10 Q. B. 461; 16 L. J. Q. B. 403; 11 Jur. 1011.)

It was therefore the duty of the plaintiff's counsel formerly to endeavour to have the damages assessed on each count separately, if he had any doubt as to sufficiency of any particular count. But now declarations and counts are abolished, and I apprehend this rule does not apply to the modern statement of claim; though as yet there has been no decision on the point.

The jury in assessing damages ought not to take into consideration the question of costs. They frequently ask a judge what amount will carry costs; but it seems it is the duty of a judge not to inform them. (*Kelly* v. *Sherlock*, L. R. 1 Q. B. 686, 691; 35 L. J. Q. B. 209; 12 Jur. N. S. 937; *Wilson* v. *Reed and others*, 2 F. & F. 152.) Though Erle, C. J., gave the jury such information in *Atthill* v. *Soman*, on the Norfolk Circuit, 15 L. T. 36, and in *Wakelin* v. *Morris*, 2 F. & F. 26. And see *Grater* v. *Collard*, 6 Dowl. 503. And indeed now as the costs are practically in the discretion of the judge, it would be difficult to answer the question. (See the next chapter, pp. 334, 6.)

II.—Evidence for the Plaintiff in Aggravation of Damages.

(i.) *Malice.*

The fact that the defamation was deliberate and malicious, will of course enhance the damages. All the circumstances attending the publication may therefore be given in evidence; and any previous transactions between the plaintiff and the defendant which have any direct bearing on the subject-matter of the action, or are a necessary part of the history of the case. But it does not follow that every piece of evidence which has been declared admissible to prove malice when malice is in issue (see Chapter IX.), is also admissible in aggravation of damages when there is no question as to the defendant's motive or intent. Thus evidence may be given of antecedent or subsequent libels or slanders to show that a communication *primâ facie* privileged was made maliciously (c. IX., p. 272); and also when evidence is necessary to explain the meaning of language which without it appears ambiguous (c. III., p. 113). But such evidence may *not* be given where the existence of malice is undisputed, and the words of the libel are clear. (*Stuart* v. *Lovell*, 2 Stark. 93; *Pearce* v. *Ornsby*, 1 M. & Rob. 455; *Symmons* v. *Blake*, *ib.* 477; 2 C. M. & R. 416; 4 Dowl. 263; 1 Gale, 182.) And when such evidence *is* admissible, the jury should always be cautioned to give *no* damages in respect of it. (*Per* Tindal, C. J., in *Pearson* v. *Lemaitre*, 5 M. & Gr. 719; 12 L. J. Q. B. 253.) But if a subsequent libel has immediate reference to the one sued on, it may be admitted as a necessary part of the *res gestæ*, if the judge considers it as bearing directly on the matter in hand. (*Finnerty* v. *Tipper*, 2

Camp. 72; *May* v. *Brown*, 3 B. & Cr. 113; 4 D. & R. 670.)

The defendant's conduct of his case, even the language used by his counsel at the trial, may aggravate the damages. (*Per* Pollock, C. B., *Darby* v. *Ouseley*, 25 L. J. Ex. 230, 233; *Blake* v. *Stevens and others*, 4 F. & F. 235; 11 L. T. 543; *Risk Allah Bey* v. *Whitehurst*, 18 L. T. 615.) So a plea of justification, if not proved, will enhance the damages. (*Simpson* v. *Robinson*, 12 Q. B. 511; 18 L. J. Q. B. 73; 13 Jur. 187. See *ante*, p. 274.)

If other words, not actionable *per se*, yet highly injurious, were uttered on the same occasion as the words complained of, these other words may clearly be given in evidence as an aggravation of the actionable words, and as shewing the *animus* of the defendant. "Where a wrongful act is accompanied by words of contumely and abuse, the jury are warranted in taking that into consideration, and giving retributory damages." (*Per* Byles, J., 10 C. B. N. S. 308.)

And where there has been no express malice, gross negligence on the part of the proprietor of a newspaper in allowing the libel to appear in its columns, may be proved to enhance the damages. (*Smith* v. *Harrison*, 1 F. & F. 565.)

But in all these cases the malice proved must be that of the defendant. If two be sued, the motive of one must not be allowed to aggravate the damages against the other. (*Clark* v. *Newsam*, 1 Ex. 131, 139.) Nor should the improper motive of an agent be matter of aggravation against his principal. (*Carmichael* v. *Waterford and Limerick Ry. Co.*, 13 Ir. L. R. 313; *Robertson* v. *Wylde*, 2 Moo. & Rob. 101.)

(ii.) *Extent of Publication.*

The attention of the jury should be especially directed to the mode and the extent of publication. If the libel was sold to the public indiscriminately, heavy damages should be given, for the defendant has put it out of his power to recall or contradict his statements, should he desire to do so. (*Per* Lord Denman, 9 A. & E. 149.)

If the libel has appeared in a newspaper, proof that the particular number containing the libel was gratuitously circulated in the plaintiff's neighbourhood, or that its sale was in any way especially pushed, will enhance the damages. (*Gathercole* v. *Miall*, 15 M. & W. 319; 15 L. J. Ex. 179; 10 Jur. 337.) Evidence of the mode and extent of publication is admissible with a view to damages, even where the publication has been admitted on the pleadings. (*Vines* v. *Serell*, 7 C. & P. 163.)

(iii.) *Plaintiff's Good Character.*

The plaintiff cannot give evidence of general good character in aggravation of damages merely, unless such character is put in issue on the pleadings; or has been attacked by the cross examination of the plaintiff's witnesses; for till then the plaintiff's character is presumed good. (*Cornwall* v. *Richardson*, Ry. & M. 305; *Guy* v. *Gregory*, 9 C. & P. 584, 7; *Brine* v. *Bazalgette*, 3 Ex. 692; 18 L. J. Ex. 348.) As to when such evidence is admissible under special circumstances to show that the libel was false to the knowledge of the defendant, and must therefore have been written maliciously, see *ante*, p. 275, *Fountain* v. *Boodle*, 3 Q. B. 5; 2 G. & D. 455.

III.—Evidence for the Defendant in Mitigation of Damages.

(i.) *Apology and Amends.*

By Lord Campbell's Act (6 & 7 Vict. c. 96, s. 1), it is enacted "that in any action for defamation it shall be lawful for the defendant (after notice in writing of his intention so to do, duly given to the plaintiff at the time of filing or delivering the plea in such action), to give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such apology." And by s. 2, "that in an action for a libel contained in any public newspaper or other periodical publication, it shall be competent to the defendant to plead that such libel was inserted in such newspaper or other periodical publication without actual malice, and without gross negligence, and that, before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper or other periodical publication a full apology for the said libel, or if the newspaper or periodical publication in which the said libel appeared should be ordinarily published at intervals exceeding one week, had offered to publish the said apology in any newspaper or periodical publication to be selected by the plaintiff in such action; and that every such defendant shall, upon filing such plea, be at liberty to pay into court a sum of money by way of amends for the injury sustained by the publication of such libel, ... and that to such plea to such action it shall be competent to the plaintiff to reply generally, denying the whole of

such plea." (See *Chadwick* v. *Herapath*, 2 C. B. 885; 16 L. J. C. P. 104; 4 D. & L. 653.) Money must be paid into Court at the time such a pleading is delivered, or it will be treated as a nullity (8 & 9 Vict. c. 75, s. 2); though now, no doubt, on good cause shown, a master at Chambers would give a defendant leave to pay money into Court at any later time under Judicature Act Rules, Order XXX. r. 1.

If the action be remitted to a county court under s. 10 of the County Courts Act, 1867, the defendant may still avail himself of these sections by giving to the registrar five clear days before the day fixed for the hearing, notice in writing of his intention so to do, signed by himself or his solicitor. (See County Court Rules, 1875, Order XX. r. 4.)

The payment into Court under these sections will in no way operate as an admission of liability, not even to the amount paid in, and the jury should be directed to assess the damages irrespective of the sum so paid into Court. (*Jones* v. *Mackie*, L. R. 3 Ex. 1; 37 L. J. Ex. 1; 16 W. R. 109; 17 L. T. 151.) The apology should be full, though it need not be abject; the defendant is not bound to insert an apology dictated by the plaintiff; but it must be such as an impartial person would consider reasonably satisfactory under all the circumstances of the case. (*Risk Allah Bey* v. *Johnstone*, 18 L. T. 620.) It should be printed in type of ordinary size, and in a part of the paper where it will be seen; not hidden away among the advertisements or notices to correspondents. (*Lafone* v. *Smith*, 3 H. & N. 735; 28 L. J. Ex. 33; 4 Jur. N. S. 1064.) The sufficiency or insufficiency of an apology is peculiarly a question for the jury. (*Risk Allah Bey* v. *Johnstone*, 18 L. T. 620.)

But wholly apart from these sections, and with or without any apology, a defendant may now, under

Order XXX. of the Judicature Act Rules, pay money into Court in any action by way of satisfaction or amends, at any time between service of the writ, the time of delivering his defence, or by leave of a master at Chambers at any later time. If such payment be made before delivering his statement of defence, he should at once give the plaintiff notice that he has paid in such money; and in any and every case he should plead the fact of payment into Court in his statement of defence. Such payment will in no way operate as an admission of liability (*Berdan* v. *Greenwood*, 3 Ex. D. 251; 47 L. J. Ex. 628; 26 W. R. 902; 39 L. T. 223); and any other defence can be pleaded at the same time, even a justification. (*Hawkesley* v. *Bradshaw* (C.A.), 5 Q. B. D. 302; 49 L. J. Q. B. 333; 28 W. R. 557; 42 L. T. 285; overruling *O'Brien* v. *Clement*, 15 M. & W. 435; 15 L. J. Ex. 285; 3 D. & L. 676; 10 Jur. 395; and *Barry* v. *M'Grath*, Ir. R. 3 C. L. 576.)

Illustrations.

To an action for libel in a newspaper, the defendant pleaded a defence under 6 & 7 Vict. c. 96, s. 2, and paid £5 into Court. The jury found the apology insufficient, and awarded the plaintiff 20*s.* damages. *Held* that the plaintiff was only entitled to £1, as he had not accepted the £5, and taken it out of Court.

Jones v. *Mackie*, L. R. 3 Ex. 1; 37 L. J. Ex. 1; 16 W. R. 109; 17 L. T. 151.

See also *Lafone* v. *Smith and others*, 3 H. & N. 735; 28 L. J. Ex. 33; 4 Jur. N. S. 1064; 4 H. & N. 158; 5 Jur. N. S. 127.

(ii.) *Absence of Malice.*

As a rule, unless the occasion be privileged, the motive or intention of the speaker or writer is immaterial to the right of action: the Court looks only at the words employed and their effect on the plaintiff's reputation. But in all cases, the absence of malice, though it may not be

a bar to the action, may yet have a material effect in reducing the damages. The plaintiff is still entitled to reasonable compensation for the injury he has suffered; but if the injury was unintentional, or was committed under a sense of duty, or through some honest mistake, clearly no vindictive damages should be given. In every case therefore the defendant may, in mitigation of damages, give evidence to show that he acted in good faith and with honesty of purpose, and not maliciously. He may show that the remainder of the libel not set out on the record modifies the words sued on; or that other passages in the same publication qualify them. But he may not put in passages contained in a subsequent and distinct publication, unless the words sued on are equivocal or ambiguous. (*Cook* v. *Hughes*, R. & M. 112; *Darby* v. *Ouseley*, 1 H. & N. 1; 25 L. J. Ex. 227; 2 Jur. N. S. 497.) The fact that the defendant did not originate the libel, but innocently repeated it, should tell in his favour. Thus, where it appears on the face of a libel that it is founded on a statement in a certain newspaper, the defendant is entitled to show that he did in fact read such statement in that newspaper, and wrote the libel believing such statement to be true. (*R.* v. *Burdett*, 4 B. & Ald. 95; *Mullett* v. *Hulton*, 4 Esp. 248.) So, if in the libel the defendant has named A. as his informant, he may prove in mitigation that he did in fact receive such information from A. (though of course this is no defence to the action; *ante*, p. 162.) (*Semble*, *per* Gibbs, C. J., in *Mills and wife* v. *Spencer and wife* (1817) Holt, N. P. 533; *East* v. *Chapman*, M. & M. 46; 2 C. & P. 570; *Charlton* v. *Watton*, 6 C. & P. 385; *Bennett* v. *Bennett*, 6 C. & P. 588; *Duncombe* v. *Daniell*, 2 Jur. 32; 8 C. & P. 222; 1 W. W. & H. 101; cited 7 Dowl. 472; *Davis* v. *Cutbush and others*; 1 F. & F. 487.) But where the libel does not, *on the face of it*,

purport to be derived from any one, but is stated as of the writer's own knowledge, there evidence is wholly inadmissible to show that it was copied from a newspaper or communicated by a correspondent. (*Talbutt* v. *Clark and another*, 2 Moo. and Rob. 312.) Evidence that in another action the plaintiff had already sued A. the informant and recovered heavy damages, is altogether inadmissible. (*Creevy* v. *Carr*, 7 C. & P. 64.) But if the defendant can show that in copying the libel from another newspaper, he was careful to omit certain passages which reflected strongly on the plaintiff, his conduct in making such omissions is admissible as showing the absence of all *animus* against the plaintiff, and this necessarily involves the admissibility of the original libel copied. (*Creevy* v. *Carr*, 7 C. & P. 64; *Creighton* v. *Finlay*, Arm. Mac. & Ogle (Ir.) 385.)

I have thus attempted to reconcile cases which are generally considered in conflict. In *Talbutt* v. *Clark*, 2 Moo. & Rob. 312, Lord Denman says:—"I know that in a case in the Common Pleas it has been held that a previous statement in another newspaper is admissible; but even that decision had been very much questioned." His Lordship probably referred to *Saunders* v. *Mills*, 6 Bing. 213; 3 M. & P. 520. And thereupon Mr. Pitt-Taylor, in the last edition (1878) of his Law of Evidence, p. 316, remarks: "However, by the subsequent recognition of *Saunders* v. *Mills*, in *Pearson* v. *Lemaitre*, 5 M. & Gr. 719, the case of *Talbutt* v. *Clark* would seem to be indirectly overruled." But with all deference to that learned writer, the *decision* in *Saunders* v. *Mills* was that evidence that many other papers besides the defendant's had also copied the statement from the *Observer* was *in*admissible; evidence that defendant had copied it from the *Observer* into his own paper had been admitted apparently without question at the trial; and in allowing that evidence, Tindal, C.J., says (6 Bing. 220): "It appeared to me I had gone the full length." There is no real conflict between the *decisions* in *Saunders* v. *Mills* or *Pearson*

v. *Lemaitre* and that in *Talbutt* v. *Clark*. I think, therefore, that the last case must still be regarded as good law.

Illustrations.

The defendant published an inaccurate report of proceedings in a court of justice, reflecting on the character of the plaintiff; any evidence to show that the defendant honestly intended to present a fair account of what took place, and had blundered through inadvertence solely, was held admissible by Coleridge, J.

Smith v. *Scott*, 2 Car. & Kir. 580.

And, therefore, evidence of what really did take place at the trial is admissible; though no evidence can be given of the truth or falsehood of the statements there made.

East v. *Chapman*, M. & M. 46; 2 C. & P. 570.

Vessey v. *Pike*, 3 C. & P. 512.

Where a newspaper published the report of a company containing reflections on the plaintiff, their manager, Wightman, J. directed the jury that if they were satisfied such publication was made innocently, and with no desire to injure the plaintiff, they might give nominal damages only.

Davis v. *Cutbush and others*, 1 F. & F. 487.

On the day of the nomination of candidates for the representation of the borough of Finsbury, the defendant published in the *Morning Post* certain facts discreditable to one of the candidates, the plaintiff, which he alleged he had heard from one Wilkinson at a meeting of the electors. *Held*, that Wilkinson was an admissible witness to prove, in mitigation of damages, that he did in fact make the statement which the defendant had published at the time and place alleged.

Duncombe v. *Daniell*, 2 Jur. 32; 8 C. & P. 222; 1 W. W. & H. 101.

(iii.) *Evidence of the plaintiff's bad character.*

There has been a great conflict of opinion as to the admissibility of evidence of the plaintiff's general bad character, and of rumours prejudicial to his reputation. There is no doubt as to the general rule that circumstances, which, if pleaded, would have been a bar to the action, cannot be given in evidence in mitigation of damages. (*Speck* v. *Phillips*, 7 Dowl. 470.) Evidence of the truth of the slander or libel is therefore inadmissible, unless a justification is pleaded. (*Underwood* v.

Parks, 2 Str. 1200.) Evidence of a rumour that the plaintiff had in fact committed the offence charged against him clearly falls short of a justification, and is moreover objectionable also as hearsay. On the other hand, the gist of the action is the injury done to the plaintiff's reputation; and if the plaintiff had no reputation to be injured, surely he cannot be entitled to substantial damages. It seems therefore that evidence of the plaintiff's *general* bad character may be given in mitigation of damages, but the defendant may not go into particulars. (*Williams* v. *Callender* (1810), Holt, N. P. 307, *n.*; *Mills and wife* v. *Spencer and wife* (1817), Holt, N. P. 533; ——— v. *Moor*, 1 M. & S. 284; *Waithman* v. *Weaver*, D. & R. N. P. C. 10; 11 Price, 257, *n.*; *Rodriguez* v. *Tadmire*, 2 Esp. 721; *contrà*, *Jones* v. *Stevens*, 11 Price, 235; wherein the case of *Earl of Leicester* v. *Walter*, 2 Camp. 251, is denied to be law; *Snowdon* v. *Smith*, 1 M. & S. 286, *n.*; *Woolmer* v. *Latimer*, 1 Jur. 119; *Bracegirdle* v. *Bailey*, 1 F. & F. 536.) If, however, the plaintiff goes into the box, he can of course be cross-examined "to credit" on all the details of his previous life; but unless such details are material to the issue the defendant must take the plaintiff's answer and cannot call evidence to contradict it.

Rumours as to plaintiff's general bad character will not however be admissible in evidence unless they be shown to have existed previously to the alleged slander or libel; for otherwise they may have been occasioned by the defendant's own publication, in which case they should rather aggravate than diminish the damages. (*Thompson* v. *Nye*, 16 Q. B. 175; 20 L. J. Q. B. 85; 15 Jur. 285.) The law on this point was much discussed in *Bell* v. *Parke*, 11 Ir. C. L. R. 413; and it was decided that evidence of antecedent general reputation of plain-

tiff's bad character is admissible, and so is evidence that the plaintiff had certain vicious habits which would lead him to commit such acts as that ascribed to him in the slander. But that evidence of a general report that plaintiff had actually committed the particular offence charged by the slander was not admissible. The following Nisi Prius decisions must therefore be considered bad law:—*Earl of Leicester* v. *Walter*, 2 Camp. 251; *Richards* v. *Richards*, 2 Moo. & Rob. 557; *Chalmers* v. *Shackell and others*, 6 C. & P. 475; and *Knobell* v. *Fuller*, Peake's Add. Cas. 139.

As to justifying part of the words complained of in mitigation of damages, see *ante*, p. 176.

Illustrations.

One officer charged another with stealing a watch; a third officer in the same regiment was called to state that he had previously heard rumours that the plaintiff had stolen that watch, but his evidence was rejected: and the Court held that such rejection was right (Pigot, C.B., dissenting).

Bell v. *Parke* (1860), 11 Ir. C. L. R. 413.

The Lord Chief Baron is reported to have given a similar ruling in *Dobede* v. *Fisher*, *Times* for July 29th, 1880.

(iv.) *Plaintiff's previous conduct in provoking the publication.*

In some cases, so we have seen, the plaintiff's conduct towards the defendant may be a bar to the action. If the plaintiff has attacked the defendant in the newspaper, and the defendant replies without undue personality, and without wandering into extraneous matters, then such reply, if made honestly in self-defence, is privileged. (See *ante*, p. 228.) But where the facts do not amount to such a defence, they may still tend to mitigate the damages. "There can be no set-off of one libel or misconduct against another; but in estimating

the compensation for the plaintiff's injured feelings, the jury might fairly consider the plaintiff's conduct, and the degree of respect he has shown for the feelings of others." (*Per* Blackburn, J., in *Kelly* v. *Sherlock*, L. R. 1 Q. B. 698; 35 L. J. Q. B. 213; 12 Jur. N. S. 937.) Thus evidence is admissible in mitigation of damages to show that plaintiff had previously himself published a libel, provided it be also shown that this libel had come to the defendant's knowledge and occasioned the publication of the libel now sued on. (*Finnerty* v. *Tipper*, 2 Camp. 76; *Antony Pasquin's case*, cited 1 Camp. 351; *Tarpley* v. *Blabey*, 2 Bing. N. C. 437; 2 Scott, 642; *May* v. *Brown*, 3 B. & C. 113; 4 D. & R. 670; *Watts* v. *Fraser*, 7 A. & E. 223; 7 C. & P. 369; 1 M. & Rob. 449; 2 N. & P. 157; *Wakley* v. *Johnson*, Ry. & M. 422.) And under the new system of pleading inaugurated by the Judicature Act such previous libels may be made the matter of a counter-claim, even though not immediately connected with the words on which plaintiff is suing; and the defendant may thus not only reduce the amount of damages due to the plaintiff, but even overtop the plaintiff's claim and recover judgment for the balance. (*Quin* v. *Hession*, 40 L. T. 70; 4 L. R. Ir. 35.) And where there is no counter-claim, the previous conduct of the plaintiff may be ground for applying to the Judge to deprive him of costs. In *Harnett* v. *Vise and wife*, 5 Ex. D. 307; 29 W. R. 7, Huddleston, B., deprived a plaintiff of his costs on this ground; although the jury found that the plea of justification was not proved, and had given him damages £10. And this decision of the learned Baron was upheld both in the Exchequer Division and in the Court of Appeal.

(v.) *Absence of Special Damage.*

When any special damage is alleged, the *onus* of proving it lies of course on the plaintiff. The defendant may call evidence to rebut the plaintiff's proof. He may either dispute that the special damage has occurred at all, or he may argue as a point of law that it is too remote (see *post*, p. 321); or he may call evidence to show that it was not the consequence of the defendant's words, but of some other cause. Thus if two newspapers have made each a distinct charge against the plaintiff, and subsequently the plaintiff finds his business falling off, whichever paper he sues may endeavour to shew that the loss of trade is due to the charge made against the plaintiff by the other paper. But, generally speaking, a defendant does not call evidence to rebut the special damage, but relies upon the cross-examination of the plaintiff's witnesses.

IV. Special Damage where the words are not actionable *per se*.

Special Damage is such a loss as the law will not *presume* to have followed from the defendant's words; but which depends, in part at least, on the special circumstances of the case. It must therefore be proved by evidence at the trial; and should always be explicitly claimed on the pleadings. In the vast majority of cases proof of special damage is not essential to the right of action. Thus it is not necessary to prove special damage—

(i.) In any action of libel.

(ii.) Wherever the words spoken impute to the plaintiff the commission of any indictable offence.

(iii.) Or a contagious disease.

(iv.) Or are spoken of him in the way of his profession or trade; or disparage him in an office of public trust.

Such words from their natural and immediate tendency to produce injury, the law adjudges to be defamatory, although no special loss or damage is, or can be, proved. Though even in these cases, if any special damage has in fact accrued, the plaintiff may of course prove it to aggravate the damages.

But in all cases not included in any of the above four classes, proof of special damage is essential to the cause of action; for the words are not actionable *per se*. The words do not, apparently and upon the face of them, import such defamation as will of course be injurious; it is necessary, therefore, that the plaintiff should aver some particular damage to have happened. And to maintain the action the damage thus averred must be the natural, immediate, and legal consequence of the words which the defendant uttered. It is not enough that his words have in fact produced such and such damage, unless it can reasonably be presumed that the defendant, when he uttered the words, either knew, or ought to have known, that such damage would result. Such damage being essential to the action, must have accrued before action brought.

The special damage necessary to support an action for defamation where the words are not actionable in themselves, must be the loss of some material temporal advantage. The loss of a marriage, of employment, of custom, of profits, and even of gratuitous entertainment and hospitality, will constitute special damage; but not mere annoyance or loss of peace of mind, nor even physical illness occasioned by the slanderous report.

Such loss may be either the loss of some right or position already acquired, or the loss of some future

benefit or advantage the acquisition of which is prevented. Thus if the defendant causes a servant to lose his situation, or prevents his getting one, by maliciously giving a false character; in either case an action will lie, though the words be not actionable *per se*. So if he prevent either a new comer from going to the plaintiff's shop, or an old customer from continuing to deal there. But in either case, and in every other, it must be clearly proved that the loss is the direct result of defendant's words.

Illustrations.

Anthony Elcock, citizen and mercer of London, of the substance and value of £3000, sought Anne Davis in marriage; but the defendant *præmissorum haud ignarus*, accused her of incontinency, wherefore the said Anthony wholly refused to marry the said Anne. *Held*, sufficient special damage. Verdict for the plaintiff for 200 marks.

Davis v. *Gardiner*, 4 Rep. 16; 2 Salk. 294; 1 Roll. Abr. 38.

So if a man lose a marriage.

Matthew v. *Crass*, Cro. Jac. 323.

In consequence of defendant's slandering the plaintiff, a dissenting minister, his congregation diminished: but this was held insufficient, as it did not appear that the plaintiff lost any emolument thereby.

Hopwood v. *Thorn*, 19 L. J. C. P. 94; 8 C. B. 293; 14 Jur. 87.

But see *Hartley* v. *Herring*, 8 T. R. 130.

"If a divine is to be presented to a benefice, and one to defeat him of it, says to the patron, 'that he is a heretic, or a bastard, or that he is excommunicated,' by which the patron refuses to present him (as he well might if the imputations were true), and he loses his preferment, he shall have his action on the case for those slanders tending to such end."

Davis v. *Gardiner*, 4 Rep. 17.

Loss of a situation will constitute special damage.

Martin v. *Strong*, 5 A. & E. 535; 1 N. & P. 29; 2 H. & W. 336.

Or of a chaplaincy.

Payne v. *Beauwmorris*, 1 Liv. 248.

If, however, the dismissal from service be colourable only, the master intending to take the plaintiff back again, as soon as the action is over: this is no evidence that the plaintiff's reputation has been impaired, but rather the contrary. If, therefore, no other special damage can be proved, the plaintiff should be nonsuited.

Coward v. *Wellington*, 7 C. & P. 531.

If a man be refused employment through defendant's slander, this is sufficient special damage.

Sterry v. *Foreman*, 2 Car. & P. 592.

So, if the agent of a certain firm going to deal with the plaintiff be stopped and dissuaded by the defendant, and this, although such firm subsequently became bankrupt, and paid but 12*s.* 6*d.* in the £, so that had plaintiff obtained the order he would have lost money by it.

Storey v. *Challands*, 8 C. & P. 234.

The loss of the hospitality of friends gratuitously afforded is sufficient special damage.

Moore v. *Meagher*, 1 Taunt. 39 ; 3 Smith 135.

Davies and wife v. *Solomon*, L. R. 7 Q. B. 112 ; 41 L. J. Q. B. 10 ; 20 W. R. 167 ; 25 L. T. 799.

So is the loss of any gratuity or present, if it be clear that the slander alone prevented its receipt.

Bracebridge v. *Watson*, Lilly, Entr. 61.

Hartley v. *Herring*, 8 T. R. 130.

In consequence of defendant's words, a friend who had previously voluntarily promised to give the plaintiff, a married woman, money to enable her to join her husband in Australia, whither he had emigrated three years before, refused to do so. *Held*, sufficient special damage.

Corcoran and wife v. *Corcoran*, 7 Ir. C. L. R. 272.

Where a vicar in open church falsely declared that the plaintiff, one of his parishioners, was excommunicated, and refused to celebrate divine service till the plaintiff departed out of the church, whereby the plaintiff was compelled to quit the church, and was scandalized, and was hindered of hearing divine service for a long time ; it was *held* that an action lay.

Barnabas v. *Traunter* (1641), 1 Vin. Abr. 396.

But a mere apprehension of future loss cannot constitute special damage. "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," says De Grey, C.J., in

Onslow v. *Horne*, 3 Wils. 188 ; 2 W. Bl. 753.

And see *Doyley* v. *Roberts*, 3 Bing. N. C. 835 ; 5 Scott, 40 ; 3 Hodges, 154.

The defendant said of a married man that he had had two bastards: "by reason of which words discord arose between him and his wife, and they were likely to have been divorced." *Held*, that this constituted no special damage.

Barmund's Case, Cro. Jac. 473.

But where the defendant advertised in *Hue and Cry* that the plaintiff had been guilty of fraud, and offered a reward for his apprehension, and the plaintiff immediately sued on the libel, and after action brought was twice arrested in consequence of it ; he was allowed to give evidence of these two arrests at the trial, not indeed as special damage, for they happened after action brought, but in order to show the injurious nature of the libel, and that the plaintiff was at time of action brought in serious danger of being arrested.

Goslin v. *Corry*, 7 M. & Gr. 342 ; 8 Scott, N. R. 21.

And see *Ingram* v. *Lawson*, 6 Bing. N. C. 212 ; 8 Scott, 471 ; 9 C. & P. 326 ; 4 Jur. 151.

So where the words are not actionable *per se*, and no pecuniary damage has followed, no compensation can be given for outraged feelings, nor for sickness induced by such mental distress, even though followed by a doctor's bill.

Allsop v. *Allsop*, 5 H. & N. 534 ; 29 L. J. Ex. 315 ; 6 Jur. N. 433 ; 8 W. R. 449 ; 36 L. T. (Old S.) 290.

Lynch v. *Knight and wife*, 9 H. L. C. 577 ; 8 Jur. N. S. 724 ; 5 L. T. 291.

Nor will the fact that plaintiff has been expelled from a religious society of which she was a member, constitute special damage.

Roberts et ux. v. *Roberts*, 5 B. & S. 384 ; 33 L. J. Q. B. 249 ; 10 Jur. N. S. 1027 : 12 W. R. 909 ; 10 L. T. 602.

Loss of the *consortium* of a husband is special damage. *Per* Lords Campbell and Cranworth in

Lynch v. *Knight and wife*, 9 H. L. C. at p. 589 ;

but not merely of the society of friends and neighbours.

Medhurst v. *Balam*, cited in 1 Siderfin 397.

Barnes v. *Prudlin or Bruddel*, 1 Lev. 261 ; 1 Sid. 396 ; 1 Ventr. 4 ; 2 Keb. 451.

The law is the same in America.

The refusal of civil entertainment at a public-house was held sufficient special damage.

Olmsted v. *Miller*, 1 Wend. 506.

So was the fact that the plaintiff was turned away from the house of her uncle, where she had previously been a welcome visitor, and charged not to return till she had cleared up her character.

Williams v. *Hill*, 19 Wend. 305.

So was the circumstance that persons who had been in the habit of so doing refused any longer to provide food and clothing for the plaintiff.

Beach v. *Ranney*, 2 Hill (N. Y.) 309.

The defendant told Neiper that the plaintiff committed adultery with Mrs. Fuller. Neiper had married Mrs. Fuller's sister and was an intimate friend of the plaintiff's. Neiper thought it his duty to tell the plaintiff what people were saying of him. Plaintiff, who was hoeing at the time, turned pale, felt bad, flung down his hoe, and left the field : lost his appetite, turned melancholy, could not work as he used to do, and had to hire more help. *Held*, that such mental distress and physical illness were not sufficient to constitute special damage ; for they did not result from any injury to the plaintiff's reputation, which had affected the conduct of others towards him. The Court said, in giving judgment, "It would be highly impolitic to hold all language, wounding the feelings and affecting unfavourably the health and ability to labour, of another, a ground of action : for that would be to make the right of action depend often upon whether the sensibilities of a person spoken of are easily excited or otherwise ; his strength of mind

to disregard abusive insulting remarks concerning him, and his physical strength and ability to bear them. Words which would make hardly an impression on most persons, and would be thought by them, and should be by all, undeserving of notice, might be exceedingly painful to some, occasioning sickness and an interruption of ability to attend to their ordinary avocations."

Terwilliger v. *Wands*, 3 Smith (17 N. Y. R.) 54, over-ruling *Bradt* v. *Towsley*, 13 Wend. 253, and *Fuller* v. *Fenner*, 16 Barb. 333.

So, too, a husband cannot maintain an action for the loss of his wife's services caused by illness or mental depression resulting from defamatory words not actionable *per se* being spoken of her by the defendant. For the wife, if *sole*, could have maintained no action. "The facility with which a right to damages could be established by pretended illness where none exists, constitutes a serious objection to such an action as this." *Per* Denio, J., in

Wilson v. *Goit*, 3 Smith (17 N. Y. R.) 445.

Special damage must always be explicitly claimed on the pleadings and strictly proved at the trial. And where the words are not actionable *per se*, the plaintiff will be confined to the special damage laid; he must either prove that, or be nonsuited; he cannot fall back on general damages, as he can where the words are actionable *per se*. For there are no general damages to fall back on; *ex hypothesi* the words are such as the law will not presume injurious. And so, too, where the special damage is proved, the jury should strictly find a verdict for the amount of such special damage merely, for the sum that the plaintiff has proved he has lost and no more. The jury ought not to compensate the plaintiff for pain, mental anxiety, or a general loss of reputation, but should confine their assessment to the actual pecuniary loss that has been alleged and proved. (*Dixon* v. *Smith*, 5 H. & N. 450; 29 L. J. Ex. 125.) This rule, however, is frequently neglected in practice; and as soon as *any* special damage is proved, the words are treated as though they were actionable *per se*.

To allege generally that in consequence of the de-

fendant's words the plaintiff has lost a large sum of money, or that his practice or business has declined, is not a sufficiently precise allegation of special damage. The names of the persons who have ceased to employ the plaintiff, or who would have commenced to deal with him, had not the defendant dissuaded them, must be set out in the statement of claim, or in the particulars; and they must themselves be called as witnesses at the trial to state their reason for not dealing with the plaintiff. Else it will not be clear that their witholding their custom was in consequence of defendant's words; it might well be due to some other cause. (*Per* Lord Kenyon, C. J., in *Ashley* v. *Harrison*, 1 Esp. 48; Peake, 256; *per* Best, C. J., in *Tilk* v. *Parsons*, 2 C. & P. 201.) Loss of custom or diminution of profits, when not specifically alleged, and the customers' names assigned, is general, not special, damage, and can only therefore be proved where the words are actionable *per se*. (*Harrison* v. *Pearce*, 1 F. & F. 567; 32 L. T. (Old S.) 298.) If the plaintiff cannot give the names of those who have ceased to deal with him, or cannot prove that their so ceasing is due to the defendant's words, he must be nonsuited; although there has in fact been a falling off in his business.

The loss to the plaintiff must be directly connected with the defendant's utterance of the words. If others repeat his words, with or without additions of their own, the defendant is not liable for the consequences of what they say. And it is only by such repetitions that a general loss of business can be brought about. It is true that many traders, such as innkeepers, tobacconists, and others, seldom know the names of their customers, who are often chance passers-by. It might therefore be urged that such traders should never be required to state the names of particular customers, whether the words be actionable *per se* or not. This is the law in Victoria apparently; see *Brady* v. *Youlden*, *post*, p. 317. And in *Riding* v. *Smith*,

1 Ex. D. 91; 45 L. J. Ex. 281; 24 W. R. 487; 34 L. T. 500, Kelly, C.B., after stating with great clearness that "the words would not be actionable as slander without proof of special damage, which must be established not merely by general evidence that the business has fallen off, but by showing that particular persons have ceased to deal with the plaintiff,"—yet held that such evidence was properly received in the case before him, which he deemed an action on the case, and not an action of defamation. It is clear, therefore, that the late Lord Chief Baron did not mean to lay down any general rule, and that *Riding* v. *Smith* is not to be regarded as an authority in actions of defamation, but merely as an exceptional case depending upon its own peculiar facts. In a very similar case, *Kent* v. *Stone*, Bristol Summer Assizes, 1880, Lord Coleridge, C.J., refused to follow *Riding* v. *Smith* on this point; as being contrary to all previous decisions. In *Clarke* v. *Morgan*, 38 L. T. 354, Grove, J., points out the anomaly which would follow if the rule in *Riding* v. *Smith* were universally carried out. The defendant has spoken to A. words which are not actionable *per se*; *i.e.*, words of such a character that the law will not presume that they can injure the plaintiff. A. repeats them to B., B. to C., C. to D., and so on, till at last the plaintiff's business declines. If B., C., and D. were called, they would state that they never heard a word from the defendant on the matter; and then it is clear law that the jury could only award the plaintiff damages for the loss of A.'s custom, A. being the one man to whom defendant spoke. (*Dixon* v. *Smith*, 5 H. & N. 450; 29 L. J. Ex. 125; *Bateman and Wife* v. *Lyall and Wife*, 7 C. B. N. S. 638; *Hirst* v. *Goodwin*, 3 F. & F. 257.) And yet, by merely keeping them out of the box, the plaintiff would (if *Riding* v. *Smith* be adopted as a general authority in cases of slander) illegally recover damages for the loss of the custom of B., C., D., E., and F. Lindley, J., in the same case (38 L. T. 355) expresses his opinion that the decisions in *Ward* v. *Weeks* and *Parkins* v. *Scott* have in no way been overruled by *Riding* v. *Smith* and *Evans* v. *Harries*. As a rule, words which cause loss of custom to a trader are spoken of him in the way of his trade, and are therefore actionable *per se*. And in other cases of special damage there is no possible hardship in the old rule; for the plaintiff must be aware of the names of

the master who has dismissed him, and of the friends who formerly showed him hospitality.

Illustrations.

The plaintiff alleged that in consequence of the defendant's slander, she had "lost several suitors." This was held too general an allegation: for the names of the suitors could hardly have escaped the plaintiff's memory.

Barnes v. *Prudlin, vel Bruddel*, 1 Sid. 396; 1 Ventr. 4; 1 Lev. 261; 2 Keb. 451.

See also, *Hunt* v. *Jones*, Cro. Jac. 499.

Davies and Wife v. *Solomon*, L. R. 7 Q. B. 112; 41 L. J. Q. B. 10; 20 W. R. 167; 25 L. T. 799.

The defendant slandered a dissenting minister, who averred that his congregation diminished in consequence. *Held*, too general an averment to constitute special damage, the names of the absentees not being given.

Hopwood v. *Thorn*, 8 C. B. 293; 19 L. J. C. P. 94; 14 Jur. 87.

Such an averment would have been sufficient, had the words been spoken of the plaintiff in the way of his office, and so actionable *per se*.

Hartley v. *Herring*, 8 T. R. 130.

Evans v. *Harries*, 1 H. & N. 254; 26 L. J. Ex. 31.

Dawes intended to employ the plaintiff, a surgeon and accoucheur, at his wife's approaching confinement; but the defendant told Dawes that the plaintiff's female servant had had a child by the plaintiff: Dawes consequently decided not to employ the plaintiff: Dawes told his mother and his wife's sister what defendant had said; and consequently the plaintiff's practice fell off considerably among Dawes' friends and acquaintance and others. The fee for one confinement was a guinea. *Held*, that the plaintiff was entitled to more than the one guinea; the jury should give him such a sum as they considered Dawes' custom was worth to him; but that the plaintiff clearly could not recover anything for the general decline of his business, which was caused by the gossip of Dawes' mother and sister-in-law.

Dixon v. *Smith*, 5 H. & N. 450; 29 L. J. Ex. 125.

The law is the same in America:—

The plaintiff alleged that the defendant's words had "injured her in her good name, and caused her relatives and friends to slight and shun her." This was held to disclose no special damage.

Bassell v. *Elmore*, 48 N. Y. R. 563; 65 Barbour 627.

So where the allegation was merely that by reason of defendant's words "the plaintiff had been slighted, neglected, and misused by the neighbours and her former associates, and turned out of doors."

Pettibone v. *Simpson*, 66 Barb. 492.

A general allegation that by reason of defendant's acts, plaintiff had been

compelled to pay a large sum of money, without showing how, was held insufficient.

Cook v. *Cook*, 100 Mass. 194.
Pollard v. *Lyon*, 1 Otto (91 U. S.) 225.

But in Australia a different rule apparently prevails :—

To say to the keeper of a restaurant, "You are an infernal rogue and swindler," was held, in the Supreme Court of Victoria, not actionable without proof of special damage, as not affecting plaintiff in his trade. But the plaintiff having alleged that, by reason of the words, people who used to frequent his restaurant, ceased to deal with him, it was held the special damage made the words actionable, and that the special damage was sufficiently alleged; that the cases of frequenters of theatres, members of congregations, and travellers using an inn, were exceptions to the rule requiring the names of the customers lost to be set forth.

Brady v. *Youlden*, Kerferd & Box's Digest of Victoria Cases, 709; Melbourne Argus Reports, 6 Sept. 1867, *sed quære.*

Where the words are not actionable without special damage, the jury, as we have seen, must confine their consideration to such special damage as is specially alleged and proved. It might, therefore, very well be argued, on the principle of *Bonomi* v. *Backhouse*, 9 H. L. C. 503; E. B. & E. 662; 34 L. J. Q. B. 181, that if any fresh damage followed in the future, that would constitute a fresh ground of action. And of this opinion were North, C. J., in *Lord Townshend* v. *Hughes*, 2 Mod. 150, and Tindal, C. J., in *Goslin* v. *Corry*, 7 M. & Gr. 345; 8 Scott N. R. 21. But Buller, in his "Nisi Prius," p. 7, lays it down most distinctly, that where a plaintiff "has once recovered damages, he cannot after bring an action for any other special damage, whether the words be in themselves actionable or not." (*Fitter* v. *Veal*, 12 Mod. 542.) And this rule is obviously more practically convenient: it is also in accordance with recent cases, such as *Stone* v. *Mayor of Yeovil*, 1 C. P. D. 691; 45 L. J. C. P. 657; 24 W. R. 1073; 34 L. T. 874; (C. A) 2 C. P. D. 99; 46 L. J. C. P. 137; 25 W. R. 240; 36 L. T. 279, and *Lamb* v. *Walker*, 3 Q. B. D. 389; 45 L. J. Q. B. 451; 26 W. R. 775; 38 L. T. 643, and must therefore, I think, be considered good law.

V.—Special Damage where the words are actionable, *per se*.

Where special damage is not essential to the action, it may still of course be proved at the trial to aggravate the damages. But to entitle such evidence to be given, the special damage relied on must be stated on the record with the same particularity as is required where the words are actionable only by reason of such special damage. The defendant is entitled to know beforehand what case he has to meet. Thus, in an action by a trader for words spoken of him in the way of his trade, evidence of a general loss of business is always admissible; for this is not special damage. But the plaintiff cannot be asked whether particular persons have not ceased to deal with him, unless the loss of their special custom is set out in the pleadings as special damage. It is clearly right that the defendant should be furnished with their names before the trial.

But though the special damage must be laid as explicitly whether the words be actionable or not, it seems that in other respects the law is not quite so strict as to what constitutes special damage in the first case as in the second. Thus, where the words are *not* actionable *per se*, we have seen that mental distress, illness, expulsion from a religious society, &c., do not constitute special damage. But where the words are actionable *per se*, the jury may take such matters into their consideration in according damages. "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes *that alone;* though where a material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the

party interested." (*Per* Lord Wensleydale, in *Lynch* v. *Knight and wife*, 9 H. L. C. 598. *See* also *Haythorn* v. *Lawson*, 3 C. & P. 196; *Le Fanu* v. *Malcolmson*, 8 Ir. L. R. 418.) And had the charge against Mrs. Roberts been one of felony I do not think any Judge would have excluded the evidence as to her expulsion from her religious sect.

Again, where words are spoken of the plaintiff in the way of his profession or trade, so as to be actionable *per se*, the plaintiff may allege and prove a general diminution of profits or decline of trade, without naming particular customers or proving they have ceased to deal with him. (*Ashley* v. *Harrison*, 1 Esp. 48; Peake, 256; *Ingram* v. *Lawson*, 6 Bing. N. C. 212; 8 Scott, 471; 4 Jur. 151; 9 C. & P. 326; *Harrison* v. *Pearce*, 1 F. & F. 569, 32 L. T. (Old S.) 298.) [In *Delegal* v. *Highley*, 8 C. & P. 448, Tindal, C. J., refused to allow any evidence to be given of general loss of business, on the ground that the law already presumed such loss in the plaintiff's favour; but this decision must now be considered over-ruled.] If, however, the plaintiff desires to go into such details at the trial, he must plead them specially and call the customers named as witnesses. Still, if the customers are not called at the trial, or if for any other reason the proof of the special damage fails, the plaintiff may still fall back on the general damage and prove a loss of income induced by the slander. (*Cook* v. *Field*, 3 Esp. 133; *Evans* v. *Harries*, 1 H. & N. 251; 26 L. J. Ex. 31.) This he could not do, had the words not been actionable *per se*: see *ante*, pp. 313—317. But where it is clear that the action lies, and that the jury must find damages to *some* amount for the plaintiff, evidence as to the nature and extent of plaintiff's business before and after publication is necessary to enable the jury to fix the amount of damages.

Illustrations.

Where the defendant published in a newspaper that a certain ship of the plaintiff's was unseaworthy, and had been purchased by the Jews to carry convicts, evidence as to the average profits of a voyage was admitted, and also evidence that upon the first voyage after the libel appeared the profits were nearly £1500 below the average, and this although the action was brought immediately after the libel appeared, and before the last-mentioned voyage was commenced. The jury, however, awarded the plaintiff only £900 damages.

Ingram v. *Lawson*, 6 Bing. N. C. 212; 8 Scott, 471.
Goslin v. *Corry*, 7 M. & Gr. 342; 8 Scott, N. R. 21.

Where a declaration alleged that the defendant spoke words of the plaintiff, a dissenting minister, in the way of his office and profession, and his congregation rapidly diminished, and he was compelled for a time to give up preaching altogether, and lost profits thereby; it was held that this was a sufficient allegation of special damage, although the members of his congregation were not named.

Hartley v. *Herring*, 8 T. R. 130.
Hopwood v. *Thorn*, 8 C. B. 293; 19 L. J. C. P. 94; 14 Jur. 87.

Where words actionable *per se* are spoken of an innkeeper in the way of his trade, evidence may be given of a general loss of custom and decline in his business.

Evans v. *Harries*, 1 H. & N. 251; 26 L. J. Ex. 31.

"Suppose a biscuit baker in Regent Street is slandered by a man saying his biscuits are poisoned, and in consequence no one enters his shop. He cannot complain of the loss of any particular customers, for he does not know them, and how hard and unjust it would be if he could not prove the fact of the loss under a general allegation of loss of custom." *Per* Martin, B., in

Evans v. *Harries*, 26 L. J. Ex. 32.
And see *Weiss* v. *Whittemore*, 38 Michigan 366.

Where the words are actionable without special damage, the jury must assess the damages once for all: for no fresh action can be brought should fresh damage follow. They should therefore take into consideration not only the damage that has accrued, but also such damage, if any, as will arise from the defendant's defamatory words in the future. (*Fitter* v. *Veal*, 12 Mod. 542; B. N. P. 7; *Lord Townshend* v. *Hughes*, 2 Mod. 150; *Ingram* v. *Lawson*, 6 Bing. N. C. 212; 8 Scott, 471; 4 Jur. 151; 9 C. & P. 326; *Gregory and another* v. *Williams*, 1 C. & K. 568.)

VI.—Remoteness of Damages.

The special damage alleged must be the natural and probable result of the defendant's wrongful conduct. In some cases it can be shown that the defendant contemplated and desired such result at the time of publication: in other cases the result is so clearly the natural and necessary consequence of the libel or slander that the defendant must fairly be taken to have contemplated it, whether in fact he did so or not. But where the damage sustained by the plaintiff is neither the necessary and reasonable result of the defendant's conduct, nor such as can be shown to have been in the defendant's contemplation at the time, there the damage will be held too remote. Evidence cannot be given at the trial of any special damage unless it either flows from defendant's words in the ordinary course of things, or through special circumstances known to the defendant may be supposed to have been in his contemplation at the date of publication.

The special damage must be the direct result of the defendant's words. The jury may not take into their consideration any damage which is produced partly by the defendant's words and partly by some other fact or circumstance unconnected with the defendant. The defendant's words must at all events be the *predominating* cause of the damage assigned.

Illustrations.

The defendant slandered the plaintiff to his master B. Subsequently B. discovered from another source that the plaintiff's former master had dis-

missed him for misconduct. Thereupon B. discharged the plaintiff in the middle of the term for which he had engaged his services. *Held* that no action lay against the defendant; for his words alone had not caused B. to dismiss the plaintiff.

Vicars v. *Wilcox*, 8 East 1; 2 Sm. L. C. 553 (8th ed.).

As explained in *Lynch* v. *Knight and wife*, 9 H. L. C. 590, 600.

The plaintiff alleged that certain persons would have recommended him to X., Y., & Z., had not the defendant spoken certain defamatory words of him on the Royal Exchange, and that X., Y., & Z. would, on the recommendation of those persons, have taken the plaintiff into their employment. The plaintiff claimed damages for the loss of the employment. Such damage was held too remote, for it was caused by the non-recommendation, not by the defendant's words.

Sterry v. *Foreman*, 2 C. & P. 592.

And see *Hoey* v. *Felton*, 11 C. B. N. S. 142; 31 L. J. C. P. 105.

In an action of slander of title to a patent, the plaintiff alleged as special damage that in consequence of defendant's opposition, the Solicitor-General refused to allow the letters-patent to be granted with an amended title, as the plaintiff desired. *Held* that this damage was too remote, being the act of the Solicitor-General and not of the plaintiff.

Haddon v. *Lott*, 15 C. B. 411; 24 L. J. C. P. 49.

Kerr v. *Shedden*, 4 C. & P. 528.

The plaintiff engaged Mdlle. Mara to sing at his concerts; the defendant libelled Mdlle. Mara, who consequently refused to sing lest she should be hissed and ill-treated; the result was that the concerts were more thinly attended than they otherwise would have been, whereby the plaintiff lost money. *Held* that the damage to the plaintiff was too remote a consequence of defendant's words to sustain an action by the plaintiff. It was, in short, not so much the result of defendant's words as of Mdlle. Mara's timidity or caprice.

Ashley v. *Harrison*, 1 Esp. 48; Peake, 256.

And see *Tarleton* v. *McGawley*, Peake, 270.

Taylor v. *Neri*, 1 Esp. 386.

Lumley v. *Gye*, 2 E. & B. 216.

The defendant, having had a quarrel in the street with a negro boy, took up a pick-axe and pursued him into the plaintiff's store, where the boy was employed. The negro being alarmed, and not able to escape rapidly by the back door, which was shut, ran behind the counter to save himself from being struck, and in so doing knocked out the faucet from a cask of wine standing there, a quantity of which ran out and was wasted. The Supreme Court of the State of New York held that the defendant was liable to the plaintiff for this loss; the damage in question being, in their opinion, the direct and natural, though not the necessary result of the wrongful act of the defendant.

Vandenburg v. *Truax*, 4 Denio, (N. Y.) 464.

Clark v. *Chambers*, 3 Q. B. D. 327; 47 L. J. Q. B. 427; 26 W. R. 613; 38 L. T. 454.

The defendant insinuated that the plaintiff had been guilty of the murder

of one Daniel Dolly; the plaintiff thereupon demanded that an inquest should be taken on Dolly's body, and incurred expense thereby. *Held* that such expense was recoverable as special damage; though it was not *compulsory* on the plaintiff to have an inquest held.

Peake v. *Oldham*, Cowp. 275; 2 W. Bl. 960.

The defendant said to Mr. Knight of his wife Mrs. Knight, "Jane is a notorious liar . . . . she was all but seduced by a Dr. C., of Roscommon, and I advise you, if C. comes to Dublin, not to permit him to enter your place . . . . She is an infamous wretch, and I am sorry that you had the misfortune to marry her, and if you had asked my advice on the subject, I would have advised you not to marry her." Knight thereupon turned his wife out of the house and sent her home to her father, and refused to live with her any longer. *Held* that loss of *consortium* of the husband can constitute special damage; but that in this case the husband's conduct was not the natural or reasonable consequence of defendant's slander. *Secus*, had the words imputed actual adultery since the marriage.

Allsop v. *Allsop*, 5 H. & N. 534; 29 L. J. Ex. 315; 6 Jur. N. S. 433; 8 W. R. 449; 36 L. T. (Old S.) 290.

Affirmed in *Lynch* v. *Knight and wife*, 9 H. L. C. 577.

Parkins et ux. v. *Scott et ux.*, 1 H. & C. 153; 31 L. J. Ex. 331; 8 Jur. N. S. 593; 10 W. R. 562; 6 L. T. 394, *post*, p. 330.

A declaration alleged that the defendant falsely and maliciously spoke of the plaintiff, a working stonemason, "He was the ringleader of the nine hours' system," and "He has ruined the town by bringing about the nine hours' system," and "He has stopped several good jobs from being carried out, by being the ringleader of the system at Llanelly," whereby the plaintiff was prevented from obtaining employment in his trade at Llanelly. *Held*, on demurrer, that the alleged damage was not the natural or reasonable consequence of the speaking of such words, and that the action could not be sustained.

Miller v. *David*, L. R. 9 C. P. 118; 43 L. J. C. P. 84; 22 W. R. 332; 30 L. T. 58.

Damage which has resulted to A. in consequence of the defendant's having defamed B., is too remote to constitute special damage in any action brought by B. Whether A., who has himself suffered the damage, can sue, depends upon the closeness of the relationship between A. and B. If A. is B.'s master, A. may have an action on the case *per quod servitium amisit*. If A. is B.'s husband, then it is clear law, that the husband may sue for any special damage which has accrued to him through the defamation of his wife. But a wife cannot

recover for any special damage which words spoken of her have inflicted on her husband. (*Harwood et ux.* v. *Hardwick et ux.* (1668), 2 Keble, 387.)

This rule presses very harshly upon married women; for before the Married Women's Property Act there was hardly any special damage which they could suffer. Their earnings were their husband's; so was their time. Lord Wensleydale, in *Lynch* v. *Knight & wife*, 9 H. L. C. 597, even doubted if loss of *consortium* of her husband was such special damage as would sustain an action of slander by a wife. Loss of the society of her friends and neighbours clearly is not. The only special damage in fact which a married woman could set up was loss of hospitality. And even in conceding her this, the judges seemed to be straining the law, for her husband was bound to maintain her: so that such gratuitous entertainment was really a saving to the husband's pocket. But in *Davies* v. *Solomon*, L. R. 7 Q. B. 112; 41 L. J. Q. B. 10; 20 W. R. 167; 25 L. T. 799, the judges declined to scrutinize too nicely into such matters: and no doubt the loss is really the wife's. Her friends would supply her with better and other food than that which the law compels her husband to afford her. The operation of the Married Women's Property Acts, 1870 and 1874, may lessen the hardship. In some cases the difficulty might perhaps have been obviated, had the husband sued alone.

Illustrations.

If one partner be libelled he cannot recover for any special damage which has occurred to the firm.

Solomons & others v. *Medex*, 1 Stark. 191.

Robinson v. *Marchant*, 7 Q. B. 918; 15 L. J. Q. B. 134; 10 Jur. 156.

Similarly, if the firm be libelled as a body, they cannot jointly recover for any private injury to a single partner: though that partner may now recover his individual damages in the same action.

Haythorn v. *Lawson*, 3 C. & P. 196.

Le Fanu v. *Malcolmson*, 1 H. L. C. 637; 8 Ir. L. R. 418; 13 L. T. 61.

Where the libel imputed that the plaintiff, a married man, kept a gaming-house, and that his wife was a woman of notoriously bad character, and his wife suffered greatly in her mind in consequence and became ill and died,

evidence of such damage was excluded in an action brought by the surviving husband.

Guy v. *Gregory*, 9 C. & P. 584.

And see *Wilson* v. *Goit*, 3 Smith, (17 N. Y. R.) 445, *ante*, p. 313.

Where words actionable *per se* were spoken of a married woman, she was allowed to recover only 20*s.* damages; all the special damage which she proved at the trial was held to have accrued to her husband, and not to her: he ought, therefore, to have sued for it in a separate action (or count since the C. L. P. Act, 1852; 15 & 16 Vict. c. 76, s. 40; Jud. Act, 1875, Order XVII. r. 4).

Dengate v. *Gardiner*, 4 M. & W. 5; 2 Jur. 470.

A declaration by husband and wife alleged that the defendant falsely and maliciously spoke certain words of the wife imputing incontinence to her, whereby she lost the society of her neighbours, and became ill and unable to attend to her necessary affairs and business, and her husband incurred expense in curing her, and lost the society and assistance of his wife in his domestic affairs. *Held* that the declaration disclosed no cause of action.

Allsop and wife v. *Allsop*, 5 H. & N. 534; 29 L. J. Ex. 315; 6 Jur. N. S. 433; 8 W. R. 449; 36 L. T. (Old S.) 290.

Approved in *Lynch* v. *Knight and wife*, 9 H. L. C. 577.

[N.B.—The excommunication case *Barnabas* v. *Traunter*, 1 Vin. Abr. 396; *ante* p. 59, was not cited to the court in this case.]

Where words were spoken imputing unchastity to a woman, and by reason thereof she was excluded from a private society and congregation of a sect of Calvinistic Methodists, of which she had been a member, and was prevented from obtaining a certificate without which she could not become a member of any other society of the same nature. *Held* that such a result was not such special damage as would render the words actionable.

Roberts and wife v. *Roberts*, 5 B. & S. 384; 33 L. J. Q. B. 249; 12 W. R. 909; 10 L. T. 602; 10 Jur. N. S. 1027.

The act of a third party, if caused by the defendant's language, is *not* too remote; and this, whether such act be in itself a ground of action by the plaintiff against such third party or not. But of course the act of the third party must be the result of the defendant's words and such a result as the defendant either did contemplate or ought to have contemplated. The defendant cannot be held liable for any eccentric or foolish conduct on the part of the person he addressed; but only for the ordinary and reasonable consequences of his words.

Formerly this was much doubted; it was held, in *Vicars* v. *Wilcox*, 8 East 1; 2 Sm. L. C. 553 (8th edition), that where the plaintiff's master was induced by the slander to dismiss the plaintiff from his employ, before the end of the term for which they had contracted, such dismissal was too remote to be special damage; because it was a mere wrongful act of the master, for, which the plaintiff could sue him. The same doctrine was laid down in *Morris* v. *Langdale*, 2 B. & P. 284, and *Kelly* v. *Partington*, 5 B. & Ad. 645; 3 N. & M. 116. But this case is clearly contrary to *Davis* v. *Gardiner*, 4 Rep. 16, *ante*, p. 310, and the numerous other cases in which loss of a marriage was held to constitute special damage, although the plaintiff there had an action for breach of promise of marriage. Doubts were thrown on *Vicars* v. *Wilcox*, in *Knight* v. *Gibbs*, 1 A. & E. 43; 3 N. & M. 467, and in *Green* v. *Button*, 2 C. M. & R. 707, and it must now be taken to have been overruled by the *dicta* of the Law Lords in *Lynch* v. *Knight and wife*, 9 H. L. C. 577, and by the decision in *Lumley* v. *Gye*, 2 E. & B. 216. And it is now, I think, clear law that the defendant is liable for any illegal act which it was his obvious intention, or the natural result of his words, to induce another to commit. "To make the words actionable, by reason of special damage, the consequence must be such as, taking human nature as it is with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking of the words." (*Per* Lord Wensleydale in *Lynch* v. *Knight and wife*, 9 H. L. C. p. 600.) "If the experience of mankind must lead any one to expect the result, the defendant will be answerable for it." (*Per* Littledale, J., in *R.* v. *Moore*, 3 B. & Ad. 188.)

Illustrations.

If I tell a master falsely that his servant has robbed him and thereupon he instantly dismisses him, I must be taken to have contemplated this as a natural and probable consequence of my act. But if the master horse-whips his servant instead of dismissing him, this is not the natural result of my accusation; I could not be held liable for the assault as special damage. See *per* Williams, J., in

Haddon v. *Lott*, 15 C. B. 411; 24 L. J. C. P. 50.

"Suppose that during the war of 1870, an Englishman had been pointed out to a Parisian mob as a German spy, and thrown by them into the Seine, it could not be contended that one act was *not* the natural and necessary consequence of the other." Mayne on Damages, 3rd ed., by Lumley Smith, p. 426. And see such cases as

Lee v. *Riley*, 18 C. B. N. S. 722.

Sneesby v. *Lancashire and Yorkshire Ry Co.*, L. R. 9 Q. B. 263; 43 L. J. Q. B. 69; 30 L. T. 492; (and in C. A.) 1 Q. B. D. 42; 45 L. J. Q. B. 41; 24 W. R. 99; 33 L. T. 372.

A man may not recover the same damages for the same injury twice from two different defendants; but he may recover from two different defendants damages proportioned to the injury each has occasioned, and clearly where words are spoken by a defendant *with the intent* to make a third person break his contract with the plaintiff, the fact that such person did break his contract with the plaintiff in consequence of what the defendant said, may be proved as special damage against that defendant.

Carrol v. *Falkiner*, Kerferd & Box's Digest of Victoria Cases, 216.

It is not essential that the third person, whose act constitutes the special damage, should believe the words spoken by the defendant, if it is shown that the words spoken did directly induce the act. The law is otherwise in America.

Illustrations.

The plaintiff and another young woman worked for Mrs. Enoch, a straw-bonnet-maker, and lived in her house. Mrs. Enoch's landlord, who lived two doors off, came to Mrs. Enoch and complained that the plaintiff and her fellow-lodger had made a great noise and been guilty of openly outrageous conduct. Mrs. Enoch thereupon dismissed them from her employ, not because she believed the charge made, but because she was afraid it would offend her landlord if they remained. *Held* that the special damage was the direct consequence of the defendant's word.

Knight v. *Gibbs*, 1 A. & E. 43; 3 N. & M. 467.

And see *Gillett* v. *Bullivant*, 7 L. T. (Old S.) 490, *post* p. 332.

But where the plaintiff was under twenty-one and lived at home with her father, and the defendant foully slandered her to her father, in consequence of which he refused to give her a silk dress and a course of music lessons on the piano which he had promised her, although he entirely disbelieved the defendant's story, this was *held* in America *not* to be such special damage as will sustain the action, on the ground that such treatment by a parent of his child is not the natural result of a falsehood told him against her. *Per* Grover, J.: "I do not think special damage can be predicated upon the act of any one who wholly disbelieves the truth of the story. It is inducing acts injurious to the plaintiff, caused by a belief of the truth of the charge

made by the defendant, that constitutes the damage which the law redresses."

Anon., 60 N. Y. 262.
And see *Wilson* v. *Goit*, 17 N. Y. 445.

But where the wrongful act of the third person is voluntary and spontaneous, there, as a rule, he alone is liable for it. This is especially the case where A. tells a falsehood against the plaintiff to B., which B. repeats, and from B.'s repetition special damage flows: here the plaintiff cannot recover for such special damage from A.; and indeed if the words be not actionable *per se*, he cannot sue A. at all: his only action is against B. For B. acted consciously and voluntarily; the repetition is his own unlawful act; for the consequences of which he alone is answerable. By repeating A.'s words, B. became an independent slanderer.

The law is not quite so restricted in cases of libel; every one in any way concerned in the publication of a libel is equally responsible for all the damages which flow from that publication. Thus, if I write you a private letter containing a libel on A., and you show the letter to various persons, one of whom acts on it to A.'s prejudice, we both are liable to an action; for I set the libel in circulation. But if, instead of merely showing my letter, you make a copy of it and send it to a newspaper to be published to all the world, without my leave, and in a way which I could not have anticipated, then this republication is your own unlawful act, for the consequences of which you alone are liable. *Secus* if I either requested or expected and intended you to publish it. (See *post*, pp. 360—365.)

Thus, it may happen that a person who invents a lie and maliciously sets it in circulation, may sometimes escape punishment altogether, while a person who is merely injudicious may

be liable to an action through incautiously repeating a story which he believed to be the truth, as he heard it told frequently in good society. For if I originate a slander against you of such a nature that the words are not actionable *per se*, the utterance of them is no ground of action, unless special damage follows. If I myself tell the story to your employer, who thereupon dismisses you, you have an action against me; but if I only tell it to your friends and relations, and no pecuniary damage ensues from my own communication of it to any one, then no action lies against me, although the story is sure to get round to your master sooner or later.

The unfortunate man whose lips actually utter the slander to your master is the only person that can be made defendant; for it is his publication alone which is actionable as causing special damage.

As to this state of the law, see the remarks of Kelly, C.B., in *Riding* v. *Smith*, 1 Ex. D. 94; 45 L. J. Ex. 281; 24 W. R. 487; 34 L. T. 500, who differed from Pollock and Huddleston, B.B., in denouncing the decision in *Ward* v. *Weeks*, 7 Bing. 211; 4 M. & P. 796, which they maintained.

It might, perhaps, have been argued formerly, in analogy to the principle of *Scott* v. *Shepherd*, 1 Sm. L. Cases (8th ed.), 466; 2 Wm. Bl. 892; 3 Wils. 403, that he who invented the slander and first set it in circulation, is as liable as he who "gave the mischievous faculty to the squib" and first started it on its wild career across the market-house at Milborne Port. But it will be remembered that the decision in that famous case turns expressly on the assumption that Willis and Ryal were *not* to be considered free agents, that what they did was "by necessity," was "the inevitable consequence of the defendant's unlawful act." Had they been considered as free agents voluntarily intervening, the other judges would have agreed with Blackstone, J. On principle, therefore, it is clearly good law to hold that when the repetition of the slander is spontaneous and unauthorised, when it is the voluntary act of a free agent, the originator of the slander is not answerable for any mischief caused by such repetition: and this principle is also far too strongly established by authority to be easily, if ever, shaken. (See *Ward* v. *Weeks*, 7 Bing. 211; *Rutherford* v. *Evans*, 4 C. & P. 79; *Tunnicliffe* v. *Moss*, 3 C. & K. 83; *Parkins et ux.* v. *Scott*

et ux., 1 H. & C. 153; 31 L. J. Ex. 331; 8 Jur. N. S. 593; *Dixon* v. *Smith*, 5 H. & N. 450; 29 L. J. Ex. 125; *Bateman* v. *Lyall*, 7 C. B. N. S. 638; *Clarke* v. *Morgan*, 38 L. T. 354, in which last case Lindley, J., expressly states his opinion that the decisions in *Ward* v. *Weeks* and *Parkins* v. *Scott* have been in no way overruled by *Riding* v. *Smith* and *Evans* v. *Harries*, 26 L. J. Ex. 31; 1 H. & N. 254. It is only in cases where the words are not actionable *per se*, that the rule as to the remoteness of damages inflicts this apparent hardship upon the plaintiff; for where the words are actionable *per se*, and in all cases of libel, the jury find the damages *generally*, and will be careful to punish the author of a pernicious falsehood with all due severity; although, of course, the judge will still direct them not to take into their consideration any damage which ensued from a repetition by a stranger. (*Rutherford* v. *Evans* (1829), 4 C. & P. 79; *Tunnicliffe* v. *Moss*, 3 C. & K. 83.)

Illustrations.

Weeks was speaking to Bryce of the plaintiff, and said, "He is a rogue and a swindler; I know enough about him to hang him." Bryce repeated this to Bryer as Weeks' statement. Bryer consequently refused to trust the plaintiff. *Held* that the judge was right in nonsuiting the plaintiff: for the words were not actionable *per se*, and the damage was too remote.

Ward v. *Weeks*, 7 Bing. 211; 4 M. & P. 796.

Hirst v. *Goodwin*, 3 F. & F. 257.

A groom in a passion called a lady's-maid "a whore." A lady, hearing the groom had said so, refused to afford the lady's-maid her customary hospitality. *Held* that no action lay, for the groom had never spoken to the lady.

Clarke v. *Morgan*, 38 L. T. 354.

Dixon v. *Smith*, 5 H. & N. 450; 29 L. J. Ex. 125, *ante*, p. 316.

The defendant's wife charged Mrs. Parkins with adultery. She indignantly told her husband, and he was unreasonable enough to insist upon a separation in consequence. *Held* that the defendant was not liable.

Parkins et ux. v. *Scott et ux.*, 1 H. & C. 153; 31 L. J. Ex. 331; 8 Jur. N. S. 593; 10 W. R. 562; 6 L. T. 394.

Bingham caused a libel on plaintiff, the proprietor of a newspaper, to be printed by Hinchcliffe as a placard, and distributed 5000 such placards. He also put the same libel into a rival newspaper, the defendant's, as an advertisement. Plaintiff sued both Bingham and Hinchcliffe as well as the defendant, alleging that the circulation of his paper had greatly declined. The action against the defendant came on first, and his counsel, having failed to prove the justification pleaded, contended that the decline of

circulation must principally be ascribed to the 5000 placards, not to the advertisement. Martin, B., while admitting that defendant was not liable for damage caused by the placards, ruled that it lay on defendant to prove that the damage sustained by the plaintiff was in fact due to the placard, and not to the advertisement. Verdict for the plaintiff, 500*l.* In the action against Bingham and Hinchcliffe plaintiff recovered only 40*s.* The 500*l.* was probably due to the justification pleaded and not proved.

Harrison v. *Pearce*, 1 F. & F. 567 ; 32 L. T. (Old S.) 298.

But this rule, that the originator of a slander, not actionable *per se*, is not liable for damage caused by its repetition, cannot of course override the general principle that every man will be liable for the natural and necessary consequences of his act. And it may well be that the repetition of a slander may be the natural and necessary consequence of defendant's original publication. It clearly is so whenever the original communication made to A., places A. under a moral obligation to repeat the slander to B. And, indeed, if defendant knew the relation in which A. stood to B., he will be taken to have maliciously contemplated and desired this result when he spoke to A. So, again, whenever the first publisher either expressly or implicitly requested or procured the repetition; then he will of course be liable for all the mischief caused by the act of his agent, and the agent would be liable also.

In America the judges in one or two cases appear to carry this doctrine further, and seem to lay down the rule that wherever the repetition is *innocent* (that is, I presume, not malicious, and on a privileged occasion), the originator must be liable for all consequential damage caused by the repetition; for else, it is said, the person injured would be without a remedy. He cannot sue the person repeating the slander, as the repetition is privileged ; therefore he *must* be able to sue the first publisher for the damage caused by his own publication, and by the innocent repetition as well. "Where slanderous words are repeated *innocently* and without an intent to defame, as under some circumstances they may be, I do not see why the

author of the slander should not be held liable for injuries resulting from it as thus repeated, as he would be if these injuries had arisen directly from the words as spoken by himself." (*Per* Beardsley, J., in *Keenholts* v. *Becker*, 3 Denio N. Y. 352, and see *Terwilliger* v. *Wands*, 17 N. Y. 58.) But this is not the law of England, at all events; it by no means follows that because the repetition is privileged or innocent, that it is therefore the natural and necessary consequence of the prior publication. In *Parkins* v. *Scott* the repetition was clearly innocent; yet no action lay against the original defamer. Mrs. Parkins was in fact held to have no remedy. So also in *Holwood* v. *Hopkins*, Cro. Eliz. 787, the communication would probably in the present day be deemed privileged.

Illustrations.

The plaintiff was governess to Mr. L.'s children; the defendant told her father that she had had a child by Mr. L.: the father went straight to Mr. L. and told him what defendant had said. Mr. L. thereupon said that the plaintiff had better not return to her duties, for although he knew that the charge was perfectly false, still for her to continue to attend to his children, would be injurious to her character and unpleasant to them both. *Held* that the repetition by the father to Mr. L., and his dismissal of the plaintiff, were both the natural consequences of the defendant's publication to the father.

Gillett v. *Bullivant*, 7 L. T. (Old S.) 490.

Fowles v. *Bowen*, 3 Tiff. (30 N. Y.) 20.

A police magistrate dismissed a trumped-up charge brought by the plaintiff, a policeman, and added: "I am bound to say, in reference to this charge and a similar one brought from the same spot a few days ago, that I cannot believe William Kendillon on his oath." This observation was duly reported to the Commissioners of Police, who in consequence dismissed the plaintiff from the force. Lord Denman held that the dismissal was special damage for which the defendant would have been liable, if the action had lain at all: for he must have known that such a remark would certainly be reported to the commissioners, and would most probably cause them to dismiss the plaintiff. Nonsuit on the ground of privilege.

Kendillon v. *Maltby*, 1 Car. & Marsh. 402.

[N.B. The report of this case in 2 Moo. & Rob. 438, refers only to the point of privilege.]

H. told Mr. Watkins that the plaintiff, his wife's dressmaker, was a woman of immoral character. Mr. Watkins naturally informed his wife of this charge, and she ceased to employ the plaintiff. *Held* that the plaintiff's

loss of Mrs. Watkins' custom was the natural and necessary consequence of the defendant's communication to Mr. Watkins.

Derry v. *Handley*, 16 L. T. 263.

If the defendant makes an oral statement to the reporter of a newspaper, intending and desiring him to insert the substance of it in the paper, he is liable for all the consequences of its appearing in print, although he may not have expressly requested the reporter to publish it.

Bond v. *Douglas*, 7 C. & P. 626.

R. v. *Lovett*, 9 C. & P. 462.

Adams v. *Kelly*, Ry. & Moo. 157.

R. v. *Cooper*, 8 Q. B. 533 ; 15 L. J. Q. B. 206.

CHAPTER XI.

COSTS.

If an action of slander or libel be tried by a jury, the costs always follow the event unless, upon application made at the trial for good cause shown, the Judge before whom such action is tried, or the Court, shall otherwise order. (Order LV. r. 1.) If by any chance such an action be tried by a Judge alone (which it very seldom is, except in the case of trade libels; *Thomas* v. *Williams*, 14 Ch. D. 864; 49 L. J. Ch. 605; 28 W. R. 983; 43 L. T. 91), the costs are absolutely in his discretion. The provisions of the County Courts Act, 1867 (30 & 31 Vict. c. 142, s. 5), no longer apply to actions of libel or slander, since s. 67 of the Judicature Act, 1873, came into operation: for no action of either slander or libel can be brought in the County Court, except by consent.

Formerly the provisions of the County Courts Act applied to all actions, whether they could be brought in the County Court or not; the words of the Act being wider than the Legislature intended. (*Sampson* v. *Mackay*, L. R. 4 Q. B. 643; 10 B. & S. 694; 38 L. J. Q. B. 245; 17 W. R. 883; 20 L. T. 807; *Gray* v. *West et ux.*; L. R. 4 Q. B. 175; 9 B. & S. 196; 38 L. J. Q. B. 78; 17 W. R. 497; 20 L. T. 221; *Craven* v. *Smith*, L. R. 4 Ex. 146; 38 L. J. Ex. 90; 17 W. R. 710; 20 L. T. 400; *Kent* v. *Lewis*, 21 W. R. 413.) Formerly also the provisions of Lord Denman's Act (3 & 4 Vict. c. 24, s. 2) applied to actions of slander and libel, and therefore a plaintiff who

recovered less than 40*s.* damages could not recover any costs whatever from the defendant unless the judge immediately certified on the record that the slander or libel was wilful and malicious. But even if the judge certified both that the action was one fit to be tried in the Superior Court, and also that the slander was wilful and malicious, so as to take the case out of both the 30 & 31 Vict. c. 142, s. 5, and the 3 & 4 Vict. c. 24, s. 2, still no certificate could enable a plaintiff to get more costs than damages if he sued for a slander actionable *per se*, and recovered less than 40*s.* (*Evans* v. *Rees*, 9 C. B. N. S. 391; 30 L. J. C. P. 16; *Marshall* v. *Martin*, L. R. 5 Q. B. 239; 39 L. J. Q. B. 85; 18 W. R. 378; 21 L. T. 788.) For the relentless words of the 21 Jac. I. c. 16, contain no proviso enabling a judge to make any exemption from the imperative rule that a plaintiff, suing on the case for slanderous words, and recovering less than 40*s.*, shall have "only so much costs as the damages so given or assessed amount unto." This statute, 21 Jac. I. c. 16, was held to apply only to words actionable *per se*, and not to actions of libel, of slander of title, of *scandalum magnatum*, or where the words are actionable only by reason of special damage alleged.

But both the 21 Jac. I. c. 16 and the 3 & 4 Vict. c. 24, s. 2, and all special Acts relating to costs, are now repealed by s. 33 of the Judicature Act, 1875 (*Parsons* v. *Tinling*, 2 C. P. D. 119; 46 L. J. C. P. 230; 25 W. R. 255; 35 L. T. 851; *Garnett* v. *Bradley* (C. A.), 2 Ex. D. 349; 46 L. J. Ex. 545; 25 W. R. 653; 36 L. T. 725; (H. of Lds.) 3 App. Cas. 944; 48 L. J. Ex. 186; 26 W. R. 698; 39 L. T. 261; *Ex parte Mercers' Company*, 10 Ch. D. 481; 48 L. J. Ch. 384; 27 W. R. 424; while the County Courts Act, 1867, is, by the express words of s. 67 of the Judicature Act of 1873, restricted to actions in which relief can be given in a County Court; and slander and libel are not among such actions (County Courts Act, 1846 (9 & 10 Vict. c. 95), s. 58).

Hence now, if a plaintiff recovers nominal damages merely, he will get his costs, unless the Judge or a Divisional Court otherwise orders. It is therefore the duty of defendant's counsel at once to apply for such an

order, or at least at the same sitting of the Court. (*Kynaston* v. *Mackinder*, 47 L. J. Q. B. 76; 37 L. T. 390.) He cannot apply to that Judge subsequently, nor to a Judge at chambers. (*Baker* v. *Oakes* (C. A.), 2 Q. B. D. 171; 46 L. J. 246; 25 W. R. 220; 35 L. T. 832; *Tyne Alkali Co.* v. *Lawson*, 36 L. T. 100; W. N. 1877, p. 18; *Forsdike and wife* v. *Stone*, L. R. 3 C. P. 607; 37 L. J. C. P. 301; 16 W. R. 976; 18 L. T. 722.) If no application be made at the trial, the only chance is to apply to a Divisional Court, which has under Order LV. an original jurisdiction to make an order to deprive a successful plaintiff of the costs of an action tried before a jury. (*Myers* v. *Defries*; *Siddons* v. *Lawrence*, 4 Ex. D. 176; 48 L. J. Ex. 446; 27 W. R. 791; 40 L. T. 795.)

But such an application must be made within a reasonable time. (*Kynaston* v. *Mackinder*, 47 L. J. Q. B. 76; 37 L. T. 390; *Bowey* v. *Bell*, 4 Q. B. D. 95; 48 L. J. Q. B. 161; 27 W. R. 247; 39 L. T. 608.) In the three other cases reported with *Bowey* v. *Bell*, in the first, *Brooks* v. *Israel*, the plaintiff was eventually allowed his costs on the merits; and so in the second, *North* v. *Bilton*; while in *Siddons* v. *Lawrence* the plaintiff was eventually deprived of his costs, good cause being shown.

The Judge or Divisional Court will, as a rule, only deprive a plaintiff of his costs where "contemptuous" damages, such as a farthing or a shilling, are given. If forty shillings or more be given, the law is generally allowed to take its course. Though in a recent case Huddleston, B., deprived a plaintiff of his costs, where the verdict was for £10 damages, and his discretion was approved both in the Exchequer Division and in the Court of Appeal. (*Harnett* v. *Vise and wife*, (C. A.) 5 Ex. D. 307; 29 W. R. 7.) But there of course the circumstances were exceptional.

And although the rule expressly requires that the Judge should only interfere as to costs, "upon application made at the trial for good cause shown," it has now been decided that the Judge need not wait for any express application to be made to him, but may make such an order *mero motu*, if he think proper. (*Turner* v. *Heyland*, 4 C. P. D. 432; 48 L. J. C. P. 535; 41 L. T. 556); provided both parties are still present and have an opportunity of arguing the question at the time. (*Collins* v. *Welch*, 5 C. P. D. 27; 49 L. J. 260; 28 W. R. 208; 41 L. T. 785.) It must be assumed that "the counsel in whose favour the order was made was ready to apply for it." But see *Marsden and wife* v. *Lancashire and Yorkshire Ry. Co.*, 42 L. T. 631.

Application for any special costs, such as those of shorthand writer's notes, or of a commission abroad, or of a special jury, or of photographic copies of the libel, should be made when judgment is delivered. No order will be made as to such costs after the judgment has been drawn up; they must be borne by the party ordering them. (*Ashworth* v. *Outram*, 9 Ch. D. 483; 27 W. R. 98; 39 L. T. 441; *Executors of Sir Rowland Hill* v. *Metropolitan District Asylum*, 49 L. J. Q. B. 668; 43 L. T. 462; W. N. 1880, p. 98; *Davey* v. *Pemberton*, 11 C. B. (N. S.) 629.) To entertain such an application would substantially be to rehear the cause. (*In re St. Nazaire Co.*, 12 Ch. D. 88; 27 W. R. 854; 41 L. T. 110.)

I presume that the word "judge," in Order LV., r. 1, includes the judge of a County Court to which the case is sent for trial; and an under-sheriff executing a writ of enquiry, for they were both included in the word "judge" in the 30 & 31 Vict. c. 142, s. 5. (*Taylor* v. *Cass*, L. R. 4 C. P. 614; 17 W. R. 860; 20 L. T. 667; *Craven* v. *Smith*, L. R. 4 Ex. 146; 38 L. J. Ex. 90; 17 W. R. 710; 20 L. T. 400.) A master, to whom an action is referred with the powers of a judge at Nisi Prius, may, in his award, make any order as to costs, not inconsistent with the terms of the submission. (*Bedwell* v. *Wood*, 2 Q. B. D. 626; 36 L. T. 213.) It is, however, usual in references to give the

arbitrator power over the costs of the reference and award only, leaving the costs of the action to follow the event. (And see *Frean* v. *Sargent*, 2 H. & C. 293; 32 L. J. Ex. 281; 11 W. R. 808; 8 L. T. 467.)

These rules as to nominal damages carrying costs apply to all courts whatsoever in England and to all actions of slander and libel, wherever tried, so long as they come before a jury. Thus, in the Salford Hundred Court of Record (*Turner* v. *Heyland*, 4 C. P. D. 432; 48 L. J. C. P. 535; 41 L. T. 556), or in the Liverpool Court of Passage (*King* v. *Hawkesworth*, 4 Q. B. D. 371; 48 L. J. Q. B. 484; 27 W. R. 660; 41 L. T. 411), the rule is the same as in the Superior Courts.

And if at the first trial there was a nonsuit and a new trial be granted, which results in plaintiff's favour, Order LV. gives him his costs of both trials, if no order be made to the contrary. (*Creen* v. *Wright*, 2 C. P. D. 354; 46 L. J. C. P. 427; 25 W. R. 502; 36 L. T. 355. *Field* v. *Great Northern Ry. Co.*, 3 Ex. D. 261; 26 W. R. 817; 39 L. T. 80.)

But if the Judge chooses to make an order, that order is not necessarily that each party should pay his own costs. He may on *very* good cause shown, order that the successful plaintiff should pay defendant's costs; and where there has been a nonsuit, and a new trial, the Judge who tries the case the second time may order that the successful plaintiff shall pay the whole costs of both trials. (*Harris* v. *Petherick* (C. A.), 4 Q. B. D. 611; 48 L. J. 521; 28 W. R. 11; 41 L. T. 146.) But of course such an order would only be made in an extreme case. (See *Norman* v. *Johnson*, 29 Beav. 77; *Wootton* v. *Wootton*, Weekly Notes, 1869, p. 175.)

In *Harris* v. *Petherick*, 4 Q. B. D. 612, Bramwell, L.J., says: "If it were possible to apportion the costs of the issues

between the parties, perhaps it would in some cases, especially in actions for slander where the damages are assessed at a farthing, be the most satisfactory manner of concluding a litigation in which, at least technically, both the plaintiff and the defendant are to blame." And accordingly it has now been decided that where the plaintiff joins four distinct causes of action in one suit (*e.g.*, malicious prosecution, libel, slander, and trespass), and the jury find for the plaintiff damages one farthing for the libel, and for the defendant as to the other causes of action, the word "event" must be read distributively, and the defendant is entitled to tax his costs of the issues found for him, unless the Court or a judge otherwise orders. (*Myers* v. *Defries*, 5 Ex. D. 15, 180; 48 L. J. 446; 49 L. J. Ex. 266; 28 W. R. 258, 406; 41 L. T. 137, 659; *Davidson* v. *Gray*, 5 Ex. D. 189, n.; 40 L. T. 192; (C. A.) 42 L. T. 834.) And by analogy to these cases, it would appear the right course in some cases to apportion the costs of the various issues arising out of the same cause of action where it is possible so to do. (See *James* v. *Brook*, 16 L. J. Q. B. 168; *Prudhomme* v. *Fraser*, 2 A. & E. 645.) Thus, if a defendant in an action of defamation both justified and pleaded privilege, and called at the trial ten witnesses in support of his plea of justification, all of whom broke down under cross-examination, or were confuted by the evidence of plaintiff's witnesses, and the jury found that the words were false, and yet at the same time it appeared that the occasion of publication was clearly a privileged one, and there was no evidence of malice, here it would clearly be right that the plaintiff should pay the general costs of the action, for he ought never to have brought it; but that all extra costs occasioned by the plea of justification being placed on the record should be paid by the defendant. (See *Skinner* v. *Shoppee et ux.* 6 Bing. N. C. 131; 8 Scott, 275; *Empson* v. *Fairfax*, 8 A. & E. 296; 3 N. & P. 385; *Harrison* v. *Bush*, 5 E. & B. 344; 25 L. J. Q. B. 99; 2 Jur. N. S. 90.) As the law now stands, the plaintiff would have to pay all the costs of the action, unless a special order be made to the above effect. But supposing that the judge at the trial makes such an order, there are immense practical difficulties in the way of taxation. It would be difficult for the master, who was not at the trial, to determine whether it was, or was not, solely in consequence of the plea of justification that a par-

ticular witness was subpœnaed, or a particular page of the brief prepared. The only plan would be to tax the costs of the action generally, and then deduct such sum as the plaintiff could prove to have been occasioned by the justification. This is the plan adopted in Chancery, where a claim and a counter-claim are both dismissed with costs. (See *post*, p. 341; *Bailiff of Burford* v. *Lenthall and others*, 2 Atk. 551, and *Cracknall* v. *Janson* (C. A.), 11 Ch. D. 1, 23; 27 W. R. 851; 40 L. T. 640.)

But even this involves great additional trouble, and the masters generally adopt a rough and ready method of apportionment. Thus in *Knight* v. *Pursell*, 49 L. J. Ch. 120; 28 W. R. 90; 41 L. T. 581, where the plaintiff applied for an injunction in respect of three separate subjects of complaint, and was successful as to one, unsuccessful as to the other two, and a special order was made, the taxing-master taxed the costs of the action as a whole, and then divided them into thirds, allowing plaintiff one third, and defendant two-thirds of both plaintiff's and defendant's costs. And the Court held that this was all that could be expected of him.

As to dividing the costs of a divisible plea of justification, see, under the old practice, *Biddulph* v. *Chamberlayne*, 17 Q. B. 351; *Reynolds* v. *Harris*, 3 C. B. N. S. 267; 28 L. J. C. P. 26. As to costs of immaterial issues, see *Goodburne* v. *Bowman*, 9 Bing. 667.

Payment into Court.

It has now been finally decided by the Court of Appeal that money may be paid into Court in any action of libel or slander without admitting the plaintiff's cause of action, and that any other defence may be pleaded at the same time, even a justification. (*Hawkesley* v. *Bradshaw* (C. A.) 5 Q. B. D. 302; 49 L. J. Q. B. 333; 28 W. R. 557; 42 L. T. 285.) If the plaintiff accepts the sum paid into Court in satisfaction of his claim, he must give the defendant a notice in Form No. 6, Jud. Act, 1875, App. B.; and may then proceed to tax his costs, and in case of non-payment within forty-eight hours,

may sign judgment for his costs. But even in this case the plaintiff is subject to the general jurisdiction of the Court over all costs; and may be deprived of his costs, if the whole action was useless or malicious. (*Broadhurst* v. *Willey*, Weekly Notes, 1876, p. 21.) If the plaintiff does not accept the sum paid into Court, but continues his action for the balance, he may have to pay the whole costs of the action, should the jury deem the sum paid insufficient. (*Langridge* v. *Campbell*, 2 Ex. D. 281; 46 L. J. Ex. 277; 36 L. T. 64; 25 W. R. 351.) But the practice in this respect has lately changed; and the rule now is, that in the absence of special circumstances, the plaintiff shall have his costs of the action up to the time when the money was paid into Court, and the defendant shall have his costs after that time. (*Buckton* v. *Higgs*, 4 Ex. D. 174; 27 W. R. 803; 40 L. T. 755.)

Counterclaim.

It is very seldom that there is a counterclaim in an action of libel or slander; but wherever there is, its presence always complicates the question of costs. The law on this point can hardly be considered as settled at present. But it is clear that the County Courts Act, 1867, does not apply to actions of libel or slander, nor to counterclaims of any kind. (*Blake* v. *Appleyard*, 3 Ex. D. 195; 47 L. J. Ex. 407; 26 W. R. 592.) It follows therefore, where the original action is either for libel or slander and the defendant sets up any counterclaim, that if the plaintiff recover any sum at all, even a farthing, and the defendant nothing on his counterclaim; then the plaintiff, in the absence of any special order to the contrary, is entitled to the whole costs of the action. (*Potter* v. *Chambers*, 4 C. P. D. 457; 48 L. J. C. P. 274; 27 W. R. 414.) If both recover some-

thing, the plaintiff on his claim and the defendant on his counterclaim, then the one who recovers the larger sum is entitled to the general costs of the cause; the other to the costs only of the particular issues which have been found in his favour. (*Blake* v. *Appleyard*, 3 Ex. D. 195; 47 L. J. Ex. 407; 26 W. R. 592; *Hallinan* v. *Price*, 27 W. R. 490; 41 L. T. 627; *Neale and others* v. *Clark and others*, 4 Ex. D. 286; 41 L. T. 438; *Davidson* v. *Gray*, 5 Ex. D. 189 n.; 40 L. T. 192; (C. A.) 42 L. T. 834; *Cole* v. *Firth*, 4 Ex. D. 301; 40 L. T. 857; *Stooke* v. *Taylor*, 5 Q. B. D. 569; 49 L. J. Q. B. 857; 29 W. R. 49; 43 L. T. 208.) If neither plaintiff nor defendant recover anything, and both claim and counterclaim be dismissed with costs, the plaintiff pays the general costs of the action, including those common to both claim and counterclaim, for he commenced the litigation; the defendant pays only such costs as the plaintiff can prove to have been occasioned by the counterclaim. (*Saner* v. *Bilton*, 11 Ch. D. 416; 48 L. J. Ch. 545; 27 W. R. 472; 40 L. T. 134, followed in the Court of Appeal in *Mason* v. *Brentini*, 15 Ch. D. 287; 29 W. R. 126; 42 L. T. 726; 43 L. T. 557.) If, however, the action be not of libel or slander, but be such that it could have been brought in the County Court, then the plaintiff cannot recover any costs at all from the defendant, unless the damages exceed £20, in an action of contract, or £10 in an action of tort; while the defendant is entitled to recover on his counterclaim in libel or in slander all the costs of his counterclaim, if he recover a farthing only thereunder. (*Staples* v. *Young*, 2 Ex. D. 324; 25 W. R. 304; *Chatfield* v. *Sedgwick*, 4 C. P. D. 459; 27 W. R. 790; 41 L. T. 438; *Rutherford* v. *Wilkie*, 41 L. T. 435.)

As to when costs will be given on the "higher scale,"

see *Horner* v. *Oyler*, 49 L. J. C. P. 655, and *Chapman* v. *Midland Ry. Co.*, 5 Q. B. D. 167; 28 W. R. 413; (C. A.) 5 Q. B. D. 431; 49 L. J. Q. B. 449; 28 W. R. 592; 42 L. T. 612.)

When an action of libel or slander is remitted to the County Court, under s. 10 of the County Courts Act, 1867 (30 & 31 Vict. c. 142), the costs will follow the event, unless the Judge at the trial make any order to the contrary (County Courts Act, 1846, 9 & 10 Vict. c. 95, s. 88); the costs of the proceedings in the Superior Court will be allowed according to the scale in use in the Superior Court; the costs incurred subsequent to the order of reference according to the County Court scale.

Any costs occasioned by undue prolixity in the endorsement on the writ (Order II., r. 2), or in the pleadings (Order XIX., r. 2), or by delivering interrogatories unnecessarily, vexatiously, or at improper length (Order XXXI., r. 2), shall be borne by the party in fault.

As to costs in criminal proceedings, see, as to indictments, *post*, p. 590; as to criminal informations, *post*, p. 595.

CHAPTER XII.

THE LAW OF PERSONS IN BOTH CIVIL AND CRIMINAL CASES.

We have hitherto dealt with the plaintiff and defendant as individuals, under no disability, who sue and are sued singly and in their own right. I propose in this chapter to examine the rights and liabilities of joint plaintiffs and defendants, and also to deal with cases of personal disability or disqualification, both in civil and criminal cases.

Formerly the law and practice as to "parties" was of the utmost importance, misjoinder of a plaintiff being ground of nonsuit, while a non-joinder of a necessary plaintiff was the subject of a plea in abatement. But now, by Judicature Act, 1875, Order XIX., r. 3, "no plea or defence shall be pleaded in abatement," and in Order XVI., r. 13, the general principle is laid down, that "No action shall be defeated by reason of the misjoinder of parties, and the Court may in every action deal with the matter in controversy, so far as regards the rights and interests of the parties actually before it. The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just, order that the name or names of any party or parties, whether as plaintiffs or defendants, who ought to have been joined, or whose presence before the

Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added." But such order will not as a rule be made where the party applying for it is clearly to blame, or where a hardship would thus be inflicted on his opponent. And even when such an order is made, it will generally be only upon payment of all costs thereby occasioned. The importance of this branch of the law is therefore scarcely diminished.

It will be convenient to divide this chapter into the following heads :—

1. Husband and Wife.
2. Infants.
3. Lunatics.
4. Bankrupts.
5. Receivers.
6. Executors and Administrators.
7. Aliens.
8. Master and Servant; Principal and Agent.
9. Partners.
10. Corporation and Companies.
11. Other Joint Plaintiffs.
12. Joint Defendants.

1. *Husband and Wife.*

Whenever words actionable *per se* are spoken of a married woman she may sue, but she must join her husband's name as co-plaintiff. When the words are not actionable *per se*, she may sue, provided she can show that some special damage has followed from the words *to her*. That special damage has accrued to her

husband, in consequence of such words, will not avail her; for such damage he alone can sue, although it is *her* reputation that has been assailed.

If the wife has been divorced or judicially separated from her husband, or has obtained a protection order under the 20 & 21 Vict. c. 85, s. 21, she may sue as a *feme sole* without joining her husband. (*Ramsden* v. *Brearley*, L. R. 10 Q. B. 147; 44 L. J. Q. B. 46; 23 W. R. 294; 32 L. T. 24.) If, however, she be living separate from her husband voluntarily, or under a deed of separation, she must join her husband as a co-plaintiff, even though the special damage alleged be the loss of her own personal earnings, which are now by the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 1, her separate estate. Though where the action is brought solely "for the protection and security" of such separate estate (*e. g.* an action for a libel upon her in the way of her separate trade); there by s. 11 she may sue alone. In the Chancery Division the practice is for a married woman in all actions relating to her separate estate to sue by her next friend, who will be personally liable for the costs of the action, and to make her husband a defendant. (*Roberts* v. *Evans*, 7 Ch. D. 830; 47 L. J. Ch. 469; 26 W. R. 280; 38 L. T. 99.) But in the Common Law Divisions it is still practically impossible for a wife to sue her husband. Under special circumstances, however, a married woman may by leave of a Master at Chambers sue without her husband and without her next friend, on giving due security for costs. (Order XVI., r. 8; *Martano* v. *Mann* (C. A.), 14 Ch. D. 419; 49 L. J. Ch. 510; 42 L. T. 890.)

If the words be spoken of the woman before marriage, the husband's name must still be joined on the writ; if she marry pending action, the husband should be made a party under Order L., r. 2.

If a married woman having general separate estate fail in an action of libel, she may be condemned in costs, although her husband was joined as a co-plaintiff. (*Newton and wife* v. *Boodle and others*, 4 C. B. 359; 18 L. J. C. P. 73; *Morris* v. *Freeman and wife*, 3 P. D. 65; 47 L. J. P. D. & A. 79; 27 W. R. 62; 39 L. T. 125.)

Whenever the wife is the meritorious cause of action, the right survives to her on her husband's death; the widow continues sole plaintiff and the action does not abate. If, however, the wife dies before final judgment, the action must cease; it cannot be continued by her husband either *jure mariti*, or as her administrator.

In Scotland a married woman can sue for libel or slander without joining her husband, a *curator ad litem* being appointed; and so she can by special statute in New York and Pennsylvania. But even in those States she cannot sue her husband for slandering her. (*Freethy* v. *Freethy*, 42 Barb. (N. Y.) 641; *Tibbs* v. *Brown*, 2 Grant's Cas. (Penns.) 39).

If defamatory words be spoken of a married woman and damage thereby follow to her husband, the husband can sue for the damage that has ensued to himself: and this whether the wife has suffered any special damage also or not. Formerly he would have been compelled to bring a separate action; by the Common Law Procedure Act, 1852, s. 40, the husband was allowed to add claims in his own right whenever he was necessarily made a co-plaintiff in any action brought for an injury done to his wife; and it was provided that on the death of either party the action should not abate so far as the causes of action belonging to the survivor were concerned. And now, by Order XVII., r. 4, "Claims by or against husband and wife may be joined with claims by or against either of them separately."

This right of the husband to sue for words defamatory of his wife is somewhat anomalous, for *his* reputation is in no way assailed; and though he has sustained damage, is it not *damnum sine injuriâ?* Generally speaking, if words defamatory of A., but not actionable in themselves, produce damage only to B., neither A. nor B. can sue. But the reputation of a husband is so intimately connected with that of his wife, that he has always been allowed to sue whenever he has received damage, just as though the words had been spoken of him.

And it would seem that this right attaches even where the words are not actionable *per se*; so that if such words be spoken of a married woman and damage ensue to the husband, none to her, she cannot sue, but he can. The damage to him is in fact the sole cause of action. That this is law, is clearly laid down in Siderfin, 346, under the year 1667 :—"Nota, si parols queux de eux m̃ ne sont Actionable mes solement in respect del collateral dam̃s. sont pl̃e. (parlés) del feme covert, Le Baron sole port L'action, et si le feme soit joyn ove luy le Judgment serra pur ceo arrest, coment soit apres verdict." Other cases of that date turn almost entirely on points of pleading (*e.g.*, whether the declaration should end "ad damnum ipsius" or "ad damnum ipsorum." (*Harwood et ux.* v. *Hardwick et ux.* (1668), 2 Keble, 387; *Coleman et ux.* v. *Harcourt* (1664), 1 Levinz, 140; *Grove et ux.* v. *Hart*, (1752) B. N. P. 7.) But so far as they decide any matter of principle, these cases are not inconsistent with the above citation from Siderfin; neither is *Russell et ux.* v. *Corne*, (1704) 1 Salk. 119; 6 Mod. 127; 2 Ld. Raym. 1031, which was at that date the leading case on the subject of battery of a wife. And this view is certainly confirmed by the recent case of *Riding* v. *Smith*, 1 Ex. D. 91; 45 L. J. Ex. D. 281; 24 W. R. 487; 34 L. T. 500; where the wife's name was struck off the record by the judge at the trial, and the husband recovered for the damage to his business caused by words not actionable *per se*, spoken of his wife; though there it is true the judges of the Exchequer Division base their judgment on the fact that Mrs. Riding helped her husband in the shop, and was therefore his servant or assistant as well as his wife. It will clearly, therefore, be prudent for the pleader to make a separate claim for damages for the hus-

band in all cases of the class of *Allsop* v. *Allsop*, 5 H. & N. 534; 29 L. J. Ex. 315.

Illustrations.

Where words actionable *per se* were spoken of a married woman, she was allowed to recover only 20*s.* damages; all the special damage which she proved at the trial was held to have accrued to her husband, and not to her: he ought therefore to have sued for it in a separate action. He could now claim such damage in the statement of claim in his wife's action.

Dengate and wife v. *Gardiner*, 4 M. & W. 5; 2 Jur. 470.

Where a married woman lived in service apart from her husband, maintaining herself, and was dismissed in consequence of a libellous letter sent to her master, it was held that the husband could sue: for his was the special damage (before the Married Women's Property Act, 1870).

Coward v. *Wellington*, 7 C. & P. 531.

In such a case, had the cause of her dismissal been slanderous words not actionable *per se*, the wife could not (before the Married Women's Property Act, 1870, at all events) have joined in the action at all. She would have been held to have suffered no damage at all, her personal property belonging entirely to her husband. *Per* Lord Campbell in

Lynch v. *Knight and wife*, 9 H. L. C. 589; 8 Jur. N. S. 724; 5 L. T. 291.

The female plaintiff lived separate from her husband and kept a boarding house. The defendant spoke words imputing to her insolvency, adultery, and prostitution; some of her boarders left her in consequence, and certain tradesmen refused her credit. After verdict for the plaintiff, judgment was arrested, on the ground that the husband should have sued alone, for the words were actionable only by reason of the damage to the business and such damage was solely his.

Saville et ux. v. *Sweeny*, 4 B. & Adol. 514; 1 N. & M. 254.

And so in America where a married woman was living apart from her husband under articles of separation, wherein the husband had covenanted that she might use his name in suing for any injury to her person or character, and the wife brought an action for slander in the joint names of her husband and herself; the defendant induced the husband to execute a deed releasing the cause of action, and pleaded the release in bar of the wife's action, and the Court was compelled to hold this deed a good answer to the action.

Beach et ux. v. *Beach*, 2 Hill (N. Y.), 260.

A married woman trading under her own name according to the custom of London, may sue as a trader without joining her husband, for a libel on her in the way of her trade. *Per* Brett, J., L. R. 9 C. P. 583.

A married woman carrying on a separate trade within the meaning of the Married Women's Property Act, 1870, sect. 1, may by sect. 11 sue without joining her husband for any tort affecting such separate trade or her credit therein.

Summers v. *City Bank*, L. R. 9 C. P. 580; 43 L. J. C. P. 261.

Where the libel imputed that the plaintiff, a married man, kept a gaming-house, and that his wife was a woman of notoriously bad character, and the wife fell ill and died in consequence, evidence of such damage was excluded in an action brought by the surviving husband alone.

Guy v. *Gregory*, 9 C. & P. 584.

And see *Wilson* v. *Goit*, 3 Smith, (17 N. Y. R.) 445, *ante*, p. 313.

Words directly defamatory of the wife may also be defamatory of the husband, who may therefore sue alone. Thus where defendant said to plaintiff's wife : " You are a nuisance to live beside of. You are a bawd ; and your house is no better than a bawdy-house," it was held unnecessary to make the wife a party to the action, although the husband proved no special damage. For had the charge been true, the plaintiff might have been indicted as well as his wife.

Huckle v. *Reynolds*, 7 C. B. N. S. 114.

Coleman et ux. v. *Harcourt*, (1664) 1 Lev. 140..

And see *Bash* v. *Somner*, 20 Pennsylvania St. R. 159.

