

So far we have been considering what spoken words will be deemed slanderous; and we have seen that the law will construe them strictly by the inquiry as to what damage they have done to, and what loss, positive or prospective, may have been sustained by the person against whom they are spoken.

But when the slanderous words come to be written down in black and white, the matter becomes more serious. The law will no longer construe them by the question of mere damage, but will hold the fact of their being written to be *prima facie* proof of the deliberation and malicious motive of their perpetrator.

The slander, upon publication, becomes libel, and an offense, not only against the party libeled, but against the public peace.

75. When merely oral, they might have been measured by their source, or by the audience to whom they were addressed.¹ Once written they may pass, no

‘none now will forbear his company though he had’ any disgraceful disease ‘in times past.’” But we think, if the learned gentleman will look again, he may possibly discover that the law is quite consistent in the matter—the charge of the itch, being written, and so libel; while the charge of having been a convict, was spoken, or slander, which may have constituted the difference.

¹ In the old reporters we find many cases in which the culture and degree of intelligence of the auditors in whose presence an alleged slander was uttered, was taken into the account in construing whether it was slander or not (*Kennedy v. Gifford*, 19 Wend. 296; *Ausman v. Veal*, 10 Ind. 355; *Fen v. Dixe*, Jo. 444, pl. 5). This famous case of Tom Fenn’s beer, it seems to me, is open to criticism. The defendant said: “I will give my mare a peck of malt, and lead her to the water and let her drink, and she shall piss as good beer as any Tom Fenn brews.” This was held not to be actionable, because it is impossible that the words should be true in any man’s understanding. But if to say of a lawyer that “he hath no more law than Master Cheyny’s bull,” and Cheyny hath no bull, is actionable, because equivalent to saying that he is no

one knows whither; he who was their source can no longer control them; "for who," says the philosopher "can recall the written word?" and it is equally impossible to know where they may find their audience. All publications are libelous which hold a man up to such scorn and ridicule as might reasonably be supposed to be liable to provoke him to a breach of the peace.¹ "In a libel," says Best, C.J.,² "any tendency to bring a party into contempt or ridicule is actionable; and, in general, any charge of immoral conduct although in matters not punishable by law."³

"If any man," says Wilmot, C.J.,⁴ "deliberately or maliciously publishes anything in writing concerning another which makes him ridiculous, or tends to hinder mankind from associating or having intercourse with him, an action well lies against such publisher." "Scandalous matter is not necessary to make a libel; 'tis enough if the defendant induces an ill opinion to be had of the plaintiff, or makes him contemptible and ridiculous."⁵ "In case upon a libel, it is sufficient, if

lawyer (1 Siderfin, 327), are not the words uttered of Tom Fenn actionable, because equivalent to saying that his beer is all water? It seems to us to be the poorest compliment possible to Mr. Fenn's beer.

Although something depends upon the intelligence of the hearer, the same does not seem to be true of the person making the charge. Thus, where one said of a jeweler, "He is a cozening knave in selling me a sapphire for a diamond," it was held actionable. It would seem that one who does not know a sapphire from a diamond is indeed stone-blind (Albany Law Journal, February 28, 1874).

¹ Holt L. L. 213; *Parmiter v. Coupland*, 6 M. & W. 108.

² *Archbishop of Tuam v. Robeson*, 5 Bing. 21.

³ *Clement v. Chivis*, 9 B. & C. 172; *Churchill v. Hunt*, 1 Chit. 480.

⁴ *Villiers v. Monsley*, 2 Wils. 403.

⁵ *Cropp v. Tinley*, 3 Salk. 226.

the matter be reflecting, as to paint a man playing at cudgels with his wife.”¹

Nor will one be permitted to slander or libel his neighbor by way of joke. It is no defense to say that the defamatory matter was uttered in jest, and not in earnest, and that the utterer did not expect to be believed.² It is related of Sergeant (afterward Lord Chancellor) Maynard, however, that, he having once brought a suit for slander against a man who said “that a client gave the sergeant a basket of pippins, and that each pippin had a gold piece for a core;—and then the other side came to him and gave him a roasting pig, within which, in place of dressing were fifty broad gold pieces more,”—although the sergeant had a verdict in his favor, judgment was arrested in consequence of the actionable words being discovered to be “the burden of an old story,” which “used to be told of Noy and all the cock lawyers of the west, and had been repeated by the defendant of Maynard, the reigning cock, as mere merriment over ale, without intent to slander.”³

But drunkenness although not, from policy, a de-

¹ Per Holt, J., 11 Mod. 99. See also *People v. Croswell*, 3 Johns. Ch. 337, 354; *State v. Southwick*, 9 Id. 214; *Cooper v. Greeley*, 1 Duer, 347; *Root v. King*, 7 Cowp. 613.

² *Hatch v. Potter*, 7 Ill. (2 Gilm.) 725; *McKee v. Ingalls*, 5 Ill. (4 Scam.) 30; *Long v. Eakle*, 4 Md. 454; *Donohue v. Hayes*, Hayes, J. Ex. 265. And see *Hawkins*, Pl. C. 356, § 13; 2 Stark. Ev. 464; *Wood's Civil Law*, 247; *Holt on Libel*, 230, 291; *Moore*, 627; 9 Coke, 59.

³ *Campbell's Lives of the Lord Chancellors*, Mallory's edition, vol. iv. ch. civ. 433; *Life of Guilford*, i. 235. When the suit was tried before Lord Chief Justice North, when the story of the pippins came out, “those were golden pippins,” quoth the judge; and when the pig was mentioned, “that's good sauce to a pig,” quoth the judge. See *Percy Anecdotes*, “The Bar.”

fense¹ would probably be matter in mitigation.² Olivia uttered very good law when she said "there is no slander in an allowed fool,"³ for fools and madmen are tacitly exempted from all laws.⁴

76. The writing will not lose its libelous character although disguised in bad spelling,⁵ initials⁶ hieroglyphics,⁷ bad grammar;⁸ or because constructed in the form of an allegory,⁹ an anagram,¹⁰ or a rebus,¹¹ or a caricature,¹² because the persons it libels are designated by fictitious names,¹³ or by the locality in which a class of

¹ McKee v. Ingalls, 4 Scam. 30; Reid v. Harper, 25 Iowa, 87.

² Howell v. Howell, 10 Ired. 84; Isley v. Lovejoy, 8 Blackf. 462; Gates v. Meredith, 7 Ind. 440.

³ Twelfth Night, i. 5. "*Oli.*—There's no slander in an allow'd fool, though he do nothing but rail."

⁴ Townshend on Slander & Libel, 434; City of London v. Vanacker, Carthew, 483; Horner v. Marshall, 5 Munf. 466; Bryant v. Jackson, 6 Humpf. 199; Yeates v. Reed, 4 Blackf. 463; Dickinson v. Barber, 9 Mass. 225. Perhaps delirium tremens, which is a species of insanity, would be a defense, if one wrote a libel while laboring under an attack of that distemper. (Maconnehey v. State, 5 Ohio, N. S. 77; O'Brien v. People, 48 Barb. 275.)

⁵ Rex v. Edgar, 2 Sess. Cas. 29, Pl. 33.

⁶ Holt on Libel, 235; Read v. Huggonson, Salk. 470.

⁷ Townshend on Slander & Libel, § 133, note.

⁸ Cornelius v. Van Slyck, 21 Wend. 70; Borthwick on Libel, 142.

⁹ Holt on Libel, 245.

¹⁰ Id.

¹¹ Id.

¹² Mezzaro's Case, 2 City Hall Recorder, 113; Du Borst v. Beresford, 2 Camp. 812; 1 Wood's Inst. 445; Holt on Libel, 244.

¹³ Ryckman v. Delavan, 25 Wend. 186; Mix v. Woodward, 12 Conn. 262; State v. Jeaudell, 32 Penn. St. 475. So that the libel is brought home (Van Vechten v. Hopkins, 5 Johns. 211; Gibson v. Williams, 4 Wend. 320; Morgan v. Livingston, 2 Rich. 573; Miller v. Butler, 6 Cush. 71; Leonard v. Allen, 11 Id. 241; McLaughlin v. Russell, 17 Ohio, 475; Good-

persons to which the person libeled belongs, reside, or congregate;¹ or by the order to which he belongs.² "Common sense is not to be deemed a stranger to legal process, but as very influential in ascertaining the force and effect of words and sentences which, although technical, are to receive a sensible construction," said Parker, Ch. J. "All the libelers of the kingdom now know," said Lord Hardwicke, so far back as 1742, "that printing initial letters will not serve their turn, for that objection has been long got over."³

On the same footing as written or printed libels, stand those which are published by means of pictures, prints, or caricatures; and it is as libelous to paint a man with a fool's cap and bells, or with horns, or asses' ears, as it is to openly call him by the names that those signs imply.⁴

So, too, where an indictment was demurred to on the ground that, by reason of its bad spelling, it was unintelligible, and wanted a meaning. The libel as set out in the indictment was as follows: "Here is there cockels in this place (meaning cuckolds), we now (meaning know) them well, he (meaning Lambert) is a nave (meaning knave), he cheats and rongs (meaning wrongs) the county, and is the cur of a son of a whore;" the indictment was held good, Raymond, Ch. J., saying: "The present libel is plain to all men and easily to be understood, and it would be hard that rich v. Davis, 11 Metc. 473; Goodrich v. Stone, Id. 486; Allensworth v. Coleman, 5 Dana, 315; White v. Sayward, 33 Me. 322; Smaley v. Stark, 9 Ind. 386).

¹ Ryckman v. Delavan, 25 Wend. 186; Le Faun v. Malcomson, 1 H. L. C. 637.

² Harrison v. Bevington, 8 C. & P. 807; Morchtand v. Cadell, 4 Paton, 385.

³ Commonwealth v. Runnels, 10 Mass. 518.

⁴ Mezzaro's Case, *ubi supra*.

a court of justice must not understand it is badly spelt, when all the world besides make no scruple to find the signification of the words.”¹

In a case where a great portion of the libel consisted of insinuations by means of questions, Alderson, B., directed the jury that “if a man insinuates a fact in asking a question, meaning thereby to assert it, it is the same thing as if he asserted it in terms.” The libel in that case containing the following passage, “We should be glad to know how many popish priests enter the nunneries at Scorton and Darlington each week? and also how many infants are born in them every year, and what becomes of them? whether the holy fathers bring them up or not, or whether the innocents are murdered out of hand or not?” The learned judge told the jury that if they thought that the defendant, by asking the questions, “meant to insinuate and to state that infants are born in the nunnery at Scorton, and that holy fathers bring them up or murder the innocents,” then it was a libel on those persons.² And said Cowen, J.,³ “one cannot protect himself from an action by the mere grammatical construction of the phrase.”

In a case *De Libellis Famosis*,⁴ it was held, that a “*famosus libellus sine scriptis* may be *picturis*; as, to paint the party in any shameful and ignominious manner.” “In case upon a libel,” says Holt, Ch.

¹ Rex v. Edgar, 2 Sess. Cas. 29; 5 Bac. Abr. tit. Libel, 199.

² Gathercole's Case, 2 Lew. C. C. 255; Hunt v. Thimblethorpe, Moo. 418; 1 Vin. Abr. 429; Earl of Northampton's Case, 12 Rep. 134; Delany v. Jones, 4 Esp. C. 191; Woolnoth v. Meadows, 5 East, 463; Hemming v. Power, 10 M. & W. 564; Le Fanu v. Malcomson, 1 H. L. Cas. 664.

³ Cornelius v. Van Slyck, 21 Wend. 70.

⁴ 5 Cok. 125.

J.,¹ "it is sufficient if the matter be reflecting: as to paint a man playing at cudgels with his wife."² Lord Ellenborough, Ch. J., said of a libelous picture of a gentleman and his lady, which was entitled "*La Belle et la Bête*," that the person who exhibited it in public was "both civilly and criminally liable for having exhibited it."³

So a libel may be expressed by fixing a gallows or other reproachful or ignominious signs at a person's door, or elsewhere;⁴ or, in general, by any insinuation upon him appealing to the eye of the community in which he lives.⁵

¹ Anon. 11 Mod. 99.

² According to Blackstone (in a statement omitted in the later editions of his "*Commentaries*"), in the case of signs or pictures it seems necessary to show not only the import and application of the scandal, but also "that some special damage has followed;" and he gives as a reason—that "otherwise it cannot appear that such libel by picture was understood to be leveled at the plaintiff, or that it was attended with any actionable consequences" (see 3 Com. 126). There appears to be no authority whatever for the proposition that, in the case of signs or pictures, special damage must be shown to have followed from the publication; and there is as little force in the reason assigned for making a distinction between libelous signs or pictures and written or printed libels; for the former tell their tale, in general, even more unmistakably than the latter (Shortt, L. Litt. 389).

³ *Du Bost v. Beresford*, 2 Camp. 511. See also *Austin v. Culpepper*, 2 Show. 314; *Skin.* 123, where the defendant was held liable in an action for having forged an order of the court of chancery defamatory of the plaintiff, and drawn, on the bottom of it, the picture of a pillory, with the words subscribed, "For Sir J. Austin and his witnesses by him suborned" (*Ib.* Shortt, L. Lit. 390).

⁴ 5 Coke, 125.

⁵ See *Jeffreys v. Dunscombe*, 11 East, 226, where a lamp was set up in front of the plaintiff's house, and kept burning in the daytime, in order to defame him as the keeper of a bawdy-house; or by the custom known as "*riding Skimmington*." See *Cropp v. Tilney*, 3 Salk. 225, 226, and *Bolton v.*

77. It has been held libelous to publish of a protestant archbishop that he had attempted to convert a Roman Catholic priest (against whom a charge of seduction had been made), by offers of money and preferment;¹ of a person seeking charity that she preferred unworthy claims or squanders money in printing circulars;² or of the overseer of a parish that he paid paupers their weekly allowance in orders for flour upon a particular tradesman,³ or to placard of an overseer that he advocated low rates when out of office, but high rates when in office, and that the defendant would not trust him with five shillings of his property.⁴

In another case where an action was held maintainable, the important part of the libel was, "I sincerely pity the man" (meaning the plaintiff) "that can so far forget what is due, not only to himself, but to others, who, under the cloak of religious and spiritual reform, hypocritically and with the grossest impurity, deals out his malice, uncharitableness, and falsehoods."⁵

It has also been held libelous to publish of any man that he has been guilty of gross misconduct, and insulted females in a barefaced manner.⁶ The individual libeled in this case was a coachman, but the publication was not held libelous, because published of him in that capacity, the court considering it only necessary to inquire whether the publication in ques-

Dean, referred to by the court in *Austin v. Culpepper*, 2 Show. 314.

¹ *Archbishop of Tuam v. Robeson*, 5 Bing. 27.

² *Hoare v. Silverlock*, 12 Q. B. 624.

³ *Woodward v. Downing*, 2 M. & Ry. 74.

⁴ *Cheese v. Scales*, 10 M. & W. 488; cf. *Warman v. Hine*, 1 Jac. 820.

⁵ *Thorley v. Lord Kerry*, 4 Taunt. 355.

⁶ *Chement v. Chivis*, 9 B. & C. 192.

tion held up the plaintiff to public hatred, contempt, or ridicule; the imputation was a very serious and contumelious one, clearly calculated to bring the plaintiff into contempt by some persons, and hatred by others, and, therefore, according to established rule, the publication was libelous.

The publication in a newspaper, of a paragraph stating that, although the plaintiff was aware of the death of a lady occasioned by his furious and careless driving, he nevertheless, on the very evening of the catastrophe, attended a public ball, was held actionable.¹

A publication alleging that a person has for years, without cause, systematically done everything to annoy another, and had unnecessarily dragged that other into the court of chancery and put him to great expense,² or that the plaintiff was ungrateful,³ or of one who had been an attorney that when practicing, he had been guilty of "sharp practice,"⁴ "cozener,"⁵ "tan-money."⁶ And courts have hesitated to take judicial notice of the meaning of the word "swindle,"⁷ or that "hooked" is sometimes used to mean "stole,"⁸ or "goose-house" to mean "brothel."⁹ The word "wool-comber," however, does not need an innuendo to show it means one who buys wool to work with.¹⁰ "Truck-

¹ Churchill v. Hunt, 1 Chitt. 480.

² Fray v. Fray, 17 C. B. N. S. 603; 34 L. J.; 45 C. P.

³ Cox v. Lee, L. Rep. 4 Ex. 284; 21 L. T. N. S. 178; 38 L. J. 219 Ex.; Hoare v. Silverlock, 12 C. B. 61; 17 L. J. 306. Q. B.

⁴ Digby v. Thompson, 4 B. & Ald. 821.

⁵ Walcot v. Hind, Hutt. 14.

⁶ Day v. Robinson, 1 Ad. & El. 554.

⁷ L'Anson v. Stewart, 17 R. 748; but see Forrest v. Hanson, 1 Cro. Car. C. 63.

⁸ Hays v. Mitchell, 7 Blackf. 117.

⁹ Dyer v Morris, 4 Mis. 214.

¹⁰ Anon., Lofft 322.

master," a word said not to be found in any dictionary, was used without an innuendo; it was left to jury to decide if used in libelous sense.¹

The court, however, will inform itself of the meaning of words peculiar to a certain place.² And a defendant will be allowed to show what he meant by the words used,³ or explanatory circumstances of time and place, known to both parties at the time the words were said, from which the court will construe the intent or malice of the speech.⁴

¹ *Homer v. Taunton*, 5 Hurl. & Nor. 661.

² *Parke, B., McGregor v. Gregory*, 2 Dowl. N. S. 769; 11 M. & W. 287; Com. Dig. Act. for Defam. C.; Rolle Abr. 86; Hobart, 126; *Pearce's Case*, Cro. Car. 382; *McGregor v. Gregory*, 2 Dowl. N. S. 769.

³ *Tighe v. Cooper*, 7 Ell. & Bl. 639; 4 Co. 14; Cro. Jac. 90; *Kinnersly v. Cooper*, Cro. Eliz. 168; *Brittridge's Case*, 4 Co. 18; *Abrams v. Smith*, 8 Blackf. 95; *Coles v. Haviland*, Cro. Eliz. 250; *Miles v. Van Horn*, 17 Ind. 245; *Rodeburgh v. Hollingsworth*, 6 Ind. 339; Vin. Abr. Act. for Words, L. b. 7; *Dimmock v. Fawset*, Cro. Car. 393, pl. 5; Vin. Abr. Act. for Words, L. b. 6; Id. 4, 7.

⁴ Explanatory circumstances known to both parties, speaker and hearer, are to be taken into the account as part of the words (*Dorland v. Patterson*, 23 Wend. 422; citing *Andrews v. Woodmansee*, 15 Id. 232; *Miller v. Maxwell*, 16 Id. 9; *Heming v. Power*, 10 M. & W. 569; *Hankinson v. Bilby*, 2 Car. & Kir. 440; 16 M. & W. 446; *Perry v. Mann*, 1 R. I. 263; *Dole v. Rensselear*, 3 Johns. Cas. 458; *Aldrich v. Brown*, 11 Wend. 596; *Trabue v. Mays*, 3 Dana, 138; *Emery v. Miller*, 1 Denio, 208; *Thompson v. Bernard*, 1 Camp. 48; *Shecut v. McDowel*, Const. Rep. 35; *Christie v. Cowell*, Peake, 4; *Pegram v. Styron*, 1 Bailey, 595; *Beardsley v. Tappan*, 1 Blatch. C. C. Rep. 588; *Cooper v. Perry*, Dudley, 247; *Ceeley v. Hoskins*, Cro. Car. 509; *Norton v. Ladd*, 5 N. H. 203; *Stevens v. Handley*, Wright, 123; *Williams v. Cowley*, 18 Ala. 206; *Hays v. Mitchell*, 7 Blackf. 117; *Harrison v. Findlay*, 23 Ind. 265; *Robinson v. Keyser*, 2 Foster (N. H.), 323; 2 Starkie on Slander, 85; *Penfold v. Westcote*, 2 N. R. 325; *Christie v. Cowell*, Peake's Cas. 4; Sel. N. P. 1250; *Bissel v. Cornell*, 24 Wend. 354; *Watson v. Nicholas*, 6 Humph. 174.

Again: the condition of things, as well as the meaning of words, may, in course of time, alter; and of the mutations in language courts will take judicial notice.¹

For instance, in the time of Charles II., it was held actionable to say of a man that he was a papist, or that he went to mass,² while in the United States it has been held actionable to call one a "mulatto."³ Though in the course of time the word "mulatto," may come to be no more a word of reproach than the word "papist" is to-day.

78. Nor will a libel be any the less actionable, if the defamatory imputation is made by reference or comparison—direct or indirect—to some character in history or fiction, or to some animal which suggests an injurious idea.

Thus, it was held a libel to publish, in a newspaper, of the plaintiff—who was an applicant for assistance from a charitable society—that her warmest friends, in giving up the advocacy of her claims, stated that they had realized the fable of the "Frozen Snake."⁴ To an objection, grounded on the absence of an innuendo in the declaration, explaining the meaning of the allusion to the "Frozen Snake," Coleridge, J., replied.

¹ Holt on Libel, 43; Borthwick on Libel, 142; Harrison v. Thornborough, 10 Mod. 196; Beardsley v. Dibblee, 1 Kerr, 246; Vanada's Heirs v. Hopkins, 1 Marshall Ken. R. 287; Gibson, J., Bash v. Sommer, 20 Penn. St. R. 159; Pollock, C. B., Tozer v. Mashford, 6 Ex. 539; Beardsley v. Dibblee, 1 Kerr, 260; Foster v. Small, 3 Whart. 143; Bloss v. Tobey, 2 Pick. 320. Carth. 55; Holt, Ch. J., Baker v. Pierce, 6 Mod. 23.

² Row v. Clargis, Ld. Raym. 482; 2 Salk. 696; Walden v. Mitchell, 2 Ventr. 265; Cutler v. Friend, 2 Show. 140. But held otherwise in the reign of King James (Ireland v. Smith 2 Brown, 166).

³ King v. Wood, 1 N. & M. (So. Car.) 184; Eden v. Legare, 1 Bay, 171; Atkinson v. Hartley, 1 McCord, 203; contra, Barrett v. Jarvis, 1 Hamm. 83, note.

⁴ Hoare v. Silverlock, 12 C. B. 624; 17 L. J. 306 Q. B.

"The jury and court, in such a case as this, are in an odd predicament, if they alone of all persons are not to understand the allusion complained of. Suppose the libel had said that the plaintiff acted like Judas; must the history of Judas have been given and referred to by innuendo? We ought to attribute to a court and jury an acquaintance with ordinary terms and allusions, whether historical or figurative, or parabolical. If an expression originally allegorical, has passed into such common use that it ceases to be figurative, and has obtained a signification almost literal, we must understand it as it is used. Half of our language is founded upon allegorical allusion: "Vinegar is used in describing a bad temper; even the word 'sour' is figurative. We must understand such terms according to the sense which has become familiar." "Nothing is easier," said Erle, J., "than to bring persons into contempt by allusion to names well known in history, or by mention of animals to which certain ideas are attached; and I may take judicial notice that the words 'Frozen Snake' have an application very generally known indeed, which application is likely to bring into contempt a person against whom it is directed."¹

See also a case where part of the libel consisted in a comparison of the conduct of the plaintiff, an attorney, in reference to a particular case, with that of the firm of Quirk, Gammon, and Snap, in the novel of "Ten Thousand a Year."²

So where a newspaper copied a libelous paragraph from another newspaper, and added the word "fudge" at the end of it, Lord Lyndhurst, C.B., on the trial of an action of libel against the publisher, left it to the

¹ Hoare v. Silverlock, 12 Ad. & El. N. S. 624.

² Woodgate v. Ridout, 4 F. & F. 206.

jury to say with what motive the paragraph was copied, and what was meant by the addition of the word "fudge;" if that word were added only for the purpose of making an argument at a future day, it would not take away the effect of the libel.¹ And, accordingly, courts will take judicial cognizance of the meaning of words and idioms in the vernacular language,² and no innuendo will be necessary to point out their meaning. But otherwise as to expressions which have not become idiomatic, such as "milk your purse,"³ "bogus peddler,"⁴ "shooting out of a leather gun."⁵

79. But absurd and ridiculous and preposterous charges that are impossible, and in the truth of which no rational person will believe, will not be held libelous. As, for instance, to charge that a woman had a litter of pups by a dog.⁶ Though the court will undoubtedly take into consideration the discrimination or common sense of the persons to whom the scandalous matter was communicated,⁷ or their peculiar relations to or dealings with the person slandered;⁸ as, for in-

¹ Hunt v. Algar, 6 C. & P. 245.

² 1 Greenl. Ev. § 5; 6 Vin. Ab. 491, Pl. 6, 7, 8; Tit. Court C.; Hoyle v. Cornwallis, 1 Stra. 387; Page v. Faucet, Cro. El. 227; Harvey v. Brand., 2 Salk. 626; Elam v. Badger, 23 Ill. 498; Forbes v. King, 1 Dowl. P. C. 672; Hoare v. Silverlock, 12 Adol. & Ell. N. S. 624; Homer v. Taunton, 5 Hurl. & Nor. 661; Edgar v. McCutchen, 9 Missouri, 768; Ashley v. Billington, Carth. 231; Vin. Abr. Act. for Words, S. a. 12.

³ King v. Lake, 2 Ventr. 18.

⁴ Pike v. Van Wormer, 6 How. Pr. 101; 5 Id. 175; and see Forbes v. King, 1 Dowl. 672.

⁵ Harman v. Delaney, 2 Stra. 898.

⁶ Kennedy v. Gifford, 19 Wend. 296. This statement, however, was held to be libelous, upon other grounds. And see Fen. v. Dixie, Jo. 444, pl. 5; Harper v. Delph., 3 Ind. 225.

⁷ Id.

⁸ Wyatt v. Gore, Holt, 299; Ward v. Smith, 6 Bing. 749; Keene v. Ruff. 1 Clarke (Iowa), 482; Schenck v. Schenck, 1

stance, if they be spoken in a foreign tongue, it must be shown that the audience understood the foreign tongue.¹

80. Not only the living but the dead can be subjects of libel. Although the person defamed be dead, the libel is, nevertheless, punishable; for it stirs up others of the same family, blood, or society, to revenge and to break the peace.² The chief cause for which the law so severely punishes all libels is, says Hawkins,³ the direct tendency of them to a breach of public peace, by provoking the parties injured, and their friends and families to acts of revenge, which it would be impossible to restrain by the severest laws, were there no redress from public justice for injuries of this kind, which of all others are most sensibly felt. And so histories, biographies, or memoirs, published at long intervals after the death of their subjects, might be so scandalous and prurient as to be actionable;⁴ but, in such cases, the intent to libel must be proved.⁵

It was held libelous to publish an obituary notice, as follows: "On Saturday evening died of the small-pox at his house in Grosvenor Square, Sir Charles Gaunter Nicoll, Knight of the Most Honorable Order of the

Spencer, 208; *Wenman v. Ash*, 13 Com. B. 836; and see *Mills v. Monday*, Lev. 112; *De La Croix v. Thevenot*, 2 Stark. C. 63.

¹ *Amann v. Damm*, 8 Com. B. N. S. 597. But where words are spoken in German, in a German county, it will be presumed they were understood (*Bechtell v. Shaler*, Wright, 107; and see 1 W. Saund. 242, n. 1; *Keene v. Ruff*, 1 Clarke [Iowa], 482; *Danvers Abr.* 146, pl. 1, 2; 2 Starkie on Slander, 52; *Fleetwood v. Curley*, Hob. 267; *Viner's Abr.*, tit. Actions for Words, A. b.; 2 Stark. Ev. 844; *Holt on Libel*, 245; *Cro. Eliz.* 496, pl. 16).

² P. C. Book 1, c. 28.

³ Co. 5, 124, C.

⁴ See a query as to the somewhat celebrated *Greville Memoirs*, *Albany Law Journal*, March 13, 1875.

⁵ *Rex v. Topham*, 4 T. R. 126.

Bath, and representative in Parliament for the town of Peterborough. He was blessed with an ample fortune, which he enjoyed in a manner that rendered him, in early years of life, a truly valuable husband and friend. He could not be called a friend to his country, for he changed his principles for a red ribbon, and voted for that pernicious project, the excise."¹

In the case, however, of libels on the dead, the intention of the person publishing must be shown to have been malevolent; for, to say that the conduct of a dead person can at no time be canvassed—to hold that, even after ages are passed, the conduct of bad men cannot be contrasted with the good—would, in the words of Lord Kenyon,² be to exclude the most useful part of history; “and, therefore,” said that learned judge, “it must be allowed that such publications may be made fairly and honestly. But let this be done whenever it may, whether soon or late after the death of the party, if it be done with a malevolent purpose, to vilify the memory of the deceased, and with a view to injure his posterity, as in *Rex v. Critchley*, then it comes within the rule stated by Hawkins; then it is done with a design to break the peace, and then it becomes illegal.”³ And so, again, it

¹ *Rex v. Critchley*, cited 4 T. R. 129.

² *Rex v. Topham*, 4 T. R. 129.

³ *Id.* For the reasons thus stated by Lord Kenyon, the court of king's bench, in 1791, held bad, after a verdict of guilty, an indictment charging the defendant that he, “wickedly and maliciously contriving and intending to injure, defame, disgrace, and vilify the memory, reputation, and character of George Nassau Clavering, Earl Cowper, then deceased, and to cause it to be believed that the said earl in his lifetime was a person of a vicious and depraved mind and disposition, and destitute of filial duty and affection, and of all honorable and virtuous sentiments and inclinations, and that the said earl had

would be libelous to publish an obituary notice of one whom the author knew to be alive.¹

81. Not only persons, but things, fall under the protection of the law of words. Properly speaking, perhaps, a thing has no rights to be invaded, and no claims to any particular duties from persons. But for all that, it may be quite possible to injure a person, by speaking disrespectfully of a thing.

"I am far from saying," said Chief Justice Cockburn,² "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 led a wicked and profligate course of life, and had addicted himself to the practice and use of the most criminal and unmanly vices and debaucheries, &c., wickedly, maliciously, and unlawfully did print and publish, and cause to be printed and published, in a certain newspaper called 'The World,' a certain false, scandalous, and malicious libel of and concerning the said Earl Cowper, &c., to the great disgrace and scandal of the memory, reputation, and character of the said Earl Cowper; in contempt, &c.; to the evil example, &c., and against the peace, &c." The court made absolute a rule to arrest the judgment, because the indictment did not allege that the libel had been published with an intent to create any ill blood, or to throw any scandal on the family and posterity of Lord Cowper, or to induce them to break the peace in vindicating the honor of the family (4 T. R. 129).—Shortt.

¹ McBride v. Ellis, 9 Rich. Law (S. C.), 313.

² Young v. McCrae, 3 Best & Sur. 264; though the chief justice suggests, further on in the same case, that such an action, however, might be more in the class of actions for false representations than actions of libel (Snow v. Judson, 38 Barb. 212; Benton v. Pratt, 2 Wend. 385; White v. Merrit, 7 N. Y. 352; Gallagher v. Brunel, 6 Cowen, 346; Swan v. Tappan, 5 Cush. 105; Ingram v. Lawson, 6 Bing. N. C. 212; 8 Scott, 471; Hamilton v. Walters, 4 Up. Can. Q. B. Rep. O. S. 24). In Yates' Pleadings & Forms, 436, is the form of a plea to a declaration for slander of the plaintiff's ship (Evans v. Harlow, 5 Q. B. 624; Malachy v. Roper, 3 Bing. N. C. 371; 3 Scott, 723; Kerr v. Sheddon, 4 C. & P. 528).

thereby causes an injury and special damage is averred, an action might not be maintained."

A man may very naturally be injured by slandering his wares; as if, for instance, he be a manufacturer of those wares (possibly not if he merely sold them—since he could easily keep others not open to the disparagement). But if a book be unfairly criticised it may be libelous of its author, as we shall see presently in this chapter, and as will be further illustrated in the chapter on newspapers.

The rule will be, that whenever disparaging words spoken of an article become injurious to the owner or producer of the article, the ordinary rules of libel may be invoked by the person injured. But in all such cases, undoubtedly, a special damage must be shown.

One form in which a slander of things is of frequent occurrence and well known to the law, is what is technically spoken of as "slander of title." Slandering of title consists in publishing language not of a person or of a thing, but of a person's right to a thing, whether the publication be written or spoken,¹ there being no such thing as a libel of title; and such slander, to be actionable, must be malicious, false,² and be productive of special damage.³

¹ *Malachy v. Roper*, 3 Bing. N. C. 371; 3 Scott, 723

² *Like v. McKinstry*, 41 Barb. 186; *aff'd*, 4 Keyes, 397; *Kendall v. Stone*, 5 N. Y. 14, *rev'g* S. C., 2 Sandf. 269. There must be malice which the plaintiff must prove (*Smith v. Spooner*, 3 Taunt. 246; *Hill v. Ward*, 13 Ala. 310; *Stark v. Chetwood*, 5 Kansas, 141; *McDaniel v. Baca*, 2 Cal. 326; *Hargrave v. Le Breton*, 4 Burr. 2422; § 87, *ante*; *Linden v. Graham*, 1 Duer, 670; *Bailey v. Dean*, 5 Barb. 297; *Watson v. Reynolds*, 1 Mo. and Malk. 1; *Paull v. Halferty*, 63 Penn. 46, and note 2, p. 315, *post*; *re*, *Madison Ave. Bapt. Church*, 26 How. Pr. 72).

³ *Kendall v. Stone*, 5 N. Y. 14; *Paull v. Halferty*, 63 Penn. 46.

As will be seen from an examination of the cases cited in the notes, a case of slander of title generally arises where one's estate in lands or real property is so impeached as to cast a cloud upon his title, or to injure or prevent a sale of the property; but it may occur also in the case of personal property. So where, at a public sale of rye, the defendant attended, and in the presence and hearing of those assembled, said, "I forbid selling the rye; it is mine," in consequence of which persons were deterred from bidding, and the rye sold for less than it otherwise would have done, it was held an action could be maintained.¹ Or, an action would lie for alleging that plaintiff's machines were an infringement on defendant's patents.²

And, similarly, where the author of a work sold the copyright to the defendant, who afterwards published a new edition, purporting to be edited by the author, but which contained mistakes and errors, it was held, if this was calculated to injure A.'s reputation as an author, he might maintain an action.³

It has been held slanderous to say that a newspaper has a low circulation,⁴ but it is not without

¹ *Like v. McKinstry*, 41 Barb. 186; *aff'd* 4 Keyes, 397; and see *Carr v. Duckett*, 5 Hurl. & N. 783; *Hill v. Ward*, 13 Ala. 310; and slander of title to a slave; *Ross v. Pines*, Wythe, 71; *Gutsole v. Mathers*, 1 M. & W. 495; 1 Tyrw. & Gr. 694; *Green v. Button*, 1. Gale, 349; 2 C. M. & R. 707; 1 Tyrw. & G. 118; *Malachy v. Soper*, 3 Bing. N. C. 371; 3 Scott, 723; *Rowe v. Roach*, 1 M. & S. 304.

² *Wren v. Wield*, 14 L. R. 213 Q. B.

³ *Archbold v. Sweet*, 5 C. & P. 219; 1 M. & R. 162.

⁴ *Heriot v. Stewart*, 1 Esp. Cas. 437. See also *Lattimer v. West. Morning News Asso.*, 25 L. T. N. S. 44.

"For instance, it would be slander to say of Jones, that he is a vulgar, ignorant, and scurrilous editor; but it would not be slanderous to say that Jones' newspaper is a vulgar, ignorant, and scurrilous journal. As experience shows, this may be a benefit rather than a detriment to Jones. One may, with-

the limits of criticism to say that a picture is a "mere daub."¹

82. A comment upon a literary production, exposing its follies and errors, and holding up its author to ridicule, will not be deemed a libel," says Broom,² 'provided such comment does not exceed the limits of fair and candid criticism, by attacking the character of the writer unconnected with his publication.

