CHAPTER IX.

NEWSPAPER REPORTS.

I. REPORTS OF JUDICIAL PROCEEDINGS.

Reports of trials and judicial investigations.

It may now be considered as established beyond possibility of doubt that an impartial, correct (although not *verbatim*) and *bonâ fide* report, and though published from day to day, of any proceedings (at any rate, if not *ex parte*) of a court of justice, is privileged; unless the publication be prohibited by the Court itself, or the nature of the trial unfits it for publication; and the privilege is not confined to reports of the proceedings of the superior courts.

"It has been adjudged," says Lord Campbell, C.J.,(*a*) "that, if the due administration of justice is supposed so to require, the Court has authority to make an order against publishing any part of the trial till the whole is concluded. Nevertheless, where no such order has been made, the practice has long existed of daily publishing, without any disapprobation from the Court, each day's proceedings till the trial is concluded. And in several instances this practice—which, in reality, only extends the area of the Court—has been found highly beneficial in the discovery of material evidence. . . . . The law upon such a subject must bend to the approved usages of society, though still resting upon the same principle, that what is hurtful and indicates malice should be punished, and that what is beneficial and *bonâ fide* should be protected."

Grounds for immunity.

The reason for allowing this liberty of publication is stated by the same learned judge in another case,(*b*) to be—that the balance of public benefit from the publicity is great: it is of great consequence that the public should know what takes place in Court, and the proceedings are under the control of the judges; the inconvenience, therefore, arising from the chance of the injury to private character, is infinitesimally small as compared to the convenience of publicity. To the same effect Lawrence, J., in *Rex* v. *Wright*:(*c*) "The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to private persons whose conduct may be the subject of such proceedings."

(*a*) *Lewis* v. *Levy* (El. Bl. & El. 560; 27 L. J. 282, Q. B.)
(*b*) *Davison* v. *Duncan* (7 El. & Bl. 231). (*c*) 8 T. R. 298.

Reports of judicial proceedings do, in fact, only extend that publicity which is so important a feature of the administration of the law in England, and thus enable to be witnesses of it, not merely the few whom the Court can hold, but the thousands who can read the reports.(*a*) "The Courts," says Lord Campbell,(*b*) "are open to all; but they are of limited extent, and only a small number of persons can be present in them; but, by means of the press, the whole nation is informed of what takes place, and is put in a position to form an opinion upon the conduct of the jury, the judge, and the witnesses."

According to Cockburn, C.J., the immunity enjoyed by publications of the proceedings of courts of justice rests upon a twofold ground. "In the English law of libel," says his Lordship,(*c*) "malice is said to be the gist of an action for defamation. And though it is true that by malice, as necessary to give a cause of action in respect of a defamatory statement, legal, and not actual, malice is meant—while by legal malice, as explained by Bayley, J., in *Bromage* v. *Prosser*,(*d*) is meant no more than the wrongful intention which the law always presumes as accompanying a wrongful act, without any proof of malice in fact—yet the presumption of law may be rebutted by the circumstances under which the defamatory matter has been uttered or published; and if this should be the case, though the character of the party concerned may have suffered, no right of action will arise. 'The rule,' says Lord Campbell, in the case of *Taylor* v. *Hawkins*,(*e*) '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.' It is thus that, in the case of reports of proceedings of courts of justice, though individuals may occasionally suffer from them, yet, as they are published without any reference to the individuals concerned, but solely to afford information to the public, and for the benefit of society, the presumption of malice is rebutted, and such publications are held to be privileged. The other, and the broader, principle on which this exception to the general law of libel is founded is, that the advantage to the community, from publicity being given

(*a*) *Per* Wilde, B., delivering the judgment of the Court of Exchequer in *Popham* v. *Pickburn* (7 H. & N. 898; 5 L. T. N. S. 846; 31 L. J. 133, Ex.).
(*b*) *Andrews* v. *Chapman* (3 Car. & Kir. 289).
(*c*) *Wason* v. *Walter* (L. Rep. 4 Q. B. 87). (*d*) 4 B. & C. 255.
(*e*) 16 Q. B. 321; 20 L. J. 314, Q. B.

to the proceedings of courts of justice, is so great, that the occasional inconvenience to individuals arising from it must yield to the general good."

Publication prohibited or improper.

With reference to the last of the qualifications stated at the beginning of this chapter, of the general right to publish the proceedings of courts of justice, Bayley, J., says, in *Rex* v. *Creevey*:(*a*) "It has been argued that the proceedings of courts of justice are open to publication. Against that, as an unqualified proposition, I enter my protest. Suppose an indictment for blasphemy, or a trial where indecent evidence was necessarily introduced, would every one be at liberty to poison the minds of the public by circulating that which, for the purposes of justice, the Court is bound to hear? I should think not; and it is not true, therefore, that in all instances the proceedings of a court of justice may be published."

And it was expressly decided in *Rex* v. *Carlile*(*b*) that it is not lawful to publish even a correct report of the proceedings in a court of justice, if it contain matter of a scandalous, blasphemous, or indecent nature. "We are bound," said Bayley, J.,(*c*) "for the purpose of justice, to hear evidence in the course of judicial proceedings, the publication of which, at any distant period of time, or at any time afterwards, may have the effect of an utter subversion of the morals and religion of the people. It very often happens that, for the purposes of justice, our ears may be shocked with extremely offensive and indelicate evidence. But though we are bound, in a court of justice, to hear it, other persons are not at liberty afterwards to circulate it at the risk of those effects, which, in the minds of the young and unwary, such evidence may be calculated to produce." To the same effect Maule, J., in a later case:(*d*) "Matters may appear in a court of justice that may have so immoral a tendency, or be so injurious to the character of an individual, that their publication could not be tolerated."

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

(*a*) 1 M. & S. 281.
(*b*) 3 B. & Ald. 169.
(*c*) 3 B. & Ald. 167.
(*d*) *Hoare* v. *Silverlock* (9 C. P. 23).
(*e*) 3 B. & Ald. 167.

The publication of a report of a prosecution for selling an obscene libel ("The Confessional Unmasked," *ante*, pp. 387, 388), which set forth the whole of the obscene work, was held to be itself an obscene libel.(*a*)

Subject to the qualifications that the publication be not of matters blasphemous, seditious, or indecent, and that it be not forbidden by the Court, it is justifiable to publish a fair and accurate report of any trial or other proceeding, in any court of justice; and no action of libel can be maintained for a statement, occurring in such report, of the charges made against any of the parties.

Publication of proceedings not *ex parte*.

In the first reported case on this subject,(*b*) which was an action against the publisher of the *Times* for an alleged libel contained in a report of an application made to the King's Bench for an information against two justices for conspiracy, the defendant pleaded only the general issue, and at the trial proved that the report was a true and faithful account of what had passed in the King's Bench upon the motion. The Court were of opinion that the action could not be maintained; but, some doubts being entertained whether the matter of justification should not have been specially pleaded, the case stood over, and no judgment was ever given.

The *dicta* of many learned judges in subsequent cases are clear on the subject. "As a general rule," says Maule, J.,(*c*) "it may be assumed that the publication of a fair account of what passes in a court of justice, not *ex parte*, is justifiable, unless there be something to take it out of that rule." "It is a good defence to an action of libel," says Lord Campbell, C.J.,(*d*) "that it consists of a fair and impartial (though not *verbatim*) report of a trial in a court of justice."

The same protection has been extended to a fair report, published in a newspaper, of the proceedings held in gaol before a registrar in bankruptcy, under sects. 101 and 102 of the Bankruptcy Act, 1861, upon the examination of a debtor in custody.(*e*) "The only question," said Pollock, C.J., "is whether the registrar's court was, under the circumstances, a public court. I think that it was. We ought, in my opinion, to make as wide as possible the right of the public to know what takes place in any court of justice, and to protect a fair, *bonâ fide* statement of proceedings there."

(*a*) *Steele* Appt., *Brannan* Respt. (L. R. 7 C. P. 261).
(*b*) *Curry* v. *Walter* (1 Bos. & P. 525).
(*c*) *Hoare* v. *Silverlock* (9 C. B. 23).
(*d*) *Lewis* v. *Levy* (El. Bl. & El. 553).
(*e*) *Ryalls* v. *Leader* (L. Rep. 1 Ex. 296; 14 L. T. N. S. 563; 35 L. J. 185, Ex.).

The proceedings before examiners appointed under 9 Geo. 4, c. 22, s. 7, to examine into the sufficiency of the sureties on the trial of an election petition, were also held to be proceedings before a legal court, of which a fair and accurate report might be published.(*a*)

It was held by the House of Lords,(*b*) 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 libellous, 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 decreet 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 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 decreet 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 incontestable in that stage), yet the whole is supposed to be the result of regular proceedings in court."(*c*)

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,(*d*) liable to an action of libel, and, if special damage has been caused by the publication, also to an action for a false representation.

(*a*) *Cooper* v. *Lawson* (8 A. & El. 746).
(*b*) *Fleming* v. *Newton* (1 H. L. Cas. 363).
(*c*) 1 H. L. Cas. 377, 378.
(*d*) *McNally* v. *Oldham* (8 L. T. N. S. 604).

"He would have been justified," said Lefroy, C.J., "if he had published the judgment as it stood in reality, as a judgment annulled 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 *bonâ fide* and according to the truth of the transaction. The very contrary has been the case here."

Reports of *ex parte* proceedings and preliminary investigations before magistrates.

With regard to reports of *ex parte* proceedings and preliminary investigations the law does not seem to be quite free from doubt.

Where the *ex parte* proceeding or preliminary investigation, though it lasts during several days, is also the end of the matter as terminating in the discharge of the person accused, it may be taken as settled that a correct and impartial report of it may be published.

Thus, in a case where, a charge of perjury having been preferred against the plaintiff, the investigation before a magistrate was adjourned from time to time, and the defendant published in his newspaper a report of each day's proceedings in next day's impression—one on the 26th of June, stating that the plaintiff was charged with perjury, and an adjournment, but reserving the report; another on the 4th of July, also stating an adjournment, in language intimating that there would be a report of the proceedings of the day to which the proceedings were adjourned; and the third on the 18th of July, stating that "the magistrate dismissed the summons, there not being sufficient evidence to secure a conviction," the two former reports being headed "Wilful and Corrupt Perjury;" it was held by the Court of Queen's Bench, after verdict finding that the reports were fair and correct, that an action of libel could not be maintained by the plaintiff for their publication.(*a*)

In reply to an argument, urged on behalf of the plaintiff, that the privilege of reporting legal proceedings must be confined to the superior courts of law and equity, the Court said: "On such a question the dignity of the Court cannot be regarded; and we must look only to the nature of the

(*a*) *Lewis* v. *Levy* (El. Bl. & El. 537; 27 L. J. 287, Q. B.).

alleged judicial proceeding which is reported. For this purpose no distinction can be made between a court of *pie poudre* and the House of Lords sitting as a court of justice."

"Proceedings before magistrates under stat. 11 & 12 Vict. c. 43," said Lord Campbell, C.J., in delivering the judgment of the Court, "with respect to summary convictions and orders in which, after both parties are heard, a final judgment is given, subject to appeal, are, we think, strictly of a judicial nature: the place in which such proceedings are held is an open court; the defendant as well as the prosecutor, has a right to the assistance of an attorney and counsel, and to call what witnesses he pleases; and both parties having been heard, the trial and the judgment may lawfully be made the subject of a printed report, if that report be impartial and correct."

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

dismissed the summons. We do not see how, on principle, this is to be distinguished from the daily report in a newspaper of a criminal trial, which lasts several days, before the Court of Queen's Bench or the Central Criminal Court, or at the assizes. . . . . The decision of Lord Chief Justice Eyre and his brethren, in *Curry* v. *Walter*(*a*) rested on sound legal principles, and is now almost universally approved of. On the same principles, we think, we ought to hold in this case that no action can be maintained for any part of the impartial and correct and *bonâ fide* report of the proceedings against the plaintiff before the magistrate, which ended in the charge being dismissed; although, the proceeding being adjourned from day to day, the report appeared in portions in different numbers of the defendant's journal."

Examination ending in committal or holding to bail.

Where, however, the result of the preliminary proceedings before the magistrate is that the person charged with an indictable offence has been committed for trial, or held to bail, the publication of a report of the proceedings is, according to several authorities, a libel. In the more recent cases, however, on the subject, the publication of such reports is regarded with greater favour; and the older cases, when the particular circumstances of each come to be examined, are not quite so strong the other way as they are sometimes thought to be.

In the first case, indeed, on the subject, that of *Rex* v. *Lee*,(*b*) tried before Heath, J., in 1804, being an information against the printers of the *Sussex Journal* for publishing the depositions, taken before a justice, against a person accused of murder, the statement of the depositions, according to the meagre report of the case,(*c*) containing "several expressions and representations prejudicial to the character of" the accused, the learned judge refused to admit evidence of the correctness of the report, being "of opinion that the mere

(*a*) 1 Bos. & P. 525. Lord Campbell pointed out in a previous part of his judgment that the proceeding reported in *Curry* v. *Walter* (*vide ante*, p. 538), was an *ex parte* one, "whereas," said his Lordship, "in the case which we have to consider, the present plaintiff was fully heard before the magistrate, and had an opportunity to call what witnesses he chose on his behalf. Nor was the proceeding more final there than here; for the application to the King's Bench for a criminal information might have been renewed on an affidavit of notice given to the magistrates; and an indictment for the conspiracy might have been found by a grand jury."

(*b*) 5 Esp. 123.

(*c*) As to the general character of Espinasse's Reports, see 13 Q. B. 840, 844, and 5 El. & Bl. 453.

publication of *ex parte* evidence, before a trial, was of itself highly criminal."