Where the defendant said to the plaintiff, an innkeeper, " Thy house is infected with the pox, and thy wife was laid of the pox," it was held that the husband could sue ; for even if smallpox only was meant, the words were still actionable, " for it is a discredit to the plaintiff, and guests would not resort hither." Damages £50.

Levet's Case, Cro. Eliz. 289.

" If an innkeeper's wife be called '*a cheat*,' and the house lose the trade, the husband has an injury by the words spoken of his wife." *Per* Wythens, J., in

Baldwin v. *Flower*, (1688) 3 Mod. 120.

Grove et ux. v. *Hart*, (1752) B. N. P. 7.

For all libels published, or slanders uttered, by the wife during coverture, her husband is liable, and must always be joined with her as a defendant. This is so, even where the plaintiff wishes to charge the wages and earnings of the wife, which are now her separate property; for the Married Women's Property Act, 1870, makes no alteration in the position of a married woman as defendant. (*Hancocks & Co.* v. *Madame Demeric-Lablache;* 3 C. P. D. 197; 47 L. J. C. P. 514; 26 W. R. 402; 38 L. T. 753.)

For all libels published, or slanders uttered by the wife before coverture, her husband was at common law liable to the full extent. But on this point the law has recently been altered by the Married Women's Property

Act Amendment Act, 1874 (37 & 38 Vict. c. 50), ss. 2, 5, which limit the liability of the husband for torts committed by his wife *dum sola* to the extent merely of the property which has vested in him by reason of the marriage. Still the husband must be made a joint defendant in every case, and must plead specially that no property came to him with his wife, if such be the fact.

If the husband dies, the action continues against the widow; if however the wife dies in the lifetime of her husband, the action immediately abates. If they be divorced, the wife must be sued alone, even though the words complained of were published before the divorce. (*Capel* v. *Powell and another*, 17 C. B. N. S. 743; 34 L. J. C. P. 168; 10 Jur. N. S. 1255; 13 W. R. 159; 11 L. T. 421.) So in the case of a judicial separation (20 & 21 Vict. c. 85, ss. 25, 26.) But if the husband and wife voluntarily live apart under a separation deed, the common law rule prevails, and the husband must be joined as a defendant. (*Head* v. *Briscoe et ux.* 5 C. & P. 485; 2 L. J. C. P. 101.)

A married woman will be held criminally liable for a libel she has published. (*R.* v. *Mary Carlile*, 3 B. & Ald. 167.) Her coverture will, it seems, be no defence to an indictment for a misdemeanour. (*R.* v. *Ingram*, 1 Salk. 384; *R.* v. *Cruse and Mary his wife*, 2 Moo. C. C. 53; 8 C. & P. 541.)

Illustrations.

Plaintiff sued Orchard and his wife for slanderous words, the jury found that Orchard had spoken the words, but not Mrs. Orchard. Judgment against the husband. It was moved in arrest of judgment that the speaking of the words could not be a joint act, and that if the husband alone uttered them, the wife ought never to have been made a party to the action. But it was held that this defect was cured by the verdict, and that the plaintiff was entitled to retain his judgment.

Burcher v. *Orchard et ux.* (1652) Style, 349.

But see *Swithin et ux.* v. *Vincent et ux.* (1764) 2 Wils. 227.

Mrs. Harwood slandered Mrs. White; wherefore White and wife sued

Harwood and wife. Pending action, Harwood died, and his widow remarried. The Court was very much puzzled, and gave no judgment, apparently, though inclining to think that the writ abated. I think it would now depend on whether the widow had any property at the date of her second marriage; if so, the second husband could be added under Order L. r. 2; if not, the action would probably be held to abate: but it would certainly be but little use continuing it. See the Married Women's Property Act Amendment Act, 1874 (37 & 38 Vict. c. 50) s. 2.

White et ux. v. *Harwood et ux.* (1648) Style, 138; Vin. Abr. "Baron and Feme," A. a.

2. *Infants.*

An infant may sue by his next friend, as before the Judicature Act. The next friend of an infant is personally liable for the costs of the suit (*Caley* v. *Caley*, 25 W. R. 528); but security for costs will not as a rule be required from him, lest the infant should lose his rights altogether. That an infant has been defamed gives his parents no right of action, unless in some very exceptional case it deprives the parent of services which the infant formerly rendered, in which case an action on the case may lie for the special damage thus wrongfully inflicted, provided it be the natural and probable consequence of the defendant's words. (See *post*, Master and Servant, p. 358.) A child will be held to be the servant of its parents, provided it is old enough to be capable of rendering them any act of service. (*Dixon* v. *Bell*, 5 Maule & S. 198; *Hall* v. *Hollander*, 4 B. & C. 660; 7 D. & R. 133; *Evans* v. *Walton*, L. R. 2 C. P. 615; 15 W. R. 1062.) An infant defends by a guardian *ad litem* appointed *ex parte* by the Master or District Registrar upon the infant's petition, supported by affidavit. Any fit and proper person *sui juris* and within the jurisdiction may be appointed, if he has no adverse interest. A co-defendant in the same interest may be appointed. If an infant defendant do not appear to a writ duly served,

the plaintiff may by virtue of Order XIII., r. 1, apply *ex parte* to a Master or District Registrar, on an affidavit of due service both of the writ and of notice of this application, for an order appointing some proper person guardian *ad litem*. A guardian *ad litem* is not liable for costs, unless he has been guilty of gross misconduct.

The infancy of the defendant is of course no defence to any action of tort not founded on contract. In *Defries* v. *Davies*, 7 C. & P. 112; 3 Dowl. 629, the defendant, a lad of fifteen, was imprisoned for default in payment of damages and costs for a slander.

An infant will also be criminally liable for any libel, if he be above the age of fourteen. If he be under fourteen but above seven, he might possibly be found guilty of a libel, if evidence were given of a disposition prematurely wicked. *Malitia supplet aetatem.* But much more than the proof of express malice ordinarily given in cases of privilege would probably be required. A child under seven cannot possibly commit any crime.

3. *Lunatics.*

It is almost inconceivable that an admitted lunatic should bring an action of libel or slander. But, should such an event happen, he ought to sue by his next friend, if he has not yet been found of unsound mind by inquisition; if he has been, then by his committee, who before commencing the action must obtain the sanction of the Lords Justices and of the Master in Lunacy in the proper way.

Lunatics defend an action by their committee, if one be appointed, and if he has no adverse interest; in other cases by a guardian *ad litem* appointed in the same way as in the case of an infant. (See *ante*, p. 352, and Order

XIII., r. 1.) Lunacy is in England no defence to an action for slander or libel. (*Per* Kelly, C. B., in *Mordaunt* v. *Mordaunt*, 39 L. J. Prob. & Matr. 59.) In America, however, insanity at the time of speaking the words is considered a defence, "where the derangement is great and notorious, so that the speaking the words could produce no effect on the hearers," because then "it is manifest no damage would be incurred." But where the degree of insanity is slight, or not uniform, there evidence of it is only admissible in mitigation of damages. (*Dickinson* v. *Barber*, 9 Tyng (Mass.), 218; *Yeates et ux.* v. *Reed et ux.*, 4 Blackford (Indiana), 463; *Horner* v. *Marshall's Administratrix*, 5 Munford (Virginia), 466.)

A lunatic cannot be held criminally liable for a libel, published under the influence of mental derangement; but the onus of proving this defence lies on the accused.

4. *Bankrupts.*

An undischarged bankrupt may sue for and recover damages for a personal wrong such as libel or slander, nor will such damages pass to his trustee under s. 15 of the Bankruptcy Act, 1869. (*Dowling* v. *Browne*, (1854) 4 Ir. C. L. R. 265; *Ex parte Vine*, *In re Wilson*, 8 Ch. D. 364; 26 W. R. 582; 38 L. T. 730.) The right of action is not assignable. (*Benson* v. *Flower*, Sir Wm. Jones, 215.) A defendant if sued by a bankrupt or one whose affairs are actually in liquidation is entitled to have security given for the costs of the action. (Common Law Procedure Act, 1852, s. 142. *Brocklebank & Co.* v. *King's Lynn Steamship Co.*, 3 C. P. D. 365; 47 L. J. C. P. 321; 38 L. T. 489.)

5. *Receivers.*

If receivers appointed by the Court of Chancery in an administration suit to carry on a gazette, publish a libel therein, they are of course personally liable to the defendant for damages and costs. The damages, it would seem, may be paid out of the estate, but not the costs; those the receivers must pay out of their own pocket. (*Stubbs* v. *Marsh*, 15 L. T. 312.) So in America. (*Marten* v. *Van Schaick*, 4 Paige, 479.)

6. *Executors and Administrators.*

The maxim *actio personalis cum personâ moritur* applies to all actions of libel and slander. If, however, a verdict be obtained, and then plaintiff die, his executor may enter up judgment: (17 Car. II. c. 8; *Palmer* v. *Cohen*, 2 B. & Adol. 966; cf. *Kramer* v. *Waymark*, L. R. 1 Ex. 241; 35 L. J. Ex. 148; 12 Jur. N. S. 395; 14 W. R. 659; 14 L. T. 368.) But if interlocutory judgment be signed and a writ of inquiry issue, and then plaintiff die, final judgment cannot be entered (8 & 9 Will. III. c. 11, s. 6; *Ireland* v. *Champneys*, 4 Taunt. 884). And the law on this point is in no way altered by Order L., r. 1. But if final judgment has once been entered in the plaintiff's favour, and then defendant appeals, the action will not abate; but the executors or administrators of the late plaintiff may appear as respondents to the appeal. (*Twycross* v. *Grant and others* (C. A.), 4 C. P. D. 40; 47 L. J. Q. B. 676; 27 W. R. 87; 39 L. T. 618.) So in America (*Sandford* v. *Bennett*, 24 N. Y. 20).

7. *Aliens.*

An alien friend residing abroad may sue in England for a libel or slander published of him in England. (*Pisani* v. *Lawson*, 6 Bing. N. C. 90; 5 Scott, 418.) The place where the words were spoken or published is the test of jurisdiction; not the domicile of the plaintiff or the defendant. (Order XI., r. 2.) But a foreign plaintiff, if domiciled abroad, will be ordered to give security for costs, unless he either has *real* property within jurisdiction available in execution, or is co-plaintiff with others resident in England. Plaintiffs resident in Scotland and Ireland are not, however, considered foreigners for this purpose (31 & 32 Vict. c. 54, s. 5).

If, however, an English plaintiff goes to reside out of jurisdiction during the action, he may be ordered to give security for costs, and that for costs already incurred as well as past costs. (*Massey* v. *Allen*, 12 Ch. D. 807; 48 L. J. Ch. 692; 28 W. R. 243.) On the other hand, if an alien plaintiff happen to be within jurisdiction at the date of the application, no order for security for costs can be made against him, even though it is admitted that he intends to return to the continent as soon as the case is at an end. (*Redondo* v. *Chaytor*, (C. A.) 4 Q. B. D. 453; 48 L. J. Q. B. 697; 27 W. R. 701; 40 L. T. 797.)

That the plaintiff is an outlaw is ground for staying proceedings. (*R.* v. *Lowe and Clements*, 8 Ex. 697; 22 L. J. Ex. 262.) But such stay will be removed on the reversal of the outlawry. (*Somers* v. *Holt*, 3 Dowl. 506.) But now no person can be outlawed in any civil proceeding. (42 & 43 Vict. c. 59, s. 3.)

Every foreigner within jurisdiction for however short

a time owes the Queen allegiance during his stay, and is subject to our laws. He will be liable therefore, both civilly and criminally, for every libel published within the jurisdiction of the English courts; he will also be civilly liable for every slander uttered within jurisdiction. If he has left England before the writ is issued, plaintiff must apply, under Order XI., for leave to issue a writ and give the defendant notice thereof in lieu of service out of the jurisdiction. (*Westman* v. *Aktiebolaget &c.*, 1 Ex. D. 237; 45 L. J. Ex. 327; 24 W. R. 405; *Beddington* v. *Beddington*, 1 P. D. 426; 45 L. J. P. D. 44; 24 W. R. 348; 34 L. T. 366; *Bustros* v. *Bustros*, 49 L. J. Ch. 396; 28 W. R. 595.) (For the form of such notice see Judicature Act, 1875, Appendix A., form No. 3.)

But if the words be spoken out of jurisdiction, the fact that they incidentally affect property within jurisdiction is not sufficient to bring the case within Order XI.

Illustrations.

The defendant out of jurisdiction made a statement in the nature of slander of title to the plaintiff's ship. The Court refused to allow the writ to be served, although the ship was at the time within jurisdiction.

Casey v. *Arnott*, 2 C. P. D. 24; 46 L. J. C. P. 3; 25 W. R. 46; 35 L. T. 424.

A French refugee in England wrote a stilted poem about the apotheosis of Napoleon Buonaparte, then first consul of the French Republic, suggesting that it would be an heroic deed to assassinate him. He was held amenable to the English criminal law, although the libel was purely political, affected no one in the British Isles, and attacked the man who was England's greatest enemy at the time. The jury found him guilty; but war broke out again between England and France soon afterwards, and no sentence was ever passed.

R. v. *Jean Peltier*, 28 Howell's St. Tr. 617.

8. *Master and Servant—Principal and Agent.*

If a servant or apprentice be libelled or slandered he can of course sue in his own right. In some cases his master also can sue in an action on the case, if the words have directly caused him pecuniary loss; *e. g.* if the servant has been arrested, and the master deprived of his services in consequence of the defendant's words; or if in any other way the natural consequence of the words spoken has been to injure the master in the way of his trade. And this appears to be the law whether the words be actionable *per se* or not.

Illustrations.

If defendant threaten plaintiff's workmen, so that they dare not go on with their work, and the plaintiff in consequence loses the profit he would have made on the sale of his goods, an action lies.

Garret v. *Taylor*, (1621) Cro. Jac. 567; 1 Roll. Abr. 108.

Springhead Spinning Co. v. *Riley*, L. R. 6 Eq. 551; 37 L. J. Ch. 889; 16 W. R. 1138; 19 L. T. 64.

"Supposing the statement made not to be slander, but something else calculated to injure the shopkeeper in the way of his trade, as for instance a statement that one of his shopmen was suffering from an infectious disease, such as scarlet-fever, this would operate to prevent people coming to the shop; and whether it be slander or some other statement which has the effect I have mentioned, an action can, in my opinion, be maintained on the ground that it is a statement made to the public which would have the effect of preventing their resorting to the shop and buying goods of the owner." *Per* Kelly, C.B., in

Riding v. *Smith*, 1 Ex. D. 94.

Mrs. Riding assisted her husband in his shop; words not actionable *per se* were spoken of her which by natural consequence injured the trade of the shop. Mrs. Riding sued the speaker, joining her husband for conformity. At the trial it became clear that the only special damage was to the husband. Thereupon the plaintiff's counsel applied to have the wife's name struck off the record. The learned judge made the required amendment, and the action then became an action by a master for injury to his business caused by slander of his assistant in that business. *Held*, that the action lay.

Riding v. *Smith*, 1 Ex. D. 91; 45 L. J. Ex. 281; 24 W. R. 487; 34 L. T. 500.

If any agent or servant be in any way concerned in writing, printing, publishing, or selling a libel, he will be both civilly and criminally liable. If a clerk or servant copy a libel, and deliver the copy he has made to a third person, he will be liable as a publisher. That his master or employer ordered him to do so, will be no defence. (*Per* Wood, B., in *Maloney* v. *Bartley*, 3 Camp. 210.) "For the warrant of no man, not even of the king himself, can excuse the doing of an illegal act; for although the commanders are trespassers, so are also the persons who did the fact." (*Per cur.* in *Sands, qui tam, &c.*, v. *Child and others*, (1693) 3 Lev. 352.) The agent or servant cannot recover any contribution from his employer (*Merryweather* v. *Nixan*, 2 Sm. Lg. Cases (8th Edn.) 546; 8 T. R. 186); and any promise to indemnify him against the consequences of the publication, or against the costs of an action brought for the libel, will be void. (*Shackell* v. *Rosier*, 2 Bing. N. C. 634; 3 Sc. 59.)

But it will be a defence if the agent or servant can satisfy the jury that he never read the paper he delivered and was wholly ignorant that it was a libel; *e.g.* where a postman or messenger carries a sealed letter of the contents of which he is not conscious.

So, too, a servant or agent will be liable for any slander uttered on his master's behalf and by his master's orders: but here he cannot set up as a defence that he did not know his master's orders were illegal; for he must be conscious of what he himself is saying.

Illustrations.

A compositor will be criminally liable for setting up the type of a libel; so will the man whose business it is merely to clap down the press.

R. v. *Knell* (1728), 1 Barnard. 305.

R. v. *Clerk*, 1 Barnard. 304.

A porter who, in the course of business, delivers parcels containing

libellous handbills, is not liable in an action for libel, if shown to be ignorant of the contents of the parcel ; for he is but doing his duty in the ordinary way.

Day v. *Bream*, 2 M. & Rob. 54.

A master or principal will be liable to an action, if false defamatory words be spoken or published by his servant or agent with his authority and consent. The mere fact that the actual publisher was the servant or agent of the defendant is not alone sufficient; for authority to commit an unlawful act will not in general be presumed. It must be further proved that the servant or agent in speaking or publishing the defamatory words was acting in accordance with the express or implied instructions of the defendant: the wrongful act then becomes the master's by construction, being the servant's in fact.

Where the instructions are express, there can be no difficulty. But the inclination of our Courts has of late years been not to press the doctrine of implied authority so far as was done in older cases. However, it is clear law that the proprietor of a newspaper is both civilly and criminally responsible for whatever appears in its columns, although the publication may have been made without his knowledge, and in his absence. For he must be taken to have ordered his servants to print and sell whatever manuscript the editor might send them for that purpose. The proprietor trusts to the discretion of the editor to exclude all that is libellous; if the editor fails in this duty, still the paper will be printed and published by the proprietor's servants, by virtue of his general orders. So if a master-printer has contracted to print a monthly magazine, he will be liable for any libel that may appear in any number printed at his office. So every bookseller must be taken to have told his shopmen to sell whatever books or pamphlets are in his shop for sale ; if any one contain libellous matter, the bookseller is (*primâ facie* at all events) liable for its publication by his servant by reason of such general instructions. But where a master's orders are such that they can be obeyed without any

illegality, he is not liable because his servant chooses to carry them out illegally and tortiously, even although the servant honestly believes that he is best serving his master's interests by thus executing his business.

But although the master has not authorised the act of the servant, still if it was done for his benefit and on his behalf, he may subsequently *ratify* it. *Omnis ratihibitio priori mandato aequiparatur.* But "in order that there may be a valid ratification, there must be both a knowledge of the fact to be ratified, and an intention to ratify it." (*Per* Keating, J., in *Edwards* v. *London & N. W. Ry. Co.*, L. R. 5 C. P. 449.) The master must do something more than merely stand by, and let the servant act. Non-intervention is not ratification. (*Moon* v. *Towers*, 8 C. B. N. S. 611; *Weston* v. *Beeman and another*, 27 L. J. Ex. 57.)

Illustrations.

At a meeting of a board of guardians, at which reporters were present, the chairman made a statement reflecting on the plaintiff, and added "I am glad gentlemen of the press are in the room, and I hope they will take notice of it: publicity should be given to the matter." A report accordingly appeared in two local papers. *Held* by the majority of the Exchequer Chamber (three judges against two) that there was some evidence to go to the jury that the defendant had expressly authorised the publication of the alleged libel in the newspapers.

Parkes v. *Prescott & another*, L. R. 4 Ex. 169; 38 L. J. Ex. 105; 17 W. R. 773; 20 L. T. 537.

See also *R.* v. *Cooper*, 8 Q. B. 533; 15 L. J. Q. B. 206.

Tarpley v. *Blabey*, 2 Bing. N. C. 437; 2 Scott, 642; 1 Hodges, 414.

The defendant's daughter, a minor, was authorised to make out his bills and write his general business letters: she chose to insert libellous matter in one letter. The father was held not liable for the wrongful act of his daughter, in the absence of any direct instructions.

Harding v. *Greening*, 8 Taunt. 42; 1 Moore, 477; 1 Holt N. P. 531.

See *Moon* v. *Towers*, 8 C. B. N. S. 611.

The defendant Moyes regularly printed *Fraser's Magazine;* but had nothing to do with preparing the illustrations. One number contained a libellous

lithographic print. The defendant, the printer, was held liable for this print, though he had never seen it; because it was referred to in a part of the accompanying letterpress, which had been printed by his servants. A rule on this point was refused. The editor was of course liable also.

Watts v. *Fraser & Moyes*, 7 C. & P. 369; 7 A. & E. 223; 1 Jur. 671; 1 M. & Rob. 449; 2 N. & P. 157; W. W. & D. 451.

The proprietor of a newspaper will be held liable for an accidental slip made by his printer's man in setting up the type.

Shepheard v. *Whitaker*, L. R. 10 C. P. 502; 32 L. T. 402.

And for a libellous advertisement inserted by the editor without his knowledge.

Harrison v. *Pearce*, 1 F. & F. 567; 32 L. T. (Old S.) 298.

The proprietor of a newspaper in America on going away for a holiday expressly instructed his acting editor to publish nothing exceptionable, personal or abusive, and warned him especially to scan very particularly any article brought in by B., who was known to be a "smart" writer. The editor permitted an article of B.'s to appear which contained libellous matter. The proprietor was held liable though the publication was made in his absence and without his knowledge.

Dunn v. *Hall*, 1 Carter, (Indiana) 345; 1 Smith, 288.
Huff v. *Bennett*, 4 Sand. (New York) 120.
Curtis v. *Mussey*, 6 Gray, (Mass.) 261.
Andres v. *Wells*, 7 Johns. (New York) 260.

A master or principal is criminally liable for any libel published by his servant or agent with his authority or consent. At common law he is even criminally liable for such libel, although he had no knowledge of what his servant was doing, if his servant was acting in pursuance of general orders. Thus, whenever an employer is civilly liable for a libel published by his servants, he is, apart from Lord Campbell's Act, criminally liable also. Indeed, in *Parkes* v. *Prescott and another*, (Exch. Ch.) L. R. 4 Ex. 169; 38 L. J. Ex. 105; 17 W. R. 773; 20 L. T. 537, Byles, J., asserts that the criminal liability of the master may be more extensive than his civil liability: — "There is a great distinction between the authority which will make a man liable criminally and the authority which will make him liable civilly. A principal is not civilly liable for the acts of his agent, unless the agent's authority be by the agent duly pursued;

but the principal may be criminally liable though the agent have deviated very widely from his authority." And the learned Judge, while approving of *R.* v. *Cooper*, 8 Q. B. 533; 15 L. J. Q. B. 206, as a decision in criminal law, refused to follow it as any authority in a civil case. But this view was not adopted by the rest of the Court.

The criminal liability of a master or principal for a libel published by his servant or agent without his knowledge or consent is now defined by s. 7 of Lord Campbell's Act (6 & 7 Vict. c. 96), by which it is enacted "that whensoever, upon the trial of any indictment or information for the publication of a libel, under the plea of 'Not Guilty,' evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part." This enactment applies only to criminal cases, and it may be questioned whether it altered or only declared, the existing criminal law. (See *R.* v. *Almon*, 5 Burr. 2686.) The only reported case on this section is *R.* v. *Holbrook and others*, 3 Q. B. D. 60; 47 L. J. Q. B. 35; 26 W. R. 144; 37 L. T. 530; 13 Cox, C. C. 650; 4 Q. B. D. 42; 48 L. J. Q. B. 113; 27 W. R. 313; 39 L. T. 536; 14 Cox, C. C. 185.

Illustrations.

The defendant kept a pamphlet-shop: she was sick and upstairs in bed: a libel was brought into the shop without her knowledge, and subsequently sold by her servant on her account. She was held criminally liable for the act of her servant, on the ground that "the law presumes that the master is acquainted with what his servant does in the course of his business."

R. v. *Dodd*, 2 Sess. Cas. 33.

Nutt's Case, Fitzg. 47; Barnard. K. B. 306.

But I doubt if later judges would have been quite so strict: the sickness upstairs would surely have been held an excuse, even before the 6 & 7 Vict. c. 96, s. 7, became law. See

R. v. *Almon*, 5 Burr. 2686.

A libel was published in a London newspaper, *The Morning Journal*. At the time of publication, Mr. Gutch, one of the proprietors, was away ill in Worcestershire, in no way interfering with the conduct of the paper, which was managed entirely by Alexander. Lord Tenterden directed the jury to find Gutch guilty, on the ground that it was on his capital that the paper was carried on, that he derived profit from its sale, and he had selected the editor who had actually inserted the libel. Lord Tenterden the next day admitted (p. 438) that some possible case might occur in which the proprietor of a newspaper might be held not criminally answerable for a libel which had appeared in it. Gutch was convicted, but subsequently discharged on his own recognizances.

R. v. *Gutch, Fisher & Alexander*, Moo. & Mal. 433.

R. v. *Walter*, 3 Esp. 21.

And see *Attorney-General* v. *Siddon*, 1 Cr. & J. 220.

The defendants were the proprietors of the *Portsmouth Times and Naval Gazette;* each of them managed a different department of the newspaper, but the duty of editing what was called the literary department was left by them entirely to an editor whom they had appointed, named Green. The libel in question was inserted in the paper by Green without the express authority, consent, or knowledge of the defendants. At the trial of a criminal information the judge directed a verdict of guilty against the defendants. *Held*, by Cockburn, C.J., and Lush, J., that there must be a new trial, for upon the true construction of 6 & 7 Vict. c. 96, s. 7, the libel was published without the defendants' authority, consent, or knowledge, and it was a question for the jury whether the publication arose from any want of due care and caution on their part. By Mellor, J., dissenting, that the defendants, having for their own benefit employed an editor to manage a particular department of the newspaper, and given him full discretion as to the articles to be inserted in it, must be taken to have consented to the publication of the libel by him: that 6 & 7 Vict. c. 96, s. 7, had no application to the facts proved, and that the case was properly withdrawn from the jury.

R. v. *Holbrook & others*, 3 Q. B. D. 60; 47 L. J. Q. B. 35; 26 W. R. 144; 37 L. T. 530; 13 Cox, C. C. 650.

On the new trial Green was called as a witness, and stated that he had general authority to conduct the paper, that the defendants left it entirely to his discretion to insert what he pleased, and that he had allowed the letter complained of to appear in the paper without the knowledge or express authority of the defendants, one of whom was absent from Portsmouth at the time. The jury found all the defendants guilty. On a motion for a new trial on the ground that the verdict was against evidence, and of misdirection, *Held* (by Cockburn, C.J., and Lush, J., Mellor, J., still dissenting), that the general authority given to the editor was not *per se* evidence that the defendants had authorised or consented to the publication

of the libel, within the meaning of 6 & 7 Vict. c. 96, s. 7, and that, as the learned judge at the trial had summed up in terms which might have led the jury to suppose that it was, and the jury had apparently given their verdict on that footing, there must be another new trial.

R. v. *Holbrook & others*, 4 Q. B. D. 42; 48 L. J. Q. B. 113; 27 W. R. 313; 39 L. T. 536; 14 Cox, C. C. 185.

The prosecutor, Mr. John Howard, Clerk of the Peace for the borough of Portsmouth, died shortly afterwards, so the proceedings dropped, and no third trial ever took place.

9. *Partners.*

Partners could always jointly sue for a libel defamatory of the firm. (*Ward and another* v. *Smith*, 6 Bing. 749; 4 C. & P. 302; *Le Fanu* v. *Malcolmson*, 1 H. L. C. 637.) But in such an action no damages could formerly have been given for any private injury thereby caused to any individual partner; nor for the injury to the feelings of each member of the firm. Only joint damages could be recovered in the joint action; for the basis of such action was the injury to their joint trade. (*Haythorn* v. *Lawson*, 3 C. & P. 196; *Robinson* v. *Marchant*, 7 Q. B. 918; 15 L. J. Q. B. 134.) But now, by virtue of Order XVII., r. 6, "claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendant." And see Order XVI., r. 1. Hence it is no longer necessary to bring two actions for the same words: each individual partner may, in any action brought by the firm, recover separate damages for any special injury done to himself, if properly claimed in the statement of claim, the firm at the same time recovering their joint damages. (See *Booth and others* v. *Briscoe*, 2 Q. B. D. 496; 25 W. R. 838, *post*, p. 370.) If, however, one partner be defamed as to his private life, the conduct of the firm not being attacked directly or indirectly, nor any special damage resulting to them from defendant's words; then the individual partner should, of course, sue alone.

Partners may sue or be sued in the name of their firm; but any other party to the action may, in such a case, apply by summons to a Master at Chambers or a District Registrar for a statement of the names of the partners in such firm. (Order XVI., r. 10.) And where partners are suing in the name of the firm, they must, on demand in writing by or on behalf of the defendant, disclose the names and places of residence of all the persons constituting the firm; the proceedings nevertheless continuing in the name of the firm. If the plaintiffs or their solicitor fail to comply with such demand, a Master at Chambers or District Registrar will stay all proceedings. (Order XVII., r. 2.) If both joint and several damages be claimed, the partners should sue in their own names, either with or without the name of the firm.

If a partner conducting the business of a firm causes a libel to be published on a rival firm, the firm will be liable as well as the individual partner. So, if any agent or servant of the firm defames any one by the express direction of the firm, or in accordance with the general orders given by the firm for the conduct of their business. (*See* Master and Servant, *ante*, p. 360.) But if there be any doubt as to the liability of the firm, it is always safer to join the individual partner or agent or servant as a co-defendant with the firm. (*See* Order XVI., r. 3.) "Any person carrying on business in the name of a firm apparently consisting of more than one person may be sued in the name of such firm." (Order XVI., r. 10 a.) Where partners are sued in the name of their firm they must appear individually in their own names. But all subsequent proceedings continue in the name of the firm. (Order XII., rr. 12, 12 a.) Where judgment has been obtained against a firm, it may be enforced against the property either of the

firm or of anyone proved or admitted to be a partner. (Order XLII., r. 8.)

Illustrations.

If one partner be libelled in his private capacity he cannot recover for any special damage which has occurred to the business of the firm. All the partners should sue for that jointly. They may now do so in the same action.

Solomons & others v. *Medex*, 1 Stark. 191.
Robinson v. *Marchant*, 7 Q. B. 918; 15 L. J. Q. B. 134; 10 Jur. 156.
Cook & another v. *Batchellor*, 3 Bos. & Pul. 150.
Maitland & others v. *Goldney & another*, 2 East, 426.

Similarly, if the firm be libelled as a body, they cannot jointly recover for any private injury to a single partner: though that partner may now recover his individual damages in the same action.

Haythorn v. *Lawson*, 3 C. & P. 196.
Le Fanu v. *Malcolmson*, 1 H. L. C. 637; 13 L. T. 61; 8 Ir. L. R. 418.

But if insolvency be imputed to one member of a firm, this is a reflection on the credit of the firm as well: therefore either he, or the firm, or both may sue, each for their own damages.

Harrison v. *Bevington*, 8 C. & P. 708.
Foster & others v. *Lawson*, 3 Bing. 452; 11 Moore, 360.

10. *Corporations and Companies.*

A corporation may sue for any libel upon it, as distinct from a libel upon its individual members. It may also sue for a slander upon it in the way of its business or trade. If, however, the corporation be not engaged in any business, it would probably be necessary to prove special damage in any case of slander.

A corporation "could not sue in respect of an imputation of murder, or incest or adultery, because it could not commit those crimes. Nor could it sue in respect of a charge of corruption; for a corporation cannot be guilty of corruption, although the individuals composing it may be." (*Per* Pollock, C.B., 4 H. & N. 90.)

The law is the same with regard to unincorporated trading companies, which may sue for libel in the manner

directed by the special Act creating them, or any statute applicable to them. (*Williams* v. *Beaumont*, 10 Bing. 260; 3 M. & Scott, 705.)

Corporations and companies may maintain actions for slander of their title; whether the slander be uttered by one of their own members or by a stranger. (*Metropolitan Omnibus Co.* v. *Hawkins*, 4 H. & N. 87; 28 L. J. Ex. 201; 5 Jur. N. S. 226; 7 W. R. 265; 32 L. T. (Old S.), 281; *Trenton Insurance Co.* v. *Perrine*, 3 Zab. (New Jersey), 402.)

A corporation will not, it is submitted, be liable for any slander uttered by an officer, even though he be acting honestly for the benefit of the company and within the scope of his duties, unless it can be proved that the corporation expressly ordered and directed that officer to say those very words: for a slander is the voluntary and tortious act of the speaker.

A corporation will be liable to an action for a libel published by its servants or agents, whenever such publication comes within the scope of the general duties of such servants or agents, or whenever the corporation has expressly authorized or directed such publication; (see *ante*, *Master and Servant*, p. 360; *Yarborough* v. *Bank of England*, 16 East, 6; *Latimer* v. *Western Morning News Co.*, 25 L. T. 44; *Alexander* v. *N. E. Ry. Co.*, 6 B. & S. 340; 34 L. J. Q. B. 152; 11 Jur. N. S. 619; *Lawless* v. *Anglo-Egyptian Cotton Co.*, L. R. 4 Q. B. 262; 10 B. & S. 226; 38 L. J. Q. B. 129; 17 W. R. 498. And in America, *Aldrich* v. *Press Printing Co.*, 9 Min. 133.)

Whether a corporation can be guilty of express malice, so as to destroy a *primâ facie* privilege arising from the occasion of publication has not yet been decided; but *semble* (*per* Lord Campbell, C.J., E. B. & E. 121; 27 L. J. Q. B. 231,) it can.

A corporation can be indicted for libel and fined. (*Per* Lord Blackburn in *Pharmaceutical Society* v. *London and Provincial Supply Association*, 5 App. Cas. 869, 870; 49 L. J. Q. B. 742; 28 W. R. 960; 43 L. T. 389; dissenting from the remarks of Bramwell, L.J., in the Court below, 5 Q. B. D. 313; 49 L. J. Q. B. 338; 28 W. R. 608; 42 L. T. 569.

Illustrations.

A joint-stock company incorporated under the 19 & 20 Vict. c. 47, may sue in its own corporate name for words imputing to it insolvency, dishonesty, and mismanagement of its affairs, and this although the defendant be one of its own shareholders.

Metropolitan Omnibus Co. v. *Hawkins*, 4 H. & N. 87; 28 L. J. Ex. 201; 5 Jur. N. S. 226; 7 W. R. 265; 32 L. T. (Old S.) 281.

Where, before the 19 & 20 Vict. c. 47, a joint-stock insurance company though not incorporated, was authorised by statute to sue in the name of its chairman, it was held that the chairman might bring an action for a libel which attacked the mode in which the company carried on its business.

Williams v. *Beaumont*, 10 Bing. 260; 3 M. & Scott, 705.

A railway company was held liable for transmitting a telegram to the effect that the plaintiff's bank had stopped payment.

Whitfield & others v. *South Eastern Railway Co.*, E. B. & E. 115; 27 L. J. Q. B. 229; 4 Jur. N. S. 688.

11. *Other Joint Plaintiffs.*

"All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person or persons who shall not be found entitled to relief, unless the Court in disposing of the costs of the action shall

otherwise direct." Order XVI., r. 1. Cf. C. L. P. Act, 1860, s. 19.

By virtue of this rule, an action of libel or slander may now be brought by two or more persons jointly, although they are not in partnership or otherwise jointly interested. *Barratt* v. *Collins*, 10 Moo. 451, must be considered overruled. The damages in such an action ought to be claimed and assessed separately; but if they be assessed jointly, and the plaintiffs be content with such a verdict, the defendant cannot avail himself of the defect. (*Booth and others* v. *Briscoe*, 2 Q. B. D. 496; 25 W. R. 838.)

The defendant may counter-claim separately against such joint plaintiffs, if the counter-claims can be conveniently disposed of in the same action with the plaintiff's claim. (*Manchester, &c., Ry. Co. and L. & N. W. Ry. Co.* v. *Brooks*, 2 Ex. D. 243; 46 L. J. Ex. 244; 25 W. R. 413; 36 L. T. 103.)

Illustrations.

A charity near Wisbeach was managed by a body of trustees, eight in number. A libellous letter was published in the *Wisbeach Chronicle*, imputing to the trustees misconduct in the management of the funds of the charity. The eight trustees sued the proprietor of the paper in one joint action for the libel. *Held*, that they were empowered so to do by Order XVI. r. 1; although before the Judicature Act, it would never have been allowed. The jury having returned a single verdict for the plaintiffs, damages 40s., the Court of Appeal refused, on the motion of the defendant, to disturb the verdict.

Booth & others v. *Briscoe*, 2 Q. B. D. 496; 25 W. R. 838.

Two co-proprietors of a newspaper may sue jointly for a libel on their paper without proving special damage; and the jury may find the damages generally.

Russell and another v. *Webster*, 23 W. R. 59.

12. *Joint Defendants.*

"All persons may be joined as defendants against whom the right to any relief is alleged to exist,

whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment." Order XVI., r. 3.

"Where in any action, whether founded upon contract or otherwise, the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, to the intent that in such action the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties to the action." Order XVI., r. 6. Though here, of course, the plaintiff will have to pay the costs of the defendant who proves not liable, unless such defendant has colluded with the other defendant found to be liable, or has otherwise been guilty of misconduct.

"It shall not be necessary that every defendant to any action shall be interested as to all the relief thereby prayed for, or as to every cause of action included therein; but the Court or a Judge may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in such action in which he may have no interest." Order XVI., r. 4.

Under these rules a joint action can now be maintained against two or more persons for slander. Formerly this was impossible. (*Chamberlain* v. *White*, Cro. Jac. 647; s. c. *sub nomine Chamberlaine* v. *Willmore*, Palm. 313.) Even if husband and wife uttered similar words simultaneously, there were two separate publications, and an action had to be brought against the husband alone for what he said, against both husband and wife for her words. (*Burcher* v. *Orchard et ux.* (1652), Style, 349, *ante*, p. 351; *Swithin et ux.* v.

Vincent et ux. (1764), 2 Wils. 227; and in America, *Tait* v. *Culbertson*, 57 Barb. 9.) But with libel it was different; the publication of a libel might well be the joint act of two or more persons, who might in such a case be sued either jointly or separately at the election of the plaintiff. Thus, if a husband and wife jointly publish a libel, they might always have been jointly sued. (*Catterall* v. *Kenyon*, 3 Q. B. 310; *Keyworth* v. *Hill*, 3 B. & Ald. 685.) If, however, plaintiff prefers to sue only one defendant when he might have sued others also, the one defendant sued cannot recover any share of damages or costs from the others, who might have been, but are not, sued. (*Colburn* v. *Patmore*, 1 C. M. & R. 73; 4 Tyr. 677; *Merryweather* v. *Nixan*, 8 T. R. 186; 2 Sm. L. C. 546; *Moscati* v. *Lawson*, 7 C. & P. 32.)

Joint defendants may counter-claim jointly or separately, or one may do so alone, against the plaintiffs jointly, or against one plaintiff separately, or against one plaintiff and a third party. See Appendix C. to Judicature Act, 1875, Forms of Pleadings, No. 14, Statement of Defence and Counter-claim in an action of Foreclosure. Such a counter-claim will, however be, of course, subject to the provisions of Order XIX., r. 3, and Order XXII., r. 9, if it cannot be conveniently disposed of in the pending action.

Illustration.

The members of the committee of the Reform Union were held jointly liable for publishing a report charging the plaintiff and others by name with bribery at the Berwick election.

Wilson v. *Reed & others*, 2 F. & F. 149.

CHAPTER XIII.

CRIMINAL LAW.

Our attention hitherto has been chiefly directed to the civil action for libel or slander, whereby the person defamed seeks such compensation as damages can afford for the injury done him by the defendant's words. But in all libels, and in some cases of spoken words, the State is also concerned, and interferes to punish the defendant as an offender against the criminal law. The evil done by some libels is so extensive, the example set so pernicious, that it is desirable that they should be repressed for the public good. Slanders do less mischief as a rule, are not permanent, and are more easily forgotten; their evil influence is not so widely diffused. As a rule, therefore, no spoken words are treated as a crime. Another reason often assigned for the interference of the State is, that libels conduce to a breach of the peace; but that reason would, I think, apply with equal, if not greater force, to slanders.

Criminal proceedings for libel may be taken either at common law, or under certain statutes; the remedy may be either by indictment or information; though informations are only granted in urgent cases, where the publication of the libel is likely to produce great public mischief and must therefore be promptly suppressed.

The fact that libel is a crime as well as a tort, produces other

consequences in law which it may be well to briefly notice here, though they are not strictly within the scope of the present treatise.

No action can be maintained for the price of libellous pictures (*Fores* v. *Johnes*, 4 Esp. 97), or for their value, if destroyed by the person ridiculed (*Du Bost* v. *Beresford*, 2 Camp. 511). A printer cannot recover for printing a libel. (*Poplett* v. *Stockdale*, Ry. & M. 337; *Bull* v. *Chapman*, 8 Ex. 104.) If a printer undertakes to print a book for a certain price, and discovers as the work proceeds that the matter is defamatory, he may decline to continue the work, and can recover for the part of the work which is not defamatory in an action for work and labour done and materials provided, the special contract notwithstanding. (*Clay* v. *Yates*, 1 H. & N. 73; 25 L. J. Ex. 237; 4 W. R. 557; 27 L. T. (Old S.) 126.) Nor can an action be maintained for breach of a contract to furnish manuscript of defamatory matter (*Gale* v. *Leckie*, 2 Stark. 107), or of a contract to let rooms to be used for the delivery of blasphemous lectures (*Cowan* v. *Milbourn*, L. R. 2 Ex. 230; 36 L. J. Ex. 124; 15 W. R. 750; 16 L. T. 290), or for pirating a libellous book (*Stockdale* v. *Onwhyn*, 5 B. & C. 173; 7 D. & R. 625; 2 C. & P. 163). There is no copyright in any libellous or immoral book, or picture. A Court of Equity will not interfere in one way or another. It will not grant an injunction to restrain a piracy of an illegal book or picture, nor decree an account of the profits made thereby. (*Per* Lord Eldon, in *Walcot* v. *Walker*, 7 Ves. 1; in *Southey* v. *Sherwood*, 2 Mer. 435, and in *Lawrence* v. *Smith*, Jacob, 471.)

No contract will be *implied* to indemnify a party against the consequences of an illegal act, such as the publication of a libel. (*Shackell* v. *Rosier*, 3 Sc. 59; 2 Bing. N. C. 634.) And *semble* the proprietor of a newspaper convicted and fined for the publication of a libel which was inserted in his paper without his knowledge or consent by the editor, has no right of action against the editor for the damages sustained through such conviction. (*Colburn* v. *Patmore*, 1 C. M. & R. 73; 4 Tyr. 677.) Even an express promise to indemnify another if he will publish a libel is void (*Arnold* v. *Clifford*, 2 Sumner, 238); for it is a promise on an illegal executory consideration, an incitement to do an illegal act. But it has been decided in America that

an express promise to indemnify another against the consequences of an illegal act already done is binding. (*Griffiths* v. *Hardenburgh,* 41 N. Y. 469; *Howe* v. *Buffalo & Erie Rail. Co.,* 38 Barbour (N. Y.) 124.)

I. *Criminal Remedy by Indictment.*

It is a misdemeanour at common law, punishable on indictment with fine and imprisonment, to speak any blasphemous, obscene, or seditious words in the hearing of others. *A fortiori,* it is such misdemeanour to write and publish blasphemous, obscene, or seditious words.

It is a misdemeanour at common law, punishable on indictment with fine and imprisonment, to write and publish defamatory words of any living person; or exhibit any picture or effigy defamatory of him.

It is not a crime merely to speak such words, however maliciously.

Whatever words would be deemed defamatory of a living person in any civil action will be held a libel on the trial of an indictment. All the rules laid down in Chapters II., III., VIII., IX., as to *Bonâ Fide* Comment, Construction and Certainty, Privilege, and Malice, apply equally to civil and criminal proceedings.

But a libel on a *thing* is no crime; and wherever no action would lie without proof of special damage, clearly no indictment can be preferred.

It will be an aggravation of the offence, if the person libelled be a foreign prince, statesman or ambassador; for such a libel would embarrass the government, and might disturb the friendly relations between England and that foreign country. See *post,* p. 383.

It is a misdemeanour at common law, punishable on indictment with fine and imprisonment, to write and publish defamatory words of any person deceased;

provided it be alleged and proved that this was done with intent to bring contempt and scandal on his family and relations and provoke them to a breach of the peace; Hawkins, P. C. i. 58; 5 Rep. 125*a*; *R.* v. *Topham*, 4 T. R. 129.

It will also be such misdemeanour to libel any sect, company or class of men, without mentioning any person in particular; provided it be alleged and proved that such libel tends to excite the hatred of the people against all belonging to such sect or class, and conduces to a breach of the peace. (*R.* v. *Gathercole*, 2 Lewin, C. C. 254.)

Such intention may sufficiently appear from the words of the libel itself, or it may be proved by the consequences that have followed from its publication.

The criminal remedy for libel, as it is the earlier, so it is the more extensive remedy; a libel may be indictable, though it be not actionable. Thus in neither of the above cases would an action lie, for want of a proper plaintiff. And see *R.* v. *Darby*, 3 Mod. 139.

Illustrations.

Libel complained of: "On Saturday evening died of the small-pox at his house in Grosvenor Square, Sir Charles Gaunter Nicoll, Knight of the Most Honourable Order of the Bath, and representative in Parliament for the town of Peterborough . . . . . He could not be called a friend to his country, for he changed his opinions for a red ribbon, and voted for that pernicious object, the excise." It was alleged that this passage was published with intent to vilify, blacken and defame the memory of the said Sir Charles, and to stir up the hatred and evil will of the people against the family and posterity of the said Sir Charles. An information was granted.

R. v. *Critchley*, (1734) 4 T. R. 129, n.

But an indictment which alleged that a libel on the late Earl Cowper had been published with intent to disgrace and vilify his memory, reputation, and character, but did not go on to aver any intent to create ill blood or throw scandal on the children and family of Earl Cowper, or to provoke them to a breach of the peace, was held bad, after a verdict of guilty, and judgment arrested.

R. v. *Topham*, 4 T. R. 126.

And, *a fortiori*, to discuss the characters of deceased statesmen and noblemen, as a matter of history, is no crime.

Per Lord Kenyon, C.J., *ib.* 129.

But if in discussing the character and policy of William III. and George I., discredit is thrown on the character and administration of the present king (George II.), with intent to spread dissatisfaction among his subjects, the publication is a seditious libel.

R. v. *Dr. Shebbeare*, (1758), cited in Lord Mansfield's judgment in *R.* v. *Dean of St. Asaph*, 3 T. R. 430, n.

The defendant published a sensational account of a cruel murder committed by certain Jews said to have lately arrived from Portugal, and then living near Broad Street. They were said to have burnt a woman and a new-born baby, because its father was a Christian. Certain Jews who had arrived from Portugal, and who then lived in Broad Street, were attacked by the mob, barbarously treated, and their lives endangered. A criminal information was granted, although it was objected that it did not appear precisely who were the persons accused of the murder.

R. v. *Osborn*, Kel. 230; 2 Barnard. 138, 166.

It is a crime to write of a Roman Catholic nunnery that it is a "brothel of prostitution;" for this is an aspersion on the characters of the nuns in general, though none are singled out by name.

R. v. *Gathercole*, 2 Lew. C. C. 254.

A pamphlet reflecting on the government and asserting that its officers are corrupt, ignorant, and incapable, will be a libel, and punishable as a crime; although no particular member of the government, and no individual officer, is mentioned or referred to.

R. v. *Tutchin*, 14 Howell's St. Tr. 1095; 5 St. Tr. 527; Holt, 56; 2 Lord Raym. 1061; Salk. 50; 6 Mod. 268.

A notice was posted in church calling attention to certain abuses permitted by "the trustees" of Lambeth workhouse; an information was granted on behalf of the whole body of trustees [although the trustees could not before the Judicature Act have jointly sued for the libel, *ante*, p. 370].

R. v. *Griffin*, 1 Sess. Cas. 257.

An information was granted for a libel commencing:—"Whereas an East India director has raised the price of green tea to an extravagant rate," although there was nothing to show which particular director was intended.

R. v. *Jenour*, 7 Mod. 400.

But an indictment for a libel on "persons to the jurors unknown" is bad, even after verdict.

R. v. *Orme* (vel *Alme*) & *Nutt*, 1 Ld. Raym. 486; 3 Salk. 224.

It is a misdemeanour at common law to utter words which amount to a direct challenge to fight a duel, or to utter insulting words with the intention of provoking another to send a challenge. (*R.* v. *Philipps*, 6 East,

464, and note on p. 476.) *A fortiori*, it is a misdemeanour to write a challenge or to consciously deliver a written challenge. And indeed all words which amount to a solicitation to commit a crime, whether spoken or written, are indictable, whether the person solicited commit the crime or not. (*R.* v. *Higgins*, 2 East, 5.)

It is also said to be a misdemeanour to fabricate and publish false news in writing (Dig. L. L. 23), or to endeavour, by spreading false rumours, to raise or lower the price of food or merchandise. (See *R.* v. *Waddington* (1800), 1 East, 143.) According to Scroggs, J., it is a misdemeanour to publish any news at all, though true and harmless. (See 11 Hargrave's St. Tr. 322.) Where eight persons combined to raise the price of Government stocks on Feby. 21st, 1814, by spreading a false rumour of the death of Napoleon Buonaparte, they were indicted and convicted of a conspiracy, for their common purpose was illegal. (*R.* v. *De Berenger*, 3 M. & S. 67.) But this is scarcely an authority for holding that the merely spreading a false rumour is in itself indictable.

In all the above cases of misdemeanour at common law, the defendant may be fined or imprisoned, or both; but he cannot be sentenced to hard labour. He may also be required to find sureties to keep the peace and to be of good behaviour for any length of time. A married woman could not, before the Married Women's Property Act, be fined; but she could be required to find sureties, though she could not enter into recognizances herself.

None of the above offences can be tried at Quarter Sessions.

Certain statutes have been passed in aid of the common law:—

By the 6 & 7 Vict. c. 96, s. 3, it is a misdemeanour to publish, or threaten to publish, any libel upon any other person, or to threaten to publish, or propose to

abstain from publishing, or to offer to prevent the publishing of, any matter or thing touching another, with intent to extort money, or gain, or to procure for anyone any appointment or office of profit. The offender may be sentenced to imprisonment for any term not exceeding three years, either with or without hard labour. Except under the first clause of the section the matter or thing threatened to be published need not be libellous; the intent to extort money is the gist of the offence. (*R.* v. *Coghlan*, 4 F. & F. 316.) But the commencement of legal proceedings is not "a publishing of any matter or thing" within the meaning of the section. (*R.* v. *Yates and another*, 12 Cox, C. C. 441.)

By the 6 & 7 Vict. c. 96, s. 4, it is a misdemeanour to maliciously publish any defamatory libel knowing the same to be false; the punishment may be fine or imprisonment, or both, such imprisonment not to exceed two years.

By the 6 & 7 Vict. c. 96, s. 5, it is a misdemeanour to maliciously publish any defamatory libel; the punishment may be fine or imprisonment, or both, such imprisonment not to exceed one year.

See the whole Statute in Appendix C., *post*, p. 674.

By the 24 & 25 Vict. c. 96, ss. 46, 47, it is a felony to accuse or threaten to accuse another of any infamous crime, whether by letter or otherwise, with intent to extort money or gain. The offender may for each letter he has sent be sentenced to penal servitude for life, or for any term not less than three years, [now *five* years, 27 & 28 Vict. c. 47, s. 2,] or to imprisonment, with or without hard labour, for any term not exceeding two years. See *R.* v. *Redman*, L. R. 1 C. C. R. 12; 39 L. J. M. C. 89; *R.* v. *Ward*, 10 Cox, C. C. 42; and before this Act, *R.* v. *Southerton*, 6 East, 126.

II. *Criminal Remedy by Information.*

In some cases of indictable words, the prosecutor may also, if he prefer, proceed by way of Criminal Information.

Criminal Informations are of two kinds:—

(i) Those filed by the Attorney-General himself, usually called *ex officio* informations.

(ii) Those filed by the Master of the Crown Office by the direction of the Queen's Bench Division at the instance of some private individual.

(i) The first class is, as a rule, confined to libels of so dangerous a nature as to call for immediate suppression by the officers of the State; especially blasphemous, obscene, or seditious libels, or such as are likely to cause immediate outrage and public riot and disturbance. In these cases, therefore, the Attorney-General himself takes the initiative. There has been no *ex officio* information filed since 1830.

(ii) In the second class of informations the relator is generally some private individual who has been defamed. But still the words complained of must be such as call for the prompt and immediate interference of the Court. There must be some evidence that the ordinary remedies by action or indictment are insufficient in the particular case. The Court, moreover, always looks at all the circumstances which occasioned or provoked the libel. Thus, if the prosecutor or relator has himself libelled the defendant, (*R.* v. *Nottingham Journal*, 9 Dowl. 1042,) or in any way invited the publication of the libel of which he now complains, (*R.* v. *Larrieu*, 7 A. & E. 277,) or had an opportunity of expressing his disapproval of its terms, of which

he did not avail himself, (*R.* v. *Lawson*, 1 Q. B. 486,) no information will be granted.

It is not necessary that the libel should charge a criminal offence, to induce the Court to grant a criminal information. It is enough that the libel, though on a private individual, is one requiring prompt suppression. The rank and dignity of the person libelled was formerly taken into consideration; and informations have been granted for imputing that the children of a marquis were bastards, (*R.* v. *Gregory*, 8 A. & E. 907); that a peer had married an actress, (*R.* v. *Kinnersley*, 1 Wm. Bl. 294); that a naval captain was a coward, a bishop a bankrupt, a peer a perjurer, &c., &c. So, too, where foreign potentates or their ambassadors are libelled, an information will be readily granted, lest ill-feeling should spring up between England and that foreign country.

Again, for any libels tending to obstruct the course of justice, for invectives against a judge or magistrate, or imputations on a jury, an information will be readily granted; and so for all reflections on the administration of justice, and for all publications tending to prejudice the fair trial of any accused person. (*R.* v. *Watson and others*, 2 T. R. 199, *post*, p. 428; *R.* v. *Jolliffe*, 4 T. R. 285; *R.* v. *White*, 1 Camp. 359; *Ex parte Duke of Marlborough*, 5 Q. B. 955; 13 L. J. M. C. 105; 1 Dav. & Mer. 720; *R.* v. *Gray*, 10 Cox, C. C. 184.)

So if there be general reflections on a body or class, no particular individual being specially attacked, still if the words are likely to cause outrage and violence, the Court will grant an information: as where the libel was on the Jews, and certain Jews in consequence had been ill-used by the mob, (*Anon.*, 2 Barnard. 138; *R.* v. *Osborn*, *ib.* 166, *ante*, p. 377); so where the general

body of clergymen in a particular diocese were libelled. (*R.* v. *Williams*, 5 B. & Ald. 595.)

But no information will be granted for a libel contained in a private letter never made public (*Ex parte Dale*, 2 C. L. R. 870); nor for any matter of mere trade dispute, even though fraud be imputed; nor in any case where no malicious intention appears (*Ex parte Doveton*, 26 L. T. 73); nor where the matter is trivial and the civil remedy sufficient.

A fortiori, no information will be granted where the words are privileged by reason of the occasion on which they were employed. (*Ex parte Hoare*, 23 L. T. 83.)

In every case the application for a criminal information must be made promptly; any delay in making the application after knowledge of the libel has reached the prosecutor will be ground for refusing an information, unless such delay can be satisfactorily accounted for. The prosecutor, too, must come to the court in the first instance, and must not have attempted to obtain redress in other ways before applying for a criminal information.

Illustrations.

A county court judge illegally refused to hear a barrister who appeared before him. The barrister memorialised the Lord Chancellor. Obtaining no redress, he applied to the Court of Queen's Bench for a criminal information. This would have been granted him, had he not previously applied to the Lord Chancellor.

R. v. *Marshall*, 4 E. & B. 475.

An information was refused where the alleged libel was proved to be a true copy of a report of a committee of the House of Commons, though it did reflect on the individual prosecutor, and though its publication was not authorised by the House.

R. v. *Wright* (1799), 8 T. R. 293.

A French gentleman D'Eon de Beaumont published a libel on the Count de Guerchy, then French Ambassador in England. The libel chiefly referred to private disputes between D'Eon and the Count, alleging that the Count had supplanted D'Eon at the Court of Versailles by trickery; but it also reflected on the public conduct of the ambassador, and insinuated

that he was not fit for his post. An information was filed and D'Eon convicted. (Lord Mansfield.)

R. v. *D'Eon* (1764), 3 Burr. 1514; 1 W. Bl. 501; Dig. L. L. 88.

And see *R.* v. *Peltier* (1803), 28 Howell's St. Tr. 617; *ante*, p. 357.

Lord George Gordon was tried in 1787 and convicted upon an information charging him with libelling Marie Antoinette, Queen of France, and "her tool" the French Ambassador in London. He was fined £500 and sentenced to two years imprisonment, and at the expiration of that time to find sureties for his good behaviour. This he could not do: so he turned Jew and died in prison on November 1st, 1793. (Ashurst, J.)

R. v. *Lord George Gordon*, 22 Howell's St. Tr. 177.

The *Courier* published the following passage:—"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 and other naval stores. In consequence of this ill-timed law, upwards of 100 sail of vessels are likely to return to this country without freights." This was deemed a libel upon the Emperor Paul I.; an information was granted, and the proprietor of the *Courier* was fined £100, sentenced to six months imprisonment, and to find sureties for good behaviour for five years from the expiration of that term. The printer and publisher were also sentenced to one month's imprisonment. (Lord Kenyon, C.J.)

R. v. *Vint* (1799), 27 Howell's St. Tr. 627.

III. *Law Common to all Criminal Cases.*

It must be proved that the defendant published the defamatory words. In civil cases it is necessary to show a publication to some third person other than the person defamed. In criminal cases this is not absolutely necessary; it is sufficient to prove a publication to the prosecutor himself, provided it be alleged and proved, that the defendant did so with intent "to provoke the prosecutor, and excite him to break the peace." (*Per* Abbott, J., in *R.* v. *Wegener*, 2 Stark. 245. And see *Hicks'* case, Hob. 215; Poph. 139; cited 6 East, 476; *Clutterbuck* v. *Chaffers*, 1 Stark. 471.)

In all other respects the law as to publication is practically identical in civil and criminal cases. (*See* c. VI., *ante*, pp. 150—168.)

Thus both author, printer and publisher are each and all liable to be prosecuted for a libel contained in any book or newspaper. In the latter case the proprietor of the newspaper will also be liable. Every fresh publication of a libel is a fresh crime. The sale of every separate copy of a libel is a distinct offence. (*R.* v. *Carlile*, 1 Chitty, 453.) "Not only the party who originally prints, but every party who utters, who sells, who gives, or who lends a copy of an offensive publication will be liable to be prosecuted as a publisher." (*Per* Bayley, J., in *R.* v. *Carlile*, 3 B. & Ald. 169.) "The mere delivery of a libel to a third person by one conscious of its contents amounts to a publication, and is an indictable offence." (*Per* Wood, B., in *Maloney* v. *Bartley*, 3 Camp. 213.)

In the last extract, the learned Baron is careful to insert the words "by one conscious of its contents." For although any delivery to a third person will amount to a *primâ facie* publication, it is open to the defendant to prove, both in civil and criminal cases, that he delivered the libel without any knowledge of the libellous nature of its contents: *e.g.*, where a postman or messenger carries a sealed letter (*per* Lord Kenyon in *R.* v. *Topham*, 4 T. R. 129,) or a parcel in which libellous handbills were wrapped up (*Day* v. *Bream*, 2 Moo. & Rob. 55), or where the defendant cannot read (*per* Lord Kenyon, C.J., in *R.* v. *Holt*, 5 T. R. 444.) And even if the defendant read the libel, still if the words were on the face of them innocent, and only became defamatory when their meaning was pointed by certain extrinsic facts and circumstances wholly unknown to the defendant, then he would still be unconscious that what he published was a libel, and such a publication would be deemed innocent; as where the libel was contained in an allegory or a riddle, to which the defendant had

no clue. Again, where the defendant copied a libel knowing it to be a libel, and afterwards inadvertently delivered such copy to a third person in mistake for some other paper, it is submitted that he would not be held criminally liable for such an accident, though he would be held liable in a civil case. (See the dicta of Lord Kenyon in *R.* v. *Topham*, 4 T. R. 129; and in *R.* v. *Lord Abingdon*, 1 Esp. 228; and the ruling of Abbott, C. J., in *R.* v. *Harvey*, 2 B. & C. 257.)

A master will be liable criminally for the acts of his servant done in the ordinary course of his employment in pursuance of his master's orders, general or express. The liability of a defendant for such constructive publication is now defined by the 7th section of Lord Campbell's Act (6 & 7 Vict. c. 96) which, however, rather declared than altered the existing law:—"Whensoever, upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent or knowledge, and that the said publication did not arise from want of due care or caution on his part."

The section only says that evidence may be given of such facts; but it has always been construed to mean that such facts, if proved, shall be an answer to the indictment; for such evidence was always admissible at common law in mitigation of punishment, (if not in defence). I can only find one case reported in which a defendant has availed himself of this statutory defence, and that is *R.* v. *Holbrook and others*, 3 Q. B. D. 60; 47 L. J. Q. B. 35; 26 W. R. 144; 37 L. T. 530; 4 Q.

B. D. 42; 48 L. J. Q. B. 113; 27 W. R. 313; 39 L. T. 536, *ante*, pp. 364, 5.

Illustrations.

Merely to be in possession of a copy of a libel is no crime, unless some publication thereof ensue.

R. v. *Beere*, Carth. 409; 12 Mod. 219; Holt, 422; Salk. 417; 1 Lord Raym. 414.

John Lamb's Case, 9 Rep. 60, *ante*, p. 156.

Overruling *R.* v. *Algernon Sidney*, 9 Howell's St. Tr. 817, 867; 3 Hargrave's St. Tr. 807; 4 St. Tr. 197.

As soon as the manuscript of a libel has passed out of the defendant's possession and control, it is deemed to be published, so far as the defendant is concerned.

Per Holroyd, J., in *R.* v. *Burdett*, 4 B. & Ald. 143.

A libel was printed and published; the printer produced the manuscript from which he had printed it, and this manuscript was proved to be in the handwriting of the prisoner; there was no evidence to shew that he authorised or directed the printing or publishing. This is evidence of publication sufficient to go to the jury, though the prisoner may give evidence to rebut it.

R. v. *Lovett*, 9 C. & P. 462.

Cooper told the editor several good stories against the Rev. J. K., and asked the editor to "show Mr. K. up;" subsequently the editor published the substance of them in the newspaper; this was held a publication by Cooper, although the editor knew of the facts from other quarters as well.

R. v. *Cooper*, 15 L. J. Q. B. 206; 8 Q. B. 533.

The defendant was the proprietor of *The Times*, but resided in the country, leaving the management of the paper entirely to his son, with whom he never interfered. A libel on the late Lord Cowper having appeared therein, the defendant was held criminally liable, and convicted.

R. v. *Walter*, 3 Esp. 21.

And see *R.* v. *Gutch, Fisher & Alexander*, Mo. & Mal. 433.

A rule was granted calling on Wiatt to show cause why he should not be attached for selling a book containing a libel on the Court of King's Bench. The book was in Latin. On filing an affidavit that he did not understand Latin, and on giving up the name of the printer from whom he obtained it, and the name of the author, the rule was discharged.

R. v. *Wiatt* (1722), 8 Mod. 123.

The defendant was a bookseller, who published a seditious libel written by the Rev. Gilbert Wakefield; he was convicted, but filed an affidavit in mitigation of punishment that he had no knowledge whatever of the nature of the book or its contents; he was accordingly discharged on payment of a fine of thirty marks. The Rev. Gilbert Wakefield was sentenced to two years' imprisonment.

R. v. *Cuthell* (1799), 27 Howell's St. Tr. 642.

There appeared in *Mist's Weekly Journal*, an account professedly of certain intrigues, &c., at the Persian Court; but any reader of ordinary intelligence could see that it was the English Court that the author really meant, that the Sultan "Esreff" was intended for George II., his father the late Sultan "Merewits" for George I., "Sophi" for the Pretender, &c. &c. The two compositors who set it up divided the work between them, one taking one column, the other the next. It was almost impossible that thus they could gain any notion of the general sense of what they were printing. Yet one of them was convicted of publishing a seditious libel; and so was the servant whose business "was only to clap down the press."

R. v. *Knell* (1728), 1 Barnard. 305.

R. v. *Clerk*, *ib.* 304.

In Massachusetts it has been held that the publisher of a newspaper is not liable for publishing an article which he reasonably and *bonâ fide* believes to be a fancy sketch or a fictitious narrative, in no way applicable to any living person; although the writer intended it to be libellous of the plaintiff. Probably this would be a defence in England in a criminal case; not I apprehend in any civil proceeding.

Smith v. *Ashley* (1846), 52 Mass. (11 Met.) 367.

Dexter v. *Spear*, 4 Mason, 115.

See *Chubb* v. *Flannagan*, 6 C. & P. 431.

Rev. Samuel Paine sent his servant to his study for a certain paper which he wished to shew Brereton; the servant by mistake brought a libellous epitaph on Queen Mary which Paine inadvertently handed to Brereton. This would probably be deemed a sufficient publication in a civil case (note to *Mayne* v. *Fletcher*, 4 Man. & Ry. 312), but was held insufficient in a criminal case.

R. v. *Paine* (1695), 5 Mod. 163.

See the remarks of Lord Kenyon in *R.* v. *Lord Abingdon*, 1 Esp. 228.

A libel appeared in the *Man of the World* of May 11th. On May 25th the defendant was appointed publisher of the paper and the back-stock was sent to his office. On December 13th the relator's agent applied at the defendant's office for a copy of the number for March 11th and the defendant told his assistant to look it up and deliver it, which was done. The defendant swore that he had not examined the back numbers at all and knew nothing of the libel. The Lord Chief Justice intimated that in those circumstances no jury would ever find the defendant guilty of criminally publishing the libel.

R. v. *Barnard*, *Ex parte Lord Ronald Gower*, *Times* for Jan. 13th, 1879.

A defendant on the trial of any information or indictment may give evidence to show that the alleged libel was privileged by reason of the occasion; and, unless such privilege be absolute, the prosecutor may rebut

this defence by evidence of express malice; precisely as in civil cases; *ante*, cc. VIII. and IX.

Except in such cases of privilege it is quite unnecessary to prove malice in any criminal proceeding for a defamatory libel; it is enough that the defendant published that which the jury have found to be a libel. After conviction, however, the defendant is allowed to file affidavits in mitigation of punishment, showing that he honestly believed in the truth of what he wrote, and published it without malice. (*R.* v. *Sir F. Burdett*, 3 B. & Ald. 95.)

The law is otherwise in Scotland; there malice must be proved in all criminal proceedings, though it need never be in civil. (1 Hume, 342; Borthwick, 190, 195.)

But it is in the matter of justification that the main difference lies between civil and criminal proceedings. In a civil trial, as we have seen, *ante*, c. VII., the truth of the matters charged in a libel was always a perfect answer to the action; the plaintiff was never allowed to recover damages for an injury done to a reputation to which he had no right. But in all criminal proceedings, by the common law, the truth of the libel constitutes no defence. The maxim used to be "the greater the truth, the greater the libel;" meaning that the injudicious publication of the truth about A. would be more likely to sting him to a breach of the peace than if some falsehood were invented about him, which he could easily and completely refute. Accordingly, on a criminal trial, whether of an indictment or an information, no evidence could be received of the truth of the matters charged, not even in mitigation of punishment. But now, by the 6th section of Lord Campbell's Act (6 & 7 Vict. c. 96), "On the trial of any indictment or information for a defamatory libel, the defendant having pleaded

such plea as hereinafter mentioned, the truth of the matters charged may be inquired into, but shall not amount to a defence, unless it was for the public benefit that the said matters charged should be published. To entitle the defendant to give evidence of the truth of such matters charged as a defence to such indictment or information, it shall be necessary for the defendant, in pleading to the said indictment or information, to allege the truth of the said matters charged in the manner now required in pleading a justification to an action for defamation, and further to allege that it was for the public benefit that the said matters charged should be published, and the particular fact or facts by reason whereof it was for the public benefit that the said matters charged should be published; to which plea the prosecutor shall be at liberty to reply generally, denying the whole thereof. If after such plea the defendant shall be convicted on such indictment or information, it shall be competent to the Court, in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by the said plea and by the evidence given to prove or disprove the same: Provided always, that the truth of the matters charged in the alleged libel complained of by such indictment or information, shall in no case be inquired into without such plea of justification: Provided also, that, in addition to such plea, it shall be competent to the defendant to plead a plea of not guilty: Provided also, that nothing in this Act contained shall take away or prejudice any defence under the plea of not guilty, which it is now competent to the defendant to make under such plea to any action or indictment, or information for defamatory words or libel."

And here note that there is still a most important distinction between civil and criminal cases on this point. The mere truth is an answer to a civil action, however

maliciously and unnecessarily the words were published. But in a criminal case, the defendant has to prove, not only that his assertions are true, but also that it was for the public benefit that they should be published. Moreover, the statute does not apply in cases of blasphemous, obscene, or seditious words. (*R.* v. *Duffy*, 2 Cox, C. C. 45.) It does not apply, by its express terms, unless there be a special plea of justification. In short, the truth of the matter complained of "can only become a defence under the statute, and then only when the statutory conditions are complied with." Wherever the Act does not apply, the law remains still as it was settled prior to that Act. Hence a magistrate at the preliminary investigation of a charge of libel, whether under s. 5 of the 6 & 7 Vict. c. 96, or at common law, has no power to receive and perpetuate any evidence of the truth of the matters charged. (*R.* v. *Townsend*, 4 F. & F. 1089; 10 Cox, C. C. 356; *R.* v. *Sir Robert Carden*, 5 Q. B. D. 1; 49 L. J. M. C. 1; 28 W. R. 133; 41 L. T. 504; 14 Cox, C. C. 359.)

Thus we see that there are two criminal remedies for libel—by criminal information and by indictment,—in addition to the civil remedy of action for damages. That there should be a criminal remedy as well as a civil one is clearly necessary, for most libellers are penniless, and a civil action has no terrors for them. The plaintiff will never get his damages. In fact—as it appears from a recent case—the proprietor of many a low newspaper rather rejoices at the prospect of a civil action for libel being brought against him. He regards it as a gratuitous advertisement for his paper, calculated to increase its circulation in these degenerate days. It is clear, therefore, that there must be a criminal as well as a civil remedy for libel.

But is it essential that there should be *two* criminal remedies? Having regard to the number of criminal prosecutions for libel in the present day, and to the recent decision in Labouchere's case (*R.* v. *Carden, supra*), it deserves consideration whether

the remedy by indictment—involving as it does, a triple investigation of the charge, before the magistrate, the grand jury, and the petty jury—might not be abolished. The remedy by way of criminal information would insure the punishment of all offenders in whose conviction the public were interested, while the numerous petty indictments for libel which are obviously vexatious, and tendered solely through personal malice and ill will, would be discouraged and gradually disappear. Moreover, on the argument of the rule, the defendant himself may make an affidavit, whereas in proceeding by indictment, the defendant's mouth is more or less closed. If one or two of the rules relating to criminal information were altered, especially that compelling the relator to forego his civil action, I think it would be found that the lesser criminal remedy might safely be dispensed with, and that no offender, whose publications were a serious outrage on society, would escape the punishment he so justly merited, although the number of prosecutions would thereby be greatly diminished.

Since the above remarks were written, the Select Committee of the House of Commons appointed to inquire into the Law of Newspaper Libel, have published a Report in which they recommend "that no criminal prosecution shall be commenced against the proprietor, publisher, editor, or anyone responsible for the publication of a newspaper, for any libel published therein, without the *fiat* of the Attorney-General being first obtained." No doubt in this way a certain number of frivolous prosecutions might be prevented. But I doubt if the Attorney-General would approve of so serious an addition to his already arduous duties. For I conceive it would be the duty of the Attorney-General, under the new system, to go into the facts of each case, and to carefully consider whether or no it would be for the public benefit that this particular defendant should be prosecuted. Unless he did so, the new rule would soon become nugatory, and the *fiat* would be granted whenever the words amounted to a libel in law. The recommendation of the Committee is confined, it will be observed, to the proprietors and editors of newspapers. Why should it not be extended to all cases of constructive publication? Surely a master-printer, or a bookseller, should be included; and why not the publisher of a book as well as of a newspaper? But supposing the Com-

mittee to have considered themselves restricted to the Law of Newspaper Libel, they have included one person who it seems to me deserves no protection, and that is the acting editor, the person actually in charge of the paper at the time of publication. It is his fault that the libel appeared; he professes to understand his business; he is paid by his employers to supervise the paper and exclude all libels; and if through carelessness or ignorance he omits to do his duty, he deserves punishment, at least as much as a medical man who, through culpable negligence, kills, when he might have cured, a patient. The Committee very properly grant no immunity to the actual composer and author of the libel.

There will be some difficulty in working out the recommendation of the Committee. Is the Attorney-General to hear only the prosecutor's story? If so, in most cases nothing will be easier than for an angry and vindictive prosecutor to obtain the *fiat* on an *ex parte* statement. In cases of libel, malignant feelings are perhaps more thoroughly aroused than in any other criminal proceedings. And even where the prosecutor would scruple to mislead the law officer of the Crown, he may *bonâ fide* and on good grounds believe an innocent man to be the author of the libel of which he complains, as in the recent case of Sir Francis Truscott; or he might honestly assert that the defendant was the acting editor of a newspaper at the time of publication, whereas he was then away ill in the country, as was Mr. Gutch, *ante*, p. 364. Without calling on the defendant for his version of the case, the Attorney-General could not refuse his *fiat* in such cases as *R.* v. *Ledger*, *ante*, p. 50, or as Lambri's case, or as *R.* v. *Truscott*. Yet if the Attorney-General is to hear both sides and thoroughly investigate the matter, he is doing informally precisely what the Court of Queen's Bench would do before allowing a criminal information to be filed. And surely if the Attorney-General granted a *fiat*, it would be quite unnecessary that the matter should be again investigated before a police magistrate. It cannot be necessary that the case should be gone into *four* times: once before the Attorney-General, next before a magistrate, then before the grand jury, and lastly in open court before the petty jury. Omit, therefore, the hearings before the magistrate and the grand jury, and let the case proceed direct to the trial in open court, as soon as the *fiat* has

been obtained: and what is the procedure so devised, but an exact reproduction of the *ex officio* information? It is no uncommon experience to those who study the suggestions of would-be law-reformers to discover that the schemes which they advocate as novel expedients certain to cure some crying evil, are but resuscitations of ancient methods of procedure, which doubtless for some good reason have long ago fallen into disuse. I venture therefore to retain my former opinion, expressed above, that the best method of avoiding the difficulty would be by abolishing altogether indictments for defamatory libels, and by allowing criminal informations to be filed in all cases wherein the Court shall be of opinion that the civil remedy by action is an insufficient protection to the public.

CHAPTER XIV.

BLASPHEMOUS WORDS.

It is a misdemeanour, punishable by indictment and by criminal information, to speak, or write and publish, any profane words vilifying or ridiculing God, Jesus Christ, the Holy Ghost, the Old or New Testament, or Christianity in general, with intent to corrupt the public morals, to shock and insult believers, or to bring the established religion into hatred and contempt. This is the crime of blasphemy, and on conviction thereof the blasphemer may be sentenced to fine and imprisonment to any extent, in the discretion of the Court. Formerly he was frequently also sentenced to the pillory or to banishment.* He may also be required to give security for his good behaviour for any reasonable time after he comes out of prison; and can be detained in prison till such sureties be found. [Thomas Emlyn, in 1703, and Richard Carlile, in 1820, were condemned to find sureties for their good behaviour throughout the remainder of their lives.] Also under the 60 Geo. III. and 1 Geo. IV. c. 8, s. 1, the Court may after conviction make an order

* In Scotland up till the year 1813 blasphemy was in certain circumstances a capital offence. The last person executed for blasphemy appears to have been Thomas Aikenhead, a young student just twenty years of age, and the son of a surgeon in Edinburgh; he seems to have been very harshly, if not illegally, treated; no counsel appeared for him: his crime consisted in loose talk about Ezra and in crude anticipations of Materialism. He was hanged on January 8th, 1697, buried beneath the gallows, and all his moveables forfeited to the Crown.

for the seizure of copies of the blasphemous libel in the possession of the prisoner or in the possession of any person to his use. (See the Statute in Appendix C. *post*, p. 669.)

The intent to corrupt the public morals, to shock and insult believers, or to bring the established religion into hatred and contempt, is an essential element in the crime. *Actus non facit reum, nisi mens sit rea.* The existence of such an intent is a question of fact for the jury, and the *onus* of proving it lies on the prosecution. The best evidence of such an intention is usually to be found in the work itself. If it is full of scurrilous and opprobrious language, if sacred subjects are treated with offensive levity, if indiscriminate abuse is employed instead of argument, then a malicious design to wound the religious sensibilities of others may be readily inferred. If, however, the author abstains from ribaldry and licentious reproach, a similar design may still be inferred if it be found that he has deliberately had resort to sophistical arguments, that he has wilfully misrepresented facts within his knowledge, or has indulged in sneers and sarcasms against all that is good and noble; for then it is clear that he does not write from conscientious conviction, but desires to pervert and mislead the ignorant; or at all events that he is criminally indifferent to the distinctions between right and wrong. But even though the work is free from all offensive levity, sarcasm, and sophistry, and is in fact the honest and temperate expression of the religious opinions conscientiously held and avowed by the writer, still it does not follow, as our law at present stands, that the author should be acquitted. It will still be the duty of the Judge to consider what would be the effect of a general dissemination of those opinions. If the doctrines maintained are so monstrous that their direct tendency

is to subvert religion, to destroy morality, and "to dissolve all the bonds and obligations of civil society," then the maxim applies that "Every man must be taken to have intended the natural and necessary consequences of his act," and the Judge will direct a conviction.

It is very difficult, however, to say in what cases a judge in the present day would feel it his duty so to direct the jury. Every one would naturally be reluctant to construe into a crime the fair and temperate expression of opinions sincerely entertained, merely in obedience to a legal presumption. And it may well be doubted whether the free discussion of any doctrines, however heretical, can in any case tend to subvert the Truth. "For, if we be sure we are in the right," says Milton in his Areopagitica (p. 65, Arber's Reprint), "and do not hold the truth guiltily, which becomes not, ... what can be more fair than when a man judicious, learned, and of a conscience for aught we know as good as theirs that taught us what we know, shall . . . . openly by writing publish to the world what his opinion is, what his reasons, and wherefore that which is now taught cannot be sound." *Magna est veritas et praevalebit.* And it may also be doubted how far the reported decisions would bind a judge in the present day. For the heretical writings of the last century were written as a rule by uneducated and immoral men, and were filled with foul and offensive passages, and were therefore deservedly punished: whereas in the present day heretical opinions are often held and advocated by men of culture and refinement, who instinctively avoid giving wanton offence to their more orthodox fellow-citizens. Again, there is one argument frequently adduced in the earlier cases in favour of prosecutions for blasphemy—that all attacks upon the established religion tend to destroy the solemnity of an oath "on which the due administration of justice depends," and thus "the law will be stripped of one of its principal sanctions—the dread of future punishment." The strength of this argument is now seriously impaired by the Acts recently passed, permitting even atheists and persons who do not believe in a future life to give evidence in our law courts. (See the 1 & 2 Vict. c. 105, s. 1; 32 & 33

Vict. c. 68, s. 4; 33 & 34 Vict. c. 49, s. 1.) But from the decided cases, it would seem that "Christianity is part and parcel of the law of England." * At all events, it is the established religion of the land. Hence to attack Christianity *in general* by striking at its very roots cannot fail, it is considered, to wound the religious feelings of others, and to excite hatred and contempt against the Church. (*R.* v. *Woolston*, Str. 834; Fitzgib. 66; 1 Barnard. 162.) Again, to deny the existence or goodness of God must tend to subvert all law and all morality, and to destroy the peace and good order of society. In these two cases, therefore, even in the absence of any indecent or offensive expressions, the jury would still probably be directed that a criminal intent must be presumed, although it is clear that the author's purpose was the *bonâ fide* dissemination of his peculiar views.

But in all other cases I think that the jury would be told that the intent to subvert religion, and to deprave the public morals, must be proved as a fact to their satisfaction before they can convict; and that if they are of opinion that the author's attack on some particular doctrine, however generally accepted and received, was made honestly with the conscientious desire of arriving at the truth, then the prisoner is entitled to an acquittal.

In all cases in which a criminal intent is not presumed under the maxim mentioned above, it is not blasphemy to seriously and reverently propound any opinions conscientiously entertained by the accused. Honest error is no crime in this country so long as its advocacy be rational and dispassionate and do not degenerate into fanatical abuse of Christianity in general, or into scurrilous attacks upon individuals. "Every man may fear-

* *Per* Kelly, C.B., L. R. 2 Ex. 234. Lord Hale first uttered this dictum in *R.* v. *Taylor*, 1 Ventr. 293; 3 Keb. 607. It was repeated by Ashurst, J., in *R.* v. *Williams*, and by many other judges. But Archbishop Whately said he never could understand its precise meaning, and the Commissioners on Criminal Law (6th Report, p. 83) have done their best to explain it away. See also Jefferson's Letter to Major Cartwright, published in Cartwright's "Life and Correspondence."

lessly advance any new doctrines, provided he does so with proper respect to the religion and government of the country." (*Per* Best, J., in *R.* v. *Burdett* (1820), 4 B. & Ald. 132.) "I would have it taken notice of that we do not meddle with any differences of opinion, and that we interpose only where the very root of Christianity is struck at." (*Per* Raymond, C. J., in *R.* v. *Woolston* (1729), Str. 834; Fitzgib. 66; 1 Barnard. 162.)

The defendant cannot plead a justification: nor can he be permitted at the trial to argue that his blasphemous libel is true. (*Per* Lord Abbott, C. J., in *Cooke* v. *Hughes*, R. & M. 115.)

The last trial for blasphemy took place at the Bodmin Summer Assizes, July, 1857, before Coleridge, J., his son, the present Lord Coleridge, C. J., being counsel for the prosecution. The prisoner had scribbled some disgusting language concerning Jesus Christ on a gate, and was convicted of a blasphemous libel, but was subsequently discovered to be insane. (*R.* v. *Pooley*.)

Illustrations.

It is blasphemy to write and publish that Jesus Christ is an impostor, the Christian religion a mere fable, and those who believe in it infidels to God.

R. v. *Eaton*, 31 Howell's St. Tr. 927.

It is blasphemy to write and publish that Jesus Christ was an impostor, a murderer in principle, and a fanatic. Such words would be libellous of whomsoever written, and the jury also had found as a fact that the intention of the prisoner was malicious; and the court on motion refused to arrest the judgment.

R. v. *Waddington*, 1 B. & C. 26.

In the last case Abbott, C.J., parried a question asked him by one of the jurymen at the trial whether every publication which denied the divinity of Jesus Christ was an unlawful libel, and the Court of King's Bench gave no opinion on the point: it was unnecessary so to do. I apprehend, however, that a controversial work in which a Unitarian divine while expressing his reverence for Christ as a Great Teacher yet denied His Deity, would never in the present day be deemed blasphemous, if written in a reverent and temperate tone and expressing the conscientious convictions of the author (in spite of such cases as *R.* v. *Clendon* (1712), cited

2 Str. 789 : *R.* v. *Hall* (1721), 1 Str. 416, and *R.* v. *Ilive* (1756), Dig. L. L. 83).

Reflections on the old Testament are as bad as on the New.

R. v. *Hetherington*, 5 Jur. 529.

Queen Mab was found by a jury in 1841 to be a blasphemous libel.

R. v. *Moxon*, 2 Mod. St. Tr. 356.

But this prosecution was a purely vindictive one by Hetherington, and no sentence was ever passed. Blackburn, J., expresses his disapproval of their finding in

R. v. *Hicklin*, L. R. 3 Q. B. 374; 37 L. J. M. C. 89; 16 W. R. 803; 11 Cox, C. C. 19; 18 L. T. 395.

To deliver a lecture publicly maintaining that the character of Christ is defective, and his teaching misleading, and that the Bible is no more inspired than any other book, was held blasphemy by the Court of Exchequer without any regard to the style of the lecture, or the religious convictions of the lecturer. [But that was a civil case in which the criminal intention might not be considered so essential.]

Cowan v. *Milbourn*, L. R. 2 Ex. 230; 36 L. J. Ex. 124; 15 W. R. 750; 16 L. T. 290.

To write and publish that the Christian miracles were not to be taken in a literal but in an allegorical sense was held blasphemous in 1729; but there the Court clearly considered that to attack the miracles was to attack Christianity in general, and could not be included amongst "disputes between learned men upon particular controverted points."

R. v. *Woolston*, 2 Str. 834; Fitz. 66; 1 Barnard. 162.

It was held blasphemy to publish or sell Paine's "Age of Reason."

R. v. *Williams* (1797), 26 Howell's St. Tr. 656.

R. v. *Richard Carlile* (1819), 3 B. & Ald. 161; 1 Chit. 451.

Richard Carlile on his trial read over to the jury the whole of Paine's "Age of Reason," for selling which he was indicted. After his conviction, his wife published a full, true, and accurate account of his trial, entitled "The Mock Trial of Mr. Carlile," and in so doing republished the whole of the "Age of Reason" as a part of the proceedings at the trial. *Held*, that the privilege usually attaching to fair reports of judicial proceedings did not extend to such a colourable reproduction of a blasphemous book; and that it is unlawful to publish even a correct account of the proceedings in a court of justice, if such an account contain matter of a scandalous, blasphemous, or indecent nature.

R. v. *Mary Carlile* (1819), 3 B. & Ald. 167.

See also *Steele* v. *Brannan*, L. R. 7 C. P. 261; 41 L. J. M. C. 85; 20 W. R. 607; 26 L. T. 509; *post*, p. 407.

For other cases of blasphemy at common law, see

R. v. *Atwood* (1618), Cro. Jac. 421.

R. v. *Taylor*, Ventris. 293; 3 Keble, 607.

R. v. *Annet* (1763), 3 Burn. Eccl. Law, 386, 9th ed.

R. v. *Wilkes* (1763), 4 Burr. 2527; 2 Wils. 151.

Paterson's Case (1843), 1 Brown (Scotch), 629.

Robinson's Case (1843), *ib.* 643.

In aid of the common law, many statutes have at different times been passed to punish particular species of blasphemy. Of these the following appear to be still unrepealed:—

"Whatsoever person or persons shall deprave, despise, or contemn the most blessed Sacrament in contempt thereof by any contemptuous words or by any words of depraving, despising, or reviling, or what person or persons shall advisedly in any otherwise contemn, despise, or revile the said most blessed Sacrament, shall suffer imprisonment of his or their bodies and make fine and ransom at the king's will and pleasure." (1 Edw. VI. c. 1, s. 1.)

"Any vicar or other minister whatsoever that shall preach, declare, or speak anything in the derogation or depraving of the Book of Common Prayer, or anything therein contained, or of any part thereof," shall on conviction for the first offence suffer forfeiture of one year's profit of benefices and six months' imprisonment, and for the second offence, one year's imprisonment and deprivation, and for the third offence, deprivation and imprisonment for life: or, if not beneficed, for the first offence imprisonment for one year, and for the second offence imprisonment for life. (2 & 3 Edw. VI. c. 1, s. 2; 1 Eliz. c. 2, s. 2.)

Any person whatsoever, lay or clerical, who "shall in any interludes, plays, songs, rhymes, or by other open words, declare or speak anything in the derogation, depraving, or despising of the same book, or of anything therein contained, or any part thereof," shall for the first offence forfeit one hundred marks, for the second offence four hundred marks, and for the third offence shall forfeit all his goods and chattels to the Queen and be imprisoned for life. (2 & 3 Edw. VI. c. 1, s. 3; & 1 Eliz. c. 2, s. 3.)

These provisions are applied to our present Book of Common Prayer by the 14 Car. II. c. 4, s. 1.

Every person ecclesiastical, who shall persist in maintaining or affirming any doctrine directly contrary or repugnant to any of the Articles agreed on in the Convocation holden at London in 1562, shall be deprived of his living. (13 Eliz. c. 12, s. 2.)

The statute 3 Jac. I. c. 21, as to players, was repealed in 1843 by the 6 & 7 Vict. c. 68, s. 1.

"If any person, having been educated in, or at any time having made profession of, the Christian religion within this realm, shall by writing, printing, teaching, or advised speaking, assert or maintain that there are more Gods than one, or shall deny the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of divine authority," he shall, on conviction by the oath of two or more credible witnesses, be deprived of all offices, civil, ecclesiastical, and military, unless he renounce his errors within four months from the date of his conviction; and for a second offence he shall be declared unable to sue in any court of law or equity, to be a guardian, an executor or administrator, to take any legacy, or to hold any office, and shall also suffer imprisonment for three years. But information must be given on oath to a magistrate within four days after such words were spoken, and the prosecution must be within three months after such information. (9 Wm. III. c. 35 [c. 32 in the Statutes at Large], as amended by 53 Geo. III. c. 160.)

But these statutes do not affect or alter the common law (*R.* v. *Carlile*, 3 B. & Ald. 161; *R.* v. *Williams*, 26 Howell's St. Tr. 656); nor will their repeal. (*R.* v. *Waddington*, 1 B. & C. 26.)

By the Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41, s. 7), any person who shall at any burial

under the Act, "under colour of any religious service or otherwise, in any churchyard or graveyard, wilfully endeavour to bring into contempt or obloquy the Christian religion, or the belief or worship of any church or denomination of Christians, or the members or any minister of any such church or denomination, or any other person, shall be guilty of a misdemeanor."

In former days the ecclesiastical courts were empowered by the canon law and various statutes to punish with penance and excommunication, and even with imprisonment and death, any person guilty of blasphemy, heresy, and schism. But by the 1 Eliz. c. 1, s. 6, all statutes relating to heresy were repealed; and by the 29 Car. II. c. 9, s. 1, the writ *de haeretico comburendo* was abolished; but s. 2 of the same Act expressly provides "that nothing in this Act shall extend, or be construed to take away or abridge the jurisdiction of Protestant archbishops or bishops, or any other judges of any ecclesiastical courts, in cases of atheism, blasphemy, heresy, or schism, and other damnable doctrines and opinions, but that they may proceed to punish the same according to His Majesty's ecclesiastical laws, by excommunication, deprivation, degradation, and other ecclesiastical censures, not extending to death, in such sort and no other as they might have done before the making of this Act, anything in this law contained to the contrary in anywise notwithstanding." By the 53 Geo. III. c. 127, s. 3, it is enacted that "no person who shall be pronounced or declared excommunicate shall incur any Civil Penalty or Incapacity whatever, in consequence of such Excommunication, save such Imprisonment, not exceeding Six Months, as the Court pronouncing or declaring such Person Excommunicate shall direct."

But no blasphemous publication, which is punishable in the secular courts, can be taken cognizance of in the ecclesiastical. For "where the common or statute law giveth remedy *in foro seculari* (whether the matter be temporal or spiritual) the conusance of that cause belongeth to the King's temporal Courts only." (Coke upon Littleton, 96 b., and see *Phillimore* v. *Machon*, 1 P. D. 481.) It is then only over blasphemous libels, *not* punishable by the common law or under any statute,

that the ecclesiastical courts have jurisdiction. And here it must be remarked that the canon law, speaking generally, is not binding at all events on laymen. "The canon law forms no part of the law of England, unless it has been brought into use and acted upon in this country: the burden of proving which rests on those who affirm the adoption of any portion of it in England." (Lord Denman, C.J., in *The Queen* v. *The Archbishop of Canterbury*, 11 Q. B. 649. See Year Book, 34 H. VI., fo. 38 (1453); Prisot c. 5; Fitzh. Abr. quare imp. 89; Bro. Abr. qu. imp. 12.) And indeed there seems strong authority for holding that at the present day the Ecclesiastical Courts no longer possess any criminal jurisdiction over *laymen*. In *Burder* v. ————, 3 Curteis, 827, May 31st, 1844, Sir H. Jenner Fust says: "As against laymen, whatever may be the nature of the charge, undoubtedly the Court has no jurisdiction to entertain a criminal suit." And though four years earlier a criminal suit was commenced against a layman for an incestuous marriage, Dr. Lushington contented himself with pronouncing the marriage null and void, which was clearly within his power, and did not impose any punishment or penance on the defendant. (*Woods* v. *Woods*, 2 Curt. 516, July 18th, 1840.) And in *Phillimore* v. *Machon*, 1 P. D. 481, Lord Penzance says: "Speaking generally, and setting aside for the moment all questions as to the clergy, it cannot, I think, be doubted that a recurrence to the punishment of the laity for the good of their souls by ecclesiastical courts, would not be in harmony with modern ideas, or the position which ecclesiastical authority now occupies in the country. Nor do I think that the enforcement of such powers, where they still exist, *if they do exist*, is likely to benefit the community." We may consider, therefore, that the criminal jurisdiction of the ecclesiastical courts over libels published by laymen is obselete: their jurisdiction over civil proceedings for defamation is expressly taken away by the 18 & 19 Vict. c. 41, s. 1.

CHAPTER XV.

OBSCENE WORDS.

It is a misdemeanour punishable by indictment and by information to publish obscene and immoral books and pictures: for such an act is destructive of morality in general, and may affect all the subjects of the realm.

The test of obscenity is this:—"Whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." (*Per* Cockburn, C. J., in *R.* v. *Hicklin*, L. R. 3 Q. B. 371; 37 L. J. M. C. 89; 16 W. R. 801; 18 L. T. 395; 11 Cox, C. C. 19.)

Similarly it is a crime to speak vicious and immoral words, provided they be uttered before a large assembly, so as to affect the mass of society: for else there is no detriment to the public.

Obscene words and libels are apparently within the jurisdiction of Courts of Quarter Sessions; not being excepted by the 5 & 6 Vict. c. 38.

The punishment may be either fine or imprisonment for a term of any length, and either with or without hard labour. (14 & 15 Vict. c. 100, s. 29.)

Illustrations.

Wilkes was fined £500 and imprisoned for a year for printing and publishing "An Essay on Woman."

R. v. *John Wilkes*, 4 Burr. 2527; 2 Wils. 151; Dig. L. L. 69.

Actors have been prosecuted for performing obscene plays.
Tremayne's Entries, 209, 213, 214, 215 ; Str. 790.
The obscene words must be set out in the indictment *verbatim*.
Bradlaugh & Besant v. *The Queen*, (C. A.) 3 Q. B. D. 607 ; 48 L. J. (M. C.) 5 ; 26 W. R. 410 ; 38 L. T. 118 ; 14 Cox, C. C. 68.

"Obtaining and procuring" obscene works for the purpose of uttering and selling them is a misdemeanour indictable at common law ; for it is an overt act taken in pursuance of an unlawful intention: but merely "preserving and keeping them in one's possession" for the same purpose is not indictable ; for "there is no act shown to be done which can be considered as the first step in the prosecution of a misdemeanour." (*Per* Lord Campbell, C. J., in *Dugdale* v. *Reg.*, Dears. C. C. 64 ; 1 E. & B. 425 ; 22 L. J. M. C. 50 ; 17 Jur. 546.)

By the 20 & 21 Vict. c. 83, if any one reasonably believes that any obscene books, or pictures, are kept in any place for the purpose of being sold or exhibited for gain, he may make a complaint on oath before the police magistrate, stipendiary magistrate, or any two justices, having jurisdiction over such place. The magistrate or justices must be satisfied :—

(i.) That such belief is well founded: and for that purpose the complainant must also state on oath that at least one such book or picture has in fact been sold or exhibited for gain in such place.

(ii.) That such book or picture is so obscene that its publication would be a misdemeanour.

(iii.) That such publication would be a misdemeanour proper to be prosecuted as such.

Thereupon the magistrate or justices issue a special warrant authorizing their officer to search for and seize all such books and pictures, and bring them into Court ; and then a summons is issued calling upon the occupier of the place to appear and show cause why such books

and pictures should not be destroyed. Either the owner, or any other person claiming to be the owner, of such books and pictures may appear: but if no one appears, or if in spite of appearance the justices are still satisfied that the books and pictures, or any of them, are of such a character that their publication would be a misdemeanour proper to be prosecuted, they must order them to be destroyed; if not so satisfied, they must order them to be restored to the occupier of the place in which they were seized. The order for the destruction of such books must state, not only that the magistrate is satisfied that the books are obscene, but also that he is satisfied that the publication of them would be a misdemeanour, and proper to be prosecuted as such: else such order will be bad on the face of it, as not showing that the magistrate had jurisdiction to make it, and a *certiorari* will be granted, in spite of the 2 & 3 Vict. c. 71, s. 49, to bring it up and quash it. (*Ex parte Bradlaugh*, 3 Q. B. D. 509; 47 L. J. M. C. 105; 26 W. R. 758; 38 L. T. 680.)

Any person aggrieved by the determination of the justices may appeal to Quarter Sessions by giving notice in writing of such appeal, and of the grounds thereof, and entering into a recognisance, within seven days after such determination. Hence the books and pictures ordered to be destroyed will only be impounded during such seven days; on the eighth day, if no notice of appeal be given, they will be destroyed. If the appeal be dismissed, or not prosecuted, the Court of Quarter Sessions may order the books and pictures to be destroyed. (See the Act *in extenso* in Appendix C., *post*, p. 680.) The death of the complainant after the issuing of the summons will not cause the proceedings to lapse. (*R.* v. *Truelove*, 5 Q. B. D. 336; 49 L. J. M. C. 57; 28 W. R. 413; 42 L. T. 250; 14 Cox, C. C. 408.)

If the work be in itself obscene, its publication is an indictable misdemeanour, and the work may be seized under this Act, however innocent may be the motive of its publisher. (*R.* v. *Hicklin*, L. R. 3 Q. B. 371; 37 L. J. M. C. 89; 16 W. R. 801; 18 L. T. 398; 11 Cox, C. C. 19.)

If any point of law arises under this Act, the magistrates or justices may state a case for the opinion of a Superior Court, under the 20 & 21 Vict. c. 43, irrespective of the power of appeal given by s. 4. That the libel is an accurate report of a judicial proceeding is no defence, if it contain matter of an obscene and demoralizing character. (*Steele* v. *Brannan*, L. R. 7 C. P. 261; 41 L. J. M. C. 85; 20 W. R. 607; 26 L. T. 509.)

Any one who openly exposes or exhibits any indecent exhibition or obscene prints or pictures in any street, road, public place or highway, or in any window or other part of any house situate in any street, road, public place or highway, shall be deemed a rogue and vagabond, and punished on summary conviction. (5 Geo. IV. c. 83, s. 4, as explained by the 1 & 2 Vict. c. 38, s. 2.) The 3 Geo. IV. c. 40, s. 3, is repealed.

By the 33 & 34 Vict. c. 79, s. 20, the postmaster-general may prevent the delivery by post of any obscene or indecent prints, photographs, or books.

Illustrations.

The Protestant Electoral Union published a book, called "The Confessional Unmasked," intended to expose the abuses of the Roman Catholic discipline, and to promote the spread of the Protestant religion. But however praiseworthy their motive may appear, many passages in the book were necessarily obscene, and it was seized and condemned as an obscene libel.

R. v. *Hicklin*, L. R. 7 C. P. 261; 37 L. J. M. C. 89; 16 W. R. 801; 18 L. T. 395; 11 Cox, C. C. 19.

The Protestant Electoral Union thereupon issued an expurgated edition of "The Confessional Unmasked," with some new matter. For selling this George Mackey was tried at the Winchester Quarter Sessions on October 19th,

1870, when the jury, being unable to agree as to the obscenity of the book, were discharged without giving any verdict. The Union thereupon published "A Report of the Trial of George Mackey," in which they set out the full text of the second edition of the "Confessional Unmasked;" although it had not been read in open court, but only taken as read, and certain passages in it referred to. A police magistrate thereupon ordered all copies of this "Report of the Trial of George Mackey" to be seized and destroyed as obscene books. *Held* that this decision was correct.

Steele v. Brannan, L. R. 7 C. P. 261; 47 L. J. M. C. 85; 20 W. R. 607; 26 L. T. 509.

CHAPTER XVI.

SEDITIOUS WORDS.

SEDITIOUS words may be defined generally in the words of 60 Geo. III. and 1 Geo. IV. c. 8, s. 1, as any words which tend "to bring into hatred or contempt the person of his Majesty, his heirs or successors, or the Regent, or the government and constitution of the United Kingdom as by law established, or either House of Parliament, or to excite his Majesty's subjects to attempt the alteration of any matter in Church or State as by law established, otherwise than by lawful means."

Seditious words may in some special cases amount to Treason or to Treason-felony. This chapter will, therefore, be divided into

I.—*Treasonable Words.*

(i.) Words merely spoken.
(ii.) Words written or printed, but not published.
(iii.) Words written or printed, and published.

II.—*Seditious Words.*

(i.) Words defamatory of the Sovereign himself.
(ii.) Words defamatory of the King's Ministers and Government.

(iii.) Words defamatory of the Constitution and of our Laws generally.

(iv.) Words defamatory of either House of Parliament, or of the members thereof.

(v.) Words defamatory of Courts of Justice, and of the Judges thereof.

(*a.*) Superior Courts.

(*b.*) Inferior Courts.

I.—*Treason and Treason-Felony.*

(i.) Words *merely spoken* against the king or his ministers cannot amount to treason. It was resolved in *Hugh Pine's case*, Cro. Car. 117 (overruling several arbitrary decisions of earlier date), "that, unless it were by some particular statute, no words will be treason."* There is no such statute; but by s. 3 of the 11 & 12 Vict. c. 12, to express, utter, and declare, *by open and advised speaking*, certain traitorous compassings, imaginations, inventions, devices, or intentions, is made treason-felony. (See the section in Appendix. The words in italics were not in the earlier statutes to the same effect.)

But words *accompanying any act* may be given in evidence to explain the intention with which such act is done.

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* The story so frequently repeated that in the reign of Edward IV., Thomas Burdett was convicted of high treason for saying that he wished the horns of his stag in the belly of him who had advised the king to shoot it (though it is still to be found in Blackstone, vol. iv. c. 6, and Folkard, p. 619), has been proved by Hallam to be mythical. The charge against Burdett was of a much more serious nature; and these idle words of his are not anywhere alluded to in the indictment against him. "Middle Ages," c. viii. *ad fin.*

(ii.) Words written or printed, but *not published*, cannot be treason at common law: and they do not constitute an overt act of treason within the meaning of the 25 Edw. III. c. 2. The decisions to the contrary in *R.* v. *Peacham* (1615), Cro. Car. 125, 2 Cobbett's St. Tr. 870, and *R.* v. *Algernon Sidney* (1683), 9 St. Tr. 889, 893, were reversed by a private Act of Parliament in 1689. (See Hallam's Const. Hist. I. 467.) But by the 6 Anne, c. 7 (Al. 41), s. 1 (passed in 1707, probably in consequence of a libel called "Mercurius Politicus:" see *R.* v. *Brown*, Holt, 425; 11 Mod. 86, *post*, p. 421); "maliciously advisedly and directly, by writing or printing, to maintain and affirm," that Queen Anne was not the rightful queen, that the Pretender or any else, except the descendants of the Electress Sophia, had any right or title to the Crown, or that an Act of Parliament could not bind the Crown, and limit the descent thereof, was made high treason; and it does not appear that any publication was requisite to complete the offence created by this statute.