. . . . But if a person, under the pretense of criticising a literary work, defames the private character of the author, and, instead of writing in the spirit and for the purpose of fair and candid discussion, travels into collateral matter, and introduces facts not stated in the work, accompanied with injurious comments upon them, such person may become a libeler of the author, and liable to an action.³

out malice, securely say that Robinson's candles are short of weight; but not that Robinson makes his candles short of weight, for that would implicate him in a wicked business. The effect of both allegations may be the same so far as the sale of the candles goes, but not the same as to Robinson's character."

—Albany Law Journal, Feb. 28, 1874, art. "Defamation."

¹ Thompson v. Shackell, 1 Mo. & Malk. 187; and as to an architect, see Soane v. Knight, Id. 74. This question will be more fully discussed, *post*, in chapter on Newspapers, which see

² Leg. Max. 288.

³ The case of Reade v. Sweetzer (6 Abb. Pr. 9, note), carefully discusses the question of libel in literary criticism, and its value seems to justify its insertion here at length:

This was a trial at circuit.

The action was brought by Charles Reade, an Englishman, residing in London, as author of a novel, "Griffith Gaunt," to recover \$25,000 damages, for an alleged libel published in the "Round Table," a New York weekly paper.

The complaint, after stating the plaintiff's profession as an author, and averring his authorship of the novel, alleged that when, in pursuance of arrangements therefor with the author, the book "Griffith Gaunt" was in course of publication in the "Argosy," a London magazine, and in the "Atlantic Monthly," by Ticknor & Fields, of Boston, on the 9th day of

83. If one requests, dictates, or suggests defamatory matter to another, who publishes it, even though the latter alter the form or otherwise changes the June, 1866, "the said defendants falsely and with malice, composed, and published in said newspaper, at the city of New York, called the "Round Table," as aforesaid, of and concerning the plaintiff as an author; and of and concerning him in his said profession, business or employment, and thereby to injure him in his said business or employment, an article containing the false, libelous, and defamatory matter following." There was set forth the notice published in the "Round Table," of "Griffith Gaunt," which charged that it was "one of the worst stories that had been printed since Sterne, Fielding and Smollett defiled the literature of the already foul eighteenth century;" that the book "is not only tainted with this one foul spot, it is replete with impurity, it reeks with allusions that the most prurient scandal-monger would hesitate to make;" and the article recommended that the publishers discontinue it, as unfit for circulation in families.

For a second cause of action, the plaintiff alleged the publication, on the 28th of July, 1866, of another article of similar tenor; and for a third cause of action, alleged that the defendant published, on the 11th of August, 1866, an article, entitled "Did Charles Reade write Griffith Gaunt?" which article asserted doubts as to whether the plaintiff was the real author of the work.

The complaint concluded as follows: "And the plaintiff further shows, that by means of the aforesaid wrongful acts and doings of the said defendants, he has been and is greatly prejudiced in his credit and reputation as an author as aforesaid, and brought into public scandal, infamy and disgrace, and otherwise greatly wronged and injured, in and by the aforesaid wrongful and malicious acts and doings of the said defendants, to the damage of the said plaintiff in the sum of twenty-five thousand dollars. Wherefore," &c.

The answer admitted the plaintiff was an author, denied his authorship of the novel in question, denied that the defendants published or owned the "Round Table," but alleged ownership of it by an "association." It admitted the publication of the articles in the "Round Table," and also that the innuendoes in the complaint were true as to persons and publications. It then alleged, that the articles complained of were just and honest criticisms of the novel, and privileged as such. It then justified the publication of the articles on

same in the publication, it seems that the former will be guilty of a libel.

Thus, where the defendant told the reporter of a the ground that they were true. In mitigation of damages, it averred that the novel was identical in plot with two other novels previously published, and that parts of it were selections from other works. It closed with a general denial.

The cause was tried at the circuit, before Mr. Justice Clerke, and a jury.

Frederick Gallatin, Elbridge T. Gerry, and William D. Booth, for plaintiff.

H. F. Dimock, W. C. Whitney, and Robert Sewell, for the defendants.

Gallatin opened the case for the plaintiff, and the articles complained of were read in evidence.

George Vandenhoff, a professor of elocution, was then called by the plaintiff's counsel, and proceeded to read at length the novel, "Griffith Gaunt." After some portion of the book had been read :

Whitney, for the defendants, objected to the further reading, on the ground that the authorship of the book was not proven.

Gerry, for the plaintiff, insisted—I. The course pursued, is sanctioned by precedent (*Strauss v. Francis*, 4 Fost. & Fin. N. P. 939, 1107).

II. The book was properly read in evidence as part of the plaintiff's case, to prove malice in fact. Justification was pleaded, and in no other way could the jury judge of the truth or falsity of the articles, than by having the book before them.

III. The plaintiff would be shown to have been the author before his case was rested, and it was a mere question as to the order of proof.

IV. As to authorship, the two first articles complained of, and the innuendoes admitted by the answer to be correct, proved it.

Mr. Justice Clerke overruled the objection of non-proof of authorship, but excluded the further reading of the book, on the ground that the articles complained of were libelous on their face, and the book was proper only in rebuttal of the defense of justification.

The plaintiff then proved by two witnesses who had resided with the plaintiff at the time, and had seen him prepare the work for the press, that he was the author of the novel in question; that he was paid twenty dollars a printed page for it, by

newspaper a story defamatory of the plaintiff, saying that "it would make a good case for the newspaper," and afterwards gave the reporter a more detailed account. Messrs. Ticknor & Fields, and a still larger sum by certain English publishers; that it had passed through three editions, of 25,000 copies each, in America; that the plaintiff had been an author twenty years, and enjoyed a reputation, as such, equaled only by Charles Dickens.

Plaintiff further proved, by the printers of the "Round Table," that the articles complained of were received by them from the defendants, and inserted pursuant to their directions; that each of the numbers in question were printed and distributed three days before its date, and that over 3,700 copies of each was so printed and published.

Plaintiff then rested.

Dimock, for the defendants, then moved for a nonsuit on the following grounds:—I. The plaintiff, a foreigner, sues for injury to him as an author. Such a character has no recognized existence in our courts, even under the copyright law.

II. There is no sufficient proof that plaintiff is author of the novel reviewed.

III. The articles being written of the book, the plaintiff cannot recover without proof of special damage (*Foot v. Brown*, 8 Johns. 53; *Tobias v. Harland*, 4 Wend. 537; *Cooper v. Stone*, 24 Id. 442; *Swan v. Tappan*, 5 Cushing, 109).

IV. The articles were privileged as criticisms (*Carr v. Hood*, 1 Campb. 355, per Lord Ellenborough), and express malice must be proven to sustain this action (*Lewis v. Chapman*, 16 N. Y., 369). This is matter of law for the court (*Cook v. Wildes*, 5 El. & Bl., 340; *Somerville v. Hawkins*, 10 Com. B., 583; *Taylor v. Hawkins*, 16 Q. B. 308).

Mr. Justice Clerke.—In regard to the first objection made, that because Mr. Reade sued in a representative capacity, and as a citizen of a foreign state, he could not maintain this action, the point is untenable (*Pisani v. Lawson*, 6 Bing., N. C. 90; *Tuerlote v. Morrison*, Yelv., 198; *Bulst.* 134; *Dows v. Maloney*, 8 Abb. Pr. 329). Bonaparte sued a London printer, named Peltier, for serious charges made against him as a sovereign; and it was in that case that Mr. Mackintosh first came into prominence as an advocate. But here, Mr. Reade does not sue only as an author. In his complaint, he says he was greatly prejudiced in his credit and reputation as an author, and brought into public scandal, infamy, and disgrace. The disgrace must refer to him as a man (*Lewis v. Walter*, 4

count, for the express purpose of inserting it in the newspaper; whereupon the reporter, from the particulars thus furnished to him, drew up an account, which, *Dow. & Ry.* 813). The copyright law makes no distinction of that sort at all. That law is intended solely to protect American authors in their right to the productions. As to the articles themselves, I hold, as matter of law, that they are libelous on their face; and hence not privileged, within the rule, as to criticisms. I do not think the other points taken by counsel tenable, and therefore deny the motion.

Sewall then opened the case to the jury for the defendants. The testimony of the defendants, under stipulation, was then read to the jury in their absence, to the effect that the "Round Table" was owned and organized by a corporation, called the "Round Table Association." It was established and conducted as a literary and critical paper. The defendants were shareholders in the organization. They had never known the plaintiff personally; they had known him only through his works; they never had any communication with him. Understood from the proprietors of the "Sunday Mercury" that "Griffith Gaunt" was offered for sale to them. When the articles complained of were published in the "Round Table," they believed them to be correct. Ticknor & Fields sent copies of the "Atlantic Monthly," containing chapters of "Griffith Gaunt," to the "Round Table," with a request that the editors would pass their critical opinion upon the numbers.

Whitney, for the defense, then offered in evidence of the "Evening Post," of June 26, 1866, as showing that other similar articles had appeared in other papers.

Gerry, for the plaintiff, objected—I. This article appeared subsequent to the defendants' articles, and hence they could not have known of it when they wrote them (*Bush v. Prosser* 11 N. Y. [Kern.] 361).

II. At best, it is only proof that other libels were published by other parties (*Hager v. Tibbits*, 2 Abb. Pr. 97; *Lewis v. Walter*, 4 B. & Ad. 611; *De Crespigny v. Wellesly*, 5 Bing. 392; *Ward v. Weeks*, 7 Id. 211).

Mr. Justice Clerke excluded the evidence.

Whitney, for defense, then offered two novels, entitled "Queen of Hearts," and "Eighth Commandment," written by the plaintiff, to show that "Griffith Gaunt" was a plagiarism, and that the plaintiff admitted that he was a plagiarist.

Gerry objected, that there was no such defense, and that the evidence offered was not admissible, even in mitigation.

after some slight alterations, not effecting the sense, were made in it by the editor, was published in the newspaper, the court held that what the reporter pub-

Mr. Justice Clerke.—I cannot see that the evidence is relevant. Nothing is more common than for standard authors of known repute to borrow ideas from others, and dress them in their own language. Shakespeare himself copied into his plays other stories, and many of his plays are based on Cynthia's novels. But the evidence may aggravate the damages, and I will admit it.

Whitney then offered 18 Howell State Trials, 1181, to show that a speech therefrom was copied *verbatim* in "Griffith Gaunt."

Gerry objected, on the ground that part of the novel was published subsequent to the articles, and cited *Bush v. Prosser* (*supra*).

Mr. Justice Clerke sustained the objection.

Whitney then offered a letter of the plaintiff's, published by the defendants in the "Round Table" after the publication of the articles entitled the "Prurient Prude."

Gerry objected—I. That the publication of this letter was the act of the defendant.

II. That the whole paper should be put in evidence.

Mr. Justice Clerke admitted the whole paper.

Whitney then called Richard H. Stoddart, who testified that he had been an author and literary man for twenty years, and that it was a common custom for authors having a book to write to employ others to aid them in compiling it, and that such fact being known would not damage their reputation.

Whitney then called Richard Grant White, who testified to the same in substance, and also that he had read "Griffith Gaunt," introduced it in his own family, and that its literary merits were very high.

Gerry, on cross-examination, asked the witness what was the reputation of Mrs. Henry Wood as an authoress in the literary world.

Whitney objected.

Gerry insisted that the evidence was competent to show malice against the plaintiff, because one of the articles complained of attacked also the character of Mrs. Wood. He cited *Miller v. Rutler*, 6 Cush. 71; *Coddy v. Barlow*, 1 Moody & R. 275.

Mr. Justice Clerke allowed the question, and the witness replied he had never heard it assailed.

lished in consequence of what passed with the defendant, might be considered as published by the defendant.¹

Gerry then asked the following question: "Suppose an article should appear in a literary weekly paper having a circulation of over 3,700 copies per week, and that article should contain a charge against an author of the position in the literary world second only to that of Mr. Charles Dickens, with having published an article which was grossly impure, a book not merely tainted with one foul spot, but replete with impurity, reeking with allusions that the most prurient scandal-monger would hesitate to make—dealing throughout with vice so familiarly, so much as a matter of course, and with such an assumption of straightforwardness, as to divest it of all the repulsiveness it should wear; should state that he is an author of position and splendid talents, and then say these splendid talents only aggravate his offense, and render the story worse than the detailed proceedings of a *crim. con.* case by just the proportion in which his writings are more graphic and fascinating than newspaper reports; and state, in addition, that the publishers of the story have no right to introduce into thousands of virtuous families, and to children and girls whose parents accept it unquestioned on their indorsement, such reading; and should assert in addition, and finally, that such a book was only fit for the avowed organ of the '*demi-monde*;'—assuming an article of this description should appear in a weekly newspaper, of high authority in the literary world, what effect would it have on the character of an author so assailed?"

Counsel cited in support of his question, *People v. Lake*, 12 N. Y. (2 Kern.) 358.

Whitney objected, and the court excluded the question.

Whitney then proved by a publisher, that, after the libels, he had published an edition of "Griffith Gaunt," and sold sixty thousand copies, but neither he himself or any one had paid for it; also, that hardly any novel had ever sold so well.

After proving publication, in other papers, of the "Prurient Prude" letter, defense rested.

Gerry, in rebuttal, then offered to read in evidence an editorial article in the "Round Table" of October 15, 1866, being the same number of that paper in which was published.

¹ *Parkes v. Prevcoll*, L. Rep. 4 Ex. 169; 20 L. T. N. S. 537; 38 L. J. 105 Ex.; 17 W. R. 773.

And where the defendant asked the editor of a newspaper to "show up" the prosecutor and his brother, telling him a ludicrous story concerning them; the letter of Mr. Charles Reade, and which article was headed, "An English Bully." He proposed to read this, as showing the *animus* of the defendants, even after the libels had been published.

Sewell objected to the admission of this article, on the ground that anything tending to an aggravation of the original libel is not admissible, and cited *Root v. Loundes*, 6 Hill, 518, as showing that no other matter, which would itself sustain an action for libel, can be admitted, as then the plaintiff would recover twice for the same words.

Gerry cited *Rustell v. Macquister*, 1 Campb. 48, n.; *Tate v. Humphrey*, 2 Id. 73, n.; *Lee v. Hudson*, Peake N. P. 167; *Chubb v. Westley*, 1 Carr. & P. 436; and Code, § 93, to show that the statute of limitations had run, and the case relied upon by defendants' counsel did not apply.

Justice Clerke decided that the reading of the article in question might be admitted.

Both sides then rested.

Whitney summed up for the defense, and commented on the book "Griffith Gaunt," certain portions of which he read at length.

Booth, in summing up for the plaintiff, cited and referred to *People v. Crosswell*, 3 Johns. Cas. 393, as showing the distinction laid down by Chancellor Kent between the liberty and license of the press.

Gallatin, for plaintiff, requested the court to charge as follows:—I. Where, under guise of reviewing a book, a criticism attacks the author's character, it ceases to be privileged as such, and is actionable as a libel (*Cooper v. Stone*, 24 Wend. 434; *Fry v. Bennett*, 3 Bosw. 210; *Cooke on Defam.* 58; *Stuart v. Lovell*, 2 Starkie, 73; *Greene v. Chapman*, 4 Bing. N. C. 92; S. C., 3 Scott, 340; *Strouse v. Francis*, *supra*). The first two articles are within this rule.

II. Language of one in his trade or profession is actionable when it imputes to him fraud, misconduct, or want of integrity, in that profession or business; and the third article charges plaintiff with defrauding Ticknor & Fields (*Baboneau v. Farrell*, 15 C. B. 360; *Bryant v. Loxton*, 11 Moore, 344; *Davis v. Davis*, 1 Nott. & McC. 290; *Fowles v. Bowen*, 30 N. Y. 20).

III. The articles complained of, in substance, charge the

and the editor told the story to a reporter for the paper, and the story appeared in the paper, with comments added; the defendant, before the publication, having plaintiff with being author of an obscene book. This alone renders them libelous, and actionable as such (*Vielé v. Gray*, 18 How. Pr. 550; *Brooker v. Coffin*, 5 Johns. 188; *Rex v. Wilkes*, 4 Burr. 2527; *Rex v. Curl*, 2 Strange, 788).

IV. A printer of a newspaper is bound to abstain from publications, which he knows to be libelous, with more than ordinary care. It is no apology for him that he is not the author; for he who wantonly publishes a libel, is as guilty, in the eye of the law, as he who writes it. The injury is done by the publication (*Dexter v. Spear*, 4 Mass. 116, per Story, J.; *Burdett v. Cobbett*, 5 Duer, 201; *Sanford v. Bennett*, 24 N. Y. 20).

V. If the jury believe that the tendency of the publications complained of was injurious to the plaintiff, the law presumes that the defendants, by publishing it, intended to produce that injury which it was calculated to effect (*Haine v. Wilson*, 9 Barn. & Cress. 643). (1.) In their verdict, they are not limited to the actual damage he sustained, but may give further damages, suited to the aggravated character the act assumed (*Taylor v. Church*, 8 N. Y. [4 Seld.] 460). (2.) And the original wrong has been aggravated by their defense of justification, in which they have wholly failed (*Fero v. Ruscoe*, 4 N. Y. [4 Const.] 162; *Hunter v. Sharp*, 4 Fost. & Fin. 992, per Cockburn, Ch. J.).

Sewell, for defendants, requested the court to charge the propositions, *supra*, on motion for nonsuit, and further—

V. If the jury find from the evidence that the articles were justified by the character of the novel “*Griffith Gaunt*,” then, whether they were privileged or not, the plaintiff cannot recover.

VI. If the jury find for the plaintiff, they are not to award damages for supposable loss resulting to the plaintiff from the sale of the edition of the novel published after the libels, and for which he received no compensation.

Mr. Justice Clerke then charged as follows:

Gentlemen of the Jury:—Among the rights of perfect obligation, which alone the law undertakes to protect, that of reputation is one of the most prominent. Many men, unfortunately for the well-being of society, are totally regardless of principle, and are therefore totally regardless of reputation. But to every member of society who, differing from the

remarked on the delay, and, after the publication, expressed approbation of it, it was held that the jury (who had found the defendant guilty) might, on this beasts that perish, is guided by principle, reputation is necessarily very precious. He is very sensitive in relation to it, and it would be most unwise as well as most unjust, not to offer him ample and efficient means of vindicating it when it is unjustly assailed. Accordingly, the law allows an action for the recovery of damages as means of redress for injuries in cases of defamation. It allows for oral defamation an action technically called an action of slander. For written defamation, or defamation by printing or pictures, it allows an action technically called libel. Our law, like the Roman law, recognizes a very marked distinction between spoken defamation, and defamation communicated by writing, printing, pictures, or signs. Matter calculated to cast ridicule upon a man, or to degrade him in the opinion of his acquaintances, or of the community, is libelous, if written, or printed and published, although, if only spoken, it may not be actionable. For instance, to accuse a man orally of being a liar, even in the presence of hundreds, is not actionable *per se*; but to say of him, in an article published in a newspaper, that he is a liar, is actionable, and no proof of special damage is necessary. A general oral charge even of having sworn falsely, without reference to material evidence given by the plaintiff at the trial of a cause, is not actionable in itself, but it is actionable to print and publish concerning a man, "Our army swore terribly in Flanders," as said Uncle Toby; and if Toby were alive now, he might say the same thing of some modern swearers. The man is no doubt swearing to an old story. A libel, then, as applicable to individuals, may be defined to be a malicious publication, expressed either in printing or writing, or by effigy, tending either to injure the memory of one dead, or the reputation of one alive, and expose him to public hatred, contempt, or ridicule.

The plaintiff, in his allegations in the complaint, first states that he is the author of a certain work called "Griffith Gaunt," and that certain articles published by the defendants are libelous. As these have been spread before you, I will not now read them. Two of them were to the effect that this work was calculated to demoralize society, to debauch public morals, and to contaminate the purity of the youthful mind. The third article accuses—but whether it amounts to an accusation you are to determine—that he allowed an obscure per-

evidence, find that the defendant authorized the publication of the particular libel, notwithstanding the comments added, and although it appeared that the

son to assume his name, and to pass off the book here as his original production. The first two are essentially different from the third. The former accuse him of writing and disseminating works calculated to debauch and demoralize the public mind, and the latter accuses him of what the plaintiff's counsel contends is absolutely an accusation of fraud. Now, in regard to the allegation in the complaint that Mr. Charles Reade is the author of "*Griffith Gaunt*," you have had the evidence of two witnesses who lived in London.

for five or six months. They saw the manuscript, saw him actually engaged in the composition of the work, and saw him hand over his original manuscript to his amanuensis, and saw him receive it back again from his amanuensis, then send it to the printers, then receive the proof, correct it, and send it back to them. It is scarcely necessary for me to say that, in my opinion—though you are to judge—the proof is ample as to the authorship. With regard to the first two alleged libels, have the defendants transcended the limits of allowable criticism in these two articles?

In criticising the productions of an author, the law allows considerable latitude. The interests of literature and science require that the productions of authors shall be subject to fair criticism; that even some animadversion may be permitted, unless it appears that the critic, under the pretext of reviewing his book, takes an opportunity of attacking the character of the author, and of holding him up as an object of ridicule, hatred, or contempt. In other words, the critic may say what he pleases of the literary merits or demerits of the published production of an author; but with respect to his personal rights, relating to his reputation, the critic has no more privilege than any other person not assuming the business of criticism. For instance, he may say that the matter is crude, forced, and unnatural; that it betrays poverty of thought, and abounds with commonplaces and platitudes, being altogether flat, stale, and unprofitable; and that its style is affected, obscure, and involved. He may say, as Burke said of the style of Gibbon, that it is execrable; but he cannot say that the author himself is execrable, or that he is personally affected, or absurd, or wayward. The critic has the same liberty, under the same restrictions, in relation to all people who come before the public for praise or censure. He may

editor had heard the story before the defendant told it to him.¹

This rule has been carried so far as to extend to a say of the orator who uses excessive gestulation and vociferation—mistaking extravagant action and verbosity for eloquence—that he has all the contortions, without any of the inspiration, of the Sybil. He can say of the player that he mouths his speech, as many players do or that “he saws the air too much with his hand,” or that he “tears a passion to tatters, to very rags, to split the ears of the groundlings”; but he cannot abuse him as “a robustious, periwig-pated fellow,” and recommend that he should be “whipt for o’er-doing Termagant.” The critic can call a painting a daub and an abortion; but he cannot call the painter himself a low,

¹ *Rex v. Cooper*, 8 Q. B. 533; 15 L. J. 206, Q. B. “If,” said Lord Denman, Ch. J., “a man requests another, generally, to write a libel, he must be answerable for any libel written in pursuance of his request: he contributes to a misdemeanor, and is therefore responsible as a principal. He takes his chance of what is to be published. Here the defendant first desires the newspaper editor to ‘show up’ the prosecutor, and communicates to him the particulars of the story, which afterwards appear in the newspaper. Having given this general authority, he meets the editor, and says that the article has not appeared. That which did, in fact, form the foundation of the libel, and which the editor communicated to the reporter, was what the defendant communicated to the editor; and, after the publication, it was approved of by the defendant. It is observed that there were additions; but the editor said that what the defendant communicated was substantially what was published. If we held this not to be a publication by the defendant, we must go the length of exonerating a party who gives instructions for a libel, in every case where the libel published, departs from the instructions, by a single word. It is enough that there is a substantial identity. I have no doubt that a man who employs another generally to write a libel must take his chance of what appears, though something may be added which he did not state.” *Wightman, J.*, added: “It would be very dangerous to allow a man to direct a libel to be published on a particular subject, and, after he has approved of what is published, to defend himself on the ground that something has been added to his original communications.”

party presiding at a public meeting, who requests the reporters present to "take notice of" a speech, or other portion of the proceedings; and, if, following discreditable pretender, and an abortion. The most comprehensive freedom in animadverting upon the productions and actions of public men is essential to the very existence of civil and political liberty, and to the progress of civilization; and I heartily say with Lord Ellenborough, in *Tabart v. Tipper*, 1 Campb. 350—"Liberty of criticism must be allowed, or we should have neither purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication, therefore, I shall never consider a libel, which has, for its object, not to injure the reputation of any individual, but to correct misrepresentation of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality." But, gentlemen, although a critic may not have directly assailed the character of an author; or ridiculed his personal appearance, his manners, his voice; or exposed any eccentricities or defects of the man—may he not, nevertheless, defame and wound him in the most vital spot by imputing to him unworthy motives, and evil designs against the well-being of society, intimating that he infers these motives and designs from the sentiments expressed, and the characters delineated, in the work which he has undertaken to review? My own opinion, gentlemen, is, that many of the works of fiction which are published in this country are very pernicious in their effects upon public morality. Not that I think that fiction, in itself, is demoralizing—very far from it. The most instructive lessons in faith and morals have been conveyed through its instrumentality. The founder of Christianity himself did not disdain frequently to employ it. Indeed, it was his favorite method of moral and spiritual instruction. But in its very fascination consists its danger; and when we see the press teeming with productions of this kind, describing scenes and portraying characters calculated to corrupt the morals, and even weaken the mental stamina, of the multitude of novel readers who seem to be absorbed in this kind of reading, it will be prudent to allow considerable latitude of criticism in relation to these productions.

There is one virtue which women of honor have not only always observed, but have tenderly and ardently cherished, and, I may say, adored. They esteem it as a sacred jewel—its price far above rubies; and the woman who is without it is

such suggestion, the matter be reported either verbatim or summarily, if the matter be libelous, he will be held to respond therefor.¹

deemed lost to all virtue. The want of it disfigures her whole nature; and any community in which the want of it is prevalent, depend upon it, is on the rapid road to ruin. The tendency of many of the productions, to which I have referred, is to weaken the foundations upon which this virtue is based. They are almost as mischievous as the plays which abounded in the profligate reign of Charles II., when the foulest and most hideous corruption prevailed in the court and among the higher classes. I have often wondered that society escaped the destruction which that corruption was calculated to produce. I do not say that English novels are as mischievous in this respect as similar works of fiction published in France. For there, in such works, open adultery seems to be especially admired and honored. Unholy love, like unsanctified human reason, at a memorable period of its history, seems to be deified in that land. The writer who has contributed most toward this dreadful condition of things is a profligate woman, although she has shown some token of decency by assuming the name of a man. I make these observations, gentlemen, to show that, in dealing with this kind of literature, the critic

¹ *Parkes v. Prescott*, L. Rep. 4 Ex. 169; 20 L. T. N. S. 537; 38 L. J. 105 Ex.; 17 W. R. 773. In this action, which was brought against the chairman, and one E., a member of a board of guardians, for a libel published in a newspaper report of one of the meetings of the board, it appeared that a discussion having taken place at the meeting respecting the case of the plaintiff's daughter, then an inmate of the workhouse, and reporters of the local newspapers being present in the ordinary discharge of their duty, the defendant E. said "he hoped the local press would take notice of this very scandalous case," and requested the chairman to "give an outline of it," which was done accordingly. The chairman, in the course of his statement of the case, said: "I am glad gentlemen of the press are in the room, and I hope they will take notice of it;" to which E. added, "and so do I;" the chairman further expressing a hope that publicity would be given to the matter. The libel was contained in what was proved to be a correct but condensed summary of what took place at the meeting, published in a local newspaper, and containing matter defamatory of the plaintiff. The learned judge

Nor will it be a defense to an action for libel, that the libelous matter was received from another; even though it be accompanied with the name of the real author.¹

should not be prevented from inferring the motives and designs of the author from the inevitable effect of his writings. Of course, if he imputes motives and designs which he was not warranted in imputing by any opinion or sentiments expressed, or any character delineated in the work, or from its general tone, he is liable, and must take the consequences, and the author is entitled to redress. To charge an author with

(Martin, B.) who presided at the trial was of opinion that there was not sufficient evidence for the jury of the publication of the libel by the defendants, and directed a verdict to be entered for them. A bill of exceptions was tendered to this ruling; and the majority of the court of exchequer chamber (Keating, Montague Smith, and Hannen, JJ.) held

¹ *De Crespigny v. Wellesley*, 5 Bing. 392. "We do not hesitate to say," observed Best, Ch. J., delivering the judgment of the court of common pleas, in this case, "that even if we were to admit, what we beg not to be considered as admitting, that in oral slander, when a man, at the time of his speaking the words, names the person who told him what he relates, he may plead to an action brought against him that the person whom he names did tell him what he related—such a justification cannot be pleaded to an action for the republication of the libel. If the person receiving a libel may publish it at all, he may publish it in whatever manner he pleases; he may insert it in all the journals, and thus circulate the calumny through every region of the globe. The effect of this is very different from that of the repetition of the oral slander. In the latter case, what has been said is known only to a few persons, and if the statement be untrue, the imputation cast upon any one may be got rid of; the report is not heard of beyond the circle in which all the parties are known, and the veracity of the accuser and the previous character of the accused will be estimated. But if the report is to be spread over the world by means of the press, the malignant falsehood of the vilest of mankind, which would not receive the least credit where the author is known, would make an impression which it would require much time and trouble to erase, and which it might be difficult, if not impossible, ever completely to remove. . . .

We have already alluded to the old star-chamber doctrine that a libel could be published by sending a sealed letter; although that doctrine has long since such motives and designs is a most serious imputation, and if it is unwarranted the critic has committed a grievous wrong, which money is scarcely capable of repairing. Undoubtedly, the criticisms complained of make these imputations against the plaintiff. That can scarcely be denied. I repeat, that it is not necessary for me to read these articles. I have no doubt you understand them. The jury have the right to determine—for it is plain that the articles are *prima facie* libelous—whether “Griffith Gaunt” is obnoxious to such imputations; and if so, you have the right to infer

that the ruling was incorrect, Byles and Mellor, JJ., dissenting.

It was contended, on behalf of the defendants in this case, that the words used by them did not amount to a request to the reporters to publish the proceedings, but were merely the expression of a wish or hope that they would do so, nor to an authority to publish the particular reports in the words in which they in fact appeared; but the majority of the court of error were of opinion that the facts proved afforded evidence

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 a joke; whether it contains a charge made by a man of sound mind, or the delusion of a lunatic.

. . . . If, without any allegation that its contents were true, or that the publisher had any reason to believe them to be true, we were to hold that these pleas were a justification, we should establish a mode by which men might indulge themselves in ruining the characters of any persons they might be disposed to calumniate. There will be no difficulty in getting wretches, who would be better off within the walls of a prison than they are without, to furnish such as will pay for them with any statements they may desire respecting the character of any person whatsoever.” *Vid.* also *M’Gregor v. Thwaites*, 3 B. & C. 24; *M’Pherson v. Daniels*, 10 B. & C. 263; *Watkin v. Hall*, 9 B. & S. 279; L. Rep. 3 Q. B. 396; 37 L. J. 125, Q. B.; 18 L. T. N. S. 561; Shortt, p. 423.

fallen before the advance of civilization, it is by no means impossible at the present day to publish a libel by means of a letter.

the culpability of the plaintiff, and the truth of the justification. I do not mean to examine the pages of the book before you. I hope you have read the whole, or a large portion of it. The three chief characters in the work are Griffith Gaunt, Caroline Ryder, and Mrs. Gaunt—once the beautiful Catharine Peyton. Griffith Gaunt is not, to my mind, a very attractive character. He is a rough, north-country squire. He is not prepossessing in his manners, or elevated in his mind, and there is nothing whatever about him calculated to excite the admiration of the virtuous and refined; and I am very much astonished that so charming a person as Catharine Peyton should have fallen in love with him. He was guilty of bigamy. But is there anything in the work itself to set off this crime? to make it alluring? and to induce others to follow his example? That is a proper consideration. Is he so fascinating in character, or has he any other qualities—any heroic qualities, any great intellectual or moral qualities—to set off his guilt, and to recommend it to others for an example? Are the circumstances, which are represented to have caused and to have attended his conduct, calculated to entice the

fit at all events to be laid before the jury, of a request by the defendants to the reporters to publish an outline or summary of the proceedings, and to publish the report in such a way as to show the conduct of the plaintiff to have been disgraceful; the disclosure to the local public of what was called the plaintiff's disgraceful conduct being the avowed object of the request made by the defendants to the reporters.

“I agree with the learned counsel for the defendants,” said Montague Smith, J., in whose judgment Keating and Hannen, JJ., concurred, “that loose expressions of a mere wish or hope that proceedings should be published, would not be sufficient to fix liability on the defendants in cases like the present. I think the words must be of such a kind, and used in such a manner, as to satisfy the jury that they amounted to, and were, in fact, a request to publish. If the words do amount to such a request, and the publication be made in pursuance of it by the persons to whom it was addressed, then, it seems to me, the persons making such request would be responsible for the libelous matter so published. Whether the libelous matter published is in pursuance of, and in accordance with, the

So if a man write scandalous matter in a letter, knowing or designing that that letter shall fall into the hands of certain persons, he is publishing a libel reader into an approval, not to say imitation, of it? His guilt is not described as the result of inherent, deliberate wickedness; of depravity—gratuitous and utterly selfish. Believing that his wife was false; maddened at the thought that one whom he had loved intensely, whom he had supposed to be the paragon of purity and honor, was a hypocritical wanton—he fled from her, far away, determined never to see her again. In his new and humble home he became, immediately after his arrival, grievously and dangerously ill, and would have died but for the devoted attention of a modest and pleasing maiden; and, persuading himself that he was forever freed from his wife, he went through the form of a marriage with this girl some time after his recovery. She devoutly loved and admired him, and, of course, thought he was bound to no other woman. In his delusion about his wife's supposed guilt, in his resolution never to see her again, and in his resignation to his new attachment, which he imagined he could not avoid, he seems almost like a man in the inexorable grasp of the destinies. Not quite an *Œdipus* indeed, although the tumult of his mind and the horrors of his condition are described with a

request, or a departure from it, and so unauthorized, would be a question to be considered on the circumstances of the particular case. It is, of course, plain, that if a man gives a copy of his speech to another to publish, he is answerable as a publisher. It cannot be contended that he would not be equally answerable, if he desired a reporter to take down his speech as he delivered it, and to publish it. Then, can it make any difference in his liability that he requests the reporter, instead of publishing the whole speech, to make and publish an outline or summary of it? Surely, in reason and principle there can be none, where the request is acted on, and a correct outline or summary made and published. It was strongly urged, for the defendants, that they could not be liable, unless they authorized the libel in the very words in which it was published. If this argument is correct, then it must follow that a man could never be liable when he desired another to make and publish an outline or summary of a speech or writing; because such an outline or summary necessitates condensation, and consequent alteration of language. But the argument cannot, as it seems to me, be correct. The man who requests

to those persons. A sealed letter addressed to a wife containing a scandal on her husband, is a libel.¹ The delivery of a writing to another that he may read it,²

power scarcely inferior to that with which Sophocles, in his "Œdipus the king," "Œdipus at Colonus," and in his "Antigone," describes the unexampled miseries of a doomed family of victims. Still, Griffith Gaunt greatly erred; and unlike Œdipus, he was a conscious doer of disastrous deeds. Next we have Caroline Ryder. She is the very incarnation of sensuality; and she, like the man she fell in love with, had a ruddy face, a well-developed person, a well-developed chest, and, I think the author says, had fine teeth. But is there anything in her character which can give a gloss to her crimes, or make them worthy of imitation by the reader, whether young or old? Now, gentlemen, the mere delineation of a character in a novel, the mere setting forth of a certain kind of wickedness in a character, is not necessarily demoralizing. If that were the case, every man would be obliged to send away from his library real history. If fictitious history is not allowed to do what real history does, the novel would be entirely des-

another to make and publish an outline or summary of a speech, writing, or proceedings, must know that the words will be, to some extent, those of him who makes such summary or outline; and he must, therefore, be taken to constitute him an agent for the purpose, and be answerable for the result, subject always to the question whether the authority has been really followed. If this be not so, a man might become a libeler with impunity. Again, if the very words of the libel, and not its substance, are in these cases to be regarded, a man who gives the manuscript of a libel to an agent to print and publish, would not be answerable if, by accident or negligence, there were variations in some of the words, although not in the substance of the libel. . . . In the result, I come to the conclusion that, on principle, it is correct to hold that where a man makes a request to another to publish defamatory matter, of which, for the purpose, he gives him a statement, whether in full or in outline, and the agent publishes that matter, adhering to the sense and substance of it, although the language be, to some extent, his own, the man making the

¹ *Schenck v. Schenck*, 1 *Spencer*, 208; *Wenman v. Ash*, 3 *Com. B.* 836; *Mills v. Monday*, *Lev.* 112.