In *Rex* v. *Fisher*,(a) which was an indictment for a libel, tried before Lord Ellenborough in 1811, the captain of a vessel was charged before a magistrate with a felonious assault on a lady on board his own ship, and was held to bail to take his trial for the offence. The report, published in the defendant's newspaper, was not a mere statement of the nature of the charge and the evidence given on the examination before the magistrate, but a highly coloured narrative of the transaction, interspersed with comments of the writer tending to inflame violently the public against the accused. It told of the assistance rendered by a passenger who, having his attention attracted by the cries of the lady, "instantly rushed to the spot in time to prevent the perpetration of the vile and dishonourable intentions of the captain, from whose loathsome embrace he extricated his almost senseless victim;" stated that immediate application was made for a warrant, "in consequence of which the criminal is likely to meet the legal punishment of his villainy;" described the accused as not seeming "the least affected at his disgraceful situation, or feeling in the slightest degree the very contemptuous manner in which he was regarded by all who were aware of his unmanly conduct;" and continued—"He employed a shorthand writer, a barrister, and a phalanx of friends, if possible to intimidate his accuser by the publicity of her exposure. Notwithstanding these attempts, however, to screen himself behind her delicacy, she gave her testimony in the clearest and most collected manner, which conscious innocence and inmate virtue could only have enabled her to accomplish."

Such an inflammatory account of the preliminary investigation before the magistrate could not, of course, be regarded as an impartial and dispassionate report of what had taken place, and we can feel no surprise at its being held a libel. "Does this publication," said Lord Ellenborough,(b) "leave the mind in a state of equipoise as to his guilt or innocence? No one with the feelings of a man can read it without being roused to indignation against the person whose misconduct is depicted in such glowing colours. Even if a fair and dispassionate account of the examination were allowed, is this account fair and dispassionate? It comes to conclusions which would only be fair after verdict. It assumes everything that the woman said to be true, and represents

(a) 2 Camp. 563.

(b) 2 Camp. 571.

the accused as conscious of his guilt. It talks of 'the contemptuous manner in which he was regarded by all who were aware of his unmanly conduct,' and triumphantly asserts that 'he is likely to meet the legal punishment of his villainy.' Allowing the utmost latitude to fair and candid statement, is this to be tolerated? Jurors and judges are still but men; they cannot always control feelings excited by such inflammatory language. If they are exposed to be thus warped and misled, injustice must sometimes be done."

Lord Ellenborough, indeed, lays down the rule broadly, that all publications of preliminary proceedings before magistrates are illegal. "The publication," he said, "of proceedings in courts of justice, where both sides are heard and matters are finally determined, is salutary, and therefore it is permitted. The publication of these preliminary examinations has a tendency to pervert the public mind, and to disturb the course of justice; and it is therefore illegal. . . . . Trials at law, fairly reported, although they may occasionally prove injurious to individuals, have been held to be privileged. Let them continue so privileged. But these preliminary examinations have no such privilege. Their only tendency is to prejudge those whom the law still presumes to be innocent, and to poison the sources of justice. "But," added his Lordship, "what defence can be made for a publication like this, which, besides containing an *ex parte* statement of evidence before a magistrate, against a man who has had no opportunity to defend himself, actually denominates him a *criminal* and describes him as a monster?" This case can hardly be regarded as a decisive authority against the lawfulness of publishing a bare and impartial report of preliminary examinations before magistrates.

The next case on the subject of *ex parte* examinations(*a*) was also one in which comments on the conduct of the parties were added to the report. A riot having taken place at Brighton, the high constable called for the assistance of the military, who charged the mob, and one person was killed. An inquest was held before the coroner, which lasted some days and ended in a verdict of wilful murder against the high constable, one of his assistants, and the soldier who caused the death of the deceased. The defendant, before the jury had finished their labours, published in his newspaper a statement of the evidence, accompanied with remarks tending to cast blame on the high constable and the other peace officers for imprudently and unnecessarily

(*a*) *Rex* v. *Fleet* (1 B. & Ald. 379).

calling out the military for the purpose of suppressing the tumult which had arisen. The Court made absolute a rule for a criminal information.

In *Duncan* v. *Thwaites*(*a*) the plaintiff had been charged before a magistrate with indecently assaulting a female child, and the report contained a statement that the evidence of the child herself and her cousin "displayed such a complication of disgusting indecencies that we cannot detail it." The Court of King's Bench held (on demurrer to a plea) that the report could not be justified on the ground of being a correct report of the proceedings which took place in the course of a preliminary inquiry before a magistrate; and there is no doubt that the judgment of the Court, which was delivered by Abbot, C.J., proceeds on the general ground that *any* publication of such proceedings is unlawful. The Chief Justice said of the case of *Curry* v. *Walter*(*b*) that, though of great authority in itself and deriving additional weight from the manner in which it is mentioned by Lawrence, J., in *The King* v. *Wright*,(*c*) "it has not, however, received the sanction of subsequent judges; and it differs in some important facts from the present case. It was an account of a proceeding in this Court, a Court instituted for final determination as well as preliminary inquiry, and whose doors are, as they ought to be, open to so many of the public as can be conveniently accommodated within its walls. The proceeding now in question was before justices of the peace, and was of a kind which they may lawfully conduct in *private* whenever they may think fit to do so. That proceeding terminated by a refusal of the application, and not by putting the subject into a train for further inquiry and trial. The proceeding in question terminated, in the first instance, by holding the accused to bail for his future appearance before the justices, and finally by holding him to bail to take his trial before a jury. Such a trial, therefore, might be expected at the time of each of the publications. This Court has, on more than one occasion within a few years, been called on to express its opinion judicially on the publication of preliminary and *ex parte* proceedings, and has on every occasion delivered its judgment against the legality of such proceedings, as was done by Mr. Justice Heath in the year 1804, in the case of *The King* v. *Lee*.(*d*) Other judges have delivered opinions to the same effect, and it is well known that many other persons have lamented the

(*a*) 3 B. & C. 556. (*b*) 1 Bos. & P. 525.
(*c*) 8 T. R. 293. (*d*) 5 Esp. 123.

inconvenience and the mischievous tendency of such publications. They were, within the memory of many persons now living, rare and unfrequent; they have gradually increased in number, and are now unhappily become very frequent and numerous; but they are not on that account the less unlawful, nor is it less the duty of those to whom the administration of justice is entrusted to express their judgment against them;" and his Lordship added, that the Court wished it not to be inferred from the preceding remarks that they thought the publication of *ex parte* proceedings even in that court was a matter allowable by law.

Later cases.

Lord Campbell(*a*) points out that, in all the cases relied on in support of the proposition that the publication of any preliminary proceeding before a magistrate is unlawful, there were vituperative comments accompanying the statement of the evidence, or some aggravation attending the publication of the report, or some peril which was likely to be caused to the person complaining of it, and that the same objection could not exist in the case of a report of a preliminary inquiry before a magistrate, which turned out to be unfounded and was dismissed.

"We are not prepared," said his Lordship, in delivering the judgment of the Court of Queen's Bench in the case of *Lewis* v. *Levy*, "to lay down for law that the publication of preliminary inquiries before magistrates is universally lawful; but we are not prepared to lay down for law that the publication of such inquiries is universally unlawful;" and of the case of *Curry* v. *Walter* he says that it "has been often criticized, but never overturned, and often acted upon."

The legality of publishing an accurate and impartial report of the preliminary proceeding, where it has ended in the dismissal of the charge, must, as before stated, be taken to be now settled by the decision in *Lewis* v. *Levy*;(*b*) and some eminent judges have recently refused to join in unqualified disapprobation of accurate and impartial reports of proceedings which do not so end, but in which the accused is held to bail or committed for trial.

"We give no opinion," said Lord Campbell, in the case last referred to, "in favour of the general legality of publishing reports of preliminary examinations before a magistrate, where the party accused has been committed or held to bail for an indictable offence; but we cannot join in the sweeping condemnation of police reports

(*a*) *Lewis* v. *Levy* (El. Bl. & El. 557; 27 L. J. 287, Q. B.
(*b*) El. Bl. & El. 537; 27 L. J. 287, Q. B.

which has been pronounced *obiter*, before the benefit arising from those reports had been fully experienced. We believe that they often lead to the detection and punishment of crime, and that they sometimes assist in the vindication of character. Against the severe denunciations of police reports by several eminent judges may be placed the following opinion of Lord Denman, C.J., solemnly delivered by him before a select committee of the House of Lords, in the year 1843, on the law of libel: 'I have no doubt that' police reports 'are extremely useful for the detection of guilt, by making facts notorious, and for bringing those facts more correctly to the knowledge of all parties interested in unravelling the truth. The public, I think, are perfectly aware that those proceedings are *ex parte*, and they become more and more aware of it in proportion to their growing intelligence; they know that such proceedings are only in course of trial, and they do not form their opinion till the trial is had. Perfect publicity of judicial proceedings is of the highest importance in other points of view, but in its effects on character I think it desirable. The statement made in open court will probably find its way to the ears of all in whose good opinion the party assailed feels an interest, probably in an exaggerated form, and the imputation may often rest on the wrong person: both these evils are prevented by correct reports.'"

And Cockburn, C.J., in a still more recent case,(*a*) referring to the modern growth of the right to publish reports of judicial proceedings, said: "Till a comparatively recent time the sanction of the judges was thought necessary even for the publication of the decisions of Courts upon points of law. Even in quite recent days judges, in holding publication of the proceedings of courts of justice lawful, have thought it necessary to distinguish what are called *ex parte* proceedings as a probable exception from the operation of the rule. Yet *ex parte* proceedings before magistrates, and even before this Court—as, for instance, on applications for criminal informations—are published every day, but such a thing as an action or indictment founded on a report of such an *ex parte* proceeding is unheard of; and if any such action or indictment should be brought, it would probably be held that the true criterion of the privilege is, not whether the report was or was not *ex parte*, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent

(*a*) *Wason* v. *Walter* (8 B. & S. 730; L. Rep. 4 Q. B. 94; 19 L. T. N. S. 418; 38 L. J. 34, Q. B.).

of all intention to do injury to the reputation of the party affected."(*a*)

Result of older cases.

Having regard to these remarks of judges so distinguished, it appears exceedingly doubtful whether a correct, impartial, and dispassionate report of proceedings before a magistrate, which end in the accused being held to bail or committed for trial, would now be held a libel. We know, as a matter of fact, that such reports are daily published with impunity.

Since the preceding was written (1871), a great forward step (in the opinion of the author) has been taken by the Common Pleas Division in *Usill* v. *Hales*,(*b*) holding that the report of an *ex parte* application to a magistrate, which he declined to entertain on the ground that he had no jurisdiction, was privileged. Lord Coleridge, C.J., indeed, was of opinion that the decision in *Lewis* v. *Levy* (*ante*, pp. 540, 541) covered the case. "I am of opinion," said his lordship, "that this is a case in which there was a judicial proceeding, terminating, not in the discharge of the party accused, because there was no such person before the magistrate, but terminating in a refusal to proceed with the charge, and to set the criminal process in motion. I am unable to distinguish the principle of *Lewis* v. *Levy* from that involved in the present case." A surer ground on which to rest the decision is (it is respectfully submitted) supplied by what is stated in a previous part of his lordship's judgment—viz., "that there is a certain elasticity in the rules which apply to questions of privilege (development is perhaps the more correct expression), and that the courts have from time to time applied, as best they may, what they think is the good sense of the rules which exist to cases which have not been positively decided to come within them."(*c*)

Proceedings before magistrate in matter over which he has no jurisdiction.

If a matter which he has no jurisdiction to deal with in any way is brought before a magistrate, the publication of a report of the proceedings, containing defamatory matter, cannot be justified on the ground of its being a correct and fair report of the proceedings of a legal court.

"As to magistrates," said Lord Campbell in *Lewis* v. *Levy*,(*d*) "if, while occupying the bench from which magisterial business is usually administered, they, under pretence

(*a*) See the case of *Pinero* v. *Goodlake* (15 L. T. N. S. 676).
(*b*) L. R. 3 C. P. D. 319. (*c*) P. 327.
(*d*) El. Bl. & El. 554: 27 L. J. 287, Q. B. Cf. *Hibbins* v. *Lee* (4 F. & F. 243), where Cockburn, C.J., laid it down that a public writer was privileged in discussing the conduct of magistrates in dismissing a charge of felony without fully hearing the evidence, and even in commenting upon the evidence given, in support of the view that the charge ought not to have been dismissed.

of giving advice, publicly hear slanderous complaints over which they have no jurisdiction, although their names may be in the commission of the peace, reports of what passes before them are as little privileged as if they were illiterate mechanics assembled in an alehouse. Hence the well-decided case of *McGregor* v. *Thwaites*."