(iii.) But a writing which imports a compassing the king's death within the meaning of 25 Edw. III. c. 2, will amount to an overt act of treason, if it be *published*.

Illustration.

Williams, a barrister of the Middle Temple, wrote two books, "Balaam's Ass" and the "Speculum Regale," in which he predicted that King James I. would die in the year 1621. He was indicted for high treason, convicted, and executed.

R. v. *Williams*, 2 Rolle R. 88.

By the 36 Geo. III. c. 7, made perpetual by the 57 Geo. III. c. 6 (as amended by 11 & 12 Vict. c. 12, s. 1), to compass, devise, or intend death or wounding, imprisonment, or bodily harm to the person of the

Sovereign, and such compassing, device, or intention to express, utter, or declare, *by publishing any printing or writing*, or by any overt act or deed, is made high treason, punishable with death.

And by the 11 & 12 Vict. c. 12. s. 3, to compass, devise, and intend to depose the Queen, or to levy war against her in order by force or constraint to compel her to change her counsels, or to intimidate either House of Parliament, or to stir up any foreigner or stranger with force to invade any of her dominions; and such compassings, devices, or intentions, or any of them, to express, utter, or declare, *by publishing any printing or writing, or by open and advised speaking*, or by any overt act or deed, is made treason-felony, punishable with transportation (now penal servitude) for life. (See the section in Appendix.)

II.—Sedition.

It is a misdemeanour, punishable by indictment or by information, to libel or to slander the Sovereign, or his administration, or the Constitution of the realm, or either House of Parliament, or its members, or any judge or magistrate. It is also a high misprision or contempt; and therefore the defendant may be fined to any amount, or sentenced to a term of imprisonment of any length, or both, at the discretion of the Judge, as in *praemunire*. Formerly banishment and the pillory could also be inflicted; but these punishments are now abolished. (60 Geo. III. and 1 Geo. IV. c. 8, ss. 1, 2, 3, 4; 11 Geo. IV. & 1 Will. IV. c. 73, s. 1; 7 Will. IV. & 1 Vict. c. 23.)

The offence cannot be tried at Quarter Sessions.

(i.) *Words defamatory of the Sovereign himself.*

It is sedition to speak or publish of the King any words which would be libellous and actionable *per se*, if printed and published of any other public character.

Thus, any words will be deemed seditious, which strike at the King's private life and conduct, which impute to him any corrupt or partial views or other bad motives for his policy, which insinuate that he is a tyrant, and does not take a lively interest in the welfare of his subjects, or which charge him with deliberately favouring or oppressing any individual or class of men in distinction to the rest of his subjects. (*R.* v. *Dr. Shebbeare* (1758), 3 T. R. 430, *note.*) *A fortiori*, any words are seditious which strike at his title to the Crown, call his legitimacy in question, or are otherwise treasonable. (*R.* v. *Clerk* (1729), 1 Barnardiston, 304; *R.* v. *Knell*, 1 Barnard. 305; *R.* v. *Nutt*, *ib.* 306.)

But to assert that the King is misled by his ministers, or that he takes an erroneous view of some great question of policy is not seditious, if it be done respectfully, with decency and moderation.

Illustrations.

The following words appeared in the *Morning Chronicle* for October 2nd, 1809:—"What a crowd of blessings rush upon one's mind that might be bestowed upon the country in the event of a total change of system! Of all monarchs, indeed, since the Revolution, the successor of George the Third will have the finest opportunity of becoming nobly popular." On the trial of a criminal information against the proprietor and printer of the paper for libel, Lord Ellenborough told the jury that if they considered that the words meant that the king's death would be a blessing to the nation, and that the sooner it happened the better, then they should find the prisoners guilty; but that if they thought the passage could fairly be construed as an

expression of regret that an erroneous view had been taken of public affairs, and of a wish for some change in the policy and system of administration under His Majesty, they might acquit them. The jury found the prisoners, Not Guilty.

R. v. *Lambert & Perry*, 2 Camp. 398 ; 3 How. St. Tr. 340.

To publish falsely of George IV. that he is insane is a criminal libel, as it would be of any other person.

R. v. *Harvey and Chapman*, 2 B. & C. 257.

So is charging the King with a breach of his coronation oath.

Oliver St. John's Case (1615), Noy, 105.

To insinuate that the King is a liar and a deceiver, and to assert that he has treacherously betrayed the interests of his subjects and allies, and prostituted the honour of his crown (*The North Briton*, No. 45) is a seditious libel.

R. v. *John Wilkes* (1763), 4 Burr. 2527 ; 19 How. St. Tr. 1075.

R. v. *Kearsley*,
R. v. *John Williams*, } Dig. L. L. 69.

As to certain of the letters of Junius, see

R. v. *Woodfall*, 5 Burr. 2661.

R. v. *Almon*, *ib.* 2686.

Many *dicta* in the old text-books represent the law as stricter on this point than is stated above. According to Hawkins' "Pleas of the Crown," i. c. 6 (8th ed. by Curwood, p. 66), and 4 Blackstone, 123, c. ix. ii. 3, it is a high misprision and contempt merely to speak contemptuously of the King, to curse him or wish him ill, to assert that he lacks wisdom, valour, or steadiness, or, in short, to say anything "which may lessen him in the esteem of his subjects, weaken his government, or raise jealousies between him and his people." But I can find no decision reported which supports so wide a proposition : and I venture to doubt if in the present day it would be deemed a crime to call the king a coward or a fool. Mere words of vulgar abuse can hardly amount to sedition. In fact, the only distinctions that the law makes between words defamatory of the king, and of any other leading public character appear to be :—

(i). That the former may be criminal when only *spoken* ; whereas the latter must be written or printed and published ;

(ii). That in the case of the former it cannot be pleaded as a defence that the words are true. (*R.* v. *Francklin* (1731), 9 St. Tr. ; 17 Howell's St. Tr. 626.)

(ii.) *Words Defamatory of the King's Ministers and Government.*

It is sedition to speak or publish of individual members of the Government words which would be libellous and actionable *per se*, if written and published of any other public character.

It is also sedition to speak or publish words defamatory of the Government collectively, or of their general administration, with intent to subvert the law, to produce public disorder, or to foment or promote rebellion.

"There is no sedition in censuring the servants of the Crown, or in just criticism on the administration of the law, or in seeking redress of grievances, or in the fair discussion of all party questions." (*Per* Fitzgerald, J., in *R.* v. *Sullivan*, 11 Cox, C. C. 50.)

Where corrupt or malignant motives are attributed to an individual minister, the words are clearly seditious.

Where, however, no particular person is libelled, the jury must be satisfied that the author or publisher maliciously and designedly intended to subvert our laws and constitution, and to excite dissatisfaction and discontent. There must be a criminal intent. But such an intent will, of course, be presumed, if the jury find that the natural and necessary consequence of the words employed, was "to excite a contempt of Her Majesty's Government, to bring the administration of its laws into disrepute, and thus impair their operation, to create disaffection, or to disturb the public peace and tranquillity of the realm." (*R.* v. *Collins* (1839), 9 C. & P. 456; *R.* v. *Lovett*, *ib.* 462.)

In determining whether such is a natural and neces-

sary consequence of the words employed, the jury should consider the state of the country and of the public mind at the date of the publication: passages which in tranquil times might be comparatively innocent might be most pernicious in a time of insurrection. (*Per* Fitzgerald, J., 11 Cox, C. C. 50, 59.) On the other hand, the circumstances which provoked the attack may tell in the prisoner's favour. If a man be smarting under a grievance, or honestly indignant at some act of a government official, he cannot be expected to speak or write as calmly and deliberately as if he were discussing matters in which he felt no special interest. (*Per* Littledale, J., in *R.* v. *Collins*, 9 Car. & P. 460.) The jury should, in every case, consider the book or newspaper article *as a whole*, and in a fair, free, and liberal spirit: not dwelling too much upon isolated passages, or upon a strong word here or there, which may be qualified by the context, but endeavouring to gather the general effect of the whole composition on the minds of the public. Considerable latitude must be given to political writers. (*Per* Lord Kenyon, C.J., in *R.* v. *Reeves*, Peake, Add. Ca. 84; 26 How. St. Tr. 530.)

Illustrations.

To attribute "the sad state of the country to the influence of French gold on those who have the conduct of affairs," is a seditious libel, though no particular minister is singled out; but to complain of "the mismanagement of the navy through the ignorance and incapacity of those who have the management of it," would (it is submitted) not be held a libel in the present day.

R. v. *Tutchin* (1704), 5 St. Tr. 527; 14 Howell's St. Tr. 1095; Holt, 424; 2 Lord Raym. 1061; 1 Salk. 50; 6 Mod. 268.

An announcement that a collection had been made for "the relief of the widows, orphans, and aged parents of our beloved American fellow-subjects, who, faithful to the character of Englishmen, preferring death to slavery, were for that reason only inhumanly murdered by the King's troops at or near Lexington and Concord in the province of Massachusetts on the 19th of April last," was held a seditious libel on his Majesty's Government and

their employment of his troops, tending to foment discord and to promote rebellion.

R. v. *John Horne* (afterwards *John Horne Tooke*) (1777), 11 St. Tr. 264; 20 Howell's St. Tr. 651; Cowp. 672.

Articles in the *Examiner* declaring that an improper and cruel method of punishment was practised in the King's army, and that his soldiers were punished with excessive severity thereby, was declared by the jury, in spite of the summing up of Lord Ellenborough, *not* to be a seditious libel on the government and the military service of the king tending to excite disaffection in the army and to deter others from becoming recruits.

R. v. *John Hunt & John Leigh Hunt* (1811), 31 Howell's St. Tr. 408.

See also *R.* v. *Beere* (1698), 12 Mod. 219; Holt, 422; Carth. 409; 2 Salk. 417; 1 Ld. Raym. 414.

R. v. *Laurence* (1699), 12 Mod. 311.

R. v. *Bedford* (1714), cited in 2 Str. 789; Dig. L. L. 19, 121.

R. v. *Bliss* (1719), Sid. 219; Rol. 773.

R. v. *Owen* (1752), 18 Howell's St. Tr. 1203; Dig. L. L. 67.

R. v. *Francklin* (1731), 9 St. Tr. 255; 17 Howell's St. Tr. 626.

R. v. *Cobbett* (1804), 29 Howell's St. Tr. 1.

R. v. *Johnson* (1805), 29 Howell's St. Tr. 103; 7 East, 65; 3 Smith, 94.

R. v. *Burdett* (1820), 4 B. & Ald. 95, 115, 314.

R. v. *Collins* (1839), 9 C. & P. 456.

R. v. *Lovett* (1839), 9 C. & P. 462.

By the statutes of *Scandalum magnatum*, 3 Edw. I., c. 34; 2 Rich. II., c. 5; 12 Rich. II., c. 11, *ante*, c. IV., pp. 133—135, it is a crime to tell or publish false news or tales of the great officers of the realm, &c.

So also in America by Act of Congress, July 14, 1798, it is an indictable offence to libel the Government, Congress or President of the United States.

There are old cases which appear to go further, and to decide that any publication tending to beget an ill opinion of the Government is a criminal libel. "If persons should not be called to account for possessing the people with an ill opinion of the Government, no Government can subsist; for it is very necessary for all Governments that the people should have a good opinion of it" (*sic*). (*Per* Lord Holt, C.J., in *R.* v. *Tutchin* (1704), 5 St. Tr. 532; 14 Howell's St. Tr. 1127.) And Lord Ellenborough, C.J., expressly following this decision,

told the jury in *R.* v. *Cobbett* (1804), 29 Howell's St. Tr. 49 :— "It is no new doctrine that if a publication be calculated to alienate the affections of the people, by bringing the Government into disesteem, whether the expedient be by ridicule or obloquy, . . . it is a crime." If this is to be taken literally, all Opposition newspapers commit such crime every day. Such a doctrine, if strictly enforced, would destroy all liberty of the press, and is, moreover, in conflict with more recent *dicta*:—"The people have a right to discuss any grievances that they may have to complain of," *per* Littledale, J., in *R.* v. *Collins*, 9 Car. & P. 461. "A journalist may canvass and censure the acts of the Government and their public policy—and indeed, it is his duty. . . . 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," *per* Fitzgerald, J., 11 Cox, C. C. 54, 57. It is clearly legitimate and constitutional to endeavour, by means of arguments addressed to the people, to replace one set of ministers by another. And the precise object of such arguments is to bring the ministers then in office into disesteem, and to alienate from them the affections of the people. Sir Francis Burdett could not possibly be convicted in the present day for such an electoral address as he issued on August 22nd, 1819. (See 4 B. & Ald. 116, 7 n.)

But I think Lord Holt's words must not be taken strictly in their modern signification: we must construe them with reference to the times in which he spoke. He clearly was not referring to a quiet change of ministry which in no way shakes the throne, or loosens the reins of order and government. In 1704 the present system of party-government was not in vogue: it was barely conceived by William III., and was certainly not generally understood under Queen Anne. And even in Lord Ellenborough's time the ministry were still appointed by the King and not by the people. By "the Government" both judges meant, not so much a particular set of ministers, as the political system settled by the Constitution, the general order and discipline of the realm. "To subvert the Government" is the phrase employed in the earlier case of *R.* v. *Beere*, 12 Mod. 221; Holt, 422; and to Lord Holt's mind "subverting the Government" meant bringing in the Pretender; to Lord Ellen-

borough's, the introduction of Jacobinism and Red Republicanism from France: not the substitution of one statesman for another at the Council Board.

(iii.) *Words Defamatory of the Constitution and of our Laws generally.*

All malicious endeavours by word, deed or writing, to promote public disorder or to induce riot, rebellion or civil war, are clearly seditious, and may be overt acts of treason. But where no such conscious endeavour is proved; still, if the natural and necessary consequence of any word, deed, or writing, be to subvert our laws and constitution and to excite or promote dissatisfaction and discontent amongst the people, a criminal intent will be presumed; and the author is guilty of sedition. (*R.* v. *Burdett* (1820), 4 B. & Ald. 95; *R.* v. *Collins* (1839), 9 C. & P. 456.) Thus all publications, the tendency of which is to bring the constitution of the realm into hatred and contempt, and to induce the people to disobey the laws and to defy legally constituted authority, are seditious libels, for which the author is criminally liable.

But mere theoretical discussions of abstract questions of political science, comparisons of various forms and systems of government, and controversies as to details of our own constitutional law are clearly permissible. And so is any *bonâ fide* effort for the repeal by constitutional methods of any law deemed obnoxious. The prosecution must satisfy the jury that the publication is calculated to disturb the tranquillity of the State and to lead ignorant persons to endeavour to subvert the government and the laws of the realm. Without satisfactory proof of such tendency, there is no evidence

of that criminal intention which is essential to constitute the offence.

The old cases *R.* v. *Brewster* (1663), Dig. L. L. 76; *R.* v. *Harrison* (1677), 3 Keb. 841; Ventr. 324, and *R.* v. *Bedford* (1714), cited in 2 Str. 789, so far as they run counter to this proposition, must be considered as overruled. It seems that Harrison would not have been convicted but for the Stat. 13 Car. II. c. 1, which, to my surprise, remains still in part unrepealed. See *post*, p. 421, 2.

The jury must find, first, that the defendant in fact spoke or published the words complained of: secondly, that the words are seditious and were spoken or published with the intent alleged in the indictment. The latter as well as the former is entirely a question for the jury. The fact that the House of Commons has resolved that the same publication is "a malicious, scandalous and seditious libel, tending to create jealousies and divisions amongst the liege subjects of Her Majesty and to alienate the affections of the people of this country from the Constitution," ought not to weigh with the jury in the least. The defendant is not to "be crushed by the name of his prosecutor." (*Per* Lord Kenyon, C.J., in *R.* v. *Reeves*, Peake, Add. Ca. 84.)

"In a free country like ours," says Lord Kenyon, C.J., in the same case, p. 86, "the productions of a political author should not be too hardly dealt with." The jury should "recollect that they are dealing with a class of articles, which, if written in a fair spirit and *bonâ fide*, might be productive of great public good, and were often necessary for public protection;" and they should therefore "deal with them in a broad spirit, allowing a fair and wide margin, looking upon the whole, not on isolated words." And they should also take into their consideration the state of the country and of the public

mind at the date of the publication. (*Per* Fitzgerald, J., in *R.* v. *Sullivan*, 11 Cox, C. C. 50, 59.)

Illustrations.

To assert that a parliament would be justified in making war against any king who broke the Social Compact, was naturally deemed seditious in the days of Charles II., as tending to a renewal of the Civil War.

R. v. *Brewster* (1663), Dig. L. L. 76.

R. v. *Harrison* (1677), 3 Keble, 841 ; Ventr. 324 ; Dig. L. L. 66.

To assert that "the late revolution was the destruction of the laws of England," or an unjustifiable and unconstitutional proceeding, and that the Act of Settlement was "illegal and unwarrantable," and "had been attended with fatal and pernicious consequences to the subjects of this realm," was deemed seditious in the days of Queen Anne and of George II., as tending to favour the cause of the Pretender.

R. v. *Dr. Brown* (1707), 11 Mod. 86 ; Holt, 425.

R. v. *Richard Nutt* (1754), Dig. L. L. 68.

And see *R.* v. *Thomas Paine* (1792), 22 Howell's St. Tr. 358.

The Reverend William Winterbotham was convicted for preaching a sermon on November 18th, 1792, containing the following words, which were deemed seditious :—"Darkness has long cast her veil over the land. Persecution and tyranny have carried universal sway. Magisterial powers have long been a scourge to the liberties and rights of the people." He was fined £100 and sentenced to two years' imprisonment.

R. v. *Winterbotham*, 22 Howell's St. Tr. 823, 875.

To habitually republish in Ireland during a time of political excitement and threatened insurrection extracts from American papers expressing sympathy with the Fenians, and inciting all Irishmen to rebel, without one word of editorial comment or disapproval, is an act of sedition.

R. v. *Pigott* (1868), 11 Cox, C. C. 47.

See Irish St. Tr. 1848, 1865, 1867, 1868.

In Ireland, newspapers containing treasonable and seditious matter could, till 1875, be seized under the provisions of the Peace Preservation Act (Ireland), 1870 (33 & 34 Vict. c. 9), ss. 30—34; but these sections were repealed by the Act of 1875 (38 Vict. c. 14), s. 2.

By an entirely obsolete, but still unrepealed, section, any person who shall maliciously and advisedly declare and publish by writing, printing, preaching or other speaking, that the parliament begun at Westminster on November 3rd, 1640 (the Long Parliament) is not yet dissolved, or that it ought still to be in being, or hath yet any continuance or existence, or that both Houses of Parliament or either House of Parliament have

or hath a legislative power without the King, or any other words to the same effect, incurs the penalties of a *præmunire*. 13 Car. II. stat. I. c. 1, s. 3. See also 6 Anne, c. 7 (al. 41), s. 2.

(iv.) *Words Defamatory of either House of Parliament, or of the Members thereof.*

It is a misdemeanour to speak or publish of individual members of either House of Parliament, in their capacity as such, words which would be libellous and actionable *per se*, if written and published of any other public character.

It is also a misdemeanour to speak or publish words defamatory of either House collectively with intent to obstruct or invalidate their proceedings, to violate their rights and privileges, to diminish their authority and dignity, or to bring them into public odium or contempt.

In both cases, all such words are also a contempt and breach of privilege, punishable summarily by the House itself, with fine and imprisonment.

Also by the statutes of *Scandalum magnatum*, 3 Edw. I., c. 34; 2 Rich. II., c. 5; 12 Rich. II., c. 11, *ante*, c. IV., pp. 133—5, it is a crime to "devise, tell or publish any false news, lyes, or such other false things," of any member of the House of Lords, or of any great officer of the realm.

Illustration.

Rainer printed a scandalous libel, reflecting both on the House of Lords and on the House of Commons, called "Robin's Game, or Seven's the Main;" he was tried in the Court of King's Bench, fined £50, and sentenced to be imprisoned for two years and until he should pay such fine.

R. v. *Rainer*, 2 Barnard. 293; Dig. L. L. 125.

On three occasions the House of Commons has voted a parti-

cular publication a scandalous and seditious libel, and a breach of privilege, &c., and petitioned the Crown to direct the Attorney-General to prosecute the author, printers and publishers thereof. But strange to say, on each occasion such prosecution has been unsuccessful: the jury in each of the three cases having acquitted the prisoner. (*R.* v. *Owen* (1752), 18 Howell's St. Tr. 1203, 1228; *R.* v. *Stockdale* (1789), 22 Howell's St. Tr. 238; *R.* v. *Reeves* (1796), Peake Add. Ca. 84; 26 Howell's St. Tr. 530.) Hence the House of Commons now invariably deals with offenders itself.

The House of Lords can inflict fine and imprisonment for any length of time. In former days the pillory was sometimes added: *e.g.*, in the case of Thomas Morley in 1623, and of William Carr in 1667, who were sentenced to stand in the pillory for libelling individual peers.

The House of Commons can inflict fine and imprisonment, and in the case of a member, expulsion. One unfortunate member, Arthur Hall, suffered all three penalties in 1581 for publishing a book disparaging the authority of the House of Commons, and reflecting upon certain individual members—see Hallam, Const. Hist., Vol. I., c. v.—the first instance of a libel being punished by the House. But in the case of a commitment by the House of Commons, the imprisonment can only last till the close of the existing session. The prisoner must be liberated on prorogation (*Stockdale* v. *Hansard*, 9 A. & E. 114; *Grissell's case*, Aug. 1879). It is otherwise with the House of Lords.

The Speaker's warrant is a perfect answer to any writ of *habeas corpus*, and fully justifies the Serjeant-at-arms and his officers in arresting the offender, and protects them from any action of assault or false imprisonment (*Howard* v. *Gosset*, 10 Q. B. 359; *Burdett* v. *Colman*, 14 East, 163). It will not be scanned too strictly by the courts of law, nor set aside for any defect of form

(*R.* v. *Paty*, 2 Ld. Raym. 1108; *R.* v. *Hobhouse* (1819), 2 Chit. 210). Thus, the libel for which the prisoner was committed need not be set out in such warrant (*Burdett* v. *Abbott*, 14 East, 1; see 1 Moore, P. C. C. 80); though the libel must always be set out at full length in either an indictment (*Bradlaugh and Besant* v. *The Queen* (C.A.), 3 Q. B. D. 607; 48 L. J. M. C. 5; 26 W. R. 410; 38 L. T. 118); or a statement of claim (*Harris* v. *Warre*, 4 C. P. D. 125; 48 L. J. C. P. 310; 27 W. R. 461; 40 L. T. 429). Still less will any court of common law inquire into the propriety of the commitment or hear it argued that the act complained of did not amount to a contempt, or that the privilege of the House alleged to have been broken does not exist (*Stockdale* v. *Hansard*, 9 A. & E. 165, 195).

The House is the best judge of its own privileges, and of what is a contempt of them. But if on the face of the warrant it *plainly and expressly* appears that the House is exceeding its jurisdiction, the courts of common law would feel bound to order the release of the prisoner. (See *ib.* 169; Hawkins, 3 Pl. Cr. II., 15, 73, p. 219; *R.* v. *Evans and another*, 8 Dowl. 451.)

The House may commit for any contempt of one of its committees, or of the members of any such committee; instances of such committals occurred in 1832, 1858, and 1879.

So in America the House of Representatives has a general power of committing for contempt, whether the offender be a member or a stranger (*Anderson* v. *Dunn*, 6 Wheat. 204). But as with the English House of Commons, the imprisonment terminates at the adjournment or dissolution of Congress.

But with subordinate legislative bodies it is different. No power of committing for contempt is inherent in them (*Kielley* v. *Carson*, 4 Moore, P. C. C. 63; *Fen-*

ton v. *Hampton*, 11 Moore, P. C. C. 347, overruling *dicta* of Lord Denman, C.J., in *Stockdale* v. *Hansard*, 9 A. & E. 114; of Parke, B., in *Beaumont* v. *Barrett*, 1 Moore, P. C. C. 76); although they have, of course, power to preserve order during their deliberations, which involves a power to remove from the Chamber any person obstructing their proceedings, or otherwise guilty of disorderly conduct *in the presence of the House itself*, and if the offender be a member, to exclude him for a time, or even to expel him altogether. Such latter power is necessary for self-preservation; and is quite distinct from the judicial power of sentencing the obstructive to a term of imprisonment as a punishment for his misconduct (*Doyle* v. *Falconer*, L. R. 1 P. C. 328; 36 L. J. P. C. 37; 15 W. R. 366; *Attorney-General of New South Wales* v. *Macpherson*, L. R. 3 P. C. 268; 7 Moo. P. C. (N. S.) 49; 39 L. J. P. C. 59).

Thus the House of Assembly of Newfoundland (*Kielley* v. *Carson*, 4 Moore, P. C. C. 63); the Legislative Council of Van Diemen's Land (*Fenton* v. *Hampton*, 11 Moore, P. C. C. 347); the House of Keys in the Isle of Man (*Ex parte Brown*, 5 B. & S. 280; 33 L. J. Q. B. 193; 12 W. R. 821; 10 L. T. 453); and the Legislative Assembly of the Island of Dominica (*Doyle* v. *Falconer*, L. R. 1 P. C. 328; 36 L. J. P. C. 33; 15 W. R. 366), possess no inherent powers to commit for contempt. (See also *Attorney-General of New South Wales* v. *Macpherson*, L. R. 3 P. C. 268; 7 Moo. P. C. (N. S.) 49; 39 L. J. P. C. 59.)

But though such a power is not inherent in any inferior legislature, it may be expressly granted by statute; thus the Legislative Assembly of Victoria possesses this privilege by virtue of the 18 & 19 Vict. c. 55, s. 35 and the Colonial Act, 20 Vict. No. 1 (*Dill* v. *Murphy*, 1 Moore, P. C. C. (N. S.) 487; *Speaker of the Legislative*

Assembly of Victoria v. *Glass*, L. R. 3 P.C. 560; 40 L. J. P. C. 17; 24 L. T. 317).

Also it is said that such a power may be acquired by prescription, acquiescence and usage. (*Per* Lord Ellenborough, C.J., in *Burdett* v. *Abbott*, 14 East, 137, and Cockburn, C.J., in *Ex parte Brown*, 5 B. & S. 293.) And it is by virtue of such acquiescence and usage that the Jamaica House of Assembly has the power of committing a libeller, if indeed it has such power at all (*Beaumont* v. *Barrett*, 1 Moore, P. C. C. 80, as explained by Parke, B., in 4 Moore, P. C. C. 89).

(v.) *Words Defamatory of Courts of Justice and of Individual Judges.*

(*a*) Superior Courts.

It is a misdemeanour to speak or publish of any judge of a superior court words which would be libellous and actionable *per se*, if written and published of any other public officer.

It is also a misdemeanour to speak or publish words defamatory of any court of justice or of the administration of the law therein, with intent to obstruct or invalidate its proceedings, to annoy its officers, to diminish its authority and dignity, and to lower it in public esteem.

Such words, whether spoken or written, are punishable on indictment or information, with fine or imprisonment or both. They are also in every such case a contempt of Court punishable summarily by the Court itself with fine or commitment.

Such words are also indictable under the Statutes of *Scandalum magnatum* (3 Edw. I., c. 34; 2 Rich. II.,

c. 5; 12 Rich. II., c. 11, *ante*, c. IV., pp. 133—135), as well as at common law.

It is immaterial whether the words be uttered in the presence of the Court or at a time when the Court is not sitting, and at a distance from it (*Crawford's case*, 13 Q. B. 630; 18 L. J. Q. B. 225; 13 Jur. 955); nor need they necessarily refer to the judges in their official capacity.

But "there is no sedition in just criticism on the administration of the law. . . . A writer may freely criticise the proceedings of courts of justice and of individual judges—nay, he is invited to do so, and to do so in a free, and fair, and liberal spirit. But it must be without malignity, and not imputing corrupt or malicious motives." (*Per* Fitzgerald, J., in *R.* v. *Sullivan*, 11 Cox, C. C. 50.) "It certainly was lawful, with decency and candour, to discuss the propriety of the verdict of a jury, or the decisions of a judge, . . . but if the extracts 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," then the defendants had transgressed the law, and ought to be convicted. (*Per* Grose, J., in *R.* v. *White and others*, 1 Camp. 359.)

Illustrations.

To say that a judge had been bribed, or that in any particular case he had endeavoured to serve his own interests or those of his friends or of his party, or wished to curry favour at Court, or was influenced by fear of the Government or of any great man, or by any other side-motive other than a simple desire to arrive at the truth and to mete out justice impartially, is a seditious libel.

See *R.* v. *Lord George Gordon*, 22 Howell's St. Tr. 177.

To call the Lord Chief Justice "a traitor and a perjured judge," and to

allege that a recent judgment delivered by him was treason, is a misdemeanour.

R. v. *Jeffe* (1632), 15 Vin. Abr. 89.

Hutton, J. v. *Harrison*, Hutton, 131.

To say that the Lord Chief Justice disgraces his high station and prevents justice being done, is a misdemeanour.

R. v. *Hart and White* (1808), 30 How. St. Tr. 1168, 1345 ; 10 East, 94.

R. v. *Wrennum* (1619), Popham, 135.

Butt v. *Conant*, 1 Brod. & Bing. 548 ; 4 Moore, 195 ; Gow, 84.

Hurry sued Watson for a malicious prosecution, and recovered damages £3000 : the corporation of which Watson was a member thereupon resolved "that Mr. Watson had been actuated by motives of public justice in prosecuting Hurry," and voted him £2300 towards payment of his damages. The court of King's Bench granted an information against the members of the corporation.

R. v. *Watson & others*, 2 T. R. 199.

[That the vote of money was an improper employment of the corporate funds is very probable ; but so far as the mere words of the resolution are concerned, I see no misdemeanour. They appear to me to be but a temperately worded statement that the corporation differed from the jury in their opinion of Mr. Watson's conduct.]

Besides such indictable offences, many other acts and words are contempts of Court. Thus it is contempt of Court to insult the Judge, jury or witnesses, to obstruct any officer of the Court in the execution of his duty, to express contempt for the process of the Court, to calumniate the parties concerned in any cause, to prejudice the minds of the public against the suitors or others before the cause is finally heard, or in any other way to taint the source of justice or to divert or interrupt its ordinary course. (See the judgment of Blackburn, J., in *Skipworth's Case*, L. R. 9 Q. B. 232, 241.)

In all such cases a Superior Court may interfere summarily to protect itself and fine the offender or commit him to prison *proprio motu ;* and this, although no indictable offence has been committed. (*Per* Lord Holt, C. J., in *R.* v. *Rogers*, 7 Mod. 29.)

Illustrations.

Even the prisoner in the dock, who is always allowed great latitude, if he be defending himself, may be fined for contempt of court, if he persist

in using blasphemous language and in applying offensive epithets to the residing judge in the course of his speech to the jury.

R. v. *Davison*, 4 B. & Ald. 329.

So, too, a barrister may be guilty of contempt of Court, if he unnecessarily insults one of the jury in the course of his address to them.

In re Pater, 5 B. & S. 299; 33 L. J. M. C. 142; 12 W. R. 823; 10 L. T. 376.

The most innocent words, if uttered in a peculiar manner and tone, may be a contempt of Court. For an insult may be conveyed either by language or by manner.

Carus Wilson's Case, 7 Q. B. 1015.

It is a contempt of court and a libel, punishable by attachment, to publish a pamphlet asserting, that judges have no power to issue an attachment for libels upon themselves, and denying that reflections upon individual judges are contempts of Court at all.

R. v. *Almon*, Wilmot's Notes of Opinions and Judgments, p. 253.

Any attempt to bribe a judge, or to influence his probable decision on a matter before him by any private communication, is a contempt of Court.

Martin's Case, 2 Russ. & Mylne, 674.

Macgill's Case, 2 Fow. Ex. Pr. 404.

But not every silly or impudent letter addressed to a judge about a matter which he *has* decided will be treated as a contempt.

R. v. *Faulkner*, 2 Mont. & Ayr. 321, 322.

It is a contempt for a party to a suit to publish before the case has come on for hearing a copy of his brief, or even an abstract of his petition or statement of claim, or of the affidavits filed on either side, or any other *ex parte* statement tending to prepossess the minds of the public in his favour or to calumniate his adversary.

Captain Perry's Case, cited 2 Atk. 469; 2 Dick. 794.

Mrs. Farley's Case, 2 Vesey, senr., 520.

Coleman v. *West Hartlepool Harbour & Railway Co.*, 8 W. R. 734; 2 L. T. 766.

In re The Cheltenham & Swansea Waggon Co., L. R. 8 Eq. 580; 38 L. J. Ch. 330; 17 W. R. 463; 20 L. T. 169.

Tichborne v. *Mostyn*, L. R. 7 Eq. 55, n.; 15 W. R. 1072; 17 L. T. 5.

An article in a newspaper, commenting on a case still before the Court, is a contempt, though written temperately and respectfully, and in all other respects such an article as might properly and legitimately be written and published *after* the trial is ended.

R. v. *Clement*, 4 B. & Ald. 218.

Littler v. *Thompson*, 2 Beav. 129.

Roach v. *Garvan, Read & Huggonson*, 2 Atk. 469; 2 Dick. 794.

Tichborne v. *Mostyn*, *per* Wood, V. C., L. R. 7 Eq. 57, n.; 15 W. R. 1074; 17 L. T. 7.

Tichborne v. *Tichborne*, 39 L. J. Ch. 398; 18 W. R. 621; 22 L. T. 55.

Vernon v. *Vernon*, 40 L. J. Ch. 118; 19 W. R. 404; 23 L. T. 697.

Buenos Ayres Gas Co. v. *Wilde*, 29 W. R. 43; 42 L. T. 657.

An advertisement in a newspaper offering £100 reward for legal proof of a certain marriage, such evidence being required in a pending suit, was considered by Parker, L.C., a contempt of Court, as tending to procure false evidence. (But I doubt if such a construction would be put on such an advertisement in the present day.)

Pool v. *Sacheverel*, 1 P. Wms. 675.

Threats and insults addressed either to a party or a witness pending a suit, whether by word or letter, are a contempt of Court.

Smith v. *Lakeman*, 26 L. J. Ch. 305; 2 Jur. N. S. 1202; 28 L. T. (Old S.) 98.

Shaw v. *Shaw*, 31 L. J. Pr. & Matr. 35; 6 L. T. 477; 2 Sw. & Tr. 515.

Re Mulock, 33 L. J. Pr. & Matr. 205; 10 Jur. N. S. 1188; 13 W. R. 278.

A fortiori, if addressed to the judge or a master.

Lechmere Charlton's Case, 2 Myl. & Cr. 316.

So it is a contempt for the solicitor to a defendant to publish in a newspaper anonymous letters full of arguments in the defendant's favour, and denying the facts on which the plaintiff would rely at the trial.

Daw v. *Eley*, L. R. 7 Eq. 49; 38 L. J. Ch. 113; 17 W. R. 245.

The publisher of a newspaper was committed for printing an article which attacked the persons who had made affidavits in a suit in Chancery not yet concluded, imputing to them ignorance of facts and interested motives.

Felkin v. *Herbert*, 33 L. J. Ch. 294; 12 W. R. 241, 332; 9 L. T. 635; 10 Jur. N. S. 62.

See also *Littler* v. *Thompson*, 2 Beav. 129.

In re William Watson, Shaw's Cases (Scotch), No. 6.

Still more is it a contempt of court for one committed for trial for perjury or for any of his partizans to address public meetings, alleging that there is a conspiracy against him, and that he will not have a fair trial.

Castro, Onslow's & Whalley's Case, L. R. 9 Q. B. 219; 12 Cox, C. C. 358.

Skipworth's Case, L. R. 9 Q. B. 230; 12 Cox, C. C. 371.

And even when the case is over, the solicitor for the defeated party will be guilty of a contempt, if he publishes a pamphlet describing the judgment pronounced as "an elaborate production, wholly beside the merits of the case," with other flippant and contumacious observations.

Ex parte Turner, 3 Mont. D. & De G. 523, 551, 558.

The committee of a lunatic published a pamphlet reflecting upon persons who were managing the lunatic's estate under the orders of the Court of Chancery. Lord Erskine, C., committed him to prison for contempt, and the printer as well.

Ex parte Jones, 13 Ves. 237.

Where the Court of Bankruptcy has appointed a receiver to take and

hold possession of a bankrupt's property, it is a contempt of Court for the holder of even a valid bill of sale to forcibly oust the receiver.

Ex parte Cochrane, In re Mead, L. R. 20 Eq. 282 ; 44 L. J. Bkcy. 87 ; 23 W. R. 726 ; 32 L. T. 508.

And see *In re Fells, Ex parte Andrews*, 4 Ch. D. 509 ; 46 L. J. Bkcy. 23 ; 25 W. R. 382 ; 36 L. T. 38.

And *Ex parte Drake, In re Ware*, 5 Ch. D. 866 ; 46 L. J. Ch. 105 ; 25 W. R. 641 ; 36 L. T. 677.

To beat and kick the officer of the Court who serves a *subpœna* and to compel him to eat the wax and parchment thereof is a contempt, punishable by committal.

Williams v. *Johns* (1773), cited in the note to *Elliot* v. *Hal-marack*, 1 Mer. 303.

So is merely using abusive and violent language towards any person serving the process of any Court.

Price v. *Hutchinson*, L. R. 9 Eq. 534 ; 18 W. R. 204.

R. v. *Jones* (1719), 1 Stra. 185.

If a high sheriff proceeds to address the grand jury in open Court at the close of the judge's charge and persists in so doing though ordered by the judge to sit down and be quiet, he may be fined £500 for contempt.

In re the High Sheriff of Surrey, 2 F. & F. 234, 237.

So for a civilian high sheriff to meet a judge of assize in ordinary civilian dress has been deemed a contempt of Court.

Wilful disobedience to any lawful order of a Court or a judge is a contempt, especially if on being served with a copy of the order the party expresses in defiant and contemptuous language his intention to disregard such order (*Anon.* (1711) 1 Salk. 94; *R.* v. *Clement*, 4 B. & Ald. 218; *Mr. Long Wellesley's Case*, 2 Russ. & Mylne, 639; *Hudson* v. *Tooth*, 2 P. D. 125; 35 L. T. 820; *Martin* v. *Mackonochie*, 3 Q. B. D. 730; *Combe* v. *Edwards*, 3 P. D. 103). And if a plaintiff be guilty of such contempt, he is liable, in addition to fine or imprisonment, to have all proceedings stayed, or even the whole action dismissed and money paid into Court returned to the defendant (*Republic of Liberia* v. *Roye*, 1 App. Cas. 139; 45 L. J. Ch. 297; 24 W. R. 967; 34 L. T. 145). A true copy of the order of the Court must as a rule be served (*In re Holt*, 11 Ch. D. 168; 27 W. R. 485; 40 L. T. 207). If, however, at the

time of disobedience the offender has from any reasonable source knowledge that the order has been made, it is immaterial that the order has not yet been duly served. Notice by telegram may be sufficient (*In re Bryant*, 4 Ch. D. 98; 25 W. R. 230; 35 L. T. 489; *Ex parte Langley*, *Ex parte Smith*, *In re Bishop*, 13 Ch. D. 110; 49 L. J. Bkcy. 1; 28 W. R. 174; 41 L. T. 388. See further on this point Jud. Act, Order XLII., rr. 2, 4, 5, 20; Order XLIV.; Order XXXI., rr. 20, 22, and *Hutchinson* v. *Hartmont*, W. N. 1877, p. 29 (M. R.); *Phosphate Sewage Co.* v. *Hartmont*, 25 W. R. 743.)

But where the defendant *bonâ fide* desires, but is in fact unable, to obey the order of the Court, such disobedience is not wilful, and is not a contempt (*Clare* v. *Blakesley and others*, 8 Dowl. 835). Where, however, a person ordered to perform a particular act, purposely puts it out of his power to obey with a view of evading the order of the Court, such conduct is an aggravation of his original offence in disobeying, and is in itself a contempt of Court.

Illustrations.

A trustee was ordered to pay £94 14*s.* into court: on the same day he was adjudicated a bankrupt: the Court refused to attach him for disobedience to the order.

Cobham v. *Dalton*, L. R. 10 Ch. App. 655; 44 L. J. Ch. 702; 23 W. R. 865.

See also *Earl of Lewes* v. *Barnett*, 6 Ch. D. 252; 47 L. J. Ch. 144; 26 W. R. 101.

Pashler v. *Vincent*, 8 Ch. D. 825; 27 W. R. 2.

The defendant had illegally removed a quantity of human bones and earth from the parish burial ground of Chew Magna to his own field. The Court of Arches issued a monition to him to replace them. In the meantime, the defendant on the marriage of his daughter to a Mr. Bromfield conveyed this field and other land to the trustees of the marriage settlement, and it was argued that the defendant was unable to obey the order of the Court as he no longer either owned or occupied the field, and it was further pretended that Mr. Bromfield refused to allow his father-in-law to enter on the field and remove the bones. The Court of Arches pronounced the

defendant guilty of contumacy and contempt. The bones were replaced within six days.

Adlam v. *Colthurst*, L. R. 2 Adm. & Eccl. 30; 36 L. J. Ec. Ca. 14.

An advocate at Aberdeen snatched a petition from the Clerk of the Court; the Sheriff-substitute remonstrated and warned him he was committing a contempt of court; but the advocate put the petition in his pocket and immediately left the Court. The Sheriff-substitute thereupon issued a warrant ordering him to deliver up the document on pain of imprisonment. As soon as the sheriff's officers entered the advocate's office, and demanded the petition, the advocate threw it into the fire. The officer thereupon immediately seized and imprisoned him. In an action brought by the advocate for false imprisonment, *held* by the House of Lords, that the arrest was perfectly lawful under the circumstances.

Watt v. *Ligertwood & another*, L. R. 2 Sc. App. 361.

If the contempt is committed in open Court and in presence of the Judge, he may commit the offender *instanter*, and without any prior notice. (Gascoyne, C. J., thus committed the Prince of Wales in 1406. *See* L. R. 2 Sc. App. 367, *n.*) And I presume this power is not taken away by Jud. Act, Order XLIV., r. 2. A written warrant is not essential to such a committal, though it is usual. (*Per* Wightman, J., in *Carus Wilson's Case*, 7 Q. B. 1017.)

But when the offender is not present, and the contempt is committed by words spoken or published out of Court, it is usual to grant first a rule *nisi* calling on the offender to show cause why an attachment should not be granted against him; although the Court still may, and in flagrant cases will, on clear and satisfactory evidence, grant an attachment in the first instance, and issue its warrant, so that the offender shall answer for his contempt in custody. (*Anon.* (1711), 1 Salk. 94; *R.* v. *Jones* (1719), 1 Stra. 185.) The rule *nisi* is generally granted on affidavit of the fact, though the Court may proceed on its own knowledge, without any suggestion. (*In re the High Sheriff of Surrey*, 2 F. & F. 236; *Skipworth's and Castro's Cases*, L. R. 9 Q. B. 230;

12 Cox, C. C. 358.) If the offender fails to appear and show cause, a warrant may issue for his apprehension (*Lechmere Charlton's Case*, 2 Myl. & Cr. 316); or he may be fined in his absence (*R.* v. *Clement*, 4 B. & Ald. 218).

When the offender was brought before the Court, it was formerly the custom to adjourn the matter for four days, in order that interrogatories might be exhibited against him, which he was compelled to answer on oath. But now it is usual to dispense with all interrogatories; the offender at once shows what cause he can, and endeavours to purge his contempt with the aid of ordinary affidavits. If the Court is not satisfied, it may commit him to prison for a time certain, or may impose a fine, or may do both; and in every case the Court may further order the offender to pay the costs of the proceedings. (*Martin's Case*, 2 Russ. & Myl. 674.) But in this case, as in every other, the costs are in the discretion of the Court, and will not be granted where the proceedings are clearly vexatious, and the party instituting them is himself to blame. (*Vernon* v. *Vernon*, 40 L. J. Ch. 118; 19 W. R. 404; 23 L. T. 697.) The costs should be asked for when the rule is argued (*Abud* v. *Riches*, 2 Ch. D. 528; 45 L. J. Ch. 649; 24 W. R. 637; 34 L. T. 713); and in cases where the contempt is slight or unintentional, and the offender submits himself to the Court, and has done all in his power to clear his contempt, the Court often makes no other order, except that defendant pay the costs of the motion. (See L. R. 7 Eq. 58, n.)

The commitment must be for a time certain. (*R.* v. *James*, 5 B. & Ald. 894; *Green* v. *Elgie and another*, 5 Q. B. 99.) But in all other respects the warrant may be in general terms: no special grounds need be stated; nor need the facts which are the cause of the arrest be

specified: it is sufficient to state that the offender is committed for contempt of Court. (*Howard* v. *Gossel*, 10 Q. B. 411; *Ex parte Fernandez*, 6 H. & N. 717; 10 C. B. (N. S.) 3.) Two lines are sufficient (*R.* v. *Paty*, 2 Lord Raym. 1108), and will justify the officer of the Court in arresting the offender, and protect him from any action of false imprisonment. It is presumed that the Court was acting regularly and rightly, unless, indeed, the contrary appears expressly on the face of the writ. (*R.* v. *Evans and another*, 8 Dowl. 451.) And the decision of the Judge committing cannot be reviewed by any other Court. (*Burdett* v. *Abbott*, 14 East, 1; *Stockdale* v. *Hansard*, *per* Littledale, J., 9 A. & E. 169; *Carus Wilson's Case*, *per* Lord Denman, C. J., 7 Q. B. 1008.) If a fine is inflicted it is usual to add a sentence of imprisonment till the fine be paid, in addition to any other term of imprisonment that may have been inflicted. (L. R. 9 Q. B. 228, 229, 240.) Where the period for which the offender is to be detained is expressed in the margin of the writ, or may be gathered from it by necessary inference, the gaoler should discharge the prisoner at the end of that period. (*Moone* v. *Rose*, L. R. 4 Q. B. 486; 38 L. J. Q. B. 236.) But if the warrant does not state the period for which he is to be kept in custody, nor refer to the nature of the contempt committed, the gaoler should not release him without an order of the Court. (*Greaves* v. *Keene*, 4 Ex. D. 73; 27 W. R. 416; 40 L. T. 216; *McCombe* v. *Gray*, 4 L. R. (Ir.) 432.) When the period assigned comes to an end, the offender may not be detained in custody merely for the costs of the application to the Court to commit. (*Jackson* v. *Mawby*, 1 Ch. D. 86; 45 L. J. Ch. 53; 24 W. R. 92; *Hudson* v. *Tooth*, 2 P. D. 125; 35 L. T. 820.) *A fortiori* where condemnation in costs is the only punishment inflicted, the

Court has no power subsequently to commit to prison for default in payment. (*Mickelthwaite* v. *Fletcher*, 27 W. R. 793.)

In Scotland the Court of Session has sometimes *by interdict* prevented the intended publication of any statements having a tendency to interfere with the administration of justice. Thus, where one of two prisoners charged with murder confessed before his trial and by his confession seriously implicated the other, the Court of Session prohibited the *Edinburgh Evening Courant* from publishing the confession, lest it should prejudice the fair trial of the other prisoner. (Bell's Notes, 165. See also *Emond's Case*, Dec. 7th, 1829, Shaw, 229.) But in *Fleming* v. *Newton*, 1 H. L. C. 376, Lord Cottenham expresses a strong opinion that such interdicts are an excess of the powers of the Court of Session; as by such intervention "jurisdiction over libels is taken from the jury, and the right of unrestricted publication is destroyed."

In England such a prohibition would be clearly an illegal restriction of the liberty of the press. But the Court of Chancery has sometimes asserted that an exception to this rule exists in its own favour: and it has granted injunctions to restrain, not indeed all publications which it deems contempts, but one special class, viz., premature publications of its own proceedings, whether in court or before an examiner. (*Ex parte Jones*, 13 Vesey, 237; *Brook* v. *Evans*, 29 L. J. Ch. 616; 6 Jur. N. S. 1025; 8 W. R. 688; *Coleman* v. *West Hartlepool Rail. Co.*, 8 W. R. 734; 2 L. T. 766.) And there is one instance in which a court of gaol delivery exercised a similar power (*R.* v. *Clement*, 4 B. & Ald. 218), on the trial of Thistlewood and others for treason in 1820.

It is said that such injunction will not generally be granted unless applied for promptly, nor if the party complaining has himself invited, or commenced, public discussion of the matter in a newspaper. (*Daw* v. *Eley*, L. R. 7 Eq. 49; 38 L. J. Ch. 113; *Buenos Ayres Gas Co.* v. *Wilde*, 29 W. R. 43; 42 L. T. 657.) But having regard to the recent decision in the *Prudential Assurance Co.* v. *Knott*, L. R. 10 Ch. 142; 44 L. J. Ch. 192; 23 W. R. 249; 31 L. T. 866, it may well be doubted whether

any such exception to the general rule exists either in Scotland or in England. No doubt it is a *contempt* for any one to prematurely publish garbled *ex parte* accounts of interlocutory proceedings: but surely subsequent punishment by fine and imprisonment is a sufficient deterrent. There seems no need of such an unusual remedy in this particular case, especially as the Courts of Equity have no jury, whose minds might be influenced thereby.

The words "Superior Court" include the House of Lords, the Judicial Committee of the Privy Council, the Court of Appeal, the High Court of Justice, and any Divisional Court thereof, and any Judge of any division sitting in Court alone (Jud. Act, 1873, s. 39) and the London Court of Bankruptcy (32 & 33 Vict. c. 71, ss. 19, 77; G. R. 178, 179; c. 62, s. 9; c. 83, ss. 4, 16). Also any commissioner of oyer and terminer, assize, gaol delivery, and Nisi Prius. (*Ex parte Fernandez*, 6 H. & N. 717; 10 C. B. (N. S.) 3; 30 L. J. C. P. 321; 7 Jur. N. S. 529, 571; 9 W. R. 832; 4 L. T. 296, 324; *In re McAleece*, Ir. R. 7 C. L. 146.) And the Superior Courts of Law and Equity in Dublin, and the Court of Session in Scotland.

But whether a judge sitting at chambers is "a superior court," and has such power to commit for contempt, may well be doubted. Wilmot, C.J., was clearly of opinion that a judge at chambers had such a power, as appears by the very learned judgment which he intended to deliver in *R.* v. *Almon*, (Wilmot's Opin. & Judgments, 253) but it was not delivered in fact, the case having dropped on the resignation of the then Attorney-General, Sir Fletcher Norton. But there is no instance of a judge at chambers himself inflicting fine or imprisonment. He invariably reports any insult offered to him at chambers to the full court, and leaves it to the Court to punish the offender. And in *R.* v. *Faulkner*, 2 Mont. & Ayr. 338, Lord Abinger, C.B., states most distinctly that a judge at chambers has *no* power to commit for contempt. Section 39 of the Jud. Act, 1873, seems in no way to enlarge the powers of a judge at chambers; and

its concluding sentence certainly implies that a judge at chambers is not "a court," and in so far confirms Lord Abinger's opinion. In the analogous case of the Court of Review, it has been decided that a single judge has no power to commit for contempt, except when sitting as the Court. (*Ex parte Van Sandau*, 1 Phillips, 445; *Van Sandau* v. *Turner*, 6 Q. B. 773; compare also, *In re Ramsay*, L. R. 3 P. C. 427; 7 Moo. P. C. C. N. S. 263; *Rainy* v. *Justices of Sierra Leone*, 8 Moo. P. C. C. 47.) Hence, in spite of the *dictum* of Folkard & Starkie, 4 ed., 631, the better opinion appears to be that a judge at chambers cannot safely commit summarily for a contempt of himself; although, of course, he constantly issues at chambers writs of attachment *after notice* to the party in default under Jud. Act, Order XLIV.

And *d fortiori* no official or special referee (Jud. Act, Order XXXVI. r. 33), and no arbitrator (3 & 4 Will. IV. c. 42, s. 40) can commit for contempt.

The Colonial courts of record are also superior courts, and possess the power of instantly committing for contempt in all the above cases: and no appeal lies from such a commitment to the Privy Council. (*Crawford's case*, 13 Q. B. 613; 18 L. J. Q. B. 225; 13 Jur. 955. *In re McDermott*, L. R. 1 P. C. 260, 2 P. C. 341; 38 L. J. P. C. 1; 20 L. T. 47; *Hughes* v. *Porral and others*, 4 Moore, P. C. C. 41.) But if it appear on the face of the writ that the Court had exceeded its jurisdiction (*In re Ramsay*, L. R. 3 P. C. 427; 7 Moore, P. C. C. N. S. 263; *Rainy* v. *The Justices of Sierra Leone*, 8 Moore, P. C. C. 47); or if the offender had no opportunity given him of defending or explaining his conduct (*In re Pollard*, L. R. 2 P. C. 106; 5 Moore, P. C. C. N. S. 111); or if the punishment awarded for the contempt was not appropriate to the offence (*Re Wallace*, L. R. 1 P. C. 283; 36 L. J. P. C. 9; 15 W. R. 533; 14 L. T. 286; *Re Downie & Arrindell*, 3 Moore, P. C. C. 414); the order of commitment will

be set aside, and the fine ordered to be remitted, by the judicial committee of the Privy Council on appeal. But if it sufficiently appears that the prisoner was committed for contempt, and that the Court had power to commit for such contempt, the offender cannot be heard to say that such contempt was not in fact committed. "Every Court in such a case has to form its own judgment." (*Per* Ld. Denman, C.J., in *Carus Wilson's case*, 7 Q. B. 1015.) When a competent court, acting clearly within its jurisdiction, states certain matters of *fact*, affidavits are not admissible to contradict such findings. So if the colonial court administers a different system of law from ours, affidavits cannot be received in England to show that the colonial court was acting contrary to its own law. The English Courts must "give full credit to that Court for knowing and administering their own law." (*Per* Lord Denman, C.J., in *Carus Wilson's case*, 7 Q. B. 1014.)

(*See* also *The Bank of Australasia* v. *Harding*, 9 C. B. 661; 19 L. J. C. P. 345; *Bank of Australasia* v. *Nias*, 16 Q. B. 717; 20 L. J. Q. B. 284; *De Cosse Brissac* v. *Rathbone*, 6 H. & N. 301; 30 L. J. Ex. 238; *Munroe* v. *Pilkington*, 31 L. J. Q. B. 89; 8 Jur. N. S. 557; 6 L. T. 21; *Simpson* v. *Fogo*, 32 L. J. Ch. 249; 1 H. & M. 195; 1 J. & H. 18; 9 Jur. N. S. 403; 1 N. R. 422; 11 W. R. 418; 8 L. T. 61; *Godard* v. *Gray*, L. R. 6 Q. B. 139; 40 L. J. Q. B. 62; 19 W. R. 348; 24 L. T. 89.)

(*b*) Inferior Courts.

The Judge of an inferior court is in no better position than any other public character, so far as words written and published are concerned. It is a misdemeanour to write and publish concerning him in the execution of his office any words which would be libellous and actionable *per se* if written and published of any other public officer.

It is not indictable to *speak* disrespectful and abusive words of the judge of an inferior court behind his back, or even to his face, provided he be out of court.

But it is indictable to *speak* aloud in open court when the judge is present in the discharge of his duty, words reflecting upon him in his official capacity.

Illustrations.

It is indictable—

to give the lie to the steward of a manor holding a court leet,

Earl of Lincoln v. *Fisher*, Cro. Eliz. 581; Ow. 113; Moore, 470;

to put on your hat in the presence of the lord of a court leet and refuse to take it off, saying, "I care not what you can do,"

Bathurst v. *Coxe*, 1 Keb. 451, 465; Sir T. Raym. 68;

to rise up in court and say to the justices in session, "Though I cannot have justice here, I will have it elsewhere,"

R. v. *Mayo*, 1 Keb. 508; 1 Sid. 144 (although Twisden, J., mercifully endeavoured to construe the words to mean merely, "I propose to appeal from your decision");

to say *to* a justice of the peace in the execution of his office, "You are a rogue and a liar,"

R. v. *Revel*, 1 Str. 420;

to call the mayor of Yarmouth in his court in the hearing of the suitors, a puppy and a fool,

Ex parte The Mayor of Yarmouth, 1 Cox, C. C. 122.

But it is not indictable—

to call a justice of the peace, "a logger-headed, a slouch-headed, bursen-bellied hound,"

R. v. *Farr*, 1 Keb. 629;

Nor to say that a justice is a fool, or an ass, or a coxcomb, or a blockhead, or a bufflehead. *Per* Holt, C.J., in

R. v. *Wrightson*, 2 Salk. 698 ; 11 Mod. 166 ; 2 Roll. Rep. 78 ; 4 Inst. 181 ;

Nor to say of a burgess of Hull, that "Whenever he comes to put on his gown, Satan enters into him,"

R. v. *Baker*, 1 Mod. 35 ;

Nor to say of a justice of the peace in his absence that he is a scoundrel and a liar. *Per* Lord Ellenborough,

R. v. *Weltje*, 2 Camp. 142 ;

Nor to accuse a justice of partiality or corruption, unless the words were uttered at a time when the magistrate was in the actual execution of his office,

Ex parte The Duke of Marlborough, 5 Q. B. 955 ; 1 Dav. & Mer. 720 ;

Nor to tell a borough magistrate, out of court but to his face, that he is a liar, and unfit to be a magistrate, and that he will hear the same every time he came into town ; unless indeed the words can be construed as tending to provoke a breach of the peace.

Ex parte Chapman, 4 A. & E. 773.
See also Anon. (1650), Style, 251.
Simmons v. *Sweete*, Cro. Eliz. 78.
Bagg's Case, 11 Rep. 93, 95 ; 1 Roll. Rep. 79, 173, 224.
R. v. *Burford*, 1 Ventris, 16.
R. v. *Leafe*, Andrews, 226.
R. v. *Penny*, 1 Ld. Raymond, 153.
R. v. *Langley*, 2 Ld. Raymond, 1029 ; 2 Salk. 697 ; 6 Mod. 125 ; Holt, 654.
R. v. *Rogers*, 2 Ld. Raymond, 777 ; 7 Mod. 28.
R. v. *Nun*, 10 Mod. 186.
R. v. *Granfield*, 12 Mod. 98.
R. v. *Pocock*, 2 Str. 1157.
R. v. *Burn*, 7 A. & E. 190.
These cases overrule *R.* v. *Darby*, 3 Mod. 139 ; Comb. 65 ; Carth. 14.

Thus the same act which would be indictable if committed with respect to a superior court may not be indictable if only an inferior court is concerned. And the power of an inferior court to deal itself with such contempts is again still further restricted.

For as we have seen the superior courts could commit to prison in many cases where the offence is not indictable. An inferior court on the other hand cannot commit

in every case which is indictable, and certainly in none which is not. (*R.* v. *Revel*, 1 Str. 420.)

An inferior court of record can only commit for contempts committed in open court, *in facie curiæ*. (*R.* v. *Lefroy*, L. R. 8 Q. B. 134; 42 L. J. Q. B. 121; 21 W. R. 332; 28 L. T. 132.) The judge or coroner must at the moment be actually discharging his duty; and the words employed or act done must either be pointedly and personally disrespectful to the judge or coroner himself; or else amount to a serious obstruction of the course of justice.

Illustrations.

If a coroner for any reason (and the sufficiency of such reason is a matter entirely for the coroner in the exercise of his discretion) order a particular person to quit the room where he is about to hold an inquest, and such person wholly refuse to go, and defiantly continues in the room to the hindrance of the inquest, the coroner may lawfully order him to be expelled.

Garnett v. *Ferrand*, 6 B. & C. 611.

The solicitor for a plaintiff in a county court wrote a letter to the local newspaper, accusing the judge of the county court of "arbitrary and tyrannical abuse of power," and calling one statement he had made "a monstrosity" and "an untruth." *Held* that the judge had no power to proceed against the solicitor for contempt of court; although the matter was still pending.

R. v. *Lefroy, Ex parte Jolliffe*, L. R. 8 Q. B. 134; 42 L. J. Q. B. 121; 21 W. R. 332; 28 L. T. 132.

Before actually committing, the judge or coroner should always give the offender an opportunity of explaining his conduct and showing cause why he should not be committed.

If the judge or coroner does commit, he must issue a warrant in writing, and duly signed; he may not commit by word of mouth, as a judge of a superior court may sometimes do. (*Mayhew* v. *Locke*, 7 Taunt. 63.) Such warrant should state clearly the cause for which the prisoner was committed and all facts necessary

to give jurisdiction to commit. Affidavits are inadmissible to contradict any statement *of fact* contained in the warrant (*In re John Rea* (2), 4 L. R. Ir. 345; 14 Cox, C. C. 256); though they are admissible to show want of jurisdiction. (*R.* v. *Bolton*, 1 Q. B. 73.) But where it sufficiently appears that the prisoner was committed for contempt, and the court had power on the facts as stated by them to commit for such contempt, their decision cannot be reviewed by any court. (*Carus Wilson's case*, 7 Q. B. 984, 1014; *Garnett* v. *Ferrand*, 6 B. & Cr. 625; *R.* v. *Bolton*, 1 Q. B. 73.) They alone can judge of the insult offered to them. Such a warrant will justify any officer of the inferior court in arresting the offender, and protect him from any action of assault or false imprisonment. (*Levy* v. *Moylan*, 19 L. J. C. P. 308; 1 L. M. & P. 307.)

Illustrations.

Charles Carus Wilson, an English attorney, went to reside in Jersey, and there brought an action against Peter Le Sieur in the Royal Court of Jersey, which was composed of a Bailiff and two Jurats, or Lieutenant-bailiffs. On September 23rd, 1844, the court was about to deliver an interlocutory judgment in the cause against Wilson, when he interposed and in an unbecoming manner protested against the competency of the court, his own counsel being present and silent. Wilson had previously been repeatedly warned that his conduct was disrespectful. The court thereupon, after giving Wilson full opportunity to explain or apologise for his conduct, sentenced him to pay a fine of £10 and apologise to the Court, and in default to be imprisoned till obedience. This sentence was duly recorded in the Judgment Book, and read aloud to Wilson and his counsel then and there; but Wilson wholly refused either to pay or to apologise, and was accordingly at once arrested by the Viscount of the island, whose duty it was to carry into effect the sentences of the Royal Court, and lodged in Her Majesty's gaol. A writ of *habeas corpus* was obtained on the ground that there was no written warrant for his arrest or detainer. The return to the writ set out all the facts and also stated that by the law and practice of the Island of Jersey no written warrant was necessary or usual, but the sentence duly recorded was of itself a sufficient authority justifying and compelling the Viscount to arrest, and the gaoler to detain, the offender. *Held* by Lord Denman, C.J., Patteson, Williams and Wightman, JJ., that affidavits on behalf of Wilson to show that such was *not* the law or practice of Jersey, and that in other respects the Royal Court had acted inconsistently with

its own law, could not be received: that no written warrant was necessary; that the contempt was a matter which the Royal Court had to decide for itself; that its decision, being the decision of a competent court, could not be reviewed by the Queen's Bench; and Wilson was accordingly, on April 22nd, 1845, remanded to Her Majesty's Prison in Jersey.

Carus Wilson's Case, 7 Q. B. 984.

Inferior Courts not of record have no power to fine or commit for contempt. But they have another remedy which is now peculiar to inferior courts, although it was formerly employed also by the superior courts in cases not calling for severer punishment. The offender may be required to find *sureties for his good behaviour*:—

(i.) If he use any disrespectful or unmannerly expressions in the face of the court. (1 Lev. 107; 1 Keb. 558.)

(ii.) If, out of court, he uses words disparaging the judge or magistrate in relation to his office.

(iii.) If, out of court, he obstruct or insult an officer of the court in the execution of his duty. (Hawk. P. C. c. 61, ss. 2, 3.)

(iv.) And generally, if he use any words which directly tend to a breach of the peace.

But *not* for contemptuous and uncivil words spoken of the judge in his private capacity.

Such binding over should be done as soon as possible after the contempt is committed; and in the case of petty sessions, it should be done, *not* by the justice specially attacked, but one of his brethren. (*R.* v. *Lee*, 12 Mod. 514.) And in default of sureties being provided, the justices may commit either to the common gaol or to the House of Correction (6 Geo. I., c. 19, s. 2); but it should appear clearly upon the face of their warrant that the committal is for want of sureties, and not merely for contempt. (*Dean's case*, Cro. Eliz. 689.) And the committal should be for a time

certain, not "until he shall find such sureties," else a poor and friendless man might be imprisoned for life. (*Prickett* v. *Gratrex*, 8 Q. B. 1020.)

Illustrations.

Langley said to the Mayor of Salisbury whilst in the execution of his office, "Mr. Mayor, I do not care for you; you are a rogue and a rascal." *Held* that the words were not indictable; but that the Mayor might have bound him over then and there to be of good behaviour, and ought to have done so instantly.

R. v. *Langley*, 2 Ld. Raymond, 1029; 6 Mod. 125; 2 Salk. 697; Holt, 654.

Rogers spoke unmannerly words to Sir Robert Jeffryes, an Alderman of the City of London, while he was holding a wardmote in a church. Holt, C. J., said, "No information or indictment will lie for these words. For the common law has provided a proper method for punishment of scandalous words, viz., binding to the good behaviour; such words being a breach of the peace."

R. v. *Rogers*, 2 Ld. Raym. 777; 7 Mod. 28.

As to some inferior courts special statutes have been passed. Thus, as to County Courts, by 9 & 10 Vict. c. 95, s. 113 (County Courts Act, 1846), it is enacted, that "if any person shall wilfully insult the judge or any juror, or any bailiff, clerk or officer of the said court for the time being, during his sitting or attendance in court, or in going to or returning from the court, or shall wilfully interrupt the proceedings of the court or otherwise misbehave in court, it shall be lawful for any bailiff or officer of the court, with or without the assistance of any other person, by the order of the judge, to take such offender into custody, and detain him until the rising of the court; and the judge shall be empowered, if he shall think fit, by a warrant under his hand, and sealed with the seal of the court, to commit any such offender to any prison to which he has power to commit offenders under this Act (see 12 & 13 Vict. c. 101, s. 2), for any time not exceeding seven days, or to impose upon any such

offender a fine not exceeding £5 for every such offence; and, in default of payment thereof, to commit the offender to any such prison as aforesaid for any time not exceeding seven days, unless the said fine be sooner paid." (See *Levy* v. *Moylan*, 19 L. J. C. P. 308; 1 L. M. & P. 307.)

And it has been held that a County Court judge has no power to commit in any case not within this section. (*R.* v. *Lefroy, ex parte Jolliffe*, L. R. 8 Q. B. 134; 42 L. J. Q. B. 121; 21 W. R. 332; 28 L. T. 132.) Except, of course, for breach of injunction and in other cases coming within rules 30 & 31 of County Court Rules, 1875, Order XIX. (*Martin* v. *Bannister*, 4 Q. B. D. 212, 491; 48 L. J. Ex. 300; 27 W. R. 431.)

By the County Voters Registration Act, 1865 (28 Vict. c. 36), s. 16, it is declared to be lawful for any Revising Barrister, whether revising the Lists of a County, City, or Borough, to order any person to be removed from his Court who shall interrupt the business of the Court, or refuse to obey his lawful orders in respect of the same; and it shall be the duty of the Chief Constable, Commissioner, or Chief Officer of Police of the County, City, Borough, or Place in which the Court is held, to take care that an officer of police do attend that Court, during its sitting, for the purpose of keeping order therein, and to carry into effect any order of the Revising Barrister as aforesaid.

By the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93,) s. 9, it is enacted that if any person shall wilfully insult any Justice or Justices. . . . sitting in any. . . . Court or place, or shall commit any contempt of any such Court, it shall be lawful for such Justice or Justices by any verbal order, either to direct such person to be removed from such Court or place, or to be taken into custody, and at any time before the

rising of such Court, by warrant, to commit such person to gaol for any period not exceeding seven days, or to fine such person in any sum not exceeding 40*s*.

Illustrations.

In 1874 Thomas Willis claimed to vote as a freeholder; but the revising barrister on the meagre evidence before him held that the property in respect of which he claimed was copyhold, and disallowed the vote. His cousin William Willis who was present in court as agent for the opposite political party knew perfectly well that it was really freehold, but held his tongue. In 1875 Thomas Willis accordingly claimed as a copyholder. Then William came forward and produced the family title-deeds and proved clearly that the land was freehold. The revising barrister was compelled again to disallow Thomas's vote; but ordered William to be turned out of the room for not having produced this evidence in 1874. *Held* that such expulsion was wrongful, as William's conduct in 1874, though possibly deserving of moral reprobation, was certainly no "interruption" of the proceedings of the court then being held in 1875.

Willis v. *Maclachlan*, 1 Ex. D. 376; 45 L. J. Ex. 689; 35 L. T. 218.

To insist, in spite of repeated remonstrance, upon interrupting and insulting a court of petty sessions, by shouting at the bench in the most violent and unseemly manner, so that not even one of the justices was able to speak a word, is a contempt for which the court may commit to prison even a solicitor practising before them.

In re John Rea (1878), 2 L. R. Ir. 429; 14 Cox, C. C. 139.

A material witness against a prisoner committed for trial on a charge of felony refused to be bound over to appear at the Quarter Sessions to give evidence against him, saying that she would not go to Maidstone, and nobody should make her. After fully explaining the matter and expending nearly an hour in the attempt to persuade her to go, the committing magistrate issued a warrant by virtue of which she was taken to Maidstone, and gave her evidence, and the prisoner was convicted; without her evidence he could not have been convicted. *Held* that the arrest was lawful, by necessary implication from 1 & 2 Ph. & M. c. 13.

Bennett and wife v. *Watson and another*, 3 M. & S. 1.

The term "Inferior Court" includes the Mayor's Court, London, the Sheriff's Court, the City of London Court of Record, the Secondary's Court, the Tolzey Court of Bristol, the Salford Court of Record, the Court of Passage, Liverpool, all Sheriff's Courts, all County Courts, all Courts of Quarter and Petty Sessions, all Coroners, all

Revising Barristers, and, in short, all *temporal* Courts not enumerated as Superior Courts, *ante*, p. 437.

The ecclesiastical Courts have no power to commit for contempt at all. All that such Court can do is to signify such contempt to the Lord Chancellor, who thereupon, under 2 & 3 Will. IV. c. 93, issues a writ *de contumace capiendo* for taking the offender into custody. (*Adlam* v. *Colthurst*, L. R. 2 Adm. & Ecc. 30; 36 L. J. Ec. Ca. 14; *Ex parte Dale*, 43 L. T. 534.) But such writ will not issue if the alleged offender be a peer, a lord of Parliament, or a member of the House of Commons (s. 2). Note that both Mr. Long Wellesley and Mr. Lechmere Charlton (*ante*, pp. 430, 431), were members of Parliament, and yet both were committed to the Fleet for contempt of the Court of Chancery. (2 Russ. & Mylne, 639; 2 Mylne & Cr. 316.) And see the remarks of Cockburn, C.J., in *Onslow's* and *Whalley's cases*, L. R. 9 Q. B. 228, 9; 12 Cox, C. C. 369.

PART II.

PRACTICE, PROCEDURE, AND EVIDENCE.

CHAPTER XVII.

PRACTICE AND EVIDENCE IN CIVIL CASES.

AN action of libel or slander should not be lightly undertaken; it is a dangerous experiment; many a plaintiff, even though nominally successful, has bitterly regretted that he ever issued his writ. Everyone who proposes to bring an action of defamation should remember that he is about to stake his reputation on the event of a lawsuit, and to invite the public to be spectators of the issue. No step, therefore, should be taken in hot haste. There are many matters which require careful consideration before an action be commenced.

Considerations before Writ.

First, is it clear that the plaintiff is the person defamed? Libels are often couched in guarded language, so that none but the initiated can tell to whom they refer. Thus, if the libel be on "a certain vicar," no individual vicar should sue, unless by other passages in the libel he is unmistakably identified; otherwise he will be "putting the cap on his own head." It is not enough that one or two of the plaintiff's dearest friends feel convinced that he is the person aimed at; he should not sue unless his relations and acquaintances generally have arrived at the same conclusion.

Next, is the charge, or any part of it, true? If so, the plaintiff, by bringing an action takes the surest method of adver-

tising his own disgrace. When once the action is brought and a justification pleaded, no honourable compromise can be effected; the matter must be fought out to the bitter end; and every detail will become matter of "town talk." It would be better, therefore, for such a plaintiff to affect an indifference which he does not feel, and treat the libel as "beneath contempt."

And even if the charge itself be false, still if the plaintiff has been at all to blame in the matter, if his conduct, though not morally reprehensible, has yet been indiscreet or unbecoming, it will be better for him not to sue. He will have to be cross-examined in open court, and every admission wrung from him will be published in all the county papers; the blackest motives will be imputed to him, and the worst possible construction be put upon his conduct. And although the verdict be ultimately in the plaintiff's favour, many of his acquaintances will remember with pleasure to their dying day what a sorry figure he cut in the box.

The plaintiff should also consider whether he has not brought the libel or slander on himself, whether his own conduct was not such as naturally to lead people to make unkind remarks. See *Davis* v. *Duncan*, L. R. 9 C. P. 396; 43 L. J. C. P. 183; 22 W. R. 575; 30 L. T. 464; *ante*, p. 52. Sometimes it is a defence to an action that the plaintiff challenged or invited the defendant's attack (*ante*, p. 228); and in every case the defendant may show in mitigation of damages the provocation given by the plaintiff (*ante*, pp. 306, 307). A man who has commenced a newspaper controversy comes with a very bad grace to the law courts for assistance against too powerful an adversary. If both parties are to blame, the result of the trial is generally:—Damages, one farthing; each party to pay his own costs.

And wholly apart from the above considerations, is it worth while to bring an action? Is the matter sufficiently serious? A man does not advance either his dignity or his reputation by showing himself too sensitive to calumny. His friends will think that he is eager for litigation, because he knows that his character cannot stand the least wear and tear. This remark applies chiefly to actions of slander. It is not wise to inquire too curiously what others say of us behind our backs. The slander is only heard by few; it will soon be forgotten: if yo

bring an action, it will be disseminated throughout the country, and recorded in a permanent shape. If then you are in doubt whether to bring an action of slander or not, my advice would be in the negative, unless the charge made be really serious. A libel in a newspaper is very different.

And even in cases of libel, it is better to exhaust every other method first. If the libel has appeared in a newspaper, write to the editor a calm and dignified letter in answer, avoiding all "smart writing," and indulging in no *tu quoque*. This will probably bring an apology from the writer of the original letter. And a prompt apology and retractation of the charge is always worth more to the plaintiff than any amount of damages. If, however, no apology comes, but another letter worse than the first, the plaintiff should lie by awhile till his adversary has thoroughly committed himself by some third letter palpably outrageous. Now the plaintiff can show a systematic course of persistent libelling, which is cogent evidence of malice, entitling him to heavy damages.

Next, before issuing a writ, the plaintiff should make sure what were the defendant's exact words. Of a libel, a copy can as a rule be easily obtained; but with slanders it is different. What has reached the plaintiff's ears is probably a much exaggerated version of what defendant actually said. The plaintiff is usually the last person who hears the charge against him; and words not actionable *per se* are frequently converted into actionable words in the intermediate process; for we know that:—

> "Fama, malum quo non aliud velocius ullum,
> Mobilitate viget, viresque acquirit eundo,
> * * * * * * *
> Tam ficti pravique tenax, quam nuntia veri."
>
> VIRG. Æn. IV. 174, 188.

The person slandered should, therefore, take a friend with him (who will make a good witness) and go and ask the alleged slanderer:—"Is it true that you have been saying this of me?" If he denies that he ever said so, as is very possible, appear at all events to believe him, and bring no action; if he confesses that he did say so, but has since discovered he was mistaken, get him to write you a letter acknowledging his error, to show

anyone if necessary, and then forgive him. If, however, he admits that he said so and reiterates the charge, then you are provided by anticipation with the best possible evidence of publication—an admission by the defendant. Lord Denman says, in *Griffiths* v. *Lewis*, 7 Q. B. 61 ; 14 L. J. Q. B. 199 ; 9 Jur. 370, "it is never wise to bring an action for slander unless some such course has been taken." See his remarks, *ante*, p. 231.

As soon as it is clear what is the precise charge made by the defendant, the next question will be :—Are the words actionable ? On this point the plaintiff should consult his solicitor, who should consult c. II. *ante*, pp. 17—92. If the words are not actionable without special damage, the plaintiff must wait for some damage to accrue before commencing his action.

Parties.

Next, it must be determined who is the right plaintiff, and who the proper defendant; as to which see c. XII. *ante*, pp. 344—372. In cases of slander where special damage is essential to the action, be careful to sue only that person whose actual utterance of the slander caused the special damage. Do not sue the originator of the falsehood, if his utterance of it has produced no direct injury to the plaintiff. In cases of written libels, it is often wise to sue the person who actually wrote the libel as well as his master or employer who directed or sanctioned what he wrote. For thus, should the plaintiff fail to prove agency at the trial, he will yet be entitled to judgment against the clerk or servant. In a recent case (*Pollard* v. *Green*, Bristol Summer Assizes, 1880) the libel was contained in a business letter written by the wife of a tradesman : the plaintiff sued the husband alone, and failed to prove that the libellous portion of the letter was written with the husband's knowledge or consent. The plaintiff's counsel thereupon applied to have the wife added as co-defendant ; but Grove, J., ruled that it was too late to do so. Had the wife's name been added in the first instance, the plaintiff must have succeeded, whether the husband knew what his wife was writing or not.

Where a libel has appeared in a newspaper, the person defamed can sue the editor, printer, publisher, or author, or

some, or all of them. He would naturally prefer to sue the author, and should write to the editor demanding the writer's name and address. This information the editor will, as a rule, refuse to give. It is generally regarded as a point of honour with an editor not to disclose the name of any of his regular contributors. In *Harle* v. *Catherall and others*, 14 L. T. 802, Martin, B., says, "When a man went to an editor to ask for the name of an anonymous correspondent, no blame attached to the editor for refusing to give the name. Indeed, an editor would almost be mad to do so. He should blame no editor for so refusing." The plaintiff must in such a case be content to sue the proprietor of the paper.

Letter before Action.

In all cases, before actually issuing a writ, the plaintiff's solicitor should write to the defendant, demanding an apology and threatening proceedings. If the charge was made publicly, a public apology should be demanded. If only a few heard it, the plaintiff should be content with a letter of apology, fully retracting the charge; this could be shown to everyone who heard what the defendant said.

Notice of Action.

Sometimes besides the letter before action it is necessary to give a formal notice of action a month and a day before the writ is issued—*e.g.*, where a libel is written by anyone acting *bonâ fide* in the execution of any statutory duty (5 & 6 Vict. c. 97, s. 4). In such cases, a letter asking for the name of the writer's informant, and threatening proceedings if the name be not disclosed, will not be a sufficient notice within the statute. (*Norris* v. *Smith*, 10 A. & E. 188.)

Choice of Court.

Next, in what Court shall the action be brought? The County Court has no jurisdiction (9 & 10 Vict. c. 95, s. 58), unless by consent of both parties (19 & 20 Vict. c. 108, s. 23); (although the action may subsequently be remitted to the County Court,

see *post*, pp. 468, 565). Where the particulars before a County Court judge disclose a cause of action for libel or slander, he has no power to amend them so as to give himself jurisdiction, *e.g.*, by turning the case into an action for false imprisonment. (*Hopper* v. *Warburton*, 7 L. T. 722.) The Courts of Equity before the Judicature Act had no cognizance over libels or slander, whether public or private, except as contempt of their own Courts. (*Roach* v. *Read and another*, 2 Atk. 469 ; 2 Dick. 794.) The Chancery Division now undoubtedly has jurisdiction to try a case of libel. (*Thomas* v. *Williams*, 14 Ch. D. 864; 49 L. J. Ch. 605 ; 28 W. R. 983 ; 43 L. T. 91.) But it is obviously inexpedient to commence such an action there ; for libel or no libel is peculiarly a question for a jury, and the judges of the Chancery Division never have a jury. (*Clark* v. *Cookson*, 2 Ch. D. 746 ; 45 L. J. Ch. 752 ; 24 W. R. 535 ; 34 L. T. 646 ; *Murdoch* v. *Warner*, 4 Ch. D. 750 ; 46 L. J. Ch. 121 ; 25 W. R. 207 ; 35 L. T. 748.) In *Thomas* v. *Williams*, the defendant never expressed a wish for a jury till the whole of the evidence on both sides had been taken ; had he applied sooner, Fry, J., would have changed the mode of trial. (See 14 Ch. D. 871.) The only object in going to the Chancery Division would be to obtain an injunction ; and it is clear now that an interim injunction cannot be obtained on an interlocutory application. (*Prudential Assurance Co.* v. *Knott*, L. R. 10 Ch. 142 ; 44 L. J. Ch. 192 ; 23 W. R. 249 ; 31 L. T. 866.) And at the full hearing of the case, after the trial, an injunction can be obtained as readily in the Common Law Divisions as in the Chancery Division. (*Saxby* v *Easterbrook*, 3 C. P. D. 339 ; 27 W. R. 188.) For every reason, therefore, it is best to issue the writ in one of the Common Law Divisions of the High Court of Justice.

District Registry.

The plaintiff, wherever resident, may, if he pleases, issue a writ out of the registry of any district (Order V. r. 1) ; but it is absolutely useless to do so, unless the plaintiff's solicitor has his office within the district. (See Order IV. r. 3*a* ; R. S. C. Feb. 1876, r. 3.) The districts of the district registries are defined by an Order in Council issued under s. 60 of the Judicature Act, 1873, on August 12th, 1875 : they are as a rule co-exten-

sive with the County Court district of the same place. Again, there is very little advantage in issuing a writ out of a District Registry, unless all the defendants reside or carry on business within the district; as if one of them neither resides nor carries on business within the district, he is almost sure to appear in London. If, however, all parties and their respective solicitors reside or carry on business within the district, then, if the action be simple and straightforward, it may be as well to issue the writ out of the District Registry. Instructions to draw pleadings may in that case be sent direct to counsel in town by post; and thus some few agency expenses will be saved. But if there are likely to be many applications at chambers, *e.g.*, over the Interrogatories and their Answers, or as to a plea of Justification, then it would be much better to issue the writ in London in the usual way. Even where the defendant resides and carries on business within the district, he may after appearance there remove the action to London as of right at any time before delivering his statement of defence, by merely giving a notice under Order XXXV. r. 12. After the expiration of the time for delivering defence an order is requisite, Order XXXV. r. 13. Of course issuing the writ out of the Central Office in London in no way prevents the trial taking place at the assizes.

Statute of Limitations.

It is seldom that a plaintiff in an action of defamation allows his remedy to be barred by lapse of time. He is generally too eager to commence proceedings, and will not wait till his special damage has fully accrued. (*See Ingram* v. *Lawson*, 6 Bing. N. C. 212; 8 Scott. 471; 9 C. & P. 326; 4 Jur. 151; *Goslin* v. *Corry*, 7 M. & Gr. 342; 8 Scott, N. R. 21.) Still the Duke of Brunswick waited nearly eighteen years; it may be as well therefore to state that an action of slander for words actionable *per se* must be brought "within *two* years next after the words spoken, and not after" (21 Jac. I. c. 16, s. 3), and that an action for libel or of *scandalum magnatum* must be brought within six years from the date of publication. (*Lord Saye & Seal* v. *Stephens*, cited Cro. Car. 535; Litt. 342.) In cases of slander of title, and indeed whenever the words are actionable

only by reason of special damage, the plaintiff has six years within which to sue; and the time does not begin to run till the damage has actually been sustained. (*Saunders* v. *Edwards*, 1 Sid. 95). This is in accordance with the principle of *Bonomi* v. *Backhouse*, 9 H. L. C. 503; E. B. & E. 662; 34 L. J. Q. B. 181. Lord Campbell was evidently under a misapprehension as to the effect of stat. 21 Jac. I. c. 16, in his remarks in 9 H. L. C. p. 513. In all other cases the time runs from the date of publication, unless indeed the party then entitled to bring the action be under any disability, or be beyond the seas (21 Jac. 1. c. 19, s. 7; 4 & 5 Anne, c. 3 (al. c. 16), s. 19; 3 & 4 Will. IV. c. 42, s. 7; 19 & 20 Vict. c. 97, s. 12). But if once such disability be removed and the time begin to run, nothing afterwards can stop it.

But the publication relied on to oust the statute need not be the original or substantial publication. Thus if any agent of the plaintiff can induce the defendant to sell him an old copy of the libel, published many years ago, such second publication, although contrived by the plaintiff for the very purpose, will be sufficient to disprove the plea of the Statute of Limitations. And that plea being once ousted the jury will not be confined to that single publication within the six years, but may give damages generally for the original dissemination of the libel. (*Duke of Brunswick* v. *Harmer*, 14 Q. B. 185; 19 L. J. Q. B. 20; 14 Jur. 110; 3 C. & K. 10.)

Former Proceedings.

That a previous action has already been brought and damages recovered against the same defendant for the same words is a bar to any subsequent action, even though fresh damage has since arisen therefrom. For the jury in the former action must be taken to have assessed the damages once for all; and the probability or possibility that this subsequent damage would follow should have been submitted to their consideration then. And this is so whether the words are in themselves actionable or not, *ante*, p. 317. So if the prior action was unsuccessful, this will also be a bar to the action; unless indeed the plaintiff was only nonsuited on some technical ground and the judge in giving

judgment of nonsuit expressly declared that it was a common law nonsuit, and that the plaintiff might bring a second action.

But it must be clear that the cause of action is the same in both cases. Thus 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, the defendant pleaded a former judgment recovered for the same grievances; but 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. (*Wadsworth* v. *Bentley,* 23 L. J. Q. B. 3; 17 Jur. 1077; 2 C. L. R. 127; 1 B. C. Cases (L. & M.) 203.)

So, too, a previous recovery against another person may be a bar to the present action, if the former defendant was jointly concerned with the present defendant in the very publication now sued on. Thus if A. & B. be in partnership either as printers or publishers of a newspaper, a previous judgment recovered against A. would be a bar to any action against B. for the same libel, even though the judgment obtained in the prior action be not satisfied. (*Brown* v. *Wootton,* Cro. Jac. 73; Yelv. 67; Moo. 762; *King* v. *Hoare,* 13 M. & W. 494, 504; *Brinsmead* v. *Harrison,* L. R. 7 C. P. 547; 41 L. J. C. P. 190; 20 W. R. 784; 27 L. T. 99, followed in *Ex parte Drake, In re Ware,* 5 Ch. D. 866; 25 W. R. 641; 36 L. T. 677.) But this is only because they ought to have been sued jointly, and could have been so sued before the Judicature Act. Where two are severally liable, judgment against one is no bar to an action against the other. Thus, a previous judgment against the proprietor of a newspaper, even though satisfied, is no bar to an action for the same libel against the author. (*Frescoe* v. *May,* 2 F. & F. 123.) *A fortiori* that heavy damages had been recovered against one newspaper is no bar to an action against

another newspaper which has published the same libel. Such previous recovery should not even be mentioned to the jury in mitigation of damages (*Creevy* v. *Carr*, 7 C. & P. 64); nor should it be stated that such other actions are pending. (*Harrison* v. *Pearce*, 1 F. & F. 567; 32 L. T. (Old. S.), 298.) In America it seems no judgment against another, whether jointly or severally liable, will be a bar, unless it be satisfied. (*Lovejoy* v. *Murray*, 3 Wallace (Supr. Ct.) 1; *Thomas* v. *Rumsay*, 6 Johns (N. Y.) 26; *Brown* v. *Hirley*, 5 Upper Canada, Q. B. Rep. (Old S.), 734.)

Joinder of Causes of Action.

The Judicature Act gives a plaintiff very wide powers of joining several causes of action in one writ; but as a rule in cases of libel and slander the plaintiff should not avail himself of these provisions. Defamation is a matter *sui generis*, and it would be imprudent to complicate the issue by joining irrelevant claims. Of course any number of libels or slanders published by the same defendant may well be sued on in the same action, unless they be wholly disconnected. So, too, a claim for malicious prosecution, or wrongful dismissal, or even assault may be joined, if it arises out of the same circumstances, and will be substantiated by the same witnesses, as the claim for libel or slander. In a recent case, where the plaintiff alleged that a foreign merchant and his Manchester agent had conspired to libel the plaintiff in the way of his trade, the Court allowed this joint cause of action to be joined with claims against each defendant severally for the same libels or others of the same class. (*Desilla* v. *Schunck & Co. & Fels & Co.*; Weekly Notes, 1880, p. 96.)

Claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendant (Order XVII. r. 6). Claims by or against husband and wife may be joined with claims by or against either of them separately (Order XVII. r. 4). But these rules are expressly declared (r. 7) to be subject to rr. 1, 8, 9 of Order XVII., which enact that if a plaintiff unites in the same action several causes of action which cannot be conveniently tried or disposed of together, a Master or District Registrar shall on the applica-

tion of the defendant strike out some of such causes of action, or order separate trials to be had.

Endorsement on Writ.

The writ must be endorsed with a plain statement of the nature of the action :—*e.g.*, "The plaintiff's claim is for damages for libel" or "for slander" or "for libel and slander." The words "and for an injunction" may be added ; see *ante*, p. 454. But in cases of newspaper libel, it is as well to give more particulars :—"The plaintiff's claim is for a libel on him published by the defendant in the —— *Gazette* for Friday, November 5th, 1880." This fuller form is useful as identifying the libel in case judgment should be allowed to go by default.

It is not necessary to state what sum is asked as damages; for they must always be unliquidated in these actions. But if the plaintiff does so, he should be sure to ask *enough*, for although he may recover *less*, he cannot recover *more*, than the sum claimed on the writ; unless the judge at the trial will consent, after verdict, to amend the writ under Order XXVII. r. 11; R. S. C. Feb. 1876, r. 6. At the same time it is foolish to claim an extravagant amount as it may prevent an advantageous settlement. The defendant should always be described on the writ with reasonable certainty; his Christian and surname should both be stated, if possible, so as to facilitate service. Corporations should be described by the corporate name. But inaccuracies, or mere misnomers, are immaterial, if not misleading; and if they are in any way misleading, the indorsement may be amended by a judge at chambers, under Order III. r. 2, who will also dispense with any re-service. The writ must also be indorsed with the address of the plaintiff, and the name and place of business of his solicitor. (See Order IV. rr. 1, 2, 2*a*, and 3*a* ; R. S. C. Feb. 1876, rr. 2, 3). The writ remains in force twelve months from date instead of six months, as formerly (C. L. P. Act, 1852, s. 11); and, if any defendant has not been served with it, the plaintiff, by leave of a master or district registrar, on proof that reasonable efforts have been made to serve the writ, or for other good reason, may renew it for another six months. (Order VIII. r. 1.) The original writ must be produced on the application for renewal (*Davies* v. *Garland*, 1 Q. B. D. 250 ; 45 L. J. Q. B. 137 ; 24 W. R. 252 ;

33 L. T. 727). But a writ will not be renewed so as to bar the Statute of Limitations after the period has expired (*Doyle* v. *Kaufman*, 3 Q. B. D. 7; 47 L. J. Q. B. 2; 26 W. R. 98). Concurrent writs may be issued at any time within the twelve months for which the original writ is issued, and continue in force as long only as the original (Order VI. r. 1).

Service of the Writ.

No service of the writ is required where the defendant, by his solicitor, agrees to accept service and enter an appearance (Order IX. r. 1); in other cases the service of the writ must, wherever practicable, be personal (Order IX. r. 2). If, however, from any cause the plaintiff is unable to effect prompt personal service, he should apply to a judge at chambers for an order for substituted or other service, or for the substitution of notice for service. Such an application must be supported by affidavit setting forth the grounds upon which the application is made (Order X.), *e.g.*, that the defendant had absconded, and that his address could not be ascertained; (*Waters* v. *Waters*, 24 W. R. 190; *Hartley* v. *Dilke*, 35 L. T. 706); that two or more calls had been made at his residence, and a copy of the writ left there for him (*Capes* v. *Brewer*, 24 W. R. 40); or that his only known address is a club. (*Rafael* v. *Ongley*, 24 W. R. 857; 34 L. T. 124.) It should also show a probability of the substituted service coming to the defendant's knowledge. (*Cook* v. *Day*, 2 Ch. D. 218; 45 L. J. Ch. 611; 24 W. R. 362; *Sloman* v. *The Governor of New Zealand* (C. A.), 1 C. P. D. 563; 46 L. J. C. P. 185; 25 W. R. 86; 35 L. T. 454; Bitt. 15.)

The person serving a writ must be able both to read and to write; it may be necessary for him to swear that the copy served was a true copy, therefore he should be able to read; and he is, by Order IX. r. 13, required to indorse on the writ the date of service, therefore he must be able to write. Service may not be effected on Sunday (29 Car. II. c. 7, s. 6). Service may be made in any county; but not out of jurisdiction without special leave (Order XI. r. 1, *ante*, p. 357.) A true copy of the writ should be served, but the person serving it should always have the original with him to show to the defendant, should he require to see it.

Where the action is against husband and wife, service on the husband will be sufficient; but a judge at chambers may order service on the wife when necessary (Order IX. r. 3), as, *e.g.*, where the husband happens to be abroad. When an infant is defendant, service on his or her father or guardian, or, if none, then upon the person with whom he or she resides, will be good, unless otherwise ordered (Order IX. r. 4).

When the defendant is a lunatic or person of unsound mind, service on the committee of the lunatic or on the person with whom the person of unsound mind resides, or under whose care he or she is, will be deemed good service, unless a master at chambers otherwise orders (Order IX. r. 5).

Service may be effected upon a firm by serving any one of the partners, or, at the firm's principal place of business, upon any person having the control or management of the partnership business there (Order IX. r. 6). So where the firm really consists of only one person (Order IX. r. 6*a*; R. S. C., June, 1876, r. 4). Whenever by any statute provision is made for service of any writ of summons, or other process, upon any corporation, or other body, or number of persons, the writ must be served in manner so provided (Order IX. r. 7). There are such provisions in the Companies Clauses Act, 1845 (8 Vict. c. 16), s. 135; in the Lands Clauses Act, 1845 (8 Vict. c. 18), s. 134; and the Railways Clauses Act, 1845 (8 Vict. c. 20), s. 138. So, too, writs issued against a corporation aggregate may be served on the mayor, head officer, town clerk, clerk, treasurer, or secretary of such corporation, by the C. L. P. Act, 1852, s. 16. And writs issued against a company registered under the Companies Act, 1862 (25 & 26 Vict. c. 89), may, by s. 62 of the Act, be served by leaving them at the registered office of the company, or sending it by post in a registered letter addressed to the company at such office. But it is quite useless to serve a director, even where the company has no office. (*Lawrenson* v. *The Dublin Metropolitan Junction Ry. Co.*, 37 L. T. 32.) And as to the service of writs on foreign corporations, see *Scott* v. *Royal Wax Candle Co.*, 1 Q. B. D. 404; 45 L. J. Q. B. 586; 24 W. R. 668; 34 L. T. 683; *Newby* v. *Van Oppen*, L. R. 7 Q. B. 293; 41 L. J. Q. B. 148; 20 W. R. 383; 26 L. T. 164; *Mackereth* v. *Glasgow and South Western Ry. Co.*, L. R. 8 Ex. 149; 42 L. J. Ex. 82; 21 W. R. 339; 28 L. T. 167. And,

generally, as to service of a writ out of jurisdiction, see *Tottenham* v. *Barry*, 12 Ch. D. 797; 48 L. J. Ch. 641; 28 W. R. 180; *Harris* v. *Fleming*, 13 Ch. D. 208; 49 L. J. Ch. 32; 28 W. R. 389; *McStephens* v. *Carnegie*, 28 W. R. 385; 42 L. T. 309.

The person serving the writ must (except where substituted service has been ordered: *Dymond* v. *Croft* (C. A.), 3 Ch. D. 512; 45 L. J. Ch. 604; 24 W. R. 700; 35 L. T. 27), within three days at most after such service, indorse on the writ the day of the month and week of the service, otherwise the plaintiff cannot proceed by default for non-appearance (Order IX. r. 13).

Appearance.

The writ, as we have seen, may be issued, in the discretion of the plaintiff, either in London or in any district registry (Order V. r. 1).

If issued in London, a defendant must enter his appearance in London (Order XII. r. 1). If issued in a district registry, any defendant residing or carrying on business within the district must appear there (*ib.* r. 2); but any defendant neither residing nor carrying on business in the district may appear either in the district registry or in London (Order XII. r. 3). In the latter case the action will proceed in London (r. 5). As a rule I should always advise such a defendant to appear in London. But if he does so, he must be sure on the same day to give notice of his appearance to the plaintiff's country solicitor in the district registry, or to the plaintiff himself, if he sues in person (Order XII. r. 6*a*.; R. S. C., February, 1876, r. 5). As if he omit to do so, judgment will be entered against him in the district registry for want of appearance, and such judgment being regularly entered will not be set aside; at all events not without a strong affidavit of merits (Order XIII. r. 5*a*; R. S. C. Dec. 1875, r. 7; *Smith* v. *Dobbin* (C. A.), 3 Ex. D. 338; 47 L. J. Ex. 65; 26 W. R. 122; 37 L. T. 777). Notice to the London agent of the plaintiff's country solicitor is insufficient (*ib.*).

The defendant must enter an appearance to the writ within eight days after service of the writ, inclusive of the day of service. If the defendant be out of the jurisdiction, a time will be named in the order giving leave to effect service, within which

he must appear (Order XI. r. 4). As to the method of entering an appearance, see Order XII. rr. 6*b*, 7, 8, and 9; R. S. C. April, 1880, r. 6. If the defendant be described in the writ by initials, or by a wrong name, the appearance should be entered in his true name, as "John William Smith, sued as J. W. Smith," and all subsequent pleadings and affidavits should be so entitled. An infant must appear by his guardian in the guardian's own name (*Fitzgerald* v. *Villiers*, 3 Mod. 236; *Jarman* v. *Lucas*, 33 L. J. C. P. 108). Partners sued in the name of their firm must appear individually in their own names (Order XII. r. 12); so must a person carrying on business in the name of a firm (Order XII. r. 12*a*; R. S. C. June, 1876, r. 6). In either case all subsequent proceedings nevertheless continue in the name of the firm. An appearance may be entered by a third person, though he be not a solicitor (*Oake and another* v. *Moorecroft*, L. R. 5 Q. B. 76; 39 L. J. Q. B. 15; 18 W. R. 115).

A defendant may appear at any time before judgment; but if he appear *after* the time (eight days) limited for appearance, he must on the same day give notice thereof to the plaintiff's solicitor, or to the plaintiff himself if he sues in person (C. L. P. Act, 1852, s. 29; Order XII. r. 15). By giving this notice, he will be in the same position as if he had appeared in time; but judgment signed *after* appearance, though plaintiff have no notice, is irregular. (*Rhodes* v. *Bryant*, 2 F. & F. 265; *Oake and another* v. *Moorecroft*, *suprd.*)

I should never, I think, advise a defendant not to appear to an action of libel or slander, unless he is utterly and hopelessly in the wrong, and at the same time there is no hope of compromise. If he regrets his conduct, he should come forward and say so, and pay money into Court as amends. And after appearance, a defendant can always apply at chambers for leave to withdraw his defence and to let judgment go by default.

Judgment by Default.

Where any defendant fails to appear to a writ of summons, the plaintiff must before taking any proceeding upon default file an affidavit of service, or of notice in lieu of service as the case may be. (Order XIII. r. 2.) He can then enter inter-

locutory judgment, and a writ of inquiry will issue to assess the damages. (Order XIII. r. 6.) But if the affidavit of service be afterwards proved to have been insufficient, the judgment and execution may be set aside.

The affidavit of service should be made by the process-server himself, if possible; but an affidavit by any one who saw service effected will be received, if need be. (*Goodtitle* v. *Badtitle*, 2 Bos. & P. 120.) It should be properly intituled in the proper Division of the Court, and with the names of all the parties in full. If any defendant be in any way misnamed in the writ, the affidavit should in its title follow the writ (*Sims* v. *Prosser*, 15 M. & W. 151). Where a constructive service is relied on, the affidavit must show fully why such service should be deemed good service on the defendant. Thus, if a servant or agent of the defendant was served, facts must be stated from which the judge can infer that the copy has actually reached the defendant's hands. (*Sprightly* v. *Dunch*, 2 Burr. 1116.) The affidavit must also state the day on which the indorsement of date of service was made on the writ (Order IX. r. 13).

A sufficient affidavit of service being filed, interlocutory judgment may immediately be entered, and a writ of enquiry issues to the sheriff bidding him summon a jury to assess the damages the plaintiff has sustained. As a rule the plaintiff does not recover such heavy damages from a sheriff's jury, as after a full trial at Nisi Prius. There is a provision in Order XIII. r. 6, that a judge at chambers may order the damages to be ascertained like any other issue by a judge and jury or by a referee. But it would be very difficult to obtain such an order in a case of libel or slander. As there is no statement of claim, the plaintiff should give the defendant formal notice a reasonable time before the hearing that he intends to offer before the under-sheriff evidence of such and such special damage. The inquiry is conducted precisely in the same way as a trial at Nisi Prius, except that counsel do not wear wig and gown, and that the plaintiff *must* recover some damages. The plaintiff need not adduce any evidence at all before the under-sheriff, but merely put in the libel. And the jury will not in such a case be bound to give him nominal damages only. (*Tripp* v. *Thomas*, 3 B. & C. 427.) The under-sheriff before the Judicature Act had jurisdiction to certify for costs. (*Craven* v. *Smith*,

L. R. 4 Ex. 146; 38 L. J. Ex. 90; 17 W. R. 710; 20 L. T. 400.) I presume therefore that he may now under the new system, on good cause shown, deprive a plaintiff of costs. But he would never do so except in very exceptional circumstances.

Judgment by default may be set aside if irregular on application to a master at chambers or to a district registrar; but such application must be made within a reasonable time after defendant has notice of the judgment (R. G. Hil. T. 1853, r. 135; Order XXIX. r. 14). And even if the judgment be regular, the master or district registrar will set it aside upon terms, if defendant in his affidavit accounts for his non-appearance, and sets out facts which show that he has a good defence on the merits. Such an application should be made promptly, as soon as the defendant is aware that judgment has been signed.

Matters to be considered by the Defendant.

The defendant should at the earliest moment after being served with the writ, consider the advisability of apologising. He may pay money into Court at any moment after service of the writ (Order XXX. r. 1); and offer an apology in mitigation of damages under Lord Campbell's Act, ss. 1, 2 (*ante*, p. 299). It is particularly desirable in the case of a newspaper that this question should be dealt with at once, in order that the apology may be published in the next issue of the paper. Counsel will, if necessary, send advice on this point by telegram.