² *Wyatt v. Gore*, *Holt*, 289.

or that he may copy it,—since he must read it as he copies it,—is a publication of that writing as to him.¹

And where the libelous letter is written in one titute of interest. I repeat, that the mere delineation of a character is not necessarily demoralizing.

Look at all the histories of ancient and modern times, the history of Thucydides, the biographies of Plutarch, and modern histories and biographies; they all represent real men, who were cruel, earthly, sensual, and devilish.

In modern times, we have only to go to the last century to look at the character of Catharine, empress of Russia. She certainly was much more wicked than Caroline Ryder, for she had a lover almost every week, and when she got tired of him, she killed him. But are we not to read the history of Russia in the reign of Catharine? Still there may be something else objectionable in this work beside the delineation of character. I only wish to impress upon you that the mere delineation of a vile or vicious character, unless it is presented to the reader in some seductive shape, does not make the author criminal, or liable to the charge of demoralizing society. You are to consider, also, whether all the events which the author states in any part of his work happened to them, were calculated to

request is liable to an action as the publisher. If the law were otherwise, it would, in many cases, throw a shield over those who are the real authors of libels, and who seek to defame others under what would then be the safe shelter of intermediate agents."

Byles and Mellor, JJ., dissented from the judgment in this case. Byles, J., very much doubted "whether the expression of a hope that the press would take notice of the case, or give publicity to it, or that the chairman would give an outline of the proceedings, amounts to an authority to publish in a newspaper defamatory and unjustifiable matter spoken at a meeting." The learned judge pointed out that the libel must be proved as laid; and that though a variance is now amendable, none was in this case asked for or made, or could be made so as to cure the objection that the evidence did not show what particular facts or what particular defamatory expressions were or were not authorized by the defendant. His lordship also remarked on the great difference between the authority which will make a man liable criminally for the acts of his

¹ Keene v. Ruff, 1 Clarke (Iowa), 482.

place and opened in another, it is a publication of the libel in the place where the letter is opened.¹

One Gibbons wrote defamatory matter of one encourage similar conduct in others. As to the third article, gentlemen, accusing the plaintiff of allowing his name to be given to the productions of others, and that this was fraudulent, I do not intend to dwell upon that. It has been shown by several witnesses that it is a very common practice for an author to allow his name to be used, when the materials, perhaps, are furnished by others, but that he usually superintends the work, revises it, and perhaps adds to it. They say that this is a very common practice, and is not considered dishonorable. If you believe this third article amounted really to a charge of that kind, I do not know that there is anything libelous in it. It is for you to determine, however. If you believe it to be a dishonorable practice, you should find it to be libelous.

The next inquiry is as to the damages.

You have a right to consider whatever injury in mind the plaintiff has sustained by these charges, and you may go even

agents and that which will make him liable civilly; a principal not being civilly liable unless the agent duly pursues his authority, though liable criminally even where the agent has widely deviated from the authority. Mellor, J., said: "I think that in order to make a man responsible for a report printed and published by a third person, it ought to be shown that he had seen or heard or dictated the report himself, or approved of the libelous statements therein. . . . I think that in order to support the allegation that the defendants caused to be printed and published the libels set out in the declaration, there ought to have been evidence of a communication, either verbal or written, of the entire substance of the libel to the reporter, as the libel to be published; or that either before or after the publication thereof, the defendants sought to be charged saw and approved of the particular libel; and that, inasmuch as in the present case the expressions used only in-

¹ Rex v. Johnson, 7 East, 65; Rex v. Middleton, Str. 77; Keene v. Ruff, 1 Clarke (Iowa), 482; Rex v. Watson, 1 Camp. 215; Rex v. Girdwood, East's P. C. 1116, 1120; Case of the Seven Bishops, 4 State Trials, 304; Rex v. Burdett, 4 B. & A. 717; 2 Starkie on Slander, 39-43; Commonwealth v. Blanding, 3 Pick. 304.

Trumbull, and had fifty copies printed in pamphlet form in Massachusetts. Forty-five copies he retained, and five copies he sent to his wife in New Jersey, indorsing four of them with the names of certain persons, acquaintances of the wife, but without instructing his wife to dispose of them. The wife delivered two of the copies in New Jersey to the persons whose names were indorsed thereon, and the others she delivered in New Jersey to Trumbull, who exhibited them to various persons. On Trumbull suing Gibbons in New York for libel, it was held that there was a publication by defendant within the State; that the delivery of the manuscript to be printed was a publication, although a delivery to a wife in confidence would not be a publication; the wife acted as the agent of her husband, and her delivery of the pamphlets amounted to a publication by the defendant.¹

further; you may consider what he is entitled to as compensation for his wounded character, if it has been wounded; and you have a right to consider what injury hereafter he may suffer, for I hold that prospective damages are allowable in this action. They have been allowed in several instances, and I think it may be considered as settled that they may now be awarded, when they are incident and accessory to the action, and where no separate action can be maintained for them. The jury found a verdict for the plaintiff, and assessed the damages at six cents. And see the recent case of *Johnson v. The (London) Athenæum* (*Athenæum*, April 3, 1875), which will be examined *post*, in the chapter on Newspapers.

dicating a wish that gentlemen of the press present would notice the case, or call attention to it, or give publicity thereto, leaving the mode and manner to the absolute discretion of the reporters, I am of opinion that my brother Martin was justified in holding the evidence not to be sufficient to be submitted to the jury in support of the issue joined upon the pleadings" (Shortt).

¹ *Trumbull v. Gibbons*, 2 City Hall Recorder, 97

But throwing a sealed letter, addressed to the plaintiff or a third person, into the enclosure of another, who delivers it unopened to the plaintiff himself, is not a publication,¹ nor is sending to the person whom the writing concerns a sealed letter a publication; a letter always being understood to be sealed up, unless otherwise expressed.²

So sending letters to various persons, announcing to them that a certain person is a scoundrel or a cheat,³ or circulating postal cards upon which scandalous or scurrilous matter is written is libelous.⁴ Sending a defamatory letter sealed up is no publication of a libel.⁵ But if the sender read it to a third person before sending it, such reading constitutes a publication.⁶ But sending a libelous letter, unsealed, by a messenger, if the messenger do not read it, there is no publication.⁷ A libel might be, undoubtedly, published by telegraph; in which case the liability of the telegraph company as publishers might be analogous to the liability of a newspaper, whose agents receive, publish and give circulation to defamatory matter written by another for reward.⁸ The modern invention of the postal card is one by

¹ Fonville v. Nease, Dudley (S. C.), 303.

² Lyle v. Clason, 1 Cai. 581; Phillips v. Jansen, 2 Esp. 625; 1 W. Sand. 132 (note).

³ See Note 2, *post*, p. 202.

⁴ Chamberlain's Case, U. S. C. C., S. D. N. Y. 1874.

⁵ Lyle v. Clason, 1 Cai. 581.

⁶ Snyder v. Andrews, 6 Barb. 43; McCombs v. Tuttle, 5 Blackf. 431; Van Cleef v. Lawrence, 2 City Hall Recorder, 41.

⁷ Clutterbuck v. Chaffers, 1 Stark. R. 471; Say v. Bream, 2 Moo. & R. 54. Nor where a writing is sent to the plaintiff, and he, in the presence of a third person, repeats the contents of such writing to the writer, who admits having sent it, this is not a publication of the writing to the third party (Fonville v. Nease, Dudley (S. C.), 303).

⁸ No such case, however, appears to have been reported.

which a libel could be circulated with very small trouble and expense to the libeller, and to the great damage and injury of the person libeled. A postal card, carrying defamatory matter, will be regarded by the law as libel in a particularly aggravated form, and punished with great severity not only by indictment,¹ but, in a civil suit, probably, with exemplary damages.²

84. Libel may also be published by means of a theatrical representation, and courts will enjoin the performance of a dramatic production which is intended as a libelous caricature of a citizen, upon his bill.³ And these observations, it seems, will apply to an actor.⁴ Even a historian might possibly be construed to be a libeler.⁵

85. A libel may sometimes be conveyed by a mere carelessness and inaccuracy of detail in a published work. Thus, where the writer of a treatise on the "Law of Attorneys" referred in his book to the case of the plaintiff, as that of an attorney who had been

¹ People v. Chamberlin, U. S. Dist. Court, S. D. N. Y. *Vid. post*, vol. I., p. 510.

² Crane v. Walker, *post*, Id.

³ *Post*, vol. II., chapter on Dramatic Copyright.

⁴ Broom Leg. Max. 321.

⁵ The son of McLauren, the distinguished mathematician, felt aggrieved by Goldsmith's statement, in his History of Animated Nature, that the senior McLauren was subject to fits of yawning, so violent as to render him incapable of proceeding in his lectures; and, although the senior McLauren and Goldsmith were both dead, yet the son bullied the publisher into canceling the offensive leaf. Dr. Johnson did not approve this course, but said, "it is of much more consequence that truth should be told than that individuals should not be made uneasy," and declared that the "uneasiness which a man feels on having his ancestor calumniated," is "too nice" (Boswell's Life of Johnson, Pickering's ed. vol. 3, p. 12).

For a more extended discussion of this species of libel, see chapter on Newspapers, *post*, vol. II.

struck off the rolls, whereas he had only been suspended for two years, as appeared from the very report of the case cited by the writer, the court, after pointing out to the jury the important distinction between the two punishments, and that the misstatement was an unintentional mistake, left it to them to say whether it was a reasonably fair statement of the report, or whether it was a mistake arising from want of reasonable diligence and care.¹

A corporation is a person in law. It may have a reputation, which is part of its capital,² and therefore be the subject of a libel. Or it may entertain malice, and be itself a libeler of others. Though, as a corporation can only act by its agent, it cannot, of course, be guilty of slander, since that crime cannot be vicariously committed.³ In the case of a libel, as both authors and publishers are always liable,⁴ the corporation has no such escape.⁵ They can sue or pros-

¹ *Blake v. Stevens*, 11 L. T. N. S. 544; 4 F. & F. 239.

² *Abshire v. Cline*, 3 Ind. 115; *Long v. Brougher*, 5 Watts, 437; *Smith v. Wyman*, 4 Shep. 13; *Lewis v. Black*, 27 Miss. 425; *Snow v. Witcher*, 9 Ired. 346; *Ingham v. Lawson*, 5 Bing. N. C. 60 (this latter was a case of a libel on the plaintiff's ship); *Trenton Ins. Co. v. Perrine*, 3 Zabris. 402.

³ *Maloney v. Bartley*, 3 Camp. 210; *Hecker v. De Groot*, 15 How. Pr. 314. There can be no agency in a crime (*Lowenstein*, 54 Barb. 305; *Reg. v. Bull*, 7 L. T. 8).

⁴ *Rex v. Drake*, Holt, 425; *Rex v. Paine*, 5 Mod. 163; *Rex v. Bear*, Carth. 407; *Rex v. Williams*, 2 Camp. 646; *Dale v. Lyons*, 10 Johns. 461; *Cochran v. Butterfield*, 8 N. H. 115; *Dexter v. Spear*, 4 Mason, 115; *Watts v. Fraser*, 7 Car. & P. 369; *Frescoe v. Miay*, 2 F. & F. 23; *Miller v. Butler*, 6 Cush. 71.

⁵ *Phil. R. R. Co. v. Quigley*, 21 How. U. S. R. 202; *Aldrich v. Printing Press Co.*, 9 Minn. 133; *Lawless v. Anglo Egyptian Cotton Co.*, Law Rep. IV. Q. B. 262; *Maynard v. Fireman's Ins. Co.*, 34 Cal. 48; *Latimer v. West. Morn. News Co.*, 25 Law Times, N. S. 44. In New York by statute (Laws 1860, ch. 90). *Whitfield v. South-East. R. R. Co.*, 1 Ell. B. & E. 115;

ecute for a libel of themselves, upon proof of special damage, though not otherwise.¹ But a voluntary association, not chartered or organized under any general law, could not maintain an action,² and so no action would lie by the members of a voluntary organization known as "No. 12 Hose Company," against one who published, with other defamatory matter, that his hat had been "stolen by some of the members of No. 12 Hose Company."³

86. An exception arises just here in regard to what are called private publications. It is a well-known principle of the common law, that a communication made *bona fide* upon any subject-matter in which the party making it has an interest; or in reference to which he has, or honestly believes that he has, a duty, is privileged; if made to person or persons who have, or honestly believe they have, a corresponding interest or duty, is privileged accordingly; a bishop's charge to his clergy has been held privileged, although containing matter which would have been otherwise libelous;⁴ and injurious reflections on the

Alexander v. N. East. R. R. Co., 34 Law Jour. Rep. N. S. 152, Q. B.; 11 Jurist, N. S. 619. Exemplary damages against a corporation (Jefferson R. R. v. Rogers, 28 Ind. 1).

¹ Townshend on Slander & Libel, 263.

² Giraud v. Beach, 3 E. D. Smith, 337.

³ Id.

⁴ Laughlin v. Bishop of Sodor & Man., 4 L. R. P. C. 495. 9 Moore P. C. C. N. S. 318; 42 L. J. P. C. 11; 21 W. R. 214; 28 L. T. N. S. 377, *sed vid. aliter*; Gournley v. Plimsoll, 42 L. J. C. P. 121; 8 L. R. C. P. 362; 21 W. R. 683; Dawkins v. Lord Rokeby, 8 L. R. Q. B. 255; 42 L. J. Q. B. 63; 21 W. R. 544; 28 L. T. N. S. 134; Exch. Cham. Hart v. Gumpach, 4 L. R. P. C. 439; 42 L. J. P. C. 25; 21 W. R. 365; 9 Moore P. C. C. N. S. 241; Hunt v. Goodlake, 29 L. T. N. S. 472, C. P.; Odger v. Mortimer, 28 L. T. N. S. 472, C. P.

The late celebrated charge of Judge Routhier, however, holding that a Roman Catholic priest was not responsible for words spoken in the pulpit, was reversed by ———.

character and conduct of individuals, may be rendered justifiable and necessary by the occasion, or circumstances.

Thus, it becomes absolutely necessary to the due administration of justice, that judges, jurors, witnesses, and suitors should enjoy an absolute immunity for all words spoken or written, in the course of, or necessary to any judicial proceeding, and that members of legislative bodies should not be trammelled in their deliberations by the restraints to which, as private individuals, they might be subjected.

Such publications, whether made by spoken or by written words, are known to the law as privileged publications, and are of two kinds,—those absolutely privileged, and those qualifiedly privileged,—and it will make no difference with a publication so absolutely privileged, whether or not it be influenced by malice on the part of the speaker.

Publications are absolutely privileged when made by a privileged person. Publications are qualifiedly privileged, when made not by a privileged person, but upon a privileged occasion, which will excuse everything except actual malice. Thus a judge, whether he be judge of a superior or inferior court, or a coroner, is absolutely privileged.¹ An action will not lie for defamatory matter contained in pleadings,² or

¹ *Scott v. Stanfield*, L. Rep. 3 Ex. 220; 18 L. T. N. S. 572; *Floyd v. Barker*, Co. Rep., part 12, p. 24; *Rex v. Skinner*, Lofft, 55; *Miller v. Hope*, 2 Shaw, Sc. App. Cas. 125; *Jekyll v. Moore*, 2 B. & P. N. R. 341; *Revis v. Smith*, 18 C. B. 126; *Henderson v. Broomhead*, 4 H. & N. 569; *Fray v. Blackburn*, 3 B. & S. 576; *Thomas v. Churton*, 2 Id. 475; 31 L. J. 139, Q. B.; per Kent, Ch. J., in *Yates v. Lansing*, 5 Joh. 282; 9 Joh. 395. But see per Cockburn, Ch. J., 2 B. & S. 479; and per Lord Denman, Ch. J., *Kendillon v. Maltby*, 1 Car. & Mar. 409.

² 1 Roll. 33; *Dyer*, 285; 2 Burr. 808, 817; *Weston v. Dobi-*

affidavits,¹ or judgments;² and a want of jurisdiction in

net, Cro. Jac. 432; Ram v. Lamley, Hutt. 113; Astley v. Young, 2 Burr. 809, 817.

¹ Revis v. Smith, 18 C. B. 126; Astley v. Younge, 2 Burr. 817; Henderson v. Broomhead, 4 H. & N. 569; 28 L. J. 360, Ex.; Doyle v. O'Doherty, 1 C. & Mar. 418. See Maloney v. Bartley, 3 Camp. 210; and McGregor v. Thwaites, 3 B. & C. 24. But see, however, the case of King v. Townshend, 1 King's Bench, A. D. 1822, and reported in the Appendix to Townshend on Slander & Libel, p. 641. That was an action for a libel, contained in an affidavit voluntarily made by the defendant, before a magistrate, charging plaintiff with having given information to the commissioners of customs, that one Decima Barber, a milliner, was possessed of certain uncus-tomed goods, which were in fact seized, whereby the plaintiff, who carried on the business of a silk mercer, sustained special damage, by reason that the said Decima Barber wholly ceased to deal with the said plaintiff in consequence of such slander. Plea, not guilty, and issue joined.

Mrs. Decima Barber, to prove the special damage, deposed that previous to the publication of this libel she had dealt almost entirely with the plaintiff, for such articles of silk as she required in her business; but that since the publication, believing that the plaintiff had been the person who caused information to be given against her to the customs, she had ceased to deal with him to so large an extent as formerly, though she had not ceased to deal with him altogether.

Abbott, Ch. J.—I am of opinion that this action is maintainable. First, I think this affidavit is not a judicial proceeding, for it is the mere voluntary affidavit of the defendant; and if such an affidavit were to be considered as a judicial proceeding, and therefore privileged, it would afford a very easy recipe for a libeler to traduce the characters of the most innocent persons. Second, I think that to designate a man as an informer, in a publication like this, if done maliciously (which is for the jury), it is libelous in a very offensive degree, and may be the subject of an action. And, Third, I have no doubt that proof of Mrs. Decima Barber having ceased to deal with the plaintiff to any extent, in consequence of the publication of this libel, will be sufficient proof of special damage to sustain this declaration; and it is for the jury to say

² Jekyll v. Moore, 2 B. & P. N. R. 341; Home v. Bentinck, 2 Brod. & Bing. 130. See Oliver v. Bentinck, 3 Taunt. 456.

the court¹ or court martial,² will not abrogate the privilege. Communications made by officers and soldiers of the army, in the discharge of military or other duty, are absolutely privileged.³

In the case of publications qualifiedly privileged, "the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defense, depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or inquiry, and honestly made such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits."⁴ "The proper meaning of a privileged communication is only this: that the occasion on which the communication was made, rebuts the infer-

what damages they will give under the circumstances of the case.

A letter complaining that the affidavit of an attorney's clerk was untrue was held privileged (*Buckley v. Kiernan*, 1 Ir. L. R. N. S. 75).

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

² *Jekyll v. Moore*, 2 B. & P. N. R. 341; *Home v. Bentinck*, 2 Brod. & Bing. 130; *Oliver v. Bentinck*, 3 Taunt. 456.

³ *Dawkins v. Paulett*, 9 B. & S. 768; *L. Rep.* 5, Q. B. 94; 21 L. T. N. S. 584; 39 L. J. 53, Q. B.; *Dixon v. Earl of Wilton*, 1 F. & F. 419; *Keighley v. Bell*, 4 Id. 763.

The Scotch law on this subject is in general the same as the English. In case of an action of libel against a judge or witness there is a *presumptio juris et de jure* in favor of the defendant, the effect of which cannot be traversed by any contrary evidence. Proof of actual malice will, however, take away the privilege from a litigant party (*Borthwick's Law of Libel*, ch. 5, § 1, p. 217).

⁴ Per Parke, J., *Toogood v. Spyring*, 1 Cr. M. & R. 193. See also *Somerville v. Hawkins*, 10 C. B. 583; *Croft v. Stevens*, 7 H. & N. 570; *Whiteley v. Adams*, 15 C. B. N. S. 419; *Cowles v. Potts*, 34 L. J. 247, Q. B.

ence *primu facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact—that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made.”¹ “The rule is, that if the occasion be such as repels the presumption of malice, the communication is privileged, and the plaintiff must then, if he can, give evidence of malice: if he gives no such evidence, it is the office of the judge to say that there is no question for the jury, and to direct a nonsuit or a verdict for the defendant.”²

All occasions upon which a publication of defamatory or injurious matter is made by a person *bona fide* in the discharge of a public or private, legal or moral duty, or in the conduct of his own affairs in matters where his interest is concerned,³ are privi-

¹ Per Parke, B., *Wright v. Woodgate*, 2 Cr. M. & R. 577.

² Per Campbell, J., *Taylor v. Hawkins*, 16 Q. B. 321.

³ A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it contain criminatory matter, which, without this privilege, would be slanderous and actionable; and this, though the duty be not a legal one, but only a moral or social duty of imperfect obligation. And the court was of opinion, though it was not necessary to decide so expressly in that case, that the same privilege would be accorded to a communication made to a person who had not in fact such a corresponding interest or duty as referred to, but who might reasonably be, and is, supposed by the party making the communication to have such interest or duty (*Harrison v. Bush*, 5 El. & B. 344. *Vid.* also *Fairman v. Ives*, 5 Barn. & A. 642; *King v. Bayley*, cited by Bayley, J., 5 Id. 647; *Scarll v. Dixon*, 4 F. & F. 250).

The cases in which the law of Scotland accords this qualified privilege are those of counsel, litigants, masters giving characters of servants, literary criticisms, and communications to persons having an interest in the matters made known (*Shortt*, p. 429).

leged occasions, and the publication so made, is a privileged publication.¹ And so the communication of a church-member complaining of the character or conduct of the clergyman of his society, if not malicious,² or of an agent to his principal within the province of his agency,³ are privileged. And as to where, in an action for slanderous words, the defendant justified, on the ground that he was the pastor of the church of which the plaintiff was a member; that by the rules and regulations of the church the ruling elders composed the session of the church, and the pastor was the moderator thereof; and that, if the words were spoken, they were used in the course of church discipline, to the session, in the progress of the investigation of certain rumors against the chastity of the plaintiff, see a very recent case.⁴ A lawyer's letter to his client, or a client's to his lawyer, are privileged.⁵

So, too, are charges preferred by one member of a lodge of Odd-Fellows against another, within the rules of the order,⁶ or a banker's communication to a firm who had sent him a customer's note for collection.⁷

Where the New York College of Pharmacy appointed a committee to examine certain charges as to

¹ *Toogood v. Spyring*, 1 Cr. M. & R. 93.

² *O'Donohue v. McGovern*, 25 Wend. 26.

³ *Wasburne v. Cooke*, 3 Den. 110; *Gilbert v. People*, Id. 11.

⁴ *Kleizer v. Aymmes*, 40 Ind. 562. Held, that the paragraphs of the answer were good, and that the word "crimes," in the rules, was not confined to statutory crimes, but included a violation of the moral law or of duty as a member of the church. Written charges were not necessary to authorize the investigation. Pettit, Ch. J., dissented.

⁵ *Warner v. Payne*, 2 Sand. 195.

⁶ *Streety v. Wood*, 15 Barb. 105. But see, however, *Holmes v. Johnson*, 11 Ired. 55.

⁷ *Lewis v. Chapman*, 2 Smith, 369; reversing 19 Barb. 252.

the importation of spurious drugs, and—the committee having reported recommending that charges be forwarded to the secretary of the treasury against plaintiff, who was public inspector of drugs—the college sent such charges, it was held that such constituted a privileged communication.¹

But a letter addressed to a superior officer having a power of removal, charging his subordinate with fraud in office,² or a memorial to the post-master-general in relation to the business of his department, where the plaintiff can show want of probable cause,³ or the publication of proceedings on an *ex parte* application to a magistrate for a criminal warrant, will not be privileged. The published representations of a mercantile agent or agency, confidentially reporting the business character and standing of merchants and others, may be, however.⁴

The keeping of a mercantile agency, whose business it is to obtain information respecting the credit and responsibility of persons in business, and to furnish the same to subscribers, is a lawful business; and a communication made, in good faith, to a subscriber to such agency, is one privileged, and sanctioned by the usages of commercial communities.⁵ The privilege accorded to a mercantile agency, however, will not extend to the country correspondents of the agency,⁶ nor is a communication by the proprietor of a mercantile agency,

¹ Van Wyck v. Aspinwall, 3 Smith, 90.

² Howard v. Thompson, 21 Wend. 319.

³ Cook v. Hill, 3 Sand. 341.

⁴ 4 Seld. 452; Billings v. Russel, 8 Boston Law Rep. N. S. 699; Getting v. Foss, 3 Car. & P. 160; Ormsby v. Douglass, 37 N. Y. 477; Sherwood v. Gilbert, 2 Albany Law Journal, 323; Beardsley v. Tappan, 5 Blatchf. 497; but see Taylor v. Church, 1 E. D. Smith, 279.

⁵ Ormsby v. Douglass, 37 N. Y. 477.

⁶ Sherwood v. Gilbert, 2 Albany Law Journal, 323.

through his clerks, to his customers and their clerks, privileged.¹

The publication of a report of a coroner's inquest, by the coroner and a county physician, implicating the managers of the public poorhouse ;² or, generally, matters presented to any person or tribunal not having jurisdiction in the premises,³ are not privileged. But an abusive article in a newspaper, touching a candidate for an appointment for office, is not privileged, though such a remonstrance, addressed to the appointing power, would be.⁴

True, it has been held that when a man becomes a candidate for public honors, he makes profert of himself for public investigation. No one has the right, indeed, to impute to him infamous crimes or misdemeanors ; but talents and qualifications are mere matters of opinion, of which the electors are the only judges, and it has been held that imputing weakness of understanding to a candidate for Congress (for instance), was not actionable.⁵

And to a like effect said Parsons, Ch. J. :⁶ " When a man shall consent to be a candidate for a public office, conferred by the electors of the people, he must be considered as putting his character in issue, so far as may respect his fitness and qualifications for office." But the better opinion will be that, as in every other case, the existence of malice in the publication will be the criterion. " Officers and candidates for office may

¹ Beardsley v. Tappan, 5 Blatchf. 497.

² Greene v. Telfair, 20 Barb. 11.

³ Hoseman v. Loveland, 19 Barb. 111.

⁴ Hunt v. Bennett, 19 N. Y. 173 ; affirmed, 4 S. D. Smith, 647.

⁵ Mayrant v. Richardson, 1 Nolt. & McC. 327.

⁶ Commonwealth v. Clapp, 4 Mass. 163 ; but see Aldrich v. Press Print. Co., 9 Min. 133 ; Curtis v. Mussey, 6 Gray (Mass.), 261.

be canvassed, but not calumniated";¹ and some of the cases went further, and held that malice would be implied if the charge were false.² So in a recent case,³ where it was claimed to be justifiable for an elector, *bona fide* to communicate to the constituency, matter respecting a candidate which the elector believed to be true and material to the election, the principle was conceded by the court to be correct, but was held inapplicable, because the communication had not been confined to the constituency of the plaintiff, but had been published in a newspaper.⁴ Words which deter others from voting for him of whom they were spoken, at an election at which he is a candidate, are actionable.⁵

90. The presence or absence of actual malice is generally for the jury to determine.⁶ Whether or not the occasion is privileged, and so makes the publication privileged, is, nevertheless, a question of law for the court;⁷ so also the intention of malice⁸ is often a

¹ Lewis v. Few, 5 Johns. 1; Harwood v. Astley, 4 Bos. & Pul. 47; 1 N. R. 47; Seely v. Blair, Wright, 358, 683. See Brewer v. Weakley, 2 Overt. 99; Root v. King, 7 Cow. 613; affirmed, 4 Wend. 113, note; 1 Stark. Slan. 301.

² Lewis v. Few, 5 Johns. 1.

³ Law v. Scott, 5 Har. & J. 438.

⁴ And see Cowles v. Pott, 34 L. J. 247 Q. B; George v. Goddard, 2 F. & F. 689.

⁵ Brewer v. Weakley, 2 Overt. 99.

⁶ Liddle v. Hodges, 2 Bosw. 544; Dolloway v. Turrell, 26 Wend. 369; Cooke on Defamation, ch. iv.

⁷ Taylor v. Hawkins, 16 Q. B. 321; Cooke v. Wildes, 5 El. & Bl. 335; Dickson v. Earl of Wilton, 1 F. & F. 426; Hancock v. Case, 2 Id. 711; Whiteley v. Adams, 15 C. B. N. S. 392; 33 L. J., 89 C. P.

⁸ So strictly will the doctrine of malice be construed, that, it seems, though a member of congress is not responsible out of Congress for words spoken there, though libelous on individuals, yet, if he causes his speech to be published, he may be punished as for a libel, by action or indictment (1 Kent. Com.

conclusion of law.¹ But, while it is undoubtedly a question for the jury whether matter not *prima facie* libelous, is or is not so, according to the circumstances; the law will presume that one who publishes of another what is defamatory on its face, does so with that malicious intention which constitutes a libel.²

If one use the weapon of truth wantonly, though the occasion be a proper one, he may be guilty of libel; but where, for example, a person consents to become a candidate for a public office, conferred by a public election, he must be considered as putting his character in issue so far as regards the question of his fitness or unfitness for that particular office. For, that offices of public trust be well filled, is most certainly a matter of the greatest public interest, and the publication of truth concerning one's past character, made with the honest intention of informing the electors, will not be a libel. Where the communication is *prima facie* privileged, the burden is on the plaintiff to prove malice.³ But a privileged communication made with a knowledge of its falsity is actionable,⁴ and if a news-

p. 236, note; Cases of Lord Abingdon and of Creevy, 3 Eq. N. P. Cases, 228; 1 M. & S. 278).

¹ Fry v. Bennett, 1 Code R., N. S. 1243; 5 Sandf. 54; Root v. Lowndes, 6 Hill, 520; Washburn v. Cook, 3 Den. 162; Howard v. Sexton, 4 N. Y. 151; Littlejohn v. Greeley, 13 Abb. Pr. 55; and see Hargrave v. De Breton, 4 Burr. 2425; Bromage v. Prosser, 4 B. & C. 247; 6 Dowl. & R. 296.

² Commonwealth v. Odell, 3 Pittsb. (Pa.) 449. *Vid.* Wilson v. Fitch, which discriminates as to who is or is not a public officer; also, Thorn v. Blanchard, 5 Johns. 508; King v. Root, 4 Wend. 113; Vanderzee v. McGregor, 12 Id. 545; Fawcett v. Charles, 13 Id. 473; Howard v. Thompson, 21 Wend. 319; O'Donaghue v. McGovern, 23 Id. 26; Washburne v. Cooke, 3 Den. 110.

³ O'Donaghue v. McGovern, 23 Wend. 26.

⁴ King v. Root, 4 Wend. 113.

paper publish falsehood and calumny, such an excuse will not avail.¹

88. The publisher of a newspaper in which a libel appears, is *prima facie* presumed to have published the libel, and this presumption is not rebutted by evidence that he never saw the libelous matter, and was not aware of its publication until it was pointed out to him in print, and that an apology and retraction were afterwards inserted in an issue of the same newspaper.² Nor that the article in question was copied from another newspaper merely as an article of news, and in the form of an extract.³ But the publisher will be allowed the fullest opportunity to rebut all presumption of malice if he can⁴—and he may plead matters in mitigation as a partial defense.⁵

¹ Commonwealth v. Odell, 3 Pitt. & C. 449.

² Id.

³ McDonald v. Woodruff, 2 Dill, 244.

⁴ Wilson v. Fitch, 41 Cal. 363.

⁵ Bennett v. Matthews, 67 Barb. 410.

It was held by the house of lords, on appeal from the Scotch court of session, that the publication, in a book called "The Scottish Mercantile Society's Record" (known amongst the trading community as the "Black List"), of a copy of the register of protests for non-acceptance and non-payment of bills of exchange and promissory notes, established by the Scotch acts of 1681 and 1696, and the 12 Geo. 3, c. 72, and 23 Geo. 3, c. 18, was not libelous, the contents of the register being public property, and the publication of them authorized; and the result of the various acts of parliament being to give the registration the effect of a decree or judgment of the court of session, "It is equivalent," said the lord chancellor, "to what in this country we call a judgment upon a warrant of attorney. In neither case does the court interfere, but in both, as in cases of judgment by default and decret in absence, the party having a right to the authority of the court to confirm his claim, obtains the judgment as of course. Whether that judgment is obtained by authority of parliament, or by the consent of parties, or by the practice of the court, appears to me to be immaterial. It is for all purposes a judgment of the

89. The following have been held communications privileged by the occasion of their publication: a letter written by a person to his mother-in-law,¹ giving her advice on the subject of her proposed marriage, and containing imputations upon the person whom she was about to marry;² a letter written by a tenant who had been asked by his landlord to tell him if he saw

court until altered or reversed, and entitled to all the attributes of any judgment after the longest and most contested litigations. . . . Is it, then, unlawful to state or publish the decret or judgment of courts of justice? If their proceedings are public, so must be the result of such proceedings—namely, the judgment. For, although the steps preliminary to the judgment are not transacted in open court (the whole being incontestible in that stage), yet the whole is supposed to be the result of regular proceedings in court.

If, however, the publisher of such a “Black List” inserts in it, as a still existing liability, a judgment which has been satisfied by payment, he is, according to a decision of the Irish court of queen’s bench (*McNally v. Oldham*, 8 L. T. N. S. 604), liable to an action of libel, and, if special damage has been caused by the publication, also to an action for a false representation.

“He would have been justified,” said Lefroy, Ch. J., “if he had published the judgment as it stood in reality, as a judgment annuled and satisfied; but if, instead of that—if instead of availing himself of a legal right, which none of us mean to question, the right of publishing a judgment, a true copy of a judgment, so long as the party does not add a sting to it—if he adds the sting that it is an unsatisfied judgment, this becomes an exercise of a legal right with an addition which makes that injurious to the plaintiff, in a way that it would not have been, if he represented the truth of the transaction. . . . The case in Scotland was very different from the present one. The party there acted under an act of parliament, and what he did, he did *bona fide* and according to the truth of the transaction. The very contrary has been the case here” (*Fleming v. Newton*, 1 H. L. Cas. 363).

¹ It is not libelous, however, to accuse a man of having brought suit against his mother-in-law, especially if such is the fact (*Cox v. Cooper*, 9 L. T. N. S. 329).

² *Todd v. Hawkins*, 2 M. & Rob. 20; 8 C. & P. 88.

or heard anything respecting game, informing the landlord that his gamekeeper sold game;¹ information given to a party asking for it, as to the respectability of a tradesman with whom that party is about to deal;² a letter written confidentially to persons employing a particular solicitor, containing charges as to his professional conduct in the management of certain matters intrusted to him by the writer, and in which the writer was interested;³ a letter written *bona fide* and confidentially to the employer of a steward, informing him of certain supposed malpractices on the part of the steward;⁴ a character given by a master or mistress of a servant,⁵ or a retraction of a character formerly given;⁶ a letter written by a subscriber to a charitable institution, to the committee, reflecting on the conduct of the secretary;⁷ a communication made by one director of a company to his co-directors, respecting the conduct of one of its officers;⁸ a communication addressed by a rate-payer to a parish meeting, reflecting on the parish constable;⁹ a letter addressed to a bishop, informing him of a report affect-

¹ Cockayne v. Hodgkisson, 5 C. & P. 543.