In *McGregor* v. *Thwaites*,(a) a Mr. Prince and a Captain Antrim waited upon the lord mayor elect (who sat for the lord mayor) to request his advice as to three orphan children who had been brought home to England by Captain Antrim from Poyais on the Mosquito Shore in America, to which place a large number of persons had emigrated from Great Britain. A report of what occurred before the magistrate was published in a newspaper, of which the following was the important part: "Mr. Prince stated that about 200 of the victims of delusion had returned from the Mosquito Shore to Honduras in a state of utter destitution, and of disease which terminated the sufferings of a great part of them soon after. They must have all died but for the charity of the people and the authorities of Honduras. The poor creatures had been led by Mr. McGregor to expect a land where they would live in the greatest plenty, where everything was flourishing, and but little labour would be required: it was mentioned to them as a mark of the improvement of the place, that a fine theatre had been established and other establishments formed, indicative, not merely of civilization and comfort, but of luxury. Captain Antrim mentioned a charge which the poor creatures had preferred to him against McGregor. Most of those who sailed from Leith were poor people, who had by their frugality saved small sums of money of from £15 to £30; McGregor learned the property which the settlers had with them, and, telling them that Scotch money would not pass at the settlement, persuaded them to give it all up to him, and take his drafts for the amounts upon his bankers at Poyais. The savings were all given up to him, and it is perhaps unnecessary to add, that the settlers, on their arrival at the houseless wilds of Poyais, found that no such thing as a banking house was in existence. Captain Antrim regretted that he had not arrived sooner, as another ship had sailed with settlers for the same place just before his arrival, who, he feared, would also fall a sacrifice. He had thought it his duty to make the statement publicly, that the poor might be put on their guard." To an action of libel for the publication of this report, the publisher pleaded

(a) 3 B. & C. 556.

that Mr. Prince and Captain Antrim did go before the magistrate and make the statements charged as libellous, and that the alleged libel contained a correct and fair account of the proceedings before the magistrate, and that the facts charged in it were true. The jury having found that the report was a true, fair, and correct report of the proceedings before the lord mayor elect, but that the facts charged in it were not true, the Court held that the publication could not be justified on the ground of its being a correct and fair report of what took place before the lord mayor elect, as the matter was not brought before him in his judicial character or in the discharge of his magisterial functions.

"I think," said Littledale, J., "that the lord mayor elect had no legal authority to inquire into the matter brought before him by Captain Antrim; that he was not then exercising his office of magistrate, and that this case is to be considered in the same light as if the communication had been made to him in his private room. It is unnecessary, therefore, to decide in this case, whether the defendant would have been justified in publishing this matter in a newspaper, if it had contained a correct report of a proceeding which had taken place before a magistrate acting in a judicial capacity."

The Court also held, in this case, that the defendant was not justified by reason of his having mentioned in the libel the names of the parties who stated the matter of it to the magistrate; because, as to part of the slanderous matter, no action would lie against the party who stated it to the magistrate: it had become actionable only by reason of its being published in print, and, therefore, by stating the names of the persons who uttered it, no right of action was given against them.

Distinction between inherent and resulting want of jurisdiction.

On the subject of want of jurisdiction, an important distinction was pointed out by Lord Coleridge, C.J., in *Usill* v. *Hales*(*a*) between "a real and inherent want of jurisdiction on account of the nature of the complaint, and what may be called a resulting want of jurisdiction because the facts do not make out the charge." "It has long been held," said his lordship, "and I think most properly held, that it is not the result but the nature of the application made to the magistrate which founds his jurisdiction; and, wherever an application is made to a magistrate as to a matter over which, supposing the facts to bear out the statement, he has jurisdiction, he then has jurisdiction to ascertain whether the facts make out a case for the exercise of that jurisdiction which, if the facts make out the case, undoubtedly he has;" and his lordship referred

(*a*) L. R. 3 C. P. D. 323.

in support of this view to *Reg.* v. *Bolton*,(*a*) and the judgment of Sir John Richardson in *Brittain* v. *Kinnaird*.(*b*)

Report of irrelevant matter.

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

"I do not concur," said Bramwell, B., in *Ryalls* v. *Leader*,(*c*) "in the suggestion made to us, viz., that what is irrelevant and libellous on a third person is not protected. There are cases where an individual must suffer for the public good, and it is difficult to draw the line between relevancy and irrelevancy." "Wherever," said Channell, B., in the same case, "the report is of something not wholly irrelevant, then, at any rate, the fact that it contains reflections on a third person does not prevent the reporter from being protected."

Report must not contain injurious comments.

The report of judicial proceedings, whatever the tribunal before which they take place, must, in order to be protected, be free from comments injurious to the character of any of the persons named in it, and must be accurate as well as fair. "The moment comments are made," said Lord Campbell,(*d*) "the immunity is gone."

"If any comments are made," said the same learned judge in another case,(*e*) "they should not be made as part of the report. The report should be confined to what takes place in court, and the two things, report and comment, should be kept separate."

Report should not be merely of effect of evidence.

The report of preliminary proceedings before justices ought to state nakedly, and without any high colouring, the facts as they appear in evidence; it should not describe their effect merely, as pointing to or establishing the guilt of the accused, or confirming or negativing the account of the matter given by him.

Thus, a report of the proceedings upon the hearing of a summons before a magistrate, charging a person with having committed perjury, which stated simply that the evidence before the magistrate "entirely negatived" the story of the accused, was held not to be protected; and a plea, justifying it on the ground that it was a fair and correct report of the

(*a*) 1 Q. B. 66. (*b*) 1 B. & B. 432.
(*c*) L. Rep. 1 Ex. 300; 14 L. T. N. S. 563; 35 L. J. 185, Ex.
(*d*) *Lewis* v. *Levy* (El. Bl. & El. 544). Cf. *Behrens* v. *Allen* (3 F. & F. 135).
(*e*) *Andrews* v. *Chapman* (3 Car. & Kir. 288).

proceedings which had taken place, was held bad, even after verdict for the defendant.(a) "The reporter," said Lord Campbell, "takes upon himself to aver that the evidence adduced against the plaintiff entirely negatived his story. Such conclusions are wholly unjustifiable. And, where the report of law proceedings has mixed up with it commentaries reflecting upon any of the parties whose names appear in it, it entirely loses the privilege which it might otherwise claim."

Comments on Evidence.

This observation of Lord Campbell's must, of course, be limited, in its application, to remarks of a defamatory character which cannot be justified as fair and *bonâ fide* comments on a matter of public interest; such fair and *bonâ fide* comments being, as we have before seen,(b) protected.

It must also be borne in mind that not all comments require a justification. Some comments are little more than another mode of stating what has gone before. "It would be extravagant," said Lord Denman, C.J., in *Cooper* v. *Lawson*,(c) "to say that in cases of libel, every comment upon facts requires a justification. But a comment may introduce independent facts, a justification of which is necessary. A comment may be the mere shadow of the previous imputation; but if it infers a new fact, the defendant must abide by that inference of fact, and the fairness of the comment must be decided upon by the jury."

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

(a) *Lewis* v. *Levy* (El. Bl. & El. 544).
(b) See the preceding chapter. (c) 8 A. & El. 753.
(d) *Stiles* v. *Nokes* (7 East, 453).

Curry v. *Walter*(*a*) only shows that a fair, plain, unvarnished account of proceedings in a court of justice is not a libel; but not that a highly-coloured picture, mixed up with insinuations of perjury is not a libel.(*b*)

Report must not insinuate a charge of perjury.

The report must not even insinuate that any of the witnesses had committed perjury.

Thus, where an account of the proceedings under a commission of lunacy, in which the plaintiff had been examined as a witness (to prove the insanity of Mr. W.), did not set out his evidence, but stated shortly that "it was *attempted to be proved* by the testimony of Mr. R., the plaintiff, that Mr. W. had conversed in a peculiar manner with him on a certain day;" that "on this evidence it was *meant to be inferred* that Mr. W. was insane at that time and on that day; but Mr. R.'s testimony being *unsupported* by that of any other person, it failed to have any effect on the jury;" that "the *object of fixing* on *the 22nd of September* was to set aside a will supposed to be made on that day;" and concluded thus: "Mr. Jervis made a splendid speech of two hours' duration in favour of Mr. W.'s sanity, and commented with cutting severity on the testimony of Mr. R.," it was held that the whole publication, taken together, was libellous, and that a plea justifying the concluding sentence only was bad on demurrer.(*c*) "Reading the whole of the libel together," said Tindal, C.J., "it is impossible not to perceive that the intention of the writer was not simply to convey an idea that the speech made on the occasion alluded to was cutting and severe, but that the severity was deserved. . . . . The statements that 'it was attempted to be proved,' &c., that 'it was meant to be inferred,' that the plaintiff's testimony was 'unsupported,' and that the 'object' of fixing on the day named was to set aside a will—all clearly show that the writer of the paragraph intended to convey the imputation that the plaintiff's testimony was untrue, and got up for the occasion, and discredited by the jury. Then the conclusion that Mr. Jervis 'made a splendid speech, and commented with *cutting severity* on the testimony of the plaintiff,' was calculated, in conjunction with what had gone before, to impress the reader with the notion that the severity was deserved, and the force of it felt by the plaintiff, from a consciousness of its justice." Parke, J., added: "I think it impossible to read the publication in question without coming to the conclusion that it is libellous, inasmuch as it imputes

(*a*) 1 Bos. & P. 525. (*b*) 7 East, 504.
(*c*) *Roberts* v. *Brown* (4 Moo. & S. 407; 10 Bing. 519).

perjury to the plaintiff; and a defendant has no right to select for justification a part of a libel which, standing alone, would possibly not be actionable."(*a*)

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

(*a*) See also *Stiles* v. *Nokes* (7 East, 453).
(*b*) *Cooper* v. *Lawson* (8 A. & El. 746).

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

Report must be accurate.

The report, in order to be protected, must be not only *bonâ fide*, but also accurate, that is, substantially accurate. It need not be a *verbatim* report, or set out fully all that occurred at the trial; but, if it summarizes or abridges, it must do so fairly, and not give a one-sided complexion to the narrative.

Condensed Report.

On this subject Lord Campbell, C.J.,(*a*) thus explained the law to a jury: "The privilege—a valuable privilege for the public—of publishing reports of proceedings in courts of justice would be useless if it were necessary to set out every word of the evidence and of the speeches, and of what was said by the judge. However, that is not necessary; if what is stated is substantially a fair account of what took place, there is an entire immunity for those who publish it."

Another learned judge (Byles, J.) directed a jury that newspapers had a full right to publish either a *verbatim* or an abridged or condensed report of what passed in courts of justice; and, however it might affect the character of an individual, he had no ground for an action of libel unless it was an unfair report. In reporting the proceedings of courts of justice omissions and abridgments were essential, but they must not be such as to change the complexion of the transaction; if they did, there would not be a fair and just report.(*b*)

Where the report of a trial professed to give a short summary of the facts of the case, and stated that the counsel for the defendant was both extremely severe and amusing at the expense of the plaintiff's attorney; and then, without setting out the evidence, professed to give an outline of the speech of defendant's counsel, the part set out containing some very severe reflections on the conduct of the plaintiff's attorney in advising the form of action with a view to his own profit, a plea justifying the report as being *in substance* a true report of the trial was held bad on demurrer.(*c*)

Report setting out facts as stated by counsel for one party.

A report is not justifiable which merely sets out the circum-

(*a*) *Andrews* v. *Chapman* (3 C. & Kir. 289).
(*b*) *Turner* v. *Sullivan* (6 L. T. N. S. 130).
(*c*) *Flint* v. *Pike* (4 B. & C. 473).

stances of the case "as stated by the counsel for" one of the parties, and does not give the evidence.

Such a report, said Tindal, C.J., does "not even profess to be an account taken from evidence given at the trial, nor even to be an account taken from counsel's statement, but afterwards corrected by the evidence given in the cause. Everybody knows that the statement of a counsel is *ex parte*, and that he is often instructed to make allegations which it is afterwards impossible to support in proof. Would it be either safe or proper that after a cause has been tried, a statement which the evidence has not at all supported should be published in a newspaper; and then, merely because that statement had been made by a counsel, it should be held to be privileged? Ought such a publication to be considered a fair report of what had passed in court, although the evidence afterwards given might not only not support, but might even to some extent contradict it? Ought such a publication to be privileged? I conceive not; and I think that such will not be held to be the law of the land."(*a*)

Still less can a report be justified which not only does not give the evidence, but adds to the speech of counsel, which it sets out, that all that he stated was proved.

Thus, where a report of the trial of the plaintiff (an attorney) and two other persons for a conspiracy to defraud the under-sheriff of Hants, set out the speech of the counsel for the prosecution, and then continued: "The first witness was R. P., who proved all that had been stated by the counsel for the prosecution; Mr. J. G., the attesting witness to the bill of sale from the sheriff to Messrs. W., was next called, but not being able to prove a deputation from the under-sheriff for that year, the jury, under the directions of the learned judge, were obliged to give a verdict of acquittal, to the great regret of a crowded court, on whom the statement and the evidence, so far as it went, made a strong impression of their guilt;" a plea justifying the report on the ground that in fact such a speech had been made, and that the witness called proved all that had been so stated, but not setting out the evidence or justifying the truth of the charges made in the counsel's speech, was held bad on demurrer.(*b*) "The objection," said Abbott, C.J.,(*c*) "taken to the plea seems to me to be unanswerable. It is asserted

(*a*) *Saunders* v. *Mills* (6 Bing. 218).
(*b*) *Lewis* v. *Walter* (4 B. & Ald. 605). (*c*) *Ibid.* 612.

in the libel that a certain witness proved the allegations contained in a speech made by counsel in stating a case to the jury. Now that justification cannot be supported. The defendant ought to have detailed and transcribed in the publication the evidence of the witness. If he had done so, his readers might then have judged for themselves. If a party is to be allowed to publish what passes in a court of justice, he must publish the whole case, and not merely state the conclusion which he himself draws from the evidence." "It is no justification," said Bayley, J., "that a defendant has truly stated, in his publication, the speech made by counsel in stating a case to the jury; he must go further, and show the truth of the facts there stated. It is the duty of a counsel to state facts, although they may be injurious to the character of individuals, and he is privileged so to do, if he speaks conscientiously according to his instructions;(*a*) but if it were to follow that others might repeat what he says, it might be most injurious to the character of individuals; for, as to them, the reason for the privilege, which is the advancement of public justice, does not apply."

Slight errors must sometimes occur in reports of trials; and if any one of the parties in a case complains of the tendency of a report to injure him, the jury will be asked to determine whether, under all the circumstances of the case, the publication amounts to a libel. Slight errors in reports.