If, however, the defendant means to contest the action, he should consider whether the plaintiff has shaped his claim in the proper way, and also whether security cannot be obtained for costs. Thus, if an infant or person of unsound mind has commenced an action without a next friend, the defendant should take out a summons to dismiss the action; and the master or district registrar, if satisfied that there ought to have been a next friend will dismiss the action with costs against the solicitor. So if a married woman sue without joining her husband. If in the same action claims by the plaintiffs jointly be combined with claims by them or any of them separately under Order XVI. r. 1, or Order XVII. rr. 4, 5, 6, the defendant may apply to have such claims severed on the ground that they cannot be conveniently disposed of in the same action, if such

indeed be the fact. (Order XVII. rr. 1, 7, 8, 9.) But such an application would probably be unsuccessful if the words sued on be the same in each case, or were published simultaneously. If on the other hand two or more actions be unnecessarily brought against thes ame defendant either alone or with others for the same words, or for separate publications of similar words; or for two distinct libels or slanders, or for a libel and a slander, all arising out of the same transaction and intimately connected with each other; a master at chambers will consolidate the actions. (Order LI. r. 4; *Whitely* v. *Adams*, 15 C. B. N. S. 392; *Jones* v. *Pritchard*, 18 L. J. Q. B. 104; 6 D. & L. 529). An application for consolidation may be made at any time after service of the writs, and without any consent on the plaintiff's part. (*Hollingsworth* v. *Brodrick*, 4 A. & E. 646; 6 N. & M. 240; 1 H. & W. 691.)

If the writ has been issued in a district registry, the defendant may remove the action as of right to London at any time after appearance and before delivering a statement of defence. (Order XXXV. r. 13.) This can be done by merely giving a notice under r. 12. If the defendant neglects to remove it before the expiration of the time for delivering his statement of defence, he must apply to the district registrar for an order for removal, and file an affidavit showing good cause for the application.

If the alleged libel was published by order of either House of Parliament, all proceedings will be stayed at once on production of a certificate to that effect by the clerk of the House, with an affidavit verifying such certificate. (3 & 4 Vict. c. 9, Appendix C, *post*, p. 672.)

Security for Costs.

An order will generally be made requiring the plaintiff to give security for costs, if he be a foreigner, out of jurisdiction at the moment and holding no land in England, or a felon undergoing imprisonment or penal servitude, or a bankrupt or a liquidating debtor. If there be more than one plaintiff the defendant will not be entitled to security for costs unless they all come within one or other of the preceding classes. Security is generally confined to the future costs of the action; but it may include costs already incurred, if they are of any considerable amount, and the defendant has not been guilty of

laches in not applying sooner. (*Brocklebank & Co.* v. *King's Lynn Steamship Co.*, 3 C. P. D. 365; 47 L. J. C. P. 321; 31 L. T. 489; *Massey* v. *Allen*, 12 Ch. D. 807; 48 L. J. Ch. 692; 28 W. R. 243.)

Any application for security for costs must be made promptly; that is within a reasonable time after appearance; or if the defendant was not then aware of the facts entitling him to apply, then within a reasonable time after such facts come to his knowledge, and before taking any further step in the action. If the order be made, it will be a stay of proceedings till security be given; and if such security be not given within a reasonable time, the defendant may take out a further summons calling on the plaintiff to show cause why the action should not be dismissed with costs unless security be given by a fixed day. (*De la Grange* v. *Mc Andrew*, 4 Q. B. D. 210; 48 L. J. Q. B. 317; 27 W. R. 413; *Ex parte Isaacs*, 10 Ch. D. 1; 27 W. R. 297; 39 L. T. 520.) Where the plaintiff, a foreigner, had in an action of libel been ordered to find security for costs to the amount of £400, and had given security to that amount, the Court refused to increase it in spite of an affidavit to the effect that certain necessary witnesses resided abroad and that the expense of obtaining their evidence would greatly exceed £400. (*Pisani* v. *Lawson*, 5 Scott, 418; 6 Bing. N. C. 90.) What is a reasonable time for finding security must depend on the special circumstances of each particular case; and in determining it, the Court will have regard to the amount ordered to be paid. (*Sturla* v. *Freccia*, *Polini* v. *Gray*; 11 Ch. D. 741; 28 W. R. 81; 40 L. T. 861.) Where a bond is to be given as security for costs, it shall, unless a master at chambers otherwise directs, be given to the party or person requiring the security, and not to an officer of the Court. (Order LV. r. 3, R. S. C. April, 1880, r. 41.)

If a married woman sue by her next friend instead of her husband, and such next friend is a person of no means, or is insolvent, a master at chambers will stay proceedings till security for costs is given. But in the case of an infant it seems that security for costs will never be required, even though the next friend be a pauper. Nor in the case of a married woman who has a separate income of £1500 a year. (*Noel* v. *Noel*, 13 Ch. D. 510; 28 W. R. 720; 42 L. T. 352.)

Remitting the Action to the County Court.

By virtue of s. 10 of the County Courts Act, 1867 (30 & 31 Vict. c. 142) :—"It shall be lawful for any person against whom an action for . . . . libel, slander . . . . or other action of tort may be brought in a Superior Court, to make an affidavit that the plaintiff has no visible means of paying the costs of the defendant should a verdict be not found for the plaintiff; and thereupon a judge of the Court in which the action is brought shall have power to make an order that unless the plaintiff shall, within a time to be therein mentioned, give full security for the defendant's costs to the satisfaction of one of the masters of the said Court, or satisfy the judge that he has a cause of action fit to be prosecuted in the Superior Court, all proceedings in the action shall be stayed, or in the event of the plaintiff being unable or unwilling to give such security, or failing to satisfy the judge as aforesaid, that the cause be remitted for trial before a County Court to be therein named; and thereupon the plaintiff shall lodge the original writ and the order with the registrar of such County Court, who shall appoint a day for the hearing of the cause, notice whereof shall be sent by post or otherwise by the registrar to both parties or their attorneys; and the County Court so named shall have all the same powers and jurisdiction with respect to the cause as if both parties had agreed, by a memorandum signed by them, that the said County Court should have power to try the said action, and the same had been commenced by plaint in the said County Court; and the costs of the parties in respect of the proceedings subsequent to the order of the judge of the Superior Court shall be allowed according to the scale of costs in use in the County Courts, and the costs of the proceedings in the Superior Court shall be allowed according to the scale in use in such latter Court."

It is expressly enacted by the Judicature Act, 1873, s. 67, that the provisions of this section shall apply "to all actions commenced in the High Court of Justice *in which any relief is sought which can be given in a County Court.*" The words in italics have been much discussed in *Garnett* v. *Bradley* (C.A.), 2 Ex. D. 349; 46 L. J. Ex. 545; 25 W. R. 653; 36

L. T. 725; (H.L.) 3 App. Cas. 944; 48 L. J. Ex. 186; 26 W. R. 698; 39 L. T. 261; *Parsons* v. *Tinling*, 2 C. P. D. 119; 46 L. J. C. P. 230; 25 W. R. 255; 35 L. T. 851; and the other decisions as to costs; and were held when taken with Order LV. r. 1, to limit the various sections of the County Courts Act, 1867, to actions which could be commenced in the County Court. But it could hardly, I think, be contended that these words have the same effect on s. 10, and limit its operation to actions of tort which could be commenced in the County Court; though that is perhaps the strictly logical result of the decisions mentioned above. For Order LV. r. 1, has of course nothing to do with the matter, and "libel" and "slander" are expressly mentioned in s. 10. Any how, the practice at chambers under the section continues the same, and s. 10 is always considered to apply to all actions of tort, whether they can or cannot be commenced in the County Court.

The application can be made at any stage of the action; but only by the defendant. If an order be made, its effect is practically to transform the action into a County Court cause. As to the further conduct of the action, see *post*, p. 565.

Statement of Claim.

The defendant, on his memorandum of appearance, must state whether he does or does not require a statement of claim to be delivered. I should advise the defendant in every action of libel or slander always to require a statement of claim; as it is clearly to his interest to have the exact words alleged to be defamatory set out on the record. And even if the defendant expressly says that he does *not* require a statement of claim, I should advise plaintiff still to deliver one, in spite of the risk of costs which he may incur under Order XXI. r. 1*c*. I do not think any taxing-master would ever consider the delivery of a statement of claim in an action of libel or slander to be "unnecessary or improper."

The plaintiff may, if he chooses, deliver his statement of claim with the writ; but this is not often done. He must deliver it within six weeks after the defendant's appearance, unless the time be extended by leave (Order XXI. r. 1); other-

wise the defendant will apply to the master at chambers to dismiss the action with costs for want of prosecution.

The Judicature Act has made but little difference in the plaintiff's pleadings in an action of libel or slander. An old declaration, if cut up into paragraphs in obedience to Order XIX. r. 4, would pass muster as a statement of claim; and would, indeed, be a more satisfactory document than many modern pleadings. All decisions since 1852 seem still to apply, except those relating to variances, which are rendered somewhat obsolete by the largely increased powers of amendment given to our judges, and the greater readiness with which such powers are exercised.

The very words complained of must be set out by the plaintiff in his statement of claim, "in order that the Court may judge whether they constitute a ground of action" (*per* Lord Tenterden, 3 B. & Ald. 506), and also because "the defendant is entitled to know the precise charge against him, and cannot shape his case until he knows." (*Per* Lord Coleridge, in *Harris* v. *Warre*, 4 C. P. D. 128; 48 L. J. C. P. 310; 27 W. R. 461; 40 L. T. 429.) It is not sufficient to give the substance or purport of the libel or slander with innuendoes. (*Newton* v. *Stubbs*, 3 Mod. 71; *Cooke* v. *Cox*, 3 M. & S. 110; *Wood* v. *Brown*, 6 Taunt. 169; *Wood* v. *Adam*, 6 Bing. 481; *Wright* v. *Clements*, 3 B. & Ald. 503; *Saunders* v. *Bate*, 1 H. & N. 402; *Solomon* v. *Lawson*, 8 Q. B. 823; 15 L. J. Q. B. 253; 10 Jur. 796.) So too in cases of slander of title the words must be set out *verbatim*. (*Gutsole* v. *Mathers*, 1 M. & W. 495; 1 Tyrw. & Gr. 694; 5 Dowl. 69; 2 Gale, 64.) Order XIX. r. 24, does not apply; for the words of the libel are most material. (*Harris* v. *Warre*, *suprà*.) The defendant may be interrogated as to the exact words he uttered if the plaintiff cannot otherwise discover them. (*Atkinson* v. *Fosbrooke*, L. R. 1 Q. B. 628; 35 L. J. Q. B. 182; 14 W. R. 832; 14 L. T. 553.) If the words are in a foreign language, they should be set out *verbatim* in such language. (*Zenobio* v. *Axtell*, 6 T. R. 162; 3 M. & S. 116. And see *R.* v. *Manasseh Goldstein*, 3 Brod. & B. 201; 7 Moore, 1; 10 Price, 88; R. & R. C. C. 473.) And an exact translation should be added. Take care not to translate actionable words into non-actionable, as was done in *Ross* v. *Lawrence* (1651), Sty. 263. It was formerly necessary to

aver expressly in the case of foreign words that those present understood them. (*Jones* v. *Davers*, Cro. Eliz. 496; *Price* v. *Jenkings*, Cro. Eliz. 865.) And in *Amann* v. *Damm*, 8 C. B. N. S. 597; 29 L. J. C. P. 313; 7 Jur. N. S. 47; 8 W. R. 470, where the words were spoken in German, Williams, J. appeared to think that such an averment was still necessary, but the rest of the Court thought otherwise, it would seem; although section 61 of the C. L. P. Act, 1852, was not cited to the Court. It may be safer, however, to insert a short allegation to that effect in the statement of claim, although I do not think it is now essential. (See Precedent, No. 30.) The fact must of course still be proved at the trial. (*Ante*, p. 110.)

If the slander was contained in a question, it must be set out as a question, and not as a fact affirmed. So, if the slander consists in the answer to a question, and the answer alone is unintelligible, both question and answer should be set out exactly as they were spoken. (See *Bromage* v. *Prosser*, 4 B. & C. 247.) So if the words were "Woor says M'Pherson is bankrupt," they must be so set out; if the declaration alleged that the defendant had said "M'Pherson is bankrupt" merely, the variance would formerly have been fatal (*M'Pherson* v. *Daniels*, 10 B. & C., at p. 274; *Bell* v. *Byrne*, 13 East, 554; *Pearce* v. *Rogers*, 2 F. & F. 137); but now such a variance would be amended, on payment of the costs, if any, thereby occasioned. (*Smith* v. *Knowelden*, 2 M. & Gr. 561.) If the libel consist of two letters written to the *Times*, neither of which is a complete libel without the other, both must be set out *verbatim*. (*Solomon* v. *Lawson*, 8 Q. B. 823; 15 L. J. Q. B. 253; 10 Jur. 796). But in other cases it is not necessary to set out the whole of an article or review, containing libellous passages; it is sufficient to set out the libellous passages only provided that nothing be omitted which qualifies or alters their sense. If, however, the meaning of the libellous passages taken singly is not clear, or if the rest of the article would in any substantial degree vary the meaning of the words complained of, the whole must be set out. (*Cartwright* v. *Wright*, 5 B. & Ald. 615; *Buckingham* v. *Murray*, 2 C. & P. 47; *Rutherford* v. *Evans*, 6 Bing. 451; 4 C. & P. 74; *Rainy* v. *Bravo*, L. R. 4 P. C. 287; 20 W. R. 873.) Where detached portions of a book or article are thus given, it should appear on the statement of

claim that they *are* detached portions; they should not be printed as though they ran on continuously. (*Per* Lord Ellenborough, in *Tabart* v. *Tipper*, 1 Camp. 353.)

It must be alleged that the defendant "spoke and published" or "wrote and published" these words, and it should be stated when and to whom. It is essential in cases of libel to add the words "and published," as writing a libel which is never published is no tort. Still it is not absolutely necessary to use the very word "published;" in *Baldwin* v. *Elphinston*, 2 W. Bl. 1037, the phrase "printed and caused to be printed" was held sufficient. Further, it must always be alleged that the words were spoken or written "of and concerning the plaintiff." Then it should be averred that the defendant spoke or wrote and published the words "falsely and maliciously." This is a time-honoured phrase which should always appear in every statement of claim; it would be foolish to idly raise a point of law by omitting it. But in my opinion its omission would not render the statement of claim demurrable. For, by r. 28 of Order XIX., "neither party need in any pleading allege any matter of fact which the law presumes in his favour, or as to which the burden of proof lies upon the other side, unless the same has first been specifically denied." As long ago as 1652, Rolle, C. J., held these words unnecessary in a declaration. (*Anon.*, Style, 392.) In 1813, Lord Ellenborough held the absence of the word "falsely" immaterial, "unlawfully and maliciously" being present. (*Rowe* v. *Roach*, 1 M. & S. 309). So, too, under the old practice it was decided that if "falsely" was inserted, "maliciously" might be omitted. (*Mercer* v. *Sparks* (1586), Owen, 51; Noy, 35; *Anon.* (1596), Moo, 459. See *per* Brett, L. J., in *Clark* v. *Molyneux*, 3 Q. B. D. 247, *ante*, p. 267.) There is, however, a practical convenience in alleging malice in the statement of claim, viz., if the defendant pleads privilege, no special reply is then necessary, the formal averment in the statement of claim takes a new meaning, and becomes an allegation of express malice.

But the part of the statement of claim which requires most care in drafting is the innuendo. As to its office, see *ante*, pp. 100–117. Where the words are clearly actionable on the face of them, no innuendo is necessary, though even here one is frequently inserted. But whenever the words are actionable

only in some secondary sense, an innuendo is essential to the plaintiff's success. So, too, if it is not clear that the words refer to the plaintiff, an innuendo must be inserted, "meaning thereby the plaintiff," &c.; and it will be well, though not essential, to state facts which make it clear that the plaintiff is the person referred to (see *ante*, p. 128).

Besides the innuendo, it was formerly expected that the pleader should insert in the plaintiff's declaration a variety of minute averments, tending to increase the "certainty" of the pleading, as it was then imagined. Thus it was necessary that there should be a *colloquium*, an averment that the defendant was speaking of the plaintiff, as well as constant innuendoes, and other allegations properly connecting these innuendoes with the introductory averments which described the locality, the relationship between the various persons mentioned, and all the surrounding circumstances necessary to fully understand the defendant's words. These matters could not be proved at the trial, unless they were set out on the record. (See *ante*, pp. 118—120, 128.) And if some of them were proved at the trial and not others, many legal refinements arose as to how far such allegations were or were not divisible, with which I need not trouble my readers. For now, by s. 61 of the C. L. P. Act, 1852, the *colloquium* and all other such frivolous averments are rendered unnecessary; and r. 4 of Order XIX. requires that only material facts should be stated in the pleadings, and these "as concisely as may be." The only case in which an introductory averment is now essential to the plaintiff's success is where words are actionable only by reason of being spoken of the plaintiff in the way of his office, profession, or trade. Here there must always be an averment that the plaintiff actually held the office or carried on the profession or trade at the time when the words were spoken. (*Gallwey* v. *Marshall*, 9 Ex. 300; 23 L. J. Ex. 78; 2 C. L. R. 399.) And there should also be an averment that the words were spoken of the plaintiff with reference to such office, profession, or trade. But if the former allegation appear, the omission of the latter is not fatal, as the judge will in a proper case amend the statement of claim by inserting an allegation to that effect. (*Ramsdale* v. *Greenacre*, 1 F. & F. 61.) But it is often desirable in other cases to plead some introductory averment which, though not strictly neces-

sary, will help to make the case clear, by explaining what is to follow. (See Precedents of Pleading, Nos. 3, 7, and 32, App. A.)

Also where the words were spoken ironically, it must be averred that they were so spoken, or the statement of claim would be demurrable (*ante*, pp. 113, 116).

Always aver, wherever it is not palpably absurd so to do, that the words were spoken of the plaintiff in the way of his trade. This allegation won the demurrer for the plaintiff in *Foulger* v. *Newcomb*, L. R. 2 Ex. 327; 36 L. J. Ex. 169; 15 W. R. 1181; 16 L. T. 595; and had it been present it would probably have saved *Miller* v. *David*, L. R. 9 C. P. 118; 43 L. J. C. P. 84; 22 W. R. 332; 30 L. T. 58. Yet it does not always avail. (See *Sheahan* v. *Ahearne*, Ir. R. 9 C. L. 412.)

Lastly, insert a claim for damages. Where the words are clearly actionable *per se*, it is of course unnecessary to claim *general* damages, though it is sometimes done; but any special damage that may have accrued must in every case be specifically stated and with sufficient particularity to enable the defendant to know precisely what case he has to meet. If the special damage alleged be loss of custom, the customers' names must be given; so if loss of marriage be alleged, the gentleman or lady must be named. (See Precedents, Nos. 27, 28, 36, App. A.) As to what constitutes special damage, see *ante*, pp. 309–313.

If a plaintiff does not deliver a statement of claim within the time limited for so doing, he will be liable to have the action dismissed with costs, under Order XXIX. r. 1. But the defendant will not be allowed to take advantage of a mere slip. (*Michel* v. *Wilson*, 25 W. R. 380; *Canadian Oilworks Corporation* v. *Hay*, 38 L. T. 549; Weekly Notes, 1878, p. 107.)

Every pleading which contains ten or more folios of seventy-two words must be printed. (Order XIX. r. 5; R. S. C. June, 1876, r. 9.)

Venue.

The plaintiff must now select the place of trial, and name it at the foot of his Statement of Claim. If he name no place, it will be tried in Middlesex, unless an order be made to the contrary, see *post*, p. 528. The plaintiff's choice will be determined as a rule by questions of economy and convenience; he will fix the trial in the place that best suits himself and his witnesses. But if the action be against a newspaper of wide circulation in

the district, or if the defendant in any other way is popular or powerful in his own neighbourhood, the plaintiff should decide on Middlesex, where he is sure of an educated and impartial jury.

Instructions for Statement of Defence.

On receiving the statement of claim, the defendant should carefully consider his position, and decide on his course of action. Often it would be well for him to apologise at once, and pay money into Court. In some few cases he should declare war to the knife, and justify. But it is no use for him to send his counsel merely a copy of the statement of claim with instructions consisting solely of the words "Counsel will please prepare the necessary pleas." The statement of defence in an action of libel or slander is a most important document (see Precedents, Nos. 25, 26); and before settling it, counsel should be put in possession of all the facts. He should be asked to advise whether the occasion was privileged; and if there is any thought of a justification, the evidence by which it is proposed to support that plea should be submitted to counsel in full detail, and his opinion taken as to its sufficiency. If no definite instructions be given to counsel, he will content himself with merely denying every material allegation in the plaintiff's statement of claim.

Demurrer.

The defendant's counsel, on receiving the statement of claim should first consider if it is demurrable. But if it is, it by no means follows that in every such case he should demur. If the words are not actionable *per se*, and no special damage is alleged, a demurrer is obviously the shortest way to put an end to the action, and should of course be resorted to. So, if the words set out are not defamatory in their ordinary signification, and there is no innuendo, or if the innuendo alleges a meaning which it is clear that the words will not bear. But even in the last case the defendant generally should not demur, unless the law is clearly in his favour, and the facts are not. Counsel should always bear in mind the good advice which my Lord Coke deduces as a moral from "the first cause that he ever moved in the King's Bench:"—

"When the matter in fact will clearly serve for your client,

although your opinion is that the plaintiff has no cause of action, yet take heed that you do not hazard the matter upon a demurrer; in which, upon the pleading, and otherwise, more perhaps will arise than you thought of; but first take advantage of the matters of fact, and leave matters in law, which always arise upon the matters in fact, ad ultimum, and never at first demur in law; when after trial of the matters in fact, the matters in law (as in this case it was) will be saved to you." (*The Lord Cromwell's Case* (1581), 4 Rep. 14.)

This advice, though nearly three hundred years old, is as sound now as it was in the days of Queen Elizabeth. In fact, owing to the liberal powers of amendment given by the C. L. P. Acts, and by the Judicature Acts, its efficacy has increased rather than diminished. The result of most demurrers is that the plaintiff obtains leave, on paying the costs of the demurrer, to amend his statement of claim. And it is generally better for the defendant that the plaintiff should be driven to such amendment at the trial in the presence of the jury. If, therefore, the facts are likely to prove in the defendant's favour, he should not as a rule demur, unless it is clear that the statement of claim is insufficient, and that no amendment which the plaintiff can truthfully make will cure the defect. But if, at the trial you will be compelled to admit that your client *did* speak the words complained of, that they are false, and that the occasion was not privileged, then by all means demur, and take advantage of any point of law you can.

What I have said above applies to all ordinary cases of defamation, where the law is clear, and the only difficulty is to apply the rule of law to the particular subject in question. But where the matter is one of first impression, or where in any other way the law on the point is not clear (as in the *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.*, L. R. 9 Ex. 218; 43 L. J. Ex. 171; 23 W. R. 5), there it is clearly desirable to demur and settle the point of law, before incurring the expense of a trial at Nisi Prius. A summons should be taken out for leave to plead over should the demurrer be overruled, and that in the meantime all proceedings be stayed.

Clients are sometimes afraid that, by not demurring, counsel throw away for ever one chance of success, that the objection, if not taken by demurrer, cannot be taken afterwards. But

this is not so. No doubt, slight defects, such as slips of the pen, careless omissions through inartificial pleading, &c., may sometimes be aided by pleading over; and may still more often be cured by verdict. But it is never worth while in these days to demur on the ground of some merely formal defect. But all matters of substance, as my Lord Coke says, "will be saved to you." "If the defendant wants to avail himself of 'his points of law' in a summary way, he must demur; but if he does not demur, he does not waive the objection, and may say at the trial that the claim is bad on the face of it." (*Per* Lindley, J., in *Stokes* v. *Grant*, 4 C. P. D. 28; 27 W. R. 397; 40 L. T. 36.) And, further, as to the effect of a demurrer, see *Johnasson* v. *Bonhote*, 2 Ch. D. 298; 45 L. J. Ch. 651; 24 W. R. 619; 34 L. T. 745. [But note, that there would be a difficulty in relying upon this rather startling decision in one of the Courts of Common Law; because the notion of setting up the Statute of Frauds by way of demurrer is abhorrent to every principle of Common Law pleading, whether before or since the Judicature Act. See *Catling* v. *King*, 5 Ch. D. 660; 46 L. J. Ch. 384; 25 W. R. 550; 36 L. T. 526; *Dawkins* v. *Lord Penrhyn*, 4 App. Cas. 51.] In Equity it was formerly the practice to allow a successful defendant only the costs of a demurrer, if he went to trial when he might clearly have demurred, on the ground that it is the duty of a defendant to win his case in the manner least expensive to his opponent. (*Godfrey* v. *Tucker*, 3 N. R. 20; *Webb* v. *England*, 29 Beav. 44.) But this practice now is in disuse. (*Bush* v. *Trowbridge Waterworks Co.*, L. R. 10 Ch. 459; 23 W. R. 641; 33 L. T. 137; *Pearce* v. *Watts*, L. R. 20 Eq. 492; 44 L. J. Ch. 492; 23 W. R. 771.)

If there has to be a demurrer, it is often good policy not to demur yourself, but to plead in such a way as to compel your opponent to demur. Then, on the argument of his demurrer to your plea, it is open to you to object to his statement of claim. The Court will sometimes of their own motion call on the demurring party to defend his own previous pleading. (*Clay* v. *Roberts*, 11 W. R. 649; 9 Jur. N. S. 580; 8 L. T. 397.)

Part of a statement of claim may be demurred to, and the rest pleaded to, without leave, provided such part be distinct and severable from the rest, and amounts to a separate cause of action (Order XXVIII. r. 1; *Eaton* v. *Johns*, 1 Dowl. N. S. 602,

608); but a defendant cannot, without leave, plead and demur to the same part of the same statement of claim. He should always apply for leave both to plead and demur whenever the statement of claim appears to be untrue in point of fact as well as bad in law (see Order XXVIII. r. 5). If he does not apply for such leave, and his demurrer is overruled, he will have to apply to the Court for leave to plead under Order XXVIII. r. 12, which will, however, be granted to him almost as a matter of course if he can show any merits. (*Bell* v. *Wilkinson and another* (C. A.), 26 W. R. 275; Weekly Notes, 1878, p. 3.) The defendant must state some ground in law for his demurrer; but he will not on the argument be limited to the ground or grounds so stated (Order XXVIII. r. 2). It is sufficient apparently to allege that the statement of claim discloses no cause of action. (*Per* Lindley, J., Weekly Notes, 1876, p. 37.) It is as well, after enumerating the chief grounds, to add a general clause, "and on other grounds sufficient in law to sustain this demurrer," as was done in *Dawkins* v. *Lord Penrhyn* (C. A.), 6 Ch. D. 318; 26 W. R. 6; 37 L. T. 80; (H. L.) 4 App. Cas. 51; 48 L. J. Ch. 304; 27 W. R. 173; 39 L. T. 583. The plaintiff cannot amend pending the demurrer, without leave (Order XXVIII. r. 7); and, if convinced that his statement of claim cannot be supported as it stands, he should apply for such leave as soon as the demurrer is called on, if not previously. For if he takes his chance of succeeding on the argument, the Court will then be indisposed to allow him to amend. On the other hand, if no ground of demurrer be stated by the defendant, or only a frivolous one, the plaintiff may apply to a master at chambers to set aside such demurrer with costs (Order XXVIII. r. 2).

Each party must draw up his points for argument, and deliver four copies thereof at the proper office for the use of the judges. They are also by courtesy usually exchanged between the parties. The demurring party must also make up the demurrer book on plain paper, and deliver four copies at the proper office for the use of the judges, four clear days before the day appointed for argument. The demurring party ought also to enter the demurrer for argument; but, if he does not do so, the party demurred to *must;* as if the demurrer be not entered by somebody within ten days after delivery, it will be

deemed to have been allowed with costs. (Order XXVIII. rr. 6, 13.) Either party on entering it must give notice thereof to the other. See further as to the event of the demurrer (Order XXVIII. rr. 8—12).

Often, instead of demurring, the defendant prefers to take out a summons at chambers to strike out or amend certain portions of the statement of claim (Order XXVII. r. 1, *post*, p. 499). But the more usual application at this stage is for particulars.

Particulars.

The defendant's counsel should next consider whether the statement of claim is sufficiently definite. Before the Judicature Act particulars were constantly ordered of the places where, the times when, and the persons to whom the alleged slanders were uttered. The legislature probably intended that there should be no particulars under the Judicature Act; and an attempt was at first made to carry out this presumed intention. (See *Restell and wife* v. *Steward*, Weekly Notes, 1875, p. 231; 1 Charley, 87; Bitt. 46; 20 Sol. J. 99; 60 L. T. Notes, 87.) But it was soon found necessary to revive the former practice, and an order for such particulars as above is frequently made, where the details are not set out in the statement of claim. But particulars of the names of the persons passing in the street at the time the alleged slander was uttered will not be ordered. (*Per* Denman, J., in *Wingard* v. *Cox*, Weekly Notes, 1876, p. 106; Bitt. 144; 20 Sol. J. 341; 60 L. T. Notes, 304.) So, too, whenever any special damage is claimed, but not with sufficient explicitness, particulars will be ordered of the alleged damage, setting out the names of the customers who had ceased to deal with the plaintiff in consequence of defendant's words. This is a very useful order; as, if plaintiff cannot give the names, he will be compelled to strike out the allegation of special damage from his statement of claim. (See Precedents of Pleading, App. A., Nos. 27, 28.) Particulars of general damage will, of course, never be ordered; as such damage exists rather in contemplation of law than in reality.

The summons for particulars should always ask for a stay. (See form, p. 608.) It will then be a stay from the time it is attendable till the particulars are delivered, unless the master otherwise order.

Statement of Defence.

Formerly, by one short and convenient plea, "Not Guilty," the defendant denied the publication of the defamatory matter, denied its publication in the defamatory sense imputed, or in any defamatory actionable sense which the words themselves imported, asserted that the occasion was privileged, and also denied that the words were spoken of the plaintiff in the way of his profession or trade, whenever they were alleged to have been so spoken. But now this compendious mode of pleading is abolished. "Not Guilty" can no longer be pleaded; though "Not Guilty by statute" may. (Order XIX. rr. 20, 16.) It is necessary now to deal specifically with every fact of which the defendant does not admit the truth. It will be necessary, therefore, to consider the following several pleas:—

1. Denial of the publication.
2. Traverse of the innuendo.
3. Traverse of the plaintiff's special character.
4. Denial that the words were spoken with reference thereto.
5. Denial that the words were spoken of the plaintiff.
6. Traverse of the damage.
7. No libel.
8. Privilege.
9. Justification.
10. Apology.
11. Accord and satisfaction.
12. Statute of Limitations.
13. Previous action.
14. Other defences.
15. Payment into Court.
16. The defendant may also set up a counterclaim.

All these defences, or any number of them, may be pleaded together in the same action without leave; although they are obviously inconsistent. A defendant may "raise by his statement of defence without leave, as many distinct and separate, and therefore inconsistent, defences as he may think proper, subject only to the provision contained in rule 1, Order XXVII.," as to striking out embarrassing matter. (*Per* Thesiger, L.J., in *Berdan* v. *Greenwood*, 3 Ex. D. 255; 47 L. J. Ex. 628; 26 W. R. 902; 39 L. T. 223.)

Thus, in *Restell and wife* v. *Steward*, Weekly Notes, 1875, pp. 231, 232; 1 Charley, 87; Bitt. 46; 20 Sol. J. 99; 60 L. T. Notes, 87, Quain, J., held that a denial of the publication and a justification could be pleaded together. In *Stainbank* v. *Beckett, Bart.*, Weekly Notes, 1879, p. 203, the defendant pleaded that the alleged libel did not relate to the plaintiff, that it was a fair comment upon a matter of public interest, and also that it was true in fact. This was obviously most inconsistent, but the Court of Appeal held that it was not embarrassing, and merely ordered particulars of the justification. (See also *Hawkesley* v. *Bradshaw* (C. A.), 5 Q. B. D. 302; 49 L. J. Q. B. 333; 28 W. R. 557; 42 L. T. 285; *post*, p. 492.)

If there is some defect or absurdity in your adversary's pleading, and yet you decide neither to demur nor to apply for an amendment under Order XXVII. r. 1, then be careful in pleading over not to aid the defect in any way. The less said about that part of the pleading the better; do not admit it; if need be, traverse it in so many words; but after such denial, avoid the whole topic, if possible; leaving plaintiff's counsel to explain it to the judge at the trial, if he can.

The defendant cannot bring in a third party under Order XVI. rr. 17—21; because there is no contribution between tort-feasors. (*Horwell* v. *London General Omnibus Co.*, 2 Ex. D. 365; 46 L. J. Ex. 700; 25 W. R. 610; 36 L. T. 637.)

As to pleading a defence which has arisen since action brought, see Order XX.

The defendant may deliver interrogatories with his Statement of Defence, see *post*, p. 500.

Traverses.

It was intended by the framers of the Judicature Act, that each party in his pleading should frankly admit every statement of fact which he does not intend to seriously dispute at the trial. But this intention has not been carried out. Counsel do not make admissions unless they are expressly instructed to do so, which they very seldom are. No doubt sometimes in cases of slander it may be desirable to deny uttering the words, so as to compel the plaintiff to call as his witness the person to whom the defendant spoke, whom then the defendant cross-examines to show privilege. But as a rule in cases of libel the

defendant should admit the publication whenever it can be proved against him without trouble. All the rest of the statement of claim, even immaterial averments, should be traversed; as if not denied they will be taken as admitted (Order XIX. r. 17). The most convenient form of denial is this:—

"The defendant denies the allegations contained in paragraph 3 of the plaintiff's Statement of Claim, and each and every of them."

This is the form proper to a denial of matters within the defendant's knowledge; as to matters not within his knowledge, it will be more correct to say:—

"The defendant does not admit any of the allegations contained in paragraph 8 of the Statement of Claim."

But it is contrary to the spirit of Order XIX. rr. 20 and 22 to deal too largely in these general traverses. It also looks weak, as though the defendant had no real defence. It will be well therefore to insert some more special denials:—

1. "The defendant denies that he spoke or published of the plaintiff the words set out in paragraph 3 of the Statement of Claim." The words "either falsely or maliciously" must not be added. For the plea, as it stands without them, is a denial of the publication in fact: if the plaintiff prove publication, the law will presume it to have been false and malicious, until the defendant proves either privilege or a justification; and both privilege and justification must be specially pleaded, not merely suggested by the addition of four words to a plea which really raises quite a different defence.

2. "The defendant denies that he spoke or published of the plaintiff the words set out in paragraph 3 of the Statement of Claim with the meaning as therein alleged." This is a traverse of the innuendo. The innuendo, if there be one, should always be traversed.

3. "The plaintiff did not, at the date of the publication, if any, of the said words, carry on the business of a butcher as alleged in paragraph 1 of the plaintiff's Statement of Claim;" or "The plaintiff was not at the date, &c., such vicar as alleged," or "was not at such date a partner in the firm of Mears and Stainbank as alleged." This is a traverse of the special character in which the plaintiff sues; and must always be specially pleaded. (Rules of Trinity Term, 1853, r. 16; Jud. Act, Order XIX. r. 11.)

4. "The defendant denies that he spoke or published the said words, if at all, with reference to the plaintiff in the way of his said business or trade of a butcher [office or profession of ——]." This plea did not require to be pleaded specially under the old system; and it would, therefore, I presume be now deemed to be included in a general denial of the allegations in the paragraph. But it is better to set it out plainly.

5. "The defendant denies that the said words in any way referred to the plaintiff. They were not so understood by those who heard them uttered." (See Precedent of Pleading, No. 5, para. 3.)

6. Deny all the allegations as to damage. It was formerly the rule that the defendant could not plead to damage. But he is now bound at all events to deny the allegations contained in that paragraph (Order XIX. r. 17); he often goes further, and states that the damage alleged to have been suffered was not caused by defendant's words, but by a repetition of them, or is otherwise too remote. (See Precedent, No. 34, para. 4.)

7. *Bonâ fide Comment. No Libel.*

For a plea of *bonâ fide* comment on a matter of public interest, see Precedents, Nos. 5, 19, 20; *Earl Lucan* v. *Smith*, 1 H. & N. 481; 26 L. J. Ex. 94; 2 Jur. N. S. 1170; *Clinton* v. *Henderson*, 13 Ir. C. L. R. App. 43; *Hort* v. *Reade*, Ir. R. 7 C. L. 551.

It was decided in Ireland before the Judicature Act that a plea "that the matter contained in the said paragraph is not a libel" was a good plea; for it raised a question which was now for the jury, not the judge. (*Nixon* v. *Harvey*, 8 Ir. C. L. Rep. 446.) And since then such a plea has been freely used in Ireland. (See *Maguire* v. *Knox*, Ir. R. 5 C. L. 408; *Stannus* v. *Finlay*, Ir. R. 8 C. L. 264; *Cosgrave* v. *Trade Auxiliary Co.*, Ir. R. 8 C. L. 349; *M'Loughlin* v. *Dwyer* (1), Ir. R. 9 C. L. 170.) But such pleading is not in accordance with our practice. Perhaps in England the following plea would be allowed:— "The defendant denies that he wrote or published the said words of the plaintiff with the meaning alleged in paragraph 3 of the plaintiff's Statement of Claim, or in any other defamatory sense. The said words without the alleged meaning are no libel." But a simple plea that "the said words are not defamatory," would certainly be regarded as an informal demurrer.

8. *Privilege.*

It was decided in the Exchequer Division in a case not reported (*Spackman* v. *Gibney*), that since the Judicature Act privilege must be specially pleaded, and also that the facts and circumstances must be stated showing why and how the occasion is privileged. This is clearly in accordance with Order XIX. r. 18. There is a similar decision in Ireland (*Simmonds* v. *Dunne*, Ir. R. 5 C. L. 358.) Many such pleas may be suggested :—

"The said words were spoken by the defendant whilst in the witness box during his examination on oath as a witness, in the course of a judicial proceeding before an alderman at Guildhall." (See *Seaman* v. *Netherclift*, 1 C. P. D. 540; 46 L. J. C. P. 128; 25 W. R. 159; 35 L. T. 784.)

"The said words are part of an official report written by the defendant in accordance with his military duty for the information of his military superiors, and published by him in the discharge of his said duty to such military superiors and not otherwise." (*Dawkins* v. *Lord Paulet*, L. R. 5 Q. B. 94; 39 L. J. Q. B. 53; 18 W. R. 336; 21 L. T. 584.)

"Before and at the time of the alleged grievances the defendant was the son-in-law of the Mrs. Hawkins mentioned in paragraph 3 of the Statement of Claim. The defendant was informed, as the fact was, that she was about to marry the plaintiff. Thereupon the defendant spoke the said words confidentially to the said Mrs. Hawkins, without malice, and in the honest desire to protect her private interests, and those of the defendant. The defendant at the time *bonâ fide* believed in the truth of what he said." (*Todd* v. *Hawkins*, 8 C. & P. 88; 2 Moo. & Rob. 20.) See also Precedents, Nos. 2, 11, 15, 17, 20, 39.

It is necessary where the occasion is not absolutely privileged to aver that the defendant acted *bonâ fide* and without malice. (*Smith* v. *Thomas*, 2 Bing. N. C. 372.) Such an allegation is immaterial in cases of absolute privilege. If defendant avers that he had just and reasonable grounds for believing the charges against the plaintiff to be true, he must set forth what were the grounds of such belief. (*Fitzgerald* v. *Campbell*, 18 Ir. Jur. 153; 15 L. T. 74.) It is better however to avoid such an averment altogether and to state that he repeated the charge

bonâ fide and in the honest belief in its truth. An averment of just and reasonable grounds runs dangerously near to a justification, and the averment of *bona fides* covers and includes it.

9. *Justification.*

This is a most dangerous plea, and should never be placed on the record without careful consideration of the sufficiency of the evidence by which it is to be supported. For the strictest proof is required (see *Leyman* v. *Latimer*, 3 Ex. D. 15, 352; 47 L. J. Ex. 470; 25 W. R. 751; 26 W. R. 305; 37 L. T. 360, 819); and, if not proved, the defendant's persistence in the charge is some evidence of malice, and will always tend to aggravate the damages given against him. The defence cannot be raised without a special plea; but counsel should never draw such a plea without express instructions, and even then should always caution the defendant as to the risk he runs.

When the libel consists of one specific charge, *e.g.*, "He forged my name to a bill for £500," it is sufficient to plead generally:—"The said words are true in substance and in fact." So if the charge made by the defendant were:—"He stole his master's sheep," it would be sufficient to allege that "the plaintiff did steal four sheep the property of his master, John Jones." But whenever a general charge is made, the very words alleged to have been uttered should be expressly justified (*per* Quain, J., in *Restell & another* v. *Steward*, Weekly Notes, 1875, p. 249; 1 Charley, 89; Bitt. 65; 20 Sol. J. 140; 60 L. T. Notes, 123); and also specific instances must be given, either in the plea or in the particulars. (*Newman* v. *Bailey*, 2 Chit. 665; *I'Anson* v. *Stuart*, 1 T. R. 748; 2 Sm. Lg. Cas. 6th ed. 57; *Holmes* v. *Catesby*, 1 Taunt. 543; *Hickinbotham* v. *Leach*, 10 M. & W. 361.) And it is not sufficient to allege and prove one solitary instance, where the words impute constant and habitual misconduct. (*Wakley* v. *Cooke & Healey*, 4 Ex. 511; 19 L. J. Ex. 91.) It is enough to cite three instances. (*Moore* v. *Terrell and others*, 4 B. & Ad. 870; 1 N. & M. 559.)

These instances should be set out fully in the plea; they should be stated to have happened "before the publication, if any, of the said words," and then the plea may conclude, "Wherefore the defendant says that the said words are true in

substance and in fact." Such instances must be stated with sufficient particularity to inform the plaintiff precisely what are the facts to be tried. As a rule these instances should be given in the plea. (*Honess & others* v. *Stubbs*, 7 C. B. N. S. 555; 29 L. J. C. P. 220; 6 Jur. N. S. 682.) But if they are numerous or complicated, they may be stated in the particulars instead. (*Behrens* v. *Allen*, 8 Jur. N. S. 118; 3 F. & F. 135; *Jones* v. *Bewicke*, L. R. 5 C. P. 32; *Gourley* v. *Plimsoll*, L. R. 8 C. P. 362; 42 L. J. C. P. 121; 21 W. R. 683; 28 L. T. 598.)

If it appears from the words set out in the statement of claim that the defendant did not make a direct charge himself, but only repeated what A. said, then a general plea that the words are true will be insufficient (*Duncan* v. *Thwaites*, 3 B. & C. 556); for it will only amount to an assertion that A. said so; whereas the defendant must go further and prove in addition that what A. said was true. (See *ante*, pp. 173-6.)

The precise charge must be justified; and the whole of the precise charge. (*Goodburne* v. *Bowman & others*, 9 Bing. 532.) Every fact stated must be proved true (*Weaver* v. *Lloyd*, 2 B. & C. 678; *Helsham* v. *Blackwood*, 11 C. B. 111; 20 L. J. C. P. 187; 15 Jur. 861), unless it be absolutely immaterial and trivial, and in no way alters the complexion of the affair. But not every comment on such facts need be justified. Thus, if the defendant states certain facts, and then calls the plaintiff a "scamp" and a "rascal," and such epithets would be deserved if the facts as stated are true, then it is sufficient to plead the truth of the facts; the epithets need not be expressly justified. (*Morrison* v. *Harmer*, 3 Bing. N. C. 767; 4 Scott, 533; 3 Hodges, 108; *Tighe* v. *Cooper*, 7 E. & B. 639; 26 L. J. Q. B. 215; 3 Jur. N. S. 716.) But if the comment introduces an independent fact, or substantially aggravates the main imputation, it must be expressly justified. Thus a libellous heading to a newspaper article must be justified as well as the facts stated in the article. (*Bishop* v. *Latimer*, 4 L. T. 775; *Clement* v. *Lewis & others*, 3 Br. & Bing. 297; 3 B. & Ald. 702; 7 Moore, 200. See *ante*, pp. 170-3.)

But the defendant may in mitigation of damages justify a part of the libel, provided such part is distinct and severable from the rest. (See *ante*, p. 176.) Also the defendant may deny that the plaintiff's innuendo puts the true construction on

the words and assert that in their natural and ordinary signification they are true. Such a plea might be in the following form :—"The defendant denies that he spoke or published the said words of the plaintiff with the meaning alleged in paragraph 3 of the Statement of Claim. The said words, without the said meaning, and according to their natural and ordinary signification are true in substance and in fact." (See *ante*, p. 177.) But if the defendant adopts the meaning put upon the words by the innuendo, then he must justify them in that sense, and not in any other. (*White* v. *Tyrrell* (2), 5 Ir. C.L.R. 498.) Where a plaintiff claims damages for a libel contained in a letter set out with innuendoes, a justification in the form—"The statements in the said letter are true," is a justification of the libel itself, but not of it as read with the innuendo. (*Per* Archibald, J., at Nisi Prius, in *Payne* v. *Courthope*, 20 Sol. Journ. 724.) For a plea of justification under the new system will "not be taken to intend a justification of anything more than it actually professes to justify." But any plea which wears a doubtful aspect, which may be either a justification, or a mere traverse, or a plea of privilege, will be struck out at chambers as embarrassing. (*Carr* v. *Duckett*, 5 H. & N. 783; 29 L. J. Ex. 468; *Bremridge* v. *Latimer*, 12 W. R. 878; 10 L. T. 816; *O'Keefe* v. *Cardinal Cullen*, Ir. R. 7 C. L. 319.)

A defendant will not be allowed to amend his defence and plead a justification at the last moment, *e.g.*, on the day before the trial. (*Kirby* v. *Simpson*, 3 Dowl. 791.)

10. *Apology.*

By Lord Campbell's Libel Act (6 & 7 Vict. c. 96), s. 2, in an action for a libel contained in any public newspaper or periodical publication, the defendant may plead that the libel was inserted without actual malice and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, an apology was published or offered, and may pay money into Court by way of amends. Money must be paid into Court when the pleading is delivered if not before (8 & 9 Vict. c. 75, s. 2). But such payment will not operate as an admission of liability, even to the amount paid in. (*Jones* v. *Mackie*, L. R. 3 Ex. 1; 37 L. J. Ex. 1; 16 W. R. 109; 17 L. T. 151.) Any other pleas may be pleaded

at the same time. (*Hawkesley* v. *Bradshaw* (C. A.), 5 Q. B. D. 302; 49 L. J. Q. B. 333; 28 W. R. 557; 42 L. T. 285; *post*, p. 492.)

The following is the form of a plea under Lord Campbell's Act:—"The alleged libel was contained in a public daily newspaper called the ——— *Daily Press* and was inserted in such newspaper without actual malice and without gross negligence. Before the commencement of this action [*or* at the earliest opportunity after] the defendant inserted in several issues of the said newspaper a full apology for the said libel according to the statute in such case made and provided; and the defendant immediately after the commencement of this action paid the sum of forty shillings into Court in the said action by way of amends for the injury sustained by the plaintiff for the publication of the said libel, and gave notice of such payment into Court to the plaintiff. And the defendant says that the said sum is enough to satisfy the claim of the plaintiff in respect of the said libel."

The above section of Lord Campbell's Act applies only to public periodical publications; but s. 1 of the same Act empowers *any* defendant to give in evidence in mitigation of damages in any action, whether of slander or libel, that he made or offered an apology to the plaintiff before action, or at the earliest opportunity afterwards, if he had no opportunity before action. This section distinctly does not empower a defendant to plead an apology; for it requires him *with his plea* to give notice in writing to the plaintiff of his intention to give such apology in evidence. But there can be no objection now to the plaintiff making such written notice part of his statement of defence; indeed that he made such an apology is a material fact on which he relies, within the meaning of Order XIX. r. 4. I incline to think that it is now no longer objectionable for a defendant to state in his pleading facts which are no defence, but which tend to mitigate the damages. At least, I do not see how such a method of pleading could embarrass a plaintiff: it gives him notice what will be the defendant's case at the trial.

But it is quite another matter for the defendant in his Statement of Defence to apologize for the first time, when he had previous opportunities, of which he did not avail himself. Still this is frequently done when money is paid into Court: it

shows that the defendant has taken his counsel's opinion, and acted on it. It certainly cannot embarrass a plaintiff to have placed upon the record a full retractation of the charge accompanied by an expression of regret; and it should conduce to an amicable settlement. (See Precedent, No. 34.) But it is certainly strange pleading; and if the plaintiff wishes to have it struck out, his application will probably be successful; though he can hardly afterwards demand an apology at the trial.

11. *Accord and Satisfaction.*

"The plaintiff was the proprietor and publisher of a certain weekly journal called the *Musical Review;* and the defendant was the proprietor and publisher of another weekly journal called the *Orchestra.* And, after the publication, if any, of the said words, the plaintiff and defendant agreed together to accept certain mutual apologies, to be published by the plaintiff and defendant respectively in their said weekly journals, in full satisfaction and discharge of all the causes and rights of action in the declaration mentioned, and all damages and costs sustained by the plaintiff in respect thereof. And thereupon, in pursuance of the said agreement, the defendant did, on the 14th of May, 1864, print and publish his part of the said mutual apologies in the form agreed on in his weekly journal the *Orchestra,* of which the plaintiff had notice. And the plaintiff did also after the making of the said agreement and in pursuance thereof, to wit, on the 14th of May, 1864, print and publish his part of the said apologies in the form agreed on in his said weekly journal, the *Musical Review.* And such apologies so published as aforesaid the plaintiff accepted and received in full satisfaction and discharge of the causes of action set out in the statement of claim."

A similar plea under the old practice was held a bar to the action in *Boosey* v. *Wood,* 3 H. & C. 484; 34 L. J. Ex. 65. (See also *Lane* v. *Applegate,* 1 Stark. 97.)

As to accord and satisfaction made by one jointly liable with the defendant, see *Bainbridge* v. *Lax,* 9 Q. B. 819; *Thurman* v. *Wild,* 11 A. & E. 453; *Hey* v. *Moorhouse,* 6 Bing. N. C. 52. An accord or satisfaction made by a third party on the defendant's behalf, and accepted by the plaintiff in discharge will be a bar to the action. (*Jones* v. *Broadhurst,* 9 C. B. 173.)

12. *Statute of Limitations.*

"The alleged cause of action did not accrue within six years before this suit;" *or* in the case of slander actionable *per se*, "The words complained of were not spoken within two years before this suit." (See *ante*, p. 455.)

13. *Previous Action.*

"The plaintiff heretofore, to wit, on the —— day of ——, 1878 (date of writ), sued the defendant in the —— Division of this Honorable Court, for the same cause of action as is alleged in the Statement of Claim herein; and such proceedings were thereupon had in that action that the plaintiff afterwards by the judgment of the said Court recovered against the defendant £—— for the said cause of action, and his costs of suit in that behalf; and the said judgment still remains in force." State in the margin of the plea the date when such judgment was signed, and the number of the roll in which such proceedings are entered. (Reg. Gen. Hilary Term, 1853, r. 10.)

A plea that judgment was recovered against a joint publisher will also be a bar to an action against the others for the same publication. (See *ante*, p. 457.)

A plea that in a former action judgment was given against the plaintiff, is really a plea in estoppel. Commence as above. "And such proceedings were thereupon had in that action that afterwards and before this suit it was considered by the judgment of the said Court in the said action that the plaintiff should take nothing by his writ for or in respect of the said cause of action. The said judgment was signed on the —— day of ——, A.D. 1878, and still remains in force. [The proceedings are entered on roll No. ——.] Wherefore the defendant says that the plaintiff is estopped, and ought not to be admitted to bring the present action against the defendant."

14. *Other Defences.*

In an American case, *Beach et ux.* v. *Beach*, 2 Hill, 260, the defendant pleaded a release. (See *ante*, p. 349.)

By virtue of the Married Women's Property Act Amendment Act, 1874 (37 & 38 Vict. c. 50), s. 2, a husband, if sued for a libel or slander published or uttered by his wife before her marriage may, in addition to any other pleas, plead that no property vested in him by reason of the marriage within the meaning of s. 5, or if a certain amount of property did so vest in him, then that he is liable to that extent, and no further.

By Order XIX. r. 3, it is provided that "no plea or defence shall be pleaded in abatement:" but we are not told what course to adopt in cases where such a plea would formerly have been good. Where a man and woman sue as husband and wife for slander of the woman, the defendant is surely still entitled to plead that they are not husband and wife; for, if so, the male plaintiff has no right of action. (See *Chantler and wife* v. *Lindsey*, 16 M. & W. 82; 4 Dowl. & Lowndes, 339.)

15. *Payment into Court.*

Payment into Court is not strictly *a defence:* it is rather a payment in mitigation of damages, allowed as a favour to defendants by statute, in the hope that thereby many actions may be settled out of Court. Such a plea was not formerly allowed in all actions of tort: but, where allowed, its effect always was to admit that the plaintiff had *a* cause of action against the defendant; and if the declaration was specific to admit *the* cause of action therein specified; so that the only question left for the jury was that of damages *ultra*, that is, Is the sum so paid into Court sufficient to compensate the plaintiff, or is he entitled to more? (*Perren* v. *Monmouthshire Railway Co.*, 11 C. B. 855.)

By s. 70 of the C. L. P. Act, 1852, payment into Court was allowed in all actions except actions for assault and battery, false imprisonment, libel, slander, or malicious arrest or prosecution, or debauching the plaintiff's daughter or servant. But s. 2 of 6 & 7 Vict. c. 96, *ante*, p. 487, was left unaffected.

But now by the Judicature Act, Order XXX. r. 1:—"Where any action is brought to recover a debt or damages, any defendant may at any time after service of the writ, and before or at the time of delivering his defence, or by leave of the Court or a judge at any later time, pay into Court a sum of money by way

of satisfaction or amends." These words are so wide that they must be taken to overrule s. 70 of the C. L. P. Act, 1852, and money therefore can now be paid into Court in actions of slander as well as libel. And, moreover, such payment into Court, if properly pleaded, will not operate as an admission of the cause of action. This was decided by the Court of Appeal in *Potter* v. *Home and Colonial Assurance Co.* (not reported). But shortly afterwards the Queen's Bench Division decided that although such a payment need not necessarily be an admission that the plaintiff had a cause of action, still to plead payment into Court and to deny the plaintiff's right of action in respect of the same part of the statement of claim might in special circumstances be embarrassing to the plaintiff, and therefore such a pleading would be amended under Order XXVII. r. 1, *post*, p. 499. (*Spurr* v. *Hall*, 2 Q. B. D. 615; 46 L. J. Q. B. 693; 26 W. R. 678; 37 L. T. 313.) This decision, however, must be considered to be strictly confined to actions of its own peculiar character, and not to lay down any general rule. For the general rule is the reverse, that a defendant may by his statement of defence deny the plaintiff's causes of action, and at the same time plead payment into Court in respect of the whole or any part of them. (*Berdan* v. *Greenwood and another* (C. A.), 3 Ex. D. 251; 47 L. J. Ex. 628; 26 W. R. 902; 39 L. T. 223.) In that case, Brett and Thesiger, L.JJ., after laying down this general rule, add:—"It may, however, possibly be that in some actions brought to try a right of or in respect of property which is denied, or *to establish character which has been assailed*, and in actions where the plaintiff is by the statement of defence charged with fraud, and perhaps in some other cases, it would be, as a matter of practice, improper to allow the defence of payment into Court concurrently with other defences." And Cotton, L. J., also says:—"I am of opinion that the paragraph in question cannot be considered as in any way tending "to prejudice, embarrass, or delay the fair trial of the action;" but there may be special cases in which this would be the effect, *as in actions for libel*, which the defendant by his statement of defence justifies."

This very point was raised before the Queen's Bench Division in *Hawkesley* v. *Bradshaw*, 5 Q. B. D. 22; 49 L. J. Q. B. 207; 28 W. R. 167; 41 L. T. 653. There the defendant admitted the

publication but traversed the innuendo; then said that the words without the alleged meaning were true in substance and in fact; then that the words were *bonâ fide* comment on a matter of public interest, and therefore not libellous; and then pleaded under Lord Campbell's Act that they were published inadvertently, and apologized, and paid forty shillings into Court. This mode of pleading the Court held to be embarrassing under Order XXVII. r. 1; and both Cockburn, C. J., and Manisty, went further and held that Order XXX. r. 1 did not apply to actions for libel, and that payment into Court in actions of libel could still only be pleaded under Lord Campbell's Act, and therefore still operated as an admission of the cause of action. But the Court of Appeal (5 Q. B. D. 302; 49 L. J. Q. B. 333; 28 W. R. 557; 42 L. T. 285) held that the rule in *Berdan* v. *Greenwood* applied to actions of libel and to everything else; that a plea under Lord Campbell's Act can be pleaded with any other defences; that such a method of pleading was not embarrassing; and that the plaintiff's course, if the imputation was a serious one, was to go down to trial trusting to the judge and juries to protect him, either in the way of damages or of costs, in the event of the justification failing. It will in future be almost impossible for any collocation of pleas in an action of defamation to be held embarrassing within Order XXX. r. 1. (*O'Brien* v. *Clement*, 15 M. & W. 435; 15 L. J. Ex. 285; 3 D. & L. 676; 10 Jur. 395; and *Barry* v. *M'Grath*, Ir. R. 3 C. L. 576, are now clearly overruled.)

However, no doubt when it comes to trial, a payment into Court will generally be considered by the jury as a practical admission that defendant is somehow in the wrong, and this as a matter of common sense and not of law. I should not, therefore, advise any defendant who had a fair defence on the merits to pay money into Court. Nor again is it generally worth while to pay a farthing or a shilling into Court; for it is very improbable that plaintiff will accept that sum, and if the jury do not award more than such contemptuous damages, the judge would probably order plaintiff to pay his own costs. If defendant is going to pay anything into Court, he should pay a good round sum; generally *twice* as much as the defendant himself thinks the plaintiff is entitled to, will be about the right amount for him to pay into Court.

If it be desired to pay money into Court and at the same time to guard against any admission, the plea should commence with a saving clause as in *Berdan* v. *Greenwood*:—"Lest contrary to what the defendant believes and contends he is under any liability to the plaintiff," or thus, "The defendant, while not admitting that he is under any liability to the plaintiff, yet brings into Court the sum of £——, &c." At whatever stage of the action the money be paid into Court, the payment must be specially pleaded in the statement of defence.

Counterclaims.

It is not often that there is a counterclaim in an action for libel or slander, and it would clearly be prejudicial to the fair trial of the action to permit a defendant to raise incongruous issues. Still there is no reason why other libels or slanders published by the plaintiff of the defendant should not be made matter of counterclaim, and the fact that they arise out of a different transaction will be no ground for excluding them. (*Quin* v. *Hession*, 40 L. T. 70; 4 L. R. (Ir.) 35.) Though of course a master at chambers may on the application of the plaintiff before trial, strike out a counterclaim, if in his opinion it "cannot be conveniently disposed of in the pending action, or ought not to be allowed." In *Nicholson* v. *Jackson*, W. N. 1876, p. 38, where an action had been brought by a director of a company for libel, a counterclaim set up by the defendant for damages for loss sustained in respect of shares bought on false representations, was struck out, Lindley, J., remarking, "This is one of those cases where it would be very difficult to keep the jury from mixing up the two claims." So in *Lee* v. *Colyer*, W. N. 1876, p. 8; Bitt. 80; 1 Charley, 86; 20 Sol. J. 177; 60 L. T. Notes, 157, Quain, J., struck out a counterclaim for not repairing a house, the action being for assault and slander. But in *Dobede* v. *Fisher*, at the Cambridge Summer Assizes, 1880, the Lord Chief Baron had to try an action of slander, in which there was a counterclaim about a right of shooting over the land occupied by the defendant. (*Times* for July 29th, 1880.) Where however the action was for two quarters' rent and the writ was specially indorsed for 30*l*., the defendant was not allowed to set up a counterclaim for libel and slander not con-

nected with the claim for rent. (*Rotheram* v. *Priest*, 49 L. J. C. P. 104; 28 W. R. 277; 41 L. T. 558.)

Facts relied on in support of a counterclaim must be specifically stated as such; they must be distinguished from the facts relied on as defence proper. (*Crowe* v. *Barnicot*, 37 L. T. 68.) But of course they need not be repeated at full length, if they have been previously set out in the statement of defence. It is sufficient to say:—"And by way of set-off [or counterclaim, or both] the defendant repeats the allegations contained in paragraphs 5, 6, 8 and 10 above, and says further, &c." (*Birmingham Estates Co.* v. *Smith*, 13 Ch. D. 506; 49 L. J. Ch. 251; 28 W. R. 666; 42 L. T. 111.)

A counterclaim is in the nature of a cross-action commenced at date of writ. Hence no counterclaim arising after action brought can strictly be pleaded without leave, although a defence proper can. (Order XX. *Per* Jessel, M.R., in *Original Hartlepool Colliery Co.* v. *Gibb*, 5 Ch. D. 713; 46 L. J. Ch. 311; 36 L. T. 433.) In *Ellis* v. *Munson* (C. A.), (35 L. T. 585; Weekly Notes, 1876, p. 253), leave had been obtained. Such a counterclaim must, of course be expressly pleaded *puis darrein continuance*.

Where the defendant is a foreigner residing out of jurisdiction, and sets up a counterclaim arising out of the same facts as the plaintiff's claim, the plaintiff will not be entitled to security for the costs of such counterclaim even though its amount exceeds that of his claim. (*Mapleson* v. *Masini*, 5 Q. B. D. 144; 49 L. J. Q. B. 423; 28 W. R. 488; 42 L. T. 531.)

Judgment in Default of Pleading.

The defendant is bound (unless the time is enlarged by a master at chambers, or by consent under Order LVII. r. 6a, R. S. C. April, 1880, r. 42) to deliver his defence within eight days from the delivery of the claim or from the time limited for appearance, whichever is last. (Ord. XIX. r. 2; Ord. XXII. r. 1.) Failing his doing so, the plaintiff may enter an interlocutory judgment against the defendant, in default of pleading. A writ of inquiry will then issue to assess the damages, unless the judge at chambers order them to be ascertained in another way. But if there be several defendants and one or more make default,

the damages against him or those in default must be assessed at the trial of the action against the other defendants, unless a master at chambers shall otherwise direct. (Ord. XXIX. rr. 4, 5).

But a solicitor should never "snap a judgment," if he has any reason for supposing that the delay in pleading is accidental or unavoidable. (*Canada Oil Works* v. *Hay*, W. N. 1878, p. 107.) And even where there has been no unseemly haste in signing judgment, still the judgment will generally be set aside on an affidavit of merits, on the terms that the defendant pay costs occasioned by his default, plead the same day, and, if need be, take short notice of trial.

Reply.

The plaintiff on receiving the statement of defence should first see whether any part of it is so objectionable as to entitle him to apply at chambers for an order to amend it, under Order XXVII. rr. 1, 6. Paragraphs in the nature of an informal demurrer may be struck out as embarrassing under this rule. (*Stokes* v. *Grant and others*, 4 C. P. D. 25; 27 W. R. 397; 40 L. T. 36.) Then, it may be that his own statement of claim may require amendment; such amendment now takes the place of a "new assignment," Order XIX. r. 14. Next, if the pleading is not so bad as to require amendment, particulars may still be demanded. Thus, where the libel imputed that the plaintiff had infringed defendant's patents, the defendant was ordered to deliver particulars to the plaintiffs, showing in what respects he alleged that the plaintiffs had infringed his patents, and giving references to line and page of his own specifications. (*Wren and another* v. *Weild*, 38 L. J. Q. B. 88.) But of course particulars will only be ordered of such of defendant's words as are material in the present action. (*Colonial Assurance Corporation, Limited* v. *Prosser*, Weekly Notes, 1876, p. 55; Bitt. 122; 20 Sol. J. 281; 60 L. T. Notes, 250.)

If no facts be stated in a plea of justification the plaintiff should apply for particulars, unless the charge itself be specific and precise; see *ante*, pp. 485, 6. If the facts stated are insufficient in law to justify the imputation, the defendant should demur, or apply to have the plea struck out or amended. So,

too, a plea of privilege is often demurred to. But the plaintiff should never demur unless he is sure that his own previous pleading is perfectly good in law. For by demurring he submits the whole record to the judgment of the Court, and his counsel, who came to attack the defence, may suddenly be called on to defend his own statement of claim, as in *Clay* v. *Roberts*, 11 W. R. 649 ; 9 Jur. N. S. 580 ; 8 L. T. 397.

A reply as a rule is a mere joinder of issue in actions of defamation, unless there be a counter-claim. Joinder of issue will operate as a denial of every material allegation of fact in the pleading of the other side, except facts admitted. (Ord. XIX. r. 21.) To a plea of absolute privilege no other reply can be framed which is not demurrable ; (see *Scott* v. *Stansfeld*, L. R. 3 Ex. 220 ; 37 L. J. Ex. 155 ; 16 W. R. 911 ; 18 L. T. 572. *Dawkins* v. *Lord Paulet*, L. R. 5 Q. B. 94 ; 39 L. J. Q. B. 53 ; 18 W. R. 336 ; 21 L. T. 584). To a plea of qualified privilege a special reply is unnecessary, if malice be alleged in the statement of claim. On a plea under s. 2 of Lord Campbell's Act, the plaintiff usually merely joins issue, but he may if he likes admit that the libel appeared in a newspaper, and that money had been paid into Court ; but deny that the libel was inserted without actual malice and without gross negligence, and that the sum of money paid into Court is sufficient. (*Chadwick* v. *Herapath*, 3 C. B. 885 ; 16 L. J. C. P. 104 ; 4 D. & L. 653 ; *Smith* v. *Harrison*, 1 F. & F. 565.) To a general plea of payment into Court some pleaders reply specially that the sum paid in is insufficient ; but a mere joinder of issue will raise the question with equal effect. To a justification setting out a conviction, or to a plea of a previous action, the plaintiff may reply specially *Nul tiel record ;* or if the conviction be erroneously stated in the defence (as in *Alexander* v. *N. E. Ry. Co.* 34 L. J. Q. B. 152 ; 11 Jur. N. S. 619 ; 13 W. R. 651 ; 6 B. & S. 340) the plaintiff may set it out correctly in his reply. Or to such a conviction the plaintiff may reply on a pardon (*Cuddington* v. *Wilkins*, Hob. 67, 81 ; 2 Hawk. P. C. c. 37, s. 48), or that he had undergone and completed his sentence, which will have the same effect (*Leyman* v. *Latimer and others*, 3 Ex. D. 15, 352 ; 46 L. J. Ex. 765 ; 47 L. J. Ex. 470 ; 25 W. R. 751 ; 26 W. R. 305 ; 37 L. T. 360, 819 ; 14 Cox, C. C. 51), though I apprehend neither reply would be an answer if the words complained of were that the

plaintiff "was convicted of such and such a crime." To a plea of the Statute of Limitations, a plaintiff may specially reply absence beyond seas under the statute of Anne, *ante*, p. 456.

To a counterclaim the plaintiff must of course plead as specially as a defendant is compelled to do to a statement of claim. (*Benbow* v. *Low*, 13 Ch. D. 553; 49 L. J. Ch. 259; 28 W. R. 384; 42 L. T. 14; *Green* v. *Sevin*, 13 Ch. D. 589; 41 L. T. 724.)

The plaintiff may deliver interrogatories with his reply, see *post*, p. 500. The reply must be delivered within three weeks after the defence has been received (Order XXIV. r. 1), unless the time be extended.

Rejoinder.

A rejoinder is almost always a mere joinder of issue. If it is not, leave must be obtained to plead it. (Order XXIV. r. 2.) There is an instance of a special rejoinder, which was held good on demurrer, in *Alexander* v. *North-Eastern Railway Co.*, *supra*.

A rejoinder must be delivered within four days after the receipt of the reply, unless the time be extended by order of a master at chambers, or by consent. (Order XXIV. r. 3.)

Amendment of Pleadings.

The plaintiff may without leave amend his claim once within the time limited for reply and before reply, or, if no defence has been delivered, then within four weeks from the appearance of the defendant who has last appeared; and so, also, a defendant who has pleaded a set-off or counterclaim may amend the same within the time limited for and before pleading to the reply; or, if there be no reply, then within twenty-eight days from the filing of his defence. (Order XXVII. rr. 2, 3.) But there is no provision enabling a defendant to amend his *defence* without leave. Either party may with leave amend his claim, defence, or reply, at any stage of the proceedings. (*Ib.* r. 1.) In such case the order to amend, if not acted upon within the time limited therein, or fourteen days from the date thereof, becomes void *ipso facto*. (Order XXVII. r. 7.) Generally, such leave will be readily granted on payment of costs (*Marriott* v. *Marriott*, 26 W. R. 416; Weekly Notes, 1878, p. 57), unless the party applying has been guilty of *mala fides*, or desires the amendment merely in order to raise a technical defence.

(*Tildesley* v. *Harper* (C. A.), 10 Ch. D. 393; 48 L. J. Ch. 495; 27 W. R. 249; 39 L. T. 552; *Collette* v. *Goode*, 7 Ch. D. 842; 47 L. J. Ch. 370; 38 L. T. 504.)

But it is a very different matter where one party applies to amend, not his own pleading, but that of the opposite party. No party may dictate to the other how he shall plead; he must satisfy the master at chambers or district registrar that the passage to which he objects is either scandalous (that is, both offensive and at the same time irrelevant), or that it tends to prejudice, embarrass, or delay the fair trial of the action. Some pleaders appear to be easily embarrassed; but it is no part of their duty to reform their opponent's pleadings. It is also much better policy to leave a flagrantly bad specimen of pleading unamended, and not to kindly strengthen your adversary's position. Still, if an allegation be really unintelligible or frivolously irrelevant, it should be struck out. (*Cashin* v. *Cradock*, 3 Ch. D. 376; 25 W. R. 4; 35 L. T. 452; *Smith and others* v. *Richardson*, 4 C. P. D. 112; 48 L. J. C. P. 140; 27 W. R. 230; 40 L. T. 256.)

Either party dissatisfied with the order made by the master or district registrar may appeal to a judge by summons returnable within four days (Order LIV. r. 4; *Gibbons* v. *London Financial Association*, 4 C. P. D. 263; 48 L. J. C. P. 514; 27 W. R. 619). Appeals from any decision of the judge at chambers to the Divisional Court must be made by motion within eight days after the decision appealed against (Order LIV. r. 6a); or if no Court sits within the eight days, then on the first day on which any Court sits, to which such application can be made (R. S. C., March, 1879, r. 8; *Runtz* v. *Sheffield* (C. A.), 4 Ex. D. 150; 48 L. J. Ex. 385; 40 L. T. 539; *Stirling* v. *Du Barry* (C. A.), 5 Q. B. D. 65; 28 W. R. 404). If the last of the eight days be Sunday, the appellant may make his appeal on the following Monday. (*Taylor* v. *Jones*, 1 C. P. D. 87; 45 L. J. C. P. 110; 34 L. T. 131; and see Order LVII. r. 3.) Two clear days' notice of motion must be given. (Order LIII. r. 4.) But unless a matter of principle is involved, it is not as a rule desirable to carry an appeal thus far; for the Court generally refuses to interfere with the discretion of the judge below on any point of pleading. (*Golding* v. *Wharton Saltworks Co.*, 1 Q. B. D. 374; 24 W. R. 423; 34 L. T. 474; *Byrd* v. *Nunn*,

7 Ch. D. 284; 47 L. J. Ch. 1; 26 W. R. 101; 37 L. T. 585; *Huggons* v. *Tweed*, 10 Ch. D. 359; 27 W. R. 495; 40 L. T. 284.)

Where any party has amended without leave, the other may within eight days after the receipt of the amended pleading apply to the judge at chambers to disallow the same (Order XXVII. r. 4), or for leave to plead further or amend his former pleading (*ib.* r. 5). All amended pleadings must be marked with the date of the amending order (if any), and the day on which such amendment is made (*ib.* r. 9), and delivered to the other side within the time allowed for amending (*ib.* r. 10).

Default in Pleading.

The plaintiff must deliver his reply within three weeks after defence delivered. (Order XXIV. r. 1.) All pleadings subsequent to reply, must be delivered within four days after delivery of the previous pleading (*ib.* r. 3). If the plaintiff does not deliver his reply, or either party fails to deliver any subsequent pleading, within the period allowed, the pleadings will at its expiration be deemed closed, and the statements of fact in the pleading last delivered admitted. (Order XXIX. r. 12.)

And, therefore, if it be the defendant that is in default, the plaintiff may at once give notice of trial under Order XXXVI. r. 3. If, however, it is the plaintiff that is in default, the defendant must wait for six weeks after expiration of the period allowed for pleading, and then either himself give notice of trial under Order XXXVI. r. 4, or apply to a master at chambers to dismiss the action for want of prosecution, under r. 4*a*, R. S. C. June, 1876, r. 13 (*Litton* v. *Litton*, 3 Ch. D. 793; 24 W. R. 962).

Interrogatories.

Interrogatories are now delivered almost as a matter of course in every action of libel or slander where there is any dispute as to the facts. Formerly leave was required to exhibit interrogatories, but now they are delivered as of right. They are generally administered by the party on whom will lie the main burden of proof at the trial, but often there are cross interrogatories.

The plaintiff cannot administer interrogatories without leave, before the statement of defence is delivered, in spite of the

express words of Order XXX. r. 1; for the defendant may admit in his pleading the very matters on which it is proposed to interrogate him. (*Mercier* v. *Cotton*, 1 Q. B. D. 442; 46 L. J. Q. B. 184; 24 W. R. 566; 35 L. T. 79.) So, too, the defendant as a rule cannot interrogate the plaintiff before delivering his statement of defence. (*Disney* v. *Longbourne*, 2 Ch. D. 704; 45 L. J. Ch. 532; 24 W. R. 663; 35 L. T. 301.) But between the date of delivery of the statement of defence and the close of the pleadings either party may deliver interrogatories without leave.

After the close of the pleadings, or before the delivery of the statement of defence, leave must be obtained to administer interrogatories, and good cause must be shown on affidavit for the application. (*Anon.* 1 Charley, 100; Bitt. 4; 20 Sol. J. 32; 60 L. T. Notes 32; *Hawley* v. *Reade*, Weekly Notes, 1876, p. 64; Bitt. 130; 20 Sol. J. 298; 60 L. T. Notes, 268; *Ellis* v. *Ambler*, 25 W. R. 557; 36 L. T. 410.) A plaintiff has been allowed to administer interrogatories before statement of claim in order to ascertain the exact words of a libel or slander. So, too, leave has in a special case been obtained for the delivery of a second set of interrogatories, where the pleadings have been amended since the first set was delivered, and such amendments involved fresh facts. Leave is also necessary to administer interrogatories to a corporation when a party to an action; but it is almost always granted as a matter of course. The party interrogating is entitled to select any officer of the corporation or company to answer. Such officer need not and should not be made a party to the suit. (C. L. P. Act, 1854 (17 & 18 Vict. c. 125), s. 51; *Cooke* v. *Oceanic Steam Co.*, Weekly Notes, 1875, p. 220; Bitt. 33; 20 Sol. J. 80; 60 L. T. Notes, 68; *Wilson* v. *Church*, 9 Ch. D. 552; 26 W. R. 735; 39 L. T. 413.) If there be no officer of the company capable of giving them the information required, then, but not else, the party interrogating is entitled to name some ordinary member of the company, who is acquainted with the facts, who shall answer the interrogatories; nor can such member refuse to file his affidavit in answer until he has been paid his taxed costs of answering it. (*Berkeley* v. *Standard Discount Co.* (C. A.), 13 Ch. D. 97; 49 L. J. Ch. 1; 28 W. R. 125; 41 L. T. 374, reversing the decision of Fry, J., below; 12 Ch. D. 295; 48 L. J. Ch. 797; 27 W. R. 852; 41 L. T. 29.)

Very often, however, the party interrogating leaves it to the company to select the person who shall answer the interrogatories, in which case the company must select someone conversant with the facts and capable of answering fully and freely. (*Republic of Costa Rica* v. *Erlanger*, 1 Ch. D. 171; 45 L. J. Ch. 145; 24 W. R. 151; 1 Charley 111.) If a corporation elects to answer by an officer who is also their solicitor in the action, they lose the privilege attaching to information acquired by the solicitor for the purposes of the action. (*Mayor, &c., of Swansea* v. *Quirk*, 5 C. P. D. 106; 49 L. J. C. P. 157; 28 W. R. 371; 41 L. T. 758.) The propriety of the interrogatories proposed to be administered cannot be discussed at this stage. (*Berkeley* v. *Standard Discount Co.* (Malins, V.C.), 9 Ch. D. 643; 26 W. R. 852; overruling the decision of Lush, J., at chambers in *Hewetson* v. *Whittington Life Insurance Soc.*, Weekly Notes for 1875, p. 219; 1 Charley, 101; Bitt. 27; 20 Sol. J. 79; 60 L. T. Notes, 67.)

There is some art required in drawing interrogatories. It consists chiefly in looking rather at the answer you may reasonably expect to obtain than at the answer which you are instructed ought to be given to the question you are putting. The defendant's version of the matter must differ from the plaintiff's version, and the object of interrogatories is to discover precisely where and to what extent they differ. The question then should be framed so as, in the first place, to elicit if possible the answer you desire; and at the same time, failing that answer, to get, at all events, some definite statement sworn to, from which the party interrogated cannot afterwards diverge. Care should be taken to leave him no loophole of escape. If he will not answer the question your way, still at least find out how far he is prepared to go in the opposite direction.

To secure this it is well to ask a long series of short questions, not one long question. Each additional detail should be put in a question by itself. Thus if you are instructed that the plaintiff gave evidence in the Bankruptcy Court, in the presence of a Mr. Henderson, that a certain cheque was in the handwriting of the defendant, it will be of little use to ask merely: "Did you not state on oath, in the Bankruptcy Court, in the presence of J. Henderson, that the said cheque was in the defendant's handwriting?" as the plaintiff will simply answer "No."

Nor will it avail to add to the above question the Chancery phrase, "Or, how otherwise?" The only way to discover precisely what it is the plaintiff denies is to split the question up into several—"Were you not examined as a witness in the Bankruptcy Court on the 15th of May, 1880, or some other and what day? Was not a cheque then and there produced to you? Did you not state that such cheque was in the handwriting of the defendant? If nay, in whose handwriting did you state the said cheque to be? Was not the said cheque the one mentioned in Paragraph 4 of the Statement of Claim, or some other, and what cheque? Did you not state so on oath? Did you not state so in the presence of one John Henderson?"

Interrogatories should be put so that the party interrogated can answer "Yes" and "No" to them. (*Per* Archibald, J., in *Armitage* v. *Fitzwilliam and others*, Weekly Notes, 1876, p. 56; Bitt. 126; 20 Sol. J. 281; 60 L. T. Notes, 251.)

Great care is necessary in applying former decisions as to interrogatories to the present practice. Before the Judicature Act special leave was required to administer interrogatories, and the judge might in every case exercise his discretion as to allowing them. Now either party has a right to administer them, subject only to this—that if he exhibits interrogatories unreasonably, vexatiously, or at improper length, he may have to pay the costs of them. (Order XXXI. r. 2.) Then between November 1st, 1875, and November 18th, 1878, the party interrogated was always allowed to apply at chambers to have objectionable interrogatories struck out; this now, as a rule, he may not do; he merely refuses to answer them in his affidavit in answer. (See *post*, p. 509.)

In actions of slander the Courts formerly felt a great reluctance in allowing any interrogatories at all to be administered. (*Stern* v. *Sevastopulo*, 14 C. B. N. S. 737; 32 L. J. C. P. 268.) In fact, there is only one instance reported of such interrogatories being allowed before the Judicature Act, and in that case (*Atkinson* v. *Fosbrooke*, L. R. 1 Q. B. 628; 35 L. J. Q. B. 182; 12 Jur. N. S. 810; 14 W. R. 832; 14 L. T. 553) the plaintiff had exhausted every other channel of inquiry, and was unable to discover what were the exact words the defendant had uttered.

But now no leave is required, and the plaintiff administers interrogatories as of right in slander as in any other action; and the defendant answers them without demur.

But with libel it is different; for libel is a crime. To ask, therefore, whether the defendant had any share in writing, printing, or composing the alleged libel, or was the editor of the newspaper at the date of publication, has a direct tendency to criminate the defendant, who may, therefore, refuse to answer such questions. But this alone does not satisfy him. To refuse to answer on the express ground that to answer might criminate him is tantamount to a confession of criminality; and the defendant's endeavour, therefore, has always been to prevent such a question being put to him. In oral examination it is well known that the witness cannot object to such questions being asked; he can only decline to answer; and to do that he must take his objection on oath, stating in open Court that in his opinion the answer would tend to criminate him. (*Boyle* v. *Wiseman*, 10 Ex. 647; 24 L. J. Ex. 160; 24 L. T. (Old S.) 274; 25 L. T. (Old S.) 203.) But in the days when interrogatories were still a novelty, when leave to exhibit them was only granted as a favour, it was thought unfair to the defendant to permit a string of questions to be asked him which it was clear he was not bound to answer (*Tupling* v. *Ward*, 6 H. & N. 749; 30 L. J. Ex. 222; 7 Jur. N. S. 314; 9 W. R. 482; 4 L. T. 20; *Baker* v. *Lane*, 3 H. & C. 544; 34 L. J. Ex. 57; *Edmunds* v. *Greenwood*, L. R. 4 C. P. 70; 38 L. J. C. P. 115; 17 W. R. 142; 19 L. T. 423); and it came to be the rule that, in the absence of very special circumstances (*Inman* v. *Jenkins*, L. R. 5 C. P. 738; 39 L. J. C. P. 258; 18 W. R. 897; 22 L. T. 659; *Greenfield* v. *Reay*, L. R. 10 Q. B. 217; 44 L. J. Q. B. 81; 23 W. R. 732; 31 L. T. 756), questions which on the face of them tended to criminate could not be asked (*Villeboisnet* v. *Tobin and others*, L. R. 4 C. P. 184; 38 L. J. C. P. 146; 17 W. R. 322; 19 L. T. 693); that questions not clearly criminatory might be asked, but the defendant might refuse to answer them, if he stated his objection on oath at the time of answering. (*Osborne* v. *London Dock Co.*, 10 Exch. 698; 24 L. J. Ex. 140; *Chester* v. *Wortley*, 17 C. B. 410; 25 L. J. C. P. 117; *Bartlett* v. *Lewis*, 12 C. B. N. S. 249; 31 L. J. C. P. 230; *Bickford* v. *Darcy and Beachey*, L. R. 1 Ex.

354; 14 W. R. 900; 14 L. T. 629; *McFadzen* v. *Mayor and Corporation of Liverpool*, L. R. 3 Ex. 279; 16 W. R. 48.)

But, though this was the rule at Common Law, in Equity the practice was different. There the distinction between an obvious and a latent tendency to criminate was unknown, though there was a rule against allowing discovery in aid of an action for a mere personal tort. (*Glynn* v. *Houston*, 1 Keen, 329.) All questions material to the issue might be asked, and the defendant was always compelled to answer them unless he took the objection on oath in his answer. And this is now the practice in all the divisions; for by sub-s. 11 of s. 25 of the Judicature Act, 1873, whenever there is a variance between the practice at Common Law and at Equity, the rules of Equity shall prevail. (*Fisher* v. *Owen* (C. A.), 8 Ch. D. 645; 47 L. J. Ch. 477, 681; 26 W. R. 417, 581; 38 L. T. 252, 577; *Allhusen* v. *Labouchere* (C. A.), 3 Q. B. D. 654; 47 L. J. Ch. 819; 27 W. R. 12; 39 L. T. 207.) In an earlier case (*Atherley* v. *Harvey*, 2 Q. B. D. 524; 46 L. J. Q. B. 518; 25 W. R. 727; 36 L. T. 551), the Queen's Bench Division, it is clear, desired and intended to follow the Chancery rule, but were misled as to what precisely was the practice in Equity. (See the remarks of Cotton, L.J., in *Fisher* v. *Owen*, 8 Ch. D. 654.) It is now, therefore, clear that relevant interrogatories cannot be set aside merely because they tend to criminate; the party interrogated must take the objection on oath in his affidavit in answer. (See also *Webb* v. *East* (C. A.), 5 Ex. D. 23, 108; 49 L. J. Ex. 250; 28 W. R. 229, 336; 41 L. T. 715.)

The fusion of Law and Equity appears also to have done away with another distinction as to what questions could be asked and what not. It was formerly a rule, well recognised at Common Law, that interrogatories must be confined to matters which relate to the case of the party administering them, and must not extend to matters which relate exclusively to the case of the opposite party; though questions might be asked as to any matter common to the case of both parties. (*Per* Lord Campbell, C.J., in *Carew* v. *Davies*, 5 E. & B. 709; 25 L. J. Q. B. 165; and *per* Cockburn, C.J., in *Moor* v. *Roberts*, 3 C. B. N. S. 671; 26 L. J. C. P. 246.) The rule was formerly precise:—"Put your own case to your opponent by means of interrogatories; but apply for particulars of his case." But in Chancery there

was nothing corresponding to particulars. (*Augustinus* v. *Nerinckx* (C. A.), 16 Ch. D. 13 ; 43 L. T. 458.) There the only way in which a party could ascertain what was the case he had to meet, was by means of interrogatories. And such information may still be so obtained. (*Saunders* v. *Jones* (C. A.), 7 Ch. D. 435 ; 47 L. J. Ch. 440 ; 26 W. R. 226 ; 37 L. T. 395, 769.) And in *Gay* v. *Labouchere*, 4 Q. B. D. 206 ; 48 L. J. Q. B. 279 ; 27 W. R. 412 ; Cockburn, C.J., asks "Why should not the plaintiff have this information by means of interrogatories as well as by particulars?" and overrules the distinction that the answer to interrogatories is on oath, while particulars are not sworn to, and can be at any time amended. It seems, then, that the Common Law rule is now obsolete, and that instead of it must stand the Equity rule : that either party is entitled, by means of interrogatories, to ascertain the facts on which his opponent relies, but not the evidence by which he proposes to prove those facts : *Ashley* v. *Taylor*, 37 L. T. 522 ; (C. A.) 38 L. T. 44 ; *Commissioners of Sewers* v. *Glasse*, L. R. 15 Eq. 302 ; 42 L. J. Ch. 345 ; 21 W. R. 520 ; 28 L. T. 433, as explained in *Saunders* v. *Jones*, *supra*. Thus you are not entitled to see your adversary's brief, or to ask him to name the witnesses he means to call at the trial. You may not ask in whose presence such and such events occurred ; but you are entitled to know precisely what is the charge made against you, and what are the facts upon which your opponent intends to rely. (*Eade and another* v. *Jacobs* (C. A.), 3 Ex. D. 335 ; 47 L. J. Ex. 74 ; 26 W. R. 159 ; 37 L. T. 621 ; *Johns* v. *James*, 13 Ch. D. 370 ; *Lyon* v. *Tweddell*, *ib.* 375.)

One instance which came within the above-mentioned Common Law rule deserves special notice. The defendant could formerly, as now, apply for particulars of the special damage alleged in the declaration ; therefore, it was held he might not interrogate as to it. It was entirely the plaintiff's case. (*Peppiatt and wife* v. *Smith*, 33 L. J. Ex. 239 ; *Jourdain* v. *Palmer*, L. R. 1 Ex. 102 ; 35 L. J. Ex. 69 ; 12 Jur. N. S. 214 ; 14 W. R. 283 ; 13 L. T. 600 ; overruling *Wood* v. *Jones*, 1 F. & F. 301, where Williams, J., refused particulars, but allowed interrogatories as to the names of the persons to whom a slander was uttered.) But even before the Judicature Act this strictness was abated, and a defendant was allowed to interrogate as to

special damage, when his object was to ascertain how much would be a reasonable sum to pay into Court. (*Horne* v. *Hough and others*, L. R. 9 C. P. 135; 43 L. J. C. P. 70; 22 W. R. 412; *Wright* v. *Goodlake*, 34 L. J. Ex. 82.) And now there would appear to be no objection to a defendant's applying first for particulars and then interrogating the plaintiff as to those particulars.

In an action for libel, *Davis* v. *Gray*, 30 L. T. 418, interrogatories were disallowed, the object of which was to establish special malice so as to meet the defence of privilege, should it be set up. But the reason for this decision is not clearly stated in the report. Even then there was no objection to a plaintiff interrogating as to matter of reply: certainly there is none now.

The following, therefore, are, with some diffidence, suggested as the rules which now in a Common Law action determine what interrogatories may be administered and what not.

1. Interrogatories must be relevant to the matter in issue. Not every question which could be asked a witness in the box may be put as an interrogatory. (*Per* Martin, B., in *Peppiatt and wife* v. *Smith*, 33 L. J. Ex. 240.) Thus, questions to credit only will not be allowed, although, of course, they may be asked the party in cross-examination. (*Baker* v. *Newton*, Weekly Notes, 1876, p. 8; 1 Charley, 107; Bitt. 80; 20 Sol. J. 177; 60 L. T. Notes, 157; *Allhusen* v. *Labouchere* (C. A.), 3 Q. B. D. 654; 47 L. J. Ch. 819; 27 W. R. 12; 39 L. T. 207.) Again, no question need be answered which is not put *bonâ fide* for the purposes of the present action. Thus, the publisher of a newspaper must answer the interrogatory: "Was not the passage set out in paragraph 3 of the Statement of Claim intended to apply to the plaintiff?"; but he need not answer the further question, "If not, say to whom?" as, if the passage did not apply to the plaintiff, it is immaterial to whom it referred, so far as the plaintiff's action is concerned. (*Wilton* v. *Brignell*, Weekly Notes, 1875, p. 239; 1 Charley, 105; Bitt. 56; 20 Sol. J. 121; 60 L. T. Notes, 104.) For further instances of interrogatories held irrelevant, see *Sivier* v. *Harris*, Weekly Notes, 1876, p. 22; Bitt. 98; 20 Sol. J. 240; 60 L. T. Notes, 213; *Phillips and another* v. *Barron and another*, Weekly Notes, 1876, p. 54; Bitt. 119; 20 Sol. J. 280; 60 L. T. Notes, 249; *Mansfield* v. *Childerhouse*, 4 Ch. D. 82; 46 L. J. Ch. 30; 25 W. R. 68; 35

L. T. 590; *Sheward* v. *Earl of Lonsdale*, 5 C. P. D. 47; 28 W. R. 324; 42 L. T. 54; *Bolckow* v. *Young*, 42 L. T. 690.

2. Next, as we have seen above, the party interrogating may deal with his own case, or with matters common to the case of both parties, in full detail. But he is entitled to obtain an outline only of matters exclusively relating to the case of the party interrogated, and not the evidence which the party interrogated means to give at the trial in support of his allegations.

3. The questions asked must not be "fishing;" that is, they must refer to some definite and existing state of circumstances, not be put merely in the hopes of discovering something which may help the party interrogating to make out *some* case. They must be confined to matters which there is good ground for believing to have occurred. "Fishing" interrogatories are especially objectionable when their object is to get at something which may support a plea of justification. (*Gourley* v. *Plimsoll*, L. R. 8 C. P. 362; 42 L. J. C. P. 121; 21 W. R. 683; 28 L. T. 598; *Buchanan* v. *Taylor*, Weekly Notes for 1876, p. 73; Bitt. 131; 20 Sol. J. 298; 60 L. T. Notes, 268.)

4. In the Common Law divisions, at all events, interrogatories are not allowed as to the contents of written documents, unless it is admitted that such documents have been lost or destroyed. (*Fitzgibbon* v. *Greer*, Ir. R. 9 C. L. 294.) Nor will interrogatories be allowed, the object of which is to contradict a written document. (*Moor* v. *Roberts*, 3 C. B. N. S. 671; 26 L. J. C. P. 246.) The old question as to documents which formerly concluded every set of interrogatories is no longer allowed. (*Pitten* v. *Chatterburg*, Weekly Notes, 1875, p. 248; 1 Charley, 106; Bitt. 62; 20 Sol. J. 139; 60 L. T. Notes, 122.) Its place is taken by a summons for discovery of documents, see *post*, p. 515.

If, however, the party from whom discovery is sought does not in his affidavit of documents disclose a document which there is good reason for believing was once, at all events, in his possession, then interrogatories may be administered asking him whether he did not receive a particular document from a certain person on a given day; whether it is not now in his possession or control; if nay, when did he part with it, and to whom? Was it ever in his possession or control? (*Lethbridge* v. *Cronk*, 44 L. J. C. P. 381; *Jones* v. *Monte Video Gas Co.* (C. A.), 5

Q. B. D. 556; 49 L. J. Q. B. 627; 28 W. R. 758; 42 L. T. 639.) And the interrogatory might continue: "If you state that such document is lost or destroyed, set out the contents of the same to the best of your recollection and belief." And see *Stein* v. *Tabor*, 31 L. T. 444.

5. Questions which tend to criminate may certainly be asked, unless they are either irrelevant or "fishing," though the party interrogated is not bound to answer them. (*Per* Thesiger, L.J., in *Fisher* v. *Owen*, 8 Ch. D. 655.) That the interrogatories will tend to criminate others is no objection, if they be put *bonâ fide* for the purposes of the present action. (*M'Corquodale* v. *Bell and another*, W. N. 1876, p. 39; Bitt. 111; 20 Sol. J. 260; 60 L. T. Notes, 232.) That to answer them would expose the party interrogated, or third persons, to civil actions was never an objection. (*Tetley* v. *Easton*, 25 L. J. C. P. 293.)

Striking-out Interrogatories.

By the Rules of November, 1878, the original Rules 5 and 8 of Ord. XXXI. are repealed, and the following rule substituted:—

5. "Any objection to answering any one or more of several interrogatories on the ground that it or they is or are scandalous or irrelevant, or not *bonâ fide* for the purpose of the action, or that the matters inquired into are not sufficiently material at that stage of the action, or on any other ground, may be taken in the affidavit in answer.

"An application to set aside the interrogatories on the ground that they have been exhibited unreasonably or vexatiously, or to strike out any interrogatory or interrogatories on the ground that it or they is or are scandalous, may be made at chambers within four days after service of the interrogatories."

This rule came into operation on November 18th, 1878.

It will be observed that the words of the first clause are "*may be*" only, but the judicial interpretation of the rule, founded no doubt on practical convenience, is that such objections *must* be taken in the affidavit in answer and not otherwise; and that it is only in cases within the second clause of the rule, that an application may be made to strike out the interrogatories. (*Gay* v. *Labouchere*, 4 Q. B. D. 206; 48 L. J. Q.

B. 279; 27 W. R. 413.) The present practice, therefore, is to dismiss every summons to strike out interrogatories, unless they are, as a whole, "unreasonably or vexatiously exhibited," or unless any one or more of them is or are "scandalous." All objections to particular interrogatories, or portions of interrogatories, on the ground that they are irrelevant, or "fishing," &c., must be taken in the affidavit in answer, and is no ground for any application to set the interrogatories aside. And both the phrases "unreasonable or vexatious" and "scandalous" have special meanings. Masters at chambers, following the *dictum* of Pollock, B., in *Gay* v. *Labouchere*, 4 Q. B. D. 207, construe "unreasonable or vexatious" as referring to the time or stage in the cause at which they are exhibited; in short, that they are "premature" (see *Mercier* v. *Cotton*, 1 Q. B. D. 442; 46 L. J. Q. B. 184; 24 W. R. 566; 35 L. T. 79), or that leave has not been obtained to administer them when leave is requisite. For instances in which searching interrogatories were considered in Chancery *not* to be "unreasonable or vexatious" prior to the publication of this order, see *Reade* v. *Woodroffe*, 24 Beav. 421; *Elmer* v. *Creasy*, L. R. 9 Ch. 69; *Saull* v. *Browne*, *ib.* 364; *West of England and South Wales Bank* v. *Nicholls*, 6 Ch. D. 613. The mere fact that it would involve great expense and trouble to answer the interrogatories, was never considered in itself a sufficient reason for disallowing them. (*Macintosh* v. *G. W. Ry. Co.*, 22 L. J. Ch. 72; *Hall* v. *L. & N. W. Ry. Co.*, 35 L. T. 848.)

A "scandalous" interrogatory may be defined as an insulting or degrading question, which is irrelevant or impertinent to the matters in issue. It was a well-known term in Chancery, and is adopted by the framers of the Rules. "It is the doctrine in Chancery that nothing is scandalous that is strictly relevant to the merits." (Sidney Smith's Chancery Practice, 878; 25 L. J. C. P. 197.) "Certainly nothing can be scandalous which is relevant." (*Per* Cotton, L.J., in *Fisher* v. *Owen*, 8 Ch. D. 653.) Questions which tend to criminate are not scandalous, unless they are either irrelevant or "fishing" (*Allhusen* v. *Labouchere*, 3 Q. B. D. 654; 47 L. J. Ch. 819; 27 W. R. 12; 39 L. T. 207), and will not, therefore, be struck out; the party interrogated must take the objection on oath in his answer.

And even where the party might have applied to have the

interrogatory struck out, he may still take the same objection in his answer. (*Fisher* v. *Owen*, 8 Ch. D. 645; 47 L. J. Ch. 477; 26 W. R. 417, 581; 38 L. T. 252, 577.) Applications to strike out particular interrogatories will, therefore, in future be rare. But whenever there is a good objection to the whole set of interrogatories, the proper course is to take out a summons to strike them out: *e.g.*, on the ground that they have been administered to a corporation without leave. (*Carter* v. *Leeds Daily News Co.*, Weekly Notes, 1876, p. 11; 1 Charley, 101; Bitt. 91; 20 Sol. J. 218; 60 L. T. Notes, 196.) The party applying to strike out interrogatories must, unless they are altogether an abuse of the practice of the Court, specify those to which he objects. (*Allhusen* v. *Labouchere* (C. A.), *supra*.)

Answers to Interrogatories.

An affidavit in answer to interrogatories must be filed within ten days after their delivery, unless a master or district registrar allow further time. The answer is now very frequently drawn by counsel. It must be written or printed bookwise, and filed at the Central Office, with a note appended, showing on whose behalf it is filed. (See Order XXXVII. rr. 3 *a*, *b*, *c*, *d*, *e*, *f*, *g*; R. S. C., April, 1880, rr. 12—18.)

Any party may use, in evidence at the trial, any one or more of the answers of the opposite party without putting in the whole, but the judge may direct any others to be put in. (Order XXXI. r. 23.)

The affidavit in answer to interrogatories, like all other affidavits, should be made in the first person, and should state the description and true place of abode of the deponent. It should be divided into paragraphs numbered consecutively. One paragraph should be devoted to each interrogatory, dealing with it specifically. It is quite admissible to answer "Yes" or "No" simply, only the deponent should carefully define how much he is thus admitting or denying. So, too, it is quite admissible to say "I do not know," where the matter is clearly not within the deponent's own knowledge. The deponent is not bound to procure information for the purpose of answering. (*Per* Brett, J., in *Phillips* v. *Routh*, L. R. 7 C. P. 287.) But if the deponent has received any information on

the point from others, he should state it with the prefix "I am informed and believe," and not aver it as a fact. (*The Minnehaha*, L. R. 3 A. & E. 148; 19 W. R. 304; 23 L. T. 747.) As to a corporation, see *ante*, p. 501. If the affidavit exceed ten folios, it must be printed. (Order XXXI. r. 7.)

Any objection to answering any interrogatory on the ground that it is scandalous or irrelevant, or not *bonâ fide* for the purpose of the action, or that the matters inquired into are not sufficiently material at that stage of the action, or on any other ground *ejusdem generis*, must be taken in the affidavit in answer. (Order XXXI. r. 5, R. S. C. Nov., 1878; *Gay* v. *Labouchere*, 4 Q. B. D. 206; 48 L. J. Q. B. 279; 27 W. R. 413.)

Any other objection which might be ground for striking out the interrogatory may also be taken in the affidavit in answer. The party, by not applying at chambers, in no way waives the objection. The doubt raised as to this point by Baggallay, L.J., in *Saunders* v. *Jones*, 7 Ch. D. 435; 47 L. J. Ch. 440; 26 W. R. 226; 37 L. T. 395, 769, is now definitely overruled by *Fisher* v. *Owen*, 8 Ch. D. 645; 47 L. J. Ch. 477, 681; 26 W. R. 417, 581; 38 L. T. 252, 577.

Such objections are usually taken in the following form:—

1. "I object to answer the 9th and 10th interrogatories on the ground that they are irrelevant and are not put *bonâ fide* for the purposes of this action."

Or the party interrogated may pass over the question altogether, where it is clearly irrelevant. (*Church* v. *Perry*, 36 L. T. 513.) It is not wise, however, to treat the whole of an interrogatory thus with silent contempt; but there are often little side questions not going to the main purpose of the interrogatory which may be thus passed over if irrelevant.

2. "I object to name my witnesses." "I object to state the evidence by which I intend to establish the facts set out in paragraphs 4, 5, 6 of my Statement of Defence."

3. "I object to answer the 5th interrogatory on the ground that it is a *fishing* interrogatory, put for the purpose of making out some case under the defendant's plea of justification."

4. "I object to state the contents of a written document;" or, "The said document when produced will be the best evidence of its own contents."

This being an objection of law, it is not essential to expressly state it. (*Smith* v. *Berg*, 25 W. R. 606; 36 L. T. 471.)

5. "In answer to the 5th interrogatory, I say that the said interrogatory, if answered, would tend to criminate me; wherefore I respectfully decline to answer the same;" or, "wherefore I humbly submit that I am not bound to make any further or other answer to the same."

This answer (except in one case) is conclusive; and it is idle for the party interrogating to argue that he does not see how the question can possibly criminate the deponent, if the deponent swears positively it will. But by statute an exception has been created. Section 19 of the 6 & 7 Will. IV. c. 76, was re-enacted by the 32 & 33 Vict. c. 24, sched. 2, while other sections were repealed by sched. 1. It therefore remains in force, although subsequently the whole original Act was repealed by the 33 & 34 Vict. c. 99. It runs as follows: "If any person shall file any bill in any Court for the discovery of the name of any person concerned as printer, publisher, or proprietor of any newspaper, or of any matters relative to the printing or publishing of any newspaper, in order the more effectually to bring or carry on any suit or action for damages alleged to have been sustained by reason of any slanderous or libellous matter contained in any such newspaper respecting such person, it shall not be lawful for the defendant to plead or demur to such bill, but such defendant shall be compellable to make the discovery required; provided always, that such discovery shall not be made use of as evidence or otherwise in any proceeding against the defendant, save only in that proceeding for which the discovery is made." But before the Judicature Act it was held that this section was confined to a bill for discovery in equity, and was not incorporated by the C. L. P. Act, 1854, so as to apply to interrogatories at Common Law. It followed that if the defendant answered such interrogatories, his answers could have been used against him in a criminal proceeding. The Court therefore refused to order the defendant to give the required information, he having objected on oath to answer the interrogatories, and this, although by going into Equity the plaintiff could have compelled the defendant to answer. (*Bowden* v. *Allen*, 39 L. J. C. P. 217; 18 W. R. 695; 22 L. T. 342.)