² Storey v. Challands, 8 C. & P. 234. See Bennett v. Deacon, 2 C. B. 628; King v. Watts, 8 C. & P. 614.

³ M'Dougall v. Claridge, 1 Camp. 267. See also Dunman v. Bigg, 3 Camp. 260.

⁴ Cleaver v. Senande, referred to by Lord Ellenborough, 1 Camp. 267.

⁵ Burr. 2425; Edmondson v. Stevenson, Bull. N. P. 8; Child v. Affleck, 9 B. & C. 403; Pattison v. Jones, 8 B. & C. 578; Fountain v. Boodle, 3 Q. B. 11; Dixon v. Parsons, 1 F. & F. 24.

⁶ Gardner v. Slade, 13 Q. B. 796; 18 L. J. 334 Q. B.

⁷ Maitland v. Bramwell, 2 F. & F. 623. See Hartwell v. Vesey, 3 L. T. N. S. 275.

⁸ Harris v. Thompson, 13 C. B. 333. See Brooks v. Blanshard, 1 Cr. & M. 779; 3 Tyrw. 844.

⁹ Spencer v. Amerton, 1 M. & Rob. 470. See George v. Goddard, 2 F. & F. 689.

ing the character of an incumbent in his diocese; *bona fide* applications to the proper authorities for redress for wrongs suffered;² letters written by the defendant in answer to a letter from a friend of the plaintiff who had been in correspondence with the defendant on the subject of certain charges against the plaintiff, with the sanction and concurrence of the latter;³ a memorial from an elector and inhabitant of a borough, complaining of misconduct on the part of a magistrate of the county in which the borough was situated, although not addressed to the proper authority.⁴ It is important to note here, however, that in cases where the occasion would render privileged a communication otherwise defamatory, the privilege may be lost by the use of language so exaggerated as to be clearly in excess of the occasion. But a letter written to the secretary of state by an inhabitant of a borough, imputing to a person holding the offices of town-clerk and clerk to the justices of the borough, corruption in the latter office;⁵ or a letter written to Lloyd's, by an officer in the navy, imputing to a captain of a transport-ship misconduct and incapacity in the management of it;⁶ or a letter written by an opposing creditor to a judge of the bankruptcy court, previous to the hearing of an insolvent's case;⁷ or a letter written to a newspaper by members of a town council, charging contractors intrusted with the erec-

¹ James v. Boston, 2 C. & Kir. 4.

² Johnson v. Evans, 3 Esp. 32; Woodward v. Lander, 6 C. & P. 548.

³ Hopwood v. Thorn, 8 C. B. 293; 19 L. J. 94 C. P.

⁴ Harrison v. Bush, 5 E. & B. 344; 25 L. J. 28 Q. B.

⁵ Blagg v. Sturt, 10 Q. B. 899; 16 L. J. 39 Q. B.

⁶ Harwood v. Green, 3 C. & P. 141.

⁷ Gould v. Hulme, 3 C. & P. 625. See chapter on Contempt of Court.

tion of a jail with misconduct in the performance of their contract;¹ or an advertisement in a newspaper, addressed to the creditors of B. & Co., who had been declared bankrupts, and containing imputations on B. of fraudulent conduct, published by the solicitor who had acted under the commission of bankruptcy;² or the publication in a newspaper, by a voter at an election, of statements reflecting on the character of one of the candidates: will not be considered as privileged. "However large the privilege of electors may be," said Lord Denman, Ch. J., in that case,³ "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."

A pamphlet which has *bona fide* for its object the vindication of the character of the writer against charges made by others, is undoubtedly privileged. Thus, where the plaintiff, a policy-holder in an insurance company, published a pamphlet accusing the directors of fraud, the court held privileged, if the jury should be of opinion that it was published without malice,⁴ a pamphlet published in reply by the directors, declaring the charges contained in the plaintiff's pamphlet to be false and calumnious, and also asserting that in a suit he had instituted he had sworn, in support of those charges, in opposition to his own handwriting, was held of privilege, his Lordship thus directed the jury: "The law is that a publication is privileged either by the duty or the fair and honest interest of the party who has made it. And I am of opinion that the answer here was privileged,

¹ Simpson v. Downs, 16 L. T. N. S. 391. But *vid.* Harle v. Catherall, 14 L. T. N. S. 801.

² Brown v. Croome, 2 Stark. N. P. 297.

³ Duncombe v. Daniels, 8 C. & P. 222.

⁴ Koenig v. Ritchie, 3 F. & F. 413.

and that the publication was privileged. If you are of opinion that it was *bona fide* for the purpose of the defense 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.”¹

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

¹ Ib. *Vid.* also Rex v. Veley, 4 F. & F. 1117.

bigamy to the plaintiff.¹ The soundness of this law however, was doubted by Lord Denman, Ch. J., in a subsequent case.² "I have great doubt," said that learned judge, "whether the interest which the wife had in the inquiry could justify the offering a reward in a newspaper."

Another class of publications which would appear to be privileged from considerations of public interest, if not of public policy, are newspaper comments on matters of daily occurrence—the news of the day, proceedings of legislative or other deliberative bodies, judicial proceedings in the courts, etc. These will be considered further on in the chapter on newspapers.

The law of libel, it should be remarked, is in no sense in conflict with a liberty which, with us, is especially dear to the citizen, and especially guarded and secured by our constitution—the liberty of the press—"The law of libel is no more unfavorable to the press than the statute against larceny is unfriendly to the people. One perplexes thieves, the other liars, but neither is a terror to honest men, and nothing therein can militate against the principle laid down in what Judge Kent calls the 'comprehensive and accurate definition' of Alexander Hamilton: 'the liberty of the press consists in the right to publish, with impunity, truth, with good motives, and for justifiable ends, whether it respects government, magistracy, or individuals.'"

The question as to how far a newspaper may comment upon matters of public interest, which involve more or less the reputation and the rights of individuals, will be examined in the chapter on news-

¹ *Delaney v. Jones*, 4 Esp. 191. And see *Fendin v. Westlake*, 1 Mo. & Malk. 461.

² *Lay v. Lawson*, 4 A. & E. 795.

papers, except as to the question of comments upon judicial proceedings, which will be found treated of in the chapter upon contempts of court.

A defendant will not be allowed, for purposes of mitigating damages, or of justifying a libel, to inquire into a plaintiff's religious opinions, even where the libel concerns his religious creed.¹ Nor will he be allowed to read, in his address to the jury, specific books and documents, as proofs of what the doctrines of the plaintiff's co-religionists are. These are matters of fact and must be proved by witnesses.²

The conduct of the plaintiff in provoking the libel, is a fit subject for the jury to take into account, in estimating the amount of compensation for his injured feelings.³

And evidence may be given of libels on the defendant, published by the plaintiff, respecting the same subject-matter. Said Mansfield, Ch. J., "If a man is in the habit of libeling others, he complains with a very bad grace of being libeled himself; and he cannot be supposed to suffer much injury from this source."⁴ But before such publications are read, it must be shown that they are connected with the libels proceeding from the defendant: for it is not a proper ground for mitigating damages that, on other occasions, the plaintiff has written libels on the defendant, on some other matter unconnected with that which is the subject of the action;⁵ and it must be proved that

¹ *Darbey v. Ouseley*, 1 H. & N. 1. But see *Turnbull v. Bird*, 2 F. & F. 508.

² *Id.*

³ *Kelly v. Sherlock*, 2 R. 1 Q. B. 686; 35 L. J. 209, Q. B. And see note 1, p. 222.

⁴ *Finnerty v. Tipper*, 2 Camp. 72.

⁵ *May v. Brown*, 3 B. & C. 113; *Tarpley v. Blabey*, 2 Bing. N. C. 437; *Wakeley v. Johnson*, 1 Ry. & Moo. 422.

they came to the defendant's knowledge before he libelled the plaintiff.¹

¹ *Watts v. Frazer*, 7 Ad. & E. 223. So, too, the provocation for the libel will be considered at the trial. Thus, where the action was for imputing unchastity to the plaintiff's wife, the defendant was allowed to prove that the wife had lived alone with an unmarried man in the same house. *Reynolds v. Tucker*, 6 Ohio, N. S. 516; and see *Bradley v. Heath*, 6 Pick. 163; *Shoulty v. Miller*, 1 Carter (Ind.) 544; *Knight v. Foster*, 39 N. H. 876; *Regnier v. Cobot*, 2 Gilman 34; *Henson v. Veatch*, 1 Blackf. 369. It was remarked on page 201, that undoubtedly a libel could be published by telegraph. While these pages are going through the press, such a case (*Jaffras v. McKellop. &c. Co.*, 4 T. & C. (N. Y.) 578) has been reported, though it does not appear that the telegraph company was pursued as a publisher.

In England, 1 of 6 and 7 Vict., c. 96, enacts that "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" (*Shortt L. L.* 568). Upon the action, by virtue of "Fox's Libel Act" (32 Geo. 3, c. 60), the judge before whom a case of libel is tried, may give his opinion as to whether the publication is libelous (*Id.* 595).

CHAPTER III.

OF CONTEMPT OF COURT.

90. The original source of judicature is the people. And courts are the distributors of the justice of the people. In England, by theory of law, the king, and with us, the state, hears all disputes between man and man. "But as it would be impracticable to render complete justice to every individual by the people sitting collectively to hear each other's disputes, they have committed that power to certain select magistrates, who, with more ease and expedition can hear and determine complaints,"¹ whence it is that courts are appointed to be the tribunals wherein all disagreements shall be heard and determined.

But in order to do justice, these courts must be omnipotent. In order to protect the suppliant, they must themselves be protected.² If a court of justice was merely a bench, upon which a judiciary, elected or appointed, sat to arbitrate concerning the quarrels of its neighbors, to say that its doings and proceedings should be sacred against criticism, and beyond arraignment by the people, might savor of arrogance, and oligarchism, and smack of that oppression of the many by the few, which it is the boast of our constitution, cannot thrive beneath the shadow of her ægis.

But under the above definition of a court, as a

¹ Bl. Com. 267.

forum where the majesty of the state sits forever and supreme, the whole doctrine is plain and rational,¹ and consonant to the spirit of our laws. The great power—the great physical power of the state—sits in her courts. And all her engines of execution, from the constable and the *posse comitatus*, to her soldiers and her army, are at their beck to enforce obedience to their last decree. But for all this, the mightiest power which centers in courts, is a moral one. A court, to be useful, must secure and maintain the confidence and respect of society, and without that, the puissance of the commonwealth is vain.

91. It is for this reason that to the author and the man of letters these courts must look for their greatest support and co-operation. The vast power of the writer, whether his vehicle of publication be through the library, the bookseller, the press, the rostrum or the stage ; can readily become the greatest and chiefest auxiliary of equity, justice, and good order ; or, with equal ease, a mighty power for their destruction. Law is the arm of justice, and is the means by which justice—the end—is to be reached. Courts are the administrators of this means, and to the learned and wise and far-seeing, the law looks with confidence, that, all the more because of their wisdom and foresight, will they be solicitous to utter nothing that shall go to undermine her sway or paralyze her arm—nay more, to those who guide and mold opinion and society with their pens, she looks not only that they refrain from lessening her authority, but for positive and substantial aid, countenance, and support. And when the author reflects that it is to this

¹ The authority to punish for contempt is granted as a necessary incident in establishing a tribunal (U. S. v. New York, 1 W. & M. 401).

law that he owes the power of following and controlling his own thoughts and clustered words, when—once uttered—they pass beyond his reach, it would seem that to him, at least, she should not look in vain.

92. There are two sorts of contempts of a court. The first arises when words are spoken derogatory of its justice, its impartiality, or its organization; the second, when its directions or decrees are disobeyed or slighted.

It is this first sort which may arise in the form of a literary composition, and with which we have to deal in this chapter. For, it is to be remarked, that the criticism of the decree of a court is not a contempt of that decree; since, once made, it is beyond the power of cavil and cannot be disarmed by clamor; the theory of literary contempts being, that they interrupt the facility of the court in arriving at, and not in enforcing, its judgments.

It is, therefore, the rule, founded in the reason of the common law, that all contempts to the personality, or organization of a court: to its judges, juries, officers, or ministers, when acting in the due discharge of their respective duties, whether such contempts be by direct obstruction, or consequentially: that is to say, whether they be by act or writing, are punishable by the court itself, and may be abated *instanter* as nuisances to public justice, and subject the party so offending to fine and imprisonment.¹ And it belongs exclusively to the court offended to judge of what are contempts—and of their punishment.²

¹ Holt L. L. 138;
37 N. H. 950.

v.

² No other judge or court can or ought to undertake, in a collateral way, to question or review an adjudication of a contempt made by another collateral jurisdiction, though a superior court may undoubtedly review them, except perhaps in a

93. The law of contempt might at first appear to be contrary to the spirit of the common law. Personal liberty, by the law of England, was considered a strictly natural right, not to be abridged but in the exercise of the greatest possible caution, nor at the mere discretion of a magistrate.¹ This case, however, appears to be without that provision, since it seems that, in a proceeding for contempt, the party accused is not entitled to a trial by jury.²

Says Dr. Dwight,³ "The power to punish for contempts is undefined, and its exercise depends on the discretion of the court or judge. It is lodged in the hands of one who may suppose himself to have been insulted, or, in other words, with the person aggrieved. It is exercised without the ordinary checks or safeguards attending criminal trials. The proceeding is inquisitorial, and the accused is compelled to answer against himself. The decision of the committing judge is without appeal. The only supervision that an appellate court can exercise, is to see that the forms of the law have been observed; as, for instance, that the person charged with contempt has had a hearing, and that the offense is stated in the order of commitment. Whether the acts were, in fact, a contempt of court, is finally decided by the court or judge before whom, in the first instance, the case is presented, and the punishment may be by fine and

matter arising on *habeas corpus*. *Vid.* 3 Wils. 188; 14 East. 1; 2 Bay. So. C. 182; 1 Ill. 266; J. J. Marsh. (Ky.) 575; 1 Black^c. (Ind.) 166; 2 U. P. Charlt. (Ga.) 136; 14 Ark. 538, 544; 2 Ind. 161; 6 Johns. (N. Y.) 337; 9 Id. 395; 6 Wheat. 204; 7 Id. 38.

¹ Mag. Chart. c. 29.

² Neel v. State, 4 Eng. 259.

³ Paper prepared in the case of the Code Amendments, 1871.

imprisonment, or both." But the earlier and modern authorities hold the power to exist by the reason of the common law, and as vital to the very existence of courts.

94. The power to imprison for contempt of court is traced by Blackstone to Magna Charta itself.

The Magna Charta bears date June 15th, 1215, which was the seventeenth year of the reign of King John. The first enactment upon the subject of contempt was the statute of Westminster,¹ or seventy years afterward; the statute, however, having reference only to contempts in resisting the process of the King's courts, or, as Blackstone entitles them, to consequential contempts alone.² From this statute one writer³ derives the present doctrine of contempts, consequential or otherwise.

95. The power of courts to imprison for contempt is declared both by our own and by English writers. It has been repeatedly asserted in the English courts (and those decisions followed in the courts of this country), as of immemorial usage and practice, since the law itself was known. It is claimed to be a vitally essential attribute and consequence of the administration of the law itself, without which it dies; since it is, thereupon, impotent to command respect or obedience to its own decrees.⁴ It is held to have arisen from the very nature and necessity of things,

¹ 4 Com. 237.

² "If, then, the power to punish this class of consequential contempts constituted a part of 'the law of the land' so long anterior to the date of Magna Charta as to have become, at that early day, a very maxim of law, where was the necessity for legislation upon the subject?" (per Thacher v. *Ex parte* Hickey, 12 Miss. 751).

³ Gilb. Hist. C. P. C. 3.

⁴ *Ex parte* Hickey, 12 Ark. 751.

coeval with the period when the administration of the law, by means of courts and legal tribunals, was established. It is in this point of view that it is insisted by Blackstone¹ to have been confirmed by the statute of Magna Charta, when it enacted that "no freeman shall be imprisoned and condemned but by the judgment of his peers or by the law of the land."

"In this country," said Dade, J.,² "we know no privileges but such as exist for the public good. Many such privileges we have—from those which appertain to the legislature itself, even down to such as belong to the lowest executive officer. Those which surround the administration of justice are of the same order. Courts, their officers and process, are shielded from invasion and insult—not from any imaginary sanctity in the institutions themselves, or the persons of those who compose them, but solely for the purpose of giving them due weight and authority, and to enable those who administer them to discharge their functions with impartiality, fidelity, and effect. This is the true test of every privilege not granted by statute, and is the spirit of every one (not merely private) which is so secured. The political character of the judiciary, and the tendency of the duties which are devolved upon it, render it necessary to invest it with a considerable share of these privileges. It is confessedly the weakest branch of all governments, wielding neither wealth, force, nor patronage. Its duties consist in adjusting and settling the contested rights of individuals; in controlling their turbulence, and punishing their crimes. These duties are often of a severe and rigorous character, and as they are generally

¹ 4 Com. 237; *Commonwealth v. Dandridge*, Virginia Cas. 409.

² *Commonwealth v. Dandridge*, Virginia Cas. 409.

to be discharged in almost immediate contact with those on whom they act, their exercise will frequently elicit the angry passions, or excite unworthy and sinister attempts to bias or avert their operation; and where there is little real power, and no patronage, a certain degree of external dignity may have been considered necessary to supersede a too frequent resort to the actual powers of the courts."

Said Scott, J.:¹ "The doctrine of contempts, and of attachments for contempts, as it existed at common law, and has been recognized by some of the ablest American jurists, extends not only to acts which directly and openly insult or resist the power of the court or the persons of the judges, but to consequential, indirect, and constructive contempts, which obstruct the process, degrade the authority, or contaminate the purity of the court; and every case of authority seen in the books will be found to proceed upon the idea, either remote or proximate, of disrespect to the court or the judges, in reference to their official character or conduct, or of matter in derogation of the dignity of the court, or are referable to that power of self-protection, which, we have remarked, is necessarily inherent in judicial institutions.

"Although these doctrines of the common law had their origin in an idea totally unrecognized and without place in this country, and preserved, even in England, only by a fiction of law, still, in our own free government, it has always been admitted that, to a greater or less degree, they must have place, and they have rested, with us, on an idea not totally dissimilar to that original one. Anciently, in England, it is known that the king, in person, presided in his courts of justice, and sat, himself, in judgment; and the

¹ *Neel v. State*, 9 Eng. (Ark.) 259.

insult, resistance, or contamination, was to majesty itself, that held sway in divine right. In our day we refer it to the majesty of the law."

96. It has never been contended in this country that the common law, although it is our birthright,¹ and in force among us without express recognition by our constitution and laws, was ever actually in force in all its length and breadth, but only to an extent that was not wholly inconsistent with those great principles upon which our free institutions, purely American, have been reared and maintained. So these doctrines which we are considering, in being recognized by the courts, must be regarded as having received a corresponding abatement of those of its lineaments which are at open war with the nature and character of our constitution, and the actual state of things among us, under its legitimate operation, or it would be an exotic that could not germinate in our soil.²

"Contempt of court," says Blackstone, "may also, it appears, be committed by insult to a judge out of court; that contempts thus punished are either direct, which openly insult or resist the powers of the court, or the persons of the judges who preside, and elsewhere."³ In enumerating the contempts which degrade the judicial authority, he refers to one which consists in "speaking or writing contemptuously of the courts, or judges in their official capacity."

"It is obvious," said the learned judge above

¹ The common law of England is not the common law of the United States (*Van Ness v. Pacard*, 2 Pet. 144). There is no common law of the United States. The constitution and laws of the Union prevail as the authority of law throughout the Union; but each independent state may have its own common law, which may not be considered so in another (*Wheaton v. Peters*, 8 Pet. 658; *Ex parte Hickey*, 2 Miss. 751).

² 4 Com. 238.

³ *Id.* 285.

quoted,¹ "that, in these two clauses, the word 'judges' is not used by the writer for the mere purpose of illustrating his meaning in the use of the word 'court;' for, besides the consideration that this view is not sustained by the context, such an explanation of his meaning is so altogether futile and useless, after his luminous exposition of the courts in his third volume, as not to be attributed to a writer so able and perspicuous. On the contrary, it was evidently his purpose in the first clause, to take the distinction between a disrespect of the constitutional powers of the court and a personal disrespect of the judges therein sitting; and in the second, between a contempt of the judges while actually holding a court, and a contempt of the same persons while in discharge of judicial duties appertaining to their official character, though not performed in court. The opposite construction would produce a complete identification of the judges with the court, so as to make a contempt, of the one or the other, perfectly convertible. From which may be deduced the clear privilege of the persons of the judges in or out of court, when acting in their judicial capacity; not because of any imaginary sanctity of their persons, nor because that an indignity to their persons when so engaged obstructs the course of justice, for it might sometimes be of such a character as not to have that effect (and besides, in that aspect, it is always referable to another head of contempts; that is, for obstructing the powers of the court), but because, to use the words of Blackstone, 'it demonstrates a gross want of that respect which, when once the courts of justice are deprived of, their authority (so necessary for the good of the kingdom) is entirely lost among the people.' "

¹ *Neel v. State*, 9 Eng. (Ark.) 259.

Nor, to produce this effect, is it of any importance whether the contumely be used in open court, at the moment when the occasion occurs, or the moment afterward, when the sheriff has proclaimed the adjournment. The only real question in either case is, whether it is the official conduct for which the judge is challenged and insulted. Nor can a reason be offered for the protection of the person of the judge in court, that will not equally apply to a protection out of court: on the same account, in view of the remark we have already made, that whenever the indignity in open court would have the effect to interrupt its business, the attachment would be referable to the head of obstructing the powers of the court.

An ideal, imaginary being, without form, substance, or locality, needs no protection from penal sanctions. A court separate from the persons who compose it, is of this description. A sensible writer has said that the terms "nation, state, community, are words only; they do not denote anything separate from the individual members whose aggregation and association have received these names," and the like may be affirmed of a court of justice.¹

97. In *ex parte* Hickey,² Mr. Justice Thatcher ably expressed himself on this branch of the subject as follows: "What is a contempt of court? Besides the various classes of contempts which were known to the common law of England and particularly described; besides those relations to officers and others connected with the courts, concerning which the law is plain and explicit, there are many which are claimed to lie exclusively within the discretion of courts. The belief in the existence of such, is alone in the breast

¹ 4 Bl. Com. 286.

² 12 Miss. (Sm. & Mar.) 751.

of the court. They may be construed to spring from a gesture, a word or a look."

98. "Thus, the court is constituted the judge of his own privileges, and the vindicator of his own wrongs, whether real or supposed, and his jurisdiction in this particular, is without measure. The offense is without specification and without definition; and, though, legally viewed, it is said to refer solely to the functionary, it necessarily touches and stimulates the individual who finds it hard to separate himself from the office and station. It may thus become an offense of opinion, of feeling, or of prejudice. An offense which has no other legislation than the imperfections of human nature, blinded and misled by the circumstances of the moment, notions of caprice, and the improper bias of passion, or by those powerful, but imperceptible influences from which the most upright and enlightened minds cannot be considered or trusted to be wholly exempt."

99. "The power of punishing may be extended to a degree despotic, and, as it is extended in a judicial capacity, it is irresponsible, and may therefore be used, regardless of consequences. Under such a state of things, liberty and property may become precarious, and there is no protection against expression. The rights and privileges which our constitution has retained and reserved to its citizens, may thus be despotically abridged or wholly refused, and their remedy, by due course of law, 'denied' or, at least, 'delayed,' until vindicated and restored by the slow process of the proverbially sluggish channels of jurisprudence."

"Many cases of the infringement of constitutional rights could be conceived and enlarged upon, to illustrate in strong relief this position, but the mere ad

mission of the principle of entire and complete power—without responsibility—to adjudicate for the time being, upon those rights and privileges, will suggest them to all freemen who are acquainted with, and jealous of what of right belongs to them as their inheritance under our form of government. It is a legal motto, full of meaning, and not too strong in expression which declares that, '*Misera est servitus, ubi lex est vaga aut incerta.*' And certainly in no code of laws can one be pointed out more obnoxious to this reproach, than that of a supposed offense which finds its enactment, its tribunal, and its punishment in one and the same source."

100. The learned judge, however, does not hesitate to admit that the power, or rather, the potentiality of the court to exercise the discretion is the most potent engine of the authority and usefulness of courts, and, when soberly and judiciously administered, to the greatest interest of the public good; and he concludes, by denying that the fact that it is capable of abuse should constitute a reason for its abrogation, as follows :

101. "The shield which our constitution throws around the press has been held up to interpose before the power of courts to punish for contempts. The most dearly prized offspring of our national liberty is the freedom of the press. It is so because it can be made its most effectual protection at home, and because it can be employed as the apostle of those liberties, to millions abroad. The worst enemy to freedom is ignorance. Instruct men in a knowledge of their rights, and a vindication of those rights follows as surely as light follows the rising sun. Yet the freedom of the press is abused to base and unworthy purposes. Such, indeed, as sad experience

teaches, is often the melancholy fate of the greatest blessings that a wise providence has bestowed upon us, or that human skill has invented. The free air we breathe is essential to our existence, but when infected with pestilential matter it becomes the most terrible weapon of death. But who would argue, because disease may float in the atmosphere, that that atmosphere should be destroyed ?¹

It is not within the scope of the present chapter to essay a full discussion of the law of contempt ; it being only where such contempt is committed by the pen that it enters into our inquiry.

Contempts by the pen arise mainly in the publication of language or statements which impair the authority of courts, or their usefulness in the course of their administration or legitimate scrutiny.

The questions of contempt of courts, and what are privileged communications by written or printed matter, are in many cases difficult of separation. It has been attempted, however, to treat the latter question according to the three classes under which all communications group themselves. Such communications, when reflecting upon individuals, we have examined in the chapter on Libel ; when published in newspapers exclusively, we have treated them, as far as possible, in the chapter on Newspapers, while in the present chapter we have striven to confine ourselves strictly to its title.

102. The common law defined three classes of contempts of court, namely : Those which scandalize the court itself ; those which calumniate, villify, or ridicule the parties concerned in causes before the court ; and those which prejudice the public before

¹ 12 Miss. (Sm. & Mar.) 781.

the cause is heard, or the cause itself before the court. The disregard of the process of a court is also a contempt thereof. And any literary or artistic work, writing, manuscript, letter, book, magazine, or newspaper article, picture, or caricature, which, in intention or effect, would do either of the above, will bring itself under the charge of obstructing the course of justice by corrupting its sources and its channels, and incur the penalties attached to a contempt of court.

103. Contempts of court, by written matter, can arise in at least four different ways:—I. By a statement reflecting upon any officer of a court while in session, providing such reflection interfere, or have a tendency to interfere, with his duty as an officer of the court in discharge of the legitimate duty of the court. II. By a disrespect shown to the court itself. III. By such comments upon the proceedings of the court as will tend to weaken the confidence of the people in their courts; impair its usefulness or its impartiality or as will tend to produce a prejudgment of a case undergoing investigation before it; and—IV. By unauthorized reports of the proceedings of the courts. As will be seen in treating of the first of these sorts, a libel upon an individual—under any of the definitions given in the chapter on libel—will not lose its libelous character, and become contempt of court, merely because that individual is employed as an officer of a court. The latter's remedy will still be for a libel. If, however, the circumstances of the attack upon the individual cannot be separated from the circumstances of his employment, the attack will constitute contempt of court, and the remedy proceed out of the court upon its own motion.

104. "Not only contempts in the face of a court

of record," says Dr. Dwight,¹ speaking of the old common-law doctrines upon the subject, "but alleged libels published out of court, upon the administration of justice, might be regarded either as direct offenses against the king's peace, in which case they would be tried by jury, or they might be considered as attacks on the dignity of the court, when they would be regarded as contempts. In the one view, the alleged delinquent had the protection of twelve of his fellow-citizens, and of regular modes of trial, and could only be convicted upon the evidence of witnesses; in the other, the matter was examined by the court, and perhaps by a single judge, who considered himself to have been insulted. The proceeding was summary, and without the usual safeguards. The accused could be required to answer interrogatories of the most searching character. The judge could put his own interpretation on the words used, and the skill of a man of thorough training in the use of language might be employed to attach a meaning to words which was possible and plausible, though not ordinary and natural. Charges which could never be substantiated before a jury, might meet with swift condemnation and punishment at the hands of an offended magistrate. The matter of criminal contempts is left in a very undefined condition at the common law. Blackstone classifies the cases under seven general heads, the last of which is, for the present purpose, the most important. 'Contempts,' he says, 'may arise in the face of the court, as by rude and contumelious behavior; by obstinacy, perverseness, and prevarication; by breach of the peace, or any willful disturb-

¹ See a paper prepared upon the occasion of the passage of the celebrated Contempt of Court Amendments to the Code of Procedure of the State of New York, 1871.

ance whatever; . . . by speaking or writing contemptuously of the court or judges, acting in their judicial capacity; by printing false accounts, or even true ones, without proper permission, of causes then depending in judgment; and by anything, in short, that 'demonstrates a gross want of that regard and respect which, when once courts of justice are deprived of their authority, is entirely lost among the people.' "

105. I. As to contempts of court by defamatory statements concerning an officer of a court in session, it is the theory of the law that officers of a court in session are ministers of the justice of the state.

The offense of contempt of court is, therefore, not an offense against the particular officer whose person or whose edict happens to be ignored or disobeyed, but against the state.

II. In speaking of contempts of court by a libel of the judge, Scott, J., said :¹ " When, therefore, the common law deemed it so necessary, for this great purpose (*i.e.*, the public good), to protect the juror, the witness, the informer, the party, the jailor, the attorney, and other persons, many of whom might never again be called into a court of justice, it was not to be expected that it would fail to cover, with its complete armor, the presiding minister of the law's majesty, who would be so often exposed to similar trials."

"Not that any higher personal privileges were arrogated to him than to the humblest of these, but because it was obvious that the principle which suggested the protection of these would be powerless if it did not also protect him, since the majesty of the law might be more degraded in the person of a higher than of a lower officer intrusted with its administration."

¹ Neel v. State, 9 Eng. (Ark.) 268.

“To the same source are to be traced the numerous cases that have settled the doctrine that a judge acting within the scope of his jurisdiction shall not be called to answer for his judgment, except by impeachment, however erroneous, malicious, or even corrupt it may have been. But while the ægis of the law is so thrown over the judge, it finds no pleasure in him when he proves recreant to the high trust reposed in him; for, in the language of one of its oracles,¹ ‘If a judge will so far forget the honor and dignity of his post as to turn solicitor in a cause which he is to judge, and privately and extrajudicially tamper with witnesses, or labor jurors, he hath no reason to complain if he be dealt with according to the capacity to which he so basely degrades himself;’ nor does it animadvert upon his outdoor affairs more than upon those of other citizens, unless these are forced upon him on account of his judicial functions.”

When, therefore, attachments were sent out for the various kinds of contempts which are summed up by Blackstone,² as “demonstrating a gross want of that regard and respect, which, when once courts of justice are deprived of their authority (so necessary for the good order of the kingdom) is entirely lost among the people;” they were not issued upon the idea that the abstract ideal, invisible judicial institution known as a court, had been injured; or because the efficacy of their process, rule, order, or writ, was impaired by such contumely, but because the public good, as connected with the preservation, in its purity, of the judicial institution required them, and that the authority and dignity of the officers in whom this ideal, invisible being called a court, is realized and personified

¹ Sergeant Hawkins.

² 4 Bl. Com. 286.

was sunk and degraded. And that the impurity of such conduct would deprive these institutions of the aid of public opinion in carrying into effect their ordinances, and render a resort to force in all cases necessary, and thus avert a state of things in which it is not probable that any judicial system could long exist.”¹

Chief Justice Wilmot² in discussing the objections to a proceeding to commit for contempt for a libelous attack upon a justice, namely, that it is an invasion upon the ancient simplicity of the law ; that it took its rise from the Statute of Westminster (ch. 2), that that act applies only to persons resisting process; and that—while proper to remove obstructions to the execution of process, or to any contumelious treatment of it, or to any contempt of the authority of the court—papers reflecting merely upon the qualities of judges themselves are not proper objects of an attachment ; that judges have proper remedies to recover a satisfaction for such reflections by actions of *scandalum magnatum* ; and that in the case of a peer, the House of Lords may be applied to for a breach of privilege ; that such libelers may be brought to punishment by indictment or information ; that there are but few instances of this sort of libels on courts or judges ; that libels of this kind have been prosecuted by actions and indictments ; and that, should attach-

¹ 9 Eng. (Ark.) 268.

² In an elaborate judgment, prepared, and intended to be delivered in the case of an application in 1765 by the attorney-general for attachment against J. Almon, for publishing a pamphlet entitled “A Letter concerning Libels, Warrants, Seizure of Papers, &c.,” containing many libelous passages upon the court of king’s bench, and the chief justice, charging the court, and particularly the chief justice, with having introduced a proceeding to deprive the subject of the benefit of the *Habeas Corpus* Act.

ments be extended to libels of this nature, judges would be determining their own wrongs, &c., and denies that attachments derived their origin from the Statute of Westminster (ch. 2). "The power which the courts in Westminster Hall have of vindicating their own authority," he says, is "coeval with their first foundation and institution; it is a necessary incident to every court of justice, whether of record or not, to fine and imprisonment for a contempt to the court acted in the face of it. And the issuing of attachments by the supreme courts of justice in Westminster Hall for contempts out of court, stands upon the same immemorial usage as supports the whole fabric of the common law: it is as much the *lex terræ*, and within the exception of Magna Charta as the issuing any other legal process whatsoever."

To the objection that there is not such necessity for summary punishment, in the case of libels upon courts or judges, as in the case of resistance of process, his Lordship said: "When the nature of the offense of libeling judges for what they do in their judicial capacity, either in court or out of court, comes to be considered, it does, in my opinion, become more proper for an attachment than any other case whatsoever. . . . The arraignment of the justice of the judges is arraigning the king's justice; it is an impeachment of his wisdom and goodness in the choice of his judges, and excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men's allegiance to the law is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any

other obstruction whatsoever; not for the sake of the judges as private individuals, but because they are the channels by which the king's justice is conveyed to the people. To be impartial, and to be universally thought so, are both absolutely necessary for the giving justice that free, open, and uninterrupted current which it has for many ages found all over this kingdom, and which so eminently distinguishes and exalts it above all nations upon the earth."

"The constitution has provided very apt and proper remedies for correcting and rectifying the involuntary mistakes of judges, and for punishing and removing them for any voluntary perversions of justice. But if their authority is to be trampled upon by pamphleteers and news-writers, and the people are to be told that the power given to the judges for their protection is prostituted to their destruction, the court may retain its power some little time, but I am sure it will instantly lose all its authority. The power of the court will not long survive the authority of it."

As to whether a judge making an order at his house or chambers is not acting in his judicial capacity as a judge of the court, and both his person and character under the same protection as if he were sitting in court: "It is conceded," he says, "that an act of violence upon his person when he was making such an order would be a contempt punishable by attachment: upon what principle? for striking a judge in walking along the streets would not be a contempt of the court. The reason, therefore, must be, that he is in the exercise of his office, and discharging the function of a judge of this court; and if his person is under this protection, why should not his character be under the same protection? It is not for the sake of the individual, but for the sake of the public, that

his person is under such protection ; and in respect of the public, the imputing corruption and the perversion of justice to him, in an order made by him at his chambers, is attended with much more mischievous consequences than a blow ; and, therefore, the reason of proceeding in this summary manner applies with equal, if not superior, force to one case as well as the other. There is no greater obstruction to the execution of justice from the striking a judge, than from the abusing him, because his order lies open to be enforced or discharged, whether the judge is struck or abused for making it or not. It may, perhaps, merit a less punishment to libel a single judge in court or out of court, than to libel the whole court ; but the question of the offense does not vary the mode of prosecuting it ; it is an offense *ejusdem generis*, although *inferioris gradus* ; and I cannot explore a single reason which can be urged to cover the judges in court against calumny and detraction for what they do there, which does not hold equally true, though in a less degree, when applied to what they do in their judicial capacities out of court."