Where the writer of a treatise on the "Law of Attorneys" referred in his book to the case of the plaintiff as that of of an attorney who had been 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, Cockburn, C.J., 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 statement reasonably fair of that which was contained in the report, and whether it was a mistake which arose from want of reasonable diligence and care.(*b*)

The plaintiff and M. having been convicted of a conspiracy to extort money from a third person, an action of libel was brought against the publisher of a report of the trial, for publishing that the counsel who moved for judgment had stated the plaintiff to have been the writer of one letter, which

(*a*) See *Hodgson* v. *Scarlett* (1 B. & Ald. 232). The privilege of counsel is absolute, *vide ante*, p. 502.

(*b*) *Blake* v. *Stevens* (11 L. T. N. S. 544; 4 F. & F. 239).

was not in fact written by him, but by his co-conspirator. The plaintiff's evidence on the trial proving the great probability of the counsel alluded to having in fact made the statement reported, it was held that it was properly left to the jury to say whether the publication was a libel, and, the jury having found a verdict of not guilty, that this was not contrary to the evidence.(*a*)

Report of action for libel setting out the libel.

An action of libel was brought against the proprietors of a newspaper for publishing what purported to be a report of the trial of another action of libel, brought by the same plaintiff against the proprietors of another newspaper, who justified the libel on the ground of its truth. The report stated the libel on which the original action was brought, the defendant's proofs on the justification, and the judge's summing up, and ended by stating that the plaintiff had a verdict for £30. No proof was given that such a trial had taken place, or whether, if it had, the report in question was a fair and impartial report of it. Lord Abinger, C.B., told the jury that if, in their opinion, the report was so worded as to indicate a malicious motive against the plaintiff, or to be injurious to his character by misstatement, or by conveying an insinuation of his being actually guilty of the matter originally imputed, notwithstanding he was stated to have obtained damages for the imputation, or if the report of such a trial having taken place was pure fiction invented by the defendants, their verdict should be for the plaintiff; but if they thought otherwise, or that the report, though containing some allegations prejudicial to the plaintiff, yet when taken altogether, with the alleged verdict in his favour, was not on the whole injurious to him, the verdict should be for the defendants. The jury having found for the defendants, the Court refused a rule for a new trial on the ground of misdirection.(*b*)

"In *Dicas* v. *Lawson*," said Alderson, B., "the plaintiff complained of the report of a trial containing strong observations on his character, but also stating that he had obtained a verdict for £50 damages. The report was said to be libellous, because it set out the charge made against the plaintiff in the first publication. At the trial I told the jury to look at the whole publication and to consider whether, taking the whole of it together, it was such as would be likely to depreciate the plaintiff's character; and the jury decided that it was not, because

(*a*) *Stockdale* v. *Tarte* (4 A. & El. 1016).
(*b*) *Chalmers* v. *Payne* (5 Tyrw. 766).

they found that the damages awarded to the plaintiff took away the impression which would otherwise arise from the statement. On an application for a new trial, the Court approved my direction. I perfectly agree that the law will infer malice from the act of uttering or publishing slanderous matter actionable in itself and not justified by sufficient cause; but the question here for a jury is, whether slanderous matter has or has not been published. That question has been decided by them, under a direction to take the whole together and consider whether the result is calculated to injure the plaintiff's character. If the whole be not slanderous matter, and prejudicial to the plaintiff, it is not actionable; for, though in one part of the publication something disreputable be imputed to him, it is removed by the conclusion which the jury, sworn to judge of its tendency, have arrived at; the 'bane and antidote' are together, and for the jury to consider. Nor can we suppose, without proof, that the occurrence of such a trial was mere invention, or that newspapers publish reports of merely imaginary trials."(*a*)

In an old case (1732) one Lofield, having recovered £1100 damages in an action against a person named Bankcroft for maliciously charging him with felony, published in the news "that Bankcroft had conspired to charge him with this felony, that in vindication of his character he had brought an action against Bankcroft for so doing, and had recovered £1100 damages against him." The Court of King's Bench made absolute a rule for a criminal information against Lofield for this publication, because it falsely represented the fact; for Lofield did not bring his action for a conspiracy, but for Bankcroft's maliciously charging him with felony, and a conspiracy requires an infamous judgment.(*b*)

Heading to report.

Care must be taken not to put a general heading of a libellous character to what may be in other respects a fair report of a judicial proceeding. A particular case, in which an attorney has treated his client badly will not, according to Byles, J.,(*c*) justify the prefixing to the report of that case a general heading in the words "How Lawyer B. treats his clients."

So, where a newspaper published a report of proceedings in the Insolvent Debtors' Court headed "Shameful Conduct of an Attorney," a plea stating that the alleged libel contained a correct account of what took place in court was, even after

(*a*) *Chalmers* v. *Payne* (5 Tyr. 769).
(*b*) *Rex* v. *Lofield* (2 Barn. Rep. 128).
(*c*) *Bishop* v. *Latimer* (4 L. T. N. S. 775).

verdict for the defendant, held bad, on motion *non obstante veredicto*, on the ground that by the prefatory words the defendant had taken upon himself to make the allegation of shameful conduct against the plaintiff.(*a*)

Malice.

It must not be forgotten that the privilege of a report in the case of legal proceedings is not absolute but only qualified; and that it is lost if actual malice is proved, even, it would seem, according to *Stevens* v. *Sampson*, in the case of a fair and accurate report.(*b*) In this case, however, the report held not privileged was not sent to the newspaper by its ordinary reporter, but by the solicitor for one of the parties; and the judgment of Bramwell, L.J., seems to have proceeded wholly on this ground.

II.—Reports of Parliamentary Proceedings.

Reports of Parliamentary debates privileged.

Reports of proceedings in Parliament(*c*) may now be

(*a*) *Lewis* v. *Clement* (3 B. & Ald. 702). See *Lewis* v. *Levy* (El. Bl. & El. 537; 27 L. J. 287, Q. B.).

(*b*) L. R. 5 Ex. Div. 53.

(*c*) For our reports of such fragments of the parliamentary debates of earlier times as have come down to us, we are indebted to the private labours of such compilers as Sir Symonds D'Ewes, in his journal of Queen Elizabeth's Parliament; Sir Benjamin Rudyard (time of Charles I.); Burton, who made reports of the Commonwealth Parliaments; Anchitell Grey, who recorded the proceedings of Charles II.'s Parliaments; and Somers, who took pencil notes of the debates of the Convention. The first who ventured on the practice of publishing regular reports for general readers, appear to have been the publishers of "The Political State of Great Britain." Various resolutions had from time to time been passed by both Houses against publishing reports of their debates. There is a standing order of the House of Lords of the 27th of February, 1698, declaring "that it is a breach of the privilege of this House, for any person whatsoever to print, or publish in print, anything relating to the proceedings of the House, without the leave of the House;" and that House, in 1801, fined one Allen Macleod £100, and committed him to Newgate for six months for publishing in *The Albion and Evening Advertiser* certain paragraphs ordered to be expunged from the journals of the House, and also a report of the debate thereupon (43 Lords' J. 105); and, in the same year, the printer and the publisher of the *Morning Herald* were committed to the custody of the Black Rod, for publishing in that paper what purported to be an account of a debate, which the House resolved to be a scandalous misrepresentation of what had passed (43 Lords' J. 60). The House of Commons ordered, in 1641, "That no member shall either give a copy or publish in print anything that he shall speak here, without leave of the House" (2 Com. J. 209); and in 1642 resolved, "That what person soever shall print or sell any act or passages of this House, under the name of a diurnal or otherwise, without the particular licence of this House, shall be reputed a high contemner and breaker of the privilege of Parliament, and so punished accordingly" (2 Com. J. 220). In 1694 the House resolved "That no

regarded as standing on the same footing with reports of proceedings in courts of justice.

For a long time the law on the subject remained in a

news-letter writers do in their letters, or other papers that they disperse, presume to intermeddle with the debates or any other proceedings of this House" (11 Com. J. 193): and repeated the same resolution in 1695 (*Ibid.* 439), 1697 (12 Com. J. 48), 1703 (14 Com. J. 270), and 1722 (20 Com. J. 99). In the last-mentioned year the Commons also resolved, "That no printer or publisher, of any printed newspapers, do presume to insert in any such papers any debates or any other proceedings of this House or any committee thereof" (*Ibid.*). In 1728 the House resolved, "That it is an indignity to, and a breach of the privilege of, this House, for any person to presume to give, in written or printed newspapers, any account or minutes of the debates or other proceedings of this House, or of any committee thereof;" and "that upon discovery of the authors, printers, or publishers of any such written or printed newspaper, this House will proceed against the offenders with the utmost severity" (21 Com. J. 238). See further orders, 23 Com. J. 148; 23 Com. J. 754; 29 Com. J. 207). In a debate which took place on the subject in 1738, Mr. Pulteney said he thought no appeals should be made to the public with regard to what was said in the House, "and to print or publish the speeches of gentlemen in this House, even though they were not misrepresented, looks very like making them accountable without doors for what they say within. Besides, sir," added the honourable member, "we know very well that no man can be so guarded in his expressions as to wish to see everything he says in this House in print" (Parl. Hist. vol. x. p. 283). Sir Robert Walpole, in the same debate, complained (p. 285) that in some of the reports he had been made to speak the very reverse of what he meant; and that in others, all the wit, the learning, and the argument had been thrown into one side, and into the other nothing but what was low, mean, and ridiculous; and yet, when it came to the question, the division has gone against the side which upon the face of the debate, had reason and justice to support it, so that, had he been a stranger to the proceedings and the nature of the arguments themselves, he must have thought this to be one of the most contemptible assemblies on the face of the earth. The debate ended in a resolution, "That it is a high indignity to, and a notorious breach of the privilege of this House, for any news-writer, in letters or other papers (as minutes, or under any other denomination), or for any printer or publisher of any printed newspaper of any denomination, to presume to insert in the said letters or papers, or to give therein, any account of the debates or other proceedings of this House, or any committee thereof, as well during the recess as the sitting of Parliament; and that this House will proceed with the utmost severity against such offenders." It must be remembered that there was considerable ground for complaining of the manner in which the debates were at this time misrepresented in the reports which appeared; language and sentiments being frequently attributed to members which they never used or entertained. We are told in Hawkins's "Life of Johnson," that the parliamentary reports written by him (for the *Gentleman's Magazine*) were the only part of his writings which gave him any compunction; being frequently written from very slender materials, and often from none at all—the mere coinage of his own imagination. Of Pitt's famous speech in reply to Horace

PART IV. CHAPTER IX.

doubtful state, but the decision of the Court of Queen's Bench in the leading case of *Wason* v. *Walter*(*a*) may be considered to have placed beyond doubt(*b*) the right to publish, without liability to civil action or criminal proceeding, a full and fair report of parliamentary debates, even though they contain matter defamatory of an individual.(*c*)

Wason v. Walter.

In that case an action was brought against the publisher of the *Times* newspaper, for an alleged libel contained in a report of a debate, which took place in the House of Lords, on the presentation of a petition by the plaintiff, charging a high judicial officer with having been guilty of dishonourable conduct many years previously. Cockburn, C.J., directed the jury that if they were satisfied that the matter charged as a libel was a faithful and correct report of the proceedings in the House of Lords, and of the speeches delivered on the occasion, it was in point of law a privileged publication, and one which was not the subject of a civil action. The jury having found a verdict for the defendant,

Walpole, we learn from Boswell's "Life of Johnson" that the Doctor avowed his having written it in a garret in Exeter Street; adding, "I saved appearances tolerably well; but I took care that the Whig dogs should not have the best of it." In order to evade the resolutions of the Houses of Parliament against the publication of their debates, recourse was had to the expedient of publishing them as the debates in the senate of Magna Lilliputia, or as the debates in the Roman Senate, with Roman names adapted to the several speeches. In 1771, Colonel George Onslow made a complaint to the House of Commons of a number of newspapers, as misrepresenting the speeches and reflecting on several of the members of the House, in contempt of the order, and in breach of the privilege of the House, and moved that the printers should be brought to justice. Warm and long-continued debates ensued; orders were issued for the arrest of the printers; the city was in a ferment; mobs assembled around the House; and ultimately the offending printers were wrested by force from the hands of the parliamentary messengers. Since this time no attempt has been made to check the publication of debates of either House.

(*a*) L. Rep. 4 Q. B. 73; 19 L. T. N. S. 409; 38 L. J. 34, Q. B.

(*b*) A bill of exceptions was tendered to the ruling of the learned judge (Cockburn, C.J.), who presided at the trial at Nisi Prius; but the matter has not since been carried any further.

(*c*) Lord Campbell tried in 1843 (see Hansard's Parliamentary Debates, 3rd series, vol. lxx. p. 1254), and again in 1858 (see Hansard, vol. cxlix. p. 947), but on both occasions unsuccessfully, to give, by Act of Parliament, an immunity to faithful reports of any proceedings in either House of Parliament, at which strangers were permitted to be present. One of the main grounds insisted on for resisting Lord Campbell's Bill was that there was no necessity for legislation, inasmuch as no action had ever been brought in respect of the publication of a parliamentary debate (see *per* Cockburn, C.J., *Wason* v. *Walter*, *ubi supra*, and the remarks of Lord Brougham in the 70th vol. of Hansard, p. 1225).

a rule *nisi* was obtained for a new trial on the ground of misdirection, which was afterwards discharged. The decision of the Court was delivered by Cockburn, C.J., in an elaborate judgment.