Hence a plaintiff was compelled to file a bill for discovery in Equity to obtain this information, a cumbrous and expensive proceeding. There is only one instance reported in which a plaintiff availed himself of the privilege. (*Dixon* v. *Enoch*, L. R. 13 Eq. 394; 41 L. J. Ch. 231; 20 W. R. 359; 26 L. T. 127.) But directly the Judicature Act came into operation, every division of the High Court of Justice was empowered to grant all equitable remedies, and to exercise all powers formerly possessed by the Court of Chancery (ss. 16, 24). The principal object of the fusion of law and equity was to avoid all circuity and multiplicity of legal proceedings. Hence as early as November 7th, 1875, Lush, J., in *Ramsden* v. *Brearley*, 33 L. T. 322; Weekly Notes, 1875, p. 199; 1 Charley, 96; Bitt. Addenda; 20 Sol. J. 30, decided that the following interrogatory was allowable, and could not be struck out:—"Were you, on the 22nd of November, 1874, the printer or publisher, or both, of the *Standard* newspaper?" And his lordship decided that the protection accorded by the concluding proviso of the s. 19 of 6 & 7 Will. 4, c. 76, would attach to the defendant's answers, which therefore cannot be used against the defendant in any other proceeding. To answer such an interrogatory cannot therefore tend to criminate the defendant. This decision was followed by Archibald, J., in *Carter* v. *Leeds Daily News Co. and Jackson*, Weekly Notes, 1876, p. 11; 1 Charley, 101; Bitt. 91; 20 Sol. J. 218; 60 L. T. Notes, 196, *post*, p. 620.

So, too, in *Lefroy* v. *Burnside*, 4 L. R. (Ir.) 340; 41 L. T. 199; 14 Cox, C. C. 260, the defendant in an action for libel, the alleged proprietor of a newspaper, was served with interrogatories by the plaintiff inquiring, *inter alia*, whether he was not such proprietor. This interrogatory the defendant in his answer declined to answer, on the ground that it might tend to criminate him in certain criminal proceedings which had been commenced against him by the same plaintiff, and were then actually pending. On summons by the plaintiff to compel further answer to this interrogatory, the Exchequer Division in Ireland held that it must be answered; inasmuch as s. 19 of the 6 & 7 Will. IV., c. 76, was still in force, and was by sect. 24, subs. 7 of the Judicature Act, 1873, made enforceable by interrogatories in an action in a Common Law Division. See *post*, p. 619.

But it must be remembered that s. 19 of 6 & 7 Will. IV. c. 76, applies only to the "printer, publisher, or proprietor" of a newspaper. A defendant may therefore object on the ground of criminality to answer any interrogatory asking whether he is the editor of the paper (*Carter* v. *Leeds Daily News & Jackson, suprd*), or whether he is the author of the alleged libel (*Wilton* v. *Brignell*, Weekly Notes, 1875, p. 239; 1 Charley, 105; Bitt. 56; 20 Sol. J. 121; 60 L. T. Notes, 104. And see *M'Loughlin* v. *Dwyer* (1), Ir. R. 9 C. L. 170.)

Further and Better Answers.

If the answers are insufficient or evasive, a summons should be taken out calling on the deponent to show cause why he should not within two days make and file a further and better affidavit in answer. The summons should specify the interrogatories or parts of interrogatories to which a better answer is required. (*Church* v. *Perry*, 36 L. T. 513; *Chesterfield Colliery Co.* v. *Black*, 24 W. R. 783; Weekly Notes, 1876, p. 204; *Anstey* v. *N. & S. Woolwich Subway Co.*, 11 Ch. D. 439; 48 L. J. Ch. 776; 27 W. R. 575; 40 L. T. 393.) And it should be taken out promptly, within a reasonable time after the answers are delivered. (*Lloyd* v. *Morley*, 5 L. R. (Ir.) 74.) The summons may ask in the alternative that the deponent be examined *vivâ voce* before a Master. (Order XXXI. r. 10.) Should the deponent have taken the objection that he is asked as to the contents of a written document, the party interrogating may set out on affidavit facts showing a strong probability that the document has been lost or destroyed; and then on the hearing of a summons for better answers, the judge may order the deponent to state his recollection of its contents, on his opponent undertaking not to use such answer at the trial until the judge shall be satisfied that it was in fact lost or destroyed. (*Wolverhampton New Waterworks Co.* v. *Hawksford*, 5 C. B. N. S. 703; 28 L. J. C. P. 198.)

Discovery of Documents.

Either party may, under Order XXXI. r. 12, without filing any affidavit, or naming any particular document (Bitt. 44),

apply by summons to a Master at Chambers for an order directing any other party to the action to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question in the action, or stating what he knows as to the custody they or any of them are in.

A Master at Chambers may at any time during the pendency of any action or proceeding, order the production by any party thereto on oath of such of the documents in his possession or power relating to any matter in question in such action or proceeding, as the master shall think right; and may deal with such documents when produced in such manner as shall appear just. (*Ib.* r. 11.) Except under special circumstances, which must be set out on affidavit if they exist (*Union Bank of London* v. *Manby*, 13 Ch. D. 239; 49 L. J. Ch. 106; 28 W. R. 23; 41 L. T. 393), the plaintiff cannot have discovery until he has delivered his claim. (*Cashin* v. *Cradock*, 2 Ch. D. 140; 25 W. R. 4; 34 L. T. 52; *Davis* v. *Williams*, 13 Ch. D. 550; 28 W. R. 223.) Nor can the defendant until he has delivered his statement of defence. (*Hancock* v. *Guerin*, 4 Ex. D. 3; 27 W. R. 112; *Egremont Burial Board* v. *Egremont Iron Ore Co.*, 14 Ch. D. 158; 49 L. J. Ch. 623; 28 W. R. 594; 42 L. T. 179; *Webster* v. *Whewall*, 15 Ch. D. 120; 49 L. J. Ch. 704; 28 W. R. 951; 42 L. T. 868.)

The Courts of Common Law used formerly, when discovery was only granted as a favour, to refuse to assist a defendant to obtain evidence in support of a plea of justification, on the ground that he should not have published the charge till he was in a position to prove its truth. Thus where a shareholder in a joint-stock company published and justified a libel imputing insolvency to the company, he was held to be not entitled to inspect the books of the company. (*Metropolitan Saloon Omnibus Co.* v. *Hawkins*, 4 H. & N. 87, 146; 23 L. J. Ex. 201; 5 Jur. N. S. 226; 7 W. R. 265; 32 L. T. (Old. S.) 281.) But in equity it appears that a defendant, in an action of libel was allowed precisely the same discovery as a defendant in any other suit, and that although he had pleaded a justification. *Per* Sir John Leach, V.C., in *Thorpe* v. *Macaulay*, 5 Madd. 230; and see Hare on Discovery, p. 116. And now the Chancery rules govern discovery in all Divisions. (*Anderson* v. *Bank of British Columbia*, (C. A.) 2 Ch. D. 644; 45 L. J. Ch. 449;

24 W. R. 724; 35 L. T. 76.) But it may still be questioned whether such discovery should be allowed till after full particulars of such justification have been delivered. A plaintiff was always allowed discovery and inspection of all documents in the possession of the defendant which would help him to rebut the justification. (*Collins* v. *Yates and another*, 27 L. J. Ex. 150).

The party against whom the order for discovery is made must make an affidavit, describing all the documents material to the matters in dispute, which are, *or have been*, in his possession, with sufficient particularity to identify them. (1 Charley, 109.) He must also specify which, if any, he objects to produce (Order XXXI. r. 13), and on what grounds he so objects. (*Gardner* v. *Irwin*, 4 Ex. D. 49; 48 L. J. Ex. 223; 27 W. R. 442; 40 L. T. 357.) "Everything which will throw light on the case is *primâ facie* subject to inspection." (*Per* Blackburn, J., in *Hutchinson* v. *Glover*, 1 Q. B. D. 141; 45 L. J. Q. B. 120; 24 W. R. 185; 33 L. T. 605, 834.) Every material document must be produced, unless the party objecting to produce it can show it to be privileged: the party seeking discovery has a right to its production; the matter is not in the discretion of the Master or Judge. (*Bustros* v. *White*, (C. A.) 1 Q. B. D. 423; 45 L. J. Q. B. 642; 24 W. R. 721; 34 L. T. 835.) What documents are privileged from production will be decided by the rules formerly prevailing in the Court of Chancery. (Judicature Act, 1873, s. 25, subs. 11; *Anderson* v. *Bank of British Columbia*, (C. A.) 2 Ch. D. 644; 45 L. J. Ch. 449; 24 W. R. 624; 35 L. T. 76.) There are four possible grounds on which production may be refused:

(1.) That the documents required to be produced relate solely to the party's own title to real property. As to this, see *Lake and another* v. *Pooley*, Weekly Notes, 1876, p. 54; Bitt. 121, 20 Sol. J. 280; 60 L. T. Notes, 250; *New British Co.* v. *Peed*, Weekly Notes, 1878, p. 52; 26 W. R. 354; *Fortescue* v. *Fortescue*, 24 W. R. 945; 34 L. T. 847; *Egremont Burial Board* v. *Egremont Iron Ore Co.*, 14 Ch. D. 158; 49 L. J. Ch. 623; 28 W. R. 594; 42 L. T. 179.

(2.) That the documents were prepared with a view to the present action, and were called into existence solely for the purposes of the party's own case. Thus counsel's opinion, all

briefs, draft pleadings, &c., are privileged, but not counsel's endorsement on the outside of his brief. (*Walsham* v. *Stainton*, 2 H. & M. 1; 12 W. R. 199; *Nicholl* v. *Jones*, 2 H. & M. 588; 13 W. R. 451.) So are all papers prepared by any agent of the party for the use of his solicitor for the purposes of the action, provided such action be then commenced, or at least imminent. (*M'Corquodale and another* v. *Bell and another*, 1 C. P. D. 471; 45 L. J. C. P. 329; 24 W. R. 399; 35 L. T. 261; *English* v. *Tottie*, 1 Q. B. D. 141; 45 L. J. Q. B. 138; 24 W. R. 393; 33 L. T. 724; *Southwark and Vauxhall Water Co.* v. *Quick*, 3 Q. B. D. 315; 47 L. J. Q. B. 258; 26 W. R. 328, 341; 38 L. T. 28; *The Theodor Körner*, 3 P. D. 162; 47 L. J. P. & M. 85; 38 L. T. 818; *Martin* v. *Butchard*, 36 L. T. 732; *Friend* v. *London, Chatham, and Dover Railway Co.*, (C. A.) 2 Ex. D. 437; 46 L. J. Ex. 696; 25 W. R. 735; 36 L. T. 739.) But discovery may be had of proceedings in a former suit relating to the same subject-matter. (*Richards* v. *Morgan*, 4 B. & S. 641; 33 L. J. Q. B. 114; 12 W. R. 162; 9 L. T. 662; *Hutchinson* v. *Glover*, 1 Q. B. D. 138; 45 L. J. Q. B. 120; 24 W. R. 185; 33 L. T. 605.) No privilege can be claimed for private letters written to the party by a stranger to the suit, even though they are expressed to be written in confidence, and the writer forbids their production. (*Hopkinson* v. *Lord Burghley*, L. R. 2 Ch. 447; 36 L. J. Ch. 504: 15 W. R. 543; *Slade* v. *Tucker*, 14 Ch. D. 824; 49 L. J. Ch. 644; 28 W. R. 807; 43 L. T. 49.) That letters are privileged in the special sense in which that term is used in actions of defamation (*i.e.*, that the occasion on which they were written renders them not actionable unless the plaintiff can prove express malice) is no ground for refusing to produce them: they are not privileged from inspection (*Webb* v. *East*, (C. A.) 5 Ex. D. 23, 108; 49 L. J. Ex. 250; 28 W. R. 229, 336; 41 L. T. 715.)

(3.) The third ground of privilege is that the documents, if produced, would tend to criminate the party producing them. But this objection (as in the case of interrogatories) can only be taken by the party himself and on oath. Thus, in an action to recover damages for a libel, alleged by the plaintiff to be contained in two letters written by the defendant to Lord Rosslyn, the plaintiff administered interrogatories to the defendant, who in his answer admitted that he had written two letters to Lord

Rosslyn on specified dates, and that copies of such letters were in his possession. On a summons before the Master for inspection of these copies, an objection was raised by the defendant that such inspection might expose him to criminal proceedings for libel. The Master thereupon refused to order inspection, but Kelly, C. B., and Stephen, J., subsequently reversed the decision of the Master, and granted an order to inspect. The decision of the Exchequer Division was affirmed in the Court of Appeal, where it was held that if the defendant could protect himself from production at all, it could only be by his oath that the production would expose him to criminal proceedings. (*Webb* v. *East*, *supra*).

This decision overrules *Hill* v. *Campbell*, L. R. 10 C. P. 222; 44 L. J. C. P. 97; 23 W. R. 336; 32 L. T. 59; a case which was indeed already practically overruled by *Fisher* v. *Owen*, (C. A.) 8 Ch. D. 645; 47 L. J. Ch. 681; 26 W. R. 581; 38 L. T. 252, 577.

(4.) The fourth excuse is on the ground of public policy and convenience. This can only arise where one party to the suit is officially in possession of State documents of importance. If the defendant be a subordinate officer of a public department sued in his official capacity, he cannot claim privilege on the ground of public policy; production can only be refused on that ground by the head of a department. (*Beatson* v. *Skene*, 5 H. & N. 838; 29 L. J. Ex. 430; 6 Jur. N. S. 780; 2 L. T. 378, *post*, p. 535.) But if it be shown to the Court that the mind of some responsible person has been brought to bear upon the question, the objection will be upheld. (*Kain* v. *Farrer*, 37 L. T. 469; W. N. 1877, p. 266.)

Further and better affidavit.

An affidavit of documents which omitted the words "and never have had" would be deemed an insufficient compliance with the order, and a further and better affidavit will be ordered. (*Wagstaffe* v. *Anderson and others*, 39 L. T. 332.) So if the affidavit does not state what the defendant had done with the documents which he admits were formerly in his possession. (*Per* Lush, J., 1 Charley, 109; Bitt. 24; 60 L. T. Notes, 66). But if an affidavit of documents be drawn up in proper form, it is as a rule conclusive.

No affidavit in reply thereto will be permitted. Applications for a further and better affidavit are discouraged. Still, if it appears from the affidavit of documents itself, or from any admission on the pleadings of the party making it, or from the documents mentioned therein that it is insufficient, a further affidavit will be ordered. (*Welsh Steam Colliery Co.* v. *Gaskell*, 36 L. T. 352; *Johnson* v. *Smith*, 25 W. R. 539; 36 L. T. 741; *Appleby* v. *Waring*, 15 L. J. Notes of Cases (1880), p. 125.) Otherwise if discovery be wrongfully withheld, the party seeking discovery must administer interrogatories. (*Jones* v. *Monte Video Gas Co.*, (C. A.) 5 Q. B. D. 556; 49 L. J. Q. B. 627; 28 W. R. 758; 42 L. T. 639.)

Inspection of Documents.

Every party to an action or other proceeding may, at or before the hearing, give notice in writing to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for inspection. Such notice should be in Form No. 10, Jud. Act, 1875, App. B. Any party not complying with such notice shall not afterwards put such document in evidence on his behalf in such action, unless he satisfy the Court that it relates only to his own title, he being a defendant, or that he had some sufficient cause for not complying with such notice (Order XXXI. r. 14); as to which, see *Webster* v. *Whewall*, 15 Ch. D. 120; 49 L. J. Ch. 704; 28 W. R. 951; 42 L. T. 868.

The party to whom such notice is given must, within two days from the receipt thereof, if all the documents therein referred to have been set forth by him in his affidavit of documents, or within four days, if any of the documents referred to in such notice have not been set forth by him in such affidavit, give notice to the party desiring inspection, stating a time within three days from delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his solicitor, and stating which (if any) of the documents he objects to produce, and on what ground. (Order XXXI. r. 16). Such counter-notice should be in Form 11, Jud. Act, 1875, App. B. If he omit to give notice of time for inspection, or object to give inspection, the party desiring it may apply to a Master for an order to inspect documents which it

will be sufficient for him to serve on the solicitor of the objecting party. (*Ib.* rr. 17, 21, 22.) If, however, the documents desired to be inspected have not been disclosed or referred to in the affidavits or pleadings of the party against whom the application is made, such application must be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and his belief that they are in the possession or power of the other party. (*Ib.* r. 18.)

But the application generally made at this stage is for inspection of those documents which the party holding them refuses to produce. It is thus that the claim of privilege set up is tested. Very often, on such a summons, the documents are shown to the Judge by consent in order to take his decision after he has read them. Where this is done, no appeal lies from his order. (*Bustros* v. *White*, (C. A.) 1 Q. B. D. 423; 45 L. J. Q. B. 642; 24 W. R. 721; 34 L. T. 835). If this is not done, then the only question is, whether the defendant has in his affidavit said enough about the documents in dispute to entitle him to refuse production. (*Per* Lindley, J., in *Kain* v. *Farrer*, 37 L. T. 471; W. N. 1877, p. 266.)

Any description is sufficient which identifies the documents sufficiently to enable the Court to enforce production, if it should see fit to order it. (*Taylor* v. *Batten*, (C. A.) 4 Q. B. D. 85; 48 L. J. Q. B. 72; 27 W. R. 106; 39 L. T. 408.)

When inspection is obtained, the party seeking discovery, or his solicitor, attends at the time named and examines the documents. He may take copies of them himself, but the usual course is to bespeak copies of the more important ones. Such copies are of course paid for by the party bespeaking them. In a proper case (as when the chief question in dispute is, In whose handwriting is the libel?), the Master will order the party in possession of the libel to permit his opponent to take photographic or facsimile copies thereof, of course at his own expense. (*Davey* v. *Pemberton*, 11 C. B. N. S. 628.)

Formerly all applications relating to interrogatories or to discovery and inspection of documents were made to a Judge at chambers, unless both parties agreed to their being decided by a Master. (Order XXXI. r. 18, Order LIV. r. 2.) But now by the Rules of November, 1878, all such applications must be made in the first instance to a Master.

Default in making Discovery.

Any party failing to answer interrogatories or to discover or allow inspection of documents as ordered, is liable to attachment; and, if a plaintiff, to have his action dismissed for want of prosecution; and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended. (Ord. XXXI. r. 20.) This highly penal provision will only be exercised in the last resort, and, it seems, will not be enforced when the parties really intend to answer. (*Per* Lush, J., in *Twycross* v. *Grant*, Weekly Notes, 1875, pp. 201, 229; 1 Charley, 114, 115; Bitt. 10, 38; 20 Sol. J. 54, 97; 60 L. T. Notes, 49, 84; *Fisher* v. *Hughes*, 25 W. R. 528.) And before any application of this kind, the other party must have obtained a peremptory order for such discovery within a time fixed. If the Master makes an order dismissing an action for want of prosecution unless an affidavit in answer to interrogatories be filed by a certain date; then if no such affidavit be filed, the action is at an end. (*Whistler* v. *Hancock*, 3 Q. B. D. 83; 45 L. J. Q. B. 460; 24 W. R. 640; 34 L. T. 682; *Wallis* v. *Hepburn*, 3 Q. B. D. 84 n.; *King* v. *Davenport*, 4 Q. B. D. 402; 48 L. J. Q. B. 606; 27 W. R. 798.) But it seems that a Master or Judge still has power to enlarge the time for appealing against the Master's order dismissing the action (*Burke* v. *Rooney*, 4 C. P. D. 226; 48 L. J. C. P. 601; 27 W. R. 915; *Wallingford* v. *Mutual Society*, (H. L.) 5 App. Cas. 685; 50 L. J. C. P. 49; 43 L. T. 258); and then an order may be made enlarging the time for delivering the interrogatories. (*Carter* v. *Stubbs*, (C. A.) 50 L. J. C. P. 4; 29 W. R. 132; W. N. 1880, p. 183.) Though such power will only be exercised in very special circumstances.

Notice of Trial; Entry for Trial.

Directly either party has joined issue, simply, without adding any further or other pleading, the pleadings will be deemed closed (Order XXV.); though if it appear to a Judge that the issues of fact in dispute are not sufficiently defined, he may direct the parties to prepare issues; in case of difference to be settled by himself. (Order XXVI.)

The parties being thus fairly at issue, the plaintiff should

give notice of trial. If he neglects to give such notice within six weeks after close of pleadings, the defendant may either himself give notice of trial (Order XXXVI. r. 4), or may apply to a Master at Chambers to dismiss the action for want of prosecution under Order XXXVI. r. 4 *a.* (R. S. C. June, 1876, r. 13). Whichever party gives notice of trial has the choice of the mode of trial: but this should always be by judge and jury in cases of defamation. Either party therefore receiving notice of trial by any other mode than before a jury should within four days give notice that he requires a jury, and will thereupon without any summons or order at Chambers, be entitled to have the cause tried before a jury. Nor can any Judge or Master deprive either party of his right to a trial by jury, if it has been claimed in due time. (*Sugg* v. *Silber*, 1 Q. B. D. 362; 45 L. J. Q. B. 460; 24 W. R. 640; 34 L. T. 682.)

Ten days' notice of trial must be given, unless the other party has consented to take short (*i.e.*, four days') notice. (Order XXXVI. r. 9.) The notice must be given before entering the action for trial (*Ib.* r. 10), and cannot be countermanded except by consent or leave. (*Ib.* r. 13.) It must state whether it is for the trial of the action or of issues therein; and in actions in the Queen's Bench, Common Pleas, and Exchequer Divisions, the place and day for which it is to be entered for trial. (*Ib.* r. 8; R. S. C. Dec. 1875, r. 12.) Notice of trial for London or Middlesex will not be deemed to be for any particular sittings, but for any day after expiration of the notice on which the trial can come on in its order. (*Ib.* r. 11.) If the party giving notice of trial for London or Middlesex omit on the same day, or the day after, to enter the action for trial, the other party may do so within four days. (*Ib.* r. 14.) But notice of trial elsewhere than London or Middlesex will be deemed to be for the first day of the next assizes at the place mentioned (*Ib.* r. 12), and there either party may enter the action for trial. (*Ib.* r. 15.)

By the express words of Order XXXVI. r. 3, a plaintiff may give notice of trial with his reply, although the pleadings be not yet completed. But he cannot *enter* the cause for trial until the record is complete; because by rule 17*a* of the same Order the party entering the action for trial must deliver to the officer two copies of the *whole* of the pleadings in the action. (See *Metropolitan Inner Circle Railway Co.* v. *Metropolitan*

Railway Co., 5 Ex. D. 196; 49 L. J. Ex. 505; 28 W. R. 510; 42 L. T. 591). In this case Stephen, J., construed r. 3 to mean that a plaintiff could only give notice of trial with his reply, where such reply completed the pleadings. That was very probably the intention of those who framed the rule; but the words they have used are undoubtedly to the contrary effect. And there is a practical advantage in enabling a plaintiff thus to hurry on a dilatory defendant. Kelly, C. B., considered that a plaintiff could always deliver notice of trial with his reply, and such has been and still is the practice at chambers, both before and since this case was reported. The remarks of Stephen, J., were cited to the Divisional Court (Cockburn, C. J., and Hawkins, J.,) on August 2nd, 1880, in a case of *Asquith* v. *Molineux*, 49 L. J. Q. B. 800; Weekly Notes, 1880, p. 156; but it was held that the words of Order XXXVI. r. 3, were precise, and fully justified the practice at chambers. So that now it is settled that a plaintiff may always, if he pleases, deliver notice of trial with reply.

As to either party discontinuing the action, see Order XXIII.

Advice on Evidence.

As soon as notice of trial is given, or in urgent cases even sooner, the papers should be laid before counsel for his advice on evidence. This should always be done by both sides, even in cases apparently simple; else the action may be lost for want of some certificate or other formal piece of proof, as in *Collins* v. *Carnegie*, 1 A. & E. 695. Every document in the case should be sent in to counsel, especially the affidavits of documents, the answers to interrogatories, and the draft notices to produce and to inspect and admit. Also some statement as to the oral evidence proposed to be given, if not the full proofs which will afterwards form part of the brief.

Counsel in advising on evidence must consider first what are the issues in the case and which lie on the plaintiff, which on the defendant; and then state *seriatim* how each is to be proved or rebutted.

The *onus* lies on the plaintiff to prove that the defendant published or uttered the defamatory words, that they were understood in the sense alleged in the innuendo, that they

referred to the plaintiff, and, if the occasion be one of qualified privilege, that they were published or uttered maliciously. In some cases, also, it is essential, in every case desirable, to prove special damage resulting from the words. It may further be necessary to prove that the plaintiff at the date of publication held some office or exercised some profession or trade, and that the words were spoken of him in the way of such office, profession, or trade. If money has been paid into Court, the *onus* lies on the plaintiff of proving that the amount is insufficient. If the Statute of Limitations has been pleaded, the *onus* lies on the plaintiff (*Wilby* v. *Henman*, 2 Cr. & M. 658) of proving a publication of the libel within six years, or the utterance by the defendant of words actionable *per se* within two years, or that damage has within six years resulted from the utterance by the defendant of a slander not actionable *per se*. (See *ante*, p. 455).

On the defendant, on the other hand, lies the *onus* of proving privilege, justification, or an accord and satisfaction. If he has pleaded a plea under Lord Campbell's Act, the *onus* lies on the defendant to prove that the libel was inserted without gross negligence, and that a full apology was inserted in proper type before action brought, or as soon as possible afterwards.

The plaintiff may also offer evidence in aggravation, the defendant in mitigation, of damages. (See *ante*, pp. 296, 299.)

Each party should be prepared with evidence not only to prove the issues which lie upon him, but also to rebut his adversary's case. Counsel should name the witnesses who will be required. If a material witness is unavoidably absent, it may be necessary to apply for leave to countermand notice of trial, under Order XXXVI. r. 13, or to postpone the trial. The trial will, even after notice of trial, be posponed, upon terms, in order to procure the attendance of witnesses from abroad. (*Brown* v. *Murray*, 4 D. & R. 830; *M'Cauley* v. *Thorpe*, 1 Chit. 685.) In other cases it may be necessary to apply for a commission abroad, or for leave to examine, before trial, a witness who is dangerously ill or about to leave the country (*post*, p. 526). If it be necessary to bring up a prisoner to give evidence, an application may be made to the judge *ex parte* for an order, under 16 & 17 Vict. c. 30, s. 9, on an affidavit stating where the prisoner is confined, and for what crime, and when

and where his attendance will be required. In the case, now rare, of a person being confined upon civil process, the above statute does not apply, and a writ of *habeas corpus ad testificandum* must be obtained upon application on affidavit to a judge at chambers. This application apparently cannot be made *ex parte*. A lunatic may be brought up from his asylum under such a writ if he is fit for examination. (*Fennell* v. *Tait*, 1 C. M. & R. 584.) A witness residing in Ireland or Scotland can be compelled to attend by a *subpœna ad testificandum* issued by the special leave of a judge under the 17 & 18 Vict. c. 34, s. 1.

Counsel should next consider what documents will be required, and how, if the originals cannot be produced, they may be proved by secondary evidence. (See *post*, p. 536.) For this purpose he must carefully go through the notice to inspect and admit, and the notice to produce, and advise on their sufficiency. He is sometimes also consulted as to the advisability of securing a special jury or of applying to change the venue (*post*, p. 528).

It is often convenient to copy the advice on evidence into the leader's brief, especially if any points of law are discussed in it, and cases cited.

Examination of Witnesses before Trial.

If a witness is obliged to go abroad on a voyage of necessity, or is so ill and infirm that in all probability he will not be able to attend at the trial, an application should be made, after issue joined, for an order, under Order XXXVII. rr. 1, 4, that he be examined upon oath before a Master or a special examiner, and that his deposition may be read at the trial.

It is a misfortune to both sides when such a necessity arises. The jury pay little attention to a deposition read out by an officer of the Court; and the other side loses the precious opportunity of cross-examining the witness in the presence of the jury. The party applying should show on affidavit that the witness is so necessary and material that he cannot safely proceed to trial without him. The reasons for his absence must be stated and verified: in the case of illness the affidavit of the medical man in attendance must be obtained. The other side will object on the ground that the evidence of the witness is

immaterial, that there is no sufficient reason for his not being produced in Court, that the same evidence could be given by others who can attend, &c. If the order be made, and the deposition taken, still it cannot be read in Court without proof of continued absence or illness. But for this purpose the affidavit of the solicitor is generally sufficient.

The above practice applies to witnesses either within or without the jurisdiction of the Court; but it is practically confined to witnesses of the former class. Where it is desired to take evidence out of the jurisdiction, the rule is to apply for a commission abroad. This application must be made on affidavit, stating as far as practicable the names and addresses of the foreign witnesses, and showing the necessity for the application, and that the party applying cannot safely proceed to trial without their evidence. Where the defendant in an action of slander applied for a commission to examine witnesses in Australia, he was ordered to state in an affidavit the general nature of the evidence which he expected such witnesses to give. (*Barry* v. *Barclay*, 15 C. B. N. S. 849. And see *Macaulay* v. *Shakell and others*, 1 Bligh, N. S. 96; *Thorpe* v. *Macauley*, 5 Madd. 19.) Such affidavit may be made by the managing clerk having the conduct of the action. The application is not usually made till after issue joined: if it is made earlier, reasons for such urgency must be assigned in the affidavit. It will be an answer to the application, if it can be shown that the witnesses could be brought to England without much greater expense (*Spiller* v. *Paris Skating Rink Co.*, Weekly Notes, 1880, p. 228); or that witnesses now in England could give the same evidence. (*The M. Moxham*, (C. A.) 1 P. D. 107, 115; 46 L. J. P. D. & A. 17; 24 W. R. 597, 650; 34 L. T. 559.) Sometimes the mere delay, which will thus necessarily be caused, is a sufficient reason for refusing the application. (*Steuart* v. *Gladstone*, 7 Ch. D. 394; 47 L. J. Ch. 154; 26 W. R. 277; 37 L. T. 575. But see *Milissich* v. *Lloyd's*, Weekly Notes, 1875, p. 200; 1 Charley, 119; Bitt. 5; 20 Sol. J. 31; 60 L. T. Notes, 33.)

The costs of the commission must be borne by the party who applied for it, unless the judge at the trial makes any order in respect of them. (*Re Imperial Land Co. of Marseilles*, 37 L. T. 588; Weekly Notes, 1877, p. 244.)

Special Jury.

Either party will be entitled to have the cause tried by a special jury upon giving notice in writing to his opponent of such intention. The plaintiff must give such notice ten days at least before trial, unless the defendant is under terms to take short notice of trial: the defendant must give his notice more than six days before commission day. (Reg. Gen. Hilary Term 1853, r. 44.) The ss. 109, 112 of the Common Law Procedure Act, 1852 originally did not apply to actions in London or Westminster, but were extended to such actions by the Jury Act 1870, 33 & 34 Vict. c. 77, s. 18. If the time has gone by, either party may take out a summons for a special jury, and must then be prepared to show some reason for the application, *e.g.*, that difficult questions of fact will arise, &c. That there were special pleas in a case of libel has been held a sufficient reason for allowing a special jury. (*Roberts* v. *Brown*, 6 C. & P. 757.)

The party who has obtained a special jury must give notice thereof to the sheriff six days before the first day of the sittings or the commission day of the assizes. (Common Law Procedure Act, 1852, s. 112.) Such party will also have to pay the costs of the special jury, if sworn, unless the judge certifies to the contrary.

Change of Venue.

The plaintiff having selected a place of trial when he drew up his statement of claim, cannot change it without an order; and for that he must apply to a master or district registrar, showing reasonable ground for the change. If, however, a defendant desires to have the venue changed, he must show more than reasonable ground for the change. For the plaintiff has the right to fix the place of trial; and the defendant must show a distinct preponderance of convenience to oust plaintiff of his right. (*Church* v. *Barnett*, L. R. 6 C. P. 116; 40 L. J. C. P. 138; *Plum* v. *Normanton Iron Co.*, Weekly Notes, 1876, p. 105; Bitt. 140; 20 Sol. J. 340; 60 L. T. Notes, 303.) Where the defendant resides is quite immaterial. (*Per* Quain, J., 1 Charley, 119; Bitt. 53; 60 L. T. Notes 103.) Where the cause of action arose has now but little to do with the question.

The defendant must show that a trial in the county to which he desires to change the venue, will be clearly less expensive and more convenient for the majority of witnesses on both sides. That it will be more convenient for defendant's witnesses is alone no ground for the application. (*Wheatcroft* v. *Mousley*, 11 C. B. 677.) But the defendant will, as a rule, be entitled to have the venue changed, if he can show that there is no probability of a fair trial in the place the plaintiff has selected, *e.g.*, if a local newspaper of extensive circulation has published unfair attacks on the defendant with reference to the subject-matter of the action. (*Pybus* v. *Scudamore*, Arn. 464; *Walker* v. *Brogden*, 17 C. B. (N. S.) 571; 11 Jur. N. S. 671; 13 W. R. 809; 12 L. T. 495.)

This application is not generally made by defendant till after notice of trial.

Trial.

When the action is called on, if the defendant does not appear, the plaintiff may prove his claim so far as the burden of proof lies upon him. (Order XXXVI. r. 18.) It is not necessary to produce an affidavit of service of notice of trial. (*Chorlton* v. *Dickie*, 13 Ch. D. 160; 49 L. J. Ch. 40; 28 W. R. 228; 41 L. T. 469.) If the plaintiff does not appear, the defendant is entitled to judgment with costs. Verdict or judgment obtained in default of such appearance may be set aside upon application to a judge at chambers within six days after trial, upon terms (*ib.* r. 20). Or the judge, when the case is called on, may postpone or adjourn the trial, upon terms, if he think it expedient for the interests of justice (*ib.* r. 21). But the fact that either party is not ready, that his witnesses have missed the train, or that his counsel has been but that moment briefed, is not generally considered by judges as *any* ground for a postponement. But it is otherwise where there has been no negligence or default, *e.g.*, where it is stated on affidavit that a witness is unavoidably absent through illness. (*Turner* v. *Meryweather*, 7 C. B. 251; 18 L. J. C. P. 155.) A judgment obtained by default of appearance will be set aside if no notice of trial was given, or if for any other reason the defendant was not aware that his case was in the paper for trial, unless his ignorance of the fact was caused by gross negligence in his

solicitor. (*Burgoine* v. *Taylor*, (C. A.) 9 Ch. D. 1; 47 L. J. Ch. 542; 26 W. R. 568; 38 L. T. 438.)

If, however, both parties appear at the trial, the plaintiff is always entitled to begin, even where the *onus* of proof lies on the defendant. (*Carter* v. *Jones*, 6 C. & P. 64; 1 M. & R. 281; *Mercer* v. *Whall*, 5 Q. B. 447, 462, 463; 14 L. J. Q. B. 267, 272.)

Proof of the Plaintiff's Special Character.

Where the words are actionable only by reason of the plaintiff's holding an office or exercising a profession or trade, the plaintiff must prove that he held such office or exercised such profession or trade at the date of publication, and that the words complained of were spoken of him in the way thereof. Sometimes the words themselves admit the plaintiff's special character, or it may be admitted on the pleadings: if so, it is of course unnecessary to give any evidence on the point. (*Yrisarri* v. *Clement*, 3 Bing. 432; 4 L. J. (Old S.) C. P. 128; 11 Moore, 308; 2 C. & P. 223.)

Strict proof of the plaintiff's special character is not, as a rule, required. Thus, to prove that a person holds a public office, it is not necessary to produce his written or sealed appointment thereto (*Berryman* v. *Wise*, 4 T. R. 366; *Cannell* v. *Curtis*, 2 Bing. N. C. 228; 2 Scott, 379); not even in a case of murder (*R.* v. *Gordon*, 2 Leach, 581). It is sufficient to show that he acted in that office, and it will be presumed that he acted legally. So where the libel imputes to the plaintiff misconduct in his practice of a physician or surgeon, or as a solicitor, and does not call in question or deny his qualification to practise, it will not be necessary for him to do more than prove that he was acting in the particular professional capacity imputed to him at the time of the publication of the libel. (*Smith* v. *Taylor*, 1 B. & P. N. R. 196, 204; *Rutherford* v. *Evans*, 6 Bing. 451; 8 L. J. (Old S.) C. P. 86). It is, as a rule, sufficient to call the plaintiff to say "I am an M.R.C.S." or "I am a barrister." But, when the libel or slander imputes to a medical or legal practitioner that he is not properly qualified, and the professional qualification is again denied on the pleadings, the plaintiff should always be prepared to prove it, by producing his diploma or certificate, duly sealed or signed, and stamped,

where a stamp is requisite. At Common Law there was no other way. (*Moises* v. *Thornton*, 8 T. R. 303; *Collins* v. *Carnegie*, 1 A. & E. 695; 3 N. & M. 703; *Sparling* v. *Haddon*, 9 Bing. 11; 2 Moo. & Scott, 14.) But now the "Law List" is by the 23 & 24 Vict. c. 127, s. 22, made *primâ facie* evidence that any one whose name appears therein as a solicitor is a solicitor duly certificated for the current year; and similarly by the 21 & 22 Vict. c. 90, s. 27, the "Medical Register" is *primâ facie* evidence that the persons specified therein are duly registered medical practitioners. But if it is known the plaintiff's qualification will be seriously challenged at the trial, it is safer not to rely solely on such *primâ facie* proof, but to produce all diplomas and certificates. If the plaintiff sues as a solicitor, and his name does not appear in the "Law List," that may be only because he has not taken out his certificate for the present year; if so, he may still sue for a libel on him as solicitor. (*Jones* v. *Stevens*, (1822) 11 Price, 235.)

So too a medical man can sue for a libel on him professionally, although his name does not appear in the "Medical Register," if he can show by a certificate under the hand of the registrar, or in any other way, that he is duly qualified and entitled to be registered.

No other introductory averment is now material or necessary; hence, if inserted, it may be treated as a surplusage; it need not be proved.

Proof of Publication.

The plaintiff must next prove that the defendant published the libel or spoke the slanderous words to some third person. The statute 6 & 7 Wm. IV. c. 76, ss. 6, 8, 13, formerly facilitated proof of publication of a libel contained in a newspaper (*Mayne* v. *Fletcher*, 9 B. & C. 382; *R.* v. *Franceys*, 2 Ad. & E. 49; *R.* v. *Amphlit*, 4 B. & C. 35); but these sections are now repealed by the 32 & 33 Vict. c. 24, s. 1, sched. 1. Nor is the 29th section of the 39 Geo. III. c. 79, as qualified by 9 & 10 Vict. c. 33, s. 1, of any practical assistance.

The Select Committee of the House of Commons appointed to inquire into the law of Newspaper Libel recommend "that the name of every proprietor of a newspaper, or, in the case of several

persons engaged as partners in such proprietorship, the names of all such persons, should be registered at the office of the Registrar of Joint Stock Companies, with full particulars of the addresses and occupations of all such persons, or of any change therein." (See App. B.) This would be a beneficial provision, if it were also enacted that a certificate purporting to issue from the office of the said Registrar should be receivable in all Law Courts, and in all proceedings whether civil or criminal, as sufficient evidence that the defendant was proprietor or part-proprietor of the paper throughout the period during which his name was on the register.

Till some such measure becomes law, discovery can only be obtained under the 6 & 7 Wm. IV. c. 76, s. 19, which is still law (*Dixon* v. *Enoch*, L. R. 13 Eq. 394; 41 L. J. Ch. 231; 20 W. R. 359; 26 L. T. 127); or interrogatories may now be administered on this point (see *ante*, p. 514). But if no satisfactory admission be thus obtained, the plaintiff must prove that the newspaper "was purchased of the defendant, or at any house, shop, or office belonging to or occupied by the defendant, or by his servants or workmen, or where he may usually carry on the business of printing or publishing such newspaper, or where the same may be usually sold." (6 & 7 Wm. IV. c. 76, s. 8.)

As to what is a sufficient publication in law see *ante*, c. VI. pp. 150–168. As to constructive publication by a servant or agent, see *ante*, c. XII. pp. 360–365, Principal and Agent. As to publication by telegram, see *Williamson* v. *Freer*, L. R. 9 C. P. 393; 43 L. J. C. P. 161; 22 W. R. 878; 30 L. T. 332; by postcard, *Robinson* v. *Jones*, 4 L. R. Ir. 391. The sale of each copy is a distinct publication. (*R.* v. *Richard Carlile*, 1 Chitty, 451; *Duke of Brunswick* v. *Harmer*, 14 Q. B. 185; *R.* v. *Stanger*, L. R. 6 Q. B. 352; 40 L. J. Q. B. 96; 16 W. R. 640.) Causing a libel to be printed may be a *primâ facie* publication. (*Baldwin* v. *Elphinstone*, 2 W. Bl. 1037.) But if the libel never reaches the hands of any one except the printers and compositors, this alone would in the present day be deemed insufficient. (*Watts* v. *Fraser*, 7 A. & E. 223; *ante*, p. 152; *Lawless* v. *Anglo-Egyptian Cotton and Oil Co.*, L. R. 4 Q. B. 262; 10 B. & S. 226; 38 L. J. Q. B. 129; 17 W. R. 498.)

A letter is published as soon as it is posted, provided it ever

reaches the party to whom it is addressed, which will be presumed if there be no evidence to the contrary. Thus if a letter in the handwriting of the defendant be produced in Court with the seal broken, and the proper postmarks outside, that is sufficient evidence of publication. (*Warren* v. *Warren*, 1 C. M. & R. 250; 4 Tyr. 850; *Ward* v. *Smith*, 6 Bing. 749; 4 M. & P. 595; 4 C. & P. 402; *Shipley* v. *Todhunter*, 7 C. & P. 680.) So where a libel had appeared in print, and the manuscript from which it was printed is proved to be in the defendant's handwriting, this is *primâ facie* a publication by the defendant. It is not necessary to prove expressly that he directed or authorised the printing. (*Bond* v. *Douglas*, 7 C. & P. 626; *Tarpley* v. *Blabey*, 2 Bing. N. C. 437; *R.* v. *Lovett*, 9 C. & P. 462; *Adams* v. *Kelly*, Ry. & M. 157.) So if the defendant write a libel, which is in some way subsequently published, this is, *primâ facie*, at all events, a publication by the defendant. (*Per* Holt, C. J., in *R.* v. *Beere*, 12 Mod. 221; 1 Ld. Raym. 414.)

Any one who has ever seen the defendant write (even though once only, *Garrels* v. *Alexander*, 4 Esp. 37), can be called to prove his handwriting. So can any one who has corresponded with the defendant, or seen letters which have arrived in answer to letters addressed to the defendant. Thus a clerk in a merchant's office who has corresponded with the defendant on his master's behalf, may be called to prove the handwriting. (*R.* v. *Slaney*, 5 C. & P. 213.) The usual course is for the plaintiff's counsel merely to ask the witness, "Are you acquainted with the defendant's handwriting?" leaving it to defendant's counsel to cross-examine as to the extent of his acquaintance. Such cross-examination will only weaken the force of his evidence, not destroy its admissibility. (*Eagleton* v. *Kingston*, 8 Ves. 473; *Doe d. Mudd* v. *Suckermore*, 5 A. & E. 730.) By s. 27 of the C. L. P. Act, 1854, "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by the witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute." (See *Brookes* v. *Tichborne*, 5 Ex. 929; 20 L. J. Ex. 69; 14 Jur. 1122.) But the evidence of experts must always be received with caution. In a recent case, an expert in handwriting

swore positively that the libel was in the handwriting of the Lord Mayor elect; but subsequently a young man came forward and acknowledged that he wrote it, and that Sir F. Truscott never had anything to do with the matter. (See also *Seaman* v. *Netherclift*, 1 C. P. D. 540; 45 L. J. C. P. 798; 24 W. R. 884; 34 L. T. 878; (C. A.) 2 C. P. D. 53; 46 L. J. C. P. 128; 25 W. R. 159; 35 L. T. 784.) If the defendant be present in Court, he may, it seems, be then and there required to write something which the Court and jury may compare with the document in dispute. (*Doe d. Devine* v. *Wilson*, 10 Moo. P. C. 502, 530.)

Publication may also be proved by the evidence of an accomplice (*R.* v. *Haswell and Bate*, 1 Dougl. 387; *R.* v. *Steward*, 2 B. & Ad. 12), or by the defendant's own admission. (*R.* v. *Hall*, 1 Str. 416.) But such admission will not be extended beyond its exact terms. Thus an admission that the defendant wrote the libel is no admission that he also published it. (*The Seven Bishops' case*, 4 St. Tr. 300.) An admission that defendant was the editor of a periodical at a certain date is no evidence to connect him with a libel published in the same periodical at a later date. (*Macleod* v. *Wakley*, 3 C. & P. 311.) A witness may be asked if he knows who wrote the libel, but if he answers "yes," he is not bound to name the person, because it may be himself. (*R.* v. *Slaney*, 5 C. & P. 213.) The plaintiff may even call the defendant himself as a witness, nor can his counsel object that no relevant question can be asked him that will not tend to criminate him. The defendant must go into the box, and take the objection himself, when the question is asked. No one can take it for him. (*Boyle* v. *Wiseman*, 10 Ex. 647; 24 L. J. Ex. 160; 24 L. T. (Old S.) 274; 25 L. T. (Old S.) 203.) But no witness can be compelled to answer any question, if he states on oath that he objects on the ground that to answer it might tend to show that he was concerned in the publication of libel.

Where the facts are in dispute, it will be for the jury to decide whether the defendant wrote the libel, whether it was ever published to a third person other than the plaintiff, whether the office where the libel was purchased was the defendant's or not, &c. &c. When the facts are found, it is for the judge to decide whether there has been a publication in law by the defendant.

Proof of the Libel.

The libel itself must be produced at the trial: the jury are entitled in all cases to see it. (*Wright* v. *Woodgate*, 2 C. M. & R. 573; *Gilpin* v. *Fowler*, 23 L. J. Ex. 156.) The defendant is entitled to have the whole of it read. (*Cook* v. *Hughes*, R. & M. 112.) The original must be carefully traced, where it has passed through many hands. (*Fryer* v. *Gathercole*, 4 Ex. 262; 18 L. J. Ex. 389; *Adams* v. *Kelly*, Ry. & Moo. 157.) Where a large number of copies are printed from the same type, or lithographed at the same time by the same process, none of them are copies in the legal sense of the word. They are all counterpart originals, and each is primary evidence of the contents of the rest. (*R.* v. *Watson*, 2 Stark. 129; *Johnson* v. *Hudson and Morgan*, 7 A. & E. 233, n.)

Where the libel is contained in a letter or memorial sent to a Secretary of State, or to some Government department, an objection is often raised to its production on grounds of public policy. If this objection appears to the judge to be well founded, no evidence can be given of the contents of such letter or memorial. In *Beatson* v. *Skene*, 5 H. & N. 838; 29 L. J. Ex. 430; 6 Jur. N. S. 780; 2 L. T. 378, it was decided that the objection must be taken by the head of the public department of State, who is alone able to judge. That course was followed in the recent case of *Swann* v. *Vines*, tried before Lord Coleridge and a special jury at Westminster in November, 1877. (See also *M'Elveney* v. *Connellan*, 17 Ir. C. L. R. 55.) The rule on the point is that "the Court is entitled to have the pledge and security of the head officer of State to give the reason for the non-production of those documents which it is objected to produce, and to demand that he shall come into the witness-box, and there say that he is the head of the department, and objects to such and such documents being produced, specifying them, on the ground of public policy." (*Per* Grove, J., in *Kain* v. *Farrer*, 37 L. T. 470.) But in the case of *Spackman* v. *Gibney*, tried before the same learned judge at the Bristol Spring Assizes, 1878, the Government clerk, who had brought down the document in obedience to his subpœna, refused to produce it, stating that the Home Secretary had ordered him to object on grounds of public policy; and the learned judge

refused to trouble Mr. Cross to come down to Bristol to repeat what his clerk had said. But a letter written by a private individual to the Chief Secretary of the Postmaster General complaining of the conduct of the guard of the Exeter mail, though it may be a privileged communication in the sense that the plaintiff must prove actual malice, is not a document privileged from production on the ground of public policy. (*Blake* v. *Pilfold*, 1 Moo. & Rob. 198.)

If the original libel has been lost or destroyed, secondary evidence may of course be given of it (*Rainy* v. *Bravo*, L. R. 4 P. C. 287; 20 W. R. 873; *Gathercole* v. *Miall*, 15 M. & W. 319), except where the libel is contained in an official document, which is privileged from production on the ground of public policy, in which case the same public policy requires that no secondary evidence of its contents shall be given. (*Home* v. *Bentinck*, 2 Brod. & B. 130; *Anderson* v. *Hamilton*, *ib.* 156, n.; *Stace* v. *Griffith*, L. R. 2 P. C. 428; 6 Moore P. C. C. N. S. 18; 20 L. T. 197; *Dawkins* v. *Lord Rokeby*, (Ex. Ch.) L. R. 8 Q. B. 255.) The plaintiff is also entitled to give secondary evidence of the contents of the libel, if it be in the defendant's possession and is not produced, after notice to produce it given a reasonable time before the trial. So also where the libel is in the possession of some one beyond the jurisdiction of the Court, who refuses to produce it, on request, although informed of the purpose for which it is required. (*Boyle* v. *Wiseman*, 10 Ex. 647; 24 L. J. Ex. 160; *Newton* v. *Chaplin*, 10 C. B. 56; *R.* v. *Llanfaethly*, 2 E. & B. 940; 23 L. J. M. C. 33; *R.* v. *Aickles*, 1 Leach, 330.) Where the libel is written or placarded on a wall, so that it cannot conveniently be brought into Court, secondary evidence may be given of its contents. (*Per* Lord Abinger in *Mortimer* v. *McCallan*, 6 M. & W. at p. 68; *Bruce* v. *Nicolopulo*, 11 Ex. at p. 133; 24 L. J. Ex. at p. 324.)

All questions as to the admissibility of secondary evidence are for the judge, and should be decided by him then and there. (*Boyle* v. *Wiseman*, 11 Ex. 360; 24 L. J. Ex. 284.)

If the words proved materially differ from those set out in the statement of claim, this is a variance which would formerly have been fatal. (*Bell* v. *Byrne*, 13 East, 554; *Tabart* v. *Tipper*, 1 Camp. 350.) But now the judge has ample power to amend

the record, if in his discretion he considers such amendment can be made without prejudice to the defendant. (Order XXVII., rr. 1, 6; Order LIX., r. 2, R. S. C. April, 1880, r. 44.) But no amendment will be made, the result of which will be to render the statement of claim demurrable. (*Martyn* v. *Williams*, 1 H. & N. 817; 26 L. J. Ex. 117; *Caulfield* v. *Whitworth*, 16 W. R. 936; 18 L. T. 527.) The defendant is entitled to an adjournment if he really desires to justify the words newly inserted in the statement of claim by such amendment. (*Saunders* v. *Bate*, 1 H. & N. 402. And see *Foster* v. *Pointer*, 9 C. & P. 718; *May* v. *Brown*, 3 B. & C. 113; *Lord Churchill* v. *Hunt*, 2 B. & Ald. 685.)

Proof of the Speaking of the Slander.

In cases of slander, the only way to prove publication is by calling those who heard the defendant speak the words. It is not, in strictness, sufficient to prove that the defendant spoke words *equivalent* to those set out in the statement of claim. (*Armitage* v. *Dunster* (1785), 4 Dougl. 291; *Maitland and others* v. *Goldney and another* (1802), 2 East, 426.) Thus where the declaration alleged that the defendant stated as a fact that "A. could not pay his labourers," and the evidence was that he had asked a question, "Have you heard A. cannot pay his labourers?" the plaintiff was nonsuited. (*Barnes* v. *Holloway* (1799), 8 T. R. 150.) But now if the words proved convey practically the same meaning as the words laid, the variance will be held immaterial, or else the judge will amend. (*Dancaster* v. *Hewson*, 2 Man. & Ry. 176; *Sydenham* v. *Man* (1617), Cro. Jac. 407; *Orpwood* v. *Barkes, vel Parkes*, 4 Bing. 261; 12 Moore, 492; *Smith* v. *Knowelden*, 2 M. & Gr. 561.)

It was never necessary, however, to prove all the words laid in the declaration; if the words that are proved are intelligible and actionable by themselves. (*Per* Lawrence, J., 2 East, 434.)

If the witness committed the words to writing shortly after the defendant uttered them, he may refer to such writing to refresh his memory; but it must be the original memorandum that is referred to, not a fair copy. (*Burton* v. *Plummer*, 2 A. & E. 343.) And so where the action is for procuring a libel to

be published by making a verbal statement to the reporter of a newspaper, who took it down in writing, the original writing taken down by the reporter and handed by him to the editor must be produced in Court; otherwise it will not appear that it was the same or substantially the same as the libel which appeared in the newspaper. (*Adams* v. *Kelly*, Ry. & Moo. 157.)

Where the Governor of a British colony made communications to the Attorney-General in his official capacity defamatory of the plaintiff, and the Attorney-General was called as a witness in an action against the Governor, it was held that he was not bound to disclose what the Governor had said to him. (*Wyatt* v. *Gore*, 1 Holt, N. P. 299.)

If the words be spoken in a foreign language, the interpreter must be called to prove their meaning; and it must be further proved that those who heard them understood that language; else there is no publication. (*Ante*, pp. 110, 471.)

Evidence as to the Innuendo.

Whenever the words used are not well-known and perfectly intelligible English, but are foreign, local, technical, provincial, or obsolete expressions, parol evidence is admissible to explain their meaning, provided such meaning has been properly alleged in the statement of claim by an innuendo. The rule is the same where words which have a meaning in ordinary English are yet, in the particular instance before the Court, clearly used not in that ordinary meaning, but in some peculiar sense; as are slang and cant expressions. But where the words are well-known and perfectly intelligible English, evidence cannot be given to explain that meaning away, unless it is first in some way shown that that meaning is for once inapplicable. This may appear from the words themselves: to give them their ordinary English meaning may make nonsense of them. But if with their ordinary meaning the words are perfectly good sense as they stand, facts must be given in evidence to show that they may have borne a special meaning on that particular occasion. After that has been done, a bystander may be asked, "What did you understand by the expression used?" But without such a foundation being laid, the question is not allowable. (*Daines*

v. *Hartley*, 3 Exch. 200; 18 L. J. Ex. 81; 12 Jur. 1093; *Barnett* v. *Allen*, 3 H. & N. 376; 27 L. J. Ex. 415; *Humphreys* v. *Miller*, 4 C. & P. 7; *Duke of Brunswick* v. *Harmer*, 3 C. & K. 10.) And this is so, whether the word can be found in the last edition of the English dictionary or not. (*Homer* v. *Taunton*, 5 H. & N. 661.) Figurative or allegorical terms of a defamatory character, if of well-known import, such as imputing to a person the qualities of the "frozen snake" in the fable, need no evidence to explain their meaning. (*Hoare* v. *Silverlock*, 12 Q. B. 624; 17 L. J. Q. B. 306.) Nor do historical allusions or comparisons to odious, notorious, disreputable persons; as where the conduct of the plaintiff in a case which he conducted as attorney for one of the parties was compared to that of "Messrs. Quirk, Gammon, and Snap;" the novel "Ten Thousand a Year" was put in and taken as read. (*Woodgate* v. *Ridout*, 4 F. & F. 202.)

Wherever the words sued on are susceptible, both of a harmless and an injurious meaning, it will be a question for the jury to decide which meaning was in fact conveyed to the hearers or readers at the time of publication. It will be of no avail for the defendant to urge (except, perhaps, in mitigation of damages) that he intended the words to convey the innocent meaning, if the jury are satisfied that ordinary bystanders or readers would have certainly understood them in the other sense. (*Fisher* v. *Clement*, 10 B. & C. 472.) Every man must be taken to have intended the natural and probable consequences of his act. The plaintiff may give evidence of surrounding circumstances from which a defamatory meaning can be inferred; he may call witnesses to state how they understood the libel; though the jury are not bound to adopt the opinions of such witnesses. (*Broome* v. *Gosden*, 1 C. B. 732.) Also in this case evidence of subsequent words of the same import may be given, so as to explain and point the libel charged. (*Pearce* v. *Ornsby*, 1 M. & Rob. 455.)

The plaintiff may also show that the words, though apparently commendatory, may have been spoken ironically.

If, however, the words are in their primary sense not actionable, and there is no evidence of any facts known both to the writer and the person to whom he wrote, which could reasonably induce the latter to put upon them any actionable secondary

meaning, the judge should stop the case. (*Capital and Counties Bank* v. *Henty and Sons*, (C. A.) 5 C. P. D. 514; 49 L. J. C. P. 830; 28 W. R. 851; *Ruel* v. *Tatnell*, 29 W. R. 172; 43 L. T. 507.) So, too, if the words are not reasonably susceptible of the defamatory meaning put upon them by the innuendo, the judge should nonsuit the plaintiff. (*Mulligan* v. *Cole and others*, L. R. 10 Q. B. 549; 44 L. J. Q. B. 153; 33 L. T. 12; *ante*, pp. 112—117.). If, however, in his opinion the words are capable of the meaning ascribed to them by the innuendo, and there is any evidence to go to the jury that they were used with that meaning, then it will be for the jury to decide whether in fact the words were understood in that sense by those who heard or read them.

Proof that the words refer to the Plaintiff.

If the libel does not name the plaintiff, there may be need of some evidence to show who was meant. The plaintiff may give evidence of all "surrounding circumstances;" *i.e.*, the cause and occasion of publication, later statements made by the defendant, and other extraneous facts which will explain and point the allusion. The plaintiff may also call at the trial his friends or others acquainted with the circumstances, to state that on reading the libel they at once concluded that it was aimed at the plaintiff. (*Broome* v. *Gosden*, 1 C. B. 728; *R.* v. *Barnard*, *Times* for December 17th, 1878, *post*, p. 593.) It is not necessary that all the world should understand the libel; it is sufficient if those who knew the plaintiff, can make out that he is the person meant. (*Bourke* v. *Warren*, 2 C. & P. 310.) [In *Eastwood* v. *Holmes*, 1 F. & F. 349, Willes, J., would not allow a witness to be asked, "To whom did you understand the words to apply?" on the ground that that was *the* question for the jury. But the circumstances of that case were peculiar.] Evidence that the plaintiff was jeered at at a public meeting is admissible to show that his neighbours understood the libel as referring to him. (*Cook* v. *Ward*, 4 M. & P. 99; 6 Bing. 412.) So, in *Du Bost* v. *Beresford*, 2 Camp. 511, Lord Ellenborough held that the declarations made by spectators, while they were looking at a libellous caricature, were admissible in evidence to show whom the figures were intended to represent.

Proof that the words were spoken of the plaintiff in the way of his office, profession, or trade.

It is not enough for the plaintiff to prove his special character, and that the words refer to himself; he must further prove that the words refer to himself in that special character, if they be not otherwise actionable. It is a question for the jury whether the words were spoken of the plaintiff in the way of his office, profession, or trade. It is by no means necessary that the defendant should expressly name the plaintiff's office or trade at the time he spoke, if his words must necessarily affect the plaintiff's credit and reputation therein. (*Jones* v. *Littler*, 7 M. & W. 423; 10 L. J. Ex. 171. See *ante*, p. 124.) But often words may be spoken of a professional man which, though defamatory, in no way affect him in his profession, *e.g.*, an imputation that an attorney had been horsewhipped off the course at Doncaster (*Doyley* v. *Roberts*, 3 Bing. N. C. 835; 5 Scott, 40; 3 Hodges, 154; *ante*, p. 75), or that a physician had committed adultery (*Ayre* v. *Craven*, 2 A. & E. 2; 4 N. & M. 220; *ante*, p. 76. See further, *ante*, pp. 65—69.) But any imputation on the solvency of a trader, any suggestion that he had been bankrupt years ago, is clearly a reflection on him in the way of his trade (*ante*, pp. 78, 79).

Evidence of Malice.

The judge must decide whether the occasion is or is not privileged, and also whether such privilege is absolute or qualified. If he decide that the occasion was one of absolute privilege, the defendant is entitled to judgment, however maliciously and treacherously he may have acted. If, however, the privilege was only qualified, the *onus* lies on the plaintiff of proving actual malice. (*Clark* v. *Molyneux*, (C. A.) 3 Q. B. D. 237; 47 L. J. Q. B. 230; 26 W. R. 104; 37 L. T. 694.) This he may do either by *extrinsic* evidence of personal ill-feeling (*ante*, pp. 271—277), or by *intrinsic* evidence, such as the exaggerated language of the libel, the mode and extent of publication, and other matters in excess of the privilege (*ante*, pp. 277—288). Any other words written or spoken by the defendant of the plaintiff, and indeed all previous transactions or communications

between the parties, are evidence on this issue. The defendant often makes the mistake of cross-examining the plaintiff severely on such previous matters, with the view no doubt of showing that in all these transactions the plaintiff was solely to blame. The jury, as a rule, will hold both parties to a silly quarrel equally blameworthy. But even if they adopt the defendant's view that all the provocation was given by the plaintiff, that will only tell against the defendant. For such provocation must produce a feeling of resentment, or at least of injured innocence, in the defendant's mind; and if, under the influence of such feeling, he writes or speaks a falsehood of his late antagonist, such falsehood will probably be deemed spiteful and malicious.

A plea of justification, if neither abandoned nor proved, will be evidence of malice, if there be any other circumstance in the case suggesting malice, but not otherwise. Care must be taken in citing *Simpson* v. *Robinson*, 12 Q. B. 511, to refer to the judgments of the Court; as the headnote is declared misleading by Willes, J., in *Caulfield* v. *Whitworth*, 16 W. R. 936; 18 L. T. 526. Proof that the plaintiff at the time of publication knew that what he was saying or writing was false, is proof positive of malice. Proof that in fact the words were false is no evidence of malice; the falsity of the words is indeed always presumed in the plaintiff's favour. The plaintiff's counsel may, if he chooses, in the first instance rebut the justification; but it is generally safer to leave such proof till the reply, as he will then know the strength of defendant's case. But he cannot, in the absence of special circumstances, call some evidence to rebut the justification in the first instance, and more afterwards, thus dividing his proof. (*Brown* v. *Murray*, R. & M. 254.)

If no justification be pleaded, and yet the plaintiff's counsel gives evidence of the falsity of the libel, this will let in evidence on the other side of the truth of the statement. (*Per* Lord Ellenborough in *Brown* v. *Croome*, 2 Stark. 298, 299.)

The plaintiff cannot, as a rule, give any evidence of his own good character (*ante*, p. 298).

Evidence of Damage.

The plaintiff need give no evidence of any actual damage where the words are actionable *per se*; he will nevertheless be

entitled to substantial damages. (*Tripp* v. *Thomas*, 3 B. & C. 427; *Ingram* v. *Lawson*, 6 Bing. N. C. 212.) But if the plaintiff has suffered any special damage, this should be pleaded and proved. It cannot be proved unless it has been pleaded. As to what constitutes special damage, see *ante*, pp. 308—320. As to what damage is too remote, see *ante*, pp. 321—333.

Where words are not actionable *per se*, the plaintiff cannot prove a general loss of custom; he must call individual customers and friends to state why they have ceased to deal at his shop, or to entertain him. Such witnesses cannot, however, be called unless their names have been set out in the statement of claim or the particulars. It must also be proved that they heard of the charge against the plaintiff from the defendant, and from no one else. It will not be sufficient to prove that they heard a rumour, and that the defendant set such a rumour afloat. (See *ante*, pp. 314, 328; *Dixon* v. *Smith*, 5 H. & N. 450; 29 L. J. Ex. 125; *Bateman* v. *Lyall*, 7 C. B. (N. S.) 638.)

The plaintiff may also call evidence in aggravation of damages, as to which see *ante*, pp. 296—298.

Nonsuit.

At the close of plaintiff's case, the defendant's counsel sometimes submits to the judge that there is no case for him to answer.

The judge should nonsuit the plaintiff, or direct a verdict for the defendant:—

(1.) If there is no evidence that the defendant published the words. If the Statute of Limitations be pleaded, the plaintiff must prove a publication within the period prescribed.

(2.) If there is no evidence that the words refer to the plaintiff.

(3.) If the words proved are not actionable *per se*, and there is no evidence of any special damage.

(4.) If the words are actionable by reason only of their being spoken of the plaintiff in the way of his office, profession, or trade, and there is no evidence that the words were so spoken, or that the plaintiff held such office or exercised such profession or trade at the time of publication.

(5.) If the words are not actionable in their natural and

primary signification, and there is no innuendo; or if the only innuendo puts upon the words a meaning that they cannot possibly bear. If, however, it is reasonably conceivable by reason of any facts known to those addressed that they might have put upon the words the secondary meaning ascribed to them by the innuendo, then it would be a question for the jury in which meaning the words were in fact understood. Whenever the words, though primarily not actionable, are yet reasonably susceptible of a defamatory meaning, the judge should not stop the case; if he does so, the Divisional Court will order a new trial. (*Hart and another* v. *Wall*, 2 C. P. D. 146; 46 L. J. C. P. 227; 25 W. R. 373.) "It is only when the judge is satisfied that the publication *cannot* be a libel, and that, if it is found by the jury to be such, their verdict will be set aside, that he is justified in withdrawing the question from their cognizance." (*Per* Kelly, C.B., L. R. 4 Exch. at p. 288.) Where the words of the libel are ambiguous, allegorical, or in any way equivocal, and the jury have found that they were meant and used in a defamatory sense, the Court will not set aside their verdict, unless it can be clearly shown that on reading the whole passage, there is no possible ground for the construction put upon it by the jury. (*Hoare* v. *Silverlock*, 12 Q. B. 624; 17 L. J. Q. B. 306; *Fray* v. *Fray*, 17 C. B. N. S. 603; 34 L. J. C. P. 45; 10 Jur. N. S. 1153.) But where the words are not reasonably capable of any defamatory meaning, there the judge will be right in directing a nonsuit. (*Hunt* v. *Goodlake*, 43 L. J. C. P. 54; 29 L. T. 472; *Mulligan* v. *Cole and others*, L. R. 10 Q. B. 549; 44 L. J. Q. B. 153; 33 L. T. 12; *ante*, p. 117.)

(6.) If the occasion of publication was one of absolute privilege.

(7.) If the occasion is clearly or admittedly one of qualified privilege, and there is no evidence, or not more than a *scintilla* of evidence, to go to the jury of express malice. If the evidence adduced to prove malice is equally consistent with either the existence or the non-existence of malice, the judge should stop the case; for there is nothing to rebut the presumption which the privileged occasion has raised in the defendant's favour. (*Somerville* v. *Hawkins*, 10 C. B. 583; 20 L. J. C. P. 131; 15 Jur. 450; *Harris* v. *Thompson*, 13 C. B. 333.)

(8.) Where, however, the question of privilege involves

matters of fact which are disputed, it will be for the jury to find the facts, and for the judge subsequently to decide whether on the facts so found the occasion is privileged. (*Beatson* v. *Skene*, 5 H. & N. 838; 29 L. J. Ex. 430; 6 Jur. N. S. 780; 2 L. T. 378.)

Under the former practice a nonsuit did not estop the plaintiff from bringing a second action, though such second action might, on application, be stayed till he had paid the costs of the first. (*Hoare* v. *Dickson*, 7 C. B. 164; 18 L. J. C. P. 158; *Prowse* v. *Loxdale*, 3 B. & S. 896; 32 L. J. Q. B. 227.) But now, by Order XLI. r. 6, judgment of nonsuit is equivalent to a judgment on the merits for the defendant, unless the Court or a judge otherwise directs. Whenever the nonsuit is caused merely by some failure in the formal proof of plaintiff's case, the plaintiff's counsel should apply to the judge to direct a common law nonsuit, not on the merits. The defendant is entitled to his costs on a nonsuit, unless the judge expressly orders otherwise.

The judge at the trial has full power to amend any defect or error in any pleading or proceeding on such terms as may seem just. (Order XXVII. r. 6; Order LIX. r. 2, R. S. C., April, 1880, r. 44.)

Evidence for the Defendant.

The defendant, as we have seen, is entitled to have the whole libel read, or the whole of the conversation, in which the slander was uttered, detailed in evidence. If the alleged libel refers to any other document, the defendant is also entitled to have that document read, as part of the plaintiff's case. (*Weaver* v. *Lloyd*, 2 C. & P. 296; *Thornton* v. *Stephen*, 2 M. & Rob. 45; *Hedley* v. *Barlow and another*, 4 F. & F. 227.) So where the action is brought for a criticism on the plaintiff's book, no imputation being cast on him personally, it was held that the plaintiff ought to put in the book criticized as part of his own case. (*Strauss* v. *Francis*, 4 F. & F. 939, 1107.) This will save the defendant from the necessity of giving any evidence. But where a paragraph in a subsequent number of a newspaper is given in evidence by the plaintiff to show malice, the rest of the newspaper is no part of plaintiff's case, unless it refers to the special paragraph put in. The defendant is therefore not

entitled to have other passages in that newspaper read. (*Darby* v. *Ouseley*, 11 H. & N. 1; 25 L. J. Ex. 227.)

The defendant's counsel often prefers not to call any witnesses, so as to have the last word with the jury. He must rely, instead, on the cross-examination of the plaintiff's witnesses. These should often be cross-examined not only as to the facts of the case, but also "to credit;" that is, they should be cross-examined as to matters not material to the issue, with a view of shaking their whole testimony. But in order to prevent the case from thus branching out into all manner of irrelevant issues, it is wisely provided that on such matters the defendant must take the witness's answer: he cannot call any evidence to contradict it. There is one exception. By section 24 of the Common Law Procedure Act, 1854, if a witness in any cause be questioned as to whether he has been convicted of any felony or misdemeanour, and if he either denies the fact, or refuses to answer, the opposite party may prove such conviction, however irrelevant the fact of such conviction may be to the matter in issue in the cause. (*Ward* v. *Sinfield*, 43 L. T. 253.) The right method of proving a conviction at the Assizes or Quarter Sessions, either for this purpose, or as evidence under a plea of justification, is by a certificate under the Common Law Procedure Act, 1854, s. 25, containing the substance and effect of the indictment and conviction, but omitting the formal parts. If, however, the conviction was at petty sessions only, then it was decided, in *Hartley* v. *Hindmarsh*, L. R. 1 C. P. 553; 35 L. J. M. C. 255; 12 Jur. N. S. 502; 14 W. R. 862; 13 L. T. 795, that either the record itself must be produced, or an examined copy of it. This involves the trouble and expense of having the record duly made up for the purpose. (*Per* Byles, J., L. R. 1 C. P., at p. 556.) But since that decision, the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), has become law: and though the Act applies entirely to criminal proceedings, yet s. 18 contains the words "in any legal proceeding whatever." As a rule, therefore, no objection is made to the admissibility in civil proceedings of a certificate under that section; although the point has never yet been decided, and is certainly open to argument.

The defendant must be careful, however, not to increase, by such cross-examination, the amount of damages that may be

given against him. Thus where the libel consisted of comments in a newspaper on a criminal trial, in which the plaintiff was acquitted, and the defendant's counsel put to the plaintiff a series of questions tending to show that he really had been guilty of the crime with which he was charged, such a course of cross-examination was held a serious aggravation of the libel. (*Risk Allah Bey* v. *Whitehurst*, 18 L. T. 615.)

Either party may use in evidence at the trial any one or more of the answers of the opposite party to interrogatories, without putting in the others: but the judge may direct any others to be put in. (Order XXXI. r. 23.)

Where the words are actionable only because they were spoken of the plaintiff in the way of his trade, the defendant may show that such trade is illegal (*Hurst* v. *Bell*, 1 Bing. 1); and it is no objection to such evidence that it also indirectly proves the truth of the defendant's words. (*Manning* v. *Clement*, 7 Bing. 362, 368; 5 M. & P. 211.)

Where it is not alleged that the defendant is the author of the libel, he may give evidence to show that he published it innocently without any knowledge of its contents, as where a porter delivered a sealed packet. (*Day* v. *Bream*, 2 M. & Rob. 54.) But in most cases such evidence will only tend to mitigate the damages; it will not be a defence to the action. (See *ante*, pp. 160, 384.)

The defendant's counsel may also urge that the occasion of publication was privileged. (See *ante*, c. VIII., pp. 182—263.) If the facts necessary to raise this defence are not already in evidence, he must call witnesses to prove them. Thus it is often necessary to put the defendant himself in the box to state the facts as they were presented to him at the date of publication, the information which he received and on which he acted, and all surrounding circumstances. He will also state that he acted *bonâ fide*, and under a sense of duty. But there is danger in calling the defendant in such a case: he will be severely cross-examined, and may let slip some observation which will be seized upon as evidence of malice. It is better, if possible, by denying the fact of publication, to compel the plaintiff to call those to whom the defendant wrote or spoke, and to elicit from them, in cross-examination, circumstances which show that the occasion was privileged. Statements made

to the defendant behind the plaintiff's back, and acts to which he was no party, are admissible in evidence on this issue to show the state of the defendant's mind at the moment when he spoke or wrote the words.

The defendant may also give evidence of antecedent conversations and transactions, or other circumstances well known to the bystanders, which show that the words were not used in their ordinary signification. Thus they may have been uttered in joke; or the preceding part of the conversation may limit or qualify the words sued on. But the defendant cannot give in evidence some particular transaction which he had in his mind at the time he spoke, but to which he did not expressly refer, and which was unknown to the person addressed. (*Hankinson* v. *Bilby*, 16 M. & W. 442; 2 C. & K. 440; *Martin* v. *Loeï*, 2 F. & F. 654; *ante*, pp. 107—9.) For the question which the jury have to determine is not "What did the defendant intend?" but "What would a reasonable person have understood from the language used?" So, too, where a libel is unambiguous in itself, and does not refer to any other writing, the defendant cannot use any other writing for the purpose of explaining away its meaning.

The defendant may also prove a justification. The attempt, if unsuccessful, will aggravate the damages. Strict proof must be given of the whole charge made and of the precise charge made. Sometimes a libel contains two or more distinct and severable charges against the plaintiff: if so, it will tend in mitigation if the defendant can prove any one of such charges true. (See *ante*, p. 176.) If the charge made against the plaintiff is that he was *convicted* of an offence, then such conviction may be proved in the manner stated, *ante*, p. 546. (See *Alexander* v. *North-Eastern Railway Co.*, 6 B. & S. 340; 34 L. J. Q. B. 152; 13 W. R. 651.) So, too, where the libel consists of an incorrect statement of a conviction of the plaintiff by a magistrate, the plaintiff may, with a view of the assessment of damages, enter into all the circumstances which led to the conviction, although such evidence tends to show that the conviction was erroneous. (*Gwynn* v. *South-Eastern Railway Co.*, 18 L. T. 738.) If, however, the imputation is that the plaintiff has *committed* a crime, then the charge must be proved as strictly as on an indictment for the same offence. And here,

the fact that the plaintiff had been previously tried and acquitted, or convicted, is irrelevant; and the record of the criminal trial is not admissible in evidence either way, for the parties are not the same. (*Justice* v. *Gosling and others*, 12 C. B. 39; 21 L. J. C. P. 94; *England* v. *Bourke*, 3 Esp. 80.)

Where no justification is pleaded, the defendant can give no evidence of the truth of his words, not even in mitigation of damages. (*Smith* v. *Richardson*, Willes, 20.) But evidence admissible and pertinent under another issue cannot be excluded merely because it happens incidentally to prove the truth of the libel. (*Manning* v. *Clement*, 7 Bing. 362, 368; 5 M. & P. 211.) Thus, if the defendant has pleaded privilege, he may show that he reasonably and *bonâ fide* believed in the truth of the charge he made, and it is no objection that the grounds of his belief were so forcible as to convince every reasonable man of the plaintiff's guilt.

If the present defendant is liable, the fact that some one else is also liable is of course no defence. The plaintiff may at his option sue one or all in the same or in different actions. And the fact that such other actions are pending should not be mentioned to the jury. Thus, if an author be sued for a libel he has composed, it is no defence that the publisher has been already sued and heavy damages recovered against him in another action. (*Frescoe* v. *May*, 2 F. & F. 123; *Harrison* v. *Pearce*, 1 F. & F. 567; 32 L. T. (Old S.) 298). So too, that others have previously published the same charges against the plaintiff and have *not* been sued, is no justification for the defendant's republication. Still less is it any evidence of the truth of such charges. (*R.* v. *Newman*, 1 E. & B. 268; 21 L. J. Q. B. 156; 3 C. & K. 252; Dears. C. C. 85; 17 Jur. 617.) If, however, the libel purports on the face of it to be derived from a certain newspaper, the defendant may prove in mitigation of damages that a paragraph to the same effect had appeared in that newspaper. (*Wyatt* v. *Gore*, 1 Holt, N. P. 303; see also *ante*, p. 302, 3.) The defendant may not give evidence that there was a rumour current to the same effect as the words he spoke. (*Ante*, p. 304—6.) As to the proof of a plea under Lord Campbell's Act see *ante*, p. 300;—as to other evidence in mitigation of damages, see *ante*, pp. 301—8.

Withdrawing a Juror.

Actions of defamation are often compromised before the judge comes to sum up the evidence. A juror is often withdrawn, sometimes at the suggestion of the judge. This means that neither party cares for the case to proceed. If no special terms are agreed on, the effect of withdrawing a juror is that the action is at an end, that no fresh action can be brought on the same libel or slander, and that each party pays his own costs. (See *Strauss* v. *Francis*, 4 F. & F. 939, 1107; 15 L. T. 674.) If any other terms be agreed on, they should be endorsed on counsels' briefs, and each endorsement signed by the leading counsel on both sides. The terms of such a compromise will be strictly enforced, if necessary by an order of the Court. (*Riley* v. *Byrne*, 2 B. & Ad. 779; *Tardrew* v. *Brook*, 5 B. & Ad. 880.) Counsel have full authority to make such a compromise, unless expressly forbidden to do so by the client at the time. (*Strauss* v. *Francis*, L. R. 1 Q. B. 379; 35 L. J. Q. B. 133; 12 Jur. N. S. 486; 14 W. R. 634; 14 L. T. 326; *Davis* v. *Davis*, 13 Ch. D. 861; 28 W. R. 345.)

Summing-up.

The judge now sums up the facts of the case to the jury, and directs them as to the law. He is not bound to state to the jury, as matter of law, whether the publication complained of be a libel or not. (*Baylis* v. *Lawrence*, 11 A. & E. 920; *Hearne* v. *Stowell*, 12 A. & E. 719; 11 L. J. Q. B. 25; 4 P. & D. 696.) The proper course is for him to define what is a libel in point of law, and to leave it to the jury to say whether the publication in question falls within that definition. (*Parmiter* v. *Coupland and another*, 6 M. & W. 105.) The jury are bound to take the judge's definition of a libel, and decide in accordance therewith. (*Levi* v. *Milne*, 4 Bing. 195; 12 Moore, 418.) Though the question for the jury "Libel or no libel" is not precisely the same as "What is the legal definition of an actionable libel?" (*Per* Barry, J., in *Stannus* v. *Finlay*, Ir. R. 8 C. L. 264.) The question for the jury is *not* "Did the defendant *intend* to injure the plaintiff?" but, "Has he in fact injured the plaintiff's reputation?"

Where other libels, &c., have been given in evidence to prove express malice, the judge should caution the jury not to give any damages in respect of them. (*Pearson* v. *Lemaitre*, 5 M & Gr. 700.) But the omission of the judge to give such caution is not a misdirection. (*Darby* v. *Ouseley*, 1 H. & N. 1; 25 L. J. Ex. 229.)

Either party had formerly the power of excepting to the direction of the judge at the trial on a point of law. This was done by tendering to the judge a bill of exceptions before verdict, which was then annexed to the record, so that the point could be raised at once in a Court of Error. But now, by Order LVIII. r. 1, bills of exceptions and proceedings in error are abolished. But by s. 22 of the Judicature Act, 1875, a very similar method is provided. That section enacts that nothing in either Judicature Act "shall take away or prejudice the right of any party to any action to have the issues for trial by jury submitted and left by the judge to the jury before whom the same shall come for trial, with a proper and complete direction to the jury upon the law, and as to the evidence applicable to such issues. Provided also that the said right may be enforced by motion in the Court of Appeal founded upon an exception entered upon or annexed to the record."

Thus, whenever the judge, on a point of law, directs a verdict to be entered for either party, the other party may still tender exceptions to such ruling, and the judge should then be asked to order such exceptions to be annexed to the record. The proper mode of bringing before the Court of Appeal exceptions to the ruling of a judge in directing a jury, is to give an ordinary notice of motion of appeal against the judge's ruling, stating the point intended to be raised. (*Cheese* v. *Lovejoy*, (C.A.) 2 P. D. 161; 46 L. J. P. D. & A. 67; 25 W. R. 453; 37 L. T. 294.) Such exceptions must be tendered before verdict, so as to give the judge an opportunity of reforming his direction, if he thinks fit. (*Rutter* v. *Chapman*, 8 M. & W. 38; *Armstrong* v. *Lewis*, 2 Cr. & M. 274.)

Verdict.

The jury now consider their verdict. They should look to the whole of the publication to see whether it is calculated to

injure the plaintiff's character, not study detached and isolated sentences. The conclusion may modify the commencement, and if so, "the bane and antidote must be taken together." (*Per Alderson*, B., in *Chalmers* v. *Payne*, 2 C. M. & R. 159; see also *Hunt* v. *Algar and others*, 6 C. & P. 245; *R.* v. *Lambert* v. *Perry*, 2 Camp. 398.)

Where the words are actionable *per se*, the amount of damages is entirely a matter for the jury. They may consider the libel itself, the mode and extent of publication, and the express malice evinced by the defendant. Also in an action against a newspaper, they may have regard to the gross negligence shown by the editor in allowing the libel to appear in print. (*Smith* v. *Harrison*, 1 F. & F. 565.) The jury must assess the damages once for all, as no fresh action can be brought for any subsequent damage. (*Fitter* v. *Veal*, 12 Mod. 542; B. N. P. 7; *Gregory and another* v. *Williams*, 1 C. & K. 568.) And in assessing the damages, the jury should not regard at all the question of costs. (*Poole* v. *Whitcomb*, 12 C. B. N. S. 770; *Levi* v. *Milne*, 4 Bing. 195; 12 Moore, 418.)

Judgment.

The judge at the trial may

(1.) direct that judgment be entered for any or either party,

or (2.) adjourn the case for further consideration,

or (3.) leave any party to move for judgment.

No judgment shall be entered after a trial without the order of a Court or judge. (Order XXXVI. r. 22a, R. S. C. December, 1876, r. 3.) From the repeal of the former rule 22, it may be inferred that the judge should no longer enter judgment, subject to leave to move. At all events it is not the practice now to give either party leave to move.

If the judge direct judgment to be entered for either party absolutely, then if the officer present at the trial be not the proper officer to enter judgment, the associate's certificate will be authority to the proper officer (Order XXXVI. r. 24), a full copy of the pleadings being delivered to him, to enter judgment in a book kept for the purpose. (Order XLI. r. 1.) And thereupon execution will issue forthwith, unless it be stayed. (Order XLII. r 15.) There is no need to ask for speedy execution.

Where the judge leaves either party to move for judgment, the plaintiff should set the case down and give notice of motion within ten days after the trial; if he omit to do so the defendant may do so himself. (Order XL. r. 3.) At least two clear days' notice of motion must be given. (Order LIII. r. 4; *Roupell* v. *Parsons*, 24 W. R. 269; 34 L. T. 56.)

If the plaintiff move for judgment, the judge has full power on that motion to direct judgment to be entered for the defendant.

Further considerations and motions for judgment must now take place before the judge who tried the case. (Appellate Jurisdiction Act, 1876, 39 & 40 Vict. c. 59, s. 17; Order LVIIA., R. S. C., December, 1876, rr. 8, 9.) They are in fact but a prolongation of the *Nisi Prius* trial. The judge has no longer any power, apparently, to reserve any point for the consideration of a Divisional Court, or to direct any point to be argued before a Divisional Court (Judicature Act, 1873, s. 46; 1875, s. 22). He must decide the point himself one way or the other, and leave the parties to appeal if they wish to do so.

Costs.

There is no longer any need to ask for a certificate for the general costs of the suit. The successful party now gets his costs as of right, unless the judge deprives him of them for good cause shown (Order LV. r. 1, *ante*, c. XI. p. 334). Thus if there be a verdict for the plaintiff for nominal damages only, his counsel should say nothing about costs; it is the duty of the defendant's counsel to ask the judge to interfere. But it is otherwise with special costs, such as costs of a special jury, of a commission to take evidence abroad, or of photographic copies of the libel: the party who has required these will have to pay for them unless he obtain an order for their allowance on taxation before judgment is entered, *ante*, p. 337. If a married woman having general separate estate fail in an action of libel, she may be condemned in costs, although her husband was joined with her as a co-plaintiff or a co-defendant. (*Newton and wife* v. *Boodle and others*, 4 C. B. 359; 18 L. J. C. P. 73; *Morris* v. *Freeman*, 3 P. D. 65; 47 L. J. P. D. & A. 79; 27 W. R. 62; 39 L. T. 125; and see the remarks of Jessel, M. R., in *Besant* v. *Wood*, 12 Ch. D. 630; 40 L. T. 453.)

Proceedings after Judgment.

After a judgment has been entered by order of the judge, there seem now to be only three possible courses open to the unsuccessful party. He may

(1.) Move in the Divisional Court for a new trial under Order XXXIX.

(2.) Move in the Court of Appeal to set aside the judgment on the ground that on the verdict, as entered, the judgment directed was wrong (Order XL. r. 4*a*, R. S. C., Dec. 1876, r. 7), or upon exceptions annexed to the record; Judicature Act, 1875, s. 22, *ante*, p. 551.

(3.) Apply to a Master at Chambers under Order XLII. r. 22, for a stay of execution or for other relief against such judgment, upon the ground of facts which have arisen too late to be pleaded. This is in lieu of the antiquated proceeding by *auditâ querelâ:* but it can very seldom be necessary to make such an application, regard being had to the extensive powers given by Order XX. of pleading matters which have arisen since action brought.

There seems to be now no case in which, after judgment entered, a party can move the Divisional Court for judgment. Order XL. r. 2 is practically abolished by Order XXXVI. r. 22*a*, R. S. C., Dec. 1876, r. 3, which seems to take away from the judge the power of ordering judgment to be entered subject to leave to move. Motions for judgment must in fact be made either to the judge who tried the case, sitting alone, or to the Court of Appeal. See Order LVIIA., R. S. C., Dec. 1876, rr. 8, 9, which altered the previous practice in order to give effect to the Appellate Jurisdiction Act, 1876, 39 & 40 Vict. c. 59, s. 17. Motions for judgment *non obstante veredicto* and motions in arrest of judgment are now obsolete, if not abolished. Nor is any repleader any longer necessary, as by Order XL. r. 10 the Court has power, upon a motion for judgment or for a new trial, to direct issues or questions to be tried or determined.

There has sometimes been a difficulty in deciding whether application should be made to the Divisional Court or to the Court of Appeal. The most obvious test appears to be this:— Does the party applying complain of the verdict, or of the judgment entered on that verdict? If his contention is that

accepting the findings of the jury as correct, still the judgment as entered is wrong, then he must move the Court of Appeal. If on the other hand he complains of the verdict as recorded, then, although the judge directed such verdict, he must apply to the Divisional Court within the time allowed for a new trial. (*Yetts and another* v. *Foster* (C. A.), 3 C. P. D. 437; 26 W. R. 745; 38 L. T. 742.)

Whenever the judgment is right, if the verdict is right, the application must be to the Divisional Court; for the Court of Appeal has no power in the first instance to review the finding of a jury. (*Davies and others* v. *Felix and others* (C. A.), 4 Ex. D. 32; 48 L. J. Ex. 3; 27 W. R. 108; 39 L. T. 322.) Thus if on the trial of an action for libel, the counsel for the defendant asks the judge to nonsuit the plaintiff or to direct a verdict for the defendant, on the ground that there is no evidence to go to the jury in support of the plaintiff's case, then, whether the judge grants or refuses this application, the only course by which his decision can be reviewed is by motion for a new trial in the Divisional Court. (*Davies and others* v. *Felix and others, suprà; Capital and Counties Bank* v. *Henty and Sons*, 28 W. R. 490; 42 L. T. 314; (C. A.) 5 C. P. D. 514; 49 L. J. C. P. 830; 28 W. R. 851; *Etty* v. *Wilson* (C. A.), 3 Ex. D. 359; 47 L. J. Ex. 664; 39 L. T. 83.) A nonsuit is for this purpose considered as of the same effect as a judgment directed by the judge in the defendant's favour: although in the former case there is no finding by the jury. (*Etty* v. *Wilson, suprà.*) But Thesiger, L.J., guarded himself from giving any opinion as to the case where a nonsuit is directed on admitted facts entered on the judge's notes. Here, as the jury decide nothing, it is substantially a trial by the judge alone, and if so, the application should perhaps be made to the Court of Appeal.

These distinctions are important, because the parties, as a rule, do not make up their mind to move for a new trial till after it is too late to make the application, and then endeavour to appeal instead. But apart from the rules as to time, the matter is one rather of name than of substance. For when, in an action tried by a jury, the judge has given judgment for one party on the findings of the jury, and the other party has, without appealing from such judgment, moved the Divisional Court for a new trial either on the ground of misdirection by

the judge, or on the ground that the findings are against the weight of evidence; the Divisional Court has power under Order XL. r. 10, on the argument, to set aside the judgment entered and enter final judgment for the party unsuccessful at the trial, if they are of opinion that the findings and the judgment at the trial cannot stand, and if they have before them all the materials necessary for finally determining the questions in dispute. (*Hamilton & Co.* v. *Johnson & Co.* (C. A.), 5 Q. B. D. 263; 49 L. J. Q. B. 155; 28 W. R. 879; 41 L. T. 461.) So, too, if the unsuccessful party moves for judgment in the Court of Appeal, and that Court is dissatisfied with the findings as to any matter of fact, it may, in a proper case, set aside the verdict and the judgment entered thereon, and direct that a new trial shall be had. (Order LVIII. r. 5*a*, R. S. C., April, 1879, r. 8.)

Application for a New Trial.

Applications for new trials shall be by motion [for an order] calling on the opposite party to show cause at the expiration of eight days from the date of the order, or so soon after as the case can be heard, why a new trial should not be directed. Such motion shall be made within the times following, unless the Court, or a judge, shall enlarge the time:—

An application to a Divisional Court for a new trial, if the trial has taken place in London or Westminster, shall be made within four days after the trial, or on the first subsequent day on which a Divisional Court, to which the application may be made, shall have actually sat to hear motions. If the trial has taken place elsewhere than in London or Middlesex, the motion shall be made within seven days after the last day of sitting on the circuits for England and Wales during which the action shall have been tried, or within the first four days of the next following sittings, if such day occurs during or within a week immediately before vacation. (Order XXXIX. r. 1*b*, R. S. C., March, 1879, r. 6; *Grant* v. *Holland*, 49 L. J. Q. B. 800; 29 W. R. 32.)

Where an action is commenced in one of the Common Law Divisions, and the trial takes place before a judge of another Division, the cause shall from that time be transferred to the Division of which such judge is a member. (Order V. r. 4*a*, R.

S. C., March, 1879, r. 3.) Any application for a new trial must be made to a Divisional Court of that division, if the trial was by a jury. If, however, the trial was by the judge without a jury, the application for a new trial must be made direct to the Court of Appeal. (Order XXXIX. r. 1*a*, R. S. C., Dec. 1876, r. 5.)

If a *primâ facie* case be made out, an order *nisi* will be granted, a copy of which must be served on the opposite side within four days. (Order XXXIX. r. 2.) Such order *nisi* will be a stay of proceedings unless a special order be made to the contrary (*ib.* r. 5). The grounds on which such order is granted should be stated in it. After full argument the order will be either discharged or made absolute.

An application for a new trial may be made on the ground that the verdict is against the weight of evidence, that the damages are excessive or inadequate, or on the ground of misdirection or surprise. That no notice of trial was given, or that the jury misbehaved, may also be ground for a new trial.

But a new trial will not be granted on the ground of misdirection or improper admission or rejection of evidence, if the party showing cause can satisfy the Court that no substantial wrong or miscarriage has been thereby occasioned. (Order XXXIX., r. 3; *Anthony* v. *Halstead*, 37 L. T. 433; *Faund* v. *Wallace*, 35 L. T. 361.) And then the Court may grant a new trial as to so much of the matter only as the miscarriage affects, without interfering with the decision upon any other question. (*Marsh* v. *Isaacs*, 45 L. J. C. P. 505.) So too the Court may grant a new trial as against one defendant without granting it as to all; though notice of the order *nisi* must be served on all. (*Price* v. *Harris*, 10 Bing. 331; *Purnell* v. *G. W. Ry. Co. and Harris* (C. A.), 1 Q. B. D. 636; 45 L. J. Q. B. 687; 24 W. R. 720, 909; 35 L. T. 605.)

The question of libel or no libel is pre-eminently one for a jury; the Court will rarely interfere to set aside a verdict or grant a new trial on the ground that the verdict was against the weight of evidence; especially where the question left to the jury was whether the matter complained of was or was not fair comment on the acts of a public man. (*Odger* v. *Mortimer*, 28 L. T. 472.) And whenever the words are fairly susceptible both of an innocent and of an actionable meaning, the finding

of the jury is final; whichever construction they may have placed upon the words will be upheld. (*Per Cur.* in *Burgess* v. *Bracher* (1724), 8 Mod. 240; 2 Ld. Raym. 1366; 1 Stra. 594; *Walter* v. *Beaver*, and *Naden* v. *Micocke* (1684), 3 Lev. 166; Sir T. Jones, 235; 2 Ventr. 172; 3 Salk. 325.) "The Court never, or very rarely, grants new trials in actions for words." (*Per* Holt, C.J., *Anon* (1696), 2 Salk. 644.)

A new trial will, however, be granted when the matter complained of is clearly libellous, and there is no question as to the fact of publication, or as to its application to the plaintiff, and yet the jury have perversely found a verdict for the defendant, in spite of the summing-up of the learned judge. (*Levi* v. *Milne*, 4 Bing. 195, *ante*, p. 130; *Hakewell* v. *Ingram*, 2 C. L. R. 1397.) But unless the jury are manifestly wrong, unless the Court can say with certainty that there has been a miscarriage of justice, no new trial will be granted. (*Per* Tindal, C.J., in *Broome* v. *Gosden*, 1 C. B. 731.) If the judge directs the jury that the publication is in law a libel, and the Court above hold that it is not, a new trial will be granted on the ground of misdirection. (*Hearne* v. *Stowell*, 12 A. & E. 719; 11 L. J. Q. B. 25; 4 P. & D. 696.)

A new trial will not be granted on the ground that the jury expressed an opinion during the judge's summing-up inconsistent with their subsequent verdict. (*Napier* v. *Daniel and another*, 3 Bing. N. C. 77; 3 Scott, 417.)

In actions of defamation the Court very rarely grants a new trial on the ground that the damages are either too small or too great. Still there is no inflexible rule on the subject. Scroggs, J., indeed, contended in *Lord Townshend* v. *Dr. Hughes*, 2 Mod. 150, that the Court had no power to order a new trial on the ground that the damages (4000*l.*) were excessive; but Atkins, J., was of the contrary opinion, and gave an instance in which the Court of Queen's Bench had done so. The Court however declined to exercise their power both in that case and in *Highmore* v. *Earl and Countess of Harrington*, 3 C. B. (N. S.) 142, where 750*l.* damages were awarded. A new trial will only be granted where the amount of damages is so large as to satisfy the Court that the jury acted perversely and with partiality, or grossly misconceived the case on a matter of principle. Whenever there is any evidence

of express malice, the jury are entitled to give vindictive damages.

So, too, there is no inexorable rule of practice which precludes the Court from granting a new trial on account of the smallness of damages. In *Kelly* v. *Sherlock*, L. R. 1 Q. B. 686, 697; 35 L. J. Q. B. 209; 12 Jur. N. S. 937, a rule *nisi* was granted on that ground, though it was discharged on the argument. There seems to be no case reported in which a rule for a new trial has been made absolute on this ground in an action of libel; but in an action of slander a rule for a new trial was made absolute, where the smallness of the amount recovered ($\frac{1}{4}d.$) shewed that the jury had made a compromise, instead of deciding the issues submitted to them. (*Falvey* v. *Stanford*, L. R. 10 Q. B. 54; 44 L. J. Q. B. 7; 23 W. R. 162; 31 L. T. 677.) See, however, *Forsdike and wife* v. *Stone*, L. R. 3 C. P. 607; 37 L. J. C. P. 301; 16 W. R. 976; 18 L. T. 722, and *Rendall* v. *Hayward*, 5 Bing. N. C. 424, which lay down the rule that where there has been no misconduct on the part of the jury, no error in the calculation of figures, no mistake in law on the part of the judge, a new trial will not be granted. That the jury intended their verdict to carry costs, but have returned an amount insufficient in law to do so, never was a ground for granting a new trial. (*Mears* v. *Griffin*, 1 M. & Gr. 796; 2 Scott N. R. 15; *Kilmore* v. *Abdoolah*, 27 L. J. Ex. 307; *Forsdike and wife* v. *Stone*, *suprd.*) The whole law on this subject has recently been discussed in *Phillips* v. *London and S. W. Ry. Co.*, 4 Q. B. D. 406; 48 L. J. Q. B. 693; 27 W. R. 797; 40 L. T. 813; (C.A.) 5 Q. B. D. 78; 49 L. J. Q. B. 223; 28 W. R. 10; 41 L. T. 121.

That either judge or jury prematurely expressed a strong opinion as to the case is no ground for a new trial. (*Lloyd* v. *Jones*, 7 B. & S. 475). It would be otherwise if a juror before being sworn had expressed a determination to give a verdict in favour of the plaintiff. (*Ramadye* v. *Ryan*, 9 Bing. 333; 2 Moo. & Sc. 421.)

If a new trial be moved for on the ground of surprise, the absence of a material witness at the trial, &c., there must be an affidavit setting out the facts. "Surprise is a matter extrinsic to the record and the judge's notes, and consequently can only be made to appear by affidavit; and here we have

no affidavit of surprise, in the sense required by the practice of the Court." (*Per* Maule, J., in *Hoare* v. *Silverlock* (No. 2), (1850), 9 C. B. 22.)

The question whether an apology was or was not sufficient is peculiarly a question for the jury, and their decision cannot be reviewed or set aside by the Court. (*Risk Allah Bey* v. *Johnstone*, 18 L. T. 620.) So, too, a verdict cures a misjoinder of parties, *e.g.*, where husband and wife are jointly sued in a case where the husband should be sued alone. (*Burcher* v. *Orchard* (1652), Sty. 349; 1 Roll. Abr. 781.)

If a new trial be ordered, the costs of the first trial are in the discretion of the judge who tries the case the second time; if he makes no order, they follow the event. (*Creen* v. *Wright*, 2 C. P. D. 354; 46 L. J. C. P. 427; 25 W. R. 502; 36 L. T. 355; *Field* v. *G. N. Ry. Co.*, 3 Ex. D. 261; 26 W. R. 817; 39 L. T. 80; *Harris* v. *Petherick* (C. A.), 4 Q. B. D. 611; 48 L. J. Q. B. 521; 28 W. R. 11; 41 L. T. 146.)

If an order *nisi* be refused, the applicant must apply within four days, if at all, to the Court of Appeal (Order LVIII., r. 10). An order *nisi* granted in the Court of Appeal on such an application will in itself be no stay of proceedings. (*Goddard* v. *Thompson* (C. A.), 47 L. J. Q. B. 382; 26 W. R. 362; 38 L. T. 166.) If the Divisional Court makes absolute an order for a new trial, an appeal from this decision must be brought, if at all, within twenty-one days from the time when the order absolute is entered and recorded. (*Ib.*, r. 15. *Highton* v. *Treherne*, 48 L. J. Ex. 167; 27 W. R. 245; 39 L. T. 411.)

Where the trial has been before a judge without a jury, an application for a new trial, if made at all, must in all cases be made direct to the Court of Appeal. (Order XXXIX. r. 1*a*, R. S. C., Dec. 1876, r. 5; *Oastler* v. *Henderson* (C. A.), 2 Q. B. D. 575; 46 L. J. Q. B. 607; 37 L. T. 22.) As a rule, however, the application should be by way of appeal, and not by motion for a new trial (*Pannell* v. *Nunn* (C. A.), 28 W. R. 940; *Potter* v. *Cotton* (C. A.), 5 Ex. D. 137; 49 L. J. Ex. 158; 28 W. R. 160; 41 L. T. 460,) for the Court of Appeal has power upon an appeal to review the judge's findings as to the facts, without a rule for a new trial having been expressly asked for

or obtained. The only exception to this rule is in the case of surprise: then a new trial should be asked for. (*Jones* v. *Hough* (C. A.), 5 Ex. D. 115; 42 L. T. 108.) If, however, the issues were settled before the case was heard by the judge, or if the judge first tried the issues of fact, and subsequently there was a separate determination of the law applied to those facts, then perhaps there should be a motion for a new trial. (*Krehl* v. *Burrell* (C. A.), 10 Ch. D. 420; 48 L. J. Ch. 252; 27 W. R. 234; 39 L. T. 461; as explained by *Lowe* v. *Lowe* (C. A.), 10 Ch. D. 432; 48 L. J. Ch. 383; 27 W. R. 309; 40 L. T. 236; and *Dollman* v. *Jones*, 12 Ch. D. 553; 27 W. R. 877; 41 L. T. 258.)

If an action commenced in the Chancery Division be tried by a judge and jury in one of the Common Law Divisions, it is *ipso facto* transferred to the Division to which that judge belongs, and the application for a new trial must be made to a Divisional Court of that Division; for such a case is within Order XXXIX. r. 1*a*, R. S. C., Dec. 1876, r. 5 (though not within the words of Order V. r. 4*a*, R. S. C., March, 1879). (*Hunt* v. *City of London Real Property Co.*, 3 Q. B. D. 19; 47 L. J. Q. B. 42, 51; 26 W. R. 37; 37 L. T. 344; *Jones* v. *Baxter* (C. A.), 5 Ex. D. 275; 28 W. R. 817.) But this does not apply to an action in which an issue has been directed by a judge of the Chancery Division. The action in that case still remains attached to the Chancery Division. (*Jenkins* v. *Morris* (C. A.), 14 Ch. D. 674; 49 L. J. Ch. 392.)

Proceedings in the Court of Appeal.

If no exception be taken at the trial, and annexed to the record (*ante*, p. 551), the only rule which authorises a party to come direct from *Nisi Prius* to the Court of Appeal appears to be the following:—

Where, at or after the trial of an action by a jury, the judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment and enter any other judgment, on the ground that the judgment directed to be entered is wrong, by reason of the judge having caused the finding to be wrongly entered with

reference to the finding of the jury upon the question or questions submitted to them.

Where, at or after the trial of an action before a judge, the judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment and to enter any other judgment, upon the ground that, upon the finding as entered, the judgment so directed is wrong.

An application under this rule shall be to the Court of Appeal. (Order XL. r. 4*a*; R. S. C., Dec. 1876, r. 7.)

An application under this rule must be made by motion upon notice, not as in the case of a motion for a new trial by an *ex parte* application for an order *nisi*. (Order LIII. rr. 2, 3; Order LVIII. r. 2; *Jones* v. *Davis* (C. A.), 36 L. T. 415; W. N. 1877, p. 86.) It may be made at any time within a year after the party seeking to make the motion first became entitled so to do. (Order XL. r. 9.) He apparently becomes so entitled the moment the jury are discharged. (*Shaw* v. *Hope*, 25 W. R. 729.) Fourteen days' notice of motion must be given under Order LVIII. r. 4; *Foster* v. *Roberts*, W. N. 1877, p. 11.