106. III. Any publication pending a suit, reflecting upon the court, the jury, the parties, the officers of the court, or the counsel, with reference to the suit, or tending to influence the decision of the controversy, is a contempt of court, and punishable by attachment.¹

A slur or innuendo cast upon a court by means of written matter, will be contemptuous.² Thus, where an attorney wrote on the court docket, opposite the entry of a cause in which he was engaged, the words following :

¹ Hollingsworth v. Duane, Wallace R. 77.

² People v. Freer, 1 Caines, 485, 518 ; Bayard v. Passmore,

"Having become satisfied that we cannot get the law administered, by direction of the plaintiff I hereby dismiss this action, without prejudice to the plaintiff.

"JOS. SMITH,

"March 6th, 1867."

For Plaintiff.

It was held that the foreign and unnecessary matter, introduced into the order dismissing the suit, could only be regarded as a direct reflection on the integrity of the court. So in the matter of the high sheriff of Surrey,¹ where a judge of assize ordered part of the court to be cleared on account of the noise made by the persons assembled there, and the high sheriff of the county caused a placard, signed by him, to be posted up in the town opposite the court, in which he recorded his protest against "this unlawful proceeding" of the learned judge, and said, "I have given directions that the court shall be opened again to the public according to the custom and the law. All persons, so long as they conduct themselves with decorum, have a lawful right to be present in court; and I hereby prohibit my officers from aiding and abetting any attempt to bar out the public from free access to the court": it was held to be a contempt of court.

Threatening letters written to persons concerned in a trial, either as judge, parties, witnesses, solicitors, or jurymen, are alike contemptuous of the court, and there is no difference in the degree of the crime, whether it be to the officer or the person summoned.²

³ Yeates, 439; Morrison v. Moor, 3 Edw. Ch. 25. In Passmore's Case, the matter was written with chalk on a blackboard.

¹ 2 F. & F. 237.

² Smith v. Lakeman, 26 L. J. 305, ch. —; Shaw v. Shaw, 31 L. J. Prob. 35; 6 L. T. N. S. 477; 2 S. & T. 515; *re* Mullock, 33 L. J. Prob. 205; 10 Jur. N. S. 1188.

107. And so any one sitting in the place or stead of a judge, will likewise be entitled to protection. Where a barrister and member of parliament who wrote a letter in threatening and insulting terms to a master in chancery, before whom he had appeared in support of a petition presented by himself and others, the tendency of the letter being to induce the master to alter the opinion he was supposed to have formed upon the case, he was committed by the Lord Chancellor (Cottenham) to the Fleet during pleasure. His lordship saying: "the power of committal is given to courts of justice for the purpose of securing the better and more secure administration of justice. Every writing, letter, or publication which has for its object to divert the course of justice is a contempt of the court. It would be strange, indeed, if the judges of the court were the only persons not protected from libels, writings, and proceedings, the direct object of which is to pervert the cause of justice. Every insult offered to a judge in the exercise of the duties of his office is a contempt; but when the writing or publication proceeds further, and when—not by inference, but by plain and direct language—a threat is used, the object of which is to induce a judicial officer to depart from the course of his judicial duty, and to adopt a course he would not otherwise pursue, it is a contempt of the very highest order."¹

¹ Mr. Lechmere Charlton's Case, 2 My. & Cr. 316.

Lord Abinger, C.B., and Alderson, B., seem to have taken a different view of the mode of dealing with insulting letters addressed to a judge, touching a matter under consideration. "I can only say," said Lord Abinger, "that if I received such a letter I should not consider myself at liberty to commit the writer." To which Alderson, B., added: "There would be a great many committals if such a course were pursued by the judges." "Do you mean to say," asked Lord Abinger of counsel, "that one of the judges has the power to fine a man

“The principle upon which attachments issue for libels upon courts,” said Wilmot, J., “is of a more enlarged and important nature (than that upon which attachments are granted in certain other cases)—it is to keep a blaze of glory around them, and to deter people from attempting to render them contemptible in the eyes of the public.” The law cannot be understood as a respecter of persons, but she will very zealously respect her own instruments.

108. As to matters disrespectful to the court: It has been very recently held to be a contempt of court for counsel in a case to hand up to the court a written paper protesting against his hearing a certain case on the ground of his personal prejudice against the prisoner. And we think that the ruling is grounded in good sense. The statutes of the various states appear to enumerate the cases in which a judge shall be disqualified from sitting; but it does not appear to be just that counsel should be at liberty to conclude, from their own opinions, or from hearsay, or from matters not upon the record, that a certain judge is unfitted to preside at a trial. Though possibly the distinction might arise just here: that it would not be contemptuous for counsel to object to the judge's sitting, in the course of their argument, if they believed it for their client's interest so to do; but only when they went so far—upon such objection being overruled or ignored—to write out a paper in the form of a protest, and hand it to the judge, personally, upon the bench.¹

for sending him a silly letter, or an impudent letter about any matter that he has decided? I can only say I should be very much afraid of exercising it” (See *Rex v. Faulkner*, 2 Mont. & Ayr. 321, 322).

¹ *People v. Tweed, Matter of Contempt*, N. Y. S. C. 1874.

So, again, to write a letter to a judge, before whom a proceeding is depending, attempting to influence his decision therein;¹ or to the foreman of a grand jury which has before it the case of one accused of an indictable offense.²

Where a barrister and attorney, not in his professional capacity, but in his private capacity as a suitor, in respect of a supposed grievance and injury done him as a suitor, wrote a letter to the chief justice of Nova Scotia, reflecting on the judges and the administration of justice generally in the court, the privy council held that an order suspending the writer from practicing in the court was not an appropriate punishment for the offense, and on that ground advised her Majesty to discharge the order.³

"The letter," said Lord Westbury, in delivering the judgment of the privy council in that case, "was a contempt of court, which it was hardly possible for the court to omit taking cognizance of. It was an offense, however, committed by an individual in his capacity of a suitor in respect of his supposed rights as a suitor, and of an imaginary injury done to him as a suitor, and it had no connection whatever with his professional character, or anything done by him professionally either as an advocate or an attorney. It was a contempt of court committed by an individual in his personal character only. To offenses of that kind there has been attached by law and by long practice a definite kind of punishment, viz., fine and imprisonment. It must not, however, be supposed that

¹ *Ex parte McGill*, 2 Fowl. 474; *Eagleton v. Duchess of Kingston*, 8 Ves. 467; *Gould v. Hulme*, 3 C. & P. 625.

² *Bergh's Case*, Abb. Pr. N. S. See *post*, this chapter.

³ *Re Wallace*, L. R. 1 P. C. App. 283; 14 L. T. N. S. 286; 36 L. J. 9 P. C. C.; 14 W. R. 609. See also *re Downie*, 3 Moore's P. C. C. 414.

a court of justice has not the power to remove the officers of the court, if unfit to be intrusted with a professional status and character. If an advocate, for example, were found guilty of crime, there is no doubt that the court would suspend him. If an attorney be found guilty of moral delinquency in his private character, there is no doubt that he may be struck off the roll. But in this particular case there is no *delictum* brought forward or assigned; except that which results from the fact of addressing an improper and contemptuous letter to the chief justice of the court, in respect of something supposed to have been done, unjustly to the writer, in his private capacity as a suitor. We think, therefore, there was no necessity for the judges to go further than to award to that offense the customary punishment for contempt of court."

. An attorney of the king's bench, in the reign of Edward III., was committed for having written a letter to one of the king's council, reflecting on the judges, saying: "That neither Sir William Scot, chief justice, nor his fellows the king's justices, nor their clerks, any great thing would do by the commandment of our lord the king, nor of Queen Philippa, in that place more than of any other of the realm."¹

The writer of a letter to Lord Hardwicke relative to a threatened suit, and inclosing a bank-note, was held guilty of contempt;² and so was the writer of a letter to Chief Baron Parker, making mention of a

¹ 3 Inst. 174.

² Macgill's Case, 2 Fowl. Ex. Prac. 404. And in 18—, Judge Barnard, of the New York supreme court, read from the bench a letter he had received from General Santa Anna, relating to a case in which the latter was a litigant, and which was about to be tried before him. "I will show the general," said Judge Barnard, "that this is not a Mexican court."

cause depending in the court of exchequer, and containing a scandalous offer to his lordship.

109. Where the offensive matter is directed to the judge upon the bench, the question whether it will constitute libel or contempt, will depend upon whether the charges published affect the judge's personal character or reputation as a man, or his record, character, and reputation for fairness, and general ability and reliability as a judge.

Thus, in *Rex v. Almon*,¹ the publisher of the letters of Junius was arraigned for contempt of court, for comments upon Lord Mansfield; but the prosecution was ultimately abandoned, and the defendant proceeded against for libel.

So, in *Neel v. State*,² where one James P. Neel, an attorney, affixed to a judge's door a writing to the effect that "Sebron G. Sneed (the judge's name) is a dam'd base and corrupt man," it was held that the words were published of the judge as a man, and not as a judge, and were not, therefore, contempt of court.

This distinction has been carried to great lengths. In the *Matter of Hickey*,³ for example, a scandalous charge against a member of a court, connected with a cause pending at the time the charge was made, was held to constitute, not contempt, but libel.

In that case the circuit court was engaged in trying an indictment for murder, when an article appeared in the defendant's newspaper, charging the judge upon the bench with being a criminal abettor of the murder.

In a proceeding to commit the defendant for contempt—held, that the publication was a libel, and not

¹ 5 Burr. 2686; Bishop on Criminal Law, § 216.

² 4 Eng.(Ark.) 259.

³ 12 Miss. (4 Sou. & Mar.) 751.

a contempt. But, with all deference to the learned judge's opinion, we can hardly accept this decision as satisfactory. It seems to us that this charge would come under all of the definitions of contempt that have been given. It is an attack upon an officer of the court, since it charges him with a criminal interest in the case in court before him. It is a disrespect to him. It tends to impair public confidence in the court, and its usefulness in investigating truth. And surely such a charge against the character of the presiding judge must be held to "scandalize the court itself."¹ That the charge was libelous, indeed, there

¹ It is equally indispensable to repress in the like speedy and effectual manner all attempts which may be made with relation to any trial depending at the time, or which has recently been so, to slander the proceedings of the court, or depreciate the character, or sully the honor of the judges; or to impose on their wisdom and pollute the demands of justice, to the prejudice of a fair and an impartial trial. In former times, they scrupled not summarily to inflict high corporal pains for transgressions of the first of these kinds. As in the case of Donald Campbell, who, in the course of a trial, when standing among the multitude by the courthouse, had openly accused the Earl of Athol, justice-general, of gross partiality and corruption in the case; he had sentence, therefore, to stand two hours upon the cuck-stool and make public confession of his fault, and to have his tongue bored by the common executioner. More lately, after the conviction of Nairn and Ogilvy, certain printers were rebuked (and, on account of their submission, were dismissed without further answer) for publishing an opinion of English counsel on the case, accompanied with notes highly injurious to the court and the jury. In a still later instance, an account had been published of a certain trial, equally slanderous of the proceedings of the court, and contemptuous of the persons of the judges; and here, as the offense was not followed with the like symptoms of contrition, the culprits Johnson and Drummond were sent to jail for three months, and till they should find surety for their good behavior for the future. In these several instances the court guarded their own honor. Hume, 2 Com. 139.

can be no doubt ; but it seems to us that this was a contempt, as well as a libel.

In treating of the English law upon this question of libeling judges, a late writer¹ says: "There is no instance of a judge at chambers fining or imprisoning, without the authority of the court, for any insult offered to him there. We must distinguish, in this respect, between a judge of a court of record and the court of record itself." "No one of the rights, privileges, and incidents of a judge of a court of record," says Alderson, B., "necessarily carries with it the power of committing for contempt." Where the proprietor and printer of a newspaper were tried upon an information filed by the attorney-general, for a libel upon Le Blanc, J., and the jury before whom the captain of a merchant-ship had been tried for murder at the Old Bailey, Grose, J., said: "It certainly was lawful, with decency and candor, to discuss the propriety of the verdict of a jury, or the decisions of a judge ; and if the defendants should be thought to have done no more in this instance, they would be entitled to an acquittal ; but, on the contrary, they had transgressed the law, and ought to be convicted, if the extracts from the newspapers set out in the information contained no reasoning or discussion, but only declamation and invective, and were written not with a view to elucidate the truth, but to injure the character of individuals, and to bring into hatred and contempt the administration of justice in the country."²

110. IV. As to the publication of comments tending to prejudice a case in the minds of the court, the jury, or the public at large :

The publication in a newspaper, pending a cause

¹ Shortt L. L. 361.

² Rex v. White, 1 Camp. N. P. 359.

in chancery, of articles reflecting on the plaintiff and his witnesses, and characterizing the chancery proceedings as vexatious and unprincipled, and representing the affidavits as "containing glaring misrepresentations, which the editor believed, and heartily hoped, would lead to an indictment for perjury," is a contempt of court.¹ "If parties in the prosecution of their rights," said Lord Langdale, Master of the Rolls, "are to be exposed to this species of attack, and are to be placed in such a situation that they cannot safely proceed in the defense of their rights, and if witnesses are, in this way, deterred from coming forward in aid of legal proceedings, it will be impossible that justice can be administered. It would be better that the doors of the courts of justice were at once closed."² Or, if the publication comment upon affidavits filed in the case, but not yet before the court.³ So in a recent case a motion was made on the part of the plaintiff that the publisher of the "Pall Mall Gazette" newspaper might be committed to the Queen's prison, for a contempt of the court, in having published in that paper, an article containing comments on certain affidavits which had been filed in support of the plaintiff's case, but had not yet been brought before the court. Similar applications were at the same time made to commit the publishers of certain other newspapers, for having published the same article. The vice-chancellor (Wood) said: "I have no hesitation in saying that a gross contempt of court has been committed in this case. The first observation I would make is, that, from the time of Lord Hardwicke downwards, the rule

¹ *Littler v. Thompson*, 2 Beav. 129.

² *Id.*

³ *Vid.* also *Felkin v. Herbert*, 9 L. T. N. S. 635; 33 L. J. 294 C. H.; *Rex v. Clement*, 4 B. & Ald. 218; *Tichborne v. Mostyn*, 17 L. T. N. S. 5; L. Rep. 7 Eq. 55.

which that great judge laid down in *Roach v. Garvan*, has been the rule which the court has adopted for its guidance, namely, the determination on the part of the court to discountenance any attempt to prejudice mankind against the merits of a case before it has been heard. I have not the slightest doubt that such an attempt has been made here, and that it has been made in the most offensive manner. An opinion has been pronounced by the author of this article (who sits down to examine these affidavits with a clear and decided bias) with all that boldness which persons under the screen of the anonymous, and having no responsibility cast upon them, think themselves entitled to indulge in. But those who have responsibility cast upon them, this court—and every tribunal which has to administer justice—is bound to protect every suitor from such an attempt to pervert the course of justice. I am not entitled to consider myself above being influenced by articles of this description, though I should hope I am. I am not entitled to think that the jury whom I may have to summon in the case are above such influences, though perhaps I ought to do so.”¹

III. And when the publication is a copy from another paper, of matter contemptuous of a court, the publisher and printer of the second paper will be, together with the publisher of the first, guilty of contempt.² The rule as to newspaper comments will not

¹ 2 Atk. 469.

² *Tichbourne v. Mostyn*, 17 L. T. N. S. 5; L. R. 7 Eq. 55; 2 Id. The publisher of the “*Pall Mall Gazette*,” having made a humble submission and apology, the vice-chancellor thought it sufficient for the purposes of justice to order him to pay the costs of the motion. A similar order was made with respect to the printer of another paper which had gone beyond a mere insertion of the article from the “*Pall Mall Gazette*,” and the

extend to comments of any description on a matter that is pending, waiting for argument, and waiting for decision ; but courts will not permit comments to be made on any documents whatever, which are before the writer and not before the court, but which are afterwards to come before the court, if such comments have a clear and distinct tendency to directing and swaying the mind of the court or jury, or whoever may have to determine the cause.¹

112. It is a contempt for the solicitor of one of the parties to a suit to write letters, for publication in a newspaper, which may tend to influence the result of the suits ;² so, for a party to print his brief, before the cause came on, was held a contempt of court, though there was nothing in the publication reflecting upon the court in any way.³

motions against the other papers were abandoned. *Vid.* also *Tichbourne v. Tichbourne*, 22 L. T. N. S. 55.

¹ *Tichbourne v. Mostyn*, *ubi supra*.

² *Dan v. Eley*, L. R. 7 Eq. 49.

³ *Vid.* per Lord Hardwicke, 2 Atk. 471 ; S. C., *nom.* *Roach v. Garvan*, 2 Dick. 794.

“It is highly important,” said Lord Romilly, M. R., “that the court should not allow steps of this sort to be taken by the officers of the court, in causes in which they are engaged, which possibly may have an effect favorable to their client, or unfavorable to the other side ; and I may further say that if I am to go minutely into every sentence of a letter which is written in a public newspaper, to say this is questionable, and that is doubtful, and the like, it is imposing a task and a duty upon the court which it will be impossible to perform. There is one distinct line drawn, which is this : that gentlemen who are concerned for contending clients in this court, whether solicitors or counsel, should abstain entirely from discussing the merits of those questions in public print ; if they do it at all, they ought to put their names to their communications. But to let the public suppose that it is merely done by a person who takes a great interest in, and has great knowledge of, the subject, and discusses it from a public point of view, when, if the fact were known, he is the solicitor of the defendant, and

113. And, it seems, not only will the truth or falsity of the publication make no difference¹ in the has the strongest possible interest in his success, is, in my opinion, highly reprehensible."

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

¹ Hollinsworth v. Duane, Wallace, 77.

offense, but even if it be neither true nor false, it may be contemptuous—as where the matter consists of an advertisement.¹

The publication, in a newspaper, of an advertisement offering a reward for evidence tending to establish one side of a controversy pending before the court, is a contempt of court, as tending to produce false evidence;² and Lord Hardwicke once committed a person who published an advertisement relating to an answer in a chancery suit; saying that his reason for committing was “not only for the sake of the party injured by such advertisement, but for sake of the public proceedings in court, to hinder such advertisements which tend to prepossess people as to the proceedings in the court.”³ And it seems that even pendency of the litigation will not be deemed necessary, to give courts jurisdiction to punish where the contempt is flagrant.⁴

D. was in the matter; and that he might have made some little excuse for the warmth which Mr. D. showed upon the subject. At the same time there is nothing I can find against the editor for which I can require him either to make an apology or to pay the costs of this motion; but, for the reasons I stated on the last occasion, I cannot give him costs. That is out of the question. He has certainly shown a tendency to decide against Mr. D.; but I also feel for the difficult position in which an editor is placed in such cases. But, as I said before, with respect to him I can make no order.”

¹ W. Bl. Com. 285; *Respublica v. Oswald*, 1 Dallas, 319; *In re Benson & Mitchell*, 12 Johns. 460.

² *Pool v. Sacheverel*, 1 P. Wms. 675.

³ *Mrs. Farley's Case*, 2 Ves. Sr. 520.

⁴ Shortt, 378.

“It is a reproach to the nation,” said the lord chancellor (Parker), in that case, “and an insufferable thing, to make a public offer in print to produce evidence; and is tantamount to saying, that such persons as will come in and swear, or procure others to swear such a thing, shall have £100 reward, and this in a cause now depending here. If £100 is to be

In the last quoted case the court¹ granted a commitment, observing that such an advertisement tended to the subornation of witnesses, was very dangerous, and not only criminal, but “a means of preventing justice in a cause now depending.”

It will be noticed that, were it not for the words above given in quotation marks, the ruling of his lordship would go to characterize the offering of the reward in the advertisement, and not the advertisement itself (a proceeding in the nature of a subornation), as the offense in this case.

114. The true liberty of the press requires the amplest and most unrestricted right of every man, not only to maintain and possess, but to publish, if he will, his own opinions. But, as we have seen (in our inquiry concerning the laws of libel), it is due to the dignity and peace of society to possess a supervisory power over the motives of such publications, to be exercised when necessary to distinguish between those opinions, expressed in the interests of good manners, of the reformation of individuals, or of institutions, and with an eye solely to the public good; and those which are intended to defame (as in the case of libel), or to delude and prejudice. To opinions of the latter description it is impossible that any good government should afford protection and impunity.

allowed, the same reason will hold as to the allowing of £500 or £1,000. And though the intention of the person so advertising may be innocent (and I, knowing the man, believe it was so, inasmuch that if a court may be said to have inclinations or impressions from thence, I must own, I should be influenced by my knowing Mr. Pool to be an honest man), yet the justice of the court nay, the justice of the nation, being concerned in so public a case, I cannot dismiss the party, though his counsel offer to pay costs to the other side, but in justice and for example's sake, he must stand committed.”

¹ Parker, L. C.

“If the liberty of the press, then, is regulated by any just principle, there can be little doubt that he who attempts to raise a prejudice against his antagonist in the minds of those who must ultimately determine the dispute between them, who for that purpose represents himself as persecuted, and asserts that his judges are influenced by passion and prejudice; willfully seeks to corrupt the source and to dishonor the administration of justice.”¹

115. The publication of an article, in a newspaper printed and circulated in the place where a court is sitting, reflecting, in severe and opprobrious terms, on the character of a criminal prosecution then pending in a court, and standing in order for trial—if the publication be made at a time and in circumstances such as would naturally bring it to the notice of jurors and others who are in attendance on the court—is a contempt of that court.²

In the Matter of Sturoc,³ the court said: “It must not be inferred that we question the right to criticise and censure the conduct of courts and parties when causes have been finally decided. The question, in this case, is whether publications can be permitted, which have a tendency to prejudice the decision of pending causes. The publishers of newspapers have the right, but no higher right than others, to bring to public notice the conduct of courts and parties after the decision has been made; and, provided the publications are true, and fair in spirit, there is no law—and

¹ Per McKean, Ch. J., in *Respublica v. Oswald*, 1 Dallas, 319.

² *Re Stinoc*, 48 N. H. 428; *People v. Wilson*, Albany Law Journal, Nov., 1872, vol. 6, p. 352; *Bronson's Case*, 12 Johns. 460; *Yates v. Lansing*, 9 Id. 417; *Tenney's Case*, 23 N. H. 165; *State v. Matthews*, 37 Id. 450.

48 N. H. 428; *Bishop on Crimes*, § 216.

I am sure there is no disposition—to restrain or punish the freest expression of disapprobation that any person may entertain.”

116. If, during the trial of his cause, a litigant publish matter in his own defense, and reflecting upon his adversary therein, it will be deemed a contempt of court.¹

Or if a litigant write threatening and abusive letters to parties engaged or concerned in the court or the controversy, it will likewise be construed to be contempt.²

A solicitor in a bankruptcy proceeding was held guilty of a gross contempt of court in publishing a pamphlet containing insulting observations on the court of review, and on certain parties engaged in litigation before it. The pamphlet spoke of the judgment of the judge as “an elaborate production, wholly beside the merits of the case, free from all allusions to the facts or statements in the affidavits, which it was but charity to suppose were never referred to by the judge; free from all denunciations against fraud; and that the only object of it seemed to have been to deter solicitors from every attempt to expose and correct abuses in bankruptcy.” The court of review considered this to be a gross and scandalous contumacy of, and a gross libel upon, the learned judge, which ought to be visited as a contempt of that court; and committed the writer to custody; from which he was released, however, on humbly apologizing and paying all the costs incidental to the application.³

¹ *Rex v. Jolliffe*, 4 Term R. 285 (1791).

² *Charlton's Case*, 2 Mylne & C. 316; 2 Russ. & M. 674, n.; *Macgill's Case*, 2 Fowl. Sch. Prac. 474; *Re Jones*, 13 Ves. 237; *Anon.*, 2 Ves. Sr. 520; *Rex v. Fleet*, 1 Barn. & A. 379; *Roach v. Sarvan*, 2 Atk. 464; 2 Dick. 749; Lofft, 465; *Re Sturoc*, 48 N. H. 428.

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

117. A false and exaggerated account of a trial, published pending the trial, will be punished as a contempt.¹

118. And it has been held that, even in cases where the publication of statements having a tendency to interfere with the administration of justice does not call for punishment, the court may, nevertheless, interfere to prohibit such publication. Thus, where one William Haire was charged with the murder of James Wilson, on the motion of the counsel for the accused, with reference to an advertisement of a forthcoming publication of the confession of William Burke, which had been announced in the "Edinburgh Evening Courant," the lords prohibited "the editor and publisher of the 'Edinburgh Evening Courant' from publishing or circulating any statement relative to the alleged murder of James Wilson, or anything prejudicial to the prisoner, William Haire, in the said confession, or doing anything whereby the same may be published, till the proceedings now in dependence against the said William Haire shall be brought to a conclusion; and recommended to the publishers of all newspapers to abstain in like manner from doing so."²

119. The publication of matter designed or tending to prejudice the public mind, in any way, in a cause depending before a court of justice, is a contempt of that court.

And even though the matter be published whilst the court is not sitting; and at a place somewhat distant, a court of record has still the power of punishing by commitment.³ The publisher and the writer of an article in a newspaper, which reflected intemperately

¹ Shaw's Cases, No. 4; Matter of McLeod, Id. No. 6.

² Bell's Notes, 165; Edmond's Case, 7 December, 1829, Shaw, Id.

³ Crawford's Case, 13 Q. B. 613.

on certain proceedings of the court of chancery of the Isle of Man, were committed to prison for the contempt, though the court was not sitting at the time of publication, and the publication took place in Douglas, ten miles distant from where the court sat.¹ "It is objected," said Patterson, J., "that the court could have no general power of commitment for a libel published out of court some time before. This point has not been expressly decided upon. In *Van Sandau's Case*,² the libel appears to have been published both in court and out of it." And, even if the publication does not, upon its face, allude to the cause depending; if it, in fact, has reference to the cause, and its tendency is to prejudice the public mind—it will be held to be in contempt.³

For, if the unlawful intention must appear upon the face of the writing, an artful man may escape, with impunity, even though his publication have the most pernicious effect or tendency to interrupt the course of justice.⁴

120. In the *Matter of Spooner*,⁵ before the mayor of the city of New York, a distinction was attempted between real and constructive contempt, which, it seems to us, no other cases on the subject, either earlier or later, can be understood to warrant.

121. Comments upon the proceedings of parties who are to be litigants in a forthcoming trial, at a session of the court already begun at the time when they are published, or who are to be witnesses or par-

¹ *Id.*

² *Van Sandau v. Turner*, 6 Q. B. 773; 1 Phill. 445, 605.

³ *Bayard v. Passmore*, 3 Yeates, 438; *Anon.*, 2 Ves. A1. 524; *Re Sluise*, 48 N. H. 428; *People v. Wilson*, 6 Albany Law Journal, 532.

⁴ *Bayard v. Passmore*, 3 Yeates, 438.

⁵ 5 City Hall Recorder, p. 108.

ties, will constitute a contempt if they tend or are likely to tend to prejudice the decisions, or to throw a suspicion of bias upon a certain decision which might be made.¹

In November, 1872, the "Chicago Evening Journal" contained an article, commenting upon a criminal trial then in progress in the city of Chicago, as follows: "The riff-raff who contributed fourteen hundred dollars to demonstrate that 'hanging is played out,' may now congratulate themselves on the success of their little game. . . . The money is operating splendidly. The courts are now completely in the control of corrupt and mercenary shysters—the jackals of the legal profession—who feast and fatten on human blood spilled by the hands of other men."—Held, to be a gross contempt of court, and to subject the editors and proprietors of that newspaper to attachment and imprisonment.²

During the pendency of an election petition, the proprietor of a newspaper published in his journal a series of articles which were calculated to interfere with the due course of justice; intended to prejudice the public mind against the petitioner; to prevent witnesses affording him their evidence; to deter him from prosecuting his petition, and, if he abandoned it, to deter any other qualified person from becoming petitioner in his stead.—Held, that the publications were a contempt of the court of common pleas.³

122. And even in a case where judgment had

¹ People v. Wilson, Illinois Supreme Court, 6 Albany Law Journal, November, 1872, vol. 4, pp. 301, 317, 334, 348, 349, 352.

² People v. Wilson, Illinois Supreme Court, 6 Albany Law Journal, November, 1872, vol. 4, p. 352. *Vid.* Bishop's Criminal Law, § 216; 5 Burr. 2686.

³ Tyrone Election Petition, *in re* Macartney v. Corry, 7 Tr. R. C. L. 242 C. P.

been finally pronounced upon a petition, but the order itself had not been drawn up, it was considered a pending proceeding for the purpose of punishing a contempt;¹ the court saying in that case:

“If the principle be the protection of the subject in all fair matter of litigation, in order that his mind may be unbiased by threat or intimidation, and that he may go on freely through that course of proceeding which the laws of his country have provided for him, I cannot but consider it the duty of the court to protect him against an impression, that, when the proceeding is concluded, he may be liable to imputations and abuse, and have no protection but by going into a court of law for damages in an action for libel. I apprehend it is the duty of the court to the suitors, to tell them that, though the matter is ended with respect to them, the court will still protect them, as if the litigation or the business of the court were still pending; and that the principle is not varied by the circumstance that the matter is altogether concluded.”

Though one party to a suit in chancery publish newspaper attacks on the conduct of his opponent, the latter will not be allowed, by way of defense, to publish, pending litigation, *ex parte* garbled accounts of any of the proceedings in court, or before the examiner.²

¹ *Ex parte* Turner, 3 Mont. D. & De G. 544 545

² Coleman v. West Hartlepool, Harbow & Ry. Co., 2 L. T. N. S. 766; 8 W. R. 734. In this case the court enjoined the publication of a pamphlet containing an unfair account of the evidence of a witness taken before the examiner, saying: “If the one party endeavors to prejudice the public in any way against the other litigant party, there is not the slightest justification for the other party doing the same; and this court, in the administration of justice, always takes care that neither party shall do it. . . . I quite agree with the respondent’s counsel in thinking that the present times are very different

123. The publication of proceedings in court, however, pending a suit, by a reporter, will be discriminated from a publication by a party thereto. The presumption is *prima facie* against the fairness of the report in the latter case;¹ though it is not

from those of Lord Hardwicke, and that the present feeling and the general judgment of mankind as to what is or is not proper to be published, are exceedingly different to what they were at that time. That may be at once conceded; but at the same time, even as regards the publicity of proceedings in courts of justice, and when it is a question between parties who are not litigant, but between one of the parties litigant and the publisher of a newspaper, for instance; even as between these parties the court, in these days, recognizing in the highest possible degree the importance of the public being duly and fairly informed of all that takes place, yet does take care that there shall only be such proper information published in a fair and reasonable manner. I mean that courts of justice, in giving directions to a jury as to the ultimate result in that which is or is not a fair publication, always leaves it for the consideration of such jury whether or not an independent, or supposed to be independent, person, who has published a narrative of proceedings of a court of justice, has published them in a fair and reasonable manner, being anxious to inform the public; or whether there is evidence of malice in the mode in which the report was framed. Now, this court, in dealing between litigants, takes care that the litigants shall not, by such foolish attempts as appear to me to have been made on both sides here, create public prejudice, each against his opponent, in the progress of the litigation, which ought to be conducted with all proper calmness and discretion, and for the purpose of eliciting truth.

¹ Id. "Nobody," said the vice-chancellor, "feels more sensibly than myself the advantage of having a fair publication of all that takes place in a court of justice; but I make this observation, that whenever one of the litigants is the party making the statement, that is a very strong *prima facie* presumption against its being at all fair, and that in any case in which a litigant makes a publication, it is exceedingly different from that which a newspaper reporter would publish simply in the discharge of what was his duty. Such a case is widely different. I am not aware that any case precisely like this has occurred before; but I had no hesitation in granting

infrequent that, in the course of a trial exciting great public interest, the bench will request the newspapers to abstain from comments upon the merits as the case proceeds.¹

124. But the question is, in all cases, one purely in the discretion of the court, and cannot be demanded, as matter of right, by either party.²

Or, if the court, in its discretion, pending a trial promising to continue for several days, make an order prohibiting the publication of its proceedings, disobedience of such order will be a contempt.³

125. If one of the parties to the suit has himself supplied the newspaper with the information upon which comments are made, he cannot himself complain of the contempt.⁴

the *interim* order for the injunction in the first instance, because I was aware of what the course of all the courts at all times has been, with reference to keeping their proceedings pure from this false description of excitement, which would tend to bring witnesses into the witness-box with their imaginations colored and prejudiced by *ex parte* statements sent and circulated among them by one of the litigant parties; and, consequently, it is a case in which one ought to prevent any such undue use being made of the proceedings of the court."

¹ See request of Judge Neilson (in *Tilton v. Beecher*) to the newspapers of New York and Brooklyn, that they should abstain from any criticisms, or expression of opinion as to the merits of that famous controversy. It is due to the press to say that as a rule they recognized the justice of the judge's request, and readily complied.

² *Brook v. Evans*, 29 L. J. 616, ch. . . So in *Rex v. Gilham*, 1 Mood. & Malk. 165, the exhibition in an assize town of inflammatory publications respecting a prisoner about to be tried for murder, was considered not to be a contempt which the judge of assize could interfere to stop by commitment, though they thought it "highly indecorous and improper, and one that might subject the man to punishment."

³ *Rex v. Clement*, 4 B. & Ald. 218.

⁴ *Vernon v. Vernon*, 23 L. T. N. S. 697. In this case the plaintiff procured the insertion in a local newspaper of a

126. The publication, by a newspaper, of a paragraph charging certain witnesses in a pending cause with "turning affidavit men," is a contempt.¹

On the 19th day of March, 1875, an information was filed in the Criminal Court of Cook County, Illinois,²

statement of his claim, and his agent gave the newspaper proprietor a copy of the bill. A motion having been made to commit the proprietor for contempt in publishing certain articles disparaging the plaintiff's claim, Bacon, V. C., refused to make any order whatever in the matter, saying: "I am not considering the offense committed against the court by contempt, but the right which the plaintiff in the suit, who has endeavored to make use of a newspaper for his own purpose, has to come afterwards and complain of subsequent statements or comments, not malevolent and not libelous, upon the subject which he has submitted to the editor of that newspaper. What right has he to be here to complain? I cannot conceive that he has the slightest right in the world."

¹ 2 Atk. 469. Construing the words "affidavit men" to mean "persons who are ready, upon all occasions, to make affidavits without regarding whether they have any cognizance of the facts," and committed the printers to prison, observing that "nothing is more incumbent upon courts of justice than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard. . . . There cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters."

² The case of the People v. Storey, excited great public interest, from the wealth and influence of the defendant, and from the fact that the articles alleged to be contemptuous as criticising the grand jury had been preceded by articles personal to the judge who delivered the opinion. "To understand the nature of the alleged offense," said the court, "we must understand who and what is assailed. The grand jury was in continuous session in the court-house, from day to day, at the time of the publication of the articles in respondent's paper. Though in a different room from the judge, it was a constituent part of the court. 1 Bishop on Crim. Prac., § 868. It was not only a part of the criminal court, but a necessary and indispensable part, without whose action no criminal could

against Wilbur F. Storey—editor and proprietor of the “Chicago Times” newspaper—alleging that the defendant had, while the grand jury was in session even be put upon trial. It only could initiate any criminal proceeding. It was the motive power in the absence of which all the other machinery of the criminal court was motionless and useless. It was so intimately connected with the court, that witnesses brought before it are sworn in what is called open court, though not necessarily in the presence of the judge. 1 Bishop's Crim. Prac. 868. The grand jurors were for most purposes as completely under the supervision of the court as would be petit jurors in sessions in their jury-room.