"The main question for our decision," said his Lordship, "is, whether a faithful report in a public newspaper of a debate in either House of Parliament, containing matter disparaging to the character of an individual as having been spoken in the course of the debate, is actionable at the suit of the party whose character has thus been called in question. We are of opinion that it is not. Important as the question is, it comes now for the first time before a court of law for decision. Numerous as are the instances in which the conduct and character of individuals have been called in question in Parliament, during the many years that parliamentary debates have been reported in the public journals, this is the first instance in which an action of libel, founded on a report of a parliamentary debate, has come before a court of law. There is, therefore, a total absence of direct authority to guide us. There are, indeed, *dicta* of learned judges having reference to the point in question, but they are conflicting and inconclusive, and, having been unnecessary to the decision of the cases in which they were pronounced, may be said to be extra-judicial. . . . . Both the principles on which the exemption from legal consequences is extended to the publication of the proceedings of courts of justice, appear to us to be applicable to the case before us. The presumption of malice is negatived in the one case as in the other by the fact that the publication has in view the instruction and advantage of the public, and has no reference to the party concerned. There is also in the one case as in the other a preponderance of general good over partial and occasional evil. We entirely concur with Lawrence, J., in *Rex* v. *Wright*,(*a*) that the same reasons which apply to the reports of the proceedings in courts of justice apply also to proceedings in Parliament. It seems to us impossible to doubt that it is of paramount public and national importance that the proceedings of the Houses of Parliament shall be communicated to the public, who have the deepest interest in knowing what passes within their walls; seeing that on what is there said and done, the welfare of the community depends. Where would be our confidence in the Government of the country, or in the Legislature by which our laws are framed, and to whose charge the great interests of the country are committed; where would be our attachment to the consti-

(*a*) 8 T. R. 298.

tution under which we live, if the proceedings of the great council of the realm were shrouded in secrecy, and concealed from the knowledge of the nation? How could the communications between the representatives of the people and their constituents, which are so essential to the working of the representative system, be usefully carried on, if the constituencies were kept in ignorance of what their representatives are doing? What would become of the right of petitioning on all measures pending in Parliament, the undoubted right of the subject, if the people are to be kept in ignorance of what is passing in either House? Can any man bring himself to doubt that the publicity given in modern times to what passes in Parliament, is essential to the maintenance of the relations between the Government, the Legislature, and the country at large? It may, no doubt, be said that, while it may be necessary as a matter of national interest that the proceedings in Parliament should in general be made public, yet that debates in which the character of individuals is brought into question ought to be suppressed. But to this, in addition to the difficulty in which parties publishing Parliamentary reports would be placed if this distinction were to be enforced, and every debate had to be critically scanned to see whether it contained defamatory matter, it may be further answered that there is, perhaps, no subject in which the public have a deeper interest than in all that relates to the conduct of public servants of the State—no subject of Parliamentary discussion which more requires to be made known than an inquiry relating to it. . . . . Lastly, what greater anomaly or more flagrant injustice could present itself than that, while from a sense of the importance of giving publicity to their proceedings, the Houses of Parliament not only sanction the reporting of their debates, but also take measures for giving facility to those who report them; while every member of the educated portion of the community, from the highest to the lowest, looks with eager interest to the debates of either House, and considers it a part of the duty of the public journals to furnish an account of what passes there, we were to hold that a party publishing a Parliamentary debate is to be held liable to legal proceedings, because the conduct of a particular individual may happen to be called in question?"(*a*)

Standing orders.

To an argument urged against the legality of publishing parliamentary proceedings as being in contravention of the

(*a*) L. Rep. 4 Q. B. 82, 89, 90; 19 L. T. N. S. 415, 416; 38 L. J. 38, 41, 42, Q. B.

standing orders of both Houses of Parliament, his Lordship replied: "The fact, no doubt, is that each House of Parliament does, by its standing orders, prohibit the publication of its debates. But, practically, each House not only permits, but also sanctions and encourages the publication of its proceedings, and actually gives every facility to those who report them. Individual members correct their speeches for publication in Hansard, or the public journals; and, in every debate, reports of former speeches contained therein are constantly referred to. Collectively, as well as individually, the members of both Houses would deplore, as a national misfortune, the withholding their debates from the country at large. Practically speaking, therefore, it is idle to say that the publication of Parliamentary proceedings is prohibited by Parliament. The Standing Orders which prohibit it are obviously maintained only to give to each House the control over the publication of its proceedings, and the power of preventing or correcting any abuse of the facility afforded. Independently of the orders of the Houses, there is nothing unlawful in publishing reports of Parliamentary proceedings. Practically, such publication is sanctioned by Parliament; it is essential to the working of our parliamentary system, and to the welfare of the nation. Any argument founded on its alleged illegality appears to us, therefore, entirely to fail. Should either House of Parliament ever be so ill-advised as to prevent its proceedings from being made known to the country —which certainly never will be the case—any publication of its debates made in contravention of its orders would be a matter between the House and the publisher. For the present purpose, we must treat such publication as in every respect lawful, and hold that, while honestly and faithfully carried on, those who publish them will be free from legal responsibility, though the character of individuals may incidentally be injuriously affected."(*a*)

Report must not be partial or garbled.

The report, in order to be protected, must be a full and fair one of the entire debate, setting out whatever is said in favour of, as well as what is said against, the individual whose conduct may be the subject of discussion. A report of only that part of a debate which reflects on an individual, or one which unfairly and injuriously represents its bearing upon him, would not be justifiable. "The analogy between the case of reports of proceedings of courts of justice and those of proceedings in Parliament being complete, all the limitations placed on the one, to prevent injustice to indi-

(*a*) L. Rep. 4 Q. B. 95; 19 L. T. N. S. 418; 38 L. J. 45, Q. B.

viduals, will necessarily attach to the other. A garbled or partial report, or of detached parts of proceedings, published with intent to injure individuals, will equally be disentitled to protection. . . . . Whatever would deprive a report of the proceedings in a court of justice of immunity will equally apply to a report of proceedings in Parliament."(*a*)

Publication by a member of a single speech.

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

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

Rex v. *Creevey*(*c*) was a stronger case. There the defendant, a member of the House of Commons, had made, in the course of a debate, a speech containing several charges against a man named Kirkpatrick. An incorrect report of the debate having appeared in the Liverpool and other papers, the defendant sent a correct report of his speech to the editor of a Liverpool paper, with a request that he would publish it, which was done. On the trial of a criminal information, Le Blanc, J., told the jury, on the authority of *Rex* v. *Lord Abingdon*, that a member of Parliament was answerable for publishing what he has delivered in his speech in Parliament, if it contains defamatory matter. The jury having found the defendant guilty, a motion was made in the King's Bench for a new trial, on the ground of misdirection, but the Court unanimously refused

(*a*) *Per* Cockburn, C.J., *Wason* v. *Walter* (*ubi supra*).
(*b*) 1 Esp. 226.
(*c*) 1 M. & S. 273.

to grant a rule. Lord Ellenborough, C.J., said: "A member of the House of Commons has spoken what he thought material, and what he was at liberty to speak in his character as a member of that House. So far he was privileged: but he has not stopped there; but, unauthorised by the House, has chosen to publish an account of that speech in what he has pleased to call a more corrected form; and in that publication has thrown out reflections injurious to the character of an individual. The only question is, whether the occasion of that publication rebuts the inference of malice arising from the matter of it. Has he a right to reiterate these reflections to the public; and to address them as an *oratio ad populum*, in order to explain his conduct to his constituents? There is no case in practice, nor, I believe, any proposition laid down by the best text writers upon the subject, that leads to such a conclusion." To the same effect, Le Blanc, J.: "Every member had privilege of speech in Parliament; but when he published his speech to the world, it then became the subject of common law jurisdiction; and the circumstances of its being accurate or intended to correct a misrepresentation, would not the less make him amenable to the common law in respect of the publication."

Authority of *Rex* v. *Creevey* considered.

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

In *Davison* v. *Duncan*,(*a*) Lord Campbell, C.J., said: "As *Rex* v. *Creevey* has been mentioned, I will add that, though I perfectly concur in the doctrine of *Rex* v. *Lord Abingdon*, that a malicious publication of his speech by a member of either House of the Legislature is not privileged, I should think that a publication of a report of his speech by a member of the House of Commons, *bonâ fide* addressed to his constituents, would be privileged;" and Crompton, J., added that, "The privilege in such a case would arise because the publication was as a communication between a member and his constituents, and not because it was a report of what took place in Parliament."

In the more recent case of *Wason* v. *Walter*,(*b*) Cockburn, C.J., in delivering the judgment of the Court of Queen's Bench, said: "Our judgment will in no way interfere with the decisions that the publication of a single speech for the purpose, or with the effect of, injuring an individual, will be

(*a*) 7 El. & Bl. 233; 26 L. J. 107 Q. B. (*b*) L. R. 4 Q. B. 94.

unlawful, as was held in the cases of *Rex* v. *Lord Abingdon* and *Rex* v. *Creevey*. At the same time it may be as well to observe that we are disposed to agree with what was said in *Davison* v. *Duncan*, as to such a speech being privileged, if *bonâ fide* published by a member for the information of his constituents."

III. Reports of Public Meetings.

Law previous to Act of 1881.

Fair and correct reports of the proceedings at public meetings were not by our Courts held entitled to the same privilege as similar reports of judicial or parliamentary proceedings.

This was so held as to meetings of Improvement Commissioners,(*a*) as to public meetings called to petition Parliament,(*b*) as to meetings of Boards of Guardians(*c*) and Vestry Boards,(*d*) and as to Commissioners of Inquiry respecting Corporations.(*e*)

Newspaper Libel and Registration Act of 1881.

An important alteration in the law has been effected by the Newspaper Libel and Registration Act, 1881,(*f*), sect. 2 of which provides that "any report published in any newspaper of the proceedings of a public meeting shall be privileged if such meeting was lawfully convened for a lawful purpose and open to the public, and if (1) such report was fair and accurate, and (2) published without malice, and if (3) the publication of the matter complained of was for the public benefit."

But "the protection intended to be afforded by this section shall not be available as a defence in any proceeding, if the plaintiff or prosecutor can show that the defendant has refused to insert in the newspaper in which the report containing the matter complained of appeared a reasonable letter or statement of explanation or contradiction by or on behalf of such plaintiff or prosecutor."(*g*)

The important provisions of the Act as to criminal proceedings for libel will be dealt with subsequently.

(*a*) *Davison* v. *Duncan* (7 El. & Bl. 231; 26 L. J. 106, Q. B.).

(*b*) *Hearne* v. *Stowell* (12 A. & E. 719).

(*c*) *Purcell* v. *Sowler* (L. R. 1 C. P. D. 781; 2 C. P. D. 215). See also *Pierce* v. *Ellis* (6 Ir. L. Rep. N. S. 65, 66). In this case the defendant handed to the newspaper reporter a correct report of his own speech, and the Court was of opinion that it appeared on the defence itself, that the report of the proceedings was not a fair one.

(*d*) *Popham* v. *Pickburn* (7 H. & N. 891; 5 L. T. N. S. 846; 31 L. J. 133, Ex.).

(*e*) *Charlton* v. *Watton* (6 C. & P. 385).

(*f*) 44 & 45 Vict. c. 60, an Act not extending to Scotland.

(*g*) Sect. 2.

CHAPTER X.

PUBLICATION OF PARLIAMENTARY PAPERS.

Case of *Stockdale* v. *Hansard*.

WITH regard to papers published by order of either House of Parliament, the decision of the Court of Queen's Bench, in the case of *Stockdale* v. *Hansard*,(*a*) led to an important alteration of the law by Act of Parliament.

The Court of Queen's Bench decided, in that celebrated case, that it was no defence to an action for publishing a libel, that the defamatory matter was part of a document which was, by order of the House of Commons, laid before the House, and thereupon became part of the proceedings of the House, and which was afterwards, by order of the House, printed and published by the defendant, and that the House of Commons had resolved, declared, and adjudged "that the power of publishing such of its reports, votes, and proceedings, as it shall deem necessary or conducive to the public interests, is an essential incident to the constitutional functions of Parliament, more especially to the Commons House of Parliament, as the representative portion of it."

The libel complained of in this case by the plaintiff (a bookseller and publisher of books) was contained in a book entitled "Reports of the Inspectors of the Prisons of Great Britain," and in a printed paper containing a copy of the reply of two of the Inspectors of Prisons for the Home District to a report of the Court of Aldermen, to whom it had been referred, to consider the first report of the inspectors, so far as related to the gaol of Newgate; and the libel consisted of statements made by the inspectors, with reference to a physiological and anatomical book published by the plaintiff, to the effect that it was of a most disgusting nature; that the plates were indecent and obscene in the extreme, and not calculated only to attract the attention of persons connected with surgical science; that the inspectors had applied to several medical booksellers, who all gave it the same character, and described it as one of Stockdale's (the plaintiff's) obscene books.

The defendants, Messrs. Hansard, printers to the House of Commons, in a long plea, which was demurred to, pleaded that the report of the Inspectors of Prisons was laid before the House of Commons pursuant to Act of Parliament, and that

(*a*) 9 A. & E. 1.

the House had ordered the report to be printed; that a copy of the report made by the Committee of the Court of Aldermen had also, by the order of the House of Commons, been laid before it and printed; that the reply of the inspectors to this report had also been ordered by the House to be laid before it and printed;(*a*) that the defendants had published the report of the inspectors and their reply by the authority of the House of Commons, and as directed and ordered by the orders and resolutions of the House, and not otherwise; and, further, that the House had resolved, declared, and adjudged that the power of publishing such of its reports, votes, and proceedings as it shall deem necessary or conducive to the public interests, is an essential incident to the constitutional functions of Parliament, more especially to the Commons House of Parliament as the representative portion of it.