Either party may also, of course, appeal from any decision of the Divisional Court, not being an order made by consent or as to costs merely. (Jud. Act, 1873, s. 49.) Such appeal shall be by way of rehearing, and shall be brought, by notice of motion, within twenty-one days from the date of an interlocutory order, or within a year from a final judgment. (Order LVIII. rr. 2, 15.) An order overruling or allowing a demurrer, is a final judgment, as it is a conclusive determination of one part of the case, if not the whole. (*Trowell* v. *Shenton* (C. A.), 8 Ch. D. 318, 321; 47 L. J. Ch. 738; 26 W. R. 837; 38 L. T. 369.) An order making absolute an order *nisi* for a new trial is an interlocutory order, the rights of the parties not being finally determined thereby. (*Highton* v. *Treherne*, 48 L. J. Ex. 167; 27 W. R. 245; 39 L. T. 411.) It might be contended that an order discharging such an order *nisi* was a final judgment, so as to enable the party desiring a new trial to appeal at any time within a year. But in *Standard Discount Co.* v. *La Grange* (C. A.), 3 C. P. D. 71; 47 L. J. C. P. 3; 26 W. R. 25; 37 L. T. 372, Brett, L. J., lays down a rule that no order can be final, unless the application on which it was granted, would have determined the action, *whichever way it was decided*.

If this be so, then an order discharging an order *nisi* for a new trial will be interlocutory, because an order making it absolute would have been interlocutory. But the point has not yet been decided, and it would be safer not to raise it, if it can be avoided. Sundays are included within the twenty-one days. (*Ex parte Viney* (C. A.), 4 Ch. D. 794; 46 L. J. Bank. 80; 25 W. R. 364; 36 L. T. 43.) An extension of the time will only be granted under very special circumstances. (*Craig* v. *Phillips* (C. A.), 3 Ch. D. 249; 47 L. J. Ch. 239; 26 W. R. 293; 37 L. T. 772; *McAndrew* v. *Barker* (C. A.), 7 Ch. D. 701; 47 L. J. Ch. 340; 26 W. R. 317; 37 L. T. 810; *In re Mansel, Rhodes* v. *Jenkins* (C. A.), 7 Ch. D. 711; 47 L. J. Ch. 870; 26 W. R. 361; 38 L. T. 403; *Taylor's case* (C. A.), 8 Ch. D. 643; 47 L. J. Ch. 701; 26 W. R. 601; 38 L. T. 587; *Collins* v. *Vestry of Paddington* (C. A.), 5 Q. B. D. 368; 49 L. J. Q. B. 264; 28 W. R. 588; 42 L. T. 573.) That the appellant's legal adviser misconstrued the rules of the Supreme Court, is no ground for an extension of the time for appealing. (*International Financial Soc.* v. *City of Moscow Gas Co.* (C. A.), 7 Ch. D. 241; 47 L. J. Ch. 258; 26 W. R. 272; 37 L. T. 736; *Highton* v. *Treherne, supra.*)

As to the notice of motion and the amendment thereof, see Order LVIII. rr. 3, 4; and *In re Stockton Iron Furnace Co.* (C. A.), 10 Ch. D. 335, 348; 48 L. J. Ch. 417; 27 W. R. 433; 40 L. T. 19.

As to setting down the appeal for hearing, see Order LVIII. r. 8; *In re National Funds Insurance Co.* (C. A.), 4 Ch. D. 305; 46 L. J. Ch. 183; 25 W. R. 151; 35 L. T. 689; *Webb* v. *Mansel* (C. A.), 2 Q. B. D. 117; 25 W. R. 389; *In re Harker, Goodbarne* v. *Fothergill* (C. A.), 10 Ch. D. 613; 27 W. R. 587; 40 L. T. 408.

If the appellant be a foreigner residing abroad, or if the appeal be unreasonable or vexatious, the appellant may be ordered to give security for costs on an application made by the respondent within a reasonable time on notice of motion. (*Grant* v. *Banque Franco-Egyptienne* (C. A.), 2 C. P. D. 430; 47 L. J. C. P. 41; 26 W. R. 68.) But such an application must always be made promptly. (*Corporation of Saltash* v. *Goodman and another*, 43 L. T. 464; W. N. 1880, p. 167.) The insolvency of the appellant is not alone a sufficient ground, if the question

raised by the appeal be a doubtful one, well worthy argument in the Court of Appeal. (*Rourke* v. *White Moss Colliery Co.* (C. A.), 1 C. P. D. 556, 562.)

An appeal is no stay of execution or of proceedings, unless the Court below, or failing that, the Court of Appeal, otherwise orders. (Order LVIII. rr. 16, 17; *Goddard* v. *Thompson* (C. A.), 47 L. J. Q. B. 382; 26 W. R. 362; 38 L. T. 166; *Wilson* v. *Church* (C. A.), 11 Ch. D. 576; 48 L. J. Ch. 690; 27 W. R. 843; 12 Ch. D. 454; 28 W. R. 284; 41 L. T. 50; *Grant* v. *Banque Franco-Egyptienne* (C. A.), 3 C. P. D. 202; 47 L. J. C. P. 455; 26 W. R. 669; 38 L. T. 622.)

The respondent may give notice that he intends to apply upon the hearing of the appeal that the order appealed against be varied. He need not give any notice of motion by way of cross-appeal. (Order LVIII. rr. 6, 7; *Ex parte Payne, in re Cross*, 11 Ch. D. 539, 550; 27 W. R. 808; 40 L. T. 563; *Ralph* v. *Carrick*, 11 Ch. D. 873; 28 W. R. 67; 40 L. T. 505.)

If the appellant does not appear at the hearing, the respondent is entitled to have the appeal dismissed with costs, without giving any proof of the service of notice of appeal. (*Ex parte Lows, in re Lows* (C. A.), 7 Ch. D. 160; 47 L. J. Bank. 24; 26 W. R. 229; 37 L. T. 583.)

At the hearing, the Court of Appeal has all the powers of a Court of first instance as to amendment or otherwise. The Court may, in its discretion, receive further evidence as to any matter of fact; but special grounds must be shown and special leave obtained for the production of such further evidence after there has been a full hearing on the merits at *Nisi Prius*. (Order LVIII. r. 5.) Due notice must be given to the respondent that appellant intends to apply at the hearing to adduce fresh evidence. (*Hastie* v. *Hastie* (C. A.), 1 Ch. D. 562; 45 L. J. Ch. 288; 24 W. R. 564; 34 L. T. 13; *Dicks* v. *Brooks*, 13 Ch. D. 652; 28 W. R. 525; 43 L. T. 71.) As to what are sufficient special grounds, see *In re Chennell* (C. A.), 8 Ch. D. 504—507; 47 L. J. Ch. 583; 26 W. R. 595; 38 L. T. 494; *Bigsby* v. *Dickinson* (C. A.), 4 Ch. D. 24; 46 L. J. Ch. 280; 25 W. R. 89; 35 L. T. 679.

The judge's note is decisive as to the evidence taken in the Court below; but either party may read a shorthand-writer's note, to supplement, though not to overrule, the judge's note.

(Order LVIII. r. 13; *Laming* v. *Gee* (C. A.), 28 W. R. 217.) The cost of printing the evidence below will be allowed if it is very voluminous. (Order LVIII. r. 12; *Bigsby* v. *Dickinson*, *infrà*.) If, upon the hearing of an appeal from a judgment pronounced by a judge or Court on the verdict or finding of a jury, or of a judge without a jury, it shall appear to the Court of Appeal that a new trial ought to be had, it shall be lawful for the said Court of Appeal, if it shall think fit, to order that the verdict and judgment shall be set aside, and that a new trial shall be had. (Order LVIII. r. 5*a*, R. S. C., March, 1879.)

The successful party will, as a rule, obtain costs. (*Per* James, L. J., 1 Ch. D. 41, 113; 45 L. J. Ch. 1.) When the respondent gives notice of his intention to contend that the order appealed from be varied, and the appeal is dismissed, the appellant will have to pay all costs which he cannot show to have been occasioned solely by the respondent's notice. (*The Lauretta*, 4 P. D. 25; 48 L. J. Prob. 55; 27 W. R. 902; 40 L. T. 444.) A special order must be obtained before the judgment of the Court of Appeal is entered, allowing the costs of shorthand-writers' notes or of printing the evidence. (*Ashworth* v. *Outram*, 9 Ch. D. 483; 27 W. R. 98; 39 L. T. 441; *In re Silver Lead Ore Co.*, 10 Ch. D. 307, 312; *Executors of Sir Rowland Hill* v. *Metropolitan District Asylum*, 49 L. J. Q. B. 668; 43 L. T. 462; Weekly Notes, 1880, p. 98; *Bigsby* v. *Dickinson* (C. A.), 4 Ch. D. 24; 46 L. J. Ch. 280; 25 W. R. 89, 122; 35 L. T. 679.)

As to a further appeal to the House of Lords, see the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), and the Standing Orders of August, 1876, Weekly Notes, 1876, Part II., p. 475—7; as amended, Weekly Notes, 1877, Part II., p. 57.

County Court Proceedings.

No action of libel or slander can be commenced in the County Court (9 & 10 Vict. c. 95, s. 58), except by consent (19 & 20 Vict. c. 108, s. 23). I presume that the word "slander" includes "slander of title." In cases of a trifling nature, it may be

desirable that both parties should consent to such a course, especially if all the witnesses reside in a town where a County Court is held. The parties or their respective solicitors must in that case sign a memorandum of consent (in the form given as No. 45), which must be filed; and thereupon a plaint will be entered and a summons issued, and all further proceedings will be taken as in an ordinary County Court case. (County Court Order XXXVII. r. 46.)

But an action of libel or slander, whatever the amount of damages claimed, may be transferred to the County Court, under s. 10 of the 30 & 31 Vict. c. 142, *ante*, p. 468. The defendant may apply to a master at chambers under this section, at any stage of the proceedings, on an affidavit, showing a good defence on the merits, that the plaintiff has no visible means, and that there will be a saving of costs, and greater convenience in trying in the County Court. But no order will be made (1) if the action is one fit to be prosecuted in the Superior Court, because involving important points of law, or because it is a test action, &c.; or (2) if the plaintiff can prove that he has visible means of paying costs. "Visible" means tangible, such property as the defendant could reach in the event of his obtaining judgment for his costs. (*Counsel* v. *Garvie*, Ir. R. 5 C. L. 74; *Watson* v. *McCann*, 6 L. R. Ir. 21; and see *Sykes* v. *Sykes*, L. R. 4 C. P. 645; 38 L. J. C. P. 281; 17 W. R. 799; 20 L. T. 663.) The plaintiff also generally denies that there will be any saving of costs or convenience in trying in the County Court. It is practically useless for a defendant to appeal from the master's order. (*Palmer* v. *Roberts*, 22 W. R. 577, n.; 29 L. T. 403.) The plaintiff may appeal, if the order is *obviously* wrong. (*Jennings and wife* v. *London General Omnibus Co.*, 30 L. T. 266; *Owens* v. *Woosman*, L. R. 3 Q. B. 469; 9 B. & S. 243; 37 L. J. Q. B. 159; 16 W. R. 932; 18 L. T. 357; *Holmes* v. *Mountstephen*, L. R. 10 C. P. 474; 33 L. T. 351.)

The plaintiff must now lodge the writ and other proceedings and the order remitting the action, with the registrar of the County Court. Until this is done, the action remains in the Superior Court, which, consequently, has jurisdiction to vary the order. (*Welply* v. *Buhl* (C. A.), 3 Q. B. D. 80, 253; 47 L. J. Q. B. 151; 26 W. R. 300; 38 L. T. 115.) As soon as the

necessary documents are filed, the action becomes a County Court cause, as completely as if it were one duly commenced therein. (*Moody* v. *Steward*, L. R. 6 Ex. 35; 40 L. J. Ex. 25; 19 W. R. 161; 23 L. T. 465.) The County Court judge is bound to assume jurisdiction; he cannot inquire into the circumstances under which the order was made. (*Blades* v. *Lawrence*, L. R. 9 Q. B. 374; 43 L. J. Q. B. 133; 22 W. R. 643; 30 L. T. 378.) If the plaintiff omit to lodge the order of transfer within a reasonable time after it is made, the defendant can apply at chambers for an order dismissing the action for want of prosecution.

The plaintiff is required by County Court Order XX. r. 2, to lodge not only the writ and the order remitting the action, but also a statement of the names and addresses of the several parties to the action, and their solicitors, if any, and a concise statement of the particulars, such as would be required upon entering a plaint, signed by the plaintiff or his solicitor, and the registrar shall thereupon enter the action for trial, and give notice to the parties of the day appointed for such trial, by post or otherwise, ten clear days before such day, and shall annex to the notice to the defendant a copy of the plaintiff's particulars. For a form of such statement of the plaintiff's particulars, see Precedent No. 50, *post*, p. 644. For a form of the Notice of Trial sent to the defendant by the registrar, see Precedent No. 51, *post*, 645. The registrar shall forthwith indorse on the order the date on which the same was lodged and file the same, and the action shall proceed in all things as if it were an ordinary action in the County Court. (County Court Order XX. r. 3.)

The defendant upon being served with such a notice of trial may proceed in all things in the same way as if the action had been brought in the County Court, and the notice so served upon him was an ordinary summons. (County Court Order XX. r. 2.)

Thus he may, five clear days at least before the day named in such notice of trial, pay money into Court, either generally or under Lord Campbell's Act, paying a Court fee of 1*s.* in the £ on the amount paid in. (County Court Order XII. rr. 4, 5, 6*a*, and 7.) Or he may set up a counterclaim (County Court Order IX. r. 1*a*), or plead Not Guilty by statute (*ib.* r. 14), or a justification (*ib.* r. 13), or any other special defence, by sending in to

the registrar a concise statement of the grounds of such special defence five clear days at least before the day named for trial. (See Precedents, Nos. 53, 54, *post*, p. 646.) If the defendant omit to send such statement, he will not be allowed to avail himself of the defence, unless the plaintiff consents thereto; but the judge will in a proper case adjourn the trial of the action to enable the defendant to give such notice. (County Court Order IX. r. 7.) So, too, if the defendant intends to avail himself of the provisions of sects. 1 and 2 of 6 & 7 Vict. c. 96, he must give notice in writing of such intention, signed by himself or his solicitor, to the registrar five clear days before the day appointed for the trial of the action. (County Court Order XX. r. 4.) Such notice should be in form No. 55, *post*, p. 647, if under s. 1 of Lord Campbell's Act, in form No. 56, *post*, p. 648, if under s. 2.

Where in any action for libel or slander the defendant relies as a defence upon the fact that the libel or slander is true, he shall in his statement set forth that the libel or slander complained of is true in substance. (County Court Order IX. r. 13.) Such statement should be in form No. 54, *post*, p. 647.

Interrogatories may be administered in the County Court by leave of the registrar. (County Court Order XIII. r. 6.) An affidavit is necessary which may be in form No. 52, *post*, p. 646. Any objection to answer must be taken in the affidavit in answer. Discovery and inspection of documents may also be obtained as in the Superior Court.

The action may at the instance of either party be tried by a jury (County Court Order XVI. r. 3) of five (9 & 10 Vict. c. 95, s. 73), upon a demand for one being made in writing to the registrar three clear days before trial. (County Court Order XVI. r. 1.) In cases where no demand for a jury has been so made, but at the trial both parties desire one, the judge may adjourn the trial upon terms in order that the necessary steps may be taken for such trial to take place. (County Court Order XVI. r. 2.) It is always desirable to have a jury in an action of libel or slander.

The trial takes place in all respects as in an ordinary County Court cause; save that if any pleadings were delivered in the action before the order was made remitting it to the County Court, the judge must not disregard them. Thus if a plaintiff has shaped his action differently on his statement of claim and

on his writ, the judge must look rather to the statement of claim than to the writ (*Johnson* v. *Palmer*, 4 C. P. D. 258; 27 W. R. 941); for the endorsement on a writ is superseded by a statement of claim except as to the amount claimed in the action. (*Large* v. *Large*, Weekly Notes, 1877, p. 198.) Great care must be taken to ask the judge before delivering judgment to make a note of any point of law on which either party relies. (*Rhodes* v. *Liverpool Investment Co.*, 4 C. P. D. 425; *Pierpoint* v. *Cartwright*, 5 C. P. D. 139; 28 W. R. 583; 42 L. T. 295; *Seymour* v. *Coulson* (C. A.), 28 W. R. 664.)

Judgment is entered and all subsequent proceedings taken as in an ordinary County Court action. Any motion for a new trial must be made to the judge in the County Court (County Court Order XXVIII.); any appeal, to the Divisional Court for hearing appeals from Inferior Courts, or if that be not sitting, to a judge at chambers, who must hear the case himself, and not adjourn it to the full Court. (*Button* v. *Woolwich Mutual Building Society*, 5 Q. B. D. 88; 49 L. J. Q. B. 249; 28 W. R. 136; 42 L. T. 54.)

The costs will follow the event, unless the judge at the trial make any order to the contrary. (County Courts Act, 1846, 9 & 10 Vict. c. 95, s. 88.) In taxing the costs incurred in the High Court of Justice previous to the transmission of the action to the County Court under sects. 7 or 10 of the County Courts Act, 1867, the registrar shall tax the same according to the scale of costs and fees in use in such High Court of Justice. (County Court Order XXXVI. r. 2.) The costs subsequent to the order remitting the action will be taxed according to the scale in use in the County Courts, by the express words of s. 10 of 30 & 31 Vict. c. 142. The Superior Court has no jurisdiction to make any order as to costs. (*Moody* v. *Steward*, L. R. 6 Ex. 35; 40 L. J. Ex. 25; 19 W. R. 161; 23 L. T. 465.)

Other Inferior Courts.

The Salford Hundred Court has power to hear all cases of libel or slander arising within the jurisdiction of the Court, provided the damages claimed do not exceed £50. If they exceed £50, it appears that the Court has no jurisdiction even by consent. (9 & 10 Vict. c. cxxvi.; *Farrow* v. *Hague*, 3 H. & C. 101; 33 L. J. Ex. 258.) The costs follow the event, both in

the Salford Hundred Court (*Turner* v. *Heyland*, 4 C. P. D. 432; 48 L. J. C. P. 535; 41 L. T. 556) and in the Liverpool Court of Passage (*King and another* v. *Hawkesworth*, 4 Q. B. D. 371; 48 L. J. Q. B. 484; 27 W. R. 660; 41 L. T. 411), and indeed wherever the case is tried by a jury; subject however to the power reserved to a judge by Order LV. r. 1, to deprive a successful plaintiff of his costs, on good cause shown. Section 29 of the County Courts Act, 1867, never applied to actions of libel or slander, for they never could have been brought in a County Court; but even if it did apply, it is a question whether it is not now repealed, as it is not expressly re-enacted by s. 67 of the Judicature Act, 1873.

CHAPTER XVIII.

PRACTICE AND EVIDENCE IN CRIMINAL CASES.

This chapter naturally divides itself into two heads:—

I. Proceedings by way of Indictment.

II. Proceedings by way of Criminal Information.

PART I.

PRACTICE AND EVIDENCE IN CRIMINAL PROCEEDINGS BY WAY OF INDICTMENT.

Proceedings before Magistrates.

CRIMINAL proceedings for libel usually commence by the prosecutor summoning the accused before a police or stipendiary magistrate, or before two justices of the peace.

The offence of libel is not included in the Vexatious Indictments Act (22 & 23 Vict. c. 17). It is not essential, therefore, that the accused should be so summoned; it is open to the prosecutor to go direct to the grand jury and prefer a bill. But it is very unusual so to do; for, should the defendant in such a case be ultimately found Not Guilty, the prosecutor may be ordered to pay all the costs of the defence, under 30 & 31 Vict. c. 35, s. 2.

If the defendant does not obey the summons served upon him, the magistrate will issue a warrant for his arrest; or he may, if he think fit, on good cause shown and information sworn, issue a warrant for his apprehension in the first instance without any previous summons. (*Butt* v. *Conant*, 1 Brod. & B. 548; 4 Moore, 195; Gow, 84; 11 & 12 Vict. c. 42, ss. 1, 8.)

When the accused comes before the magistrate the prosecutor has merely to prove publication, unless it is not clear that the libel refers to the prosecutor, in which case it may be necessary to call some one acquainted with the circumstances to state that on reading the libel he understood it to refer to the prosecutor. The magistrate must decide for himself whether the written matter before him is in point of law a libel. Unless it is clearly no libel he will, after proof of publication by the defendant, or some agent or servant on his behalf (see *ante*, pp. 362, 385) commit the defendant for trial. But, before doing so, he must ask the defendant whether he desires to call any witnesses. (30 & 31 Vict. c. 35, s. 3, Russell Gurney's Act.) The defendant may then call witnesses to prove that he did not publish the libel, that it is a fair and *bonâ fide* comment on a matter of public interest, that it does not refer to prosecutor, etc.

But he may not (unless the information charges him with an offence under s. 4 of Lord Campbell's Act) give any evidence before the magistrate of the truth of the matters charged in the libel. "The duty and province of the magistrate before whom a person is brought, with a view to his being committed for trial or held to bail, is to determine, on hearing the evidence for the prosecution and that for the defence, if there be any, whether the case is one in which the accused ought to be put upon his trial. It is no part of his province to try the case. That being so, in my opinion, unless there is some further statutory duty imposed on the magistrate, the evidence before him must be confined to the question whether the case is such as ought to be sent for trial, and if he exceeds the limits of that inquiry, he transcends the bounds of his jurisdiction. This case was one of a charge of libel, and the magistrate had to inquire, first, whether the matter complained of was libellous, and, secondly, whether the publication of it was brought home to the accused, so far as that there ought to be a committal. Independently of statute, the magistrate could not receive evidence of the truth of the libel. The question then arises whether Lord Campbell's Act enables him to do so. In my opinion it does not, because by the provisions of the Act the defence founded upon the truth of the libel does not arrive at that stage, and cannot be put forward before the magistrate.

Suppose the defendant had succeeded fully and entirely in showing the truth of the libel. What then would have been the duty of the magistrate? He would nevertheless have been bound to send the case for trial, because by the statute the truth of the libel does not constitute a defence until the statutory conditions are complied with, and they cannot be complied with at that stage of the inquiry." (*Per* Cockburn, C.J., in *R.* v. *Sir Robert Carden* (Labouchere's case), 5 Q. B. D. 6, 7; 49 L. J. M. C. 1; 28 W. R. 133; 41 L. T. 504; 14 Cox, C. C. 359.) But when the defendant is charged before the magistrate with an offence under the 4th section of Lord Campbell's Act, that is, with maliciously publishing a defamatory libel *knowing the same to be false*, there it is open to the defendant to call evidence of the truth of the libel, so as, if possible, to reduce the charge to the minor offence. (*Ex parte Ellissen* (not reported), approved by Lush, J. in *R.* v. *Carden*, 5 Q. B. D. 11, 13.)

Since the decision in *R.* v. *Carden*, it has been ruled at the Mansion House that a defendant might not cross-examine his prosecutor "to credit," if the questions asked would also tend to show the truth of the libel. An adjournment for a fortnight was granted by Sir Thomas Owden to enable the defendant to apply for a *mandamus*, but no such application was ever made. (*R.* v. *Cripps*, *Times* for November 4th and 18th, 1880.)

The defendant may himself in every case make a statement before the magistrates, but it is more prudent for him to say nothing, except in cases where he has himself seen or heard something justifying the libel.

If the accused does not appear in answer to the summons, the magistrate may, on proof of due service, go into the case in his absence, but he more usually issues a warrant for the apprehension of the defendant. (11 & 12 Vict. c. 42, ss. 1, 9.)

If the magistrate decide to send the case for trial, the defendant is entitled to be bailed. Reasonable, but not excessive, bail should be demanded, and it is for the justices to determine whether the sureties offered are sufficient. If no sufficient bail can be found, the accused must be committed to prison, but if sufficient sureties come forward, the magistrates have no discretion but to allow the defendant to be at large on bail.

In the case of an obscene libel, the prisoner may be committed for trial to the Quarter Sessions; in every other case he must be sent to the Assizes or Central Criminal Court. (5 & 6 Vict. c. 38, s. 1.)

Cases of libel are never disposed of summarily by the magistrate or justices in petty sessions. It is true that there is authority for holding that in some trifling cases of libel the justices have the power to demand sureties of good behaviour from the libeller, instead of committing him for trial; and may themselves, in default of such sureties, commit him to gaol. (*Haylock* v. *Sparke*, 1 E. & B. 471; 22 L. J. M. C. 67, overruling the *dictum* of Lord Camden in *R.* v. *Wilkes*, 2 Wils. 151; 4 Burr. 2527.) But such power is never exercised, and never should be, for it is clearly a violation of the principle of Fox's Libel Act, that libel or no libel is a question for the jury.

As to the powers of magistrates, &c., in the case of obscene books and prints, see *ante*, p. 405, c. XV. In the case of a seditious libel, there is no power to issue a search warrant to seize the author's papers. (*Leach's case*, 11 St. Tr. 307; 19 Howell's St. Tr. 1002; *Entick* v. *Carrington and others*, 11 St. Tr. 317; 19 Howell's St. Tr. 1029.)

Indictment.

Counsel must next be instructed to draft the indictment. This requires great care; as the old rules of pleading apply in all their strictness. The words must be set out *verbatim*, however great their length. (*R.* v. *Bradlaugh and Besant* (C.A.), 3 Q. B. D. 607; 48 L. J. M. C. 5; 26 W. R. 410; 38 L. T. 118.) Any material variation between the words as laid in the indictment and the words proved at the trial will still be fatal, in spite of the powers of amendment given by the 14 & 15 Vict. c. 100, s. 1.

If the words are in a foreign language they must be set out in the original, and a correct translation added. (*Zenobio* v. *Axtell*, 6 T. R. 162; 3 M. & S. 116; *R.* v. *Goldstein*, 3 Brod. & B. 201; 7 Moore, 1; 10 Price, 88; R. & R. C. C. 473.) The indictment must expressly charge the defendant with "publishing;" as merely writing a libel is no crime. (*R.* v. *Burdett*, 4 B. & Ald. 95.) It must also declare that the libel was written and published "of and concerning" the prosecutor. The

omission of those words was held fatal in *R.* v. *Marsden*, 4 M. & S. 164. But if it sufficiently appears from other allegations in the indictment to whom the libel refers, it will be held good. (*Gregory* v. *The Queen*, 15 Q. B. 957; 15 Jur. 74; 5 Cox, C. C. 247.) The indictment must also aver all facts necessary to explain the meaning of the libel and to connect it with the person defamed: for s. 61 of the Common Law Procedure Act, 1852, applies only to pleadings in civil cases, so that in an indictment an innuendo still requires a prefatory averment to support it. Hence there is still considerable technicality in criminal pleading; although modern judges will never be quite so strict as their predecessors. (See *ante*, pp. 118, 9.) The innuendo can only explain and point the defamatory meaning of the words; it must not introduce new matter. The judgment of De Grey, C.J., in *R.* v. *Horne* (1777), Cowp. 682; 11 St. Tr. 264; 20 How. St. Tr. 651, "has universally been considered the best and most perfect exposition of the law on this subject." (*Per* Abbott, C.J., in *R.* v. *Burdett*, 4 B. & Ald. 316.) See further as to the office of the innuendo, *ante*, pp. 100—104. Extrinsic facts must be averred where without such averments the libel would appear innocent or unmeaning. (*R.* v. *Yates*, 12 Cox, C. C. 233.) But where the writing on the face of it imports a libel, no innuendo is necessary, nor any introductory averments. (*R.* v. *Tutchin* (1704), 14 How. St. Tr. 1095; 5 St. Tr. 527; 2 Lord Raym. 1061; 1 Salk. 50; 6 Mod. 268.)

In 1652, Rolle, C.J., laid it down "that in an indictment a thing must be expressed to be done *falso et malitiose*, because that is the usual form." (*Anon.* Style, 392.) But in *R.* v. *Burks*, 7 T. R. 4, the Court of King's Bench decided that in an information, at all events, it is unnecessary to allege that the libellous matter is false. Still it is safer to insert such an averment, "because that is the usual form."

In some few cases it is necessary to aver a special intent. Thus where a letter is sent direct to the prosecutor, and published to no one else, an intention to provoke the prosecutor and to excite him to a breach of the peace must be alleged. An allegation that it was sent with intent to injure, prejudice, and aggrieve him in his profession and reputation cannot, in such a case, be supported. (*Per* Abbott, J., in *R.* v. *Wegener*, 2 Stark. 245.) So where a letter containing a libel on a married man

is sent to his wife "it ought to be alleged as sent with intent to disturb the domestic harmony of the parties," *ib.* So in the case of a libel on a person deceased, an intent should be alleged to bring contempt and scandal on his family and relations and to provoke them to a breach of the peace. (*R.* v. *Topham*, 4 T. R. 126, *ante*, p. 376.)

There is no objection to joining several counts, each for a separate libel, in the same indictment. (*Per* Lord Ellenborough, in *R.* v. *Jones*, 2 Camp. 132.)

All who are in any way concerned in the composition or publication of a libel may be joined in the same indictment. For by the 24 & 25 Vict. c. 94, s. 8, "whosoever shall aid, abet, counsel or procure the commission of any misdemeanour, whether indictable at common law, or by virtue of any statute, may be tried, indicted, and punished as a principal offender."

Pleading to the Indictment.

When a true bill has been found by the grand jury the defendant is arraigned, the substance of the indictment is read over to him, and he is then called on to plead. At common law he might:—

(1) Plead guilty;

(2) Plead to the jurisdiction of the Court;

(3) Plead specially in bar:—

(*a*) Autrefois acquit;

(*b*) Autrefois convict;

(*c*) Pardon;

(4) Demur to the indictment;

(5) Plead the general issue—Not Guilty.

By virtue of 6 & 7 Vict. c. 96, s. 6, he may now also—

(6) Plead a justification that the words are true and that it was for the public benefit that they should be published; see *ante*, p. 388. This plea may be pleaded with Not Guilty; it must be entered and filed at the Crown Office or with the Clerk of Assize, and a copy delivered to the prosecutor.

(7) If the prisoner stands mute of malice, or does not answer directly to the charge, a plea of Not Guilty shall be entered for him, and the trial shall proceed as though he had actually pleaded the same. (7 & 8 Geo. IV. c. 28, s. 2.)

There is now but little use in demurring to an indict-

ment, except where the words are clearly not libellous in themselves, and are not reasonably susceptible of the meaning ascribed to them by the innuendo. In such a case it might be well to put an end to the case as quickly as possible. But if the demurrer be for a mere formal defect, the Court has power to amend, after the demurrer, either an information (*R.* v. *Wilkes*, 4 Burr. 2568; *R.* v. *Holland*, 4 T. R. 457), or now even an indictment (14 & 15 Vict. c. 100, ss. 1, 2, 3, 25). If, on the other hand, the defect is one of substance, it will not be waived by pleading over, nor will it be cured by verdict; but the defendant may still bring error, or move in arrest of judgment after conviction. (See 14 & 15 Vict. c. 100, s. 25.) Moreover there is this danger in demurring, that the defendant may not demur and plead Not Guilty at the same time (*R.* v. *Odgers*, 2 Moo. & Rob. 479): hence, in strict law, if he fail on his demurrer, final judgment will be entered for the Crown on the whole case. (*R.* v. *Taylor*, 3 B. & C. 509, 515; 5 D. & R. 422.) But the Court has power to permit the defendant afterwards to plead over, and in these more merciful days, will generally exercise that power. (*R.* v. *Birmingham & Gloucester Railway Co.*, 3 Q. B. 223, 233; 10 L. J. (M. C.) 136.)

The plea of Not Guilty puts the prosecutor to proof of every material allegation in the indictment. The defendant may show under this plea that the libel was a fair and *bonâ fide* comment on a matter of public interest, that the occasion of publication was privileged, and may indeed raise every other defence permitted him by law, except that the libel is true.

It is only in the case of a defamatory libel on a private individual that the defendant may justify under Lord Campbell's Act. And he does so at his peril: for placing such a plea on the record will be deemed an aggravation of his offence, should he fail to prove it. By the express words of Lord Campbell's Act, a plea of justification under s. 6 shall be pleaded "in the manner now required in pleading a justification to an action for defamation," as to which see *ante*, pp. 170, 485. But in spite of these words there is no power in any Court to order particulars of such a plea to an indictment or information. If sufficient details be not given in the plea, the only course is for the prosecutor to demur. (*R.* v. *Hoggan*, *Times*, for Nov. 4th, 1880.) To such a plea the prosecutor may

reply generally, denying the whole thereof. (See precedents of such plea and replication in Appendix A., Nos. 70, 71.)

The other pleas mentioned above are now of rare occurrence. For a plea to the jurisdiction of the Court in a criminal case of libel, and a demurrer thereto; see *R.* v. *Hon. Robert Johnson*, 6 East, 583; 2 Smith, 591; 29 How. St. Tr. 103.

Certiorari.

An application is frequently made to the Queen's Bench Division for a writ of *certiorari* to bring up an indictment for libel from an inferior Court that it may be tried in a Superior Court. The application is frequently made before the indictment is found by the grand jury, the Court being asked to remove "any indictment which may be found." It must of course be made before verdict. In no other way can the Court change the venue in a criminal case. (*R.* v. *Casey*, 13 Cox, C. C. 614.) The advantages obtained by the removal are, amongst others, that in the Queen's Bench Division a special jury can be secured, and that the defendant can move the Court for a new trial, if convicted.

Where the application is made by the Attorney-General officially, the writ issues as a matter of course. (*R.* v. *Thomas*, 4 M. & S. 442.) But where a private individual applies for the writ, whether prosecutor or defendant, he will have to file affidavits showing some special ground for the removal, arising out of the circumstances of the particular case; and he must also enter into recognizances to pay all costs incurred subsequent to the removal, if he be ultimately unsuccessful. (16 & 17 Vict. c. 30, ss. 4, 5.) The application may in vacation be made to a judge at chambers. (5 & 6 Wm. & Mary, c. 11, s. 3.)

One of several defendants may obtain the writ: if he does, this will remove the indictment as to all. (*R.* v. *Boxall*, 4 A. & E. 513.) But the judge who grants the *certiorari* will require the defendant who applies for it to give security for the costs of the prosecution occasioned by the removal, in the event of any one of the defendants being convicted. (*R.* v. *Jewell*, 7 E. & B. 140; 26 L. J. Q. B. 177; *R.* v. *Foulkes*, 1 L. M. & P. 720; 20 L. J. (M. C.) 196.)

The affidavits should be entitled "in the Queen's Bench Division" simply. The mere fact that the defendant desires a special jury is not alone a sufficient ground for removal. (*R.*

v. *Morton*, 1 Dowl. N. S. 543.) Nor is it enough to show on affidavit that difficult questions of law may arise (*R.* v. *Joule*, 5 A. & E. 539), especially if the indictment be in the Central Criminal Court. (*R.* v. *Templar*, 1 Nev. & P. 91.) But if it can be proved that a fair and impartial trial of the case cannot be had in the Court below the application will be readily granted. (*R.* v. *Hunt and others*, 3 B. & Ald. 444; *R.* v. *Palmer*, 5 E. & B. 1024.)

Formerly in cases of misdemeanour the Court made the rule absolute in the first instance. (*R.* v. *Spencer*, 8 Dowl. 127; *R.* v. *Chipping Sodbury*, 3 N. & M. 104.) But now in all cases a rule *nisi* only is granted, unless there be great urgency. If a rule *nisi* for such a writ be obtained, the Court below will, as of course, order the trial to stand over till the rule can be argued. If the rule be made absolute, either prosecutor or defendant can apply for a special jury. (6 Geo. IV. c. 50, s. 30.) After the removal the defendant must appear in the Queen's Bench Division; and plead or demur to the indictment within four days, if not immediately; but the Court will grant him further time on good cause shown. (60 Geo. III. and 1 Geo. IV. c. 4, ss. 1, 2.)

The trial may take place, either at bar in the Queen's Bench Division at Westminster, or at the Assizes on the civil side, or at the Central Criminal Court. (19 & 20 Vict. c. 16, s. 1.) A successful prosecutor will be entitled to his costs, whether he be "the party grieved or injured" by the defendant's words or not. (*R.* v. *Oastler*, L. R. 9 Q. B. 132; 43 L. J. Q. B. 42; 22 W. R. 490; 29 L. T. 830; overruling *R.* v. *Dewhurst*, 5 B. & Ad. 405.) The costs will be taxed under a side-bar rule; and if they are not paid within ten days the recognizance will be estreated, and the sureties compelled to pay. (16 & 17 Vict. c. 30, s. 6.) The sureties may then sue the defendant and recover the amount for which they became bail in an action for money paid at the defendant's request. (*Jones* v. *Orchard*, 16 C. B. 614; 24 L. J. C. P. 229; 3 W. R. 554.)

A writ of *certiorari* may also be applied for to bring up an indictment in order that its validity may be considered and determined, and that it may be quashed, if proved invalid. Such an application must be made after the bill is found and

before judgment has been given thereon, for after judgment has been given, the record can only be removed by writ of error. (*R.* v. *Seton*, 7 T. R. 373; *In re Pratt*, 7 A. & E. 27; *R.* v. *Unwin*, 7 Dowl. 578; *R.* v. *Christian*, 12 L. J. (M. C.) 26; *R.* v. *Wilson*, 14 L. J. (M. C.) 3.) The Court below has full power to hear a motion in arrest of judgment.

Evidence for the Prosecution.

When the case comes on for trial, the *onus* lies on the prosecutor to prove:—

(1.) That the defendant published the defamatory words. As to what is a sufficient publication in law, see *ante*, c. VI. pp. 150—168. As to constructive publication by the act of the defendant's servant or agent, see *ante*, pp. 360—365.

(2.) That he published it in the county named as venue in the indictment.

(3.) That the matter so published by the defendant is a libel. Where the words are not libellous on the face of them, this involves proof of the innuendoes and other prefatory averments, see *ante*, p. 575.

(4.) In a few cases the prosecution must also prove a special intent, see *ante*, p. 376. But malice need never be proved, unless the occasion be privileged.

(5.) If the indictment be framed under s. 4 of Lord Campbell's Act, the prosecutor must give some evidence that the defendant *knew* that the words were false. But in no other case need the prosecutor give any evidence to show that the libel is false.

(1.) The proof of publication in criminal cases is precisely the same as in civil cases, save that it is not essential to prove a publication to a third person, where the indictment alleges an intent to provoke a breach of the peace. (*R.* v. *Wegener*, 2 Stark. 245; *Phillips* v. *Jansen*, 2 Esp. 624; *Clutterbuck* v. *Chaffers*, 1 Stark. 471.) Section 27 of the Common Law Procedure Act, 1854, *ante*, p. 533, as to comparison of handwriting, which was originally confined to civil proceedings (s. 103) now applies to criminal trials as well—28 & 29 Vict. c. 18, s. 8. (See also *R.* v. *Beare*, 1 Lord Raym. 414; 12 Mod. 221; 2 Salk. 417; Carth. 409; Holt, 422; *R.* v. *Slaney*, 5 C. & P.

213.) Whoever requests or procures another to write or publish a libel will be held equally guilty with the actual publisher. (*R.* v. *Cooper*, 8 Q. B. 533; 15 L. J. Q. B. 206.)

(2.) It is, however, necessary to further prove in a criminal case that the prisoner published the libel in the county in which the venue is laid. However, if the defendant write a libellous letter and cause it to be posted, that letter is published both in the county where it is posted, and in the county to which it is addressed. (*R.* v. *Burdett*, 4 B. & Ald. 95; *R.* v. *Girdwood*, 1 Leach, 169; East P. C. 1120, 5.) If the person to whom it is addressed be not then at the address given on the envelope, and the letter be forwarded unopened to him at his lodgings in Middlesex, and there opened, then this is a publication by the defendant in Middlesex. (*R.* v. *Watson*, 1 Camp. 215.) The post-mark is sufficient *primâ facie* evidence that the letter was in the post-office named on the date of the mark. (*R.* v. *Plumer*, Russ. & Ry. 264; *R.* v. *Canning*, 19 St. Tr. 370; *R.* v. *Hon. Robert Johnson*, 7 East, 65; 3 Smith, 94; 29 How. St. Tr. 103; *Stocken* v. *Collin*, 7 M. & W. 515; 10 L. J. Ex. 227.) These cases must be taken to overrule the *dictum* of Lord Ellenborough in *R.* v. *Watson*, 1 Camp. 215. An admission by the defendant that he wrote the libel is no admission that he published it, still less that he published it in any particular county. (*The Seven Bishops' Case*, 4 St. Tr. 304; *R.* v. *Burdett*, 4 B. & Ald. 95.)

(3.) The prosecutor must now put in the libel and have it read to the jury. The libel itself must, if possible, be produced at the trial. If it be in the possession of the defendant, and notice has been given to him to produce it, then if he refuses so to do, secondary evidence may be given of its contents. (*Attorney-General* v. *Le Merchant*, 2 T. R. 201, n.) Notice to produce must be given a reasonable time before the trial. No general rule can be laid down as to what is a reasonable time; each case must be governed by its particular circumstances; but if it appear that since the notice was given there was an opportunity of fetching the document, the notice will be held sufficient. (*Per* Bramwell, B., in *R.* v. *Barker*, 1 F. & F. 326.) Any other documents which explain the libel, and are referred to in it, may also be put in and read. (*R.* v. *Slaney*, 5 C. & P. 213.)

Any variance between the words as proved and the words as

laid will be fatal, if it in any way affects the sense. But a variance which is immaterial to the merits of the case may be amended by the judge at the trial, if he thinks that such amendment cannot prejudice the defendant in his defence on the merits. (7 Geo. IV. c. 64, s. 20; 14 & 15 Vict. c. 100, ss. 1, 24, 25.)

The prosecution must further prove the innuendoes and all explanatory averments of extrinsic facts, whenever such proof is necessary to bring out the libellous nature of the publication, or to point its application to the person defamed. That asterisks or blanks are left where the name of the person defamed should appear is no defence, if those who knew the circumstances understood the libel to refer to the prosecutor. Any declarations of the defendant as to what he meant are admissible in evidence against him. (*R.* v. *Tucker*, Ry. & Moo. 134.) Strict proof must be given of all material and necessary allegations in the indictment, which the libel itself does not admit to be true. (*R.* v. *Sutton*, 4 M. & S. 548; *R.* v. *Holt*, 5 T. R. 436; *R.* v. *Martin*, 2 Camp. 100; *R.* v. *Budd*, 5 Esp. 230.)

It will then be for the jury, after considering this evidence, to say whether the publication, when taken as a whole, is or is not a libel.

Evidence for the Defence.

The defendant may call evidence rebutting the case for the prosecution, *e.g.*, he may dispute the fact of publication, or negative the innuendo, or show that the libel referred to some one else, not the prosecutor. He may give in evidence any facts which put a different complexion on the libel, *e.g.*, other passages contained in the same publication, fairly connected with the same subject. (*R.* v. *Lambert and Perry*, 2 Camp. 398; 31 How. St. Tr. 340.) So, too, the defendant may give evidence of any collateral facts which show that the libel complained of is a fair and *bonâ fide* comment on a matter of public interest, or is privileged by reason of the occasion on which it was published. Unless such privilege be absolute, the prosecutor may rebut this defence by evidence of express malice, precisely as in civil cases, *ante*, c. IX., pp. 264—288.

The defendant may also cross-examine the plaintiff's witnesses as to any previous statements made by them on the subject-

matter of the indictment, and if such statements were reduced into writing, such writing may be produced to contradict them. (28 & 29 Vict. c. 18, ss. 4 & 5.) As to proving a previous conviction of a witness, see *ante*, p. 546.

The defendant may call evidence to show that though he published the libel with his own hand, he was not at the time conscious of its contents. The *onus* of proving this lies on the defendant; the bare delivery of the letter, though sealed, being *primâ facie* evidence of a knowledge of its contents. (*R.* v. *Girdwood*, 1 Leach, 169; East P. C. 1120, 5.) But if the defendant can prove that he cannot read, or that he never had any opportunity of reading the libel, but delivered it pursuant to orders, having no reason to suppose its contents illegal, this will be a defence. (See *ante*, pp. 384, 7.)

Again, where evidence has been given which has established a *primâ facie* case of publication against the defendant by the act of some other person acting by his authority, the defendant may prove that such publication was made without his authority, consent, or knowledge, and arose from no want of due care or caution on his part. (6 & 7 Vict. c. 96, s. 7.) But it seems that no defendant has ever succeeded in proving such a defence. (See *R.* v. *Holbrook and others*, 3 Q. B. D. 60; 47 L. J. Q. B. 35; 26 W. R. 144; 37 L. T. 530; 13 Cox, C. C. 650; 4 Q. B. D. 42; 48 L. J. Q. B. 113; 27 W. R. 313; 39 L. T. 536; 14 Cox, C. C. 185, *ante*, pp. 364, 5.)

Also, if the defendant has pleaded a plea under Lord Campbell's Act, but not otherwise, he may give evidence of the truth of the libel. But the truth alone is no defence, unless the defendant can also show that it was for the public benefit that the matters charged should be published. No such plea can be pleaded in the case of a blasphemous, obscene, or seditious libel. (*R.* v. *Duffy*, 9 Ir. L. R. 329; 2 Cox, C. C. 45.) If a general charge be made in the libel, specific instances must be set out in the plea. It will be sufficient, however, if at the trial two distinct instances are proved to the satisfaction of the jury. (*R* v. *Labouchere* (*Lambri's case*), 14 Cox, C. C. 419.)

Evidence that the identical charges contained in the libel which is the subject of the indictment had, before the time of composing and publishing such libel, appeared in another publication which was brought to the prosecutor's knowledge,

and against the publisher of which he took no legal proceedings, is not admissible either at common law or under this section. (*R.* v. *Holt*, 5 T. R. 436; *R.* v. *Newman*, Dears. C. C. 85; 3 C. & K. 252; 1 E. & B. 268; 22 L. J. Q. B. 156; 17 Jur. 617.) Where the libel contains several charges, and the defendant fails to prove the truth of any one of such charges, the jury must of necessity find a verdict for the Crown; and the Court, in giving judgment, is bound to consider whether the guilt of the defendant is aggravated or mitigated by the plea, and by the evidence given to prove or disprove it, and to form its own conclusion on the whole case. (*R.* v. *Newman*, 1 E. & B. 558; 22 L. J. Q. B. 156.)

If no such plea has been placed on the record, no evidence can be given of the truth of the defendant's words. But if evidence be admissible on other issues in the case, it will not be excluded merely because it tends to show the truth of the libel. (*R.* v. *Grant and others*, 5 B. & Adol. 1081; 3 N. & M. 106.)

The defendant may also, as in other criminal cases, call evidence of his good character: but such evidence would be of very little use, except, perhaps, in cases of mistaken identity. Evidence in mitigation of punishment is not generally called before verdict; but affidavits may be filed for that purpose after the trial. That rumours to the same effect had previously been circulated in other newspapers is no justification for the defendant's repeating the statement in his own paper, especially if he purports to speak from authority. (*R.* v. *Harvey and Chapman*, 2 B. & C. 257.) So, too, it is no defence to a charge of publishing a seditious libel, that it is an extract from an American paper, reprinted as foreign news, especially if such seditious extracts be habitually published by the defendant, at a time of great political excitement, without one word of warning or one note of disapproval. (*R.* v. *Pigott*, 11 Cox, C. C. 46.) Some of the judges permit the prisoner, although defended by counsel, to make a statement to the jury before his counsel addresses them. When this is done, however, it would appear that the counsel for the prosecution can claim the right to reply generally, after the counsel for the prisoner has concluded his speech. (*Per* Field, J., in *R.* v. *Eyre* (Leeds Assizes), *Times*, Nov. 6th, 1880.)

Summing up and Verdict.

The judge at the conclusion of the case sums up the evidence to the jury, and directs the jury as to the law. Before Fox's Libel Act, it had come to be the rule that the judge, not the jury, should decide whether or no the publication was a libel. The judge would direct the jury to find the defendant guilty on proof of the publication, of the innuendoes, and of the other necessary averments. (See *R.* v. *Woodfall*, 5 Burr. 2661; *R.* v. *Shipley* (*Dean of St. Asaph*), 21 St. Tr. 1043; 3 T. R. 428 n.; 4 Dougl. 73; *R.* v. *Withers*, 3 T. R. 428.) But that Act (32 Geo. III. c. 60, s. 1), declares and enacts that on the trial of an indictment or information for libel the jury may give a general verdict of guilty or not guilty upon the whole matter put in issue before them. Or the jury may in their discretion find a special verdict as in other criminal cases (s. 3). The judge of course may still direct the jury on any point of law, stating his own opinion thereon if he think fit; but the question, libel or no libel, must ultimately be decided by the jury. Fitzgerald, J., thus addressed the jury in a case of seditious libel:—"You are the sole judges of the guilt or innocence of the defendant. The judges are here to give any help they can, but the jury are the judges of law and fact, and on them rests the whole responsibility. In this sense the jury are the true guardians of the liberty of the press." (*R.* v. *Sullivan*, 11 Cox, C. C. 52.) At the same time the jury should pay attention to the judge's statement of the law; and then take the alleged libel into their hands, and consider it carefully; not dwelling too much on isolated passages, but judging it fairly as a whole.

Proceedings after Verdict.

If at the trial the defendant was acquitted, no further proceedings can be taken; the verdict of the jury is conclusive in favour of the defendant. (*R.* v. *Cohen and Jacob*, 1 Stark. 516; *R.* v. *Mann*, 4 M. & S. 337.) If, however, the defendant was convicted, then, if the judge before whom the trial took place has reserved any point of law arising thereout for the consideration of the Court above, he may state a case in the

manner pointed out by the 11 & 12 Vict. c. 78, s. 2. This case will be argued in the Court for the consideration of Crown Cases Reserved, when the conviction will be either quashed or affirmed.

If no such point has been reserved, then the prisoner may move in arrest of judgment, as in a civil case under the old procedure, on the ground that the words as laid do not sufficiently appear to be libellous, or on some other ground appearing on the face of the record. Power to make this motion is expressly reserved by Fox's Libel Act, 32 Geo. III. c. 60, s. 4. The absence of any essential introductory averment or innuendo will be a good ground for arresting judgment. (*R.* v. *Shipley* (*Dean of St. Asaph*), 21 St. Tr. 1043; 3 T. R. 428 n.; 4 Dougl. 73; *R.* v. *Topham*, 4 T. R. 126.) But mere formal defects cannot now be taken advantage of in such a motion. (14 & 15 Vict. c. 100, s. 25.) And "it is a general rule of pleading at common law that where an averment which is necessary for the support of the pleadings is imperfectly stated, and the verdict on an issue involving that averment is found, if it appears to the Court, after verdict, that the verdict could not have been found on this issue without proof of this averment, then, after verdict, the defective averment which might have been bad on demurrer is cured by the verdict." (*Per* Blackburn, J., in *Heymann* v. *The Queen*, L. R. 8 Q. B. 105, 6; 21 W. R. 357; 28 L. T. 162; *per* Brett, L. J., in *R.* v. *Aspinall*, 2. Q. B. D. 57, 8; 46 L. J. M. C. 145; 25 W. R. 283; 36 L. T. 297. See also Serjeant Williams' note (1) to *Stennel* v. *Hogg*, 1 Wms. Saund. 228; *R.* v. *Goldsmith*, L. R. 2 C. C. R. 79; 42 L. J. M. C. 94; 21 W. R. 791; 28 L. T. 881.) In all other cases, however, every objection which could have been taken by demurrer before the jury were sworn may still be taken either upon motion in arrest of judgment or by writ of error. (*Per* Cockburn, C. J., 2 Q. B. D. 572; and *per* Bramwell, L. J., 3 Q. B. D. 624; *R.* v. *Larkin*, Dears. C. C. 365; 23 L. J. M. C. 125.) Hence if an indictment for publishing an obscene book does not set out the passage or passages of such book alleged to constitute the offence, but only refers to the book by its title, this defect is not cured by a verdict convicting the defendants, nor is it waived by the defendants' omitting to demur. (*Bradlaugh and Besant* v. *The Queen* (C. A.), 3 Q. B. D. 607; 48 L. J. M. C. 5; 26 W. R.

410; 38 L. T. 118; 14 Cox. C. C. 68, overruling *R.* v. *Bradlaugh and Besant*, 2 Q. B. D. 569; 46 L. J. M. C. 286.) Where, however, an indictment or information contains several counts, if any one of them be found good, the judgment will stand. (*R.* v. *Benfield and others*, 2 Burr. 985.)

A motion in arrest of judgment should be made before sentence. The judge at the trial may reserve the point for the consideration of the Court of Crown Cases Reserved. If the defendant omit to make such motion, still the Court will of itself arrest the judgment, if on a review of the case it be satisfied that the defendant has not been found guilty of any offence in law. (*Per cur.* in *R.* v. *Waddington*, 1 East, 146.) On a motion in arrest of judgment the Court has no power to amend the record. (*R.* v. *Larkin*, Dears. C. C. 365; 23 L. J. M. C. 125.) If the judgment be arrested, all the proceedings are set aside, and judgment of acquittal is given; but this will be no bar to a fresh indictment, for the defendant was never really in jeopardy under the defective indictment. (*Vaux's case*, 4 Rep. 45*a*.) So if the judgment against him be reversed on a writ of error, he can be again indicted for the same offence. (*R.* v. *Drury and others*, 3 C. & K. 190; 18 L. J. M. C. 189.)

The defendant may bring a writ of error, after conviction and sentence, on obtaining the *fiat* of the Attorney-General, which will be granted on a certificate signed by the prisoner's counsel whenever reasonable grounds are shown. That the same point has been raised by motion in arrest of judgment and decided against the prisoner is no bar to bringing error. (*Per* Mellor, J., in *R.* v. *Bradlaugh and Besant*, 2 Q. B. D. 574; 46 L. J. M. C. 286.) If the Attorney-General refuse to grant a *fiat*, the defendant has no remedy. (*Ex parte Newton*, 4 E. & B. 869; *Re Pigott*, 11 Cox, C. C. 311.) If the judgment below be reversed, the Court of Error now has power to pronounce the proper judgment (11 & 12 Vict. c. 78, s. 5).

When the indictment or information either originated in the Queen's Bench Division or has been removed thither by *certiorari*, the defendant may also move for a new trial, as in a civil case. The motion should be made within the first four days of the next term; though the time may be extended *ex gratiâ* in a proper case, if counsel apply for an extension of time within the four days. (*R.* v. *Holt*, 5 T. R. 436; *R.* v.

Newman, 1 E. & B. 270; 22 L. J. Q. B. 156; Dears. C. C. 85; 17 Jur. 617; 3 C. & K. 252.)

A new trial may be moved for on the ground that the prosecutor has omitted to give due notice of trial, or that the verdict has been contrary to evidence, or to the direction of the judge, or for the improper reception or rejection of evidence, or other mistake or misdirection of the judge, or for any gross misbehaviour of the jury among themselves, or for surprise, or for any other cause where it shall appear to the Court that a new trial will further the ends of justice. (*R.* v. *Whitehouse and Tench*, Dears. C. C. 1.)

The prisoner *must* be present in Court when a motion for a new trial is made and argued. (*R.* v. *Spragg and another*, 2 Burr. 929; *R.* v. *Caudwell*, 2 Den. C. C. 372 *n.*) The rule is generally argued therefore when the defendant is brought up for judgment. (*R.* v. *Hetherington*, 5 Jur. 529.)

Where the verdict is on the face of it imperfect, so that judgment cannot be given upon it, the Court will award a *venire de novo*, instead of granting a new trial, the error appearing on the face of the record. In such a case the first trial is a mistrial and is treated as a nullity, and the prisoner does not plead again. (*Per* Abbott, C.J., in *R.* v. *Fowler and Sexton*, 4 B. & Ald. 273, 276.) A *venire de novo* was awarded in *Woodfall's case*, 5 Burr. 2661, it being impossible to say what the jury meant by finding him "guilty of publishing *only*." (And see *Campbell and another* v. *The Queen*, 11 Q. B. 799; 17 L. J. M. C. 89.)

When a motion for a new trial is allowed, or a writ of *venire facias de novo* awarded, the parties stand precisely as they did before the first trial, and the whole of the facts are to be reheard.

Where a new trial is ordered of an indictment removed into the Queen's Bench Division by *certiorari*, at the instance of the defendant, the Court may, in its discretion, order that the costs shall abide the event of the new trial. (*R.* v. *Whitehouse and Tench*, Dears. C. C. 1.)

Sentence.

Sentence is seldom passed directly the verdict of Guilty is given, especially in the Queen's Bench Division. Formerly the defendant was kept in custody till sentenced; but now, unless the case be exceptional, he is allowed out on the same bail as before. In the interval, the defendant frequently files affidavits in mitigation of punishment, which the prosecutor may answer. Such affidavits may show that the defendant reasonably and *bonâ fide* believed in the truth of the charges made in the libel, but not that the libel is in fact true. (*R.* v. *Burdett*, 4 B. & Ald. 314; *R.* v. *Halpin*, 9 B. & C. 65; 4 M. & R. 8.) Or they may contain general evidence of good character. That the defendant voluntarily stopped the sale of the book complained of, as soon as proceedings were commenced (*R.* v. *Williams*, Lofft. 759), or any other circumstance showing provocation by the prosecutor, or an absence of malice in the defendant, may be set out on affidavit. But the defendant should be careful not to attack the character of the prosecutor, or his witnesses, or impugn the justice of the verdict, lest he thereby aggravate his original offence.

If, in the interval since the verdict, the defendant has republished the libel, or continued its sale, or been guilty of other misconduct, the prosecutor may file affidavits in aggravation of punishment. (See *R.* v. *Withers*, 3 T. R. 428.) As to the procedure when the prisoner is brought up for judgment, see *R.* v. *Bunts*, 2 T. R. 683. The judge in passing sentence will also consider whether the guilt of the defendant is aggravated or mitigated by any plea of justification which he may have placed on the record, and by the evidence given to prove or to disprove the same (6 & 7 Vict. c. 96, s. 6).

Where judgment has been suffered by default, both parties should state their case on affidavit. If there is any matter in the prosecutor's affidavit which the defendant could not be expected to have come prepared to answer, he will be allowed an opportunity of answering it on a future day. (*R.* v. *Archer*, 2 T. R. 203 n.; *R.* v. *Wilson*, 4 T. R. 487.)

As to the sentence that may be passed in the case of a defamatory libel at common law, see *ante*, p. 378; under the various

statutes, p. 379; in the case of a blasphemous libel, p. 394; an obscene libel, p. 404; a seditious libel, p. 412. If the prisoner be found guilty of publishing a blasphemous or seditious libel, all copies found in his possession may be seized and destroyed by an order of the Court, under 60 Geo. III. and 1 Geo. IV. c. 8, ss. 1, 2.

Costs.

In the case of an indictment or information by a private prosecutor for the publication of a defamatory libel, if judgment shall be given for the defendant, he shall be entitled to recover his costs from the prosecutor. (6 & 7 Vict. c. 96, s. 8.) Such costs must first be taxed by the proper officer of the Court before which the said indictment or information is tried; and his taxation cannot be reviewed by the Queen's Bench Division. (*R.* v. *Newhouse*, 1 L. & M. 129; 22 L. J. Q. B. 127.) In the case of an information, the record being in the Queen's Bench Division, execution may issue on taxation in the ordinary way. (*R.* v. *Latimer*, 15 Q. B. 1077; 20 L. J. Q. B. 129; 15 Jur. 314.) But in the case of an indictment not in the Queen's Bench Division, there is no way of issuing execution for such costs; they must be recovered therefore by an ordinary action at law. (*Richardson* v. *Willis*, L. R. 8 Ex. 69; 42 L. J. Ex. 15, 68; 27 L. T. 828; 12 Cox, C. C. 298, 351.)

So if a defendant pleads, and fails to prove, a justification, the prosecutor may recover from the defendant the costs he has sustained by reason of such plea, whatever be the result of any other issues. (6 & 7 Vict. c. 69, s. 8.)

But this section does not apply to Crown prosecutions, or to any proceedings for blasphemous, obscene, or seditious libels. And there is no provision enabling a prosecutor to recover the general costs of the prosecution. Sometimes, however, if a fine be imposed on the defendant as part of his sentence, the prosecutor may, by memorializing the Treasury, obtain a portion of the fine towards the payment of his costs.

Where an indictment is removed into the Queen's Bench Division by *certiorari*, the party applying for the writ (not being the Attorney-General) must give security for all subsequent costs.

Where a municipal corporation have directed a prosecution for a libel on one of their officers, the costs cannot be paid out

of any borough fund. (*R.* v. *Mayor, &c., of Liverpool*, 41 L. J. Q. B. 175; 20 W. R. 389; 26 L. T. 101.) Where the directors of a company have instituted a prosecution for libel, the costs should not be paid out of the assets of the company, though the directors will not, as a rule, be ordered to repay any costs already paid. (*Pickering* v. *Stephenson*, L. R. 14 Eq. 322; 41 L. J. Ch. 493; 20 W. R. 654; 26 L. T. 608.)

PART II.

PRACTICE AND EVIDENCE IN PROCEEDINGS BY WAY OF CRIMINAL INFORMATION.

Motion for the Rule.

The Clerk of the Crown may not file any information without express order of the Queen's Bench Division granted in open Court. (4 & 5 Wm. & Mary, c. 18, s. 1.) Counsel must move the Court upon proper affidavits for a rule *nisi* calling upon the defendant to show cause why an information should not be granted. The prosecutor must consent to waive his civil remedy by action, and must submit himself to the Court; and must be prepared to go through with the criminal proceedings to conviction. The affidavits on which the application is based should be carefully drawn up; as no second application may be made on amended or additional affidavits. (*R.* v. *Franceys*, 2 A. & E. 49.) They should in the first place prove the publication by the defendant. Mere *primâ facie* evidence of this will not be sufficient. (*R.* v. *Baldwin*, 8 A. & E. 168; *R.* v. *Willett*, 6 T. R. 294.) There must be before the Court legal evidence sufficient to justify a grand jury in returning a true bill for the same offence. Thus in *R.* v. *Stanger*, L. R. 6 Q. B. 352; 40 L. J. Q. B. 96; 19 W. R. 640; 24 L. T. 266, the affidavits merely showed that the annexed copy of the *Newcastle Daily Chronicle*, the newspaper containing the libel, had been purchased from a salesman in the office of that paper, and that in a footnote at the end of that copy the defendant was stated

to be the printer and publisher of the newspaper, and the relator believed him so to be. Held that this was no legal evidence of publication, and the rule was discharged. If the defendant keeps an office or shop at which copies of the paper can be purchased, then an affidavit by a person who purchased a copy of the libel at such office or shop will be the best evidence of a publication by the defendant, and also that most easily obtainable. That the purchase was made expressly for the purpose of enabling such affidavit to be sworn is no objection. (*Duke of Brunswick* v. *Harmer*, 14 Q. B. 189; 19 L. J. Q. B. 20; 14 Jur. 110; 3 C. & K. 10.)

It is a doubtful point whether the omission of such strict proof of publication can subsequently be supplied by the admissions, if any, in the defendant's affidavits filed to show cause against the rule. The Courts have generally refused to look at defendant's affidavits to supply a defect in those of the prosecutor. (*R.* v. *Baldwin*, 8 A. & E. 169.) For the rule is that the prosecutor can at the argument refer to no document which does not appear on the face of the rule itself to have been read at the first application. (*R.* v. *Woolmer and another*, 12 A. & E. 422.) But Lord Kenyon, in *R.* v. *Mein*, 3 T. R. 597, and Blackburn, J., in *R.* v. *Stanger*, L. R. 6 Q. B. 355; 40 L. J. Q. B. 96; 19 W. R. 640; 24 L. T. 266, expressed an opinion that the Court might look at any evidence lawfully before them for any purpose they pleased.

The prosecutor must also swear to his innocence in all particulars of the charge contained in the libel. (*R.* v. *Webster*, 3 T. R. 388.) For although at the trial of the information when granted truth will be no defence, except under Lord Campbell's Act, still it is "sufficient cause to prevent the interposition of the Court in this extraordinary manner;" the prosecutor must proceed by way of indictment in the ordinary course. (*R.* v. *Bickerton*, 1 Stra. 498.)

If there is no specific charge in the libel, no such affidavit is necessary (*R.* v. *Williams*, 5 B. & Ald. 595), and it has also been dispensed with in other special circumstances. But as a rule there must be a specific denial on oath of the particular charges, even where it is a duke that is aspersed. (*R.* v. *Haswell and Bate*, 1 Dougl. 387.) If a general charge be made and a specific instance alleged, the affidavit must expressly

negative not only the general charge, but also the specific instance. (*R.* v. *Aunger*, 12 Cox, C. C. 407.)

The affidavits should be sworn with *no* heading or title. The application must be made within two terms after the publication, or at all events within two terms after the libel came to the knowledge of the prosecutor. The prosecutor, too, must come to the Court in the first instance, and must not have attempted to obtain redress in other ways. (*R.* v. *Marshall*, 4 E. & B. 475, *ante*, p. 382.) The affidavits should not contain irrelevant or improper matter; if the prosecutor abuses the alleged libeller or shows an *animus* against him, the Court will very probably reject the application. (*R.* v. *Burn*, 7 A. & E. 190.)

The rule *nisi*, if granted, should be drawn up "Upon reading" the alleged libel and the affidavits and all other documents to which it is desired to refer on the argument of the rule. It should be personally served on the defendant.

Argument of the Rule.

The defendant now shows cause. He generally files affidavits in reply. It is open to him to maintain that the libel is true. (*R.* v. *Eve and Parlby*, 5 A. & E. 780; 1 N. & P. 229.) See *ante*, p. 592.

He may also, it seems, contend that the libel complained of did not apply to the relator. In a recent case the libel did not name the person alluded to; but described him "as a man of high descent, who has been regarded as a man not only of refined tastes and studious habits but as an artist of somewhat more than ordinary ability." The relator swore that he believed that the libel was intended to refer to himself. The Duke of Sutherland and others of his friends considered that it would be generally understood as applying to him; and a rule was granted. But upon the argument of the rule, the publisher and the author of the libel both swore positively that the relator was *not* the person referred to and that they were not in fact aware that he was either a man of refined tastes and studious habits, or an artist of somewhat more than ordinary ability. And the rule was therefore discharged. (*R.* v. *Barnard*, *Times* for Dec. 17th, 1878, and Jan.

13th, 1879.) This decision is perhaps to be regretted; as it opens a door by which a libeller may escape punishment, provided he is careful not to expressly name his victim in the first place, and not too scrupulous to swear a falsehood afterwards. The writer of a libel may richly deserve punishment although it may not be clear to whom he intended the libel to apply; and the Court in granting a criminal information regards the interests of public morality and order rather than those of the individual prosecutor.

If the rule be discharged on the merits the Court generally gives the defendant his costs. And no second application may be made to the Court, even upon additional affidavits (*R.* v. *Smithson*, 4 B. & Ad. 862); except in very peculiar circumstances, as where the only person who had made an affidavit on behalf of the defendant on the argument of the first rule had since been indicted or convicted of perjury in respect of such affidavit. (*R.* v. *Eve and Parlby*, 5 A. & E. 780; 1 N. & P. 229.) But though the prosecutor cannot apply a second time for a criminal information, he can still prefer an indictment in the ordinary way. (*Per* Lord Denman in *R.* v. *Cockshaw*, 2 N. & Man. 378.)

Compromise.

Frequently, however, the defendant files exculpatory affidavits, apologising to the prosecutor, withdrawing all imputations upon him, and entreating the mercy of the Court. When this happens, the prosecutor is generally quite satisfied; he has obtained all he desired: and by no means courts the expense and notoriety of a prolonged criminal trial. But the Court is by no means disposed on that account to allow the proceedings to drop, even at the request of the prosecutor; and in more than one recent case the Queen's Bench Division have compelled a reluctant prosecutor to take a rule in the interest of the public. Having invoked the aid of the criminal law, it is his duty not to abandon the proceedings merely because his own private purpose is attained. (See *R.* v. "*The World*," 13 Cox, C. C. 305.)

Trial and Costs.

If the rule be made absolute, the prosecutor must enter into a recognizance to effectually prosecute the information and abide by the order of the Court. The amount of the recognizance is fixed by statute (4 & 5 Wm. and M. c. 18, s. 1) at 20*l.*, and this amount cannot be increased. (*R.* v. *Brooke*, 2 T. R. 190).

The information must set out the libel, &c., with all the certainty and precision of an indictment. (See Precedents Nos. 57, 60, *post*, pp. 649, 651.) As soon as it is filed a *subpœna* issues of which a copy must be served on the defendant. The defendant must appear thereto within four days. If he does not he may be attached under a judge's warrant (48 Geo. III., c. 58, s. 1.) After appearance the defendant has ten days within which to plead. His plea is duly entered on the record which is then made up and sent down for trial to the county in which the libel was published, unless a trial at bar be demanded. The record may be amended by a judge at chambers after plea and before trial. (*R.* v. *Wilkes* (1764—1770) 4 Burr. 2527; 2 Wils. 151.) The trial of an information for libel in all respects resembles the trial of an indictment; save that in *ex officio* informations, the counsel for the Crown (whether the Attorney-General himself or any one appearing for him,) has the right to reply, although the defendant calls no witnesses. (*R.* v. *Horne*, 20 How. St. Tr. 660; 11 St. Tr. 264; Cowp. 672.) The trial must take place within one year after issue joined; and if not, or if the prosecutor enters a *nolle prosequi*, or if, at the trial, the verdict pass for the defendant, the defendant will be entitled to recover his costs from the prosecutor. The judge at the trial has no longer any power to deprive a successful defendant of his costs by certifying upon the record that there was a reasonable cause for exhibiting such information, except in an *ex officio* information. (4 & 5 Wm. and Mary, c. 18, s. 1, and 6 & 7 Vict. c. 96, s. 8; as explained in *R.* v. *Latimer*, 15 Q. B. 1077; 20 L. J. Q. B. 129; 15 Jur. 314.) The master of the Crown office taxes the costs under a side-bar rule; and he may allow costs incurred by the defendant previously to the filing of the information. (*R.* v. *Steel and others*, 1 Q. B. D. 482; 45 L. J. Q. B. 391; 24 W. R. 638; 34 L. T.

283; 13 Cox C. C. 159; (C. A.) 2 Q. B. D. 37; 46 L. J. M. C. 1; 25 W. R. 34; 35 L. T. 534.) On such taxation execution issues. There is no power, however, to condemn the defendant to pay the costs of the prosecution, if he be convicted or plead guilty, unless indeed he files a special plea of justification under Lord Campbell's Act, in which case he will have to pay the costs incurred by reason of that plea. (See 6 & 7 Vict. c. 96, s. 8, *post*, p. 674, Appendix C.)

APPENDICES.

APPENDIX A.

PRECEDENTS OF PLEADINGS.

CONTENTS.

I. Pleadings in Actions for Libel.

Libel contained in a character given to a domestic servant by her late employer.

1. Statement of Claim.
2. Statement of Defence. (Justification and Privilege.)

Libel on architects (partners) in the way of their profession.

3. Statement of Claim.

Libel on the editor of a newspaper.

4. Statement of Claim. (Injunction.)
5. Statement of Defence. (Justification and *Bonâ Fide* Comment.)
6. Reply and Demurrer.

Libel contained in a Memorial to the Home Secretary.

7. Statement of Claim.
8. Summons for Particulars.
9. Order for Particulars.
10. Particulars.
11. Statement of Defence. (Privilege.)
12. Reply.
13. Rejoinder.

Libel contained in a placard.

14. Statement of Claim.
15. Statement of Defence. (Privilege.)

Action against the Manager of a Bank for showing to a customer an anonymous libellous letter.

16. Statement of Claim. (Innuendoes.)
17. Statement of Defence. (Justification and Privilege.)

Action for publishing a libellous novel.

18. Statement of Defence.

Action against a newspaper proprietor.

19. Statement of Defence, on the ground that the alleged libel is fair and *bonâ fide* comment on a matter of public interest.
20. Statement of Defence, on the ground that the alleged libel is a fair and impartial report of a judicial proceeding.
21. Interrogatories administered to a newspaper proprietor.
22. Interrogatories administered to the editor of a newspaper.
23. Notice of intention to give evidence of an apology in mitigation of damages under Lord Campbell's Act.

II. Pleadings in Actions for Slander.

Words imputing a crime.

24. Statement of Claim. (Innuendo.)
25. Statement of Defence. (Charge made in Joke.)
26. Statement of Defence. (Justification.)

Words imputing a contagious disorder.

27. Statement of Claim.
28. Particulars.
29. Statement of Defence.

Words spoken in a foreign language.

30. Statement of Claim. (Translation.)

Words spoken of a medical man.

31. Statement of Claim. (Innuendoes.)

Slander of a clergyman.

32. Statement of Claim.

Slander of a parish clerk.

33. Statement of Claim.
34. Statement of Defence. (Apology and Payment into Court.)
35. Reply.

Slander of a trader in the way of his trade.

36. Statement of Claim.
37. Statement of Defence. (Justification.)

Slander of a builder in the way of his trade.

38. Statement of Claim.
39. Statement of Defence. (Justification and Privilege.)

III. Pleadings in Actions for Slander of Title.

Pleadings in the case of "The Western Counties Manure Co. *v.* The Lawes Chemical Manure Co."

40. Declaration.
41. Pleas.
42. Replication and Demurrer.
43. Joinder in Demurrer.
44. Plaintiffs' points upon the argument of the Demurrer.
45. Interrogatories.

Slander of title to goods.

46. Statement of Claim.
47. Statement of Defence.

Libel in the nature of slander of title.

48. Statement of Claim.
49. Statement of Defence.

IV. Forms of Pleadings, Notices, etc., in the County Court.

50. Statement of the Plaintiff's Cause of Action in a remitted action.
51. Notice of Trial of such remitted Action.
52. Affidavit for leave to administer Interrogatories.
53. Notice of Set-off and Counterclaim.
54. Notice of Special Defence.
55. Notice under Lord Campbell's Act, s. 1.
56. Notice under Lord Campbell's Act, s. 2.

V. Precedents of Criminal Pleadings.

57. Information for a libel on a private individual. (*R.* v. *Newman.*)
58. Pleas thereto.
59. Replication.
60. *Ex Officio* Information for a Seditious Libel. (*R.* v. *Horne.*)
61. Indictment for a Blasphemous Libel.
62. Indictment for an Obscene Libel.
63. Indictment for Seditious Words.
64. Indictment for Slanderous Words spoken to a Magistrate whilst in the execution of his duty.
65. Indictment for a libel on a private individual at common law.
66. Indictment under s. 4 of Lord Campbell's Act.
67. Indictment under s. 5 of Lord Campbell's Act.
68. Demurrer to an Indictment or Information.
69. Joinder in Demurrer.
70. Pleas to an Indictment.
71. Replication to the above Pleas.
72. Demurrer to a Plea.
73. Joinder in Demurrer.

I. PRECEDENTS OF PLEADINGS IN ACTIONS OF LIBEL.

No. 1.

Libel contained in a Character given to a Domestic Servant by her late Employer.

1880.—J.—No. 1973.

In the High Court of Justice,
Queen's Bench Division.
Writ issued Nov. 3rd, 1880.

Between Sarah Jones . . . . *Plaintiff,*
and
Henry Roberts
and Alice his wife . . . *Defendants.*

Statement of Claim,

Delivered on the 16th day of Nov., 1880, by M. & N. of ——, in the City of London, agents for ——, of Cheltenham, in the County of Gloucester, solicitor for the above-named plaintiff.

1. The plaintiff is a housemaid, formerly in the service of the defendants, and now residing at ——.

2. The male defendant is a gentleman, residing at —— Hall, near Evesham, in the county of Worcester; and the female defendant is his wife.

3. On the 15th day of September, 1880, the female defendant falsely and maliciously wrote and published of the plaintiff the words following, that is to say:—"While she (meaning thereby the plaintiff) was with us, she stole a quantity of our house-linen, and pawned it in the High Street." *

4. [Add a paragraph setting out special damage, if any exists].

And the plaintiff claims £200 damages, and proposes that this action be tried in the county of Gloucester.

* N.B.—No innuendo is necessary.

No. 2.

STATEMENT OF DEFENCE.

1. The defendants admit that the defendant Alice wrote and published the words set out in paragraph 3 of the Statement of Claim, but deny that she did so either falsely or maliciously.

2. The said words are true in substance and in fact. While the plaintiff was in the service of the defendants, to wit, on the 18th day of March, 1880, she stole two pair of sheets and one counterpane, of the goods and chattels of the defendant Henry, and pawned them at the shop of John ——, No. ——, High Street, Evesham. Wherefore the defendants, as they lawfully might, discharged the plaintiff from their service.

3. Subsequently the plaintiff was desirous of entering into the service of Mrs. M., of ——, in the county of Warwick; and the said Mrs. M. wrote a letter to the defendant Alice inquiring as to the plaintiff's character, and asking especially why she left the defendants' service.

4. Thereupon it became and was the duty of the defendant Alice to write to the said Mrs. M., telling her what she knew as to the plaintiff's character, and stating the reason of her dismissal. In accordance with such duty the defendant Alice wrote to Mrs. M. a letter containing the said words. Such words were simply an answer to Mrs. M.'s inquiries, and were written under a sense of duty and without malice, and in the *bonâ fide* belief that the charge therein made was true and not otherwise. Wherefore the defendants say that the said letter is privileged by reason of the occasion on which it was written.

REPLY.

The plaintiff joins issue with the defendants on their statement of defence.

No. 3.

Libel on Architects (partners) in the way of their profession. Botterill and another v. *Whytehead*, 41 L. T. 588, *ante*, p. 219.

STATEMENT OF CLAIM.

1. The plaintiffs are brothers carrying on the profession and business of architects in partnership at ——.

2. At or about the time of the writing and publishing of the libels hereinafter complained of, the plaintiffs were, as the defendant well knew, employed by a committee formed for the restoration of a church at South Skirlaugh, near Hull, to superintend and carry out the restoration of the said church, and were appointed by the said committee as architects for that purpose.

3. On the 8th April, 1878, after the appointment of the plaintiffs as such architects as aforesaid, the defendant by a letter written and sent to Mr. Bethel, a member of the said committee, falsely and maliciously wrote and published of the plaintiffs, in relation to their profession and business of architects, and the carrying on and conducting thereof by them, the words following, that is to say :—

"I see in the *Hull News* of Saturday that the restoration of Skirlaugh Church has fallen into the hands of an architect who is a Wesleyan, and can show no experience in church work. Can you not do something to avert the irreparable loss which must be caused if any of the masonry of this ancient gem of art be ignorantly tampered with. Your great influence would surely have much weight in the matter."

Meaning thereby that the plaintiffs were incompetent to superintend and carry out the restoration of the said church, and that, if the restoration were left in the hands of the plaintiffs, the old masonry of the church would be ignorantly tampered with, and would not be treated with proper spirit and feeling, and would suffer from their incompetence and want of skill.

4. On or about the 16th April, 1878, and after the appointment of the plaintiffs as such architects as aforesaid, the defendant, by a letter addressed to Mr. Barnes, the incumbent of Skirlaugh Church, falsely and maliciously wrote and published of the plaintiffs, in relation to their profession and business of architects, and the carrying thereon and conducting thereof by them the words following, that is to say :—

"I am annoyed to see that you and your committee have engaged Messrs. B. as architects for the restoration of your church. Are you aware that they are Wesleyans, and cannot have any religious acquaintance with such work ?"

Meaning thereby that the plaintiffs were incompetent to

undertake and superintend the restoration of the said church, and were unable to carry it out with adequate spirit and feeling.

5. By reason of the premises and the publication of the said libels, the plaintiffs have been and are injured in their said profession and business, and have suffered in their credit and reputation as architects.

No. 4.

Libel on the Editor of a Newspaper.

Leyman v. *Latimer and others*, 3 Ex. D. 15, 352; 47 L. J. Ex. 470; 25 W. R. 751; 26 W. R. 305; 37 L. T. 360, 819.

Statement of Claim.

1. The plaintiff resides at Dartmouth, in the County of Devon, and is the proprietor and editor of a newspaper published there, and called the *Dartmouth Advertiser*.

2. The defendants are, and at the time of the publications hereinafter mentioned were, the proprietors, printers, and publishers of a newspaper called the *Western Daily Mercury*, the head publishing office of which is at Plymouth, in the said county of Devon, and which also has branch publishing offices in Devonport, in the said county, and in the city of Exeter.

3. The defendants, or some or one of them, also edit and write for the said newspaper.

4. The defendants, in their said paper called the *Western Daily Mercury*, dated on the 24th day of April, 1876, wrote, printed, and published certain words, which words (omitting for the sake of brevity certain words appearing in the original at the places marked with asterisks) were as follows:—

"The narrative must be deferred till next week. * * * The history of the *Advertiser*, too, must stand over. * * * its present editor is a convicted felon. The case in which a certain John Leyman, printer, was sentenced to twelve months' hard labour for stealing feathers—a case of which Mr. Foster may have heard, since he is so familiar with the chief actor—will be reproduced."

5. The defendants, in their said newspaper called the

Western Daily Mercury, dated the 1st day of May, 1876, wrote, printed, and published certain words, which words (omitting for the sake of brevity certain words not personally relating to the plaintiff, and appearing in the original at the places marked with asterisks) were as follows :—

"There still remain to be recorded Mr. Foster's controversies with the Town Council of Dartmouth. * * * and the facts regarding his newspaper (meaning the plaintiff's said newspaper, the *Dartmouth Advertiser*), and its bankrupt and felon editors (meaning the plaintiff). The narrative must be deferred till next week. It is worth the telling."

6. The words set out in paragraphs 4 and 5 were written, printed, and published by the defendants of and concerning the plaintiff, and were so written, printed and published falsely and maliciously, and with a libellous and defamatory sense and meaning.

7. The said words so set forth in paragraphs 4 and 5 were also so falsely and maliciously written, printed, and published of and concerning the plaintiff in his business and calling of a printer and newspaper editor, and his said occupation as proprietor and editor of the said *Dartmouth Advertiser* newspaper.

8. In consequence of the publications set forth in the 4th and 5th paragraphs, the circulation of the plaintiff's said newspaper, the *Dartmouth Advertiser*, has already been greatly injured, and has much decreased, and will be still further injured and decreased. The plaintiff has also already experienced difficulty in getting supplied with news and obtaining persons to be his correspondents, and will experience still further difficulty in getting supplied with news and obtaining persons to correspond with him. In particular one Mr. Robt. D., of Churston Ferrers, in the county of Devon, and one Mr. Robt. H., of Totnes, also in the county of Devon, who both had respectively supplied the plaintiff and his said newspaper with news, and acted as correspondents to the plaintiff's said newspaper, in consequence of the said publications refused and declined any longer so to act. The value of the goodwill of the plaintiff's said newspaper has, in consequence of the matters hereinbefore appearing, become and is greatly lessened.

The plaintiff claims:

1. £1000 damages.

2. An injunction to restrain the defendants from similar publications in future.

3. Such further or other relief as the nature of the case may require.

No. 5.

STATEMENT OF DEFENCE.

1. The defendants do not admit that the plaintiff is the proprietor and editor of the *Dartmouth Advertiser* newspaper.

2. The defendants do not admit the allegations in paragraphs 6, 7, and 8 of the statement of claim.

3. The defendants deny that the word "bankrupt" in the quotation from their said newspaper, in the fifth paragraph of the statement of claim set out, was intended to, or did refer to, the plaintiff.

4. And the defendants further say that the plaintiff has been convicted of felony, and was sentenced to twelve months' hard labour for stealing feathers.

5. The words in the 4th and 5th paragraphs of the statement of claim complained of were, and are part of certain articles printed and published in the defendant's said newspaper, each of which articles was and is a fair and *bonâ fide* comment upon the conduct of the plaintiff in his public character and as the nominal editor and proprietor of the *Dartmouth Advertiser*, a public newspaper, and was printed and published by the defendants as and for such comment, and without any malicious motive or intent whatever.

No. 6.

REPLY AND DEMURRER.

1. The plaintiff joins issue upon the 1st, 2nd, and 5th paragraphs of the defendants' statement of defence.

2. As to the 3rd paragraph of the statement of defence, the plaintiff admits the allegations in such 3rd paragraph contained.

3. As to the 4th paragraph of the said statement of defence, the plaintiff (so that such admission be not in any way extended or taken to mean that he ever was, in fact, guilty of the offence referred to) admits the allegation contained in such 4th paragraph. But the plaintiff further says that he has never been convicted of felony save on that one occasion, which is the occasion mentioned in the said 4th paragraph of the statement of defence. On that occasion he was convicted of the supposed felony by a Court duly having jurisdiction in that behalf, the Court of Quarter Sessions for the county of Cornwall; and the said Court, having jurisdiction as aforesaid, in the exercise of such jurisdiction, adjudged that, as a punishment for the said supposed felony, the plaintiff should be imprisoned and kept to hard labour for twelve calendar months. The said conviction took place several years ago, and the plaintiff, as the defendants well knew, duly endured the punishment to which he was so adjudged as aforesaid, for the said supposed felony, and thereby became, and was, and has ever since been, and is, in the same situation as if a pardon under the Great Seal had been granted to him as to the said supposed felony whereof he was convicted as aforesaid.

4. The plaintiff demurs to the said 4th paragraph of the statement of defence, on the ground that, while the statement of defence admits the publication of the whole of the libels alleged in the statement of claim, and the said paragraph is pleaded to the whole of the said libels, and a part of the libel charges that the plaintiff is a convicted felon, nevertheless the said 4th paragraph contains nothing which justifies or is otherwise a defence to that portion of the said libel; and the plaintiff also demurs upon other grounds sufficient in law to sustain this demurrer.

Demurrer by the defendants to the 3rd paragraph of the plaintiff's reply.

No. 7.

Libel contained in a Memorial to the Home Secretary.

J. S. and M. his wife v. *G.*

STATEMENT OF CLAIM.

1. The plaintiffs reside at ——, in the County of Wilts, and the defendant at —— House in the adjoining parish.

2. In the month of ——, ——, the night dress of a child of the plaintiffs accidentally caught fire, and the child was so seriously injured that he shortly afterwards died, and upon an inquest being held to inquire into the cause of his death, a verdict of accidental death was returned by the coroner's jury.

3. The defendant thereupon falsely and maliciously wrote and published of and concerning the plaintiffs, and spoke and published of and concerning the plaintiffs the words following, that is to say: "Mrs. S." (meaning the plaintiff M.) "was in the habit of unmercifully beating the child; she would kick it on the floor, and would invite the other children to do the same. The child was fed with unwholesome and putrid food, jalap was administered in its food to induce diarrhœa, and cold boiled rhubarb was administered for the same purpose," meaning thereby that the plaintiffs had neglected to provide their said child with proper and wholesome food and nourishment as it was their duty to do, and had wilfully administered unwholesome food and drugs to their said child.

4. The defendant also falsely and maliciously wrote and published of and concerning the plaintiffs, and spoke and published of and concerning the plaintiffs the words following, that is to say: "The child" (meaning the plaintiffs' said child) "was also tied by the hands and feet and beaten with a cane which had a nail fastened in the end, and this nail was forced into the body of the child," and "the child was left uncared for and without food fastened to a bed in a garret whilst bleeding from chilblains," meaning thereby that the plaintiffs had treated and had been in the habit of treating their said child with great cruelty, brutality and harshness, and leaving him without food and seeking to compass his death.

5. The defendant also falsely and maliciously wrote and

published of and concerning the plaintiffs, and spoke and published of and concerning the plaintiffs the words following, that is to say: "It is impossible that the injuries the child" (meaning the plaintiffs' said child) "received, and which caused its death, could have been produced by the conflagration of a thin night dress (which was all the child had on)," meaning thereby that the plaintiffs had wilfully caused or contributed to the injuries their said child received and which caused its death, and had been guilty of manslaughter or worse.

6. By reason of the premises the plaintiffs have been greatly injured in their credit, reputation and character, and have been exposed to contempt and odium, and have suffered great pain and anguish of mind.

The plaintiffs claim £5000 damages.

The plaintiffs propose that this action shall be tried in the City of the County of the City of Bristol.

No. 8.

SUMMONS FOR PARTICULARS.

Queen's Bench Division.

S. and wife v. *G.*

Let the plaintiffs' solicitor or agent attend me, at my chambers at ——, to-morrow at 11 of the clock in the forenoon, to show cause why he should not deliver to the defendant's solicitor or agent an account in writing of the particulars, showing when, where, and to whom the alleged libels and slanders were written, spoken and published; and why, in the meantime, all further proceedings should not be stayed until the delivery thereof.

Dated the —— day of ——, 18—.

No. 9.

ORDER ON THE ABOVE SUMMONS.

Queen's Bench Division.

S. and wife v. *G.*

Upon hearing the solicitors or agents on both sides, I do order that the plaintiffs' solicitor or agent shall deliver to the

defendant's solicitor or agent an account in writing of the particulars showing when, where and to whom the alleged libels and slanders were written, spoken and published, and that unless such particulars be delivered in seven days all further proceedings in this cause be stayed until the delivery thereof.

Dated the 5th day of February, 1878.

G. P.

No. 10.

Particulars under Order of 5th February, 1878.

The defendant on or about the 24th, 25th and 26th days of October, 18—, wrote, and published the libels complained of, to the Rev. F. S. F. and J. G., Esq., at —— in the county of Wilts, to H. A. and his wife at —— in the said county, to two police constables for the county of Wilts at —— aforesaid, to H. F. at —— in the said county, to G. M. G., M. M., R. M., and W. A., all at —— and —— in the said county, and on and between the 24th and 28th day of October, 18—, the defendant wrote and published the said libels to divers other persons in the several parishes of [B, C, and D] in the said county, whose names are at present unknown to the plaintiffs and on or about the 29th day of October, 18—, the defendant wrote and published the said libels so complained of to the Right Honourable R. Assheton Cross at the office of the Secretary of State for the Home department in London.

The defendant uttered the slanders complained of upon and between the same dates at the same places and to the same persons as are mentioned and described in the last preceding paragraph.

Dated 7th day of February, 18—.

No. 11.

Statement of Defence.

1. The defendant as to paragraph 1 of the statement of claim, says that he and the plaintiffs reside in the same parish and not

in adjoining parishes. Save as aforesaid the defendant admits the allegations contained in paragraph 1 of the statement of claim.

2. The defendant also admits the several allegations contained in paragraph 2 of the statement of claim.

3. The defendant does not admit that he wrote or published or spoke or published the words set out in paragraph 3 of the statement of claim, or any or either of such words.

4. The defendant further, even if it be proved that he wrote or published or spoke or published the words alleged in the said paragraph 3 of the statement of claim, denies that he wrote or published or spoke or published such words with the sense or meaning alleged, or with any other defamatory or actionable sense or meaning.

5. The defendant denies that he wrote or published or that he spoke or published the words set out in paragraph 4 of the statement of claim or any or either of such words.

6. The defendant, even if it be proved that he wrote or published or spoke or published the words set out in the said paragraph 4 of the statement of claim, denies that he wrote and published or spoke and published the same with the sense or meaning alleged, or with any other defamatory or actionable sense or meaning.

7. The defendant denies that he wrote or published the words set out in paragraph 5 of the statement of claim.

8. The defendant, even if it be proved that he wrote and published them at all, wholly and entirely denies that he wrote and published the words alleged in paragraph 5 of the statement of claim with the sense or meaning in that paragraph alleged, or with any such sense or in any defamatory or actionable sense.

9. The defendant denies that the several words set out in paragraph 3, paragraph 4, and paragraph 5 respectively of the statement of claim, even if the same be proved to have been respectively written and published or spoken and published by him, were or that any or either of them were written or published or spoken or published of or concerning the plaintiff J. S.

10. The defendant further denies that the several words set out in paragraphs 3, 4 and 5 respectively of the statement of claim, if the same or any or either be proved to have been

written or published, or spoken or published by him at all, were false to the knowledge of the defendant at the time of such publication (if any) by him.

11. The defendant further, if the writing and publishing, or the speaking and publishing of the said words in paragraph 3, paragraph 4, and paragraph 5 respectively of the statement of claim, or of any or either of them be proved, wholly denies that he wrote and published or spoke and published the same or any or either of them maliciously.

12. The defendant further says that if it shall be proved that he did write or publish, or speak or publish the said several words set out in paragraphs 3, 4 and 5 of the statement of claim, he did so under the circumstances following. A child of the plaintiff's named F.S. had, as mentioned in paragraph 2 of the statement of claim, accidentally met its death by burning, and an inquest had been held on it, as in the said paragraph 2 of the statement of claim is also mentioned. The plaintiff, M., had during the said child's lifetime, frequently ill-treated and neglected the said child. Rumours as to her ill-treatment and neglect of the said child, had been for some time before such child's death current in the neighbourhood. After the said child's death such rumours still continued. Many of the inhabitants in the neighbourhood entertained a strong feeling that the said inquest had been conducted in an unsatisfactory way, and that sufficient inquiry had not been made into the circumstances surrounding the death of the said child. The defendant was, and is one of the principal residents in the said neighbourhood, and the facts above stated came to his knowledge. He, after taking reasonable means to satisfy himself, in good faith believed that the case was one for further inquiry. It became and was his duty to take proper steps to obtain such further inquiry. He, in conjunction with others, prepared a Memorial to Her Majesty's Secretary of State for the Home Department for the purpose of obtaining such further inquiry, and signed and allowed others, who were also acquainted with the facts and were fit and proper persons to do so, also to sign the same. The writings, speakings, and publishings in the statement of claim complained of (if any such be proved) are the writing and publishing, and the reading, speaking and publishing of such memorial (the contents of which, however, the

defendant as aforesaid does not admit,) to persons in the neighbourhood who were interested in the matters aforesaid and were fit and proper persons to sign such memorial, and who signed or discussed with the defendant about signing the same in conjunction with the defendant, and are conversations held by the defendant with such persons as aforesaid under the circumstances aforesaid, and the sending of the said memorial to the said Right Honourable Her Majesty's Secretary of State for the Home Department. And the defendant acted in good faith in the several publications (if as aforesaid any such publications be proved,) and made the statements in conversations (if any such statements be proved,) reasonably and in good faith believing the same to be true and acted in all the matters aforesaid wholly without malice. By reason of the facts hereinbefore appearing, the said several publications complained of were and are privileged communications.

No. 12.

REPLY.

1. The plaintiffs join issue on the statement of defence herein save so far as it admits the allegations contained in the statement of claim.

2. As to paragraph 12 of the statement of defence, the plaintiffs deny that the plaintiff, M., frequently or ever neglected or ill-treated the said child during its lifetime, or that there was any feeling that the inquest upon the death of the said child had been conducted in an unsatisfactory and insufficient manner, and the plaintiffs further deny that there was any duty upon the defendant or upon any one to obtain any further inquiry. The plaintiffs deny that the publications of the said libels and slanders were made for the purposes of and in relation to the said memorial as alleged, or that they were made to persons who were interested in the matters aforesaid, and the plaintiffs deny that the said publications were or are privileged communications.

3. The plaintiffs further say that the defendant, in what he did, was actuated by malice.

No. 13.

REJOINDER.

The defendant joins issue upon the second and third paragraphs of the reply.

No. 14.

Libel contained in a Placard.

STATEMENT OF CLAIM.

C. D. v. *E. F.*

1. The plaintiff is, &c.
2. The defendant is, &c.
3. The defendant on or about the 10th day of January, 18—, falsely and maliciously published a certain libellous placard referring to the plaintiff as follows :—

"*Notice.*

"I the undersigned decline the offer made to me by C. D., of Walcot, on Wednesday last of the sum of £50 to strike him and to cause me to commit a breach of the peace.

January, 10th, 18—. E. F., of Walcot."

4. On or about the 11th day of January, 18—, the defendant again published the same false, malicious, and libellous placard set forth in the last paragraph.

5. On or about the 15th day of February, 18—, the defendant published a third printed placard, which placard was false, malicious, and libellous, and was as follows :—

[*Here set out placard.*]

meaning thereby that the plaintiff, or someone at his instigation, was guilty of the acts alleged to have been committed.

6. On or about the 17th day of March, 18—, the defendant published a fourth placard which was false, malicious, and libellous, and was as follows :—

[*Here set out the placard.*]

7. In consequence of the above-mentioned placards published

by the defendant the plaintiff has suffered much annoyance and has been disgraced and subjected to loss of reputation and of business and also suffered in his credit and good name.

The plaintiff claims £1000 damages.

No. 15.

Statement of Defence.

1. The defendant admits the facts stated in paragraphs 1 and 2 of the statement of claim.

2. The defendant as to paragraph No. 3 admits the publication of the placard therein referred to, but denies the allegation that the same is false and malicious, and says that the matters stated in the said placard are true in substance and in fact.

3. As to paragraph No. 4 the defendant denies the allegation therein contained.

4. The defendant as to paragraph No. 5 admits the publication of the placard therein referred to, but denies the allegation that the same is false and malicious; the defendant also denies the alleged meaning, and says that the several matters stated in the said placard are true in substance and in fact, and were published by the defendant for the purpose of endeavouring to discover the person who committed the assault referred to in the said placard, and with the *bonâ fide* object and intention of bringing such person to justice and of prosecuting him to conviction and not otherwise.

5. The defendant as to paragraph 6 admits the publication of the placard therein referred to, but denies the allegation that the same is false and malicious; the defendant also denies the alleged meaning, and says that the several matters set forth in the said placard are true in substance and in fact, and were published by the defendant with the *bonâ fide* object of endeavouring to discover the person or persons guilty of causing the several annoyances and committing the several assaults and offences mentioned in the said placard and of bringing the offender or offenders to justice and not otherwise.

6. As to paragraph No. 7, the defendant denies the allegations therein contained and each and every of them respectively.

No. 16.

Action against the Manager of a Bank for showing to a Customer an Anonymous Letter.

Robshaw v. *Smith*, 28 L. T. 423.

STATEMENT OF CLAIM.

1. The defendant is the general manager of the London and Yorkshire Bank (Limited), and the plaintiff carries on business as a merchant at —— Street, in the City of London.

2. Prior to the 31st of May, 1877, the plaintiff had had considerable business transactions with one J. H., also a merchant, from which he had derived large profits, and several such transactions were then in progress between the plaintiff and the said J. H., and the said J. H. would have continued to have such transactions with the plaintiff hereinafter referred to, and the said J. H. had offered the plaintiff to take him into his employment as manager, upon terms which would have given the plaintiff a salary of from £3000 to £4000 per annum for his services.

3. On the 31st May the said J. H. called upon the defendant, and the defendant then falsely and maliciously published to the said J. H. the following letter of and concerning the plaintiff:—

"16th of August, 1876.

"Caution and worth inquiry.

"Are you aware that the new partner of —— is George Robshaw" (meaning the plaintiff), "formerly of George Robshaw & Co., manufacturers, of ——, bankrupts" (meaning thereby that the plaintiff had been member of a firm which had become bankrupt), "into the burning of whose mills an inquiry was made" (meaning thereby that the plaintiff had been guilty of, and suspected and accused of, arson), "who Mr. R., the accountant of ——, acting as trustee to the estate, wished to prosecute" (meaning thereby that the plaintiff had defrauded his creditors, and been guilty of offences against the bankruptcy laws), "but was unable to find, as he fled away to ——, where he became partner or manager, at different times, to two firms, both of whom after getting possession of considerable lots

of goods fled away" (meaning thereby that the plaintiff had been guilty of obtaining goods by false pretences and other like offences). "Robshaw was in prison at —— for his share" (meaning thereby that the plaintiff had been found guilty by law of the said offences, and had been in prison therefor). "He" (meaning the plaintiff) "is the same man who was brought before the —— magistrates for the misappropriation of certain securities, and which case was compromised on his partner paying a portion of the amount" (meaning thereby that the plaintiff had been guilty of larceny). "Why has L. so suddenly become a buyer, but to keep himself afloat, and to keep the ball rolling as long as he can before the crisis arrives? He has no money left" (meaning that the plaintiff had become partner in, or manager of, a firm in an insolvent condition, which was entering into fraudulent transactions to defraud its creditors, and that the plaintiff was conniving at, aiding, and abetting in such fraud). "This is worth inquiry, and being communicated to your other branches, particularly at B., H. and S."

4. Owing to the conduct of the defendant set forth in the preceding paragraph, the said J. H. refused to have any further transaction with the plaintiff, and the plaintiff lost the profits he would otherwise have made thereby, and the said J. H. also refused to take the plaintiff into his employment as he would otherwise have done, and the plaintiff has lost the benefit of such employment and the emoluments thereof, and has been much injured in his credit, reputation, and business, and has been otherwise damnified.

The plaintiff claims £2000 damages.

No. 17.

Statement of Defence.

1, 2, 3, 4. The defendant does not admit, &c.

5. The statements contained in the said letter are true in substance and in fact, according to the fair and ordinary meaning of the words used in the said letter.

6. The publication of the said letter to H., if made, was

privileged, and was made *bonâ fide* and without malice. H., having an interest in certain business transactions, in which the plaintiff and the defendant's bank were concerned, made inquiries of the defendant as to the plaintiff, and it was in answer to such inquiries that the publication, if any, of the said letter took place.

No. 18.

Action for Publishing a Libellous Novel.

Statement of Defence.

1. The defendants admit that they printed and published the book or novel in the statement of claim mentioned, but deny that they did so falsely and maliciously. The defendants printed and published the said book or novel for the writer thereof, reasonably and *bonâ fide* believing the same to be a work of pure fiction. The defendants were not then aware and do not now admit that the said book or novel alluded to the plaintiffs or to any other living person.*

2. In answer to paragraphs 3, 4, 5, of the statement of claim, the defendants deny that they printed or published the the words therein set forth of or concerning plaintiffs or any of them, as is alleged.

3. In further answer to the said paragraphs the defendants deny that the words therein set forth bear the sense therein given to them.

* It may be doubted whether this is a defence to the action or only a plea in mitigation of damages; see *ante*, pp. 159, 384, 5, 7; *R.* v. *Knell*, 1 Barnard. 305; *Smith* v. *Ashley*, 52 Mass. (11 Met.) 367.

No. 19.

Action against a Newspaper Proprietor.
Bonâ fide Comment on a Matter of Public Interest.

STATEMENT OF DEFENCE.

1. The defendant is, and at the time of the alleged grievances was the proprietor of the *Times* newspaper.

2. On the evening of the 12th of February, 1867, the plaintiff had presented to the House of Lords a petition, making a serious charge against one of Her Majesty's judges; a debate ensued on the presentation of the said petition, and the said charge was utterly refuted.

3. The words set out in paragraph 3 of the statement of claim are a portion of the Parliamentary Report, published in the *Times* for the 13th of February, 1867. They are a fair and accurate report of the proceedings in the House of Lords on the preceding evening, and were published by the defendant *bonâ fide*, and without any malice towards the plaintiff.

4. The said petition, the charge it contained, and the said debate were, and are, all matters of general public interest and concern.

5. The words set out in paragraph 5 of the statement of claim are a portion of a leading article which appeared in the *Times* for the 13th of February, 1867. The said article was a fair and impartial comment on the matters above referred to, and was published by the defendant *bonâ fide* for the benefit of the public and without any malice towards the plaintiff.

See *Wason* v. *Walter*, L. R. 4 Q. B. 73; 8 B. & S. 671; 38 L. J. Q. B. 34; 17 W. R. 169; 19 L. T. 409.

No. 20.

Action against the Printers of a Newspaper.
Report of a Judicial Proceeding.

STATEMENT OF DEFENCE.