“If they misconducted themselves in the grand jury-room, if guilty of drunkenness, or bribery, or personal abuse of each other while in session, they could be punished by the court. They had been summoned into court and their attendance could be enforced by fine or imprisonment. All their official action was under the solemnity of an oath that ‘they will present no person through malice, hatred, or ill-will, nor leave any one unrepresented through fear, favor, or reward, or for the hope or promise thereof; but in all their present threats they should present the truth, the whole truth, and nothing but the truth, according to the best of their skill and understanding.’ Private citizens thus compelled, under the fear of penalties, to perform a thankless public service, under the obligations of solemn oaths, for the purpose of carrying on the business of our courts—a service often performed at great personal sacrifice by grand jurors—are entitled to some protection from the court of which the grand jury is a constituent part.

“The court that could not protect a grand jury from vindictive abuse in the discharge of its official duties, and the court which, possessing the power to protect, would, through fear of personal animadversion, fail to protect it, would alike fall into universal and deserved contempt. Failing to be protected, honorable men would resort to every artifice to escape service upon the grand jury, and would even brave fine and imprisonment, rather than subject themselves to such a fiery ordeal as the malicious and vituperative attacks of the daily press of the county in which they are impaneled. What honorable man would not rather be incarcerated for thirty days in the common jail than to sit thirty days upon a grand jury, exposed to have his character maligned by libelous publications, his family disgraced, and perhaps his business ruined? Is it

and engaged in investigating cases from day to day, "published of and concerning the grand jury in their official capacity, and of and concerning divers mem- to be said, as it has been said upon the argument, that he has his action of libel for the injury received? Would the privilege of bringing such an action be any special consolation to the man who has been maligned?

"On the 14th instant, 'The Times' commenced the attack upon the grand jury, continuing it on the 15th, and intensifying it and publishing five different articles in its issue of the 16th. On the last mentioned day the grand jury in a body presented themselves in the court-room, moved by a common indignation, and desired to be informed by the court if it could be protected from such insults. On the morning of that day 'The Times' had heaped upon the jurors the vilest abuse for their performance of their official duties. If it could not be stopped, the paper, increasing in virulence, might be expected to charge them the following day with being thieves and robbers. It might ruin their reputations and business standing.

"What was to be done? Was the court to say to the jurors, I have no power to protect you in the discharge of your official duties? The judge of this court did not so understand the law. Was the court to say, I have the power to protect you, but will not? Should the court say to them, in the language of the counsel who opened the argument, that 'the law for libel, the law for embracing, the law for any kind of misdemeanors, provided by the statute covering all these cases are made for your vindication.' The grand jurors did not come into court and serve therein for the privilege of bringing such suits. They came to perform a public service as a constituent part of the court. They were entitled to protection from the court which had compelled their service; and the court, upon such complaint being made by the grand jury, immediately issued a rule upon the respondent to show cause why he should not be punished for contempt. The articles show upon their face the motives which actuated the publisher. It was no regard for the interests of the public, but personal revenge against the jury for their action toward defendant. There is no proof before the court that other indictments were then pending, but there is proof that other indictments were filed in court three days later. It is more than probable that they were then under consideration. The editor of that paper had, at least, the right to suspect so much." The defend-

bers of said grand jury on account, of their action, in his paper, many slanderous and vituperative articles; calculated to impede, embarrass, or obstruct that court in the administration of justice." The articles were set forth at large in the information, and were seven in number, published in "The Chicago Times" of the 14th, 15th, and 16th insts., soon after the defendant—Storey, himself—had been indicted by the grand jury upon four different indictments, for libel, and related to the action of the grand jury in finding the same. The article published in "The Times" of Sunday, the 14th inst., was entitled, "Disreputable Vengeance," and contained, among other statements, the following :

"This action on the part of the grand jury and the state's attorney, is not in the interests of justice or decency, but wholly in the interest of the rascally elements that control the city and county. Every indictment returned by the grand jury, last week, against the editor of 'The Times,' was a mean, pitiful attempt at revenge, for his effort to invite attention to the true character of men, into whose hands has fallen the control of local affairs. 'The Times' accepts these indictments as a mean and pitiful attempt to secure revenge for the expose of official iniquity. It accepts them as such, and herewith gives notice to the state's attorney, and all others in whose interest this attempt ant Storey had, in the course of the publication complained of, printed, as it was alleged, matter personal to the judge delivering the opinion, as appears from the following sentence in the opinion :

"I have no further defense to make of the judge of this court from the character of defendant's paper, but desire to say that the feeling of intense indignation with which he first read those charges has entirely passed away, and that he is not now conscious of the least possible animosity against the defendant."

at private vengeance is directed, that it proposes to carry the battle to the end."

In the article of Monday, March 15, the following language occurred :

"The result of the trial of this man proves what 'The Times' has asserted, to wit: That no man having money has ever been sent to Joliet from the criminal court of Cook county. Just as soon as a grand jury of honorable men can be gotten together, and can be allowed to investigate abuses under the guidance of some lawyer appointed temporarily by some judge whose integrity—of judge and lawyer—are above suspicion, then will 'The Times,' in the name of an outraged community, demand an investigation of this latest development of the peculiar practices of our criminal court."

The first article of the five contained in "The Times" of the 16th instant, contained the following language :

"Especially strong is the belief of the public in the virtue, the integrity, the purity of the men composing the grand jury which has just returned an indictment against a city newspaper for publishing 'obscene' matter. The men who have done this are themselves immaculate. Their social relations are of the highest, and their private lives are of the purest. It is only necessary to mention a few names, in order to demonstrate their standing. They are 'Fred' Erby, 'Ab' Price, B. R. Chambers, W. H. Watchtel, William Manchester, Frank Sherman, 'Jim' Brown, Walter Williams, and James Fitzgerald. Not one of these gentlemen but has a record of the most lofty character. Not one of them is a common drunkard. Not one of them is a 'sport,' or a bummer. Not one of them has a bastardy case on his hands. Not one

of them keeps a one-third interest in a notorious prostitute; and not one of them is a notorious companion of abandoned women, and a regular frequenter of brothels. . . . Such being the character of the grand jury now in session, its indictments must necessarily carry weight."

The second article contained the statement:

"The state's attorney is determined to tolerate the exposure of no crime, if he has to put every male strumpet in Chicago on a grand jury to secure the punishment of the offender."

The third article, in the same paper, was as follows:

"It is a fact scarcely worthy of note, that a dozen or more members of the present grand jury, who are not bummers and notorious male strumpets, are personal friends and 'cronies' of the managing editor of 'The Tribune,' who is also wonderfully noted as not being a bummer and a male strumpet. Is this grand jury a 'Tribune' grand jury? It looks like it."

The fourth article contains these words:

"But that was before office-holding knavery found out that the grand jury could be converted from an agency for the punishment of offenders into an agency for shielding them against exposure."

The fifth is as follows:

"How to make a free press a terror to evil-doers. Get a grand jury to indict the editor that exposes them."

The court (Williams, J.) concluded its opinion delivered in the case, as follows:

"I doubt whether any city in the United States has been the scene of such events as have been transpiring in Chicago for the past few weeks. A leading public journal has been persistently employed in striving

to undermine the public confidence in the officers and juries of the only criminal court existing in the city ; a court whose efficiency would be destroyed in case that confidence was lost. Deprived of this confidence through the libels of the press, it would be as powerless and pitiable as Samson in the lap of Delilah."

"With the efficiency of this court destroyed, no home in this city would be safe for forty-eight hours, and robbers and murderers would hold high carnival. No one who has not sat in this court, as has the present judge and his brethren of the bench, can know how absolutely necessary it is to the safety of our citizens, especially of late, when crime seems to have taken a new lease of life. No greater offense can be committed by any man, than to stab justice in her own temple and at her own altar. What has been done by the respondent in reference to this court, is nothing, except so far as it has been an attack upon the administration of justice."

"The judge, prosecuting attorney, and jurors of this court are individually nothing to the public ; but when justice ceases to be duly administered, the rights of the people are no longer secure, and their wrongs must go unredressed. The question in this case rises above every personal issue. The defendant has grossly assailed and attempted to overawe that part of this court which was the most vulnerable and the least capable of self-defense—its juries. There was no way by which they could be defended, and the efficiency of this court maintained, except by the use of the only weapon of defense it possessed—the proceeding for contempt. In none of the various ways suggested by counsel upon argument, could any adequate defense be afforded. Before libel suits could be tried, the court would be without grand jurors to indict criminals or

petit jurors to try them. As I have said, the act of the defendant would have been punished, without any public protest, in the case of an insignificant person. Could it be allowed to go unpunished because of the wealth and power of the defendant? It is the disgrace of our jurisprudence—a disgrace more keenly felt by those who minister at the altars of justice than by any other—that wealthy and powerful criminals go unwhipt of justice, while indigent and friendless offenders often receive an excess of punishment. Should there be no exception to this universal rule?”

“For a judge, appealed to as I have been by the grand jury in this case, to let the offender go unpunished, would be an unpardonable crime. It would be treason to the cause of justice, which, by my official oath of office, I am bound to conserve. It would be a base and cowardly desertion of the fort while the enemy was battering down the walls.”

“A judge has never any right to think of the personal consequences which may ensue to himself. Duty must be his polar star. He may know that he will be assailed by the bitterest calumnies; that he will be furiously assaulted by his enemies, and deserted or feebly defended by his friends. If his is the post of honor, it is also sometimes the post of danger. I was reminded by the defendant’s counsel, upon argument, that the effort to enforce the law of contempt had twice, in the state of Pennsylvania, nearly resulted in the impeachment of the judges, and that in Illinois it had driven one judge from the bench of the supreme court. I shall receive the statement of counsel, that what was said was not designed as a threat.”

“But having been so recently reminded, I cannot now fail to appreciate the extent to which the malevolence of the press may be carried, and the results it

may secure. I know the vindictiveness with which some of the judges of the supreme court of this state were pursued, for their conscientious discharge of duty in a case of contempt; and that one judge, who, by his integrity, purity, learning, and ability, cast a luster upon that bench, was driven therefrom. But duty cannot be learned in the school of fear. Personal popularity may be pleasant, but the serene consciousness of duty faithfully done, is infinitely better. The storm may rage, but one may patiently and calmly bide its buffetings."

"If in this case I make a blunder, though an honest one, I expect to bear the consequences. If I shall willfully do the defendant any injustice, my conduct will deserve the execration of the public. The whole facts are before it. If I am right, the sober second thought of the people, which is seldom unjust, and sometimes generous, will sustain me. If it does not, I shall still rest content."

"Such a proceeding as this, against an editor, is extremely rare. But twice before, in the history of this state, has it been resorted to, so far as I know. This is due, in part, to the press; which, while it often libels individuals, has realized that it would be a great crime, persistently to attempt to destroy the efficiency of the courts, through which alone justice can be duly administered. In case of supposed personal wrongs by the courts, editors have usually resorted to such remedies as were possessed by them in common with other citizens, and with these they have been content. But the fact is due, even more, to the extreme patience of the courts, and the great reluctance, upon the part of judges, to use the process of the court for its own protection. No action, upon the part of a judge, can be so utterly distasteful to him as the action for con-

tempt. It is looked upon with disfavor by the public. If the process is directed against an editor, it is always attended with results which seriously prejudice the judge in the esteem of the press, and all whom it can influence."

"But if the duty should always be shunned, the independence of the courts would be soon lost. Aggressions, from whatever quarter, upon the acknowledged rights of the courts must be resisted."

"Extreme cases demand severe remedies. I believe the defendant to be the only editor in the United States who, from personal motives, by a series of articles published in his paper, day after day increasing in venom, has deliberately and persistently attempted to destroy the efficiency of a court of justice—apparently determined to ruin, if he could not rule it."

"The offense committed by the defendant has been often repeated, and in each case with greater aggravations. It was committed deliberately and willfully. Its tendency was to obstruct the due administration of justice, by the use of that almost omnipotent instrumentality—the press. It was intended to inaugurate over this court, and especially over its jurors, a reign of terror, and make the ministers of justice the subservient tools of the defendant. If the acts of the respondent had not been restrained by the proceedings in this cause, I know not to what extent of virulence and abuse the editor would not have gone. To punish such an offense merely by a fine, would be a mockery of justice. The sensational articles which would appear in 'The Times' would, in two or three days, more than reimburse the defendant for any fine which I should consider it proper to impose. Editors must understand that their rights are the same, and

no greater, than other citizens, and their responsibilities no less. If they publish libels upon individuals, they may escape without loss or damage to themselves, but they cannot with impunity commit gross outrages upon jurors, tending to impede, and obstruct, and overthrow the due administration of the law. But the action of the court must be vindictory, not vindictive. In this case the motion to vacate the rule to show cause will be denied, and the cross-motion for the issuance of the attachment will be granted. No fine will be assessed, and no costs awarded against the respondent, but for the contempt, of which he has been guilty, he will stand committed to the jail of this county for ten days."

The action of the court in this case is remarkable, in that the penalty of a fine, usual in such cases, was omitted to be imposed, either alternatively with, or as accompanying the imprisonment.¹

¹ The defendant Storey was released upon a supersedeas from the supreme court, upon giving bonds, &c.—Chicago Times, Tuesday, March 30, 1875.

The grand jury of the city and county of New York, February 15th, 1875, made the following presentment:

NEW YORK, Feb. 15, 1875.

To His Honor, Recorder Hackett, presiding in Court of General Sessions:

DEAR SIR: The accompanying communication was received from Mr. Henry Bergh, president of the American Society for the Prevention of Cruelty to Animals, February 10, instant.

We, the members of the grand jury, consider the sending of such letter on the part of Mr. Bergh as totally uncalled for, and reflecting upon our integrity as grand jurors. It has certainly never occurred within the experience of any of us, to be called to account by a party to a criminal proceeding for what we may have done, after calm deliberation and weighing of evidence. Thinking that some action in the matter, on the part of the court, would be right and proper in order to secure to future grand juries the respect which is their due, we leave

127. It was held contempt for a newspaper to publish, before it is heard, a petition which had been the matter in the hands of the court, to be acted upon or not, as may be deemed proper.

Respectfully submitted,

CHRISTIAN S. DELAVAN,
Foreman.

"THE AMERICAN
SOCIETY FOR THE PREVENTION OF
CRUELTY TO ANIMALS,
*Head Quarters, Fourth Avenue, cor.
22nd Street,*

NEW YORK, Feb. 10, 1875.

[SEAL.]

*To Christian S. Delavan, Esq., Foreman of the Grand Jury for
the City and County, at present sitting :*

SIR: On the 10th of December last were found a number of disreputable men engaged in a dog-fight in a back basement at 12 Rivington-street. Two savage bull-dogs had been fighting, a moment before the arrival of the officers; and the respective owners of the animals were at the time handling the animals, their hands at the time being covered with blood, and the dogs terribly cut up by reason of the contest. The proprietor of one of the dogs and place where they fought was present, and the lease of the vile premises is in the possession of this society. This fellow and some of his comrades have been proceeded against before; but, as in the present instance, they have escaped through means which I forbear to mention. On Monday, the 8th instant, this case came up before your jury, and, notwithstanding these facts were fully represented, as I believe, these notorious ruffians and keeper of one of the most disorderly houses in this or any other city, was relieved of all responsibility, and, in his own language, since uttered to one of our officers, 'was honorably acquitted.' I think, on reflection, you will in a measure realize the discouragement I feel at finding my earnest and unselfish labors in the public service, diverted from their legitimate ends by this decision of the grand jury, the inevitable consequence of which will be to double the already onerous duties of this society, and go far to make dog and cock-fighting, if not respectable and honorable, at least tolerable in this city. I do not mean this as a censure, for your associates acted doubtless conscientiously, but erroneously. The result, however, is the same. A scandalous stain upon our civilization has been condoned, and these execrable wretches led

presented to the court of chancery for the winding-up of a company, which contains grave charges against the directors.¹

thereby to believe, however mistakenly, that a certain amount of sympathy exists in this community with their atrocious calling.

I have the honor to remain,

Your obedient servant,

HENRY BERGH, President."

On February 16, Mr. Henry Bergh appeared voluntarily at the bar of the court with his counsel,—

The court said—In giving my action upon this proceeding, it is proper I should submit my views in writing. I am clear that it is contempt of court at common law, for a witness or by-stander to communicate with the grand jury without its request; but to be a contempt under the statute, the commu-

¹ *Re Cheltenham v. Swansea Ry. Carriage & Wagon Co.*, 20 L. J. N. S. 169; L. Rep. 8 Eq. 580.—It was contended, in this case, on behalf of the newspaper proprietor, that the case of a petition to wind-up was an exceptional one, because under the Act it must be advertised, and the advertisement must be accompanied by a statement that persons desiring to possess it might obtain copies from the solicitor by an ordinary application. Malins, V. C., said: "No doubt, every contributory and creditor can obtain such copies, but it is not open to any one of the public, strangers to the matter, and does not give a general license to publish the petition. It is the duty of the solicitor, before he gives copies of such a petition, which frequently contains unpleasant charges, to ascertain whether the applicants are contributories or creditors: he cannot give copies to any one who will pay for them. There is nothing in the Act or rules which sanctions the publication of a petition of this kind, any more than a bill in Chancery. It was said that there was no intention to injure in this publication; but it is a sound rule that you cannot dive into men's minds, but must draw inferences from their acts. In this case I must attribute to these proprietors, that they did not print these grave charges of fraudulent conduct against these directors unknowingly and unwittingly. They may be true or false, but that must be decided on the evidence. If you once permit such a publication as this, any person may file a petition, and any proprietor of a newspaper may print and publish it, and thus it may be made the vehicle of grievous injury to an individual character." Shortt, p. 374.

128. While the tendencies of the times are clearly to construe the offense of contempt of court with the greatest liberality, it is none the less true now than then that any communication must savor of the degree of contemptuous behavior committed during the sitting of the court, and directly tending to impair due respect. I think that the term behavior may cover the writing and delivery to the grand jury of a contemptuous and insulting letter. It is clear from the elementary writers, and from what the court of appeals imply in the *Hackley Case*, 24 N. Y. 78, that the grand-jury-room is an enlargement of the court-room, and part of the court sitting. Handing to the petit jury a letter containing remarks upon the case pending before them has been at *nisi prius* adjudged a contempt; the jury, for convenience, being outside of the court-room proper, it is true, but legally and technically, nevertheless, a part of the court sitting; and both the grand and petit jury-rooms were merely extensions of the court apartment, and are under equal jurisdiction.

The insinuation conveyed by this expression in the letter of Mr. Bergh, "as in the present instance they have escaped through means which I forbear to mention," addressed to any officer of the court during its sitting, could not be made worse for contemptuous and insolent behavior tending to impair respect. At the commencement of the last October term of this court, I charged the then grand jury as follows:

"The minutes of some grand juries have, in the past, distinctly shown traces as well as evidences of considerations and of reconsiderations and preferences, which can only be explained upon the belief that grand juries have yielded to lobby pressure, either in finally finding or finally dismissing bills of indictment. The grand juror who suffers himself to be even impliedly approached upon subject-matters pending before the body of which he is a sworn member, not only violates his oath, but transcends the common law that forbids such approaches, either in the act of the citizen or in the consent of the juror. Should it so happen during the present term of your duty as grand jurors that any person whomsoever (except the district-attorney, who, when desired, becomes your legal adviser), shall approach either of you and seek to confer, or endeavor to influence your action for or against the prosecution of any complaint pending before you, then it will become your duty to promptly communicate the fact to this court, in order that the person so offending may be summarily dealt with. The district-attorney has done all in his power

ever before, that the usefulness of courts of justice is capable of being greatly hampered, if not wholly destroyed, by a too great license on the part of the to destroy the opportunities for this lobby influence with the grand inquest, but if jurors allow letters to be delivered to them by accused persons, accusers, or their counsel, or visits to be made to them at their places of business, or houses, by friends of suspected persons, they cannot obviate such a scandal or frustrate the wrong intended."

It will thus be perceived that the considerations growing out of the action of Mr. Bergh are not new and were not suggested by the attitude taken by the late grand jury, and I had determined to reprehend the first instance of grand jury lobbying or outside interference which should be submitted to my consideration. But Mr. Bergh shows that he is, for the purposes of his society, both a deputy attorney-general and an assistant district-attorney by written appointments from Messrs. Pratt and Phelps. Mr. Bergh, in his affidavit swears: "Such letter was sent and intended to be sent, as an official communication in the interests of the people of this State, which deponent then honestly believed he was then representing, and not to subserve any private or personal interest, or to gratify any individual spleen or malice. and deponent firmly and conscientiously believed at the time that he was only doing his duty, and that his course was entirely justifiable under the authority derived from the attorney-general and district-attorney referred to."

In the matter of Strong, in this court, half a century since, it was held that the act of sending a scurrilous letter to the grand jury ought not to be considered a contempt, unless it clearly appeared that it was designed to interrupt the administration of justice. The supreme court has held (*Weeks v. Smith*, 3 Abb. Pr. 211) that if the alleged contempt be capable of a construction consistent with innocence of the party of any intentional disrespect, there is no legal contempt. It would seem that Mr. Bergh's explanation that he was acting as the agent of the prosecuting officers is consistent with innocence. The court, however, trusts it may be pardoned for observing that the representative of the attorney-general and the district-attorney owes it to those gentlemen, if not to himself, to infuse into his oral or written intercourse with grand juries, rather the *suaviter in modo* than the *forliter in re*; and to remember an old saying, "that he who impugns motives, should always rigidly examine his own."

press. It is to the good sense of the press that the doctrine of contempt of court most earnestly appeals.

129. There can be no doubt—in the case of proceedings of legislative bodies, for instance—that the newspapers should be untrammelled, by the law, in their comments thereon (and yet, as we shall presently see, wanton attacks upon such bodies, will on no hand be privileged). For in legislative proceedings the whole people are directly interested; since the result of legislative deliberations is to give to the public the laws which shall govern them; and since, to that end, they have sent thither their own representatives, armed as their mouth-pieces, with their own desires and opinions, and since it is for their unquestioned benefit that such scrutiny should accompany them.

But in the case of courts it is different; for although it is to the best interest of every citizen that a tribunal should exist in which they should have every confidence, still, when an individual case is once before that tribunal, the public interest can only extend so far as to be solicitous that justice (in whatever remedy that justice may consist) shall be done; which would be impossible if the deliberate examination of the court into the merits thereof were to be anticipated by a newspaper trial.

130. The fact that a publication, contemptuous of court, was innocent of any intention of its writer to be so, cannot be permitted to purge it of contempt. *Ignorantia juris non excusat*.¹

It is evident, from the theory upon which punishments for contempt are based, that this must be so.

Let the rule be discharged, and Mr. Henry Bergh stands exonerated under his explanatory oath from any intentional contempt.

¹ Broom. Leg. Max. 253.

The great principle of the safety of the people (which is the supreme law), is evidently the principle upon which punishments for contempt proceed; and against the safety of the people no evidence of good or harmless intentions can be allowed to avail.

A publication, then, once being confessed; no course is left the court but to pronounce judgment. The intention can only be taken in mitigation of the punishment, not in mitigation of the offense.

During the trial of one Nixon,¹ an article appeared in the "New York Tribune," headed, "A Judicial Outrage," which was supposed to reflect upon the conduct of the judge² presiding. The article was supposed to have been written by Horace Greeley; and an order was issued that Mr. Greeley show cause, before that judge, why he should not be attached for contempt. Instead of showing cause, he moved for a writ of prohibition, which was denied, and the following order made:

"It is ordered, by the court, that the said Horace Greeley answer (and the answer under oath is waived) the following interrogations, and have until Monday next, being the 25th day of April inst., at 11 o'clock, A. M., to file answers thereto, and be then heard in this court in defense of the accusation that he published a grossly inaccurate report of the proceedings of this court in the 'Daily Tribune' of April 14, 1864, in the language contained in and recited in interrogatory the first.

"Interrogatory the First.—Did you write in manuscript the following matter, which appeared in page 4, in column 2 thereof, in the 'New York Daily Tribune' of Thursday, April 14, 1864?

¹ Supreme Court of New York, Oyer & Terminer, New York city, April, 1864.

² Geo. G. Barnard.

To wit, ("A Judicial Outrage." Here following the article, portions of which contained the alleged contempt.)

"Interrogatory Second.—If not, did you write in manuscript any part thereof?

"Interrogatory Third.—If not, did you see the same in manuscript, or in proof, before it was published?

"Interrogatory Fourth.—If not, were you or not the responsible editor of 'The Tribune' on the 14th day of April, 1864?

"Interrogatory Fifth.—If you did not write or see before publication the said matter, do you know who is the author, or writer, or composer thereof, or did you not know that it was to be published?

"Interrogatory Sixth.—If you know the said author or writer, please name him?

"A statement of the transactions in court, which were reported and commented on in 'The Tribune' followed, together with a disclaimer from the court of any complaint as to the editorial comments, but only as to what purports to be a report of the proceedings in court."

To these interrogatories Mr. Greeley filed the following statement:

"Horace Greeley, in the above-entitled proceedings referred to, protesting against the jurisdiction of this court over his person, and over the proceedings now being taken, and insisting that they are irregular and without warrant of law, and further insisting that he ought not to be asked, and cannot legally be compelled to answer questions upon a charge which is in its nature criminal, and for which he may be exposed to indictment, both as a misdemeanor for a contempt as well as for a libel; and further insisting that the said article, in the order to show cause in these proceed-

ings referred to, is not a report of the proceedings of a court, but, on the other hand, is simply an editorial criticism, based upon a report of such proceedings contained in a newspaper called 'The Evening Express,' published two days before said editorial article was published, to wit, on the 12th day of April instant.

"For answer to the interrogatories filed and served on him, says that he is now, and ever since its foundation has been, the principal editor of the newspaper called 'The Tribune,' and is one of its proprietors, by being a stockholder of the corporation that publishes the same. That, as such editor and proprietor, he is subject to all the responsibilities that justly pertain to that relation. Believing that this avowal is a substantial answer to all the interrogatories propounded to him, he most respectfully declines to answer any questions that may expose any of his associates in the editorship and publication of said newspaper, to the discipline of this tribunal, preferring to abide the consequences, be they what they may."

The court being satisfied that no disrespect was intended, discharged Mr. Greeley.¹

¹ And see as to this subject generally *ex parte* Jones, 13 Ves. Jr., 237; *Re* Mayer, 2 Barnard, 43; *Re* Crawford, 188 J., 225 Q. B.; *Re* Yates, 4 Johns. 317; 6 Johns. 337. As to contempts by publications reflecting on courts, &c., see *Re* Van Hook, 3 City Hall Recorder, 64; *Re* Spooner, 5 Id. 109; *Re* Strong, Id. 9; *Birch v. Walsh*, 10 Ir. L. R. 13; *Re* Van Saudan, 1 De Gex. 55; *Re* Crawford, 18 L. J. 225, Q. B.; *ex parte* Turner, 3 Mont. D. & G. 523; *Rex v. Lee*, 5 Esp. 123; *Respublica v. Oswald*, 1 Dallas, 319; *Richmond v. Dayton*, 10 Johns. 393; *Folger v. Hoogland*, 5 Id. 235; *Re* Bronson, 12 Id. 460; *The People v. Freer*, 1 Cai. 485; *The People v. Few*, 2 Johns. 290; *Rex v. Hart*, 1 Camp. 359; 1 Hawk. Pl. Cr., Ch. 73; *Re* Crawford, 13 Q. B. 613; Starkie on Slander, by Folkard, Ch. xxxvi; *Moulton v. Clapham*, Sir W. Jones, 431; *March on Slander*, 20; *Hollingsworth v. Duane*, J. B. Wallace, 77; *Bayard v. Passmore*, 3 Yeates, 438.

131. Courts cannot be permitted to be scandalized by statements and comments tending to weaken their authority, merely because those statements are published by a newspaper in giving its readers the news of the day. And if a prisoner convicted of murder and sentenced to death, while on the scaffold, and before his execution, makes a speech, reflecting upon his trial, a newspaper may not be justified in publishing a report of his speech.¹ If a highwayman shall, at the gallows, arraign the justice of the law, and of those who condemned him, he who publishes (the highwayman's language) shall not go unpunished.² "The defendant's excuse," said the court, "in such a case³ is indeed entitled to be received at its fullest value; but since the wrong and injury consist, not in the intention, but in the printed word reaching the eye of the reader, the disavowal of bad intent cannot do away with the pernicious effect against which it is the aim of these proceedings to guard."

But neither, on the other hand, will the court travel behind the publication to search for a bad intent, even if the publication were intended to be contemptuous of the court, but is not so in fact, the court will not punish for the intention.⁴

Lord Erskine committed to prison the committee of a lunatic and his wife for having published a

¹ See *Sandford v. Bennett*, 24 N. Y. 20, and the same commented on *post*, in chapter on newspapers. In this case the language reflected on one of the prisoner's counsel, not upon the court. Townshend on Slander and Libel, p. 375. Here was a literal exemplification of Butler's lines:

"No rogue ere felt the halter draw
With good opinion of the law."

² 1 Read. Stat. Law, 151; Dig. L. L. 32.

³ *People v. Freer*, 1 Caine, 485.

⁴ *People v. Freer*, 1 Caine, 485, 518; *Bayard v. Passmore*, 3 Yeates, 439; *Morrison v. Moat*, 3 Edw. Ch. 25.

pamphlet, with a dedication to the lord chancellor, reflecting upon the conduct of certain persons acting, in the management of the affairs of a lunatic, under orders from the court of chancery. His lordship committed also the printer; holding that ignorance of the contents of the pamphlet would not excuse him.¹

132. Even wide insinuations will sometimes be construed into a contempt at common law. In 1788 an information was granted against the members of the corporation of Yarmouth, for having entered upon their books an order, stating "that the assembly were sensible that Mr. W. [against whom an action had been brought for a malicious prosecution, and a verdict returned for £3,000 damages, which the court refused to disturb,] was actuated by motives of public justice, of preserving the rights of the corporation to their admiralty jurisdiction, and of supporting the honor and credit of the chief magistrate; and therefore they vote him the sum of £2,300." "Nothing," said Buller, J., "can be of greater importance to the welfare of the public, than to put a stop to the animadversions and censures which are so frequently made on courts of justice in this country. They can be of no service, and may be attended with the most mischievous consequences. Cases may happen in which the judge and the jury may be mistaken: where they are, the law has afforded a remedy and the party injured is entitled to pursue every method which the law allows, to correct the mistake. But when a person has recourse; either by a writing like the present, by publications in print, or by any other means, to calumniate the proceedings of a court of justice, the obvious tendency of it is to weaken the administration of justice, and in consequence to sap

the very foundation of the constitution itself. . . . They say 'that W. was actuated by motives of public justice,' &c. But the judge and jury who tried the cause, confirmed as to their opinion by the court of common pleas, have said that—instead of his having been actuated by motives of public justice, or by any motives which should influence the actions of an honest man—he had acted from malice. These opinions are not reconcilable; if the one be right, the other must be wrong. It is, therefore, a direct insinuation that the court had judged wrong in all they have done in this case, and it is therefore clearly a libel on the administration of justice. . . . The defendants have, indeed, said that they never meant to reflect on the public justice of the country; but that, alone, is no answer to this application. Where particular allegations are made, in applying for an information, some answer must be given. If the thing charged be capable of different explanations, it is fair to take the defendants' explanation in their affidavits, that they did not intend anything wrong; but if it be only capable of one interpretation, we are not to be guided by such a general answer. I am of opinion that the information should go against all."¹

When the common council of New York city—being enjoined, by a preliminary injunction, from certain official action passed resolutions declaring the injunction illegal, proclaiming a determination to disregard it, and imputing dishonesty to the judge who granted it; the resolution was held a contempt.²

¹ *Rex v. Watson*, 2 T. R. 199.

² *People v. Sturtevant*, 9 N. Y. 263; affirming *People v. Compton*, 1 Duer. 512. See also *Morrison v. Moat*, 4 Edw 25.

But a fair account of proceedings in a court of justice will be considered as privileged from proceedings by contempt.¹

Or—even if the publication be otherwise construable as contemptuous—if it appear that no right or remedy of the parties to the suit be defeated, impaired, impeded, or prejudiced; and if the misrepresentation be not willful, the court will accept a disavowal of an intentional contempt, and withhold punishment.²

133. V. As to the publication of reports: courts have always claimed and exercised the right to dictate whether or not their proceedings should be published. In the time of Edward the Third, Lucius de Thacstead, a notary public, was committed to the Tower, for merely attending in court to take a note of the

¹ Hoare v. Silverlock, 9 C. B. 20; Ryalls v. Leader, 1 L. R. 298 Ex.; Pillock v. Onell, 63 Pa. St. 253; Hearne v. Stowell, 12 Adol. & El. 718; 4 Per. & D. 696; Turner v. Pullman, 6 Law Times Rep. N. S. 130; Rex v. Wright, 8 T. R. 298; Chambers v. Payne, 2 C. M. & R. 156; Cincinnati, &c. Co. v. Timberlake, 10 Ohio, N. S. 548; Flint v. Pike, 4 B. & C. 84; Saunders v. Mills, 6 Bing. 213; 3 M. & P. 520; Lewis v. Levy, 1 El. B. & E. 537; Andrews v. Chapman, 3 C. & K. 286; Smith v. Scott, 2 Id. 580; Thomas v. Croswell, 7 Johns. 264; Rish Allah Bey v. Whitehurst, 18 L. T. (N. S.) 298 Ex. No reporter, editor, or proprietor of any newspaper shall be liable to any action or prosecution, civil or criminal, for a fair and true report in such newspaper of any judicial, legislative, or other public official proceedings, of any statement, speech, argument, or debate, in the course of the same, except upon actual proof of malice in making such report, which shall in no case be implied from the fact of publication (Laws of N. Y. 1854, ch. 130, §1). Nothing in the preceding section contained shall be so construed as to protect any such reporter, editor, or proprietor, from an action or indictment for any libelous comments or remarks superadded to and interspersed or connected with such report. Id. § 2. Edsall v. Brooks, 17 Abb. Pr. 227; 26 How. Pr. 426.

² Morrison v. Moat, 1 Edw. ch. 25.

proceedings between Johannes de Bourne and Ricardus de Potesgrave ; and a disregard of the prohibition of a court,¹ or even of a magistrate,² is a contempt.

Lord Eldon once remarked that, when he first came into Westminster Hall, the law was well understood that it would be a contempt to publish the proceedings of the court before they were finished ;³ and Lord Tenterden, in one case,⁴ ordered that there should be no publication of the proceedings, until the several indictments against the defendant had been tried ; and fined a newspaper proprietor £500 for disobedience to this order, in publishing an account of the first trial before the second had begun.

“ Nothing,” said Lord Hardwicke,⁵ “ is more incumbent upon courts of justice than to preserve their proceedings from being misrepresented ; nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard. It has always been my opinion, as well as the opinion of those who have sat here before me, that such a proceeding ought to be discountenanced.” And the jurisdiction has been exercised in very recent cases.⁶

In the state of New York, “ publishing a false or

¹ See *Flint v. Pike*, 4 Barn. & C. 473.

² *Cox v. Coleridge*, 1 B. & C. 37 ; *Garrett v. Ferrand*, 6 Id. 611.

³ *Knight v. Knight*, 1 Jacc. & Walk. 167.

⁴ *Rex v. Clement*, 4 B. & Ald. 218. The courts upheld the action of Lord Tenterden in this proceeding, but Campbell (*Lives of the Chief Justices*, vol. iii. p. 208) gives it as his opinion that this transaction tarnished the fame of Lord Tenterden, and that the order forbidding the publication was “ imprudently ” made.

⁵ In *Baker v. Hart*, 2 Atk. 488.