After long and elaborate arguments, lasting several days, the Court held that the plea set out no defence to the action. The judgments, which are proportionately long and elaborate, and deal fully with the important constitutional questions involved in the case, will well repay a careful perusal.(*b*)

With regard to the first ground of defence relied on in argument—viz., that the grievance complained of was an act done by order of the House of Commons, a court superior to any court of law, and none of whose proceedings were to be questioned in any way, Lord Denman, C.J., said:(*c*) "It is a claim for an arbitrary power to authorize the commission of any act whatever, on behalf of a body which, in the same argument, is admitted not to be the supreme power in the State. The supremacy of Parliament, the foundation on which the claim is made to rest, appears to me completely to overturn it, because the House of Commons is not the Parliament, but only a co-ordinate and component part of the Parliament. That sovereign power can make and unmake the laws; but the concurrence of the three legislative estates is necessary; the resolution of any one of them cannot alter the law or place any one beyond its

(*a*) The reports were printed, not only for the use of members of the House, but also for public sale, the proceeds to be applied to the general expenses of printing by the House.

(*b*) Cockburn, C.J., says of the masterly judgments of Lord Denman and his colleagues in this case, that they "will secure to the judges who pronounced them admiration and reverence so long as the laws of England and a regard for the rights and liberties of the subject shall endure" (Judgment in *Wason* v. *Walter*, L. Rep. 4 Q. B. 86; 19 L. T. N. S. 416; 38 L. J. 40, Q. B.).

(*c*) 9 A. & El. 107.

control. The proposition, therefore, is wholly untenable, and abhorrent to the first principles of the constitution of England." As to the next ground of defence—viz., that the defendant committed the grievance by order of the House of Commons in a case of privilege, and that each House of Parliament is the sole judge of its own privileges—Lord Denman, after referring generally to the subject of privilege, observed, "For speeches made in Parliament by a member, to the prejudice of any other person, or hazardous to the public peace, that member enjoys complete immunity. For any paper signed by the Speaker by order of the House, though to the last degree calumnious, or even if it brought personal suffering upon individuals, the Speaker cannot be arraigned in a Court of Justice. But if the calumnious or inflammatory speeches should be reported and published, the law will attach responsibility on the publisher. So, if the Speaker, by authority of the House, order an illegal act, though that authority shall exempt *him* from question, his order shall no more justify the person who executed it than King Charles's warrant for levying ship-money could justify his revenue officer."

The learned judge added in a subsequent portion of his judgment :(*a*) "It can hardly be necessary to guard myself against being supposed to discuss the expediency of keeping the law in its present state, or introducing any and what alterations. It is, no doubt, susceptible of improvement; but the improvement must be a legislative act. If we held that any improvement, however desirable, could be effected under the name of privilege, we should be confounding truth, and departing from our duty; and if, on such considerations either House should claim as matter of privilege what was neither necessary for the discharge of their proper functions, nor ever had been treated as a privilege before, this would be an enactment, not a declaration; or, if the latter name were more appropriate, it would be the declaration of a general law, to be disregarded by the courts, though never, I hope, treated with contempt."

The subsequent history of this celebrated case, which decided that an order of the House of Commons cannot render lawful that which is contrary to law, and that still less can a resolution of the House supersede the jurisdiction of a court of law by clothing an unwarranted exercise of power with the garb of privilege,(*b*) is as follows:

(*a*) 9 A. & El. 153.
(*b*) *Per* Cockburn, C.J., *Wason* v. *Walter* (L. Rep. 4 Q. B. 87; 38 L. J. 40, Q. B.; 19 L. T. N. S. 416).

Proceedings consequent on decision in *Stockdale* v. *Hansard*.

The plaintiff having recovered judgment against the defendants, a writ of inquiry was executed; damages were assessed, and a *fi. fa.* issued; and, on the sheriff returning that he had the money in court, he was called upon to show cause why the money should not be paid to the plaintiff. It was stated on the sheriff's behalf, that the House of Commons had passed the following resolutions: "That it appears to this House that execution in the cause of *Stockdale* v. *Hansard* has been levied to the amount of £640 by the sale of the property of Messrs. Hansard, in contempt of the privileges of this House, and that such money now remains in the hands of the Sheriff of Middlesex. That the said sheriff be ordered to refund the said amount forthwith to Messrs. Hansard." The House also resolved that the sheriff had been guilty of a contempt and breach of the privileges of the House, and that he should be committed to the custody of the Sergeant-at-Arms, which was done. Notwithstanding this, the Court of Queen's Bench made absolute the rule, commanding the sheriff to pay over the money to the plaintiff. Afterwards, a rule *nisi* was obtained for an attachment against the sheriff for not paying over the money, and the rule was made absolute, Lord Denman, C.J., observing that the Court, having put the law in motion for the plaintiff, was bound to enforce it for him, and there was unfortunately no other mode of doing so than the proceeding adopted.

The two persons who filled the office of Sheriff of Middlesex, having been taken into custody of the Sergeant-at-Arms pursuant to the resolution of the House of Commons, sued out a writ of *habeas corpus*, to which the Sergeant-at-Arms made return—that he had taken them into custody and detained them by virtue of a warrant from the Speaker of the House of Commons, reciting that the House had resolved that they had been guilty of a contempt and breach of the privileges of the House, and that they should be committed to the custody of the Sergeant-at-Arms, and ordering him to take them into custody. The Court of Queen's Bench held the return sufficient, and the sheriffs were remanded into custody; but Lord Denman was careful to state that he adhered in all respects to the view of the law laid down in *Stockdale* v. *Hansard*, as to defamatory publications issued by order of the House of Commons.

Statute 3 & 4 Vict. c. 9.

This dispute between the House of Commons and the Court of Queen's Bench led to the passing of the Act 3 & 4 Vict. c. 9, entitled "An Act to give summary protection to persons employed in the publication of Parliamentary papers." This Act recites that "it is

essential to the due and effectual exercise and discharge of the functions and duties of Parliament, and to the promotion of wise legislation, that no obstructions or impediments should exist to the publication of such of the reports, papers, votes, or proceedings of either House of Parliament, as such House of Parliament may deem fit or necessary to be published:" and that "obstructions or impediments to such publication have arisen, and hereafter may arise, by means of civil or criminal proceedings being taken against persons employed by, or acting under the authority of, the Houses of Parliament, or one of them, in the publication of such reports, papers, votes, or proceedings; by reason and for remedy whereof it is expedient that more speedy protection should be afforded to all persons acting under the authority aforesaid, and that all such civil or criminal proceedings should be summarily put an end to and determined in manner" provided by the Act.

Provision for staying proceedings.

Sect. 1 provides for the stay of all proceedings commenced against persons for publication of papers printed by order of either House of Parliament, upon delivery to the Court or a judge of a certificate and affidavit, to the effect that such publication is by order of the House.

It enacts that "it shall and may be lawful for any person or persons who now is or are, or hereafter shall be, a defendant or defendants in any civil or criminal proceeding, commenced or prosecuted in any manner soever, for or on account or in respect of the publication of any such report, paper, votes, or proceedings, by such person or persons, or by his, her, or their servant or servants, by or under the authority of either House of Parliament, to bring before the Court in which such proceeding shall have been, or shall be, so commenced or prosecuted, or before any judge of the same (if one of the superior courts in Westminster) first giving twenty-four hours' notice of his intention so to do to the prosecutor or plaintiff in such proceeding, a certificate under the hand of the Lord High Chancellor of Great Britain, or the Lord Keeper of the Great Seal, or of the Speaker of the House of Lords, for the time being, or of the Clerk of the Parliaments, or of the Speaker of the House of Commons, or of the Clerk of the same House, stating that the report, paper, votes, or proceedings, as the case may be, in respect whereof such civil or criminal proceeding shall have been commenced or prosecuted, was published by such person or persons, or by his, her, or their servant or servants, by order or under the authority of the House of Lords, or of the House of Commons, as the case may be, together with an

affidavit verifying such certificate; and such Court or judge shall thereupon immediately stay such civil or criminal proceeding, and the same, and every writ or process issued therein, shall be, and shall be deemed and taken to be, finally put an end to, determined, and superseded by virtue of this Act."

Publication of copies of reports, &c.

As to the publication of copies of reports or other papers, sect. 2 enacts "that in case of any civil or criminal proceeding hereafter to be commenced or prosecuted for, or on account or in respect of, the publication of any copy of such report, paper, votes, or proceedings, it shall be lawful for the defendant or defendants, at any stage of the proceedings, to lay before the Court or judge such report, paper, votes, or proceedings, and such copy, with an affidavit verifying such report, paper, votes, or proceedings, and the correctness of such copy; and the Court or judge shall immediately stay such civil or criminal proceeding, and the same, and every writ or process issued therein, shall be, and shall be deemed and taken to be, finally put an end to, determined, and superseded by virtue of this Act."

Publication of extracts or abstracts.

As to the publication of abstracts of any such papers, or extracts from them, sect. 3 provides, "that it shall be lawful, in any civil or criminal proceeding, to be commenced or prosecuted for printing any extract from or abstract of such report, paper, votes, or proceedings, to give in evidence under the general issue, such report, paper, votes, or proceedings, and to show that such extract or abstract was published *bonâ fide*, and without malice; and, if such shall be the opinion of the jury, a verdict of not guilty shall be entered for the defendant or defendants."

Sect. 4 adds, "that nothing contained in the Act is to be deemed, or taken, or held, or construed, directly or indirectly, by implication or otherwise, to affect the privileges of Parliament in any manner whatsoever."

Object of notice.

The object of giving twenty-four hours' notice, to the plaintiff or prosecutor,(*a*) of the intention to bring the certificate before the court, is not quite clear. It is doubtful whether it gives the plaintiff or prosecutor a right to show cause, and may have been prescribed only to enable him to avoid incurring more costs.(*b*)

The only reported case on this Act is that of *Stockdale* v. *Hansard*,(*c*) where proceedings were stayed upon a certificate of the Speaker of the House of Commons, verified by affidavit,

(*a*) Sect. 1.
(*b*) *Per* Lord Denman, C.J., *Stockdale* v. *Hansard* (11 A. & E. 299).
(*c*) 11 A. & E. 297.

that the publication mentioned in the declaration (a description of which it gave) and in respect of which the action was brought, was published by order and under the authority of the House of Commons. The declaration was verified by affidavit, and appeared to be for the publication of an alleged libel, the description of which corresponded with that in the Speaker's certificate.

Older cases.

In 1686,(*a*) 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(*b*) 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 defendants' counsel whether an order of the House of Commons could justify a scandalous, infamous, and flagitious libel.(*c*)

This case of Sir William Williams happened, as observed by Lord Kenyon, C.J.,(*d*) in the worst of times, and the publication was a paper of a private individual published by another individual, under pretence of sanction of the House of Commons. Gross, J., said of the same case(*e*) that it was declared by a great authority to be a disgrace to the country.

In 1799 a criminal information was refused against a bookseller for printing a report of the Committee of Secrecy of the House of Commons, though it reflected on the character of an individual,(*f*) Lord Kenyon, C.J., observing that as the publication was a true copy of the report, there was not the least pretence for the motion. His Lordship said further: "This is an application for leave to file a criminal information against the defendant for publishing a libel; so that the application supposes that this publication is a libel. But the inquiry made by the House of Commons was an inquisition taken by one branch of the Legislature to enable them to proceed further, and adopt some regulations for the better government of the country: this report was first made by a committee of the House of Commons,

(*a*) 2 Jac. 2.
(*b*) He was not Speaker at the time the case was adjudged.
(*c*) 10 St. Tr. App. p. 34, n.; Dig. L. L. 75; Show. Rep. 471.
(*d*) *Rex* v. *Wright* (8 T. R. 296). (*e*) *Ibid.* 297.
(*f*) *Ibid.* 293.

then approved by the House at large, and then communicated to the other House, and it is now *sub judice*; and yet it is said that this is a libel on the prosecutor. It is impossible for us to admit that the proceedings of either of the Houses of Parliament is a libel." "Though the defendant," said Lawrence, J.,(*a*) "was not authorized by the House of Commons to publish the report in question, yet, as he only published a true copy of it, I am of opinion that the rule ought to be discharged."

CHAPTER XI.

CRIMINAL PROSECUTIONS FOR LIBEL.

HAVING considered what constitutes a libel, we have now to inquire how the law against libels is put into motion; what evidence is necessary to prove the charge of publishing a libel; by what means the accused may defend himself; and what penalties are incurred by the guilty.

Twofold liability of publisher.

The liabilities of the publisher of a libel are twofold: he is liable to a criminal prosecution and to a civil action.

The present chapter will be devoted to the criminal branch of the subject.

Criminal prosecution.

Every publication of a libel, be it on the Christian religion, on morality, on the Crown, on the Government, on the administration of justice, or on a private person, is a criminal offence; and it may be broadly laid down that wherever an action would lie, there an indictment would lie also. But the converse of this proposition is not strictly accurate; for no individual has a right of action against another for publishing a blasphemous, obscene or seditious libel, unless it contain something reflecting on himself. Again, a libel on a dead man may,(*b*) under certain circumstances, be indictable, as tending to excite to a breach of the peace, but in no case would an action lie for such a libel, for *Actio personalis moritur cum personâ*.

Various methods of criminal prosecution.

The criminal law may be set in motion by the Attorney-General filing an *ex officio* information; by an application to the Court of Queen's Bench to order the master of the Crown Office to file an information, by summoning the libeller before a magistrate; or by going direct to the grand jury at the assizes or Central Criminal Court.

(*a*) 8 T. R. 293. (*b*) *Vide ante*, pp. 494, 495.

The offence is not triable at sessions.

Necessity of fiat in case of newspaper prosecutions

Sect. 3 of the Newspaper Libel and Registration Act, 1881, (44 & 45 Vict. c. 60) provides that "No criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper for any libel published therein, without the written fiat or allowance of the Director of Public Prosecutions in England, or Her Majesty's Attorney-General in Ireland, being first had and obtained."