1. The defendants are the printers and publishers of the —— *County Gazette.*

2. On the —— day of ——, 1879, the plaintiff applied to the —— bench of magistrates for the —— division of the said county, at a special licensing sessions, for a spirit licence. This application the magistrates refused.

3. On the —— day of ——, 1879, the defendants published as usual in their said *Gazette* a report of the proceedings before the said magistrates on the preceding day, including an accurate and impartial account of the plaintiff's application and the reasons stated by the bench for their refusal, which is the alleged libel.

4. Such account was published by the defendant *bonâ fide*, and without malice, and for the public benefit, and in the usual course of the defendant's business and duty as a public journalist; and was, and is, a correct, fair, and honest report of proceedings of public interest and concern.

5. And the defendants further say that the publication complained of is no libel.

As to paragraph 5, if it means anything more than has been already said in paragraph 4, see *ante*, p. 483.

No. 21.

Interrogatories in an Action against a Newspaper Proprietor (allowed in *Lefroy* v. *Burnside*, 4 L. R. (Ir.) 340; 41 L. T. 199; 14 Cox, C. C. 260; *ante*, p. 514).

"Interrogatories on behalf of the above-named plaintiff for the examination of the above-named defendant:—

"1. Is it not the fact that in the said newspaper published on the 6th day of July, 1878, or some other and what date, an article appeared in the words and figures set forth in the sixth paragraph of the statement of claim in this action? If not how otherwise?

"2. Were not you, the defendant William Burnside, upon and before the said 6th day of July, 1878, or some other and what date, the proprietor, either alone, or jointly with some other and what person or persons, of the said newspaper?

"NOTE.—The defendant must answer all the above interrogatories on oath within ten days.

"Delivered by, &c."

No. 22.

Interrogatories on the part of the Plaintiff, to be answered by an Officer of the "Leeds Daily News Company (Limited)," and by the Defendant, William Lauries Jackson.

"1. Is the defendant, William Lauries Jackson, the *editor or* publisher of the 'Leeds Daily News,' *and what position does he occupy in respect of the said newspaper?*

"2. Is the said William Lauries Jackson a shareholder in the said company?

"3. Is it the duty of the said William Lauries Jackson to exercise a supervision over paragraphs of the nature of those set out in the statement of claim?

"4. *Did the said William Lauries Jackson write, or have anything to do with the writing of, any and which of the paragraphs mentioned in the statement of claim: and, if not, who was the writer of such paragraphs, and of each of them?*

"5. *Did the said William Lauries Jackson see any and which of the said paragraphs before they were inserted in the newspaper or before the newspaper was published or circulated, and did he sanction the publication of the said paragraphs, or of any and which of them?*

"6. By whom, and in what way, were the said paragraphs brought to the office of the newspaper company; or were they received by anyone else and whom on their account, at one time; and, if not, when were they received?

"7. Were the numbers of the 'Leeds Daily News' of the 13th August, 1875, 19th August, 1875, 10th September, 1875, and the numbers of the 'Leeds Daily News,' containing the paragraph commencing with the word "Query," printed and published by the Leeds Daily News Company (Limited), or by the defendant William Lauries Jackson, or by both of them?"

N.B.—The words in italics were struck out by *Archibald*, J., at Chambers on January 8th, 1876; see Weekly Notes for 1876, p. 11; 1 Charley, 101; Bitt. 91; 20 Sol. J. 218; 60 L. T. Notes, 196.

No. 23.

Notice of the defendant's intention of giving evidence of an Apology in Mitigation of Damages, to be delivered with the Plea, under the 6 & 7 *Vict. c.* 96, *s.* 1.

In the High Court of Justice,
Queen's Bench Division.
Between *A.B.* . . Plaintiff,
and
E.F. . . Defendant.

Take notice, that the defendant intends on the trial of this cause to give in evidence, in mitigation of damages, that he made [*or* offered] an apology to the plaintiff for the defamation complained of in the statement of claim herein, before the commencement of this action [*or* as soon after the commencement of this action as there was an opportunity of making or offering such apology, the action having been commenced before there was an opportunity of making or offering such apology].

Yours, etc.,
G.H., defendant's solicitor [*or* agent].

To Mr. *C.D.*, plaintiff's solicitor or agent.

For a precedent of a plea under the second section of Lord Campbell's Libel Act (6 & 7 Vict. c. 96,) see *ante*, p. 488.

II. PRECEDENTS OF PLEADINGS IN ACTIONS FOR SLANDER.

No. 24.

Words imputing a Crime.

STATEMENT OF CLAIM.

1. The plaintiff is a baker, carrying on business at ——, in the county of Middlesex.

2. On or about the 8th day of May, 1880, the defendant

falsely and maliciously spoke and published of the plaintiff the words following, that is to say:—"He is a regular smasher"; the defendant meaning thereby that the plaintiff had uttered, and was in the habit of uttering, counterfeit coin, with the knowledge that such coin was counterfeit, and had been guilty of a misdemeanor.

3. The plaintiff has, by reason of the premises, been greatly injured in his credit and reputation.

And the plaintiff claims, &c.

No. 25.

Statement of Defence.

1. The defendant admits that he spoke and published the words set out in paragraph 2 of the plaintiff's statement of claim, but denies that he spoke them maliciously or with the meaning in that paragraph alleged.

2. The defendant is, and at all times hereinafter mentioned was, clerk to Mr. N., a wholesale baker. The plaintiff is one of Mr. N.'s retail customers. It is and was one of the duties of the defendant as such clerk to call on Mr. N.'s retail customers every Saturday morning and receive the money due for the bread delivered to them in the course of the week.

3. On the morning of Saturday, March the 27th, 1880, the defendant called on the plaintiff and took the money for the bread delivered to him during the week. Amongst the change then given by the plaintiff to the defendant was a counterfeit florin. Neither the plaintiff nor the defendant knew or observed at the time that the florin was counterfeit.

4. Later in the day when the defendant was paying the money over at the office, his employer, Mr. N., discovered that the said florin was counterfeit. The defendant thereupon took the said florin back to the plaintiff's shop, and the plaintiff gave him without demur two good shillings in exchange therefor.

5. On the morning of Saturday, May the 8th, 1880, when the defendant called on the plaintiff as usual, the plaintiff

again gave the defendant a counterfeit florin amongst the money for the bread. And again neither the plaintiff nor the defendant knew or observed at the time that the florin was counterfeit.

6. Again, when the defendant was paying the money over to his employer at the office, Mr. N. discovered that the florin was counterfeit. Thereupon the defendant, recollecting the the similar occurrence mentioned in paragraphs 3 and 4 above, exclaimed:—"Why, that's the second bad florin Mr. H. has passed to me within the last six weeks. He's a regular 'smasher'!"

7. The defendant spoke these words as a joke, and never intended seriously to impute to the plaintiff any criminal offence.

8. The only persons who were present at the time or who heard the said words were the defendant's employer, Mr. N., and a fellow-clerk of his, one David Griggs. Both Mr. N. and David Griggs were aware of the circumstances detailed above, and knew to what the defendant was referring, and understood that he spoke in joke, and did not intend to make any serious charge against the plaintiff.

[N.B. This is a magnanimous and conciliatory line of defence. The plaintiff, if well advised, will at once settle the matter amicably. "All imputations withdrawn; defendant to pay a guinea to a hospital named by the plaintiff; each party to pay their own costs." If he does not, the defendant is almost sure of a verdict. See *ante*, pp. 107, 109; *Thompson* v. *Bernard*, 1 Camp. 48. But sometimes a defendant, if foolish and angry, insists on setting up a more vindictive defence. He denies uttering the words, so as to compel the tell-tale Griggs to come into the box and be cross-examined; and he then proceeds to justify. These tactics will infallibly lead to a verdict for the plaintiff with heavy damages.]

No. 26.

Statement of Defence.

1. The defendant denies the allegations contained in paragraphs 2 and 3 of the plaintiff's statement of claim, and each and every of them.

2. The defendant does not admit that he spoke or published the words set out in paragraph 2 of the plaintiff's statement of claim; but, if he did, the same are true in substance and in fact. On March, 27th, 1880, the plaintiff uttered and passed to the defendant a counterfeit florin, well knowing the same to be counterfeit. On May 8th, 1880, the plaintiff uttered and passed to the defendant another counterfeit florin, well knowing the same to be counterfeit. [*State any other instances in which the plaintiff passed bad coin to the defendant or others.*] Wherefore the defendant says that the plaintiff is a regular 'smasher,' and has uttered, and has been in the habit of uttering, counterfeit coin, well knowing the same to be counterfeit; and has been guilty of divers misdemeanors.

No. 27.

Words imputing a Contagious Disorder.

L. v. *K.*

STATEMENT OF CLAIM.

1. At the time of the speaking and publishing by the defendant of the words hereinafter set out, the plaintiff was a tailor, and carrying on business as such, and was a married man.

2. The defendant falsely and maliciously spoke and published of the plaintiff the words following (that is to say): "I" (meaning the defendant) "hear L." (meaning the plaintiff) "has, &c.," thereby meaning that the plaintiff was suffering from a loathsome contagious disorder, and had communicated the same to his wife, and was unfit, by reason of such disorder, to be admitted into society.

3. By reason of the premises the plaintiff was injured in his credit and reputation,* *and brought into disgrace among his neighbours and friends, and has been deprived of, and ceased to receive their hospitality.*

4. The defendant falsely and maliciously spoke and published of the plaintiff, in relation to his said business, the words following (that is to say): "I" (meaning the defendant),

"&c.," thereby meaning that the plaintiff was in embarrassed pecuniary circumstances, and unable to meet his liabilities.

5. By reason of the matters in the preceding paragraph mentioned, the plaintiff was injured in his credit and reputation as a tailor, and in his business,* *and many persons, who had theretofore dealt with the plaintiff in his said business, ceased to deal with him.*

The plaintiff claims £—— damages.

No. 28.

L. v. *K.*

PARTICULARS.

The following are the best particulars the plaintiff can give of the times, places, and persons, when, where, and to whom the alleged slanders were uttered, and the damages sustained.

The said slanders were uttered in the month of October, 1876, in the presence of G. R., of — High Street, in the City of Bath, and his manager, W. K., at — High Street, Bath aforesaid.

The plaintiff cannot give the names * of the persons who have ceased to deal with him, but will prove a general diminution of receipts in business, and finds he is not invited and received into society as he used to be.

The above particulars are delivered pursuant to the order of Master Butler, dated the 18th day of December, 1877.

Dated this 9th day of March, 1878.

R. & F., Plaintiff's agents.

To ——.

Defendant's agent.

* The plaintiff being unable to name the persons referred to in paragraphs 3 and 5, the statement of claim was amended by striking out the words in italics above.

No. 29.

L. v. *K.*

STATEMENT OF DEFENCE.

1. The defendant denies that he spoke and published of the plaintiff the words in the 2nd and 4th paragraphs of the statement of claim respectively set out.

2. The defendant does not admit the allegations in the 3rd and 5th paragraphs of the statement of claim contained.

L. v. *K.*

REPLY.

The plaintiff joins issue with the defendant upon his defence.

No. 30.

Words spoken in a Foreign Language.

STATEMENT OF CLAIM.

1. The plaintiff is a farmer residing at Ll. in the county of Glamorgan.

2. The defendant is, &c.

3. On the —— day of —— 1880, the defendant falsely and maliciously spoke and published of the plaintiff in the Welsh language the words following, that is to say :—[*Here set out the libel verbatim in the Welsh language.*]

4. The said words, being translated into the English language, have, and were understood by the persons to whom they were so published to have, the meaning and effect following, that is to say :—[*Here set out a literal translation of the libel in the English language, adding any innuendoes which may be necessary.*]

5. Whereby the plaintiff was injured in his credit and reputation, &c. [*Allege any special damage that may exist.*]

No. 31.

Words spoken of a Medical Man.

STATEMENT OF CLAIM.

1. The plaintiff is a M. R. C. S. of London and Edinburgh, and carries on the profession and business of a surgeon and general medical practitioner in the city of —— and its neighbourhood.

2. The defendant is a clergyman, residing in the said city.

3. On the 9th day of January, 1880, the plaintiff was called in by the defendant to attend his infant daughter, who was then lying dangerously ill. On the 14th day of January the said daughter died, through no negligence or default of the plaintiff.

4. Thereupon the defendant falsely and maliciously spoke and published of the plaintiff in relation to his said profession and business, and the plaintiff's conduct therein, the words following, that is to say:—"Mr. E. (meaning the plaintiff) killed my child."

5. The defendant meant thereby that the plaintiff had been guilty of feloniously killing his said daughter by treating her improperly and with gross ignorance and with gross and culpable want of caution and skill, and thus causing or accelerating her death.

6. And in the alternative, the plaintiff says that the defendant meant thereby that the plaintiff had been guilty of misconduct and negligence in his said profession and business, and had acted in his said profession and business negligently, injudiciously, indiscreetly, and improperly, and had not done his duty by his patient, and was unfit to be employed as a medical man.

7. In consequence of the defendant's words, the plaintiff has been and is greatly prejudiced and injured in his credit and reputation, and in his said profession and business of surgeon and general medical practitioner.

No. 32.

Slander of a Clergyman.

A. v. *C.*

STATEMENT OF CLAIM.

1. The plaintiff is, and at all times hereinafter mentioned was, a clergyman of the Church of England, a doctor of divinity, and vicar of the parish of ——.

2. The defendant is a farmer residing in the said parish.

3. It is, and was, the custom and the duty of the plaintiff as such vicar as aforesaid to constantly visit the parochial school in his said parish, and to superintend the management thereof. Miss E. B. was, and is, the mistress of the said school.

4. Whereupon the defendant, on the 25th day of April, 1880, well knowing the premises, and intending to injure the plaintiff in his good name and credit as a clergyman of the Church of England, and to cause it to be believed that the plaintiff had misconducted himself as such vicar as aforesaid falsely and maliciously spoke and published of the plaintiff, in relation to his character and profession as a clergyman of the Church of England, and to his office and benefice as such vicar as aforesaid, and to the plaintiff's conduct therein, the words following, that is to say:—"Miss E. B. (meaning thereby the said schoolmistress), &c. . . . ." Meaning thereby that the plaintiff had been guilty of undue familiarity with the said Miss E. B., and had habitually been guilty of conduct unbecoming a clergyman of the Church of England, and had misconducted himself in his office and benefice as such vicar as aforesaid, and was unfit to continue in the same, or to hold any other preferment.

5. And on divers other occasions between the said 25th day of April and the 4th day of May, 1880, the defendant falsely and maliciously repeated the same slander with the like meaning in the last paragraph assigned.

6. Whereby the plaintiff has been, and is, greatly injured in his credit and reputation, and in his said character and profession as a clergyman of the Church of England, and in his office and benefice as such vicar as aforesaid; and has been brought into public scandal, ridicule and contempt.

And the plaintiff claims £—— damages.

No. 33.

Slander of a Parish Clerk.

L. v. *P.*

STATEMENT OF CLAIM.

1. The plaintiff is a verger and church clerk, residing at ——. He has been since 1877 verger and church clerk of the district parish church of ——.

2. The defendant is the vicar or incumbent of the said church.

3. In or about the last week of April, 1879, the defendant falsely and maliciously spoke and published to one Mr. I. J. of the plaintiff as such verger and church clerk as aforesaid, and with reference to the conduct of the plaintiff in such office of verger and church clerk the words following:—"Luke" (meaning the plaintiff) "has broken offertory boxes open and taken money from them, and has also taken money from the collecting plates and used it for his own purposes," meaning thereby that the plaintiff had feloniously stolen money forming part of contributions for sacred and benevolent purposes.

4. The defendant also, about the same time as mentioned in the last paragraph, with the like meaning, falsely and maliciously spoke and published the said words or other words to the same substance and effect of the plaintiff in relation to his conduct in the said office to Mrs. O. P. and to various other persons.

5. Through the said false and malicious statements of the defendant the plaintiff has been greatly injured in his credit and reputation, and has been by the churchwardens of the said parish forbidden to perform the duties of his said office of verger and church clerk.

No. 34.

L. v. *P.*

STATEMENT OF DEFENCE.

1. The defendant denies that the plaintiff was ever church

clerk of the district parish church of ——. He was until recently verger and organ-blower at the said church.

2. The defendant does not admit that he ever spoke or published the words complained of, or any other words to the same substance and effect, as alleged in paragraphs 3 and 4 of the statement of claim.

3. Throughout the month of April and the early part of May, 1879, the defendant was suffering from acute mania, brought on by overwork; he has no recollection of having spoken any such words as alleged either then or at any other time. If, however, the defendant did in fact utter any such words (which he does not admit), they were not spoken seriously or maliciously, but solely in consequence, and under the influence of the said mania. There is and was no foundation whatever for any such charge;* and the defendant unreservedly withdraws all imputation on the plaintiff's character, and exceedingly regrets that he ever spoke the said words (if in fact he did speak them, which he does not admit).

4. The defendant denies the allegations contained in paragraph 5 of the plaintiff's statement of claim, and each and every of them. If the churchwardens of the said parish have forbidden the plaintiff to perform the duties of verger and organ-blower at the said church (which the defendant does not admit) they have not done so through or in consequence of any words uttered by the defendant.

5. The defendant does not admit that he is under any liability to the plaintiff; but he brings into Court the sum of £10, and says that the said sum is sufficient to satisfy the plaintiff's claim.

* See *ante*, pp. 488, 9.

No. 35.

L. v. *P.*

REPLY.

1. The plaintiff joins issue on paragraphs 1, 2, 3, and 4 of the statement of defence, except so far as any part of the statement of claim is thereby admitted.

2. As to paragraph 5 of the statement of defence the plaintiff says that the said sum of £10 is not enough to satisfy the plaintiff's claim.

No. 36.

Words defamatory of a Trader in the way of his Trade.

STATEMENT OF CLAIM.

1. At all dates hereinafter mentioned the plaintiff carried on, and still carries on, the trade and business of a —— at —— in the county of ——.

2. On or about the —— day of ——, A.D. ——, the defendant falsely and maliciously spoke and published of the plaintiff in relation to his said trade and business and of and concerning the plaintiff's mode of conducting the same, the words following, that is to say:—[*here set out the slander verbatim*]; meaning thereby that the plaintiff cheated or was guilty of fraudulent conduct in his said trade and business. [*Or*, meaning thereby that the plaintiff was guilty of fraudulent and dishonest practices in his trade and business, and was, or had been, insolvent and unable to pay his just debts.]

3. Whereby the plaintiff was injured in his credit and reputation as a ——, and in his said business and trade, and X., Y., and Z., who had heretofore dealt with the plaintiff in his said business, ceased to deal with him [and L., M., and N., who had previously supplied the plaintiff with goods on credit, thereupon refused to sell any more goods to the plaintiff on credit, as they otherwise would have done.]

And the plaintiff claims £ ——.

No. 37.

STATEMENT OF DEFENCE.

1. The defendant denies the several allegations contained in paragraph 2 of the statement of claim.

2. The defendant never on any occasion or occasions spoke or published of the plaintiff, as such trader or otherwise, all or any of the words alleged in the said paragraph to have been spoken by the defendant.

3. The defendant did not speak or publish the said words of the plaintiff in relation to his trade or business, or of or concerning his mode of conducting the same, or with the meaning in the said paragraph imputed to the said words, or in any other defamatory sense.

4. The said several words, without the said alleged meaning, if spoken and published by the defendant at all (which he denies), are respectively true in substance and in fact. Particulars are delivered herewith.

5. The defendant denies the several allegations contained in paragraph 3 of the statement of claim.

And by way of counter-claim, the defendant says:—

6. That heretofore, and before the publication of the alleged slander, the plaintiff, &c.

No. 38.

Slander of a Builder in the way of his Trade.

S. v. *W.*

STATEMENT OF CLAIM.

1. The plaintiff is a builder carrying on business at C——; and the defendant is a mason, and was employed by the plaintiff from the month of October, 1878, until the month of August, 1879, when he left the plaintiff's employment.

2. After the defendant had left the plaintiff's employment he made a statement to the Rev. A. B., the vicar of C——, concerning the plaintiff in the following words:—"Whilst he (meaning the plaintiff) was doing the work at Mrs. M.'s house he stole the hay from the stack there; John saw him cut the hay from the stack and take it away in his cart: he took two loads whilst he was at work there."

3. The defendant also, on or about the 25th day of August, 1879, made a statement to Mrs. M. concerning the plaintiff in

the following words: "Whilst he" (meaning the plaintiff) "was doing the work for you, he" (meaning the plaintiff) "stole your corn and hay, and cut and took away in his cart two loads of your grass:" and in reply to a question put to him by the said Mrs. M., the defendant said "he" (meaning the plaintiff) "got up into the loft and got down through a trap-door to where the corn was kept and stole it."

4. On the same occasion as is mentioned in the preceding paragraph the defendant made the further statement to the said Mrs. M. of and concerning the plaintiff: "Whilst he was working for you here, he" (meaning the plaintiff) "stole grass and corn from Mr. N., and he and Mr. N.'s gardener have taken baskets upon baskets of vegetables from Mr. N.'s garden;" the defendant meaning that the plaintiff had induced Mr. N.'s gardener to rob his master and to give him the stolen goods.

5. On the same occasion the defendant made this further statement to the said Mrs. M. of and concerning the plaintiff: "When S. (meaning the plaintiff) was making that drain for Mr. N. he used a lot of rotten old pipes that were no use;" meaning thereby that the plaintiff had been guilty of misconduct in his trade of a builder and had cheated the said Mr. N.

6. The whole of the said statements were false, and were false to the knowledge of the defendant, and were made maliciously with intent to injure the plaintiff.

7. By reason of the said statements the plaintiff has suffered loss in his trade as aforesaid, and has lost the society of his friends.

The plaintiff claims £50 damages.

No. 39.

S. v. *W.*

Statement of Defence.

1. The defendant denies that he spoke or published the words set out in paragraphs 2, 3, 4, and 5, or any or either of such words.

2. The defendant was employed by the plaintiff to work at the house of the Mrs. M. mentioned in the statement of claim. Whilst he was so employed, certain facts came to his knowledge relative to the disposition by the plaintiff and by the servants of the said Mrs. M. of certain portions of her property. It thereupon became and was the duty of the defendant to communicate such facts to the said Mrs. M., and to her son-in-law, the Rev. A. B., the vicar of C.* And the defendant says that these communications are the alleged slanders, if any, and that the same were made *bonâ fide* in the discharge of the said duty, and not maliciously, nor with intent to injure the plaintiff, and were and are therefore privileged.

3. The defendant denies that he spoke or published the words set out in paragraph 5 of the statement of claim with the meaning therein alleged, or at all with reference to the plaintiff's trade of a builder, or in any defamatory sense. The said words, without the said meaning, and according to their fair and ordinary signification are true in substance and in fact.

4. The defendant does not admit the allegations contained in paragraph 7 of the statement of claim.

* A bad plea, surely, so far as the vicar is concerned: no facts being shown which create any duty to inform the vicar.

III. PRECEDENTS OF PLEADINGS IN ACTIONS FOR SLANDER OF TITLE.

No. 40.

Libel on goods manufactured and sold by another.

Western Counties Manure Co. v. *Lawes Chemical Manure Co.* (L. R. 9 Ex. 218; 43 L. J. Ex. 171; 23 W. R. 5, *ante*, pp. 145, 148).

DECLARATION.

In the Exchequer of Pleas.

The 3rd day of February, A.D. 1874.

Devonshire to wit.

The Western Counties and General Manure Co., Limited, by William Harris, their attorney, sue the *Lawes Chemical Manure Co., Limited*, for that at the time of the committing of

the grievances hereinafter mentioned the plaintiffs carried on business, and still do carry on business, as amongst other things manufacturers of and sellers of artificial manures, and had and still have upon sale certain artificial manures, and the plaintiffs say that the defendants well knowing that the plaintiffs were carrying on the aforesaid business and selling the said artificial manures, and contriving and intending to injure the plaintiffs in their said business, falsely and maliciously printed and published and caused to be printed and published of and concerning the plaintiffs, and of and concerning them as such manufacturers and sellers of artificial manures, and of and concerning them in the way of their said business, the words following, that is to say:—[*For the words of the libel, see the report of the case*]; meaning thereby that the said artificial manures so manufactured sold and traded in by the plaintiffs were artificial manures of an inferior quality to the said other artificial manures and especially were of an inferior quality to the said artificial manures of the defendants; whereas in truth and in fact the said artificial manures so manufactured sold and traded in by the plaintiffs were not of an inferior quality and especially were not inferior in quality to the said artificial manures of the defendants *as the defendants well knew*;* and by reason of the premises certain persons and particularly George Snell and A. Rowe who before and at the time of the committing of the grievances hereinbefore mentioned had been used to buy the said artificial manures so manufactured sold and traded in by the plaintiffs ceased to do so, and certain other persons and particularly Geo. May and Samuel Harvey who would have bought the said artificial manures of the plaintiffs were induced to refrain from buying the same; whereby the plaintiffs have been prejudiced and injured in their said trade and business, and the reputation of the said artificial manures so manufactured by the plaintiffs has been injured, and the sale thereof has been much diminished and fallen off, and the plaintiffs have been greatly injured in their credit reputation and circumstances, and have been and are thereby prevented from acquiring divers great gains which they might and otherwise would have acquired.

And the plaintiffs claim £2000.

* The words in italics were subsequently struck out by consent.

No. 41.

Lawes Chemical Manure Co. ats. *Western Counties and General Manure Co., Limited.*

PLEAS.

In the Exchequer of Pleas.
The 23rd day of February, 1874.

1. The defendants by Arthur P. Bower their attorney say that they are not guilty.

2. And for a second plea, the defendants say that the alleged words are true in substance and in fact.

3. And for a third plea, the defendants deny the allegations in the declaration contained that the said artificial manures manufactured, sold, and traded in by the plaintiffs were not inferior in quality to the said artificial manures to the defendants' knowledge, as alleged.

Feb. 23, 1874.

Order by Master George Pollock, giving the defendants leave to plead the several matters. Plaintiffs to be at liberty to demur to the third plea. Particulars of the second plea to be delivered within three days.

No. 42.

Western, &c., Co. v. *Lawes, &c., Co.*

REPLICATION.

Feb. 27, 1874.

The plaintiffs join issue upon all the defendants' pleas.

And the plaintiffs say that the defendants' third plea is bad in substance.

[*In Margin.*]

A matter of law intended to be argued is that the defendants' knowledge that the plaintiffs' manures were not inferior to their own is immaterial, and that the plea is therefore no answer to the action.

No. 43.

Lawes, &c., Co. ats. *Western, &c., Co.*

JOINDER IN DEMURRER.

Feb. 28, 1874.

The defendants say that the said third plea is good in substance.

No. 44.

POINTS.

The following are the points intended to be insisted on by the plaintiffs upon the argument of this demurrer :—

1. That the defendants' third plea is bad in substance.
2. That the defendants' knowledge that the plaintiffs' manures were not inferior to their own is immaterial, and that the plea is therefore no answer to the action.
3. That the declaration is good without the allegations denied in the third plea.

Subsequently for convenience sake, and by agreement between the counsel for the parties respectively, the plaintiffs amended their pleadings by striking out the averment "as the defendants well knew," and the defendants withdrew their third plea and demurred to the declaration instead. This demurrer was decided in favour of the plaintiffs, and the case was subsequently settled without going to trial. A *Stet Processus* was entered on October 9th, 1874.

No. 45.

In the Exchequer of Pleas.

Between the Western Counties and General Manure Co., Limited . . . . Plaintiffs.

and

Lawes Chemical Manure Co., Limited . Defendants.

Interrogatories to be answered by the secretary, or manager, or some other person on behalf of the defendants, by

affidavit in writing, to be sworn and filed in the ordinary way pursuant to the order of the Hon. ——, dated the —— day of ——, A.D. 1874.

1. Was one W. M. W. an agent or servant, or in the employ of the defendants in or about the month of Feb., 1873, for the sale of their manures, or for any other purpose, in Plymouth or elsewhere, in the county of Devon, or in the county of Cornwall?

2. Was any, and what, inquiry made by the said W. M. W. of J. M., then the secretary of the Devon and Cornwall Chambers of Agriculture, in or about the month of Feb., 1873, respecting certain manures sent by the said J. M., for analysis, to Professor A.? Was the said inquiry, if any, made by the express authority of the defendants, or would it have been within the general authority of the said W. M. W. to make such inquiry? Did the said J. M., either then or at any time, give any, and what, accounts to the defendants or the said W. M. W., or any of their agents or servants, of the circumstances under which, the time when, the place where, and the person or persons from whom he had procured the said manures, or samples of manures?

3. Were the said manures, or samples of manures, forwarded to Professor A. by the authority of the defendants, or their agents or servants, or which of them?

4. Was the said J. M., in or about the month of Feb., 1873, or at any other and what time, and for how long, and where, an agent or servant of, or in any way as a shareholder, customer, or otherwise connected with the defendants?

5. Did the defendants receive, in or about the month of Feb., 1873, or at any other and what time, from the said J. M. an analysis, or copy of an analysis, made, or purporting to be made, by Professor A. of certain manures, or samples of manures? Did the said J. M. give to the defendants, their agents, or servants, any, and what, account of the time when, the place where, and the person or persons from whom he received, or became possessed of, the said analysis?

6. Were the manures sold or manufactured by the plaintiffs among the manures so analysed, or purported to be analysed? Did the defendants print or circulate the said analysis?

7. Did the defendants send a copy of the said analysis to

each or any, or either of their agents, and to which of them? Give the names and addresses of the said agents.

8. Was one E. E., in or about the month of Feb., 1873, or at any other and what time, an agent of, or in any way as a shareholder or customer, or otherwise, connected with the defendants? Did he, by the authority or with the sanction of the defendants, procure from the plaintiffs, in or about the month of Dec., 1872, or when, any and what samples of their manures? What was done with the samples, if any, so obtained?

9. Have the defendants in their possession or power any of the manures or samples, or portions of the manures or samples submitted for analysis to Professor A.?

10. *Formal interrogatory as to books, letters, documents, &c.*

No. 46.

Slander of Title to Goods.

C. v. *D.*

Statement of Claim.

1. The plaintiff, at all the dates hereinafter mentioned, carried on and still carries on, the trade or business of a stonemason and contractor, at ——, in the county of ——.

2. On or about the —— day of ——, 1860, the plaintiff, in the ordinary course of such trade and business, was desirous of selling certain goods and chattels of the plaintiff's mentioned in the advertisement hereinafter stated. He therefore caused to be printed an advertisement, of which the following is a copy:—"To be sold by auction, by Mr. F. S., on Monday and Tuesday, January 30th and 31st, 1860, at the above works, the whole of the working plant, the property of Mr. E. C., consisting of, &c. [*The advertisement then described a variety of articles, waggons, carts, sleepers, planks, and sundry other effects.*] The sale to commence each day at twelve o'clock. Cotsgate Hill, Ripon, January the 19th, 1860."

3. Thereupon the defendant, on the 25th day of January, 1860, falsely and maliciously caused to be printed and pub-

lished of and concerning the plaintiff and of and concerning the said intended sale as advertised, the false, scandalous, malicious and defamatory libel following, that is to say:—[*here set out the words verbatim*]; thereby meaning and intending to cause it to be believed, that the goods named in the said advertisement were the property of the defendant and not of the plaintiff, and that no person could safely purchase any goods to be exposed for sale at the said advertised sale.

4. There is and was no foundation or pretence for the claim set up by the defendant in the said libel, as he the defendant then well knew; and such claim was made maliciously and without any reasonable or probable cause.

5. By means of the publication of the said libel, divers persons who were desirous of purchasing the said goods or some of them, and who would otherwise have attended at the said sale, and would have bidden for, and purchased the said goods or the greater part of them, particularly X., Y. and Z., all of —— in the said county, were hindered and prevented from attending at the time and place appointed for the sale by the said advertisement, and were deterred from bidding at such sale, and declined to purchase the said goods or any part thereof; and the plaintiff was then prevented from putting up the said goods and chattels for sale, and became unable to procure a fair and reasonable price for the same, and the said intended sale failed altogether; and the expenses incurred by the plaintiff in and about preparing for the said intended sale produced no advantageous result to the plaintiff; and the plaintiff was otherwise much injured and damnified.

And the plaintiff claims, &c.

No. 47.

C. v. *D.*

Statement of Defence.

1. The defendant admits that the plaintiff caused to be printed the advertisement set out in paragraph 2 of the plaintiff's statement of claim; but denies that the goods mentioned in

such advertisement were the property of the plaintiff, and that the intended sale by auction was in the ordinary course of the plaintiff's trade and business.

2. The defendant admits that he caused to be printed and published the words set out in paragraph 3 of the plaintiff's statement of claim; but denies that he did so falsely or maliciously, or with the meaning in such paragraph alleged.

3. Before and at the time of the publication complained of, the plaintiff had unlawfully detained and was unlawfully detaining from the defendant certain timber, carts, rails, plant, materials, and sundry other effects, the property of the defendant. The defendant was informed and believed that the plaintiff intended to dispose of the same (among other things) at the said intended sale by auction. Wherefore the defendant printed and published the said words for the purpose of warning all persons from purchasing the said goods and chattels so unlawfully detained by the plaintiff as aforesaid and in the *bonâ fide* belief that such warning was necessary for the protection of the defendant's own property, and without any malice towards the plaintiff.

4. The defendant does not admit the allegations contained in paragraphs 4 and 5 of the statement of claim, or any of them.

See *Carr* v. *Duckett*, 5 H. & N. 783; 29 L. J. Ex. 468, as to paragraph 3.

No. 48.

Libel in the nature of Slander of Title.

Hart and another v. *Wall* (2 C. P. D. 146; 46 L. J. C. P. 227; 25 W. R. 373).

STATEMENT OF CLAIM.

1. The plaintiffs were at the times hereinafter mentioned, and still are, vocalists, and had been and were engaged to sing at the "Sun Music Hall, Knightsbridge," and also at the "London Pavilion Music Hall," for reward payable to the plaintiffs for their services, and they appeared and sang in public under the name of "The Sisters Hartridge."

2. On the 15th of January, 1876, the defendant falsely and maliciously wrote and published of the plaintiffs, in the form of a letter addressed to E. Williams, Esq., the proprietor of the "Sun Music Hall," of the plaintiffs and of them as such vocalists, and of their engagement at the "Sun Music Hall," the words following; that is to say:—"January 15th, 1876. E. Williams, Esq. My dear Sir,—Although I know it is quite unintentional on the part of the lady advertisers (meaning the plaintiffs), the advertisement attached at foot, if relied upon in every particular by proprietors engaging them, is calculated to lead such proprietors to incur the penalties under the Copyright Act in certain cases, as I hold the power of attorney over the performing rights of certain musical publications belonging to two houses therein named, who only have the copyrights vested in them, and a separate and distinct property never held by them. If all proprietors knew this, it would be best; but I have not time to apprise them. I remain, yours truly, H. Wall;" meaning that the plaintiffs had no right to sing certain songs which they advertised themselves as about to sing at the said music hall.

3. In consequence thereof, and by the publication of the said words, E. Williams dismissed the plaintiffs from his service and terminated the said engagement at the "Sun Music Hall."

4. On the 19th of January, 1876, the defendant falsely and maliciously wrote and published of the plaintiffs, in the form of a letter addressed to E. Loibl, Esq., the proprietor of the "Pavilion Music Hall," of the plaintiffs, and of them as such vocalists, and their engagements at the said music hall, the words following; that is to say:—"January 19th, 1876. E. Loibl, Esq. Dear Sir,—That you may not be misled, I beg to state, that, with reference to an advertisement in the last *Era*, where the Misses Hartridge (meaning the plaintiffs,) give notice that they have received unhesitating permission to perform any *morceaux* from any publication of certain publishers therein mentioned, it would be as well for you to know that, if two of the firms really had pretended to have given such unqualified sanction, that I hold powers of attorney over certain publications issued by them as to the sole liberty of public performance, which right they never possessed. But

Messrs. Chappell & Co.'s representative to-day informed me that they only granted permission for two songs in particular (which were named), and they were not aware it was for music hall singing, as they have a poor opinion of such creating any demand for their publications; and moreover that they require the advertisement to be altered. And Messrs. Metzler & Co.'s representative, in the presence and hearing of Mr. Brown (the head man of Mr. Cunningham-Boozey,) yesterday stated to me that he had granted no permission whatever, but, on the contrary, that they had informed the ladies (meaning the plaintiffs,) that their charge for such permission would be 7*s.* per night (2*l.* 2*s.* per week), as much again as Messrs. Boosey named," (meaning that the plaintiffs had advertised themselves to sing at the said music hall songs which they had no right to sing).

5. In consequence of the publication of these words E. Loibl dismissed the plaintiffs from his service, and dispensed with their services and refused to employ them to sing at the said music hall; and the plaintiffs were and are by means of the premises otherwise injured.

And the plaintiffs claim 100*l.* damages.

No. 49.

Statement of Defence.

1. The defendant denies the whole of the allegations contained in the first paragraph of the statement of claim.

2. The defendant denies the allegations contained in paragraphs 2, 3, 4 and 5 of the said statement of claim.

3. The defendant further denies that the alleged libels, and each of them as disclosed in paragraphs 2 and 4 respectively, were written and published as therein alleged.

4. The defendant further says that the alleged libels and each or either of them were privileged communications written by the defendant under the protection of privilege.*

* This paragraph would now be deemed an insufficient plea of privilege, see *ante*, p. 484.

5. The defendant further says that the alleged libels, and each or either of them, and each and certain part or parts thereof, were true in substance and in fact.

REPLY.

The plaintiffs join issue with the defendant upon his statement of defence.

IV. FORMS OF PLEADINGS, NOTICES, ETC., IN THE COUNTY COURT.

No. 50.

Statement of Plaintiff's Cause of Action in Actions of Libel or Slander remitted for trial in a County Court.

In the County Court of ——, holden at ——

Between *A. B.* . . . . Plaintiff,
and [*address and description*],
C. D. . . . . Defendant,
[*address and description*].

Being an action of libel [*or* slander] commenced in her Majesty's High Court of Justice, and remitted by order of Master ——, under section 10 of "The County Courts Act, 1867," to be tried in this Court.

Libel.

This action is brought:—

For that the defendant falsely and maliciously wrote and published of and concerning the plaintiff the words following: "*he is a liar, a blackguard, and a scoundrel;*" and the plaintiff claims £200 damages.

Libel in the way of Trade.

Or, For that the defendant falsely and maliciously caused to be printed and published of and concerning the plaintiff in the way of his trade as a grocer, the words following: "*Mr. A. B. sands his sugar and dusts his pepper*," whereby the plaintiff was injured in his trade, and lost the custom of several persons, particularly X., Y., and Z., who had before dealt at the plaintiff's shop; and the plaintiff claims £50 damages.

Slander.

Or, For that the defendant falsely and maliciously spoke and

published of and concerning the plaintiff the words following: "*A. B. is a thief, and stole Mrs. Brown's ducks;*" and the plaintiff claims £30 damages.

Slander in the way of Trade.

Or, For that the defendant falsely and maliciously spoke and published of and concerning the plaintiff, in the way of his business and calling as a ratcatcher, the words following: "*A. B. is a great rogue, and instead of doing his best to kill the rats he encourages the breed, so that he may have more employment from the farmers,*" whereby the plaintiff was injured in his business, and several farmers, particularly X., Y., and Z., who had usually employed him to kill the rats on their farms, ceased to do so; and the plaintiff claims £20 damages.

Above is the statement of the plaintiff's cause of action.

Dated this —— day of ——, 18—.

A. B., plaintiff,
or
E. F., plaintiff's solicitor.

To the registrar of the Court,
and to the defendant.

[*N.B.—The above Forms are only given as examples; and the statement of the plaintiff's cause of action must in all cases be according to the facts, and be as concise as possible.*]

No. 51.

Notice of Trial of Action of Libel or Slander remitted for trial in a County Court.

Being an action of libel [*or* slander] commenced in her Majesty's High Court of Justice, and remitted by order of Master ——, under section 10 of "The County Courts Act, 1867," to be tried in this Court.

Take notice that this action will be tried at a court to be holden on the —— day of ——, at — o'clock in the forenoon.

[*N.B.—To the notice sent to the defendant the registrar must annex a copy of the statement of the plaintiff's cause of action.*]

No. 52.

Affidavit for leave to administer Interrogatories.

We, A. B., of ——, the above-named plaintiff [*or* defendant], and L. M., of ——, solicitor in this cause for the said plaintiff [*or* defendant], make oath, and say, first :—

And I, the said A. B., for myself say :—

1. That I believe that I shall derive material benefit in this cause from the discovery which I seek by the interrogatories which I require to be delivered herein.

2. That I believe that I have a good cause of [*or* defence to this] action on the merits.

And I, the said L. M., say :—

3. That the plaintiff [*or* defendant] will derive material benefit by the discovery which he seeks by interrogatories.

4. That I believe that the plaintiff [*or* defendant] has a good cause of [*or* defence to this] action on the merits.

No. 53.

Notice of Set-off and Counterclaim.

Take notice, that the defendant intends at the hearing of this cause to claim a set-off and to counterclaim against the plaintiff's demand, the particulars of which set-off or counterclaim are annexed hereto.

Dated this —— day of ——, 18—.

The defendant [*or* defendant's solicitor].

To the registrar of the Court.

[*N.B.—The registrar is to annex to this notice the particulars of set-off and counterclaim, as furnished by defendant, sealed with the seal of the Court.*]

No. 54.

Notice of Special Defence.

Take notice that the defendant intends at the hearing of

this cause to give in evidence, and rely upon the following ground of defence.

Dated this —— day of ——, 18—.

The defendant [*or* defendant's solicitor.]

To the registrar of the Court.

Coverture.

That the defendant is now [*or* that she was, at the time when the supposed claim arose, *or* the supposed contract or agreement was made], the wife of ——, of ——. And that she was married to him at ——, in the county of ——, on the —— day of ——, and that she resides at ——, in the county of ——.

Statute of Limitations.

That the claim for which the defendant is summoned is barred by a Statute of Limitation.

Justification.

That the libel [*or* slander] complained of is true in substance and in fact.

[*N.B.—Notices of Special Defence, in cases commenced in a Superior Court, and sent to the County Court for trial under section* 10 *of* 30 & 31 *Vict. c.* 142, *must have, in addition to the usual heading, the heading of Form No.* 50.]

No. 55.

Notice to be given by Defendant under 6 & 7 *Vict. c.* 96, *s.* 1, *in an Action for Libel or Slander remitted for trial in a County Court.*

Being an action for libel [*or* slander] commenced in her Majesty's High Court of Justice, and remitted by order of Master —— under section 10 of "The County Courts Act, 1867," to be tried before this Court.

Take notice, that the defendant on the trial of this action will give in evidence in mitigation of damages that he made [*or* offered] an apology to the plaintiff for the libel [*or* slander] complained of before the commencement of the action [*or* as

soon after the commencement of the action as he had an opportunity of doing so.]

To the registrar of the Court
and to the plaintiff.

No. 56.

Notice to be given by Defendant under 6 & 7 Vict. c. 96, s. 2, in an Action for Libel remitted for trial in a County Court.

Being an action for libel commenced in her Majesty's High Court of Justice, and remitted by order of Master —— under section 10 of "The County Courts Act, 1867," to be tried before this Court.

Take notice, that the defendant on the trial of this action will give in evidence and rely upon the following ground of defence; (that is to say,)

That the libel was inserted in the newspaper called or known by the name of ——, without actual malice and without gross negligence, and that before the commencement of the action [*or* as soon after the commencement of the action as he had an opportunity of doing so] the defendant inserted in the said newspaper [*or* offered to publish in any newspaper or periodical publication to be selected by the plaintiff] a full apology for the said libel, and that the defendant has paid into Court £—— by way of amends for the injury sustained by the plaintiff by the publication of the said libel.

Dated this —— day of ——, 18—.

C. D., defendant,
or
E. F., defendant's solicitor.

To the registrar of the Court
and to the plaintiff.

[*N.B.—If the libel was published in any periodical publication other than a newspaper, alter the notice accordingly.*]

V. PRECEDENTS OF CRIMINAL PLEADINGS.

No. 57.

Information for a Libel on a Private Individual.

R. v. *Newman* (1 E. & B. 268, 558; 22 L. J. Q. B. 156; 17 Jur. 617; 3 C. & K. 252; Dears. C. C. 85).

In the Queen's Bench.

Michaelmas Term, 15 Vict., A.D. 1851.

Middlesex to wit.

Be it remembered, that C. F. Robinson, Esq., coroner and attorney of our Lady the Queen in the Court of Queen's Bench, who prosecutes for our said Lady the Queen in this behalf, comes here into the said Court at Westminster, the 21st day of November, in the fifteenth year of the reign of our said Lady, and gives the Court to understand and be informed that John Henry Newman, doctor of divinity, late of the parish of Aston, in the county of Warwick, contriving and wickedly and maliciously intending to injure and vilify one Giovanni Giacinto Achilli, and to bring him into great contempt, scandal, infamy, and disgrace, on the 1st of October, A.D. 1851, did falsely and maliciously compose and publish a certain false, scandalous, malicious, and defamatory libel, containing divers false, scandalous, malicious, and defamatory matters concerning the said Giovanni Giacinto Achilli, that is to say:—[*Here follows the libel, set out verbatim with the necessary innuendoes*]. Which said false, scandalous, malicious, and defamatory libel, the said John Henry Newman did then publish to the great damage, scandal, and disgrace of the said Giovanni Giacinto Achilli, in contempt of our said Lady the Queen, to the evil and pernicious example of all others in like case offending and against the peace of our said Lady the Queen, her crown and dignity. Whereupon the said coroner and attorney of our said Lady the Queen, who for our said Lady the Queen in this behalf prosecuteth, prayeth the consideration of the Court here in the premises, and that due process of law may be awarded against the said John Henry Newman in this behalf to make him answer to our said Lady the Queen touching and concerning the premises aforesaid.

No. 58.

*Pleas to the above Information.**

In the Queen's Bench.

Michaelmas Term, 15 Vict., A.D. 1851.

1. And the said John Henry Newman appears here in Court by Henry Lewin, his attorney, and the said information is read to him, which being by him heard and understood, he complains to have been grievously vexed and molested under colour of the premises, and the less justly because he saith that he is Not Guilty of the said supposed offences in the said information alleged, &c.

2. And for a further plea, the said John Henry Newman saith that before the composing and publishing of the said alleged libel, to wit, on the 1st of January, 1830, &c.: [*Here follow facts showing the truth of the matters charged.*] And so the said John Henry Newman says that the said alleged libel consists of allegations true in substance and in fact, and of fair and reasonable comments thereon.

And the said John Henry Newman further saith, that at the time of publishing the said alleged libel, it was for the public benefit that the matters therein contained should be published, because, he says, that great excitement prevailed and numerous public discussions had been held in divers places in England on divers matters of controversy between the churches of England and Rome, with respect to which it was important the truth should be known; and inasmuch as the said G. G. Achilli took a prominent part in such discussions, and his opinion and testimony were by many persons appealed to and relied on as of a person of character and respectability, with reference to the matters in controversy, it was necessary for the purpose of more effectually examining and ascertaining the truth, that the matters in the said alleged libel should be publicly known, in order that it might more fully appear that the opinion and testimony of the said G. G. Achilli were not deserving of credit or

* The pleas originally filed were demurred to, and amended; the amended pleas were again demurred to, as being too general in their statements, and were then altered to the above form.

consideration by reason of his previous misconduct: [*Here follow other facts showing that it was for the public benefit that the said matters charged should be published* ——]. And so the said John Henry Newman says he published the said alleged libel as he lawfully might for the causes aforesaid, and this the said John Henry Newman is ready to verify. Wherefore he prays judgment, &c.

No. 59.

Replication.

Hilary Term, 16 Vict., 1852.

The said C. F. Robinson, Esq., coroner and attorney of our said Lady the Queen, in the Court of Queen's Bench, who prosecutes for our Lady the Queen as to the plea first pleaded, puts himself upon the country, and as to the plea secondly pleaded, saith that the said J. H. Newman of his own wrong and without the cause in his said plea alleged, composed, and published the said libel as in the said information alleged, &c.

Issue joined, Hilary Term, 16 Vict., 1852.

No. 60.

Information ex officio *for a Seditious Libel.*

R. v. *John Horne*, clerk (afterwards *John Horne Tooke*), (Cowp. 672; 11 St. Tr. 264; 20 How. St. Tr. 651).

Michaelmas Term, 17 Geo. III. A.D. 1776.

London to wit.

Be it remembered, That Edward Thurlow, Esq., attorney-general of our present sovereign Lord the King, who for our said present sovereign Lord the King prosecutes in this behalf, in his proper person comes into the Court of our said present sovereign Lord the King before the King himself, at Westminster in the county of Middlesex, on Thursday next after fifteen days from the day of St. Martin in this same term, and

for our said Lord the King giveth the Court here to understand and be informed, that John Horne, late of London, clerk, being a wicked, malicious, seditious, and ill-disposed person, and being greatly disaffected to our said present sovereign Lord the King, and to his administration of the government of this kingdom, and the dominions thereunto belonging, and wickedly, maliciously, and seditiously intending, devising, and contriving to stir up and excite discontents and seditions among His Majesty's subjects, and to alienate and withdraw the affection, fidelity, and allegiance of His said Majesty's subjects from His said Majesty, and to insinuate and cause it to be believed that divers of His Majesty's innocent and deserving subjects had been inhumanly murdered by His said Majesty's troops in the province, colony, or plantation of the Massachusetts-Bay, in New England, in America, belonging to the crown of Great Britain, and unlawfully and wickedly to seduce and encourage His said Majesty's subjects in the said province, colony, or plantation, to resist and oppose His Majesty's government, on the 8th day of June, in the 15th year of the reign of our present sovereign Lord George the Third, &c., with force and arms at London aforesaid, in the parish of St. Mary-le-Bow, in the ward of Cheap, wickedly, maliciously, and seditiously, did write and publish, and cause and procure to be written and published, a certain false, wicked, malicious, scandalous and seditious libel, of and concerning His said Majesty's government, and the employment of His troops, according to the tenor and effect following: "*King's Arms Tavern, Cornhill, June 7th*, 1775. At a special meeting this day of several members of the Constitutional Society, during an adjournment, a gentleman proposed, that a subscription should be immediately entered into (by such of the members present who might approve the purpose), for raising the sum of £100—to be applied to the relief of the widows, orphans, and aged parents of our beloved American fellow subjects, who, faithful to the character of Englishmen, preferring death to slavery, were, for that reason only, inhumanly murdered by the King's (meaning His said Majesty's) troops, at or near Lexington and Concord, in the province of Massachusetts (meaning the said province, colony, or plantation of the Massachusetts-Bay, in New England, in America) on the 19th of last April; which sum being imme-

diately collected, it was thereupon resolved, that Mr. Horne (meaning himself the said John Horne) do pay to-morrow into the hands of Messieurs Brownes and Collison, on the account of Dr. Franklin, the said sum of £100, and that Dr. Franklin be requested to apply the same to the above-mentioned purpose.—John Horne" (meaning himself the said John Horne) in contempt of our said Lord the King, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like case offending, and also against the peace of our said present sovereign Lord the King, his crown and dignity. [*Then follow several counts for the several publications of the same libel in the various newspapers.*]

And the said attorney-general of our said Lord the King for our said Lord the King further gives the Court here to understand and be informed that the said John Horne, being such person as aforesaid, and again unlawfully, wickedly, maliciously, and seditiously intending, devising, and contriving as aforesaid, afterwards, to wit, on the 14th day of July, in the 15th year aforesaid, with force and arms at London aforesaid, in the parish and ward aforesaid, wickedly, maliciously, and seditiously did write and publish, and cause and procure to be written and published, a certain false, wicked, malicious, scandalous, and seditious libel, of and concerning His said Majesty's government, and the employment of His troops, according to the tenor and effect following:—"I (meaning himself the said John Horne) think it proper to give the unknown contributor this notice, that I (again meaning himself the said John Horne) did yesterday pay to Messrs. Brownes and Collison, on the account of Dr. Franklin, the sum of £50 and that I (again meaning himself the said John Horne) will write to Dr. Franklin, requesting him to apply the same to the relief of the widows, orphans, and aged parents of our beloved American fellow subjects, who, faithful to the character of Englishmen, preferring death to slavery, were (for that reason only) inhumanly murdered by the King's (meaning His said Majesty's) troops, at or near Lexington and Concord, in the province of Massachusetts (meaning the said province, colony, or plantation of the Massachusetts-Bay in New England in America) on the 19th of April last,—John Horne" (again meaning himself the said John Horne) in contempt of our said Lord the

King, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like case offending, and also against the peace of our said present sovereign Lord the King, his crown, and dignity. [*Then follow other counts for other publications of the same libel.*] Whereupon the said attorney-general of our said Lord the King, who for our said present sovereign Lord the King prosecutes in this behalf, prays the consideration of the Court here in the premises, and that due process of law may be awarded against him, the said John Horne, in this behalf, to make him answer to our said present sovereign Lord the King touching and concerning the said premises aforesaid, &c.

E. THURLOW.

No. 61.

Indictment for a Blasphemous Libel.

——, to wit.

The jurors for our Lady the Queen upon their oath present that A. B., being a wicked and evil-disposed person, and disregarding the laws and religion of the realm, and wickedly and profanely devising and intending to bring the Holy Scriptures and the Christian religion into disbelief and contempt among the people of this kingdom, on the —— day of ——, A.D——., unlawfully and wickedly did compose, print, and publish, and cause and procure to be composed, printed, and published, a certain scandalous, impious, blasphemous, and profane libel, of and concerning the Holy Scriptures and the Christian religion, in one part of which said libel there were and are contained, amongst other things, certain scandalous, impious, blasphemous, and profane matters and things, of, and concerning the Holy Scriptures and the Christian religion, according to the tenor and effect following, that is to say, [*here set out the first blasphemous passage*], and in another part thereof there were and are contained, amongst other things, certain other scandalous, impious, blasphemous, and profane matters and things, of and concerning the said Holy Scriptures and the Christian religion, according to the tenor and effect following, that is to say, [*here set out other blasphemous passages*]: to the high displeasure of Almighty God, to the

great scandal and reproach of the Christian religion, to the evil example of all others in the like case offending, and against the peace of our said Lady the Queen her crown and dignity.

No. 62.

Indictment for publishing and selling an Obscene Picture.

——, to wit.

The jurors for our Lady the Queen upon their oath present that A. B., being a wicked and evil-disposed person, and unlawfully devising contriving and intending to debauch and corrupt the morals of the young and of divers other liege subjects of our said Lady the Queen, on the —— day of ——. A.D. ——, in a certain open and public shop of him, the said A. B., situate and being at number —— High Street, in the parish of ——, in the town of ——, in the county aforesaid, unlawfully, wickedly, designedly, and maliciously did publish and sell, and cause and procure to be published and sold, to one C. D. a certain lewd, scandalous and obscene picture [print, photograph, *or* engraving,] intituled ——, and representing —— [*here give such a detailed description of the picture as will manifestly show its indecency*] to the manifest corruption of the morals of the young, and of other liege subjects of our said Lady the Queen, in contempt of our said Lady the Queen and her laws, to the evil example of all others in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

No. 63.

Indictment for Seditious Words.

——, to wit.

The jurors for our Lady the Queen upon their oath present that A. B., being a wicked, malicious, seditious, and evil-disposed person, and wickedly, maliciously, and seditiously contriving and intending the peace of our Lady the Queen and of this realm to disquiet and disturb, and the liege subjects of our said Lady the Queen to incite and move to

hatred and dislike of the person of our said Lady the Queen and of the government established by law within this realm, and to incite, move, and persuade great numbers of the liege subjects of our said Lady the Queen, to insurrections, riots, tumults, and breaches of the peace, and to prevent by force and arms the execution of the laws of this realm and the preservation of the public peace, on the —— day of ——, A.D. ——, in the presence and hearing of divers, to wit, —— of the liege subjects of our said Lady the Queen then assembled together, in a certain speech and discourse by him the said A. B. then addressed to the said liege subjects so then assembled together, as aforesaid, unlawfully, wickedly, maliciously, and seditiously did publish, utter, pronounce, and declare with a loud voice of and concerning the government established by law within this realm, and of and concerning our said Lady the Queen, and the crown of this realm, and of and concerning the liege subjects of our said Lady the Queen, committing and being engaged in divers insurrections, riots, and breaches of the public peace, amongst other words and matter, the false, wicked, seditious and inflammatory words and matter following, that is to say:—[*here set out the seditious words verbatim*]; in contempt of our said Lady the Queen, in open violation of the laws of this realm, to the evil and pernicious example of all others in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

No. 64.

Indictment for Defamatory Words spoken to a Magistrate in the Execution of his Duty.

Middlesex, to wit.

The jurors for our Lady the Queen upon their oath present, that heretofore, to wit, on the —— day of —— in the year of our Lord, —— one A. B. was brought before C. D., Esquire, then and yet being one of the justices of our said Lady the Queen, assigned to keep the peace of our said Lady the Queen in and for the county of Middlesex, and also to hear and determine divers felonies, trespasses, and other misdeeds com-

mitted in the said county ; and the said A. B. was then charged before the said C. D., upon the oath of one E. F., that he, the said A. B., had then lately before feloniously taken, stolen, and taken away divers goods and chattels of the said E. F. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. B., being a scandalous and ill-disposed person, and wickedly and maliciously intending and contriving to scandalize and vilify the said C. D. as such justice as aforesaid, and to bring the administration of justice in this kingdom into contempt, afterwards, and whilst the said C. D., as such justice as aforesaid, was examining and taking the depositions of divers witnesses against him the said A. B., in that behalf, to wit, on the day and year aforesaid, wickedly and maliciously, in the presence and hearing of divers good and liege subjects of our said Lady the Queen, did publish, utter, pronounce, declare, and say with a loud voice to the said C. D., and whilst he the said C. D. was so acting as such justice as aforesaid, the false, wicked, malicious, and seditious words and matter following, that is to say :—[*Here set out the seditious words verbatim*] ; to the great scandal and reproach of the administration of justice in this kingdom, to the great scandal and damage of the said C. D., in contempt of our said Lady the Queen and her laws, to the evil example of all others in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

No. 65.

Indictment for a Libel on a Private Individual at Common Law.

—— to wit.

The jurors for our Lady the Queen, upon their oath, present that [before and at the time of the committing of the offence hereinafter mentioned, one C. D. was, and still is, a solicitor of the Supreme Court, and exercised and carried on the profession or business of such solicitor at ——, in the county of —— ; and that] A. B., being a person of an evil and wicked mind, and wickedly, maliciously, and unlawfully contriving and intending

to injure, vilify, and prejudice the said C. D., and to bring him into public contempt, scandal, infamy, and disgrace, and to deprive him of his good name, fame, credit, and reputation [in his said profession and business, and otherwise to injure and aggrieve him therein], on the —— day of ——, in the year of our Lord ——, wickedly, maliciously, and unlawfully did write and publish, and cause and procure to be written and published, a false, scandalous, malicious, and defamatory libel [in the form of a letter directed to one E. F., containing divers false, scandalous, malicious, and defamatory matters and things] of and concerning the said C. D. [and of and concerning him in his said profession and business, and of and concerning his conduct and behaviour therein], according to the tenor and effect following, that is to say:—[*Here set out the libel verbatim, with all necessary innuendoes,*] to the great damage, scandal, and disgrace of the said C. D. [in his said profession and business], to the evil example of all others in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

No. 66.

Indictment under s. 4 of Lord Campbell's Act.

[*Commence as in the preceding precedent; then set out the libel with all necessary innuendoes, and conclude as follows*]:—he, the said A. B., then well knowing the said defamatory libel to be false; to the great damage, scandal, and disgrace of the said C. D., to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

No. 67.

Indictment under s. 5 of Lord Campbell's Act.

[*This will precisely follow the preceding form, merely omitting the words*:—"he, the said A. B., then well knowing the said defamatory libel to be false."]

No. 68.

Demurrer to an Indictment or Information.

And the said A. B., in his own proper person, cometh into Court here, and, having heard the said indictment [*or* information] read, saith, that the said indictment [*or* information] and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that he the said A. B. is not bound by the law of the land to answer the same; and this he is ready to verify: wherefore, for want of a sufficient indictment [*or* information] in this behalf, the said A. B. prays judgment, and that by the Court he may be dismissed and discharged from the said premises in the said indictment [*or* information] specified.

No. 69.

Joinder in Demurrer.

And J. N., who prosecutes for our said Lady the Queen in this behalf, saith, that the said indictment [*or* information] and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law to compel the said A. B. to answer the same; and the said J. N., who prosecutes as aforesaid, is ready to verify and prove the same, as the Court here shall direct and award: wherefore, inasmuch as the said A. B. hath not answered to the said indictment [*or* information], nor hitherto in any manner denied the same, the said J. N., for our said Lady the Queen, prays judgment, and that the said A. B. may be convicted of the premises in the said indictment [*or* information] specified.

No. 70.

Pleas to an Indictment.

At the assizes and general delivery of the Queen's gaol for the county of ——, holden in and for the said county on the

—— day of ——, A. D. ——, cometh in Court the said A. B., in his own proper person, and having heard the said indictment read, saith he is not guilty of the said premises in the said indictment above specified and charged upon him, and of this, he the said A. B. puts himself upon the country, &c.

And for a further plea in this behalf, the said A. B. says that our Lady the Queen ought not further to prosecute the said indictment against him, because he says that it is true that [*Here state facts showing the truth of every matter charged in the alleged libel*]. And the said A. B. further saith that before and at the time of the publication in the said indictment mentioned [*Here state facts showing that it was for the public benefit that the said matters charged should be published*], by reason whereof it was for the public benefit that the said matters so charged in the said indictment, and all and every of them should be published. And this he the said A. B. is ready to verify, wherefore he prays judgment and that by the Court here he may be dismissed and discharged from the said premises in the said indictment above specified.

No. 71.

Replication to the above Pleas.

And thereupon J. N. [*the clerk of arraigns, &c.*] who prosecutes for our said Lady the Queen in this behalf as to the plea of the said A. B. by him firstly above pleaded, and whereof the said A. B. hath put himself upon the country, doth the like, &c. And as to the plea of the said A. B. by him secondly above pleaded, the said J. N., who prosecutes as aforesaid, says that our said Lady the Queen ought not by reason of anything in the said second plea alleged to be barred or precluded from prosecuting the said indictment against the said A. B.; because he says, that he denies the said several matters in the said second plea alleged, and saith that the same are not, nor are nor is any or either of them, true; but that the said A. B. of his own wrong, and without the cause and matter of defence in his said second plea alleged and set forth, committed the offence and published the said libel in manner and form as in

the said indictment is mentioned. And this he, the said J. N. prays may be inquired of by the country, &c. And the said A. B. doth the like.

No. 72.

Demurrer to a Plea.

And J. N., who prosecutes for our said Lady the Queen in this behalf, as to the said plea of the said A. B. by him above pleaded, saith that the same, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude our said Lady the Queen from prosecuting the said indictment against him the said A. B., and that our said Lady the Queen is not bound by the law of the land to answer the same; and this he, the said J. N., who prosecutes as aforesaid, is ready to verify: wherefore, for want of a sufficient plea in this behalf, he the said J. N. for our said Lady the Queen, prays judgment, and that the said A. B. may be convicted of the premises in the said indictment specified.

No. 73.

Joinder in Demurrer.

And the said A. B. saith, that his said plea, by him above pleaded and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude our said Lady the Queen from prosecuting the said indictment against him the said A. B., and the said A. B. is ready to verify and prove the same, as the said Court here shall direct and award: wherefore, inasmuch as the said J. N., for our said Lady the Queen, hath not answered the said plea, nor hitherto in any manner denied the same, the said A. B. prays judgment, and that by the Court here he may be dismissed and discharged from the said premises in the said indictment specified.

APPENDIX B.

REPORT FROM THE SELECT COMMITTEE OF THE HOUSE OF COMMONS ON THE LAW OF LIBEL.

Committee nominated:—Mr. Attorney General; Sir John Holker; Mr. Courtney; Mr. Staveley Hill; Mr. Alexander Sullivan; Baron Henry de Worms; Mr. Edward Leatham; Mr. Gregory; Mr. Blennerhassett; Mr. Floyer; Dr. Cameron; Mr. Richard Paget; Mr. Errington; Mr. Master; Mr. Hutchinson.

The Select Committee re-appointed to inquire into the Law of Newspaper Libel have agreed to the following Report.

Your committee have not thought it necessary to call witnesses upon the matters referred to them. They have had the advantage of the evidence taken by the Select Committee of 1879, who, owing to the short time at their disposal, were unable to report, and your committee are of opinion that through the labours of the former committee sufficient information has been accumulated for the purposes of their inquiry.

Your committee have confined themselves to an examination of the state of the law affecting civil actions and criminal prosecutions for newspaper libel, and to the changes which, in their judgment, should be made therein.

It appears to your committee that one of the most important points of the subject referred to them is the question of extension of privilege to newspaper reports of the proceedings of public meetings.

Your committee, after careful consideration, have come to the conclusion that the balance of convenience requires that further protection should be given to such reports.

Your committee accordingly recommend that any report published in any newspaper of the proceedings of a public meeting should be privileged, if such meeting was lawfully convened for a lawful purpose, and was open to the public, and if

such report was fair and accurate, and published without malice, and if the publication of the matter complained of was for the public benefit.

But your committee are of opinion that such protection should not be available as a defence in any proceeding if the plaintiff or prosecutor can show that the defendant has refused to insert a reasonable letter or statement of explanation or contradiction by or on behalf of such plaintiff or prosecutor.

Your committee recommend that no criminal prosecution shall be commenced against the proprietor, publisher, editor, or anyone responsible for the publication of a newspaper, for any libel published therein, without the *fiat* of the Attorney General being first obtained.

Your committee are also of opinion that the name of every proprietor of a newspaper, or, in the case of several persons engaged as partners in such proprietorship, the names of all such persons should be registered at the office of the Registrar of Joint Stock Companies, with full particulars of the addresses and occupations of all such persons, or of any change therein.

14 July, 1880.

APPENDIX C.

STATUTES.

CONTENTS.

	PAGE
3 Edw. I. Stat. Westminster I. c. 34	665
13 Edw. I. stat. 4	*ib.*
2 Rich. II. st. I. c. 5	*ib.*
12 Rich. II. c. 11	*ib.*
13 Car. II. stat. I. c. 1	*ib.*
4 William & Mary, c. 18, s. 1	666
32 Geo. III. c. 60. (Mr. Fox's Libel Act)	667
39 Geo. III. c. 79	668
51 Geo. III. c. 65, s. 3	669
60 Geo. III. & 1 Geo. IV. c. 8, ss. 1 & 2	*ib.*
5 Geo. IV. c. 83, s. 4	670
6 & 7 Will. IV. c. 76, s. 19	671
1 & 2 Vict. c. 38, s. 2	*ib.*
2 & 3 Vict. c. 12, ss. 2, 3, 4	672
3 & 4 Vict. c. 9	*ib.*
6 & 7 Vict. c. 96. (Lord Campbell's Libel Act)	674
8 & 9 Vict. c. 75	677
9 & 10 Vict. c. 33, s. 1	678
11 & 12 Vict. c. 12, s. 3	*ib.*
15 & 16 Vict. c. 76 (C. L. P. Act, 1852), s. 61	679
18 & 19 Vict. c. 41	*ib.*
20 & 21 Vict. c. 83	680
23 & 24 Vict. c. 32	682
43 & 44 Vict. c. 41 (Burial Laws Amendment Act, 1880), s. 7	*ib.*

APPENDIX OF STATUTES.

THE STATUTE OF CIRCUMSPECTE AGATIS.

13 EDW. I. STAT. 4.

[A.D. 1285.]

THE King to his judges sendeth greeting :—

1. Use yourselves circumspectly in all matters concerning the Bishop of Norwich and his clergy, not punishing them if they hold plea, in Court Christian, of such things as be mere spiritual, that is to wit, of penance enjoined by prelates for deadly sin, as fornication, adultery, and such like, for the which sometimes corporal penance, and sometime pecuniary is enjoined. . . . .

6. *And for laying violent hands on a clerk, and in cause of defamation, it hath been granted already, that it shall be tried in a Spiritual Court, when money is not demanded, but* [*a thing done*] *for punishment of sin,* and likewise for breaking an oath. . . . .

12. *In causes of defamation, prelates may freely correct, the King's prohibition notwithstanding; first enjoining a corporal penance, which, if the party will redeem, the prelate may lawfully receive the money, though the prohibition be showed.*

[N.B.—The words in italics, being rendered unnecessary by the 18 & 19 Vict. c. 41, are now repealed by the Stat. Law. Revn. Act, 1863, 26 & 27 Vict. c. 125.]

SCANDALUM MAGNATUM.

3 Edw. I. Stat. Westminster I. c. 34 . . . . . *ante*, p. 133
2 Rich. II. st. I. c. 5 . . . . . *ante*, p. 134
12 Rich. II. c. 11 . . . . . *ib.*

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13 CAR. II. STAT. I. C. 1.

[A.D. 1661.]

S. 3. AND to the end that no man hereafter may be misled into any seditious or unquiet demeanour out of an opinion that the Parliament begun and held at Westminster upon the third day of November, in the year of our Lord 1640, is yet in being which is undoubtedly dissolved and determined, and so is hereby declared and adjudged to be fully dissolved and determined, or out of an opinion that there lies any obligation upon him from any oath, covenant, or engagement whatsoever, to endeavour a change of government either in church or state, or out of an opinion that both Houses of Parliament, or either of them have a legislative power without the King, all which assertions have been seditiously maintained in some pamphlets lately printed, and are daily promoted by the active

enemies of our peace and happiness; Be it therefore further enacted by the authority aforesaid, that if any person or persons at any time after the four and twentieth day of June, in the year of our Lord 1661, shall maliciously and advisedly, by writing, printing, preaching, or other speaking express, publish, utter, declare, or affirm that the Parliament begun at Westminster upon the third day of November, in the year of our Lord 1640, is not yet dissolved, or is not determined, or that it ought to be in being, or hath yet any continuance or existence, or that there lies any obligation upon him or any other person from any oath, covenant, or engagement whatsoever, to endeavour a change of government either in church or state, or that both Houses of Parliament, or either House of Parliament have or hath a legislative power without the King, or any other words to the same effect, that then every such person and persons so aforesaid offending shall incur the danger and penalty of a premunire mentioned in a statute made in the 16th year of the reign of King Richard the Second. And it is hereby also declared that the oath usually called the solemn league and covenant was in itself an unlawful oath and imposed upon the subjects of this realm against the fundamental laws and liberties of this kingdom, and that all orders and ordinances or pretended orders and ordinances of both or either Houses of Parliament for imposing of oaths, covenants, or engagements, levying of taxes, or raising of forces and arms, to which the royal assent either in person or by commission was not expressly had or given, were in their first creation and making, and still are, and so shall be taken to be null and void to all intents and purposes whatsoever. . . . .

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4 WILLIAM & MARY, c. 18.

An Act to prevent malicious informations in the Court of King's Bench.

[A.D. 1692.]

S. 1. THE clerk of the crown in the said Court of King's Bench for the time being shall not without express order, to be given by the said Court in open Court, exhibit, receive, or file any information for any of the causes aforesaid, or issue out any process thereupon, before he shall have taken or shall have delivered to him a recognizance from the person or persons procuring such information to be exhibited with the place of his, her, or their abode, title, or profession, to be entered to the person or persons against whom such information or informations is or are to be exhibited in the penalty of twenty pounds, that he, she, or they will effectually prosecute such informations or information, and abide by and observe such orders as the said Court shall direct, which recognizance the said clerk of the crown and also every justice of the peace of any county, city, franchise or town corporate (where the cause of any such information shall arise), are hereby impowered to take, after the taking whereof by the said clerk of the crown, or the receipt thereof from any justice of the peace, the said clerk of the crown shall make an entry thereof upon record, and shall file

a memorandum thereof in some public place in his office, that all persons may resort thereunto without fee. And in case any person or persons against whom any information or informations for the causes aforesaid, or any of them, shall be exhibited, shall appear thereunto and plead to issue, and that the prosecutor or prosecutors of such information or informations shall not at his and their own proper costs and charges within one whole year next after issue joined therein procure the same to be tried, or if upon such trial a verdict pass for the defendant or defendants, or in case the said informer or informers procure a *noli prosequi* to be entered then in any of the said cases the said Court of King's Bench is hereby authorized to award to the said defendant and defendants, his, her, or their costs, unless the judge before whom such information shall be tried shall at the trial of such information in open Court certify upon record that there was a reasonable cause for exhibiting such information. And in case the said informer or informers shall not within three months next after the said costs taxed and demand made thereof, pay to the said defendant or defendants the said costs, then the said defendant and defendants shall have the benefit of the said recognizance to compel them thereunto.

MR. FOX'S LIBEL ACT.

32 GEO. III. c. 60.

[A.D. 1792.]

An Act to remove doubts respecting the Functions of Juries in Cases of Libel.

WHEREAS doubts have arisen whether on the trial of an indictment or information for the making or publishing any libel, where an issue or issues are joined between the King and the defendant or defendants, on the plea of not guilty pleaded, it be competent to the jury impanelled to try the same to give their verdict upon the whole matter in issue: Be it therefore declared and enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that on every such trial the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information, and shall not be required or directed by the Court or judge before whom such indictment or information shall be tried to find the defendant or defendants guilty merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information.

2. Provided always, that on every such trial the Court or judge before whom such indictment or information shall be tried shall, according to their or his direction, give their or his opinion and directions to the jury on the

matter in issue between the King and the defendant or defendants, in like manner as in other criminal cases.

3. Provided also, that nothing herein contained shall extend or be construed to extend to prevent the jury from finding a special verdict, in their discretion, as in other criminal cases.

4. Provided also, that in case the jury shall find the defendant or defendants guilty it shall and may be lawful for the said defendant or defendants to move in arrest of judgment, on such ground and in such manner as by law he or they might have done before the passing of this Act, anything herein contained to the contrary notwithstanding.

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39 GEO. III. c. 79.

[A.D. 1799.]

S. 28. NOTHING in this Act contained shall extend or be construed to extend to any papers printed by the authority and for the use of either House of Parliament.

S. 29. Every person who shall print any paper for hire, reward, gain, or profit, shall carefully preserve and keep one copy (at least) of every paper so printed by him or her, on which he or she shall write, or cause to be written or printed, in fair and legible characters, the name and place of abode of the person or persons by whom he or she shall be employed to print the same, and every person printing any paper for hire, reward, gain, or profit who shall omit or neglect to write, or cause to be written or printed as aforesaid, the name and place of his or her employer on one of such printed papers, or to keep or preserve the same for the space of six calendar months next after the printing thereof, or to produce and show the same to any justice of the peace who within the said space of six calendar months shall require to see the same, shall for every such omission, neglect, or refusal forfeit and lose the sum of twenty pounds.

S. 31. Nothing herein contained shall extend to the impression of any engraving, or to the printing by letter-press of the name, or the name and address, or business or profession, of any person, and the articles in which he deals, or to any papers for the sale of estates or goods by auction or otherwise.

S. 34. No person shall be prosecuted or sued for any penalty imposed by this Act, unless such prosecution shall be commenced, or such action shall be brought, within three calendar months next after such penalty shall have been incurred.

S. 35. And any pecuniary penalty imposed by this Act, and not exceeding the sum of twenty pounds, shall and may be recovered before any justice or justices of the peace for the county, stewartry, riding, division, city, town, or place, in which the same shall be incurred, or the person having incurred the same shall happen to be, in a summary way.

S. 36. All pecuniary penalties herein-before imposed by this Act shall, when recovered in a summary way before any justice, be applied and dis-

posed of in manner herein-after mentioned; that is to say, one moiety thereof to the informer before any justice, and the other moiety thereof to his Majesty, his heirs and successors.

[N.B.—The above sections are continued and re-enacted by 32 & 33 Vict. c. 24, schedule 2; while other sections of the same statute are repealed by schedule 1.]

51 GEO. III. c. 65.

[A.D. 1811.]

S. 3. NOTHING in the said Act of the thirty-ninth year of King George the Third, chapter seventy-nine, or in this Act contained, shall extend or be construed to extend to require the name and residence of the printer to be printed upon any bank note, or bank post bill of the Governor and Company of the Bank of England, upon any bill of exchange, or promissory note, or upon any bond or other security for payment of money, or upon any bill of lading, policy of insurance, letter of attorney, deed, or agreement, or upon any transfer or assignment of any public stocks, funds, or other securities, or upon any transfer or assignment of the stocks of any public corporation or company authorized or sanctioned by Act of Parliament, or upon any dividend warrant of or for any such public or other stocks, funds, or securities, or upon any receipt for money or goods, or upon any proceeding in any court of law or equity, or in any inferior Court, warrant, order, or other papers printed by the authority of any public board or public officer in the execution of the duties of their respective offices, notwithstanding the whole or any part of the said several securities, instruments, proceedings, matters, and things aforesaid shall have been or shall be printed.

[N.B.—This section is continued and re-enacted by the 32 & 33 Vict. c. 24, schedule 2.]

60 GEO. III. AND 1 GEO. IV. c. 8.

An Act for the more effectual Prevention and Punishment of blasphemous and seditious Libels. [30*th December*, 1819.]

WHEREAS it is expedient to make more effectual provision for the punishment of blasphemous and seditious libels: Be it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this Act, in every case in which any verdict or judgment by default shall be had against any person for composing, printing, or publishing any blasphemous libel, or any seditious libel tending to bring into hatred or contempt the person of his Majesty, his heirs or successors, or the Regent, or the govern-

ment and constitution of the United Kingdom as by law established, or either House of Parliament, or to excite his Majesty's subjects to attempt the alteration of any matter in Church or State as by law established, otherwise than by lawful means, it shall be lawful for the judge or the Court before whom or in which such verdict shall have been given, or the Court in which such judgment by default shall be had, to make an order for the seizure and carrying away and detaining in safe custody, in such manner as shall be directed in such order, all copies of the libel which shall be in the possession of the person against whom such verdict or judgment shall have been had, or in the possession of any other person named in the order for his use, evidence upon oath having been previously given to the satisfaction of such Court or judge, that a copy or copies of the said libel is or are in the possession of such other person for the use of the person against whom such verdict or judgment shall have been had as aforesaid; and in every such case it shall be lawful for any justice of the peace or for any constable or other peace officer acting under any such order, or for any person or persons acting with or in aid of any such justice of the peace, constable, or other peace officer, to search for any copies of such libel in any house, building, or other place whatsoever belonging to the person against whom any such verdict or judgment shall have been had, or to any other person so named, in whose possession any copies of any such libel, belonging to the person against whom any such verdict or judgment shall have been had, shall be; and in case admission shall be refused or not obtained within a reasonable time after it shall have been first demanded, to enter by force by day into any such house, building, or place whatsoever, and to carry away all copies of the libel there found, and to detain the same in safe custody, until the same shall be restored under the provisions of this Act, or disposed of according to any further order made in relation thereto.

2. And be it further enacted, that if in any such case as aforesaid judgment shall be arrested, or if, after judgment shall have been entered, the same shall be reversed upon any writ of error, all copies so seized shall be forthwith returned to the person or persons from whom the same shall have been so taken as aforesaid, free of all charge and expense, and without the payment of any fees whatever; and in every case in which final judgment shall be entered upon the verdict so found against the person or persons charged with having composed, printed, or published such libel, then all copies so seized shall be disposed of as the Court in which such judgment shall be given shall order and direct.

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5 GEO. IV. c. 83.

[21*st June*, 1824.]

S. 4. . . . . EVERY person wilfully exposing to view, in any street, road, highway, or public place, any obscene print, picture, or other indecent exhibition, ... shall be deemed a rogue and vagabond, within the true intent and meaning of this Act; and it shall be lawful for any justice of the

peace to commit such offender (being thereof convicted before him by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses,) to the house of correction, there to be kept to hard labour for any time not exceeding three calendar months. . . . .

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6 & 7 WILL. 4, c. 76.

[A.D. 1836.]

S. 19. IF any person shall file any bill in any Court for the discovery of the name of any person concerned as printer, publisher, or proprietor of any newspaper, or of any matters relative to the printing or publishing of any newspaper, in order the more effectually to bring or carry on any suit or action for damages alleged to have been sustained by reason of any slanderous or libellous matter contained in any such newspaper respecting such person, it shall not be lawful for the defendant to plead or demur to such bill, but such defendant shall be compellable to make the discovery required; provided always, that such discovery shall not be made use of as evidence or otherwise in any proceeding against the defendant, save only in that proceeding for which the discovery is made.

[N.B.—This section applies to Ireland. It was re-enacted by 32 & 33 Vict., c. 24, schedule 2, and therefore remains law, although the original statute, 6 & 7 Will. IV., c. 76, was wholly repealed, without any allusion to this section, by the 33 & 34 Vict., c. 99. See *ante*, pp. 513, 514.]

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1 & 2 VICT. c. 38.

[A.D. 1838.]

S. 2. AND whereas by the said recited Act (*i.e.*, *the* 5 *Geo. IV. c.* 83, *s.* 4, *and* NOT *as stated in the margin to the Revised Edition of the Statutes, vol. viii. p.* 216, *the* 5 *Geo. III. c.* 83, *s.* 5,) it is enacted, that every person wilfully exposing to view in any street, road, highway, or public place any obscene print, picture, or other indecent exhibition shall, on summary conviction thereof, be liable to punishment as therein provided: And whereas doubts have arisen whether the exposing to public view in the windows of shops in streets, highways, or other public places, of any obscene print, picture, or other indecent exhibition, is an offence within the meaning of the said recited Act: Be it therefore declared and enacted, that every person who shall wilfully expose or cause to be exposed to public view in the window or other part of any shop or other building situate in any street, road, highway, or public place, any obscene print, picture, or other indecent exhibition, shall be deemed to have wilfully exposed such obscene print, picture, or other indecent exhibition to public view within the intent and meaning of the said Act, and shall accordingly be liable to be proceeded against, and on conviction, to be punished under the provisions of the said Act.

2 & 3 VICT. c. 12.

[A.D. 1839.]

S. 2. EVERY person who shall print any paper or book whatsoever which shall be meant to be published or dispersed, and who shall not print upon the front of every such paper, if the same shall be printed on one side only, or upon the first or last leaf of every paper or book which shall consist of more than one leaf, in legible characters, his or her name and usual place of abode or business, and every person who shall publish or disperse, or assist in publishing or dispersing, any printed paper or book on which the name and place of abode of the person printing the same shall not be printed as aforesaid, shall for every copy of such paper so printed by him or her forfeit a sum not more than five pounds: Provided always, that nothing herein contained shall be construed to impose any penalty upon any person for printing any paper excepted out of the operation of the said Act of the thirty-ninth year of King George the Third, chapter seventy-nine, either in the said Act or by any Act made for the amendment thereof.

S. 3. In the case of books or papers printed at the University Press of Oxford, or the Pitt Press of Cambridge, the printer, instead of printing his name thereon, shall print the following words, "Printed at the University Press, Oxford," or "The Pitt Press, Cambridge," as the case may be.

S. 4. Provided always, that it shall not be lawful for any person or persons whatsoever to commence, prosecute, enter, or file, or cause or procure to be commenced, prosecuted, entered, or filed, any action, bill, plaint, or information in any of Her Majesty's Courts, or before any justice or justices of the peace, against any person or persons for the recovery of any fine, penalty, or forfeiture made or incurred, or which may hereafter be incurred under the provisions of this Act, unless the same be commenced, prosecuted, entered, or filed in the name of Her Majesty's Attorney-General or Solicitor-General in that part of Great Britain called England, or Her Majesty's Advocate for Scotland (as the case may be respectively); and if any action, bill, plaint, or information shall be commenced, prosecuted, or filed in the name or names of any other person or persons than is or are in that behalf before mentioned, the same and every proceeding thereupon had are hereby declared and the same shall be null and void to all intents and purposes.

[N.B.—The above sections are re-enacted by 32 & 33 Vict. c. 24, schedule 2; the rest of the Act is repealed by schedule 1.]

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3 & 4 VICT. c. 9.

An Act to give Summary Protection to Persons employed in the Publication of Parliamentary Papers. [14*th April*, 1840.]

WHEREAS it is essential to the due and effectual exercise and discharge of the functions and duties of Parliament, and to the promotion of wise

legislation, that no obstructions or impediments should exist to the publication of such of the reports, papers, votes, or proceedings of either House of Parliament, as such House of Parliament may deem fit or necessary to be published: And whereas obstructions or impediments to such publication have arisen, and hereafter may arise, by means of civil or criminal proceedings being taken against persons employed by or acting under the authority of the Houses of Parliament, or one of them, in the publication of such reports, papers, votes, or proceedings; by reason and for remedy whereof it is expedient that more speedy protection should be afforded to all persons acting under the authority aforesaid, and that all such civil or criminal proceedings should be summarily put an end to and determined in manner hereinafter mentioned: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That it shall and may be lawful for any person or persons who now is, or are, or hereafter shall be, a defendant or defendants in any civil or criminal proceedings commenced or prosecuted in any manner soever, for or on account or in respect of the publication of any such report, paper, votes, or proceedings by such person or persons, or by his, her, or their servant or servants, by or under the authority of either House of Parliament, to bring before the Court in which such proceeding shall have been or shall be so commenced or prosecuted, or before any judge of the same (if one of the Superior Courts at Westminster), first giving twenty-four hours' notice of his intention so to do to the prosecutor or plaintiff in such proceeding, a certificate under the hand of the Lord High Chancellor of Great Britain, or the Lord Keeper of the Great Seal, or of the Speaker of the House of Lords, for the time being, or of the Clerk of the Parliament, or of the Speaker of the House of Commons, or of the clerk of the same House, stating that the report, paper, votes, or proceedings as the case may be, in respect whereof such civil or criminal proceeding shall have been commenced or prosecuted, was published by such person or persons, or by his, her, or their servant or servants, by order or under the authority of the House of Lords or of the House of Commons, as the case may be, together with an affidavit verifying such certificate; and such Court or judge shall thereupon immediately stay such civil or criminal proceeding, and the same, and every writ or process issued therein, shall be and shall be deemed and taken to be finally put an end to, determined, and superseded by virtue of this Act.

2. And be it enacted, that in case of any civil or criminal proceeding hereafter to be commenced or prosecuted for or on account or in respect of the publication of any copy of such report, paper, votes, or proceedings, it shall be lawful for the defendant or defendants at any stage of the proceedings to lay before the Court or judge such report, paper, votes, or proceedings, and such copy, with an affidavit verifying such report, paper, votes, or proceedings, and the correctness of such copy, and the Court or judge shall immediately stay such civil or criminal proceeding; and the same, and every writ or process issued therein, shall be and shall be deemed and taken

to be finally put an end to, determined and superseded by virtue of this Act.

3. And be it enacted, that it shall be lawful in any civil or criminal proceeding to be commenced or prosecuted for printing any extract from or abstract of such report, paper, votes, or proceedings, to give in evidence under the general issue such report, paper, votes or proceedings, and to show that such extract or abstract was published *bonâ fide* and without malice; and if such shall be the opinion of the jury, a verdict of not guilty shall be entered for the defendant or defendants.

4. Provided always, and it is hereby expressly declared and enacted, that nothing herein contained shall be deemed or taken, or held or construed, directly or indirectly, by implication or otherwise, to affect the privileges of Parliament in any manner whatsoever.

LORD CAMPBELL'S LIBEL ACT.

6 & 7 VICT. c. 96.

An Act to amend the Law respecting Defamatory words and Libel.
[*24th August*, 1843.]

FOR the better protection of private character, and for more effectually securing the liberty of the press, and for better preventing abuses in exercising the said liberty, be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that in any action for defamation it shall be lawful for the defendant (after notice in writing of his intention so to do, duly given to the plaintiff at the time of filing or delivering the plea in such action) to give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such apology.

2. And be it enacted, that in an action for a libel contained in any public newspaper or other periodical publication it shall be competent to the defendant to plead that such libel was inserted in such newspaper or other periodical publication without actual malice, and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper or other periodical publication a full apology for the said libel, or, if the newspaper or periodical publication in which the said libel appeared should be ordinarily published at intervals exceeding one week, had offered to publish the said apology in any newspaper or periodical publication to be selected by the plaintiff in such action, *and that every such defendant shall, upon filing such plea, be at liberty to pay into Court a sum of money by way of amends for the*

injury sustained by the publication of such libel, and such payment into Court shall be of the same effect and be available in the same manner and to the same extent, and be subject to the same rules and regulations as to payment of costs and the form of pleading, except so far as regards the pleading of the additional facts hereinbefore required to be pleaded by such defendant, as if actions for libel had not been excepted from the personal actions in which it is lawful to pay money into Court under an Act passed in the session of Parliament held in the fourth year of his late Majesty, intituled "An Act for the further amendment of the law, and the better advancement of justice," and that to such plea to such action it shall be competent to the plaintiff to reply generally denying the whole of such plea.

3. And be it enacted, that if any person shall publish or threaten to publish any libel upon any other person, or shall directly or indirectly threaten to print or publish or shall directly or indirectly propose to abstain from printing or publishing, or shall directly or indirectly offer to prevent the printing or publishing, of any matter or thing touching any other person, with intent to extort any money or security for money, or any valuable thing from such or any other person, or with intent to induce any person to confer or procure for any person any appointment or office of profit or trust, every such offender, on being convicted thereof, shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding three years: Provided always, that nothing herein contained shall in any manner alter or affect any law now in force in respect of the sending or delivery of threatening letters or writings.

4. And be it enacted, that if any person shall maliciously publish any defamatory libel, knowing the same to be false, every such person, being convicted thereof, shall be liable to be imprisoned in the common gaol or house of correction for any term not exceeding two years, and to pay such fine as the Court shall award.

5. And be it enacted, that if any person shall maliciously publish any defamatory libel, every such person, being convicted thereof, shall be liable to fine or imprisonment, or both, as the Court may award, such imprisonment not to exceed the term of one year.

6. And be it enacted, that on the trial of any indictment or information for a defamatory libel, the defendant having pleaded such plea as hereinafter mentioned, the truth of the matters charged may be inquired into, but shall not amount to a defence, unless it was for the public benefit that the said matters charged should be published, and that to entitle the defendant to give evidence of the truth of such matters charged as a defence to such indictment or information, it shall be necessary for the defendant, in pleading to the said indictment or information, to allege the truth of the said matters charged in the manner now required in pleading a justification to an action for defamation, and further to allege that it was for the public benefit that the said matters charged should be published, and the particular fact or facts by reason whereof it was for the public benefit that the said matters charged should be published, to which plea the prosecutor shall be at liberty to reply generally, denying the whole thereof; and that if after

such plea the defendant shall be convicted on such indictment or information, it shall be competent to the Court, in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove or to disprove the same: Provided always, that the truth of the matters charged in the alleged libel complained of by such indictment or information shall in no case be inquired into without such plea of justification: Provided also, that in addition to such plea it shall be competent to the defendant to plead a plea of not guilty: Provided also, that nothing in this Act contained shall take away or prejudice any defence under the plea of not guilty, which it is now competent to the defendant to make under such plea to any action or indictment, or information, for defamatory words or libel.

7. And be it enacted, that whensoever, upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part.

8. And be it enacted, that in the case of any indictment or information by a private prosecutor for the publication of any defamatory libel, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the said defendant by reason of such indictment or information; and that upon a special plea of justification to such indictment or information, if the issue be found for the prosecutor, he shall be entitled to recover from the defendant the costs sustained by the prosecutor by reason of such plea, such costs so to be recovered by the defendant or prosecutor respectively to be taxed by the proper officer of the Court before which the said indictment or information is tried.

9. And be it enacted, that wherever throughout this Act, in describing the plaintiff or the defendant, or the party affected or intended to be affected by the offence, words are used importing the singular number or the masculine gender only, yet they shall be understood to include several persons as well as one person, and females as well as males, unless when the nature of the provision or the context of the Act shall exclude such construction.

10. . . . . nothing in this Act contained shall extend to Scotland.

[N.B.—The words in italics, in s. 2, were repealed by the Civil Procedure Acts Repeal Act, 1879, 42 & 43 Vict. c. 59, Schedule, part II.]

8 & 9 VICT. c. 75.

An Act to amend an Act passed in the Session of Parliament held in the Sixth and Seventh Years of the reign of Her present Majesty, intituled "An Act to amend the Law respecting Defamatory words and Libel."

[31*st July*, 1845.]

WHEREAS by an Act passed in the session of Parliament held in the sixth and seventh years of the reign of her present Majesty, intituled "An Act to amend the law respecting defamatory words and libel," it is, amongst other things, enacted and provided, that the defendant in an action for a libel contained in any public newspaper or other periodical publication may plead certain matters therein mentioned, and may upon filing such plea be at liberty to pay into Court a sum of money by way of amends for the injury sustained by the publication of such libel, and it is thereby further enacted, that such payment into Court shall be of the same effect, and be available in the same manner and to the same extent, and be subject to the same rules and regulations as to payment of costs and the form of pleading, except so far as regards the pleading of the additional facts hereinbefore required to be pleaded by such defendant, as if actions for libel had not been excepted from the personal actions in which it is lawful to pay money into Court under an Act passed in the session of Parliament held in the fourth year of his late Majesty, intituled "An Act for the further amendment of the law and the better advancement of justice." And whereas the said Act of the fourth year of the reign of his late Majesty relates only to proceedings in the Superior Courts in England, but by an Act passed in the session of Parliament held in the third and fourth years of the reign of her present Majesty, intituled "An Act for abolishing arrest on mesne process in civil actions, except in certain cases, for extending the remedies of creditors against the property of debtors, and for the further advancement of justice, in Ireland," a like provision is made for payment of money into Court in all personal actions pending in any of the Superior Courts in Ireland as is contained in the said Act of the fourth year of the reign of his late Majesty in regard to actions pending in the Superior Courts in England, with a like exception of actions for libel, and it is expedient to prevent any doubts as to the application of the said recited Act of the sixth and seventh years of the reign of her present Majesty to actions pending in the Superior Courts in Ireland which may be created by reason of the omission of a reference in the last mentioned Act to the said Act of the third and fourth years of the reign of her present Majesty: Be it therefore enacted and declared by the Queen's most excellent Majesty; by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that when in any action pending in the Superior Courts in Ireland for a libel contained in any public newspaper or other periodical publication the defendant shall plead the matters allowed to be pleaded by the said first-mentioned Act, and shall on filing such plea pay money into Court as provided by such Act, such payment into Court shall be of the

same effect, and be available in the same manner and to the same extent, and be subject to the same rules and regulations now in force or hereafter to be made as to payment of costs and the form of pleading, except so far as regards the pleading of the additional facts so required to be pleaded by such defendant, as if actions for libel had not been excepted from the personal actions in which it is lawful to pay money into Court under the said recited Act of the third and fourth years of the reign of her present Majesty.

2. And be it declared and enacted, that it shall not be competent to any defendant in such action, whether in England or in Ireland, to file any such plea, without at the same time making a payment of money into Court by way of amends *as provided by the said Act*, but every such plea so filed without payment of money into Court shall be deemed a nullity, and may be treated as such by the plaintiff in the action.

[N.B.—The words in italics in s. 2 were repealed by the Civil Procedure Acts Repeal Act, 1879, 42 & 43 Vict. c. 59, Schedule, part II. The Statute 3 & 4 Vict. c. 105, s. 46, referred to in s. 1 is now repealed by the Stat. Law Rev. Act, 1875. See the C. L. P. A., 1852 (15 & 16 Vict. c. 76) s. 70, and for Ireland 16 & 17 Vict. c. 113, s. 77 ; *ante*, pp. 491—4.]

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9 & 10 VICT. c. 33.

[*July 27th*, 1846.]

S. 1. It shall not be lawful for any person or persons to commence, prosecute, enter, or file, or cause or procure to be commenced, prosecuted, entered, or filed, any action, bill, plaint, or information in any of Her Majesty's courts, or before any justice or justices of the peace, against any person or persons for the discovery of any fine which may hereafter be incurred under the provisions of the Act of the thirty-ninth year of King George the Third, chapter seventy-nine, set out in this Act, unless the same be commenced, prosecuted, entered, or filed in the name of Her Majesty's Attorney-General or Solicitor-General in England, or Her Majesty's Advocate in Scotland, and every action, bill, plaint, or information which shall be commenced, prosecuted, entered, or filed in the name or names of any other person or persons than is in that behalf before mentioned, and every proceeding thereupon had, shall be null and void to all intents and purposes.

[N.B.—This section is re-enacted by the 32 & 33 Vict. c. 24, Schedule 2.]

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11 & 12 VICT. c. 12.

An Act for the Better Security of the Crown and Government of the United Kingdom. [*April 22nd*, 1848.]

S. 3. If any person whatsoever after the passing of this Act shall, within the United Kingdom or without, compass, imagine, invent, devise, or

intend to deprive or depose our most Gracious Lady the Queen, her heirs or successors, from the style, honour, or royal name of the imperial crown of the United Kingdom, or of any other of Her Majesty's dominions and countries, or to levy war against Her Majesty, her heirs or successors, within any part of the United Kingdom, in order by force or constraint to compel her or them to change her or their measures or counsels, or in order to put any force or constraint upon or in order to intimidate or overawe both Houses or either House of Parliament, or to move or stir any foreigner or stranger with force to invade the United Kingdom or any other Her Majesty's dominions or countries under the obeisance of Her Majesty, her heirs or successors, and such compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare, by publishing any printing or writing *or by open and advised speaking*, or by any overt act or deed, every person so offending shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than seven years, or to be imprisoned for any term not exceeding two years, with or without hard labour, as the Court shall direct.

[N.B.—The words in italics were not in the 36 Geo. III. c. 7.]

COMMON LAW PROCEDURE ACT.

15 & 16 VICT. c. 76.

[*June 30th*, 1852.]

S. 61. In actions of libel and slander the plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense without any prefatory averment to show how such words or matter were used in that sense; and such averment shall be put in issue by the denial of the alleged libel or slander; and where the words or matter set forth, with or without the alleged meaning, show a cause of action, the declaration shall be sufficient.

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18 & 19 VICT. c. 41.

An Act for abolishing the Jurisdiction of the Ecclesiastical Courts of England and Wales in suits for Defamation.

[*26th June*, 1855.]

Whereas the jurisdiction of the ecclesiastical courts in suits for defamation has ceased to be the means of enforcing the spiritual discipline

of the church, and has become grievous and oppressive to the subjects of this realm: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. From and after the passing of this Act it shall not be lawful for any ecclesiastical court in England or Wales to entertain or adjudicate upon any suit for or cause of defamation, any statute, law, canon, custom, or usage, to the contrary notwithstanding.

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20 & 21 VICT. c. 83.

An Act for more effectually preventing the Sale of Obscene Books, Pictures, Prints, and other Articles.

[25*th August*, 1857.]

WHEREAS it is expedient to give additional powers for the suppression of the trade in obscene books, prints, drawings, and other obscene articles: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. It shall be lawful for any metropolitan police magistrate or other stipendiary magistrate, or for any two justices of the peace, upon complaint made before him or them upon oath that the complainant has reason to believe, and does believe, that any obscene books, papers, writings, prints, pictures, drawings, or other representations are kept in any house, shop, room, or other place within the limits of the jurisdiction of any such magistrate or justices, for the purpose of sale or distribution, exhibition for purposes of gain, lending upon hire, or being otherwise published for purposes of gain, which complainant shall also state upon oath that one or more articles of the like character have been sold, distributed, exhibited, lent, or otherwise published as aforesaid, at or in connexion with such place, so as to satisfy such magistrate or justices that the belief of the said complainant is well founded, and upon such magistrate or justices being also satisfied that any of such articles so kept for any of the purposes aforesaid are of such a character and description that the publication of them would be a misdemeanor, and proper to be prosecuted as such, to give authority by special warrant to any constable or police officer into such house, shop, room, or other place, with such assistance as may be necessary, to enter in the daytime, and, if necessary, to use force, by breaking open doors or otherwise, and to search for and seize all such books, papers, writings, prints, pictures, drawings, or other representations as aforesaid found in such house, shop, room, or other place, and to carry all the articles so seized before the magistrate or justices issuing the said warrant, or some

other magistrate or justices exercising the same jurisdiction; and such magistrate or justices shall thereupon issue a summons calling upon the occupier of the house or other place which may have been so entered by virtue of the said warrant to appear within seven days before such police or stipendiary magistrate or any two justices in petty sessions for the district, to show cause why the articles so seized should not be destroyed; and if such occupier or some other person claiming to be the owner of the said articles shall not appear within the time aforesaid, or shall appear, and such magistrate or justices shall be satisfied that such articles or any of them are of the character stated in the warrant, and that such or any of them have been kept for any of the purposes aforesaid, it shall be lawful for the said magistrate or justices, and he or they are hereby required, to order the articles so seized, except such of them as he or they may consider necessary to be preserved as evidence in some further proceeding, to be destroyed at the expiration of the time hereinafter allowed for lodging an appeal, unless notice of appeal as hereinafter mentioned be given, and such articles shall be in the meantime impounded; and if such magistrate or justices shall be satisfied that the articles seized are not of the character stated in the warrant, or have not been kept for any of the purposes aforesaid, he or they shall forthwith direct them to be restored to the occupier of the house or other place in which they were seized.

2. No plaintiff shall recover in any action for any irregularity, trespass, or other wrongful proceeding made or committed in the execution of this Act, or in, under, or by virtue of any authority hereby given, if tender of sufficient amends shall have been made by or on behalf of the party who shall have committed such irregularity, trespass, or other wrongful proceeding, before such action brought; and in case no tender shall have been made, it shall be lawful for the defendant in any such action, by leave of the Court where such action shall depend, at any time before issue joined, to pay into Court such sum of money as he shall think fit; whereupon such proceeding, order, and adjudication shall be had and made in and by such Court as in other actions where defendants are allowed to pay money into Court.

3. No action, suit, or information, or any other proceeding, of what nature soever, shall be brought against any person for anything done or omitted to be done in pursuance of this Act, or in the execution of the authorities under this Act, unless notice in writing shall be given by the party intending to prosecute such action, suit, information, or other proceeding, to the intended defendant, one calendar month at least before prosecuting the same, nor unless such action, suit, information, or other proceeding shall be brought or commenced within three calendar months next after the act or omission complained of, or, in case there shall be a continuation of damage, then within three calendar months next after the doing such damage shall have ceased.

4. Any person aggrieved by any act or determination of such magistrate or justices in or concerning the execution of this Act, may appeal to the next general or quarter sessions for the county, riding, division, city,

borough, or place in and for which such magistrate or justices shall have so acted, giving to the magistrate or justices of the peace, whose act or determination shall be appealed against, notice in writing of such appeal and of the grounds thereof, within seven days after such act or determination and before the next general or quarter sessions, and entering within such seven days into a recognizance, with sufficient surety, before a justice of the peace for the county, city, borough, or place in which such act or determination shall have taken place, personally to appear and prosecute such appeal, and to abide the order of and pay such costs as shall be awarded by such court of quarter sessions or any adjournment thereof; and the Court at such general or quarter sessions shall hear and determine the matter of such appeal, and shall make such order therein as shall to the said Court seem meet; and such Court, upon hearing and finally determining such appeal, shall and may, according to their discretion, award such costs to the party appealing or appealed against as they shall think proper; and if such appeal be dismissed or decided against the appellant or be not prosecuted, such Court may order the articles seized forthwith to be destroyed: Provided always, that it shall not be lawful for the appellant on the hearing of any such appeal to go into or give evidence of any other grounds of appeal against any such order, act, or determination, than those set forth in such notice of appeal.