⁶ So recently as 1867, a justice of the Superior Court of the city of New York prohibited the publication of proceedings

grossly inaccurate report of the proceedings of a court of record is a criminal contempt," by statute.¹

It is very far from the purpose of the law to forbid newspaper comments upon public and well-known and accomplished facts.

If, for instance, one engaged in the trial of a cause should himself commit a contempt of court, it would not be contempt for a newspaper to chronicle the fact, or to call the attention of the public or of the court thereto.² So, if a newspaper remark upon the conduct of a juror, who—while engaged in the trial of a capital cause, and while apart from the public and in charge of the court officers—was furnishing articles for publication to the daily press, and call the attention of the court to the fact, in a manner irritating to the presiding judge, though not in any way impeaching his impartiality or uprightness, it is not contemptuous in the newspaper.³

134. In 1831, it was enacted by congress,⁴ that "the power of the several courts of the United States to issue attachments, and punish for contempt of court, shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts, or so near them as to obstruct the administration of justice. The misbehavior of any of the officers of the said courts, in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness,

had before him, and his course was approved by the other justices of that court. Townsend on Slander and Libel, p. 370 (note).

¹ 2 Rev. Stat. 278, §1.

² Stuart v. People, 3 Scam. 395.

³ Id.

⁴ Act of March 2nd, 1831. Sec. 725, Title xiii., ch. 12. Revision of 1873-74. Where the wording was slightly changed.

or any other person, or persons, to any lawful writ, process, order, rule, decree, or command of the said courts. But there may undoubtedly, and do, arise cases in which it is expedient that a court should regulate the publication of its own proceedings. As, for instance, where these proceedings might or did awaken such intense public sympathy or indignation as might prejudice or interfere with the progress and calmness of the judicial inquiry. Such a case was *United States v. Holmes*,¹ where the defendant was a survivor of a party who, having been shipwrecked, had found themselves forced to sacrifice the life of some of their number to save the rest, and had drawn lots for their lives. The case attracted great attention, and public sentiment was intensely agitated in the matter. In that case, Mr. Justice Baldwin said: "By act of congress, passed some years since, the court has no longer the power to punish, as for contempt, the publication of testimony pending a trial before us. We have, however, the power to regulate the admission of persons, and the character of proceedings within our own bar; and as the court perceives several persons, apparently connected with the daily press, whose object, we presume, is to report the proceedings and evidence in this case, as it advances, the court takes occasion to state that no person will be allowed to come within the bar of the court for the purpose of reporting, except on condition of suspending all publication till after the trial is concluded."²

135. As we have before had occasion to remark,

¹ *Wallace Jr. 1.*

² *Vid.* also *Rex v. Clement*, 4 B. & Ald. 218; per Lord Hardwicke, 2 Atk. 471; *S. C. nom*; *Roach v. Garvan*, 2 Dick. 794; *Mrs. Farley's Case*, 2 Ves. Sen. 520; *Garnett v. Ferrand*,

fair comments upon matters of public interest will be rather encouraged than otherwise, but the privilege will not be construed by courts to extend to comments on matters still pending, which have a direct tendency towards directing and swaying the mind of the court or jury by whom the cause is to be determined.¹

136. The misrepresentation of a decision of a court, or of its views and reasons in making the decision, may be a contempt of court, or possibly the suppression of its authorized reports, made by its own reporter.²

6 Barn. & Cress. 616. The rule would to-day appear to be eminently the reverse, for almost as much a matter of course as the presence of the court itself, has come to be the presence of the representative of the daily press.

¹ Shortt L. L. 371; *Tichborne v. Mostyn*, 17 L. T. N. S. 7; L. Rep. 7 Eq. 57. In this case it was held a gross contempt of court to publish in a newspaper an article commenting on affidavits which had been filed on behalf of the plaintiff in a suit, but were not yet before the court; and the publisher, after making an ample apology, was ordered to pay the costs of a motion to commit him.

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

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

If a court made an order prohibiting the publication of the proceedings pending a trial likely to continue for several successive days, it is a contempt of court to disobey such order. Shortt L. L. 371.

² *Morrison v. Moat*, 1 Edw. Ch. 25.

137. As analogous to, and parcel of, the doctrine of contempt of court, is the doctrine of the contempt of legislative bodies.

The rule, as to contempts of this kind, has been stated to be that "whatever grossly reflects on the character of a member of either house, or whatever imputes to him what it would be a libel to impute to an ordinary person, is a contempt, and thereby breach of privilege; it is a direct assault upon his character, and, through the odium presumed to be excited thereby, a consequential obstruction of his political duties."¹

The house of lords formerly inflicted fine, imprisonment, and the pillory, for offenses of this kind against its members; but in more recent times, commitment, with or without fine, has been the ordinary punishment inflicted by both houses of parliament.²

In the case of Arthur Hall, in 1581, himself a member of parliament, the house of commons inflicted the threefold penalty of imprisonment, fine, and expulsion, for a printed libel, "not only reproaching some particular good members of the house, but also very much slanderous and derogatory to its general authority, power, and state, and prejudicial to the validity of its proceedings in making and establishing of laws."³

For examples of the punishment of the pillory, see the cases of Thos. Morley, in 1623, for a libel on the lord keeper,⁴ and William Carr, in 1667, for dispersing scandalous and seditious printed papers against Lord Gerard, of Brandon.⁵

¹ Rex v. Cuthell, 27 Howell's St. Tr. 642.

² Holt, L. L. 118.

³ D'Ewes, 291; Hatsell, 93; 1 Com. S. 125; Hallam Const. Hist. C. 5.

⁴ 39 Lords J. 314, 331.

⁵ 66 Id. 704.

Commitments were made by the house of lords, in 1663, for a libel on Lord Gerard, of Brandon; in 1688, for printing a paper reflecting on Lord Grey, of Wark.¹

In 1722, persons were attached for printing libels concerning Lord Strafford and Lord Kinnoul;² and in 1776, for sending an insulting letter to the Earl of Coventry, the offender in the last case being afterwards reprimanded and ordered "to be continued in custody until he find security for his good behavior;" in 1779, for a libel on the Bishop of Llandaff.³

One Rainer was convicted, in 1733, of having printed a scandalous libel upon the lords and commons, and sentenced by the court of king's bench to pay a fine of £50, and to be committed for two years, and until he should pay the fine, and likewise till he should find security for his good behavior for seven years.⁴

In pursuance of a resolution and address of the house of commons, John Stockdale was tried, in 1789, upon an information charging him with having published a certain false, scandalous, wicked, seditious, and malicious libel concerning the impeachment of Warren Hastings, intending to asperse, scandalize, and vilify the commons of Great Britain, in parliament assembled, and most wickedly and audaciously to represent their proceedings in parliament as corrupt and unjust, &c.⁵

¹ 14 Lords J. 144.

² 22 Id. 129.

³ 42 Id. 129.

⁴ 2 Barnard, 273.

⁵ After a brilliant speech on behalf of Mr. Stockdale by Erskine, who took the line of defense that the intention of the author was to charge with injustice, not the house of commons as a body, but the private accusers of Mr. Hastings,

In 1796, John Reeves was tried upon an information filed against him by the attorney-general, in consequence of a resolution of the house of commons, that a pamphlet published by him entitled, "Thoughts on the English Government," was a malicious, scandalous, and seditious libel, and was also a high breach of the privileges of the house, and that an address should be presented to his majesty asking him to direct a prosecution of the publisher.¹

In 1834, a leading article having appeared in "The Morning Post," reflecting upon the conduct of the lord chancellor (Lord Brougham) with reference to a case which had come before the house of lords on appeal, the house resolved that the paragraph was a gross breach of their privileges, and committed the editor to the custody of the usher of the black rod.

In 1686, an information having been filed against Sir William Williams, for publishing a libel called "Dangerfield's Narrative," the defendant pleaded that he was, at the time of publication, speaker of the house of commons, and, as such, had a right to publish the votes and acts of the house, and that the "Narrative" in question was printed and published as parcel of the proceedings; but the court called the plea an idle, insignificant one, and gave judgment for the king, inflicting a fine of £10,000 on the defendant; the lord chief justice (Wright) asking the defendant's counsel whether an order of the house of commons could justify a scandalous, infamous, and flagitious libel.²

Lord Kenyon, C. J., told the jury that he acceded to the doctrine that they must be convinced that the pamphlet "was meant as an aspersion upon the house of commons;" and the jury returned a verdict of not guilty.

¹ The jury acquitted the defendant. *Rex v. Reeves*, 26 St. Tr. 530.

² 10 St. Tr. App. 34 n.

This case of Sir William Williams happened, as observed by Lord Kenyon, C. J., in the worst of times, and the publication was a paper of a private individual published by another individual, under pretense of sanction of the house of commons. Gross, J., said of the same case, that it was declared by a great authority, to be a disgrace to the country.

In 1805, one Stuart was committed to the custody of the sergeant-at-arms for a breach of privilege in printing and publishing, in "The Daily Advertiser, Oracle and True Briton," certain libelous reflections on the character and conduct of the house. In 1810, Sir F. Burdett, a member of the house, was sent to the tower for publishing "a libelous and scandalous paper reflecting upon the just rights and privileges of the house." In 1819, the house resolved that a certain pamphlet, of which Mr. Hobhouse acknowledged himself to be the author, was "a scandalous libel containing matter calculated to inflame the people into acts of violence against the legislature, and against this house in particular," and that it was "an high contempt of the privileges and of the constitutional authority of this house;" and the writer of the pamphlet was committed to Newgate.

In 1680, two persons, named Yarrington and Groome, were committed for a libel against a member. In 1689, one Smelt was committed for spreading a false and scandalous report of a member; as was John Rye, in 1696, for having caused a libel reflecting on a member to be printed and delivered at the door. The house committed one Woodfall, in 1774, for publishing a letter reflecting on the character of the speaker; and, in 1821, the author of a paragraph in "The John Bull" newspaper containing a libel on one of the members. In 1832, two solicitors were called

to the bar of the house, for a libel contained in a printed handbill, being a copy of an official letter signed by them, and addressed to a committee sitting on the "Sunderland Wet Docks Bill," reflecting on the conduct of certain members of the committee, and containing a statement of the manner in which the members had voted in the committee.

138. *Burdett v. Abbott*¹ was an action against the speaker of the house of commons, for breaking open and entering the house of the plaintiff (a member of parliament), arresting him, taking him to the tower of London, and imprisoning him there; acts which the defendant justified, under a resolution of the house, that a certain letter published by the plaintiff in a newspaper known as "Cobbett's Weekly Register," was a "libelous and scandalous paper, reflecting on the just rights and privileges of that house," and that the plaintiff had thereby been guilty of a breach of the privileges of the house; whereupon it was ordered that the speaker should issue his warrant to commit him to the tower. "Can the high court of parliament," said Lord Ellenborough, C. J., in his judgment, "or either of the two houses of which it consists, be deemed not to possess intrinsically that authority of punishing summarily for contempts, which is acknowledged to belong, and is daily exercised as belonging, to every superior court of law, of less dignity undoubtedly than itself? And is not the degradation and disparagement of the two houses of parliament, in the estimation of the public, by contemptuous libels, as much an impediment to their efficient acting, with regard to the public, as the actual obstruction of an individual member by bodily force, in his endeavor to resort to the place where parlia-

¹ 14 East, 7

ment is holden? And would it consist with the dignity of such bodies—or, what is more, with the immediate and effectual exercise of their important functions—that they should wait the comparatively tardy result of a prosecution in the ordinary course of law, for the vindication of their privileges from wrong and insult? The necessity of the case would, therefore, upon principles of natural reason, seem to require that such bodies, constituted for such purposes, and exercising such functions as they do, should possess the powers which the history of the earliest times shows that they have, in fact, possessed and used.”¹

¹ The Speaker, in issuing such a warrant, does not, according to Bayley, J., act in the character of a subordinate officer, but in that of a member of the House. “When the House make an order that their Speaker shall issue his warrant, they do not direct him to do it as a subordinate minister to them, but only as being the individual member of greatest dignity in the House; by whom, on this and other occasions, the House speaks and acts; and his act in this respect is not, I think, the act of an officer, but the act of a member of the House. But if,” adds the learned judge, “it were the act of an officer of the House, acting under and by virtue of its judgment on the subject-matter, I can not help thinking that, where a court has competent jurisdiction to decide upon a point, and has decided and given judgment upon it, and they direct their officer to carry that judgment into execution; the officer is protected by that judgment.”

This was so decided by the Court of Exchequer Chamber (Howard v. Gossett, 10 Q. B. 359; Parke, Alderson, and Rolfe, BB., Coltman, Maule, and Creswell, JJ.), reversing the decision of the majority of the Court of Queen’s Bench, who held a Speaker’s warrant void, because it did not show a sufficient authority on the face of it, to justify the defendant in all he admitted to have done. Parke, B., in delivering the unanimous judgment of the Exchequer Chamber, says: “Writs issued by a superior court, not appearing to be out of the scope of their jurisdiction, are valid; and, of themselves, without any further allegation, a protection to all officers and others in their aid, acting under them; and this, although they be, on the face of them, irregular, as a *capias* against a peeress

139. "There is no power," says Kent,¹ "expressly given to either house of congress to punish for contempts, except when committed by their own members (Countess of Rutland's Case, 6 Rep. 54 a); or void in form, as a *capias ad respondendum* not returnable the next term (Parsons v. Lloyd, 3 Wils. 341); for the officers ought not to examine the judicial act of the court whose servants they are, nor exercise their judgment touching the validity of the process in point of law, but are bound to execute it, and are therefore protected by it (Turner v. Filgate, 1 Lev. 95; Cotes v. Michill, 3 Id. 20). . . . If, in these courts, the writ of attachment need not state any special grounds in order to show that the court is acting duly, formally, and regularly, what good reason can be assigned for requiring the House of Commons to do so? If the writ of attachment in the general form used, is a protection to the sheriff or the officer of the court executing it (as it undoubtedly is); and he need state nothing in his plea but the issuing of the attachment (Levinz's Entries, p. 191; Britton v. Cole, 1 Salk. 408; Com. Dig. "Pleader," 3 M. 24), why should not the warrant of the Speaker, in a general form, be equally a protection to the sergeant-at-arms, the proper officer of the House? We are clearly of opinion that at least as much respect is to be shown, and as much authority to be attributed to these mandates of the House, as to those of the highest courts in the country; and if the officers of the ordinary courts are bound to obey the process delivered to them, and are therefore protected by it, the officer of the House of Commons is as much bound and equally protected. . . . The possibility of abuse, which is urged as an objection to the power of either House to issue its mandate in such a form, is no valid argument against its existence. If it were, it would apply equally to all the superior courts, which, without doubt, have such power; and it would apply also to the other admitted legal powers of these courts, which may be abused without adequate remedy. In case of an improper exercise of the power of attachment by a court of law or equity, or by either branch of the High Court of Parliament, there can be no appeal: the only remedy is by application to the sense of justice of each court; and it would be improper to suppose that any one of them would be more likely to abuse the power, or less likely to grant redress, than another."

The warrant of commitment is not to be construed strictly

¹ 1 Com. 235, 236, n. 1.

bers; but in the case of Anderson,¹ who was committed by order of the house of representatives, for a contempt of the house, and taken into custody by the sergeant-at-arms, an action of trespass was carried by writ of error to the supreme court of the United States; which court decided that the house had that power, and that it was an implied power, and of vital importance to the safety, character, and dignity of the house."²

It seems indisputable that such a doctrine is of vital necessity to the usefulness of a legislative assembly. But, since it contemplates only the offense against the body in session,³ and not an offense against the laws of the land, or the dignity of the government (which offense would be sedition—a crime, as we have seen, almost unknown amongst us), the power to punish need not and does not extend beyond the as that of an inferior court or justice of the peace, but it is to be construed as a writ of a superior court, not appearing on the face of it to be beyond the scope of its jurisdiction (*Howard v. Gossett*, 10 Q. B. 359); and therefore the warrant, though it does not specify the cause of arrest, furnishes a justification to the officer who executes it. *Id.*

¹ *Anderson v. Dunn*, 6 Wheat. 204.

² It is a power inherent in all legislative assemblies, and is essential to enable them to execute their great trusts with freedom and safety; and it has been frequently exercised, not only in Congress, but by the respective branches of the state legislatures, and may be considered as indisputably acknowledged and settled (*Story's Commentaries*, ii. 305, 317).

³ In the case of *Howard v. Gossett* (10 Ad. & Ell. N. S. 359), the powers and privileges of parliament were very elaborately discussed; but the Court of Exchequer Chamber, in the final decision, placed itself upon the narrow ground, that the speaker's warrant must be construed as process of a superior court, not appearing to go beyond its jurisdiction.

In the case of a contempt of court, however, the case is different, for courts, being the impersonation of justice of the state, are always in session, there can be no *interregnum* to their authority.

session in which the contempt was committed, and will terminate upon the adjournment or dissolution of congress.¹

It was held by the supreme court, in the case of *Anderson v. Dunn*,² that the house of representatives has, by necessary implication, a general power of punishing and committing for contempts, notwithstanding that the *lex scripta*, "the constitution of the United States," had expressly conferred upon it a power to punish "its members"; thereby, as it was argued, on the principle that *enumeratio unius est exclusio alterius*, prohibiting the jurisdiction in the case of persons not members of the house. "It is true," said Johnson, J., delivering the judgment of the court, "that such a power, if it exists, must be derived from implication, and the genius and spirit of our institutions are hostile to the exercise of implied powers. . . . That a deliberate assembly, clothed with the majesty of the people, and charged with the care of all that is dear to them; composed of the most distinguished citizens, selected and drawn together from every quarter of a great nation; whose deliberations are required by public opinion to be conducted under the eye of the public, and whose decisions must

¹ 1 Kent. Com. 236. The duration of imprisonment for contempt terminates also in England upon the close of the existing session of parliament. *Stockdale v. Hanford*, cited in May's Treatise on the Privileges of Parliament, 62; *Rex v. Crosby*, 3 Wils. Rep. 138; *Burdett v. Abbott*, 14 East R. 1.

Even to the duration of imprisonment, "a period is imposed by the nature of things, since the existence of the power that imprisons is indispensable to its continuance; and although the legislative power continues perpetual, the legislative body ceases to exist on the motion of its adjournment or periodical dissolution. It follows, that imprisonment must terminate with that adjournment." Per Johnson, J., in *Anderson v. Dunn*, 6 Wheat. Rep. 231.

² 6 Wheat. R. 204.

be clothed with all that sanctity which unlimited confidence in their wisdom and purity can inspire—that such an assembly should not possess the power to suppress rudeness, or repel insult, is a supposition too wild to be suggested.” What particular acts shall amount to a contempt of either house of congress are not defined ; and are, it would seem, left to the judgment and discretion of the house, under the circumstances of each case.¹ And, we doubt not, libels which grossly interfered with the usefulness of officers or members of either house, would be held contemptuous by courts.

140. Congress has unquestionably, as we shall have occasion to consider further on, in the chapter upon newspapers, the right to control the publication of its own deliberations. But in the exercise of this right, we know of but a single instance in which that body has proceeded to its extreme powers.²

141. The newspapers of the Union always have enjoyed, and still enjoy, the largest liberty of criticism of Congress and of its officers and members, and show no disposition to be scrupulous of passing the line which separates criticism from vilification and abuse.

It is needless to observe that, not only legislative, but the whole law of contempt is one regarded with great disfavor with us, and it is possible that it would only be enforced by our courts with great reluctance and in rare instances.

¹ 1 Kent. Com. 236 (note).

² In 1873, during what has been since known as the “Crédit Mobilier Investigation.” In that instance Congress, having resolved that certain of its deliberations should be secret, discovered, nevertheless, that its proceedings were being published in the daily papers, and proceeded to imprison certain reporters who refused to disclose the perpetrators or the means employed by them to obtain the prohibited news. See Congressional Globe, 1st series, 42nd Congress, part ii., 846.

142. The foregoing pages, it is believed, exhibit the American law of contempt in its extreme form. But it is well that it should be studied in that rather than in its more lenient form, in order that we may know the extreme of its operation.

The sentiment which pervades our courts, undoubtedly, is that which was well expressed by the court in *Stuart v. People*.¹ "Respect of courts can-

¹ 3 Scam. 397; quoted with approval by Scott, J., in *People v. Wilson*, 6 Albany Law Journal, 352. The question as to what is a contempt of court, its definitions and penalties, will be usually found treated by the statutes of the different states. In 1871, a successful attempt was made in the New York legislature to enact, along with others, the following amendment to the code of procedure:

"SECTION 24.—The said act is hereby amended by adding thereto an additional title, to be known as title sixteen, as follows: 'Conferring power upon courts of record, and every judge or justice of any such court, to punish for contempts.' Every court of record, and every judge or justice of any court of record, shall have the like power which courts of record, or a judge or justice thereof, possessed at common law, to punish as for a contempt of court, any person or persons for any act, matter, or thing for which courts of record or a judge or justice thereof could at common law punish any person or persons as for a contempt of court; and the proceedings for contempt shall be had and conducted in such manner as the court, or judge, or justice shall direct, and the punishment, which may include fine or imprisonment, or both, shall be in the discretion of the court, or judge or justice, before whom the proceeding is had. And all laws and parts of laws inconsistent herewith are hereby, so far as the courts of record and judges or justices thereof are concerned, repealed."

But an earnest and intelligent opposition was made by the public, and notably by the Bar Association of the city of New York; a committee of which association waited upon the Governor (Hoffman), through whose efforts the Governor was induced to veto the whole. Said Hon. Theodore W. Dwight, one of that committee:

"It can scarcely be possible that the people of the state of New York, after an experience of forty years of full liberty of speech and of the press, as far as the doctrine of constructive

not be compelled, it is the voluntary tribute of the public to truth, virtue, and intelligence, and while they contempts is concerned, are ready to endanger, and perhaps sacrifice it, by giving deliberately such portentous powers to a single judge, having no check upon his will except the cumbersome, well-nigh obsolete and quite ineffectual method of trial by impeachment. Assuming that there is no danger at the present moment, the hour may arrive when the common-law power to commit for contempt will furnish a ready and efficient weapon in the hands of the bold and unscrupulous, to silence, not only the press, but also the utterances of advocates or counsel. Arbitrary power always frets at free speech on the part of members at the bar. So Gov. Coldon wrote to the Earl of Halifax a letter in which he refers to the dangerous influence which the profession of the law had obtained in this province more than in any other, and wishes that 'the people were freed from the domination of the lawyers.' This so-called 'domination' was nothing more than a fixed determination, on the part of the few members of the bar of that day, to insist upon a rational freedom—a determination which the governor in vain hoped to overcome. Should the struggle for free speech ever commence again, the bar will not be unfaithful to its traditions, and will strive again to 'dominate' in the same good sense. If, by the doctrine of constructive contempts, its members are cowed into silence, there will be hushed a potent voice of the tribunes of the people."

The question of contempt by written matter alone is, of course, within the province of this inquiry. What constitutes contempt, however, by other means, as by words or gestures in the presence of a judge, can not fail to be an interesting inquiry, and we can not forbear the insertion of some additional memoranda under that head.

Calling a magistrate, in a court of justice, a fool, but not so speaking of him in his absence, and without reference to the execution of his office (*Simmons v. Sweete*, Cro. Eliz. 78; *Reg. v. Wrightson*, Salk. 698; see also 2 Roll. Rep. 78; 4 Inst. 181; *ex parte* the Mayor of Yarmouth, 1 Cox Crim. Cas. 122); giving the lie to the steward of a manor holding a court leet (*Earl of Lincoln v. Fisher*, Cro. Eliz. 581; Ow. 113; Mo. 470), or telling him in court that he is forsworn (2 Rol. Abridg. 78); saying to justices in session "Though I can not have justice here, I will have it elsewhere" (*Rex v. Mayo*, 1 Keb. 508; 1 Sid. 144); putting on one's hat in presence of the lord of a

are found on the judgment-seat, so long, and no longer, will they retain the public confidence.”¹

court leet, and saying he cared not what he could do (*Bathurst v. Cox*, 1 Keb. 451, 465; *Raym.* 78); saying to a justice of the peace in the execution of his office that he was a rogue and liar (*Rex v. Revel*, 1 Str. 420); but not saying of a justice in his absence that he was a scoundrel and a liar (*Rex v. Wellie*, 2 Camp. 142).

And a court may be insulted by the most innocent words uttered in a peculiar manner and tone (per Lord Denman, C. J., *Carus Wilson's Case*, 7 Q. B. 1015). Wherever a justice may commit for such words, the offender may also be indicted for the misdemeanor (Str. 420). A justice can commit only where the contemptuous words are spoken in his presence; in other cases the remedy is by indictment of the offender (*Rex v. Revel*, *ubi supra*; see also *Rex v. Wrightson*, *ubi supra*, and 1 Vent. 169; 2 Keb. 249; *Hutt.* 131; 3 Mod. 139; *Rex v. Selby*, Mich. 4 Anne K. B.; *Rex v. Penny*, 1 Ld. Raym.; *Rex v. Pocock*, Str. 1157). A barrister may also commit a contempt of court in the conduct of a cause (*Re pater*, 33 L. J. 142 Q. B.) and so may one of the parties to the cause in the course of addressing the jury (*Rex v. Davison*, 4 B. & Ald. 329).

The act of congress of March 2, 1831 (*ante*, p. 291), is claimed to have been induced by the case of Judge James H. Peck, a district judge of Missouri, who, having written and published an opinion in a certain case (upon which, during the vacation of the court, one of the counsel therein, one Lawless, published a criticism), at a subsequent term, imposed an imprisonment and fine for contempt of court upon Lawless. Lawless complained to the House of Representatives, which voted articles of impeachment against Judge Peck, which were tried before the Senate in 1830, Monday, Dec. 13, and following days. Judge Peck was acquitted by one vote, but upon the ground that he had acted in good faith and in his understanding of the law (*annals of congress*, p. 4 *et seq.*). And see *Wharton's criminal law*, 3439; *Cole on criminal information*, ch. 2; *Re Oswald*, 1 Dall.; *Respublica v. Passmore*, 3 Yeates, 441.

CHAPTER IV.

OF ORIGINALITY.

143. Once having satisfied itself that the work asking its protection is innocent in its nature, that is, that it does not subvert the state ; or libel, deceive or injure the morals of her subjects, or undermine the sanctity and usefulness of her courts of justice ; the law will, lastly, inquire whether the work be original ; that is to say, whether the person asking to be protected therein, be, in any legal sense, its producer or originator, and entitled to a property by occupancy therein. For, as in the case of a title by occupancy to the solid earth, which he has not made, the author must show something in his published work of which he is the first possessor. Some idea, of which no other can claim to be in possession, must enter into its design, material, or manufacture, or employment. Something there must be new and original.

144. This question of originality is by no means one easy of solution, for many reasons. In the first place—like the fact of innocence—the originality must exist in every case, independently of any actual possession of the manuscript, either by manual custody or statutory registration. Though one be the owner, by legitimate purchase, of a written work ; if it be actually the production of a foreigner, the owner cannot claim the protection of the law therefor. Nor,

again : will the fact of compliance with any formal requisites of a statute, be anything more than *prima facie* proof of his ownership so long as it remains undisputed ; and equity will not fail, in either case, not only to withhold its protection from the work not original, as it did from the work not innocent, but in this case to endeavor, if possible, to restore or compensate therefor to its rightful owner.

145. In the second place, it is very clear that a legal, as contradistinguished from the popular and derivative meaning of the word original, must be sought. For in the field of literature, any such thing as absolute originality is very rarely to be met with. As long ago as the old Librarian wrote, he declared that men were in the habit of "making new books as apothecaries make new mixtures, by pouring only out of one vessel into another ;"¹ and he lived at a time when the presses of the world were not taxed with new volumes, nor the world glutted with book-writers.

That we must accept a legal definition of the words "original" and "originality," as distinguished from the strict and derivative meaning, is apparent, too, from the impossibility of following the latter at all, in these days. If we were to declare that none but he who devised from his own brain, without a knowledge of the compositions of other men, should be entitled to protection, what author could claim that protection ? (And it might be added, of what value would his production be ?) From the very inception of literature, language not only has been a common stock in trade of authors ; but sentiments, similes, phrases, and compositions ; whose recurrence might sorely tax the credulity of those who would believe them mere coin-

¹ Burton's *Anatomy of Melancholy*, 435.

cidences. "There is," said Dr. Johnson,¹ "a common stock of images; a settled mode of arrangement, and a beaten track of transition, which all authors suppose themselves at liberty to use, and which produce the resemblance generally observable among contemporaries. So that, in books which best deserve the name of originals, there is little new beyond the materials already provided. The same ideas and combinations of ideas have been long in the possession of other hands. And, by restoring to every man his own, as the Romans must have returned to their cots from the possession of the world, so the most inventive and fertile genius would reduce his folios to a few pages. Yet the author who imitates his predecessors, only by furnishing himself with thoughts and elegances out of the same general magazine of literature, can with little more propriety be reproached as a plagiarist than the architect can be censured as a mean copier of Angelo or Wren, because he digs his marble from the same quarry, squares his stone by the same art, and unites them in columns of the same order."

". . . . As not every instance of similitude can be considered as a proof of imitation, so not every imitation ought to be stigmatized as a plagiarism. The adoption of a noble sentiment, or the insertion of a borrowed ornament, may sometimes display so much judgment as will almost compensate for invention; and an inferior genius may, without any imputation of servility, pursue the path of the ancients, provided he declines to tread in their footsteps."²

¹ The time came, however, when Dr. Johnson himself was the victim of a piracy. See *Dodsley v. Kinnersley*, Amb. 402.

² "Sir Fret.—I can tell you it is not always so safe to leave a play in the hands of those who write themselves.

"Sneer.—What! they may steal from you—hey! my dear Plagiary?

Virgil imitated Homer, and Horace followed Virgil.

“Hæ tibi erunt artes—

Parcere subjectis, et debellare superbos,”

said Virgil.

“Imperet, bellante prior, jacentem

Lenis in hostem,”

said Horace.

“Nisi Ilias illa extitisset, idem tumulus qui corpus ejus contexerat, nomen ejus obruisset,”

said Cicero; and this, again, we find paraphrased in Horace:

“Vixere fortes ante Agamemnona

Multi, sed omnes illacrymabiles

Urgenter, ignotique longâ

Nocte, carent quia vate sacro.”

So Chaucer followed Petrarch, and Milton followed Æschylus, Virgil, and Spenser.¹ So the author of

“Sir Fret.—Steal! to be sure they may, and, egad—serve your best thoughts as gypsies do stolen children—disfigure them to make 'em pass for their own.

“Sneer.—But if your present work is a sacrifice to Melpomene—and he, you know, never——

“Sir Fret.—That's no security, a dexterous plagiarist may do anything. Why, sir, for aught I know, he might take out some of the best things in my tragedy and put them into his comedy.”—The Critic, act i. scene i.

¹ “Our sage and serious poet Spenser, &c.,” says Milton, in the *Arcopagitica*, 19. Milton told Dryden that Spenser was his “original.” (See Dryden's *Fables*, preface.) Without any such confession, it would have been evident from Milton's earlier works how great was the influence of Spenser over his youthful mind. To say nothing of numerous Spenserian echoes that may be detected, it is to *Faerie Queene* that he especially alludes in *Il Penseroso*, after his mention of the Squire's Tale of Chaucer:

“If aught else great bards beside
In sage and solemn tunes have sung
Of turneys and of trophies hung,
Of forests and enchantments drear
Where more is meant than meets the ear.”

Shakespeare drew from almost every source known to the learned of the day; and so Byron and Tennyson have followed, as in their turn they are and will be followed, let us be certain, until the end of time. Not only the Latin, but every poet since has exclaimed at the "*sic vos non vobis*" of the craft. Literature may be aptly styled a mill, that is always grinding over and over again the same grist. An essayist is nothing more than a man who runs together, into one composition, as much as he can of what has been said by a dozen or a hundred of his predecessors, upon the theme which he has chosen. As every opinion of a judge upon the bench is drawn from the volumes in his library, so the work of every author has grown from his reading and his lore, as well as from his genius and his fancy. A lexicographer is not the originator of language; nor a commentator, of the law; and all these difficulties and complexities must be contemplated and construed, in considering the question of originality before the law.

146. A legal definition of "originality" might, perhaps, well be, that which is, in some ascertainable feature, original. It would evidently be incorrect to substitute the words "part," or "portion," for the word "feature,"—for a work partly original, and partly copied from another, has been repeatedly held to be original, in the eye of the law, only as to the portion not copied; and no amount of original matter added, can justify use of borrowed matter *in solido*, or vest its ownership in the transcriber.

If ten chapters of my novel or cantos of my poem are entirely original, and the eleventh taken from

He quotes at length from the fifth book of the Shepherd's Calendar in his Animadversions upon the Remonstrant's Defense.

another book, the eleventh is none the less another's ; neither does it lose its identity by being printed along with my ten. But, even though not a single line of my work be new or original, if the feature of the plan and arrangement of those lines be so, it is my book. If I should print one play of Shakespeare along with ten plays of my own, or one novel of Charles Dickens, or of George Eliot, along with ten novels of my own, I would not become by the process the owner of Shakespeare's play, or of Dickens's, or of George Eliot's novel. But if I took every word of Shakespeare's plays, and arranged them into a concordance, the concordance would be mine ; or, if I arranged his sentiments alphabetically, the Shakesperian dictionary would be mine. And so I might arrange a cyclopædia of Charles Dickens's or George Eliot's Thoughts ; and even though I wrote no single original line, yet the words to which I contributed the feature of plan and arrangement, the idea of which was mine by occupancy, would be my own. In one case I have contributed originality without obtaining ownership, while in the other I have contributed only ingenuity and industry, and have rightfully acquired ownership.

The distinction becomes still more subtle, when we reflect that there might be a dozen (and doubtless, in fact, there are more than that number) different dictionaries of Shakespeare, or of elegant extracts therefrom, upon the plan of alphabetical arrangement, and yet each of them original in the legal sense ; for although in general a plan may be original, yet an alphabetical plan cannot be monopolized by any one ; and concordances, like commentaries, are likewise capable of being produced indefinitely, without infringement upon each other.

It is very apparent that equity cannot stop to pull over the libraries of the world every time an injunction is asked, or a piracy is alleged. If we were to insist upon rare and absolute originality in a work, our courts must be furnished not only with complete legal but complete literary libraries—must be turned into academies, and our judges into critics and librarians, which we cannot evidently do.

147. A learned French commentator,¹ with the facility of his language, has thrown much light upon this question, by dividing all literary composition into works *de genie*—of genius, and *de l'esprit*—of ingenuity or intelligence. And the legal meaning of "originality" may be said to include both of these. Thus, it was a genius who wrote Shakespeare. It was an intelligence that could compile from his plays a history of his native land, or a concordance of his speech. We have but to remember that the title to literary property is a title by occupancy, and assume that, in the case of literary property, the occupancy may be in any feature of the things occupied, and the whole way will become plain. If the work contain an idea, even though it be only an idea as to the plan, arrangement, or adaptability of old and well-worn matter: so that idea is first occupied and possessed by the arranger and adapter, the law will give him his proprietorship therein, equally as if the matter itself were produced entirely by himself. But—as we shall see, when we presently come to discuss the decisions upon this subject—some such idea the writer must possess; and he is not entitled to seize upon anything that can be traced to the ownership of another, any more than he will be allowed to possess himself of a

¹ M. Merlin, *Repertoire de Jurisprudence*, title *contrefaçon*, § xi.

horse that wanders near his own preserve, or of a house whose door stands open before him.