A fiat in the following form—"I hereby allow the prosecution of the publisher, proprietor, or editor of the *Freethinker*, or any other person responsible for the publication therein of blasphemous articles between the dates of March 26 and June 11, 1882," was objected to as quite general and mentioning no name; but it was held sufficient by Lord Coleridge, C.J., at the trial, and by a Divisional Court.(*a*)

I. Criminal Informations.

Ex officio information by Attorney-General.

The Attorney-General has, at common law, the right to file a criminal information for any misdemeanour.(*b*)

Sect. 3 of the Newspaper Libel and Registration Act of 1881 (*supra*) does not apply to such a case.(*c*)

This right has several times been attacked in Parliament without success. The House of Commons agreed in 1688, on the recommendation of a committee, that a clause should be inserted in the Bill of Rights abolishing informations in the Court of King's Bench; but it would seem that the House of Lords objected to it.(*d*) On the 27th of November, 1770, a motion made by Mr. Phipps in effect to take away the power of the Attorney-General to file criminal informations, was rejected by 164 against 72 votes.(*e*) And again in 1812, Lord Holland, in the House of Lords, moved the second reading of a Bill having the same object in view.(*f*) The debates on these occasions are well worthy of attention, showing the strong arguments used by men like Burke, Dunning, Lords Erskine, Holland, and Stanhope, against this extraordinary prerogative in cases of libel.

The Attorney-General exercises this right on his own responsibility. The Court will never grant an information

(*a*) *Reg.* v. *Bradlaugh* (15 Cox. C. C. 221, 222).
(*b*) See *Prynn's case* (5 Mod. Rep. 459); Show. 106.
(*c*) *Reg.* v. *Yates* (L. R. 11, Q. B. D. 750); *per totam curiam.*
(*d*) 13 St. Tr. 1370. (*e*) 16 Parl. Hist. 1175.
(*f*) 23 Parl. Debates, 1070.

upon his application, in cases prosecuted by the Crown, as he has himself a right, *ex officio*, to exhibit one.(*a*)

He may, if he thinks proper, summon the parties before him to show cause why the information should not be exhibited, before he signs it.(*b*)

In what cases *ex officio* information granted.

The only libels against which the Attorney-General uses his power are those which we have elsewhere termed *public*, such as blasphemous, seditious, or obscene publications, or libels reflecting on persons exercising public functions.

The last instance of such a prosecution, which, after examination, we have been able to find, occurred so far back as 1830, when the Attorney-General, Sir James Scarlett, filed three informations against the proprietors and printer of the *Morning Journal* for libels on the King, the House of Commons, the Lord Chancellor, and the Duke of Wellington. These prosecutions were received with universal dislike by all parties in the country.(*c*)

The Solicitor-General, during the vacancy of the office of Attorney-General, may file an *ex officio* information, and the record need not aver the vacancy.(*d*)

Nolle prosequi.

The Attorney-General, if he find the information defective, may enter a *nolle prosequi*, and prefer a new charge; therefore the Court refuses to quash an information, on his motion.(*e*)

Bringing on of trial of *ex officio* information by defendant.

Before the stat. 60 Geo. 3 & 1 Geo. 4, c. 4, the Attorney-General might keep the information hanging over the head of the unfortunate defendant as long as he pleased, but by the ninth section of that statute it is enacted: "That in case any prosecution for a misdemeanour, instituted by the Attorney or Solicitor General, shall not be brought to trial within twelve calendar months next after the plea of not guilty shall have been pleaded therein, it shall be lawful for the Court in which such prosecution shall be depending, upon application to be made on the behalf of any defendant in such prosecution, of which application twenty days' previous notice shall have been given to the Attorney or Solicitor General, to make an order, if the said Court shall see just cause so to do, authorising such defendant to bring on the trial in such prosecution; and it shall thereupon be lawful for such defendant to bring on such trial accordingly, unless a *nolle prosequi* shall have been entered in such prosecution."

By the same statute (sect. 8) the Court are, if required, to

(*a*) *Rex* v. *Phillips and others* (3 Burr. 1565 and 4 Burr. 2090).
(*b*) *Ibid.*
(*c*) 72 Annual Reg. 4.
(*d*) *Rex* v. *Wilkes* (4 Burr. 2577, and in error 4 Brown's P. C. 360).
(*e*) *Rex* v. *Stratton* (Doug. 240).

order a copy of the information to be delivered, after appearance, to the defendant or his attorney or clerk, in court, free of expense, provided no copy has previously been given.

Delivery of copy of information to defendant.

The trial is generally at the Nisi Prius sittings of the Queen's Bench, and is conducted in the same way as an indictment for a misdemeanour at the assizes; but the Attorney-General may demand a trial at Bar if he prefers it.(*a*)

Trial of *ex officio* information.

The Attorney-General is entitled to reply although the defendant call no witnesses. This privilege was strongly opposed by Horne on his trial for libel,(*b*) but without effect.

Attorney-General's right to reply.

Whether a counsel who appears for the Attorney-General has the right of reply, is not quite clear. Kelly, C.B., at the trial of a woman named Waters at the Old Bailey for murder, decided that the learned serjeant who represented the Attorney-General was entitled to reply, even if no evidence were called for the prisoner.(*c*) Lord Tenterden held, in the case of *Rex* v. *Marsden*,(*d*) that wherever the King's Counsel appears officially he is entitled to the reply.(*e*) Pollock, C.B., and Mellor, J.,(*f*) have also extended the right to counsel representing the Attorney-General. On the other hand, Martin, B.,(*g*) and Byles, J.,(*h*) held that the right is confined to the Attorney-General in person; and Martin, B., said he thought a prosecution by the Crown ought to be conducted like any other prosecution.

Sentence in case of *ex officio* information.

The only other point in which the proceedings under an *ex officio* information differ from those under an information filed by order of the Court, is, that the Attorney-General may elect whether the sentence shall be passed by the judge who tries the case or postponed to the ensuing term;(*i*) whereas the sentences on other informations must be passed by the Court of Queen's Bench.

Informations filed by order of Queen's Bench.

We now proceed to notice informations filed by order of the Court of Queen's Bench.(*k*)

(*a*) 1 Str. 644. (*b*) See 20 How. St. Tr. 660; Cowp. 672.
(*c*) *Ex relatione amici.*
(*d*) M. & M. 439. (*e*) *Reg.* v. *Gardner* (1 C. & K. 628).
(*f*) *Reg.* v. *Toakley* (10 Cox Crim. Cas. 406).
(*g*) *Reg.* v. *Christie* (1 F. & F. 75).
(*h*) *Reg.* v. *Taylor* (1 F. & F. 535).
(*i*) 11 Geo. 4 and 1 Will. 4, c. 70, s. 9.
(*k*) For cases in which informations have been granted see, in addition to those referred to in the following notes: *Rex* v. *Watson* (2 T. R. 199, cited *ante*, pp. 436, 437); *Rex* v. *White and another* (1 Camp. 359, cited *ante*, p. 435): *Rex* v. *Jolliffe* (4 T. R. 285, for publishing in the assize town, shortly before his trial, handbills reflecting on the character of the prosecutor and vindicating his own); *Rex* v. *Wake-*

PART IV. CHAPTER XI.

Whether sect. 3 of Newspaper Libel Act, 1881, is applicable.

It is not necessary (under sect. 3 of the Newspaper Libel and Registration Act of 1881), in these cases (according to Field, Denman and Mathew, JJ., *dissentientibus* Lord Coleridge, C.J. and Hawkins, J.), to get the written fiat of the Director of Public Prosecutions before instituting proceedings.(*a*) The question is to be again raised before the Court of Appeal.

Former practice.

Formerly these informations were filed by the Clerk of the Crown, who did so upon any application, as a matter of course.(*b*)

4 & 5 Will. & M. c. 18.

In consequence of the injustice and oppression caused by the number of frivolous and vexatious informations which were thus issued, at the instance of malicious persons who, even if defeated at the trial, escaped costs under the shelter of the King's name, the statute 4 & 5 Will. & M. c. 18, was passed; the preamble to which recited that divers malicious and contentious persons had, more of late than in times past, procured to be exhibited and prosecuted informations against persons in all the counties of England; that after the persons so informed against appeared and pleaded to issue, the informers very seldom proceeded any further; and that thereby the persons so informed against were put to great charges for their defence, and that, although verdicts were given for them, or a *nolle prosequi* entered against them, they had no means for obtaining costs against such informers.(*c*)

The first section enacts that the Clerk of the Crown shall not, without express order, to be given by the Court in open Court, file any information.

field (1 Salk. 405; 1 Vent. 67; for publishing that a certain jury was suspected of bribery in giving their verdict); *Reg.* v. *Grey* (10 Cox Crim. Cas. 184, for publications tending to prejudice the fair trial of certain prisoners); *Rex* v. *Osborne* (Kel. 30; 2 Barn. K. B., 138, 166, cited *ante*, p. 454); *Reg.* v. *Gathercole* (2 Lew. C. C. 254. a publication imputing immoral practices to the inmates of a nunnery); *Rex* v. *Staples* (And. 228; Dig. L. L. 80, a publication reflecting on a magistrate); *Rex* v. *Thicknesse* (Dig. L. L. 86. for publishing a ludicrous account of an alleged marriage of a married peer with an actress); *Rex* v. *Nutt* (Dig. L. L. 78; 2 Barn. K. B., 114, libels on a company).

(*a*) *Reg.* v. *Yates* (L. R. 11. Q. B. D. 750).

(*b*) *Rex* v. *Robinson* (1 W. Bl. 542).

(*c*) "But two years before the passing of this Statute their [criminal informations'] legality had been denied in the case of Mr. Prynne (5 Mod. Rep. 459) by Sir Francis Winnington, who, in the course of a very learned argument, stated that Lord Hale himself had said that on argument they could not stand. Lord Holt decided, however, to the contrary, intimating that Lord Hale must have been speaking only against the abuse of them" (Judgment in *Reg.* v. *Labouchere*, 50 L. T. N. S. 182).

General principles as to granting informations.

The principles which ought to guide the Court in granting criminal information were elaborately discussed last year in the case of *Reg.* v. *Labouchere*,(a) heard before five judges of the Queen's Bench Division (Lord Coleridge, C.J., Denman, Field, Hawkins and Mathew, J.J.). The judgment of the Court, unanimous except as to one not very important point, was recently delivered by Lord Coleridge, and lays down in considered language (which, on account of the great importance of the case, will be quoted at length), the general principles on which the Court will doubtless act in future in granting or refusing criminal informations.

The application, in this case, was made on behalf of a foreign nobleman (the Duke of Vallombrosa) residing abroad, in respect of a libel upon his deceased father published in an English newspaper.

The information was refused on several grounds; and first on the ground that as a general rule a criminal information will not be granted, where the applicant is neither resident nor sojourning in this country.

Effect of applicant being resident abroad.

"As to the point," said Lord Coleridge, "that the present Duke of Vallombrosa, the applicant, is neither resident nor sojourning in this country, it may be sufficient to observe that we do not intend to lay it down as a rule of law that this Court will not interfere, under any circumstances, by way of criminal information, on the application of a person so situate. Cases may be put, or may actually arise in fact, in which this Court would so interfere beyond all question, if the person applying to it were an English subject, or were resident in England. And the single fact that the applicant was situated as the applicant is situated here might not, in such a supposable case, be an answer to the application. But it is obvious that, if we have regard to the principles on which, from very early times, this Court has acted, the non-residence of the applicant in England is a very cogent argument against the interference of the Court. It makes it, as a general rule, very unlikely that there should be any intention to provoke a breach of the peace on the part of him who publishes the defamatory matter, and also, generally speaking, very unlikely that in fact any breach of the peace will follow. It is a matter, therefore, very important for the Court to consider when the appeal is to its discretion—a reason, further, why, in the exercise of that discretion, the Court should be unwilling to interfere. We do not preclude the Duke from his remedy, if he thinks fit to pursue it, by

(a) L. T. N. S. 177. Not yet published in any of the other Reports.

Not granted where libel is on a deceased person.

way of action or indictment; but in this particular case we should be prepared on this ground to discharge the rule."