5. This Act shall not extend to Scotland.

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23 & 24 VICT. c. 32.

An Act to abolish the Jurisdiction of the Ecclesiastical Courts in Ireland in cases of Defamation, &c. [*July 3rd*, 1860.]

[N.B.—The portions of this Act which refer to the jurisdiction of the Ecclesiastical Courts in Ireland are now repealed as unnecessary by the Stat. Rev. Act, 1875, 38 & 39 Vict. c. 66. For the Ecclesiastical Courts themselves are altogether abolished by 32 & 33 Vict. c. 42, s. 21; and on January 1st, 1871, the ecclesiastical law of Ireland ceased to exist as law.]

BURIAL LAWS AMENDMENT ACT, 1880.

43 & 44 VICT. c. 41.

[*Sept. 7th*, 1880.]

S. 7. All burials under this Act, whether with or without a religious service, shall be conducted in a decent and orderly manner; and every person guilty of any riotous, violent, or indecent behaviour at any burial under this Act, or wilfully obstructing such burial or any such service as

aforesaid threat, or who shall, in any such churchyard or graveyard as aforesaid, deliver any address, not being part of or incidental to a religious service permitted by this Act, and not otherwise permitted by any lawful authority, or who shall, under colour of any religious services or otherwise, in any such churchyard or graveyard, wilfully endeavour to bring into contempt or obloquy the Christian religion, or the belief or worship of any church or denomination of Christians, or the members of any minister of any such church or denomination, or any other person, shall be guilty of a misdemeanor.

NEWSPAPER LIBEL AND REGISTRATION ACT, 1881.

44 & 45 VICT. c. 60.

An Act to amend the Law of Newspaper Libel, and to provide for the Registration of Newspaper Proprietors. [27*th August*, 1881.]

WHEREAS it is expedient to amend the law affecting civil actions and criminal prosecutions for newspaper libel:

And whereas it is also expedient to provide for the registration of newspaper proprietors:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. In the construction of this Act, unless there is anything in the subject or context repugnant thereto, the several words and phrases hereinafter mentioned shall have and include the meanings following; (that is to say,)

The word "registrar" shall mean in England the registrar for the time being of joint stock companies, or such person as the Board of Trade may for the time being authorise in that behalf, and in Ireland the assistant registrar for the time being of joint stock companies for Ireland, or such person as the Board of Trade may for the time being authorise in that behalf.

The phrase "registry office" shall mean the principal office for the time being of the registrar in England or Ireland, as the case may be, or such other office as the Board of Trade may from time to time appoint.

The word "newspaper" shall mean any paper containing public news intelligence or occurrences or any remarks or observations therein [*Qy.* thereon] printed for sale and published in England or Ireland periodically or in parts or numbers at intervals not exceeding twenty-six days between the publication of any two such papers parts or numbers.

Also any paper printed in order to be dispersed and made public weekly or oftener, or at intervals not exceeding twenty-six days, containing only or principally advertisements.

The word "occupation" when applied to any person shall mean his trade or following, and if none, then his rank or usual title, as esquire, gentleman.

The phrase "place of residence" shall include the street, square, or place where the person to whom it refers shall reside, and the number (if any) or other designation of the house in which he shall so reside.

The word "proprietor" shall mean and include as well the sole proprietor of any newspaper, as also in the case of a divided proprietorship the persons who, as partners or otherwise, represent and are responsible for any share or interest in the newspaper as between themselves and the persons in like manner representing or responsible for the other shares or interests therein, and no other person.

But see *post*, s. 18.

2. Any report published in any newspaper of the proceedings of a public meeting shall be privileged, if such meeting was lawfully convened for a lawful purpose *and open to the public*, and if such report was fair and accurate, and published without malice, and *if the publication of the matter complained of was for the public benefit;* provided always, that the protection intended to be afforded by this section shall not be available as a defence in any proceeding, if the plaintiff or prosecutor can show that the defendant has refused to insert in the newspaper in which the report containing the matter complained of appeared a reasonable letter or statement of explanation or contradiction by or on behalf or such plaintiff or prosecutor.

This section was no doubt introduced in consequence of the decision of the Court of Appeal in *Purcell* v. *Sowler*, 2 C. P. D. 215; 46 L. J. C. P. 308; 25 W. R. 362; 36 L. T. 416, *ante*, p. 260. But if the words in italics be strictly construed, the section will make very little alteration in the law, the publication of *bonâ fide* comments on matters of public interest being already protected (*ante*, pp. 34—52). I apprehend that the words "meeting open to the public" will be held to include any meeting to which the public were in fact admitted without restriction. It would greatly narrow the scope of the enactment to confine it to those meetings at which the public are in law entitled to be present. As to the "reasonable letter" of contradiction, see *ante*, pp. 262, 3. See also *ante*, p. 174.

3. No criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper for any libel published therein, without the written fiat or allowance of the Director of Public Prosecutions in England or Her Majesty's Attorney General in Ireland being first had and obtained.

See *ante*, pp. 391—3.

4. A court of summary jurisdiction, upon the hearing of a charge against a proprietor, publisher, or editor, or any person responsible for the publication of a newspaper, for a libel published therein, may receive evidence as to the publication being for the public benefit, and as to the matters charged in the libel being true, and as to the report being fair and accurate, and published without malice, and as to any matter which under this or any

other Act, or otherwise, might be given in evidence by way of defence by the person charged on his trial on indictment, and the court, if of opinion after hearing such evidence that there is a strong or probable presumption that the jury on the trial would acquit the person charged, may dismiss the case.

The rule in *R. v. Carden (Labouchere's Case)* 5 Q. B. D. 1; 49 L. J. M. C. 1; 28 W. R. 133; 41 L. T. 504; 14 Cox, C. C. 359, *ante*, p. 573, is therefore no longer in force, whenever the libel complained of has appeared in a newspaper within the meaning of this act.

5. If a court of summary jurisdiction upon the hearing of a charge against a proprietor, publisher, editor, or any person responsible for the publication of a newspaper for a libel published therein is of opinion that though the person charged is shown to have been guilty the libel was of a trivial character, and that the offence may be adequately punished by virtue of the powers of this section, the court shall cause the charge to be reduced into writing and read to the person charged, and then address a question to him to the following effect: "Do you desire to be tried by a jury or do you consent to the case being dealt with summarily?" and, if such person assents to the case being dealt with summarily, the court may summarily convict him and adjudge him to pay a fine not exceeding fifty pounds.

Section twenty-seven of the Summary Jurisdiction Act, 1879, shall, so far as is consistent with the tenor thereof, apply to every such proceeding as if it were herein enacted and extended to Ireland, and as if the Summary Jurisdiction Acts were therein referred to instead of the Summary Jurisdiction Act, 1848.

As to the powers of a Court of Summary Jurisdiction before this Act, see *ante*, p. 574. If the libel be "of a trivial character," surely no *fiat* would be granted under s. 3.

6. Every libel or alleged libel, and every offence under this Act, shall be deemed to be an offence within and subject to the provisions of the Act of the session of the twenty-second and twenty-third years of the reign of Her present Majesty, chapter seventeen, intituled "An Act to prevent vexatious indictments for certain misdemeanors."

See *ante*, p. 571; and note that this section applies to *all* libels; the rest of the Act deals only with libels appearing in a *newspaper*.

7. Where, in the opinion of the Board of Trade, inconvenience would arise or be caused in any case from the registry of the names of all the proprietors of the newspaper (either owing to minority, coverture, absence from the United Kingdom, minute subdivision of shares, or other special circumstances), it shall be lawful for the Board of Trade to authorise the registration of such newspaper in the name or names of some one or more responsible "representative proprietors."

This section should have come after s. 10. See *post*, s. 18.

8. A register of the proprietors of newspapers as defined by this Act shall be established under the superintendence of the registrar.

9. It shall be the duty of the printers and publishers for the time being of every newspaper to make or cause to be made to the Registry Office *on or before the thirty-first of July* one thousand eight hundred and eighty-one, and thereafter annually in the month of July in every year, a return of the following particulars according to the Schedule A. hereunto annexed; that is to say,

(*a.*) The title of a newspaper:

(*b.*) The names of all the proprietors of such newspaper together with their respective occupations, places of business (if any), and places of residence.

The Act did not come into force till August 27th, 1881.

10. If within the further period of one month after the time hereinbefore appointed for the making of any return as to any newspaper such return be not made, then each printer and publisher of such newspaper shall, on conviction thereof, be liable to a penalty not exceeding twenty-five pounds, and also to be directed by a summary order to make a return within a specified time.

11. Any party to a transfer or transmission of or dealing with any share of or interest in any newspaper whereby any person ceases to be a proprietor or any new proprietor is introduced may at any time make or cause to be made to the Registry Office a return according to the Schedule B. hereunto annexed and containing the particulars therein set forth.

It will be observed that this section is permissive merely. The transferee may register his name and address, or not, as he pleases. Hence a plaintiff or prosecutor can never be certain that the registered proprietor is the person liable for the publition complained of. No doubt the presumption would be that the person who was proprietor in July last was proprietor still; but it will be open to him to prove at the trial, after all the costs have been incurred, that since July last he transferred his interest in the paper to some one else; see *post*, s. 15. In a civil case this difficulty may be overcome by administering interrogatories; see *ante*, pp. 513, 619. But it would have been better if the Legislature had made the "return according to Schedule B" compulsory on every transfer, and had further enacted that, till such return was registered, the former proprietor should remain liable for everything published in the newspaper; see *ante*, p. 532.

12. If any person shall knowingly and wilfully make or cause to be made any return by this Act required or permitted to be made in which shall be inserted or set forth the name of any person as a proprietor of a newspaper who shall not be a proprietor thereof, or in which there shall be any misrepresentation, or from which there shall be any omission in respect of any of the particulars by this Act required to be contained therein whereby such return shall be misleading, or if any proprietor of a newspaper shall knowingly and wilfully permit any such return to be made which shall be misleading as to any of the particulars with reference to his own name, occupation, place of business (if any), or place of residence, then and in

every such case every such offender being convicted thereof shall be liable to a penalty not exceeding one hundred pounds.

13. It shall be the duty of the registrar and he is hereby required forthwith to register every return made in conformity with the provisions of this Act in a book to be kept for that purpose at the Registry Office and called "the register of newspaper proprietors," and all persons shall be at liberty to search and inspect the said book from time to time during the hours of business at the Registry Office, and any person may require a copy of any entry in or an extract from the book to be certified by the registrar or his deputy for the time being or under the official seal of the registrar.

14. There shall be paid in respect of the receipt and entry of returns made in conformity with the provisions of this Act, and for the inspection of the register of newspaper proprietors, and for certified copies of any entry therein, and in respect of any other services to be performed by the registrar, such fees (if any) as the Board of Trade with the approval of the Treasury may direct and as they shall deem requisite to defray as well the additional expenses of the Registry Office caused by the provisions of this Act, as also the further remunerations and salaries (if any) of the registrar, and of any other persons employed under him in the execution of this Act, and such fees shall be dealt with as the Treasury may direct.

15. Every copy of an entry in or extract from the register of newspaper proprietors, purporting to be certified by the registrar or his deputy for the time being, or under the official seal of the registrar, shall be received as conclusive evidence of the contents of the said register of newspaper proprietors, so far as the same appear in such copy or extract without proof of the signature thereto or of the seal of office affixed thereto, and every such certified copy or extract shall in all proceedings, civil or criminal, be accepted as sufficient primâ facie evidence of all the matters and things thereby appearing, unless and until the contrary thereof be shown.

16. All penalties under this Act may be recovered before a court of summary jurisdiction in manner provided by the Summary Jurisdiction Acts.

Summary orders under this Act may be made by a court of summary jurisdiction, and enforced in manner provided by section thirty-four of the Summary Jurisdiction Act, 1879; and, for the purposes of this Act, that section shall be deemed to apply to Ireland in the same manner as if it were re-enacted in this Act.

17. The expression "a court of summary jurisdiction" has in England the meanings assigned to it by the Summary Jurisdiction Act, 1879; and in Ireland means any justice or justices of the peace, stipendiary or other magistrate or magistrates, having jurisdiction under the Summary Jurisdiction Acts.

The expression "Summary Jurisdiction Acts" has as regards England the meanings assigned to it by the Summary Jurisdiction Act, 1879; and as regards Ireland, means within the police district of Dublin metropolis the Acts regulating the powers and duties of justices of the peace for such

district, or of the police of that district, and elsewhere in Ireland the Petty Sessions (Ireland) Act, 1851, and any Act amending the same.

These definitions should have formed part of s. 1.

18. The provisions as to the registration of newspaper proprietors contained in this Act shall not apply to the case of any newspaper which belongs to a joint stock company duly incorporated under and subject to the provisions of the Companies Acts, 1862 to 1879.

19. This Act shall not extend to Scotland.

20. This Act may for all purposes be cited as the Newspaper Libel and Registration Act, 1881.

THE SCHEDULES TO WHICH THIS ACT REFERS.

SCHEDULE A.

Return made pursuant to the Newspaper Libel and Registration Act, 1881.

Title of the Newspaper.	Names of the Proprietors.	Occupations of the Proprietors.	Places of business (if any) of the Proprietors.	Places of Residence of the Proprietors.

SCHEDULE B.

Return made pursuant to the Newspaper Libel and Registration Act, 1881.

Title of Newspaper	Names of Persons who cease to be Proprietors.	Names of Persons who become Proprietors.	Occupation of new Proprietors.	Places of business (if any) of new Proprietors.	Places of Residence of new Proprietors.

ERRATA.

Page 247, line 5 from bottom, *insert* " *after* Court.

,, 341, line 9, *for* sum paid insufficient, *read* sum paid in sufficient.

,, 348, line 21, *omit bracket before* e.g.

,, 398, line 11, *for* Lord Abbott, C.J., *read* Abbott, L.C.J.

ADDENDA.

Page 57, line 29 }
,, 102, line 16 } *insert, Simmons* v. *Mitchell*, 6 App. Cas. 156; 50 L. J. C. P.
,, 539, line 4 } 11; 29 W. R. 401; 43 L. T. 710.

,, 57, line 29 }
,, 221, line 12 } *insert, Harrison* v. *Fraser*, 29 W. R. 652.

,, 187, line 24, *insert, Goffin* v. *Donnelly*, 6 Q. B. D. 307; 29 W. R. 444; 44 L. T. 141.

,, 331, line 25 }
,, 356, line 7 } *insert, Bree* v. *Marescaux*, (C. A.) 7 Q. B. D. 434; 44 L. T. 765.
,, 357, line 24 }

GENERAL INDEX.

A.

ABATEMENT OF ACTION, 352, 355

ABSOLUTE PRIVILEGE, 185—196
(i.) Parliamentary proceedings, 186
(ii.) Judicial proceedings, 188
words spoken by a judge, 188
words spoken by counsel, 190
words spoken by a witness, 191
(iii.) Naval and military affairs, 194

ABUSE,
mere general words of, 18, 109

ACCESSORIES
to the publication of a libel, 576

ACCIDENTAL PUBLICATION,
civil liability for, 6, 153, 154, 387
criminal liability for, 385, 387

ACCORD AND SATISFACTION
plea of, 489

ACTION,
how commenced, 453
within what time, 455
and in what Court, 453
letter before, 453
notice of, 453
considerations before, 449
consolidation of, 466
previous, 456, 490
joinder of causes of, 458
who may maintain, 344, 372, 452
proceedings in, are privileged, 188—193
on the case for words, 87—92
for acts injurious to reputation, without express words, 8

ACTIONABLE *PER SE*,
what language is, 18, 53—81
what language is not, 82—87, 253, 308.

ACTS,
reputation may be affected by, 8, 148, 149

ADMINISTRATION OF JUSTICE,
bonâ fide comments on, 44—46
publications reflecting on, 426—448

ADMINISTRATORS,
right of action does not pass to, 355

ADMISSION,
by defendant, effect of, 534

ADMONITION,
communications by way of, 239

ADULTERY,
words imputing, not actionable, 59, 84
to a physician, 66, 83
to a clergyman, 64, 66
to a married woman, 85, 86
law on this point considered, 86, 87

"ADVENTURER,"
charge of being, libellous, 22

ADVERTISEMENT
in newspaper, when privileged, 225
of tradesmen, may be criticized, 34, 50, 51
of cure, may be criticized, 50, 51

ADVICE,
when privileged, 215, 239
on evidence, 524

ADVOCATES,
privilege of, 190
reports of speeches of, 250—253
publication in vindication of character assailed by, 230

AFFAIRS OF STATE
may be criticized, 42—44

AFFIDAVIT,
defamatory statements in, privileged, 191, 192
in answer to interrogatories, 511
further and better answer, 519
on applications for leave to file criminal informations, 591
in aggravation of punishment, 589
in mitigation of punishment, 589

AGENT,
and principal, 358
publication of libel by master through agency of servants, 362, 385
principal's orders no defence, 359
evidence of authority to publish, 364, 365
ratification, 361
innocently publishing a libel, 153, 154, 359, 387
ignorant of the contents of the paper, 387, 583

AGGRAVATING CIRCUMSTANCES,
must be justified, 169

AGGRAVATION OF DAMAGES,
wide circulation of libel, 298
malice, 296
by plea of justification, 178, 274, 485, 542
by injudicious cross-examination of plaintiff, 542, 547
plaintiff's good character, 298

AGGRAVATION OF PUNISHMENT,
affidavits in, 589

AGREEMENT,
to accept the publication of mutual apologies, 489
to compromise, 550

ALIENS, 356

ALLEGORY,
may be a libel, 8, 98, 130, 384

AMBASSADORS,
foreign, libels on, 383

AMBIGUOUS EXPRESSIONS,
rule of construction as to, 107—115
evidence as to meaning of, 539, 548
meaning ascribed by innuendo, must be adhered to, 102

AMENDMENT,
of pleadings, 498
at the trial, 537, 545
of variances between words laid and those proved, 471, 536 537, 545
on argument of demurrer, 478
of indictment, 577
of information, 595

"AMBI-DEXTER," 75

ANAGRAM,
may be a libel, 8

ANONYMOUS LETTER,
shown confidentially, 207
opinion as to handwriting of, when privileged, 237

ANSWERS,
to interrogatories, 511
further and better, 515

APOLOGY, 299, 487
jury to judge of sufficiency of, 300, 560
notice of intention to give evidence of, 488, 621
statutory plea of, for libel in a newspaper, 299, 487
form of plea of, 488
any other plea may be pleaded at the same time, 487

APPEAL,
proceedings in the Court of, 561
from County Court, 569

APPEALS,
to the public, may be criticized, 50—52

APPEARANCE, 462

APPENDICES.
A. *Appendix of Precedents of Pleadings, &c.*, 596—661
Contents, 596
I. Precedents of pleadings in actions for libel, 600
II. Precedents of pleadings in actions of slander, 621
III. Precedents of pleadings in actions of slander of title, 634
IV. Forms of pleadings, notices, &c., in the County Court, 644
V. Precedents of criminal pleadings, 649
B. *Report of the Select Committee of the House of Commons on the Law of Libel*, 662
C. *Appendix of Statutes*, 664—683
Contents, 664

APPORTIONMENT
of costs of issues, 338

ARBITRATION,
costs where cause referred to, 338

ARCHBISHOP,
language concerning, 28

ARCHITECT,
criticisms on the works of, 49, 68, 172, 601

ARGUMENT
of the rule for a criminal information, 593

ARREST OF JUDGMENT,
motion for, in civil cases, 96, 118, 554
in criminal cases, 586, 587

ARSON,
charge of, 114, 125

ARTIST,
criticism on the pictures and works of, 48, 49

ART-MASTER,
libel on, 25

ASSAULT,
with intent to rob, charge of, actionable, 55

ASTERISKS,
put for plaintiff's name, 130, 582

ATTACHMENT,
for contempt, 433

ATTEMPT,
to commit a felony, charge of, actionable, 55, 57
words sufficient to impute, 123

ATTORNEY,
slander of, 65, 74, 75
libels on, 6, 7, 29, 30, 99
plaintiff, proof of qualification, 530, 531
acting as advocate, privilege of, 190
not liable for objecting to title, 142, 226
bill of costs of, not a judicial proceeding, 193

AUCTIONEER,
words concerning, 67, 80
libellous notice to, by person interested in proceeds of sale, 226

AUDITÂ QUERELÂ,
proceedings by, abolished, 554

AUTERFOIS ACQUIT,
plea of, 576

AUTERFOIS CONVICT,
plea of, 576

AUTHOR,
liable as publisher, 155
criticisms of works of, 48

AUTHORITY,
given to another to publish a libel, 360—365
when implied, 360
ratification, 361
in criminal cases, 362, 385

AVERMENTS,
when necessary, 118, 120
in civil cases, need not be proved, 473
except of plaintiff's office or trade, 530
in indictments and criminal informations, introductory averments still necessary, 575
of special intent, 376, 575

B.

BACON, LORD,
his "Use of the Law," cited, 19

BAIL,
for appearance to take trial, 573

BANKER,
refusing to honour a cheque, 8
circulation of rumour that bank had stopped payment, 206, 282, 369
refusing to accept cheque of a particular bank, 26, 236

BANKRUPT,
can sue for libel or slander, 354
charges against, by trustee, privileged, 235, 281

BANKRUPTCY,
words imputing, 7, 31
proceedings before registrar, reports of, privileged, 248
charge of having committed act of, 226, 235

BARRISTER,
slander of, 74
libels on, 29
slander by, in legal proceedings absolutely privileged, 190
libel by, in law-book, 6
criminal information against County Court Judge for refusing to hear, 382

BASTARD,
imputation that heir-apparent is, 139, 140
charge of having had, not actionable, 85
except formerly under 18 Elizabeth, c. 3, 58

BAWD,
charge of being a, not actionable, except in London and Southwark, 84, 85

BAWDY HOUSE,
charge of keeping, is actionable, 56, 131

BEGIN,
right to, always with plaintiff, 530

BELIEF
in truth of charge, necessary to privilege, 199
in truth, in mitigation, 589
hearsay is probable ground for, 214, 278

BIGAMY,
what words amount to a charge of, 123
charge of, is actionable, 55

BILL OF EXCEPTIONS, 551

"BLACK-LEG,"
meaning of, 24, 61
charge of being, not actionable, 83

"BLACK-LIST,"
libel on a trader in, 249

"BLACK-SHEEP,"
meaning of, 24, 61

BLASPHEMOUS WORDS, 394—403
defined, 394
intent to bring religion into contempt, 395
honest advocacy of heretical opinions, 396
justification not allowed, 398
statutory provisions, 400
jurisdiction of Ecclesiastical Courts, 402
reports of proceedings in Courts of Justice as to, are not privileged, 219, 399
punishment, 394
limitation of prosecutions for, 401
Common Law not affected by statutes, 401
Scotch Law as to, 394

BOARD OF GUARDIANS,
reports of meetings of, not privileged, 260

BONÂ FIDE COMMENT,
no libel, 34—52
plea of, 483, 605, 618, 619

BONA FIDES
of defendant, 199

BOOK,
reviews and criticisms of, 48, 49
in Latin, 161, 386
libellous, sale of by bookseller's servant, 160, 362
obscene, statute for preventing sale of, 405

BOOKSELLER,
libel on, 34
liability of for sale of libellous book, 160, 362, 386

BREACH OF PEACE,
libels tend to, 3, 373

BRIBERY,
words imputing, actionable, 56
in offices of public trust, 64, 71
imputations of in report by political committee, 43
contempt of Court by offering a bribe to a judge, 429

BROTHEL,
imputation of keeping, 8, 56, 131

"BUNGLER,"
spoken of an artificer, is actionable, 65

"BUNTER," 111

BURGLARY,
charge of, actionable, 55

BURNING
in effigy, 9

BUSINESS,
slander of persons in, 65, 77—81
libels of persons in way of, 31

BUTCHER,
words concerning, 80, 236

BYSTANDER
at inquest, remarks of, not privileged, 191, 254

C.

CALLING,
words injuring plaintiff in the way of his, when written, 22, 27—34
when spoken, 65, 77—81

CANDIDATE,
for office, words concerning, 236, 241

CANT, or SLANG TERMS, 110, 538

CAPTAIN OF SHIP,
words concerning, 217

CARICATURE,
libel by means of, 8, 22

CARPENTER,
words concerning, 67

CAUSES OF ACTION,
joinder of, 458

CAUTION
to tradesmen, when privileged, 215, 218

CENSORSHIP OF THE PRESS, 9—12

CENSORSHIP OF PLAYS, 13

CENSURE,
words of, by a judge, 187, 189

CENTRAL CRIMINAL COURT, 579

CERTAINTY,
how ensured formerly, 118
early technicalities, 118
of the imputation, 120
criminal charges, 121
indirect imputations, 125
as to person defamed, 127

CERTIORARI
for removal of indictment for libel, 578
costs when indictment removed by, 590

CHALK-MARK
may be a libel, 8

CHALLENGE TO FIGHT,
sending, a misdemeanour, 377

CHANCERY, COURT OF,
contempts of, 429, 448

CHANGE OF VENUE, 528

CHARACTER,
proof of plaintiff's special, 530
of servant, *primâ facie*, privileged, 200
bonâ fide communications as to, 203—219
master not bound to give, 201
evidence of good, not receivable unless impeached, 275, 298
evidence of plaintiff's bad, 304
evidence for defendant as to, on trial of indictment or information, 584, 589
of witnesses, evidence to impeach, 546

CHARGE
of crime must be precise, 121—127
of attempt to commit a crime, 55, 123
of an impossible crime, 61
of being a felon, 58, 171, 603
of being a returned convict, 179
to a constable in his character as such, 204, 267

CHARITABLE INSTITUTION,
criticisms on officers of, 47, 238, 239
trustees of, words concerning, 28, 370, 377
private, not to be criticized, 47

CHASTITY,
charge of want of, not actionable, 84, 85
actionable if in writing, 24

"CHEAT,"
charge of being a, not actionable, 61, 80

CHEATING,
charge of, libellous, 24, 25
in way of trade, actionable, 80

CHEQUE,
action for dishonouring, 8

CHILD,
liability of, 352
parent not answerable for wrongs by, 361

CHOICE OF COURT, 453

CHRISTIANITY,
publications against, 394—402
part of the common law, 397

CHURCHWARDEN,
slander of, 62

CIRCULARS
of tradesmen, may be criticized, 50, 51

CIRCULATION OF LIBEL,
extent and mode of, 282, 293

CIVIL REMEDY FOR DEFAMATION, 9, 390

CLAIM,
statement of, 469—474
by husband for words defamatory of wife, 347
by wife alone, 465
joint and several, 365, 369, 465

CLASS
religious order or community, libels on, 376, 377, 381

CLERGYMEN,
words affecting them in office, 28, 47, 64, 217, 219, 628
charges of incontinency and immorality against, 66, 72, 73
deprivation of office the ground of action, 72
plaintiff must hold benefice or office at the time of the slander, 72
slander by, in sermon, &c., 6, 242
libels by, on schoolmaster in parish, 268
general reflections on the clergy of a particular diocese, 382

CLERK,
words concerning, 77, 285, 629
to vestry, words concerning, 29
to justices, words concerning, 29
words by, not privileged, 190

CLUBS,
"blackballed," 23
notice posted in, 25

COINING,
charge of, 58, 622

COLLOQUIUM
or application of the slander, 118
provisions of C. L. P. Act as to, 120

COLONIAL COURTS,
power of, to commit for contempts, 438

COLONIAL LEGISLATIVE ASSEMBLIES,
power of, to commit for contempt, 425

COMMANDS
of master no defence to servant, 359

COMMENTS
on matters of public interest, 34—52
every citizen has a right to make, 35, 36
not privileged in the strict sense of that term, 35, 36
on matters of local interest, 41, 42
bad motives must not be recklessly imputed, 37, 39
honest belief in truth of, not alone sufficient, 38
limits on, 36—41
affairs of State, 42—44
trials in law courts, 44—46
local institutions and authorities, 46, 47
parochial charity, 47
ecclesiastical affairs, 47, 48
books and pictures, 48, 49
architecture, 48, 49, 68, 172
theatres and concerts, 49
public entertainments, 49, 50
appeals to the public notice, 50—52
advertisements and circulars, 50, 51
controversy in newspapers, 50—52, 228, 229
plea of, 483, 605, 618, 619

COMMISSION
to examine witnesses, 527

COMMITTEE
of charity, communications to, 238, 239

COMMODITIES
of tradesmen, verbal imputations upon, 79, 145
libel on, 32, 145—148

"COMMON FILCHER,"
not actionable, 61

COMMONS, HOUSE OF,
libels on, 422
contempts of, 423

COMPANIES
and corporations, 367—369
may sue for slander of title, 368
may sue a shareholder for libel, 32
proceedings of, at meeting of shareholders, privileged, 235, 242

COMPARISON
of handwriting, 533, 580

COMPETITION
between rival traders, 31, 145

COMPROMISE
in civil case, 550
not allowed in criminal cases 596

CONCERTS
may be criticized, 49

CONDITION
in life of plaintiff, 293

CONDUCT,
unfeeling, charge of, libellous, 24

CONFESSION
of publication, 534

CONFIDENTIAL COMMUNICATIONS,
when privileged, 203—219

CONFIDENTIAL RELATION,
defined, 210

CONSIDERATIONS
before writ, 449
for defendant, 465

CONSOLIDATION
of actions, 466

CONSORTIUM,
loss of, 312

CONSPIRACY,
charge of, actionable, 56

CONSTABLES,
words concerning, 237, 285
words spoken on giving in charge of, are privileged, 204, 267

CONSTITUTION,
libels against the, 419—421

CONSTRUCTION, 93—132
what meaning the speaker *intended* to convey is immaterial, 93, 548
libel or no libel is a question for the jury, 27, 94, 550, 557
duty of the Judge, 94, 540, 544
words not to be construed *in mitiori sensu*, 95
jury to consider the words as a whole, 98, 551
when evidence may be given of other defamatory publications by defendant of plaintiff, 99, 272, 545
of the innuendo, 100, 538
the words must be set out *verbatim* in the statement of claim, 101, 470
words clearly defamatory, 105
words *primâ facie* defamatory, 107
neutral words, 109
words *primâ facie* innocent, 112
ironical words, 114, 116, 539
words clearly innocent, 116
after verdict, 558, 586

CONTAGIOUS DISEASE,
charge of having, 62, 63, 624

CONTEMPTIBLE,
words rendering plaintiff, libellous, 21, 22

CONTEMPTS
of the King, 413, 414
of the Government, 415—419
of Parliament, may be dealt with in the law courts, 422
how punished by the House of Lords, 423
how, by the House of Commons, 423
the propriety of committal by, cannot be questioned in courts of law, 424
of Colonial Legislative Assemblies, 424
their power to exclude, 425
of courts of law and judges, 426
of Superior Courts, 426
proceedings against offenders for contempts, 428
Judge at Chambers, 437, 438
attachment and committal, 433
publications prejudicial to fair trial of action, 429
injunctions to restrain, 13, 436
Scotch law as to, 436
of Inferior Courts of record, 440
no power to commit except for those committed in face of Court, 442
statutory powers, 445—447
county courts, 442, 445
of Inferior Courts not of record, 444
sureties for good behaviour, 444
of ecclesiastical courts, 448

CONTRACTS
as to libels cannot be enforced, 374

CONTRIBUTION,
none between wrong-doers, 157, 374

CONTROVERSY
in the newspapers, 50—52, 228, 229

"CONVICTED FELON,"
actionable, 58, 171, 603

CONVICTION,
summary before justices, reports of, 243—248
proof of, 546
placards notifying, at railway stations, 173, 179

COPYING LIBELS,
from one newspaper into another, 100, 302, 549, 584

COPYRIGHT,
none in immoral or libellous work, 374

CORONER,
defamatory statement by, on inquest, 189
has power to eject disturber, 442

CORPORATIONS
may sue for libel, 32, 367
may sue for slander of title, 368
may be sued for libel, 368
not for slander, 368
may be sued for acts of agents, 368
criminally liable, 369
discovery against, by interrogatories, 501

CORRUPTION
in office, charge of, 27, 28, 64, 427

COSTS, 334—343
now follow the event, 334
all early statutes as to costs repealed by Judicature Act, 335
application to deprive successful plaintiff of costs, 336
of new trial, 338
apportionment of costs of issues, 338
after payment into court, 340
of counterclaim, 341
security for, 466, 553, 590
practice as to asking for, 337, 553
married woman liable for, 553
special costs, 337, 553
in actions remitted to County Court, 343, 468, 569
in local Court of Record, 569
on writ of inquiry, 337, 464
jury not to consider question of costs, 295
of indictment, 590
of criminal information, 595

COUNSEL,
privilege of, 190
reports of speeches of, made in courts of justice, 250—253

COUNTS
in an indictment, 576, 587

COUNTERCLAIM, 307, 494
costs of, 341

COUNTY,
proof of publication within, 581

COUNTY COURT,
no jurisdiction of actions for slander or libel, except by consent, 453
remitting action to, 468
subsequent proceedings, 565
discoveries and interrogatories in, 568
jury, 568
taxation of costs in, 343, 468, 569

COUNTY COURT—*continued.*
contempts of, 442, 445
criminal information against judge of, 382
forms of precedents, notices, &c., 644—648

COURT,
selection of, 453
payment into, 491
Divisional, proceedings in, 554—561
of Appeal, proceedings in, 561—565
proceedings in County Court, 565

COURTS MARTIAL,
defamatory statements made in course of proceedings by, 189, 194

COURTS OF JUSTICE,
publication of proceedings of, 187
contempts of Superior Courts of Record, 428
Colonial Courts, 438
Inferior Courts of Record, 440
proceedings in County Court, 565
other inferior, 569

COURTS OF PETTY SESSION,
defamatory statements made in the regular course of proceedings at, privileged, 188
reports of proceedings, privileged, 243—248

"COZENER,"
charge of being, not actionable, 61

CREDIT
of traders, libels affecting, 30—32
words affecting, 7, 78, 79

CRIME,
libel is, slander is not a, 4, 373
words conveying direct charge of, actionable, 54
statement that plaintiff had been accused of crime, 24, 57
words not necessarily imputing, actionable if written, 21, 22
imputation must be specific, 121—127
words of suspicion only, 57
imputing the murder of a person yet alive, 61
attempting to commit, 55, 57, 123
solicitation or hiring to commit, 56
justification as to charge of committing, 178, 548
proof of conviction, 546, 548

CRIMINAL INFORMATION,
for libel, 380—383
discretion of the court as to granting, 380
proceedings in, 591—596
forms of, 649, 651

CRIMINAL LAW, 373—393
law common to all criminal cases, 383
publication of a libel by one unconscious of its contents, 384
I. Criminal remedy by indictment, 9, 375
special intent, when necessary, 376
punishment at common law, 378
statutes, 379
II. Criminal remedy by information, 380
libels on foreign ambassadors, &c., 383
considerations as to criminal proceedings for libel, 390
suggestion of the Select Committee of the House of Commons, 391

CRIMINAL LIABILITY
of a married woman, 351
of an infant, 353
of master or principal, 362, 385
of a corporation, 369

CRIMINAL PLEADINGS,
precedents of, 649—661

"CRITIC,"
defined, 36

CRITICISM,
right of, 34—52
distinguished from defamation, 36, 37
of public men and institutions, 42—47
must be fair and *bonâ fide*, 38, 39
on public entertainments, &c., 49—52
of books, pictures, and architecture, 48, 49
ridicule of author permitted, 48

CROWN CASES RESERVED,
Court for consideration of, 585, 587

CRUELTY,
charge of, libellous, 24, 607

"CUCKOLD,"
charge of being, is not actionable, 84

CUSTOM,
loss of, as special damage, 310
evidence as to loss of, 314, 315, 319
of London, as to charge of whoredom, 59, 84

CUSTOMERS,
complaints by, privileged, 226

D.

DAMAGES, 289—333
general and special damage defined and distinguished, 289
I. *General Damages*, 291
general loss of custom, 293

DAMAGES—*continued.*
II. *Evidence for the Plaintiff in Aggravation of Damages.*
(i) malice, 296
(ii) extent of publication, 298
(iii) plaintiff's good character, 298
III. *Evidence for the Defendant in Mitigation of Damages.*
(i) apology and amends, 299
(ii) absence of malice, 301
conflicting cases on this point, 303
(iii) evidence of the plaintiff's bad character, 304
(iv) plaintiff's previous conduct in provoking the publication, 306
(v) absence of special damage, 308
IV. *Special Damage where the words are not actionable* per se, 18, 308
what constitutes special damage, 309
special damage must be specially pleaded, 313
special damage subsequently arising, 317
V. *Special Damage where the words are actionable* per se, 318
VI. *Remoteness of Damages*, 321
damage resulting to the husband of the female plaintiff, 323
damage caused by the act of a third party, 325
not essential that such third person should believe the charge, 327
wrongful and spontaneous act of a third person, 328
originator of a slander not liable for damage caused by its repetition, 329
exceptions to this rule, 331
other actions, not to be considered, 549
vindictive, 292
evidence of, 542
excessive, new trial on ground of, 291, 558
inadequacy of, new trial on ground of, 559

DANCING-MISTRESS,
slander of, 67

DEAD,
libels on the, 375
intent must be proved, 376

DEATH,
charge of being the cause of, 76, 122, 627
"guilty of the death of D." is actionable, 121
of party to action, effect of, 355

DEBATES IN PARLIAMENT,
reports of, 257

DEBT,
unfounded claim of, *bonâ fide* dispute as to, 8, 9

DECREES OF STAR CHAMBER,
regulating the Press, 10, 11, 13, 14

DEERSTEALING,
charge of, actionable, 59

DEFAMATION,
defined, 17
jurisdiction of Ecclesiastical Courts abolished, 17, 59, 86

DEFAMATORY WORDS,
defined, 1, 17
classified, 17—92

DEFAULT,
judgment by, 463
judgment in, of pleading, 495
in pleading, 500
in making discovery, 522

"DEFAULTER,"
charge of being, libellous, 24, 29

DEFENCE
that words are not defamatory, 483
justification, 169—181, 485
privilege, 484
absolute privilege, 186—196
qualified privilege, 196—263
infancy, no defence, 353
insanity, no defence, 354
master's commands no defence, 359
statement of, 475, 480—495
accord and satisfaction, 489
Statute of Limitations, 455, 490
previous proceedings, 457, 490
apology, 487
payment into court, 491
other defences, 490
all may be pleaded together, 480
justification in criminal cases, 178, 388, 650, 660
innocent publication, 153, 359, 387, 617
publication to plaintiff only, 383
evidence for the, 582

DEFENDANT,
married woman, 350
matters to be considered by the, 465
may be called by plaintiff, 534
evidence for, 545

DEFENDANTS,
who are liable as, 344—372
joint, 371
no contribution between or indemnity to, 157, 374

DEFINITION
of libel, 7, 21
of slander, 7, 53
of defamatory words, 1, 17, 36
of reputation, 150
of confidential relationship, 210
of malice, 265, 267
of publication, 150

DEMANDING MONEY WITH MENACES,
charge of, actionable, 55

DE MINIMIS NON CURAT LEX, 18, 20

DEMURRER
to statement of claim, 475
where words are not susceptible of any defamatory meaning, 26
informal, 496
to statement of defence, 497
when to demur, 475
points on, 578, 637
to an indictment, 577, 659
to a plea of justification, 577, 661
joinder in, 637, 659, 661
precedents, 606, 636, 659

"DIFFICULTIES,"
charge of being in, libellous, 23, 31

DISCOVERY
of documents, 515
what documents are privileged from, 517—519
state papers, 519
by interrogatories, 500—515
further and better affidavit, 519
inspection of documents, 520
default in making, 522

DISEASE, INFECTIOUS OR CONTAGIOUS,
charge of having, 62, 63, 624

DISHONESTY,
charge of, is actionable, if written, 21—22, 32
imputation of in giving character of servant, 203, 268, 275

DISINHERISON,
words tending to, 139

DISSENTING MINISTER,
words concerning, 28

DISTRICT REGISTRY, 454

DIVORCE,
assertions that husband is seeking, a libel on wife, 24

DOCUMENTS,
discovery of, 515—522
inspection of, 520

DOUBTFUL MEANING,
words of, 107—115, 539, 548, 586

DRUNKARD,
charge of being a, actionable, 66

DUEL,
challenge to fight a, 377

"DUNCE,"
actionable, if spoken of a lawyer, 68

DUTY,
as ground of privilege, 198—233
may be moral or social, 198

E.

ECCLESIASTICAL AFFAIRS
may be criticized, 47, 48

ECCLESIASTICAL COURTS,
jurisdiction of, in cases of defamation, 59, 85, 403
abolished, 17, 59, 86
law of, how far part of English Common Law, 402, 403
contempts of, 448

EDITOR OF NEWSPAPER,
words concerning, 30
may comment on matters of public interest, 34—52
joint liability for publication of libel, 157, 261
liability to proprietor, 157, 374

EFFIGY,
libel by means of, 7, 8, 22
burning in, 9
assertion that plaintiff had been hung in, 25

EMBEZZLEMENT,
words imputing, actionable, 55, 62, 124

EMPLOYER,
liability of, 360, 362, 385

EMPLOYMENT,
loss of, is special damage, 310

ENDORSEMENT ON WRIT, 459

ENGAGEMENT,
notice of termination of, not libellous, 25

ENGINEER,
libel on, 33

ENTRY FOR TRIAL, 522

EQUITY, COURTS OF,
no jurisdiction over libels except as contempts, 13, 454

ERROR,
writ of, abolished, in civil cases, 551
in criminal cases, 587

ESTOPPEL,
plea by way of, 490

ETIQUETTE,
charge of a breach of, not actionable, 29

EVENT,
costs to follow, 334

EVIDENCE
1. *In civil cases*, 449—570
advice on, 524
of appointment to office, &c., 530
of publication, 531
as to innuendo, 538
as to the libel, 535
secondary, 536
as to speaking the slander, 537
of plaintiff's good reputation, 298
that the words refer to plaintiff, 540
that the words were spoken of him in the way of his trade, 541
of malice, 272—5, 485, 541
of other libels or slanders, 272, 296, 545
of damage, 542
of plaintiff's distress of mind, 312, 318
of loss of trade, 310—317
as to handwriting, 533, 580
of admissions by defendant, 534
of personal ill-will, 271
for defendant, 545
of privilege, 547
of a justification, 169, 548
of an apology, 299
in aggravation of damages, 296—8
in mitigation of damages, 301—8
2. *In criminal cases*,
for the prosecution, 580
for the defence, 582

EXAGGERATION
may be evidence of malice, 281

EXAMINATION OF WITNESSES BEFORE TRIAL, 526

EXCEPTIONS, BILL OF, 551

EXCESS
in mode and extent of publication, 282

EXCOMMUNICATED,
charge of having been, is actionable, 59

EXECUTION,
no stay of, on appeal, 564
rule *nisi* for new trial is a stay of, 557

EXECUTORS AND ADMINISTRATORS, 355

EXEMPLARY DAMAGES,
when allowed, 292

EX PARTE PROCEEDINGS,
reports of, 244

EXPERTS,
evidence of, 533

F.

FAIR REPORT,
what is meant by, 250—256
question for jury, 252

"FALLING SICKNESS,"
charge of having, 62, 66, 74

FALSE BOOKS,
charge of keeping, 80

FALSEHOOD,
need not be shown, 169
of the communication, may be evidence of express malice, 274

FALSE IMPRISONMENT, 9

FALSE NEWS,
devisers of, 378

FALSE PRETENCES,
charge of obtaining a horse by, 123

FALSE WEIGHTS,
charge of using, 80

FEELINGS,
injury to, 309, 312, 318

"FELON,"
charge of being a, is actionable, 24, 58, 171, 603

FELONY,
what amounts to a charge of, 120—127
imputation of, actionable, 55

FICTITIOUS NAMES,
use of, to conceal defamation, 129

FIGURATIVE EXPRESSIONS,
libel by, 106, 539

FISHERY ACTS,
charge of offence against, not actionable, 57

FLOWER-SHOW
may be criticized, 50

FOREIGN AMBASSADORS,
libellous reflections on, 383

FOREIGN LANGUAGE,
slander or libel in, 109, 110, 470, 626

FOREIGNER
plaintiff, security for costs by, 356

FORGERY,
charge of, actionable, 55
what words a sufficient charge of, 60, 122

FORMER PROCEEDINGS, 456

FORMER RECOVERY,
defence of, 490

FORMS,
of pleadings, notices, &c., in the Country Court, 644—648

FORNICATION,
charge of, not actionable, 85

FORSWORN,
charge of being, 60, 123

FOX'S LIBEL ACT (32 Geo. III. c. 60), 12, 94, 585, 667

FOXES,
charge of poisoning, libellous, 25
charge of shooting, against a gamekeeper, actionable, 77

FRAUD,
charge of, must be proved to the letter, 225
charge of, actionable, if written, 21
if spoken in way of trade, 32
not otherwise, 61

FREEDOM
of the press, 10, 416, 420, 436

FROZEN SNAKE,
charge of being, libellous, 22
judicial notice of meaning of, 106, 539

"FUDGE,"
affixed to a newspaper article, 100

FURTHER AND BETTER ANSWERS TO INTERROGATORIES, 515
affidavit, 519

G.

GALLOWS
may be a libel in effigy, 8

"GAMBLER,"
not actionable, 61

GENERAL DAMAGES,
defined and distinguished from special damage, 289
amount entirely in discretion of jury, 291, 552
on each count separately, 295

GENERAL ISSUE,
abolished in civil cases, 480
on trial of indictment or information, 577

GENERAL LOSS OF CUSTOM, 293

GIST
of an action of slander, 18—21

GONORRHŒA,
charge of having, is actionable, 62

GOOD BEHAVIOUR,
binding to, 378, 444, 574

GOODS,
slander of title to, 79, 145
libel on, 32—34, 145—148

GOVERNMENT,
libels against, 415—418
patronage, may be criticized, 44

GOVERNOR,
official publication by, privileged, 257
communication to, privileged, 538

GRAND JURY,
defamatory presentment by, privileged, 191

GUARDIANS, BOARD OF, 260

GUARDIANS OF THE POOR,
words concerning, 29

GUNSMITH,
libel on, 33

H.

HANDBILL
of tradesman, may be criticized, 34, 50, 51

HANDWRITING,
proof of, 533, 580

HATRED,
words exposing plaintiff to, 21, 22

"HEALER OF FELONS,"
meaning of, 114

HEARSAY,
sufficient ground for *bonâ fide* belief, 214, 278

HEIR,
slander of title of, 139

HERESY,
no crime, 396

"HERMAPHRODITE,"
not actionable, 67

HIEROGLYPHICS
may be a libel, 8

HISTORY,
matters of, may be discussed, 377

"HOCUSSED," 102

HOMŒOPATHIST,
charge of meeting in consultation, 29

HONORARY OFFICE,
words of one in, 64

HOSPITALITY,
loss of, 311, 324

HOUSE OF COMMONS,
report of Select Committee of, 662
observations on such report, 261, 391, 531

HUSBAND AND WIFE, 345
one in law, 152
claim by husband for words defamatory of wife, 347
married woman defendant, 350
plea that plaintiffs are not, 491
where wife has obtained a protection order, 346
repetition by wife to husband of charge affecting herself, 330, 332
the like by husband to wife of a charge affecting others, 153, 332

"HYPOCRITE,"
charge of being, is libellous, 22

I.

IGNORANCE,
words imputing, 28, 29

ILLEGAL OCCUPATION,
action for slander in respect of, not maintainable, 81

ILLNESS,
as special damage arising from slander, 309, 312, 318

IMMORALITY,
charge of, if written, is actionable, 21
not if spoken, 84—87
in a physician, 66
in a clergyman, 64, 66, 72

"IMPOSTOR,"
charge of being, is libellous, 22
not actionable, if spoken, 85

IMPRIMATUR
no longer necessary, 10, 11

IMPUTATION
of crime must be specific, 121—127

INCOMPETENCY
in office, 27

INCONTINENCE,
words imputing, to unmarried women, 85, 86
to married women, 312
to clergymen, 66, 72

INDECENT PUBLICATIONS
may be stopped in the post, 407

INDICTABLE OFFENCE,
imputation of, in slander, 121—127

INDICTMENT,
for libel, 574
pleading to the, 576
removal of, by certiorari, 578
averments, 575
amending, 577
costs of trial of, 590
forms of, 654—658

INFAMOUS PUNISHMENT,
what is, 54

INFANCY,
no defence, 353

INFANTS, 352

INFECTIOUS DISEASE,
imputations of having, actionable, 21, 22, 624

"INFERNAL VILLAIN,"
libellous, 22

INFORMATION,
when privileged, though volunteered, 213—219, 286

INFORMATION, CRIMINAL,
for libel, 380—383
practice on, 591—596
forms of, 649, 651

INGRATITUDE,
charge of, libellous, 23

INITIALS OF NAME,
libel expressed by, 130, 582

INJUNCTION
will not be granted to restrain publication of libel, 13—16, 436, 454
except after verdict, 16
to restrain premature and unfair publication of proceedings in Chancery, 436

INJURIA SINE DAMNO, 17, 18

INJURY TO REPUTATION,
gist of action, 18—21

INNKEEPER,
libel on, 34
slander of, 79

INNOCENT PUBLICATION, 6, 154, 384—387, 617

INNUENDO,
office of, 100—117
when necessary, 109, 112, 116
when not necessary, 105, 107
drafting the, 472
evidence as to the, 538
plaintiff bound by, 102

INQUIRY,
communications in answer to, privileged, 203—207
writ of, to assess damages, 464

INSANITY,
charge of, is libellous, 23
of the king, 414
no defence, 354

INSINUATION,
libel by, 98

INSOLVENCY,
words imputing, 23, 31, 78, 79
acts imputing, 8, 9

INSPECTION OF DOCUMENTS, 520
both parties may now obtain, 516

INSTRUCTIONS FOR STATEMENT OF DEFENCE, 475

INSULTING LADIES,
charge of, libellous, 22

INTEGRITY,
words imputing want of, 70

INTENTION
without overt act, no crime, 57, 124
of defendant, immaterial in civil cases, 5—7, 264
unless occasion privileged, 264, 266
of defendant, in criminal cases, immaterial, 358
except in case of libel on dead, &c., 376
to produce natural and necessary consequence of act, presumed, 5

INTERCOURSE
of friends, of husband, loss of, words tending to cause, 22, 312

INTEREST,
as ground of privilege, 233—243
in actions for slander of title, 141
public, matters of, may be criticized, 36—52
where large body of persons interested, 237
persons present who have no corresponding interest, 239

INTERROGATORIES, 500—517
leave to administer, when necessary, 501
tending to criminate, 504
as to opponent's case, 506
what allowed, 507
striking out, 509
answer to, 511
what defendant may refuse to answer, 512
further and better answers, 515

INTOLERANCE,
religious, charge of, libellous, 23

IRONICAL PRAISE
may be a libel, 8, 23

IRONICAL WORDS
may be actionable, 8, 23, 116, 539
must be alleged to have been so spoken, 114, 539

ISSUES, SEVERAL,
assessment of damages on, 295
apportionment of costs of, 338—340

ITCH,
charge of having, actionable, if written, 22
not, if merely spoken, 63

J.

"JACOBITE,"
charge of being, 121, 418, 421

JEST,
publication of libel in, no defence, 6

JOINDER
of causes of action, 458
of parties, 369, 371, 452

JOINT,
plaintiffs, 369
defendants, 371

JOINT PUBLICATION
of written language, 157, 328

JOINT STOCK COMPANY,
action by, 367

JOURNALIST,
privileges of, 36—41, 416, 420
libels on, 30

JUDGE
of Superior Court, words concerning, 426—439
of Inferior Court, words concerning, 64, 440—448
at Chambers, 437
remarks by, absolutely privileged, 188
private letter to, not privileged, 191, 237
duty of, on question of Libel or No Libel, 94, 98
on uncontroverted facts to decide if publication is privileged, 185
when to nonsuit, 543
summing-up, 550

JUDGES' CHAMBERS,
reports of proceedings in, 248

JUDGMENT, 552
in default of pleading, 495
by default, 463
proceedings after, 554
arrest of, 96, 118, 554, 586, 587

JUDICIAL NOTICE
of meanings of words, &c., 106, 116

JUDICIAL PROCEEDINGS,
statements made in, absolutely privileged, 188
bonâ fide comments on, protected, 44
private letter to judge is not privileged, 191, 237
attorney's bill of costs is not, 193
voluntary affidavit is not, 193
Courts martial, 189, 194
counsel, privilege of, 190
jury, 191
witnesses, 191
affidavits, &c., 191
reports of, 243—257
coram non judice, 244
ex parte proceedings, 244
reports must be fair and accurate, 250
no comments should be interpolated, 254
by party or solicitor, 256, 257, 429, 430
prohibited reports, 249, 436

JURISDICTION
of County Court, 453, 468, 565
of Salford Hundred Court, 569
of Ecclesiastical Courts in suits for defamation, abolished, 17, 59, 86, 403, 679

JURISDICTION—*continued.*
none to restrain by injunction the publication of a libel, 13—16, 436, 454, 459
of quarter sessions, 374, 404, 574
removal of indictment by certiorari, 578
summary, of justices as to libels, 574

JUROR,
privilege of, 191
withdrawing a, 550

JURY,
to determine whether a publication be a libel or not, 16, 94, 98, 544, 557
to decide on the sufficiency of an apology, 300, 560
to construe the libel, 26, 94
to determine the meaning of words, 94—117
to read whole of libel, 27, 98, 551
to determine truth of the facts charged, 169, 170
must assess damages once for all, 295, 317, 320, 552
should not consider the question of costs, 295, 552
not to be dispensed with, 454, 523, 568
function of, in prosecutions for libel, 585
special, 528

JUS IN REM,
right to reputation, 1, 18

JUSTICE OF THE PEACE,
no jurisdiction in libel, 574
words by, when privileged, 188
words concerning, 64, 70, 72, 440, 441
administration of the law by, is matter of public interest, 45
reports of proceedings before, 243—248, 255
cannot commit for contempt, 444
sureties for good behaviour, 444

JUSTIFICATION, 169—181
onus of proving words true is on the defendant, 169
the whole libel must be proved true, 169
the rule applies to all reported speeches or repetitions of slander, 173
must justify the precise charge, 169
heading must be justified, 98, 99
of innuendo, 177
must be proved in every material part, 170—174
slight immaterial inaccuracy, 170
of part only, in mitigation, 176, 306
plea of, when evidence of malice, 274, 485, 542
must be specially pleaded, 177, 485
danger of pleading, 178, 274, 485, 623
how proved, 548
Roman law as to, 180
forms of plea of, 485, 605, 616, 624

JUSTIFICATION—*continued.*
in a criminal case, 178, 388
not permitted at Common Law, 388
under Lord Campbell's Act, 389
not allowed in prosecutions for blasphemous, obscene, or seditious libels, 388, 398, 414, 577
form of plea to information or indictment, 650, 660

K.

KEEPING A BAWDY-HOUSE,
charge of, actionable, 56

KILLING,
charge of, actionable, 121, 627

KING,
libels against the, 413, 414
petition to, privileged, 223
words cannot amount to treason, 410
denying his title to the crown, 413
disparaging his ministers, 415—419

KNOWLEDGE
of defendant that his words were false, proof positive of malice, 267, 274
in criminal cases, 379, 580

L.

LANDLORD
and tenant, communications between, privileged, 217, 233, 236, 241

LANGUAGE,
construction of, 93—117
certainty of, 118—132
ambiguous, 107—116
actionable *per se*, 21—81
actionable only by reason of special damage, 82—92
jury to determine meaning of, 26, 94, 98, 544, 550

LARCENY,
what will amount to a charge of, 61, 122
charge of, actionable, 55

LAW,
ecclesiastical, 402

LEAVE TO MOVE, 554

LECTURES,
contract for hire of rooms for delivery of blasphemous, 374, 399

LEGISLATIVE ASSEMBLIES,
libels on, 422—425
petition to, is privileged, 187

LEPROSY,
charge of having, 63

LETTER,
confidential, not privileged from inspection, 518
before action, 453
post-marks on, 533
libels by, in what county published, 581
shown confidentially, 207, 615
threatening, indictment for, 377, 379

LETTERS PATENT,
slander of title to, 144

LIBEL,
defined, 1, 7, 21, 22
malice not essential to, 5—7, 264
distinguished from slander, 3, 4
action for, maintainable without proof of special damage, 2—4
is criminal, 4, 56
in foreign language, 110, 470, 574
remedies for, civil and criminal, 9, 376, 390—393
how construed, 93—132
or no libel, pre-eminently a question for the jury, 16, 94, 98, 557
whole to be looked at, 27, 98, 551
bonâ fide comment, 34—52, 483
on the dead, 375
proof of the, 535
contract for printing, cannot be enforced, 374
blasphemous, 394—403
obscene, 404—408
seditious, 409—448
precedents of pleadings in actions for, 600—621

LIBEL ACT,
32 Geo. III. c. 60 (Mr. Fox's), 12, 94, 585, 586
statute in full, 667
6 & 7 Vict. c. 96 (Lord Campbell's),
s. 1, 299, 465, 568
s. 2, 299, 301, 465, 487, 491, 497, 568
s. 3, 379
s. 4, 379, 572, 573, 580
s. 5, 379, 390
s. 6, 389, 576, 577, 589
s. 7, 363, 364, 365, 385, 583
s. 8, 590, 595, 596
statute in full, 674, 675, 676

"LIBELLER,"
charge of being a, is actionable, 30, 56

"LIBELLOUS JOURNALIST,"
charge of being a, 30, 171

LIBELLOUS WORKS,
no copyright in, 374

LIBERTY
of the press, defined, 10, 416, 420
history of growth of, 9—12, 421
not to be restrained by injunction, 13—16, 436, 454, 459

LICENSED VICTUALLER,
libel on, 31, 102
words concerning, 79

LIMITATIONS,
statute of, 455
defence under, must be pleaded, 490

LOCAL INTEREST,
matters of, may be criticized, 41, 46

LORD CHAMBERLAIN,
control over plays, 13

LUNATICS,
liability of, 264, 353

M.

MAGAZINE,
joint liability of editor and printer for libel in, 361

MAGISTRATES,
language concerning, 64, 70, 440, 441
report of proceedings before, privileged, 243—8, 255
cannot commit for contempt, 444
proceedings before, 571

MAINTENANCE,
loss of, by wife, as special damages, 324

MALICE,
not essential to the action, 5—7, 264
unless occasion privileged, 5, 266
onus of proving lies on the plaintiff, 269
proof of actual, 271—288, 541
I. Extrinsic evidence of, 271
former publications by defendant of plaintiff, 272, 541, 545
former quarrels, 271, 542
acts of defendant subsequent to publication, 273
that the words are false is alone no evidence of, 274
that defendant knew the words were false, is evidence of, 267, 274
plea of justification, 274, 485, 542
II. Evidence of, derived from the mode and extent of publication, the terms employed, &c., 277
(i) Where the expressions employed are exaggerated and unwarrantable, 280
(ii) Where the mode and extent of publication is excessive. 282
communications volunteered, 286
absence of, tends to mitigate damages, 301
in actions of slander of title, 142—145
maliciously publishing a libel, knowing it to be false, 379, 580
malice in law defined, 265, 267

MALICIOUS PROSECUTION, 9

MAN FRIDAY,
charge of being, not actionable, 25
judicial notice of the meaning of the term, 114

"MAN OF STRAW"
libellous, 22

MANSLAUGHTER,
charge of, actionable, 55, 608, 627

MARRIAGE,
loss of, as special damage, 309, 310, 474
evidence of loss of, 316

MARRIED WOMAN,
libel on, 24
slander of, 84—87, 312, 324
charge of stealing goods of, 62, 96
trader, 32, 346, 349
as plaintiff, 345
as defendant, 350
rights of husband, 347
criminal liability of a, 351
may be ordered to find sureties for good behaviour, 378
cannot sue her husband for slander or libel, 346, 347

MARRIED WOMEN'S PROPERTY ACT, 346, 350

MARRIED WOMEN'S PROPERTY ACT AMENDMENT ACT, 351, 491

MASTER
and servant, 358
his commands no defence for his servant, 359
liable for words of his servant, spoken with his authority, 360
ratification, 361
giving character of servant, 200—203, 268, 600
criminal liability of, 362, 385
defence under Lord Campbell's Act, 363—365, 385, 583

MASTER MARINER,
charge of drunkenness against, actionable, 29, 215, 217

MATTERS OF PUBLIC INTEREST, 36—52
what are, 41, 42
matters of local interest, may be, 41, 42
affairs of state, 42—44
parliamentary proceedings, 42, 43
administration of justice, 44—46
public authorities, 46, 47
local institutions, 46, 47
parochial charity, 47
ecclesiastical affairs, 47, 48

MATTERS OF PUBLIC INTEREST—*continued.*
unpublished sermons, 47
books, 48, 49
pictures, 48, 49
architecture, 48, 49
theatres and concerts, 49
public balls and entertainments, 49, 50
flower show, 50
appeals to the public, 50—52
advertisement of cure, 50, 51
circulars and handbills of tradesmen, 50, 51
controversies in the newspapers, 50—52
persons inviting public attention, 51, 52

MAYOR,
words concerning, 28, 40, 440
contempt of, 440, 445

MEANING
of words is a question for the jury, 93—117
assigned by innuendo, must be adhered to, 102
defendant may justify the words without the, 177, 487, 634

MEDICAL MEN,
slanders on, 68, 76, 83, 627
libels on, 29, 34
criticism on the advertisements of, 51, 173
imputation upon, of immorality, 66, 316
proof of qualification of, 530, 531

MEETINGS,
public, reports of proceedings at, not privileged. 260—263

MEMBER OF PARLIAMENT,
words concerning, 71, 236, 304
privilege of speech of, 186, 236, 259

MEMORIAL
to Home Secretary, 222, 611

MENTAL DERANGEMENT,
imputations of, 23

MENTAL DISTRESS
is not special damage, 309, 312

MERCHANTS,
words concerning, 77—81
imputations on their credit, 30, 78
charge of keeping false account books, 80
imputations on their goods, 32, 79, 145—148

MERCHANT'S CLERK,
words concerning, 124, 228

MIDWIFE,
words concerning, 68

MILITARY AND NAVAL OFFICERS,
reports by, privileged, 144

MINISTER,
dissenting, words concerning, 28, 72, 73
proof of special damage by. 316, 320

MISCONDUCT,
general, charge of, actionable only if written, 21
in trade, charge of, is actionable always, 31, 80

MISDEMEANOUR,
charges of, 54, 56, 123, 124

MISJOINDER
of parties, 344

MISTAKE,
publication of libel by, 6, 153, 264, 387. 531

MIS-TRIAL, 588

MITIGATING CIRCUMSTANCES,
what amount to, 299—307
(i) apology and amends, 299
(ii) absence of malice, 301
conflicting cases on this point, 303
defendant's belief in truth of charge, 302, 589
(iii) evidence of the plaintiff's bad character, 304
(iv) plaintiff's previous conduct in provoking the publication, 306
(v) absence of special damage, 308
affidavits as to, receivable in criminal cases, 589

MITIORI SENSU,
construction in, 95—97

MONEY,
unfit to be trusted with, charge of being, actionable, 23

MOTHER-IN-LAW,
charge of sueing in County Court, not libellous, 25

MOTIVE
immaterial, unless occasion privileged, 5—7, 264, 265
in criminal cases, 376, 388
wicked, imputation of, libellous, 27

MOTION
for judgment, 553
non obstante veredicto, 554
in arrest of judgment, 554, 586, 587
for a new trial, in a civil case, 105, 556
in a criminal case, 587
for a rule for a criminal information, 591

MURDER,
charge of, actionable, 55, 608
what is a sufficient charge of, 121
what insufficient, 122
charge of, explained away by context, 108

N.

NAME AND ADDRESS
of printer and his employer, 12, 531, 532

NAVAL AND MILITARY OFFICERS,
reports by, privileged, 144

NEGRO,
charge of being, not libellous in England, 25

NEW ASSIGNMENT, 496

NEWS,
false, fabrication of, 378

NEWSPAPER,
proprietor, liability of, 7, 157, 261, 391, 392, 618
criminal liability of, 364, 365, 386
libels on, 30, 33
cannot sue editor for contribution, 374
editor, liability of, 157, 261, 391, 392
libels on, 30, 603
printer of, 12, 157, 361, 384, 618
reporter, duty of, 245, 247, 254
letters written to, may be answered, 50—52
how much may be read in evidence, 545
not justified in publishing story told by plaintiff against himself, 6
proof of publication of, 531
latitude allowed to writers in, 38, 39, 416, 420
actionable language concerning, 30, 105
imputation that it has a small circulation, libellous, 30
advertisement in, when privileged, 225, 226
statutory provisions relating to, 12, 531
statutory plea of apology for libel in, 299, 487, 621
extent of circulation of libel in, increases damage, 31, 157, 158
discovery of proprietors, printers, and publishers of 513, 514, 532, 619
copying libellous articles from another, 159, 302, 303, 584
reports in, of judicial proceedings, 243—257
reports in, of debates and proceedings of parliament, 257—259
reports in, of public meetings, not privileged, 260—263
comments in, on matters of public interest, 34—52
editor not bound to give up name of correspondent, 452—453
publications reflecting on suitors, witnesses, or prisoners, 44, 249, 429, 430, 436

NEW TRIAL,
when granted, 556—561
application for, to what Court, 555, 557, 560
perverse finding of jury, 105, 558
for excessive damages, 558
for insufficient damages, 559
surprise, 559
verdict against weight of evidence, 557
on one of several issues, 557
costs of, to follow event, 560
on criminal information or indictment for libel, 587, 588

NOMINAL DAMAGES,
jury not limited to giving, 293

NONJOINDER
of parties, 344

NONSUIT, 543
no action can be brought subsequently for same cause, 545

NOT GUILTY,
plea of, abolished in civil cases, 480
plea of, on trial of indictment, 576, 577

NOTICE
to auctioneer, libel in, 226
of exclusion from public room, 25
of termination of engagement, no libel, 25
that defendant will not accept payment in cheques on plaintiff's bank, 25
of action, 453
of intention to adduce evidence of apology in mitigation, 299, 488, 621
to produce, 526, 536
to inspect and admit, 526
of trial, 522

O.

OBSCENE WORDS, 404—408
test of obscenity, 404
summary proceedings under 20 & 21 Vict. c. 83, 405
reports of proceedings of Courts of Justice as to, not privileged, 249, 407
parties aggrieved may appeal, 406
no copyright in, 374
as to sending by post, 407

OCCASION
of publication gives rise to absolute privilege, 186—196
qualified privilege, 196—263

OCCUPATION
of plaintiff, how proved, 530
libels on plaintiff in way of, 27—33
words concerning plaintiff in way of, 77—81

OFFICE,
words concerning plaintiff in his, actionable whether written, 22, 27—30
or spoken, 64—81
proof of appointment to, 530
action lies whether the office one of profit or not, 64
distinction between imputation of want of ability and imputation of want of integrity, 28, 70
imputing ignorance in, 67, 68
plaintiff must be in the present enjoyment of, in slander, 69, 70
not so in libel, 27
the words must affect plaintiff in his office, 65
imputing corruption to officer of Court, 28, 71
Judges of Superior Court, 64, 426
Judges of Inferior Court, 28, 40, 440
justices of the peace, 70, 71, 72, 440
clergymen and ministers, 72, 73
barristers-at-law, 74
solicitors and attorneys, 74
physicians and surgeons, 76

OPINION,
words lowering plaintiff in people's, 22
of expert witnesses, when receivable, 533

"OPPRESSIVE CONDUCT,"
charge of, libellous, 29

OPTICIAN,
libel on, 31

ORIGINATOR OF RUMOUR
may escape punishment, 166, 329

OUTLAW,
action by, 357
civil proceedings in outlawry, now abolished, 357

OVERSEER,
words concerning, 28, 29, 229
evidence as to appointment of, 530

P.

PAMPHLET,
publication of report of trial in, 251

PARDON,
crime imputed for which pardon granted, 58, 497, 606

PARENT,
not liable for acts of children, 361

PARISH MEETINGS,
proceedings at, privileged, 234, 237
reports in newspapers of proceedings at, 260

PARISH OFFICERS,
words affecting, 28, 29
constable, 71, 237
overseer, 28, 29, 229
churchwarden, 62
waywarden of a district, 46

PARLIAMENT,
speeches in, absolutely privileged, 186
petition to, 43, 187, 222, 259
contempts of either House, 422—425
resolutions of House of Commons, 423
power of commitment, 423
Speaker's warrant not to be too closely scrutinized, 423

PARLIAMENTARY DEBATES AND PROCEEDINGS,
reports of, in newspaper, privileged, 257—259
may be freely commented on by every one, 35, 42, 43

PARLIAMENTARY PAPERS,
liability for publication of, 187
statute protecting authorised publication of, 187, 672—674

PAROCHIAL
affairs may be matter of public comment, 41, 42
charity, privately organized, may not, 47

PARTIALITY,
charging a judge with, is actionable, 28

PARTICULARS,
of statement of claim, 479, 608, 609, 625
of plea, 485, 486, 632

PARTIES
to action, 344—372, 452
misjoinder of, 344
non-joinder of, 344
1. Husband and wife, 345
claim by husband for words defamatory of wife, 347
married woman defendant, 350
criminal liability of a married woman, 351
2. Infants, 352
3. Lunatics, 353
4. Bankrupts, 354
5. Receivers, 355
6. Executors and administrators, 355
7. Aliens, 356
8. Master and servant—principal and agent, 358
master's commands no defence, 359
principal liable for words spoken by his authority, 360
ratification, 361
criminal liability of master or principal, 362
9. Partners, 365
10. Corporations and companies, 367
11. Other joint plaintiffs, 369
12. Joint defendants, 370

PARTNERS,
in trade, words imputing insolvency to one of, 81, 367
libels on, 32
service of writ on, 461
may join in the action, 365
previous recovery against one partner, 457
appear in their own name, 463

PATENT,
slander of title to, 144

PATRONAGE,
Government, may be criticized, 44

PAWNBROKER,
words concerning, 111

PAYMENT INTO COURT
under Lord Campbell's Act, 299—301, 487
no admission of liability, 300
form of plea, 488
under the Judicature Act, 491—494
no admission of liability, 493
any pleas can be pleaded at same time, 480, 493
form of plea, 494, 630

PECUNIARY LOSS
is special damage, 309
when essential to action, 18—21

PEERS
and great officers of the realm, slander of, 133—136

PENCIL MARK
may be a libel, 7

PERJURY,
what amounts to a charge of, 123
charge of committing, actionable, 24, 56
charge of procuring one to commit, 56, 130

PERMANENT MARK OR SIGN,
if scandalous, a libel, 3, 22

PERSONS
under various disabilities, 344—372

PETITIONS
for redress of injuries, privileged, 220—224
to Parliament, are privileged, 222, 259
are matters of public interest, 43, 259
to the Sovereign, 223

PHYSICIAN,
words concerning, 68, 76
libel on, 29, 34
imputation of adultery to, 66, 83, 316
proof of qualification of, 530, 531

"PICKPOCKET,"
charge of being a, is actionable, 122

PICTURES,
libels by, 3, 22, 24
libellous, public exhibition of, 374
publicly exhibited, may be criticized, 48, 49

PILLORY,
punishment of, in former times, 394, 412

PLACARD,
on wall, proof of, 536
publication by, 153, 283, 613

PLACE
of trial, change of, 528
of publication, how far material, 110, 581

PLAGUE,
charge of having the, 63

PLAINTIFF,
who may be, 344—372
death of, 355
must be sufficiently pointed at and identified, 127, 540
general reputation of, 298, 304
conduct of, in provoking libel, &c., 306
evidence for, 530—542
matters to be considered by, 449
proof that the words refer to, 127—132, 540
special character, proof of, 530
joint plaintiffs, 369
infant, 352
married woman, 345

PLEADINGS,
In Civil Cases,
statement of claim, 469—475
joinder of causes of action, 458
averments, what necessary, 118, 473, 531
innuendo, 100, 107, 538
colloquium, 118, 120
special damage, 138, 289, 308—333, 474
venue, 474
amendment of, 498, 537, 545
particulars, 479, 609, 625
demurrer, 475, 606
statement of defence, 480—494

PLEADINGS—*continued.*
bad for uncertainty, 487
counterclaim, 494
reply, 496
rejoinder, 498
amendment of, 498, 545
default in, 500
variance, 471, 536, 537, 545
precedents of, 596—661
in actions for libel, 600—621
of slander, 621—634
of slander of title, 634—644
In Criminal Cases,
indictment, 574
amendment of, 577
demurrer to, 659
forms of, 654—658
pleas, 576
forms of, 659
replication to pleas, 660
demurrer to plea, 577, 661
justification under Lord Campbell's Act, 389, 576
information, 595
amendment of, 595
form of, 649, 651
form of pleas to, 650
replication to pleas, 651

POLICEMAN,
slander of, 189, 332
words published to, 221

POLITICAL AUTHORS,
privilege as to writings of, 38, 39, 416, 420

POST-CARD,
publication of libel by, avoids privilege, 151, 283, 284

POST-MARK,
as evidence of publication in a particular county, 581

POST-MASTER,
complaint as to, 217, 223

POX,
charge of having, 63

PRACTICE IN CIVIL CASES, 449—570
considerations before writ, 449
parties, 452
letter before action, 453
notice of action, 453
choice of Court, 453
district registry, 454
Statute of Limitations, 455, 490

PRACTICE IN CIVIL CASES—*continued.*
former proceedings, 456
joinder of causes of action, 458
endorsement on writ, 459
service of the writ, 460
appearance, 462
judgment by default, 463
matters to be considered by the defendant, 465
security for costs, 466
remitting the action to County Court, 468
subsequent proceedings in County Court, 566
pleadings (*See* PLEADINGS), 469—498
amending pleadings, 498
default in pleading, 500
interrogatories, 500—515
discovery and inspection of documents, 515—522
default in making discovery, 522
notice of trial, 522
entry for trial, 522
advice on evidence, 524
examination of witnesses before trial, 526
special jury, 528
change of venue, 528
trial, 529—553
compromise, 550
costs, 553
proceedings after judgment, 554
application for a new trial, 556
proceedings in the Court of Appeal, 561
County Court proceedings, 565
other inferior Courts, 569

PRACTICE IN CRIMINAL PROCEEDINGS BY WAY OF INDICTMENT, 571—591
proceedings before magistrates, 571
indictment, 574
pleading to the indictment, 576
certiorari, 578
evidence for the prosecution, 580
evidence for the defence, 582
summing-up and verdict, 585
proceedings after verdict, 585
sentence, 589
costs, 590

PRACTICE IN PROCEEDINGS BY WAY OF CRIMINAL INFORMATION, 591—596
motion for the rule, 591
argument of the rule, 593
compromise, 594
trial and costs, 595

PRECEDENTS
of pleadings, &c., Appendix A., 596—661
in actions for libel, 600—621
in actions of slander, 621—634
in actions of slander of title, 634—644
of criminal pleadings, 649—661

PREFATORY AVERMENTS,
as to traverse and denial of, 452
evidence as to, 531

PRESS,
liberty of, defined, 10, 416, 420
history of growth of, 9—12, 421
abuse of liberty of, 10
censorship of, 9—12

PREVIOUS ACTIONS, 456, 490

PREVIOUS REPORTS OR RUMOURS, 165, 231—233, 305, 306, 584
if *bonâ fide* repeated to person calumniated, 167, 217, 219

PRIEST,
words spoken by, 242

PRINCIPAL,
liable for words spoken by his authority, 360
criminal liability of, 362, 385
defence under Lord Campbell's Act, 363—365, 385, 583
ratification, 361

PRINTER,
liability of, 157, 361, 384
to print his name and address on every publication, 12
to preserve name of his employer, 12
cannot recover wages for printing libellous matter, 374

PRINTING,
libels by, 3, 156—158
primâ facie evidence of publishing, 154, 155, 533
a libel without publication, 152, 386

PRIVILEGED OCCASIONS, 182—263
defence that words were spoken on a privileged occasion, 182
occasions absolutely privileged, 183
occasions on which the privilege is qualified, 183
the Judge to decide whether occasion is privileged or not, 185
presumption of privilege rebutted by evidence of malice, 264—288

I. Occasions absolutely Privileged, 185—196
(i) Parliamentary proceedings, 186
(ii) Judicial proceedings, 188
words spoken by a judge, 188
words spoken by counsel, 190
words spoken by a witness, 191
(iii) Naval and military affairs, 194

PRIVILEGED OCCASIONS—*continued.*
II. Qualified Privilege, 196—263
cases of qualified privilege classified, 196
I. WHERE CIRCUMSTANCES CAST UPON THE DEFENDANT THE DUTY OF MAKING A COMMUNICATION.
(A.) *Communications made in pursuance of a Duty owed to Society*, 198
duty may be moral or social, 198
(i) Characters of servants, 200
(ii) Other confidential communications of a private nature:
(*a*) Answers to confidential inquiries, 203
(*b*) Confidential communications not in answer to a previous inquiry, 207
(*c*) Communications made in discharge of a duty arising from a confidential relationship existing between the parties, 209
(*d*) Information volunteered when there is no confidential relationship existing between the parties, 213, 286
difficulty of the question, 215, 288
(iii) Information given to any public officer imputing crime or misconduct to others, 220
such officer must have some jurisdiction to entertain complaint, 223
(B.) *Communications made in Self-Defence.*
(iv) Statements necessary to protect defendant's private interests, 225
(v) Statements provoked by a previous attack by plaintiff on defendant, 228
statements invited by the plaintiff, 230
II. WHERE THE DEFENDANT HAS AN INTEREST IN THE SUBJECT-MATTER OF THE COMMUNICATION, AND THE PERSON TO WHOM THE COMMUNICATION IS MADE, HAS A CORRESPONDING INTEREST, 233
where a large body of persons are interested, 237
if strangers present, the privilege will be lost, 239
III. PRIVILEGED REPORTS, 243
(i) Reports of Judicial Proceedings, 243
matters *coram non judice*, 244
reports not privileged, 249
reports must be accurate, 250
no comments should be interpolated, 254
an accurate report may still be malicious, 256
(ii) Reports of Parliamentary Proceedings, 257
(iii) Other Reports, 259
suggestion of the Select Committee of the House of Commons, 261

PRIVILEGE OF DOCUMENTS
from inspection, 517—519

PRIVILEGE OF WITNESSES,
as to self-criminating evidence, 504, 534
as to production of state papers, 535, 536

PROCEEDINGS,
former, 456, 490
after judgment, 554
in the Court of Appeal, 561
in the County Court, 565
before magistrates, 571
after verdict of guilty, 585

PROCTOR,
words concerning, 30

PROFANE LIBELS, 394—403

PROFESSION,
words injuring the plaintiff in the way of, actionable whether spoken, 64—81
or written, 21, 27—30

PROFITS,
loss of, is special damage, 293, 309, 313—320

PROOF
of plaintiff's special character, 530
of publication, 531
of the libel, 535
of the speaking of the slander, 537
that the words refer to the plaintiff, 540
that the words were spoken of the plaintiff in the way of his office, profession, or trade, 541

PROPRIETOR
of newspaper liable for all libels contained therein,
civilly, 7, 157, 261, 391, 392
criminally, 364, 365, 386

PROSPECTIVE DAMAGES, 317, 320

PROSTITUTE,
charge of being, not actionable, if spoken, 85
charge of having under protection, libellous, 24

PROSTITUTION,
words imputing, to a single woman, 84—87
to a schoolmistress, 84
to the shopwoman of a trader, 84
to a married woman, 84—87, 312, 324

PROTECTION ORDER, 346

PROVOCATION
by libel to a breach of the peace, 3, 373
by plaintiff's conduct, 228, 306, 380
by previous libels, when evidence in mitigation, 307, 380

PUBLIC ATTENTION,
persons inviting, may be criticized, 51, 52

PUBLIC BENEFIT,
when a defence on trial of indictment or criminal information, 389, 390, 650, 659

PUBLIC INTEREST, MATTERS OF,
may be freely commented on, 34—52
what are, 41—52
affairs of State, 42—44
Government patronage, 44
debates and proceedings in Parliament, 42, 44
petitions to Parliament, 43
books and other literary publications, 48, 49
paintings and works of art, 48, 49
architecture, 48, 49
advertisements, placards, circulars, 50, 51
the performances at places of public entertainment, 49, 50
the conduct of persons attending a public political meeting, 52
management of public institutions, 46, 47
parochial charity, 47
ecclesiastical affairs, 47, 48
the public conduct of public men, 34, 40, 41, 43
persons inviting public attention, 50—52
newspaper controversies, 50—52

PUBLIC MEETINGS,
reports of proceedings at, not privileged, 241, 260—263
comments on conduct of persons attending, permitted, 52

PUBLIC MEN,
who are, 41
their public conduct may be freely discussed, 34, 40—43
libels on by imputation of corrupt motives, 37—39, 43

PUBLIC PERFORMANCES AND ENTERTAINMENTS
may be the subject of fair criticism, 49, 50

PUBLIC POLICY,
ground for refusing to produce a document, 535, 536

PUBLICAN,
libel on, 31

PUBLICATION, 150—168
definition of, 150
must be to a third person, 150, 152, 383
plaintiff must prove a publication by the defendant *in fact*, 153
publication *per alium*, 155
publication in a newspaper, 157

PUBLICATION—*continued.*
repetition of a slander, 161
naming your authority now no defence, 162
rule that every one repeating a slander becomes an independent slanderer, 166
exceptions to this rule, 167
by sale in a shop, 160, 384
by telegram or postcard, 151, 283, 284
by placard, 153, 536
by copying from another newspaper, 159, 302, 303, 584
by mistake, 6, 153, 385, 387
by anticipation, 261
by contrivance of plaintiff himself, 168, 231
cannot be restrained by injunction, 13—16
proof of, 531
proof of where libel is lost, 536

PUBLISHER,
who is liable as, 156—166, 384—387

PUFFING
own goods, no libel, 32, 33

PUNISHMENT
at common law, 374, 378
under s. 4 of Lord Campbell's Act, 379
under s. 5, 379
by requiring sureties for good behaviour, 378, 414
for a blasphemous libel, 394
for an obscene libel, 404
for a seditious libel, 412
for contempt of court, 428, 433, 434
pillory, 394, 412
what may be shown in mitigation of, 589

Q.

"QUACK,"
charge of being a, libellous, 29—31

QUALIFIED PRIVILEGE, 196—263
cases of qualified privilege classified, 196

I. WHERE CIRCUMSTANCES CAST UPON THE DEFENDANT THE DUTY OF MAKING A COMMUNICATION.

(A). *Communications made in pursuance of a Duty owed to Society*, 198
(i) Characters of servants, 200
(ii) Other confidential communications of a private nature, 203
(*a*) answers to confidential inquiries, 203
(*b*) confidential communications not in answer to a previous inquiry, 207
(*c*) communications made in discharge of a duty arising from a confidential relationship existing between the parties, 209

QUALIFIED PRIVILEGE—*continued.*
(*d*) information volunteered when there is no confidential relationship existing between the parties, 213
(iii) Information given to any public officer imputing crime or misconduct to others, 220
such officer must have some jurisdiction to entertain complaint, 223
(B). *Communication made in Self-Defence.*
(iv) Statements necessary to protect defendant's private interests, 225
(v) Statements provoked by a previous attack by plaintiff on defendant, 228
statements invited by the plaintiff, 230
II. WHERE THE DEFENDANT HAS AN INTEREST IN THE SUBJECT-MATTER OF THE COMMUNICATION, AND THE PERSON TO WHOM THE COMMUNICATION IS MADE, HAS A CORRESPONDING INTEREST, 233
where a large body of persons are interested, 237
if strangers present, the privilege will be lost, 239
III. PRIVILEGED REPORTS, 243—263

QUARTER SESSIONS,
power to punish for contempts, 442
jurisdiction to try indictments for libel, 374, 404, 574

R.

RAILWAY COMPANY,
placarding conviction for infringement of bye-laws, 173, 179
may be sued for libel, 369

"RASCAL,"
libellous, 22

RATIFICATION, 361

RE-ASSERTION OF SLANDER
in reply to inquirer, 230—233

RECEIVERS
appointed by Court of Chancery, 355

RECEIVING STOLEN GOODS,
charge of, actionable, 56, 59
what a sufficient charge of, 60, 123

RECOGNISANCES, 378, 444, 574

RECORD,
courts of, 426—443
courts not of, 444—447

REDRESS,
bonâ fide claim for, privileged, 220—228

REGISTRY, DISTRICT,
issuing writ in, 454

REJOINDER, 498, 613

RELIGION,
publications against, 394—403

RELIGIOUS INTOLERANCE,
charge of, libellous, 23

RELIGIOUS SECTS AND SOCIETIES,
libels upon, 376, 377, 381
sentence of expulsion from, 86, 87, 312, 319, 325
excommunication, 59

REMEDIES FOR LIBEL,
civil and criminal, 9, 376, 390—393

REMITTING ACTION
to the County Court, 468

REMOTENESS OF DAMAGES, 321
damage resulting to the husband of the female plaintiff, 323
damage caused by the act of a third party, 325
not essential that such third person should believe the charge, 327
wrongful and spontaneous act of a third person, 328
originator of a slander not liable for damage caused by its repetition, 329
exceptions to this rule, 331

REPETITION
of slander heard from another, 161—168, 328—333
naming informant now no avail, 162, 165
formerly a defence, 162
bonâ fide repetition to person calumniated, 167, 217, 219
libellous articles reproduced from other newspapers, 159, 302, 303, 584
of libel, may be evidence of malice, 273
of slander, by wife to husband, 152, 330, 332

REPLICATION
in criminal cases, 651, 660

REPLY,
as to pleading, 496
of pardon to a plea charging felony, 58, 497, 606
to plea under Lord Campbell's Act, 299, 497
precedents of, 605, 612, 630

REPORTS,
(i) Reports of judicial proceedings, 243
of *ex parte* proceedings, 244
of matters *coram non judice*, 244
must be accurate, 250
no comments should be interpolated, 254
an accurate report may still be malicious, 256
whole should be considered, 27
(ii) Reports of parliamentary proceedings, 257
(iii) Other reports, 259
suggestion of the Select Committee of the House of Commons, 261

REPORTER,
duty of, 245, 247, 254

REPUTATION
defined, 150
is property, 17
injury to, gist of action, 17—21
of plaintiff in aggravation of damages, 298
in mitigation of damages, 304

"RETURNED CONVICT,"
actionable, 58

REVIEWS OF BOOKS, PICTURES, &c.,
how far permitted, 36—41, 48

RIDICULE,
words which expose a person to, libellous, 21, 22
as a weapon of criticism, 37, 48

"RIDING SKIMMINGTON," 9

RIGHT OF ACTION
not assignable, 354

ROBBERY,
charge of, actionable, 56

"ROGUE,"
libellous, 22
not actionable, if spoken, 61

ROMAN CATHOLICS,
penal statutes against, 58
libel on monks and nuns, 126, 377
attacks upon, 6, 44, 250, 260

ROMAN LAW
as to acts injurious to reputation of other
as to justification, 180
as to malice, 184

"ROUGH MUSIC," 9

RULE ABSOLUTE, 593

RULE *NISI*,
for a criminal information, 591

RULE OF COURT,
contempt by disregarding, 431

RUMOUR,
existence of, no justification for a repetition of, 165, 231—233, 305, 306, 584
except *bonâ fide* repetition to person calumniated, 167, 217, 219
when evidence in mitigation, 305, 306
false rumours, wilfully circulated, 378

"RUNAGATE,"
not actionable, 61

S.

SALFORD HUNDRED COURT,
jurisdiction of, in slander and libel, 569
costs in, 338

SATISFACTION, ACCORD AND, 489

SCANDALUM MAGNATUM,
statutes of, 133—135
who may bring action of, 135
the nature of the words to support the action, 135
venue in actions for, 136

SCHOOLMASTER,
words concerning, 66, 224

SCHOOLMISTRESS,
imputing prostitution to, 67, 84

"SCOUNDREL,"
charge of being, libellous, 23

SECONDARY EVIDENCE,
when libel lost or destroyed, 536

SECRETARY OF STATE,
letters to, privileged, 196, 211, 222—224
orders issued by, absolutely privileged, 196

SECT,
libels on, 376, 377, 381

SECURITY FOR COSTS, 346, 352, 466

SEDITION,
charge of, actionable, 121

SEDITIOUS WORDS, 409—418
defined, 409
treasonable words, 410
words defamatory of the sovereign himself, 413
truth no defence, 414
words defamatory of the king's ministers, 415
words tending to subvert the Government, 418

SEDITIOUS WORDS—*continued.*
words defamatory of the Constitution, 419
latitude allowed to political writers, 420
words inciting to disaffection and riot, 421
words defamatory of either House of Parliament, 422
commitment for contempt, 423
Colonial legislative bodies, 425
words defamatory of the Superior Courts of Justice, 426
contempt of Court, 428
wilful disobedience to an order of Court, 431
attachment and committal, 433
Colonial Courts of Justice, 438
words defamatory of Inferior Courts of Justice, 440
contempt of an Inferior Court of Record, 442
sureties for good behaviour, 444
statutory powers of Inferior Courts, 445
Ecclesiastical Courts, 448
no justification that it first appeared in another paper, 584
whether the publication is a seditious libel is a question for the jury, 420, 585
copies of, may be seized after conviction for, 590

SELECT COMMITTEE OF THE HOUSE OF COMMONS,
report of, on the law of libel, 662
observations on such report, 261, 391, 531

SELF-DEFENCE,
language published in, is privileged, 225—232

SENTENCE, 589

SENSUS VERBORUM EX CAUSÂ DICENDI ACCIPIENDUS EST 108

SERMONS,
not privileged, 6, 242
unpublished, criticisms on, 47

SERVANT,
when liable as publisher, 358
employer, when liable for acts of, 360—365, 385, 583
charge against, when privileged, 203, 209, 226, 275
communication to employer concerning, when privileged, 217
giving character to, 200—203, 600
delivery of libel by, not knowing contents, 359, 384, 585

SERVICE OF THE WRIT, 460

SHAREHOLDERS,
proceedings at meeting of, privileged, 238, 242
reports to, privileged, 235, 242

SHIP,
libel on, 34, 132
slander of, 357

SHIPOWNER,
words concerning, 34, 132

SHOPKEEPER,
words concerning, actionable, 78—81, 226, 227

SHOPMAN,
said to have scarlet-fever, 358

SHOPWOMAN,
words imputing prostitution to, 84

SICKNESS
is not special damage, 309, 312

SLANDER,
defined, 1, 7
distinguished from libel, 3, 18—21
when not actionable without proof of special damage, 253, 308, 309
I. Words imputing an indictable offence, 54, 621
early cases on this subject, 58
the charge must be specific and precise, 60, 120—127
the crime imputed must be possible, 61
II. Words imputing a contagious disease, 62, 624
III. Words spoken of the plaintiff in the way of his office, profession, or trade, 64
such words must affect him in such office, profession, or trade, 65
imputation of professional ignorance or unskilfulness, 67
plaintiff must be carrying on such trade, &c., at the time he is defamed, 69
words imputing want of integrity to any one holding an office of trust, 70
words concerning clergymen, 72, 628
words concerning barristers, solicitors, &c., 74
words concerning physicians and surgeons, 75, 627
words affecting traders in the way of their trade, 77, 631
imputations of insolvency, 78
imputations of dishonesty and fraud in the conduct of their trade, 79, 633
IV. Words actionable only by reason of special damage, 82
words imputing immorality, 83
words imputing unchastity, 84
unsatisfactory state of the law on this point, 86
all words causing special damage are actionable, 87, 148
repetition of, 161—168, 328—333
naming informant, 162
bonâ fide repetition to person calumniated, 167, 217, 219
re-assertion in answer to plaintiff's inquiry, 230—233
proof of the speaking of the, 537
precedents of pleadings in actions of, 621—633

SLANDER OF TITLE, OR WORDS CONCERNING THINGS, 137—149
definition, 137
I. Slander of title proper, 138
actionable, if words *false* and *malicious*, and if *special damage* be proved, 138
proof of malice, 142
II. Slander of goods manufactured or sold by another, 145
other words producing special damage, 148
precedents of pleadings in actions of, 634—643

SLANG TERMS,
question for jury as to meaning of, 110
evidence for jury as to, 538

SMALL-POX,
charge of having, not actionable, 63

SOCIETY,
loss of, words tending to cause, 22
of neighbours, 312
of husband, 312

SOLICITORS,
words concerning, 74, 75
libels on, 29, 30, 99

SOLICITING ANOTHER TO COMMIT A CRIME,
charge of, actionable, 56

SORCERY,
charge of, formerly actionable, 59

SPECIAL CHARACTER,
proof of plaintiff's, 530
mode of averring, 473, 474

SPECIAL DAMAGE,
when essential to action, 18
defined, 289
words causing, 82, 87, 148
essential in slander of title, 138
what constitutes, 309
must be specially pleaded, 313, 474
arising after action, 317
where the words are actionable *per se*, 318
where the words are not actionable *per se*, 308
remoteness of, 321—333

SPECIAL JURY, 528

SPEAKING OF THE SLANDER, PROOF OF, 537

SPEECHES
in Parliament, reports of, 35, 42, 186, 257
of counsel, reports of, 250—253

SPIRITUAL COURT,
jurisdiction of, in cases of defamation, 17, 59, 85, 86

STAR CHAMBER,
decrees of, regulating press, 10, 11, 13
criminal jurisdiction of, 14

STATEMENT OF CLAIM, 469—475
joinder of causes of action, 458
the very words must be set out, 101, 470
averments, what necessary, 118, 473, 531
innuendo, 100, 107, 538
words in a foreign language, 470
special damage must be specially pleaded, 313, 474
venue, 474
particulars of, 479, 609, 625
demurrer to, 475, 605
precedents of, in libel, 600, 601, 603, 607, 613, 615
in slander, 621, 624, 626, 628, 631, 632
in slander of title, 639, 641

STATEMENT OF DEFENCE, 475, 480
traverses, 481
bonâ fide comment, no libel, 483
privilege, 484
justification, 485
apology, 487, 621
accord and satisfaction, 489
previous action, 490
other defences, 490
payment into Court, 491
counter-claims, 494
judgment in default of pleading, 495
precedents in libel, 601, 605, 609, 614, 616, 617, 618
in slander, 622, 623, 626, 629, 631, 633
in slander of title, 640, 643

STATE PAPERS,
privilege as to production of, 535

STATUE
may be a libel, 8

STATUTE OF LIMITATIONS,
plea of, 455, 490

STATUTES. *See* APPENDIX OF STATUTES, C, 664—683
contents of such Appendix, 664
See also TABLE OF STATUTES cited, lxvii.
TABLE OF RULES AND ORDERS cited, lxx.

STAYING PROCEEDINGS IN ACTION, 479, 557, 564

STEALING,
what amounts to charge of, 61, 122
goods of married woman, 62, 96

STOCK-JOBBER,
words concerning, 81

STOLEN GOODS,
charge of receiving, 56, 59, 60, 123

STORY PREVIOUSLY TOLD BY PLAINTIFF AGAINST HIMSELF, 25

STRIKING OUT INTERROGATORIES, 509

STRUCK OFF THE ROLLS,
charge that an attorney was, or ought to be, 7, 30, 75, 173, 205

"STRUMPET,"
charge of being a, not actionable, 85
except in London and Southwark, 59, 84

SUBORNATION OF PERJURY,
charge of, actionable, 56

SUBSCRIBER TO A CHARITY,
statement by, respecting the officers of charity, 238, 239

SUMMARY JURISDICTION
of justices to require sureties for good behaviour, 444, 574
to issue warrant to apprehend a libeller, 571
to commit for trial, 573
to take bail, 573
truth of libel may not be inquired into, 572
in cases of obscene libels, &c., 405—407
seizure of other libellous papers, illegal, 574

SUMMARY PROCEEDINGS
before magistrates, reports of, 243—248

SUMMING UP
in a civil case, 550
in a criminal case, 585

SUMMONS
for leave to plead and demur, 476
for particulars, 479, 608
to amend a pleading, 498
for leave to administer interrogatories, 501
to strike out interrogatories, 509
for inspection of documents, 521
for a commission, 527
to change venue, 528
for a special jury, 528
before a magistrate, 571

SUPERIOR COURTS,
words concerning, 426
contempts of, 428

SUPERIOR OFFICER,
reports to, privileged, 194, 195

SURETIES
for good behaviour, 378, 444, 574

SURGEON,
slander of, 68, 76, 83
libels on, 29, 34
proof of qualification of, 530, 531

SURPRISE
as ground for new trial, 559

SUSPICION,
words of mere, not actionable, 57
bonâ fide communication of, 204, 217, 220, 222

"SWINDLER,"
charge of being a, libellous, 23
not actionable, if spoken, 61

SYPHILIS,
charge of having, 63

T.

TELEGRAM,
publication of libel by, avoids privilege, 151, 283, 284

THEATRICAL PERFORMANCES,
criticism on, permitted, 49,

THEFT,
imputations of, 61, 122

THING,
slander of, 137—149
libel on, 32—34

THREATENING
to publish a libel with intent to extort money, etc., 378, 379
a witness, or suitor, contempt of court, 430

TITLE,
slander of, 137—149
precedents of pleadings in actions of, 634—644

TOWNSHEND
on Libel and Slander, American treatise, 18—21

TRADE,
libel of persons in the way of, 21, 30—34, 64—81
humility of, no obstacle to right of action, 77
must be a lawful one, 81

TRADE PROTECTION SOCIETY,
circulars of, not privileged, 213

TRADERS,
libels on, 31—34
slander of, 77—81, 631
imputation of fraud and dishonesty in trade, 79, 80, 633
of being a cheat or a rogue, 80
words affecting the credit and solvency of, 7, 78, 79
imputations on the goods or commodities of, 32, 33, 79, 137, 145—148
caution to, not to trust a certain customer, 215, 218
words affecting partners in trade, 32, 81, 365—367
married women traders, 32, 346, 349
a trading company, 32, 367—369
that the commodities of one trader are inferior to those of another, 33, 145—148
criticisms on advertisements and circulars of, 34, 50, 51
evidence of loss of profits and of business, 314, 315, 319

TRAVERSES, 481

TREASON,
charge of, actionable, 56
words cannot amount to overt acts of, 410
what a sufficient charge of, 121

TRESPASS
to land of plaintiff, 83
to building, 8
to persons, 9
imputation of, not actionable, 56

TRIAL IN CIVIL CASES,
notice of, 522
entry for, 522
examination of witnesses before, 526
special jury, 528
change of venue, 528
libel or no libel is a question for the jury, 16, 94, 98, 55
evidence for plaintiff, 530—543
nonsuit, 548
evidence for defendant, 545—549
compromise, 550
summing up, 550
the libel itself must be produced at, 535
verdict, 551
judgment, 552
postponement of, 529
reports of, 243—257
comments on, 44—46
time of giving evidence to rebut justification
application for a new, 556
proceedings after, 554, 555

TRIAL IN CRIMINAL CASES,
pleading to the indictment, 576
certiorari, 578
evidence for the prosecution, 580
evidence for the defence, 582
summing-up and verdict, 585
proceedings after verdict, 585
sentence, 589
costs, 590
of criminal information, 595

"TRUCKMASTER,"
charge of being, libellous, 24

TRUSTEES OF A CHARITY,
words concerning, 29, 370, 377

TRUTH,
as a justification in civil proceedings, 169—178
why a defence, 179
as a justification on the trial of an indictment or criminal information, 178, 388—390
no justification, unless publication was for public benefit, 390
belief in, in mitigation, 302, 589

U.

UNCHASTITY,
charge of not actionable, 84, 85
unsatisfactory state of law as to, 86, 87

UNCONSCIOUS PUBLICATION OF A LIBEL, 154, 384—387, 617

UNCIVIL WORDS,
not actionable, 18

UNDER-SHERIFF,
on writ of inquiry, has power over costs, 337, 464

UNFEELING CONDUCT,
charge of, libellous, 24

UNNATURAL OFFENCES,
charge of, actionable, 56
words imputing, 124

"USE OF THE LAW,"
by Bacon, cited, 19

V.

VARIANCE
between words laid and those proved, amendment of, 471, 536, 537, 545

VENEREAL DISEASE,
charge of having, actionable, 62, 63

VENIRE DE NOVO, 588

VENUE,
plaintiff to select, 474
application to change, 528
grounds for changing, 529
in indictment, 578

VERDICT
in civil case, 551
against weight of evidence, 557
in criminal case, 585
proceedings after, in a civil case, 552—561
in a criminal case, 585
cures certain defects, 477, 586

VESTRY MEETINGS,
reports of proceedings at, 260
imputation on parish officers at, 234, 237

VEXATIOUS INDICTMENTS ACT,
libel not within, 571

VICE,
words imputing, actionable if written, 21
not if spoken, 84—87

"VILLAIN, INFERNAL,"
libellous, 22

VINDICATION
of defendant's character from attacks, 228, 229, 230

VINDICTIVE DAMAGES,
when allowed, 292

VOCALISTS,
libel on, 34

VOLENTI NON FIT INJURIA, 168, 231

VOLUNTARY
affidavit, not a judicial proceeding, 193
characters of servants given when not asked for, 202

VOLUNTEERING COMMUNICATIONS
in discharge of duty, 213—219
not evidence of malice where duty clear, 286—288
caution given to a tradesman, 215

VULGAR ABUSE,
mere words of, not actionable, 18, 109

W.

WALL,
libel by writing or drawing upon, 8, 283, 536

WARRANT OF ARREST, 571

"WELCHER,"
not actionable, 61

"WHORE,"
charge of being, not actionable, 84, 85
except in London and Southwark, 59, 85

WIFE,
and husband, 345
claim by husband for words defamatory of wife, 347
as defendant, 350

WILL,
charge of secreting, formerly not actionable, 59

"WITCH,"
charge of being, formerly actionable, 59

WITHDRAWING A JUROR, 550

WITNESS
cannot be asked how he understood the language published, 110, 538
privilege of, 191
commission to examine, before trial, 526
defendant as a, 534
proof of previous conviction of, 546

WOMEN,
verbal imputations on, 84—87

WORDS,
action on the case for, 87—92
actionable *per se*, 18
imputing crime, must be precise, 120—126
meaning of, how affected by circumstances, 98, 107, 108
general terms of abuse, not actionable, 18, 109
must be set out *verbatim* in the Statement of Claim, 101, 470
clearly defamatory, 105
primâ facie defamatory, 107
adjective, 126
ambiguous, 107—116, 539, 548
ironical, 8, 23, 114, 116, 539
neutral, 109
primâ facie innocent, 112
clearly innocent, 116
of a cant or slang character, 110, 538
indirect imputations, 125
of suspicion, 57
of interrogation, 126, 471, 537
in foreign language, 470
application of, to the plaintiff must be shown, 127—132, 540

WORKMEN,
action for threatening, 149, 358

WORKS OF ART,
criticisms on, 48, 49

WRIT,
considerations before, 449
endorsement on, 459
service of the, 460

WRIT OF ERROR, 587

WRIT OF INQUIRY, 464, 465
under-sheriff has power over costs, 337, 464

THE END.

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