148. The word 'author,' which is, as we shall presently see, the one used both by the English and American statutes of copyright law, is not, in itself, one readily capable of exact definition. Some light may be thrown upon its precise significance by the expression used in the French copyright statute or decree of July 19th, 1793, to which we have already referred. Instead of the word authors, the expression "les auteurs d'écrits eu tout genre" was there substituted,—in the construction of which expression M. Merlin says: "Mais il ne faut pas nécessaire, dans cet article, les mots écrits 'en tout genre,' de l'expression 'auteurs;' et la propriété dont cet article déclare que les écrits en tout genre sont susceptibles, ne peut évidemment être réclamée que par ceux qui en sont auteurs, dans la véritable acception de ce terme."

Or, "le mot 'auteurs' quel sens a-t-il en general? Quel sens a-t-il relativement aux écrits? Quel sens a-t-il dans la loi du 19 Juillet, 1793?"

"En general, le mot auteur designe Quivant la definition qu'en donne le dictionnaire de l'academie Francaise celui que est la premiere cause de la quelque chose: et il est aussi, suivant la même définition, synonyme d'inventeur.

"Appelé aux écrits, le mot auteur se del (toujours suivant le même dictionnaire) de celui qui a composé un livre, qui a fait quelques ouvrages d'esprit, en vers ou en prose, et il est bien clair qu'en ce sens, le mot auteur est opposé a copiste.

"Enfin la loi du 19 Juillet, 1793, ne permet pas de douter qu'elle n'exclue également les copistes de la denomination d'auteurs. Les littérature ou de gravure, dit-elle, art. 7, ou de toute autre production de

l'esprit ou du génie, qui appartient aux beaux-arts, en auront la propriété exclusive pendant dix années. Ces termes, "ou de toute autre production de l'esprit ou du génie, qui appartient aux beaux-arts," ne sont ni obscurs ni équivoques. Ils signifient clairement que les productions de l'esprit ou du génie sont de deux sortes ; que les unes consistent en ouvrages de littérature ; que les autres appartiennent aux beaux-arts ; mais que nul ne peut être réputé auteur soit d'un ouvrage de littérature, soit d'un ouvrage d'arts, si ce n'est pas à son esprit ou à son génie qu'en est due la production.

"Donc, les expressions "d'écrits en tout genre," ne sont employées dans l'art. 1^{er} de la même loi, que pour désigner tous les genres de compositions littéraires.

"Donc, elles n'y désignent pas les écrits qui ne seraient pas des compositions, mais de simples copies.

"Donc, celui qui ne fait que copier une composition littéraire, ne peut jamais être réputé auteur de la copie de cette composition, ni par conséquent en avoir la propriété, dans le sens attaché à ce mot par la loi du 19 juillet 1793 et par le Code penal 1810."¹

149. The essential attribute of one who would establish himself to be "an author" of anything, is, that he must be the first producer of the thing composed. As for instance, let us state that Shakespeare was the author of the plays which bear his name: Schlegl was the author of a translation of those plays into German: Halliwell was the author of an edition of those plays: Furness was the author of a variorum collection, from various sources, of notes to certain of those plays, Price was the author of an alphabetical

¹ Merlin, Répertoire de Jurisprudence, titre Contrefaçon,

arrangement of sayings and proverbs taken from those plays. Now here Shakespeare, Schelgl, Collier, Furness, and Price were all authors, "de l'esprit," though only the first was, primarily, an original writer, "de génie." And so there may be, besides, an author of original matter, an author of secondary matter, such as a translation, an edition, a collection, or an arrangement. And yet the authors of all of these are authors, in the legal sense of the word, and will be protected by law in the product of their labors.

Or, again, take the case of legal reports. A reporter collects, in book form, a certain number of opinions of judges, accompanied by statements of the cases in which they were uttered. A compiler of digests takes a certain number of these reports; and, by drafting resumés of the point involved in each case found in them, forms a digest. After a certain number of digests have been published, still another compiler forms from them a table of the names of cases contained in the digests, with the volumes and pages where they occur. And still another writer may, from the reports or the digests, or both, compose an abridgment, or an index, or a compendium of practice, or innumerable volumes of use to the practicing lawyer. Now, every one of these volumes are of value to the profession. No case involving a legal question can be tried without their aid—no opinion given, or pleading drawn—and yet, if we were to insist upon the derivative meaning of "originality" and "author," neither the compiler of the reports, of the digest, nor of the index, abridgment or compendium, could be protected in the profits of his toil, in what the profession know to be its most laborious and important branches. For, in the latter case, not one of the persons mentioned have exercised the slightest invention. Even the

judges arrived at their opinions from the perusal of the opinions of other judges, and carefully guarded themselves from the exercise of any such faculty as invention—they merely pronouncing over again what had been enunciated thousands of times before.

150. In the mercantile law there is such a thing as admixtion, and rules are laid down following the ownership of the things mixed, to the very limits of possibility, and providing for the rights and remedies of all concerned. But in the law of literature no such provision is possible.

The utmost that the law can do is to require and insist that the secondary author shall have exercised original labor in devising the plan, selection, arrangement, and presentation of the materials which he has found to be *in medio*, and open to all. It will not be sufficient, on the one hand, that he has bestowed upon his work the manual labor of copying or clipping the material; nor will it be necessary, on the other, that he have used such judgment in discovering the wants of the public, and such skill in catering to them, as to have produced a really valuable book. But the product of actual mental labor, whether valuable¹ or worthless, will be protected by law.

¹ “The mere utility of a book, or its adaptation to the end which it professes to answer—its value in a critical point of view—can not determine its legal originality. The law takes upon itself none of the functions of the critic, in this sense. It looks only for some substantial product of individual thought or labor, and leaves to public taste or judgment to determine its value, and to bestow its due reward. So that whether a book be more or less useful, more or less successful, or brilliant, or important, if in a just sense the claimant is the author of that in which he claims an exclusive property, he is entitled to his copyright *valere quantum, valere potest*. It is true, there may be cases, in which the question will arise, whether a subsequent author has made any im-

So, as we shall presently see, the science of mathematics is a subject *in medio*; and the law will protect a man in the ownership of a set of mathematical problems or tables, calculated by himself, even though everybody knows that the problems cannot be varied because their principles are immutable; and although a calculation by any other person must, *ex necessitate*, produce identically the same tables, the same problems, and the same results.¹ “Sans doute,” says the learned commentator, before quoted, “Sans doute, il est des compilations d’ouvrages littéraires qui, par l’immensité des recherches qu’elles supposent, par le discernement et le goût qu’elles exigent, peuvent et doivent passer pour de véritables productions de l’esprit, et qu’il n’est pas plus permis de contrefaire que si elles étaient réellement des compositions originales.

“Par exemple, les Pandectes de Pothier ne sont, à peu de chose près, qu’une compilation des Institutes, du Digeste du Code et des Nouvelles de Justinien; c’est-à-dire, de recueils qui, depuis plusieurs siècles, sont incontestablement dans le domaine du public.

“Cependant, si Pothier vivait encore, et qu’un imprimeur s’avisât de publier une édition de ses Pandectes, sans sa permission, qui est-ce qui oserait conprovements upon his predecessors; and, in such cases, it may become necessary to apply collaterally, as a test of originality, an inquiry into the practical and relative value of his publication. But this will be done, in order to determine whether he has borrowed any, and how great a part of his matter from sources common to all writers—whether he has actually produced anything of his own, and not whether his production is better or worse than the productions of others. If it appears that he has produced anything of his own, not borrowed or adopted from a previous writer, its effect in advancing or retarding the progress of knowledge, or its value in a critical point of view, can have no influence upon his title to a copyright.” Curtis on Copyright, 172.

¹ Bailey v. Taylor, 3 Law Journal, 56; and see *post*.

tester à Pothier le droit de la poursuivre comme contrefacteur ? Qui est-ce qui oserait dire que Pothier, en compilant à sa manière les Institutes, le Digeste, le Code et les Nouvelles de Justinien, n'a pas fait un ouvrage qu'il n'appartenait qu'à un jurisconsulte du premier ordre d'entreprendre et d'achever ? Qui est-ce qui oserait dire qu'un simple copiste eût pu, comme lui, tirer tous les textes du droit romain de l'espèce de chaos dans lequel ils sont dispersés ; les ranger dans un vaste cadre où, enchaînés les uns aux autres, ils s'expliquent mutuellement ; rapprocher de chaque règle générale toutes les exceptions qui la limitent ; placer à côté de la loi ancienne, la loi moderne qui la modifie ; et la loi plus moderne encore qui l'abroge ; en un mot, substituer l'ordre à la confusion, la lumière, à l'obscurité, la facilité d'étudier et d'apprendre aux dégouts et aux épines qui arrêtent, dès leurs premiers pas, tous les aspirants à l'exacte connaissance des lois romaines ?

“ Compiler de cette manière ce n'est pas copier c'est créer ; c'est faire ce que ferait un architecte qui, après avoir démoli un édifice gothique—en emploierait tous les matériaux pour élever un superbe palais, un temple majestueux.”

“ Mais il est aussi des compilations qui se font comme—on le dit vulgairement—avec des ciseaux, qui n'exigent, qu'un travail de manœuvre et qui, pour cette raison, ne peuvent pas mériter à leurs artisans le titre d'auteurs.”¹

151. In the legal sense, then, of the word, the originality of a literary production will be found to exist :

First. In its author (if an original work).

Second. In its compiler or arranger—(if a com-

¹ Merlin, Répertoire de Jurisprudence, titre Contrefaçon, § xi.

pilation, such as a dictionary, glossary, gazetteer, encyclopedia, abridgment, guide-book, text-book, manual of an art, of a science, or, generally; any other book of reference),—or,

Third. Its translator—(in case of a translation). And the ownership of the work will follow the individual or individuals in whom its originality exists, until he or they part with the same by his or their own act.

152. An author is well described, by Dryden, as one who “has the choice of his own thoughts and words.” And, following him, we may define an author as, one who by his own intellectual labor produces a new work, composed in his own thoughts and words.¹

A compiler is one who by his own intellectual labor, makes, arranges, or frames a composition or collection of literary or scientific matter, not originally produced by him; but which he has himself first brought together in an arrangement new with himself.²

It is important, at the outset, to remark that the words compiler, editor, arranger, codifier, abridger, &c., though technically distinguished, will be regarded by the law as one and the same; that is, in so far as their legal rights and liabilities are concerned.

If it were otherwise, the law of copyright might be-

¹ Author.—(Latin, auctor; Italian, autore; Spanish, autor; French, auteur or auteur).—He to whom anything owes its origin; originator; maker; first cause; one who composes a work of science or literature; the first writer of a thing; distinct from a translator or compiler; a composer; a writer.—Worcester.

² Compiler.—(Greek, *πιλόω*, to press close; Latin, *pilo*; Italian, *compilare*; Spanish, *compilare*; French, *compiler*).—One who frames a composition from various sources; a collector of literary fragments.—Worcester.

come a complicated and intricate mass of subtleties instead of the simple and logical thing it is.

153. The law can recognize but two classes of intellectual labor, viz., original labor and secondary labor. An original work alone has, properly speaking, an author. The producer of a secondary work, that is, a work consisting of parts, passages, or matters collected, condensed, or amplified from various sources, is a compiler,¹ editor, arranger, or abridger, as the case may be.

An editor is also one who superintends, revises, or prepares a work for publication, or—in popular language—one who conducts a newspaper, but none the less his labors are secondary, and not original.

154. There is, however, a third sort of literary laborers, in the classification of whom, and of the results of whose labors, an apparent, though—as we think will presently appear—no real difficulty arises. This class of intellectual laborers are translators.

A translator is one who renders or interprets literary matter from one language into another, retaining the idea and the sense, which are not his, and clothing them in words which are his own.

Now, a translation, under the division above indicated, is clearly a secondary work. A translator, however, is not a secondary laborer; and it is not erroneous, but perfectly correct and proper, to speak of the author of a translation.²

¹ In the time of Alfred the local customs of the several provinces of the kingdom were grown so various that he found it expedient to compile the Dome Book. 4 Blackstone Com. —. Atwill v. Ferrett, 2 Blatchf. 45; DeWitt v. Brooks, MS. N. Y. 1861; Nelson, J., cited in Law's Digest of Patent and Copyright Cases, 174.

² All translations, I suppose, may be reduced to these three heads: first, that of metaphrase, or turning an author, word for word and line by line, from one language into another.

155. The apparent paradox, therefore, arises, that while the labor is original, the result is secondary; and hence the difficulty to which allusion has been made.

The work of a translator is clearly original, since it not only presupposes and requires knowledge, care, foresight, and a wide appreciation of the difference between the real and popular significance of idioms, expressions, phrases, and words in the language into which, as well as in the language out of which, he translates; but a positive primary labor—as contradistinguished from the secondary labor of selecting transcribing, and compiling, which the mere collector or editor performs.

Again, the labor of a conscientious and faithful translator is much more original and primary, for instance, than the labor of a mere paraphraser; since a creditable paraphrase may be produced without the slightest knowledge of, or familiarity with, or reference to, the language of the original work, by mere reference to a previous translation, and a book of synonyms. The paraphraser's labor might be secondary, but the work of a translator is at least original, in the contemplation of the common law and statutes of copyright,

This manner was: Horace—"His Art of Poetry," translated by Bengonson. The second way is that of paraphrase, or translation with latitude, where the author is kept in view by the translator so as never to be lost; but his words are not so strictly followed as his sense, and that, too, is admitted to be amplified, but not altered. Such is Mr. Waller's translation of Virgil's fourth *Æneid*. The third way is that of imitation, where the translator (if now he has not lost that name) assumes the liberty, not only to vary from the words and sense, but to forsake them both, as he sees occasion, and taking only some general limits from the original to run divisions on the groundwork as he pleases. Such is Mr. Cowley's practice in turning two odes of Pindar's and one of Horace's into English. Dryden's Works, Scott's Ed. xxii.

and of the definition given by them of the word "author."

In the earliest days of our literature, the translator's work was regarded as one of much greater merit and genius than the author's. The mere faculty of invention was formerly little prized ; while the learning required to translate, was of the highest value, and exacted the highest respect.

Chaucer, the father of English literature, never attempted invention ; neither did the author of Shakespeare, whose stories are, without exception, taken from the classics, or the Italian, and from other and foreign sources.

The reason undoubtedly was, and is, that education does not develop (possibly by affording ruts and grooves for the intellect, it rather retards) the faculty of literary invention ; and in the days when education was a thing very rarely met with, the mere faculty of story-telling was of no estimation whatever.¹

It is an interesting reflection that stories, legends, and tales—what in fact is now learnedly known as "folk-lore," sprung entirely from the lowest classes intellectually—from the utterly uneducated, in whom superstition and imagination go hand in hand—the imagination of one generation becoming, in the course of time, the superstition of the succeeding, and the fancy of each lending new exaggerations and amplifications to the superstition of the age before it.

It is essential, of course, that the translated work should be in a language foreign to the one into which it is translated. One who should take a work by an author of his own country, and carefully change each word into a synonym, thus destroying the identity

¹ For curious confirmation of this fact, see Prof. John Fisk's "Folk Lore." Boston, 1872.

of the language, but in reality leaving the ideas and thoughts the same, would not be held, by this exercise of disingenuous ingenuity, to be entitled to the rights of a translator.¹ It is of the utmost importance that these classes of secondary works should be carefully approached and examined; for it is in regard to their construction that the questions of originality arise, which we are about to consider.

156. In the copyright law of the United States, these three classes of writers we have alluded to are undoubtedly included under the word "author," or at least under the three words "author," "designer," or "proprietor," in the first sentences, which are as follows:

"Any citizen of the United States, or resident therein, who shall be the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph, or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and the executors, administrators, or assigns of any such person shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same; and, in the case of a dramatic composition, of publicly performing or representing it, or causing it to be performed or represented by others. And authors may reserve the right to dramatize or to translate their own works."² But,

¹ The rights of a paraphraser do not appear to have ever been recognized as such in the law.

² Revision of 1873-4, § 4952; 3 Feb. 1831, ch. 16, § 1, v. 4, 436; 18 Aug. 1856, ch. 169, § 1, v. 11, 138, 139; 3 Mar. 1865, ch. 126, § 1, v. 13, 540; 8 Pet. 662; 14 How. 530; Hopk. ch. 351; 1 Blatchf. 625; 1 Story, 17; 3 Story, 778; 4 McLean, 316, 317; 5 Id., 37; 2 Wood & Min. 46; 2 Bla. 46, 170, 336; 2 Paine. 383.

in the interpretation of this law, the distinctions above alluded to arise, and make it of the utmost importance to carefully examine and determine them.

157. Whenever an author can identify his own labor in the book or production of another, he can claim damages for its use, or protection by injunction against its further illegitimate employment. It is a maxim of the law that wherever there exists a wrong, there also exists somewhere a remedy. But if it should appear that the portion used was so insignificant or so trifling as to be unworthy the consideration of the dignity of the bench, the above rule might not apply;—for *de minimi non curat lex*. Mere quotation (i. e., fair quotation) is always optional; the only test, as we have seen, is whether the author has been injured by the use of his language.¹

If the unwritten law which prohibits larceny and theft were capable of being applied to a man's thoughts, as well as to his watch or his purse, no statutes of copyright would be necessary. Their existence is only important because of the impracticability of carrying the law's recognition of *meum* and *tuum* so far. Their principle and spirit is precisely the same; and the law of copyright is only the eighth commandment applied to intellectual and immaterial labor. Upon this point it is unnecessary to dwell further.²

The simple rule is, that a man is entitled to the product of his own literary labor. And the simple question that the law will ask, without reference to the form or the pretension of the work is, Is it inclusive of any genuine product of his own labor? is it an original conception, an original composition, an original compilation, an original translation, codification, ex-

¹ Curtis on Copyright 247, 249, 250, 252.

² See *post*, chapter on piracy.

emplification, arrangement, analyzation, or annotation?

“In truth, in literature, in science, and in art,” says Judge Story,¹ “there are and can be few, if any, things which, in an abstract sense, are strictly new and original throughout. Every book in literature, science, and art, borrows, and must necessarily borrow and use, much which was well known and used before. No man creates a new language for himself—at least if he be a wise man—in writing a book. He contents himself with the use of language already known, and used and understood by others. The thoughts of every man are more or less a combination of what other men have thought and expressed, although they may be modified, exalted, or improved by his own genius or reflection. If no book could be the subject of copyright which was not new and original in the elements of which it is composed, there could be no ground for any copyright in modern times; and we should be obliged to ascend very high even in antiquity to find a work entitled to such eminence.”

158. “The law does not require that the subject of a book should be new, but that the method of treating it should have some degree of originality about it,” not merely colorable.²

Thus, for instance, the composing receipts, or arranging them in a book, will give a copyright to the compiler; but the mere collecting them and handing them over to a compiler will not.³ Or, one may have

¹ *Emerson v. Davies*, 3 St. 779; *Vid.* also *Gray v. Russel*, 1 St. 16.

² *Copinger on Copyright*, 21; *Sayre v. Moore*, 1 East, 361; *King v. Reed*, 8 Ves.; *Jarrould v. Houlston*, B. K. & J. 708; *Reed v. Carusi*, 98 Law Rep. O. S. 411; *Wilkins v. Atkins*, 17 Ves. 422.

³ *Rundell v. Murray*, Jac. 314; *Newton v. Cowrie*, 4 Bing. 234.

copyright in mathematical tables, actually calculated by himself, although, on a similar calculation, precisely the same tables would be produced from the same sources, upon an application of the same principles by anybody else, and although they may have been published previously, and before his appeared.¹ Upon this principle, mere indices of title,² and school-books, no matter how elementary their character—as we have remarked elsewhere in this chapter—will be protected.³

“Anything like absolute originality in the composition of a work nowadays,” says a late and learned writer, “seems to be almost an impossibility. The range of human ideas on any subject is limited; and the productions of the busy brains and pens of preceding thinkers are so numerous, that, if books are to be written, the writers must be, to some extent at least, beholden for their materials to those who have written before. If no copyright exist in a work, of course subsequent writers may make of it what use they like, and reproduce it to any extent they please. But if a copyright does exist in it, then the important and somewhat difficult question arises: In what manner, and to what extent, may subsequent authors make use of the materials contained in it without an infringement of the copyright? In other words, how far may

¹ *Bailey v. Taylor*, 3 L. J. 66; “I admit,” said Lord Eldon (in *Matthewson v. Stockalde*, 12 Ves. 275), “that no man can monopolize such subjects as the English Channel, the Island of St. Domingo, or the events of the world; and every man may take what is useful from the original work, improve, add, and give the public the whole, comprising the original work, with the additions and improvements.”

² *Banker v. Caldwell*, 3 Minn. 94.

³ *Emerson v. Davies*, 3 Story, 768; *Lennie v. Pillans*, 5 Sess. Cas. 2 Law, 416; *Constable v. Brewster*, 3 S. 215 (N. E. 152).

one writer avail himself of the product of another's labor in which copyright exists, without subjecting himself to the charge of piracy?"¹

He who claims the originality must show something which the law can recognize as the result of his own, and not of another's industry and skill. "Something he must show to have been produced by himself; whether it be a purely original thought or principle, unpublished before, or a new combination of old thoughts and ideas and sentiments, or a new application or use of known and common materials, or a collection, the result of his industry and skill. In whatever way he claims the exclusive privilege accorded by these laws, he must show something which the law can fix upon, as the product of his own, and not another's labors. But, in order that the law should do this ample justice to the great variety of claimants, it is necessary that its rules should be capable of adaptation to the objects of their labor. They must include in their range everything that can be justly claimed as the peculiar product of individual efforts; otherwise, they would exclude from the benefits of literary property, objects which are as clearly the products of individual labor as the most original thoughts ever written, namely, new and important combinations and arrangements, or collections of materials known and common to all mankind."²

159. No matter how original in his conception the author may be, or at what date he writes, or how soon after the discovery, or invention, or introduction of his theme, he clearly cannot copyright his subject-matter. He may even own it, but still it is free to the

¹ Shortt, 171.

² Curtis on Copyright, 171, 172.

world, to be described and commented upon by whomsoever will.¹

One who has written a treatise, for example, on the moon, cannot copyright the moon as a subject, and give out that thereafter he intends to monopolize it. Nor can he copyright the name of a cardinal virtue, and prevent the use of that title forever afterwards.² Nor, if one happened to be the owner of land upon which an aereolite had fallen, or upon which a curious boulder happens to rest, which attracts the attention of scientific men, could he copyright the subject of that aereolite, or that boulder, and prevent its description by others. He would have power, indeed, to prevent an incursion upon his premises for the purpose of their examination, but his power over his property would not extend to words. He could not enjoin their discussion.

Neither, on the other hand, will the fact that the subject-matter is common, deprive the author of the product of his original labor, *bona fide* performed, in creating that subject-matter.

160. "I do not see why," said Lord Eldon, "if a person collects an account of natural curiosities, and such articles, and employs the labor of his mind by giving a description of them, that is as much a literary work as many others that are protected by injunction.

¹ See, however, the case of *Prince Albert v. Strange*, 2 De G. & Sm. 674.

² *Isaacs v. Daly*, N. Y. Times, March 3d, 5th, and 6th, 1874. In that case the defendant, who was proprietor of the Fifth Avenue Theater, in the city of New York, had advertised and announced his intention of producing at that theater, on a certain night, a play called "Charity;" the plaintiff, who claimed to have written and copyrighted a play by that name, some time before, moved for an injunction, not pretending that the play was the same as the one he had written, but merely claiming the title "Charity." Curtis, J., refused the injunction. See this case reported *post*, chapter on Dramatic Copyright.

and by action. It is equally competent to any other person, perceiving the success of such a work, to set about a similar work, *bona fide* his own; but it must be in substance a new and original work, and must be handed out to the world as such.¹

The fact that the subject of the work is common, does not deprive an author of copyright in the product of the labor which he has *bona fide* spent on it, or render it less necessary for any subsequent author to have recourse to the original sources. So in *Longmans v. Winchester*,² the plaintiffs were held entitled to copyright in the "Court Calendar," a work consisting of lists of members of the houses of peers and commons, &c., and an injunction was granted restraining the defendants from copying and publishing the plaintiffs' work. "The question before me," said Lord Eldon, "is whether it is not perfectly clear that, in a vast proportion of the work of these defendants, no other labor has been applied than copying the plaintiffs' work. From the identity of the inaccuracies, it is impossible to deny that the one was copied from the other *verbatim et literatim*. To the extent, therefore, in which the defendant's publication has been supplied from the other work, the injunction must go; but I have said nothing that has a tendency to prevent any person from giving to the public a work of this kind if it is the fair fruit of original labor, the subject being open to all the world; but if it is a mere copy of an original work, this court will interpose against that invasion of copyright."³

A work entitled "The Guide to Science," which

¹ *Hogg v. Kirby*, 8 Ves. 221.

² 16 Ves. 269; *Vid.* also *Kelly v. Morris*, L. Rep. 1 Eq. 702; 14 L. J. N. S. 222; 35 L. J. 423; ch. 14, W. R. 496.

³ *Longmans v. Winchester*, *ubi supra*.

laid no claim to any originality with reference to the scientific doctrines treated in it, but contained, in the form of questions and answers, a scientific exposition of some of the ordinary phenomena of human life, in parts digested from different works; was held to constitute an original work, in which the author was entitled to copyright. Wood, V. C., said, "That an author has a copyright in a work of this description is beyond all doubt. If any one, by pains and labor, collects and reduces, into the form of a systematic course of instruction, those questions which he may find ordinary persons asking in reference to the common phenomena of life, with answers to those questions and explanations of those phenomena; whether such explanations and answers are furnished by his own recollection of his former general reading, or out of works consulted by him for the express purpose, the reduction of questions so collected, with such answers under certain heads and in a scientific form, is amply sufficient to constitute an original work, of which the copyright will be protected.¹

In *Cary v. Faden*² the question is fully illustrated. In 1797, the plaintiff Cary was employed to make a survey of certain roads and highways in Great Britain. Upon the completion thereof, he published a book called "*Cary's New Itinerary*," which followed the plan and contained much of the materials of an older work called "*Patterson's Road Book*," but contained also many corrections of and additions to it. Faden having published a book bearing the same relation to Cary's that Cary's did to Patterson's, Cary filed a bill in chancery to restrain Faden from publishing his work, on the ground that it was not original, but,

¹ *Jarrold v. Houlston*, 3 K. & J. 708.

² 5 Ves. 23.

either in whole or part, a copy of Cary's. The lord chancellor (Loughborough) refused an injunction. He said, "What right had the plaintiff to the original work? If I were to do strict justice I should order the defendants to take out of their book all that they have taken from the plaintiff, and reciprocally the plaintiff to take out of his all he has taken from Patterson. I think the plaintiff may be contented that a bill is not filed against him."¹ An action was brought in 1801 by the same plaintiff against Messrs. Longman & Rees for publishing a pirated edition of the same or a similar work, the book published by the defendants being professedly a twelfth edition of the original work by Patterson, but containing nine-tenths of Cary's alterations and improvements. The plaintiff was held entitled to recover. Lord Kenyon, Ch. J., said, "Certainly the plaintiff had no title on which he could found an action to that part of his book which he had taken from Mr. Patterson's; but it is as clear that he had a right to his own additions and alterations, many of which were very material and valuable: and the defendants are answerable at least for copying those parts in their book. . . . The courts of justice have been long laboring under an error, if an author have no copyright in any part of a work unless he have an exclusive right to the whole work."²

161. "The identity of a literary work," says Blackstone,³ "consists entirely in the sentiment and the language. The same conceptions, clothed in the same words, must necessarily be the same composition; and whatever method may be taken of exhibiting that composition to the ear or the eye of another, by recital,

¹ 1 East, 358.

² Cary v. Kearsley, 4 Esp. 169.

³ Com. 406.

by writing, or by printing, in any number of copies, or at any period of time, it is always the identical work of the author which is so exhibited."

162. If the author of a work be unknown, and impossible to be ascertained, the copyright will be held to belong to the publisher.¹

Where one procures from another the subject-matter or data of a work, and, upon procuring them, frames them into a work—the authorship of the work exists in the person composing it, and not in the one furnishing the material.²

Accordingly, in the case of *De Witt v. Brooks*,³ it was held that where the incidents of a person's life were furnished by him to one who prepared them for publication, and the copyright was taken out in the name of the person furnishing the facts, it was held that he was not the author, and that a person claiming as his assignee, could not maintain an action for an infringement.

But a judicious, careful, and useful new arrangement of old and well-known material, may be produced by original labor; and if so, will be entitled to protection.⁴

And so, under the copyright law of 1831, it was held that, to constitute a person an author, he must, by his own intellectual labor, applied to the materials of his composition, produce an arrangement or compilation new in itself;⁵ but he cannot obtain an owner-

¹ *McLean v. Moody*, Scotch Sess. Cas. 2nd series, vol. 20, 1163.

² *DeWitt v. Brooks*, MS. cited *Law's Digest of Patent and Copyright Cases*, 174.

³ MS. cited *Law's Digest of Patent and Copyright Cases*, 174.

⁴ Per Lord Jeffrey in *Alexander v. McKenzie*, 9 Scotch Sess. Cas. 2 ser. 758.

⁵ *Atwill v. Ferrett*, 2 Blatchf. 39.

ship in those materials in the same state in which he finds them, or in which they are furnished to him.¹

In the case of *Alexander v. Mackenzie*,² the pursuer had copyrighted a manual of practical forms and styles of the writs and instruments introduced by the heritable securities and infestment acts, those acts giving only general descriptions of the forms to be used.

The court, in rendering its judgment (per Lord Fullerton) remarked : " It is said, that owing to the particular nature of the styles they cannot be the subject of copyright, because they are drawn up precisely after the form prescribed in the statute, and because any styles relating to the same subjects as those given by the complainer must, if the directions of the statutes and phraseology of conveyancers were used, be expressed in the same manner exactly as those proposed by the complainer. Now, it may be quite true that, if the statute had supplied certain forms by which the operations intended to be thereby regulated were to be done, if the statute had contained, as such statutes sometimes do, an appendix exhibiting certain schedules of forms which it was only necessary for anyone to copy in order to avail himself of the provisions of the act, then I hold that the reprinting of such forms in a separate publication would not give him a copyright in those forms. But the case here is different, for the statute only gives very general directions and descriptions of the styles that are to be used. The schedules are very general in their terms, and it is no doubt of great practical importance to suit these general directions to each case falling under the statute as it may arise. The preparing and adjusting of such writings require much care and exertion of mind. As

¹ *Id.*

² 9 Scotch Sess. Cas. 2nd ser. 758.

to invention, that is a different thing ; it does not require the exercise of original or creative genius, but it requires industry and knowledge." And he was, therefore, held to have in them such a property as courts of equity would protect.

163. A work, to be entitled to recognition as sufficiently original for the purposes of protection, must, therefore, contain internal evidence of labor, thought, and skill, on the part of the one claiming the originality of the secondary labor.

164. A not unusual case arises where a person compiles a list of names of public men for reference. In such cases, the first compiler undoubtedly has a copyright in his compilation, though the material is in no sense original, and is equally accessible to any person seeking it. But how far a second compilation of the same will be an infringement upon the first, does not appear to be fully settled.

In the case of *Longman v. Winchester*, where this question arose, it was evident, from the identical reappearance in the second compilation of certain inaccuracies in the first, that the defendant had performed scarcely any other labor than merely to copy, *verbatim et literatim*, from the plaintiff. "To the extent," said Lord Eldon, "in which the defendant's publication has been supplied from the other work, the injunction must go ;" and he adds, by way of *obiter*, "but I have said nothing that has a tendency to prevent any person from giving to the public a work of this kind (a 'court calendar,' or lists of members of the houses of lords and of commons, &c.), if it is the fair fruit of original labor, the subject being open to all the world.¹ Take the case of a map describing a particular country, and a map of the same country afterwards.

¹ 16 Ves. 271.

published by another person : if the description is accurate in both, they must be pretty much the same ; but it is clear the latter publisher cannot, on that account, be justified in sparing himself the labor and expense of actual survey, and copying the map previously published by another."

The circumstances here supposed by Lord Eldon, appear actually to have arisen in the case of *Kelly v. Morris*.¹

And the court, in its judgment, stated the rule with great clearness, as follows :

"The compiler of a directory or guide-book containing information derived from sources common to all, which must of necessity be identical in all cases, if correctly given ; is not entitled to spare himself the labor and expense of original inquiry, by adapting and republishing the information contained in previous works on the same subject. He must obtain and work out the information independently for himself ; and the only legitimate use which he can make of previous works is for the purpose of verifying the correctness of his results,"² as Lord Eldon said in *Longman v. Winchester*.³

Lord Eldon had previously said, with reference to a "Road Book," "It is certainly competent to any other man to publish a book of roads ; and if the same skill, intelligence, and diligence are applied in the second instance, the public would receive nearly the same information from both works ; but there is no doubt that this court would interpose to prevent a

¹ L. Rep. 1 Eq. 702 ; 14 L. J. N. S. 222 ; 35 L. J. 423, ch. 14 ; W. R. 496.

² *Vid.* also *Lewis v. Fullerton*, 2 Beav. 14 ; *Murray v. Bogue*, 1 Drew, 353.

³ 16 Ves. 271.

mere republication of a work which the labor and skill of another person had supplied to the world."

165. This fact, perhaps, can only be established by the testimony of individuals employed on the second work. In *Kelly v. Morris*, canvassers and employees of the defendant were examined; and one of them admitted that he had "done his work carelessly, and had not taken the trouble to make the necessary inquiries; and such testimony, where internal evidence (as in the case of *Longman v. Winchester*, where the inaccuracies of the first work had been copied along with the rest¹) is wanting, will be the safest test.

166. As to in how far portions of one original work may be quoted, contained, or incorporated in another, without interfering with the originality of the second—it would be difficult to state any one principle of universal application. The decisions will be found mainly to be governed by the circumstances of the particular cases. A quotation is, of course, a reprinting of the portion quoted. Without doubt, the author has a right to every line of his work; and the only question can be—at least the only question for the court—is the author injured, or in danger of being injured, by the publication of quotations from his book?

The gist—the valuable part of a work—might readily be copied, and credit therefor duly given, and yet the quoting be illegal. The value of the matter taken, rather than the quantity thereof, must be regarded. If the tendency of the quotation be to supersede the sale of the work quoted from,² then it will

¹ It is curious to observe that the first conclusive proof of the forgeries of Chatterton was of this description. Skeat's *Chatterton*, vol. 1, p. 16.

² *Emerson v. Davies*, 3 Story, R. 768, 797.

be illegal. "When it comes to a question of quantity," said Lord Cottenham, "it must be very vague. One author might take all the vital part of another's book, though it might be a small proportion of the book in quantity. It is not only quantity, but value that is always looked to."¹

There are several cases where courts of equity have refused interference, on account of the minuteness of the injury occasioned by short extracts or quotations. Where the value of the extract or the amount of injury is minute and trifling, courts will discourage the practice of occupying their time by applications in which it would be harassing and difficult to ascertain, by account, the precise value of the injury alleged to have been committed.² But the court, however, would not refuse to allow an attempt to assess the damages by a jury. "There is no doubt," said Lord Eldon, "that a man cannot, under pretense of quotation, publish the whole or a part of another's book, though he may use—what, in all cases, it is very difficult to define—fair quotation."³ And in determining the question of fair quotation, the intention of the person quoting will make no difference.⁴ The question must be, has the quotation the effect of injuring the sale of the book quoted from? The work might be quoted from with a view, even, of advertising or complimenting it; and Lord Ellenborough instanced—[what has become of such habitual custom in these days]—the practice of reviewers and literary critics, who include large extracts

¹ *Bramhall v. Halcombe*, 3 Mylne & C. 737, 738.

² *Whittingham v. Wooler*, 2 Swanst. 428; *Tonson v. Walker*, 3 Id. 672; *Bell v. Whitehead*, 17 L. J. 142; *Wilkins v. Aikin*, 17 Ves. 422, 424.

³ *Wilkins v. Aikin*, *supra*.

⁴ *Curtis on Copyright*, 245 (note).