It was refused next on the ground that the libel was on a deceased person. "Next, as to the point that the subject of the libel is dead, the authorities are not absolutely conclusive; but it seems to us that the weight of authority inclines upon the whole in favour of the objection. The *locus classicus* upon this subject is the judgment of Lord Kenyon in *R.* v. *Topham*, 4 T. R. 126. He points out (p. 128) that the general statement in 5 Rep. in the case *de libellis famosis*,(*a*) that publications defamatory of dead persons are libellous, was a statement extra-judicial, that it was not the point in judgment, and that the judgment might well have been sustained without going into it. He shows, further, that the passage in Hawkins (1 Hawk. P. C. c. 28, s. 3), which deals with informations as well as ordinary indictments, puts the whole criminality of libels (as distinguished from the civil liability of those who publish them) on private persons on their tendency to disturb the public peace. Hawkins, indeed, in a passage immediately following the words quoted by Lord Kenyon, puts his own view beyond all doubt, and shows that he would have discouraged, or even disallowed, many of the indictments for libel—to say nothing of informations—with which the Courts of late years have been occupied. For he says: 'The Court will not grant this extraordinary remedy, nor should a grand jury find an indictment, unless the offence be of such signal enormity that it may reasonably be construed to have a tendency to disturb the peace and harmony of the community. In such a case the public are justly placed in the character of an offended prosecutor to vindicate the common right of all, though violated only in the person of an individual; for the malicious publication of even truth itself'—this was written when truth could not be pleaded to an indictment—'cannot in true policy be suffered to interrupt the tranquillity of any well-ordered society.' The case in Carthew, 405(*b*) (a strange and unsatisfactory case, and very loosely reported), Lord Kenyon explains, as he does also *R.* v. *Critchley*,(*c*) by stating that in both cases an intention to subvert and slander the Government of the country was charged in the indictment, and supports both cases distinctly on this ground. It may be doubted, if the cases are looked at, whether Lord Kenyon did not support the decisions (what the actual decision in the case in Carthew was does not appear) upon grounds which the judges who decided

(*a*) 5 Co. Rep. 125. (*b*) *Rex* v. *Paine*.
(*c*) 4 T. R. 128, in note.

them did not think of, which most certainly they did not state. The libel in *R.* v. *Paine* (Carth.) was on King William, who was alive, and Queen Mary, who was dead; the case, therefore, is a very weak one on the point now before us in any view of it.(*a*) The libel in *Rex* v. *Critchley* stated of a certain Sir Charles Nicoll, who was dead, that 'he changed his principles for a red ribband, and voted for that pernicious project, the excise.' This was the whole libel, and Lord Kenyon may well have been puzzled to uphold the propriety of a criminal information in respect of it, even though the deceased Sir Charles was the father of the wife of a Secretary of State. But in the case itself in which the libel on a deceased Lord Cowper was of the most virulent possible description, imputing to him 'unmanly vices and debaucheries,' Lord Kenyon, after time taken to consider, with the assent of Mr. Justice Buller, who had tried the case, arrested the judgment on the ground that it was not the subject-matter of indictment for libel to asperse the memory of the dead, unless it was done with a design to break the peace. The Court of King's Bench, in the case of *Rex* v. *Topham*,(*a*) appears to assent to the principle laid down by Hawkins, that private character is to be vindicated by private action, and that an indictment or information for libel is then only to be justified where there are some incidents in it which concern the public, such as an attempt to injure the Government, or an intention or tendency to break the public peace. This necessity of the person who applies for the criminal information being himself individually aspersed, is laid down in very strong terms by Mr. Justice Patteson in *Reg.* v. *Mead* (4 Jur. N. S., 1014). There is no instance of an action for libel by the representative of a deceased person; it must be some very unusual publication to justify an indictment or information for aspersing the character of the dead. If such a case should ever arise, it must stand upon its own footing. But this is not that case; and on this ground also we should, in our discretion, decline to interfere."

Libel on a peer, &c., as a private individual.

The Court next considered the more general objection that the social position of the applicant, however lofty, was not a ground for granting a criminal information where the libel is one affecting his private character only, and does not reflect upon him in the exercise of any public office.

On this point the judgment sketches the practice of the Court from the time of Lord Hale, and points out the increasing facility, reaching its greatest height in the time of Lord

(*a*) See the remarks on this case, *ante*, p. 494. (*b*) 4 T. R. 126.

Tenterden, with which these informations were obtained. "It is impossible," proceeds the judgment, "for any one not to see the great change which had come over the feeling of the Court between the days of Lord Hale, Lord Holt, and Hawkins, and those of Lord Tenterden. But the general dissatisfaction of the profession with this state of things led, in the time of Lord Denman and Lord Campbell, to a much stricter practice in the Court in the granting of these informations. I am quite aware that *Reg.* v. *Gregory*,(a) *Reg.* v. *Latimer*,(b) and some few cases of this sort occurred during this period of time; but there can be no doubt that the cases were rare, except where some person in a public or official position was attacked in relation to such position, or where the attack was of so cruel and outrageous a sort as to make it, according to the view of Hawkins, a matter which interested the public, and called for interference of the Court, as representing the public and charged with the defence of its interests. So it was during the greater part of the time of Sir Alexander Cockburn, though towards the close of his life the practice of the Court became somewhat easier and laxer. I have, however, by the kindness of a learned friend, been furnished with the reports of fifty cases of criminal information, running over the years from 1860 to 1880 inclusive, and, out of these fifty cases, four only were cases of informations granted at the suit of persons who were not in some public office or position. And during that time there were repeated declarations by various members of the Court, not indeed that as matter of law the information would not be granted at the suit of private persons, but that the Court would, as a general rule, leave private persons to their private remedies. For example, in *Reg.* v. *Lord Winchilsea*, 1865, Mr. Justice Blackburn says the remedy had usually and properly been confined to cases of magistrates, ministers, public officers, and persons in a high position whose character was of such public importance as to require immediate vindication. The Lord Chief Justice (Sir A. Cockburn) adds that 'the extraordinary intervention by means of a criminal information was a procedure of a high prerogative character reserved for cases of public importance.' In the case of *Reg.* v. *Headley*, in 1875, I find Mr. Justice Blackburn reported as saying 'It is not enough that it should appear that there has been a libel' (differing apparently in terms from Lord Tenterden, who seems, if rightly reported, to have thought it was enough); 'it must also appear that it is a publication as to which we ought to put the prerogative process of the Court in operation against the

(a) 8 A. & E. 907. (b) 15 Q. B. 1077.

writer. It should not be done too lightly, or otherwise our jurisdiction to grant criminal informations, though very useful, may be brought into odium. Again, in 1877, in the matter of a gentleman named Middleton, in which the libel was very gross, the rule was refused, and I find Mr. Justice Mellor, with the concurrence of Mr. Justice Lush, saying this: 'We must be chary of making the high jurisdiction of this Court a sort of substitute for the ordinary jurisdiction of the magistrates. The Court used to be far more strict in the exercise of its extraordinary jurisdiction in granting criminal informations than it has been perhaps in later times; but this is hardly a case for its exercise. It is not like the case of a serious imputation on a magistrate or a public officer, like a town clerk, for misconduct in his office.' Again, in 1878, in the case of an application on the part of the musical critic of the *Times* newspaper against the present defendant for imputing to the applicant personal corruption, the rule was refused by Mr. Justice Mellor and Baron Huddleston, the Court saying that 'the libel was one which might well warrant an indictment or an action, but it did not follow that it was the fit subject of a criminal information. That was an exercise of the extraordinary jurisdiction of the Court, which, as a general rule, was reserved for cases of libel upon persons in an official or judicial position, and filling some office or post which made it for the public interest necessary that such jurisdiction should be exercised for the refutation of the libellous charges made.' Examples might be multiplied, but these are sufficient. Very few of these cases are to be found in the volumes of reports. They are cases of discretion, and turn generally upon facts and have seldom been reported; and the passages which I have been reading have been furnished me by a gentleman of the Bar(*a*) who reported them for the newspapers, and who is able to vouch for the substantial correctness of his own reports. . . . . I am able from my own recollection to state two cases, each of them, I think, important. This Court in the time of Lord Campbell refused Sir Charles Napier a criminal information for a libel imputing to him great misconduct in regard to his conquest of Scinde, on the ground, among others, that he had ceased to be Commander-in-Chief in India and was at the time of his application to the Court only a private person; and a rule in the case of *Reg.* v. *Plimsoll*, in which I was myself counsel, for a criminal information for a libel, in which a member of Par-

(*a*) Referring to Mr. W. F. Finlason, the very learned reporter of the *Times*, and one of the editors of Foster and Finlason's Reports, so often referred to in this work.

liament was accused of sending his ships to sea overloaded in order that they might sink and he might gain the insurances on them, was discharged, after argument; and it was discharged without costs, inasmuch as the applicant had cleared his character; but the Court left him to his ordinary remedy as a shipowner against any one who libelled him in that character. We are thus brought down to the last case upon the subject, with the authority of which we were pressed very properly. I mean *Reg.* v. *Yates*. I know nothing of the merits of that case, and if I did, as the litigation is still depending, it would be unfit to say a word upon it. But a libel upon the private character of Lord Lonsdale, certainly not so aggravated as some of those as to which informations have been refused, was made the subject of an application to this Court, and the rule for a criminal information was made absolute. It is said that it was granted almost as of course, because the applicant was a peer. The case is as yet unreported, (*a*) and I am unaware of what my learned brothers may have said; but if this was the ground, I must respectfully dissent from it."

The judgment then proceeds to deal broadly with the question as affecting peers:—"I can find nowhere any trace of the doctrine that a peer, as such, is entitled to exceptional and most important privileges in the administration of the law. If a peer is libelled, as a peer, for his conduct in Parliament, or as Lord Lieutenant (if he is one), or as magistrate, or as the holder of a public office, it would undoubtedly be almost of course (all other legal conditions being fulfilled) that the Court would interfere in his behalf. But that a peer in private matters is entitled to any interference at the hands of this Court—which the Court would not exercise in favour of the humblest subject of the Queen—I respectfully but emphatically deny. I am not aware of any authority for such a proposition. *Reg.* v. *Gregory* is certainly no such authority; and I decline to make one. It is said, on the other hand, that the point now under consideration was not taken, or, at any rate, not pressed upon the Court in *Reg.* v. *Yates*; and the probable explanation of this, which I understand on the best authority to be the fact is this—namely, that with several of the cases decided in the latter years of Sir A. Cockburn it was felt that a Divisional must act on those later authorities, which no doubt formed a complete justification for the course taken by this Court. I have said, however, that it is not possible to reconcile the cases; it is not

(*a*) Reported on another point, L. R. Q. B. D. p. 750.

easy, perhaps it is not possible, to lay down any rule which can guide discretion amid the ever-varying facts to which discretion has to be applied. If we go back to principle we find it well stated by Blackstone, book iv., c. 23, p. 309, as follows: 'The objects of the other species of informations filed by the Master of the Crown office upon the complaint or relation of a private subject, are any gross or notorious misdemeanours, riots, batteries, libels, and other immoralities of an atrocious kind, not particularly tending to disturb the Government (for those are left to the care of the Attorney-General), but which, on account of their magnitude or pernicious example, deserve the most public animadversion;' and if the passage of Mr. Starkie be looked at, in which he defends the proceeding by way of criminal information, which he calls 'a proceeding irreconcilable with the ordinary principles of jurisprudence on which the law of libel in England is founded,' it will appear at once that that great writer would have met this application before us with a summary refusal and as not at all within those considerations which, in spite of the anomaly of the proceeding, bring about a result far more beneficial than might have been expected. It is under these circumstances that, acting under the powers conferred by the Judicature Acts, I have ventured to bring together five judges of the High Court to establish, if possible, upon unusual authority some principles for our guidance in future. My colleagues, with a slight exception to be presently noticed, concur in this judgment, and I trust that the full discussion which this rule has received may be of some advantage, and that, the grounds on which we discharge it becoming generally known, the practice of the Court may be brought back to that greater and more wholesome strictness which prevailed for at least a generation and a half, and that criminal informations may hereafter be granted only in cases which come fairly within the language of Sir William Blackstone already quoted, which I will not repeat and which I certainly cannot improve."

Denman, J., while concurring in the judgment thus delivered, had written a few words which he desired to add and which Lord Coleridge then read:—"I agree with the Lord Chief Justice that the rule ought to be discharged on the first two grounds upon which he rests his judgment, but I desire to add that I cannot accept the passage from Blackstone upon which he comments as being quite an exhaustive description of the cases in which the Court ought to interfere; for example, if a newspaper or an individual were to show by repeated attacks and by wide circulation of these attacks upon a private individual, whether a British subject or a foreigner, whether

resident in England or abroad, a persistent determination to persecute, I, as at present advised, should think it would be the duty, in many cases, of this Court to protect the individual by granting a rule, and even, in case of further persistence, by making it absolute." To grant a rule in respect of an existing libel with the intention of not making the rule absolute except in case of 'further persistence' would be a recurrence to the practice, condemned by Cockburn, C.J., of using the machinery of the Court merely to obtain a retractation or apology, the rule being then discharged on payment of costs by the libeller."

Motion must be made by counsel.

To obtain this order, counsel must be instructed to move upon proper affidavits, which must not be entitled or they cannot be read,(*a*) for a rule *nisi* calling upon the libeller to show cause why the information should not issue.

The Court will not permit the motion to be made by the prosecutor in person, as it is a general rule applicable to all proceedings in the name of the Sovereign, that no private person can be heard as an advocate in a court of justice.(*b*)

Affidavit improperly sworn.

Where the affidavit on which the rule had been obtained was not properly sworn, the Court refused to enlarge the rule in order that the affidavit might be resworn.(*c*) "The Court," said Lord Denman, C.J., "have been looking for some time for a precedent for such an application, and can find no precedent in cases of criminal information. There are some cases with reference to bail. The party ought to have come properly prepared in the first instance. No injustice will be done, as the party can still prefer an indictment."

The Court requires to be satisfied upon various points before it even calls upon the defendant to show cause why the information should not go.

Prosecutor must swear to his innocence.

The first requisite is, that the prosecutor should swear directly and pointedly to his innocence of the charge contained in the libel, unless the subject-matter is general imputation, or the party libelled is abroad at a great distance.

This was laid down in the case of *Rex* v. *Haswell and Bate*, on the prosecution of the Duke of Richmond,(*d*) as an invariable rule, upon which the Court acts without

(*a*) *Rex* v. *Robinson*, cited 6 T. R. 642.
(*b*) *Rex* v. *Lancashire* (*Justices*) (1 Chitty, 602); *Rex* v. *Brice* (2 B. & Ald. 606).
(*c*) *Rex* v. *Cockshaw* (2 N. & Man. 378).
(*d*) *Rex* v. *Haswell and Bate* (1 Doug. 387).

distinction of person. The libel in that case had appeared in the *Morning Post*, imputing to the Duke a variety of treasonable practices and designs, among other things that he had, in his speeches in the House of Lords, opposed the increase of the military strength of the kingdom, in order to facilitate a descent in this country by the French; and also charging him with having conveyed intelligence to the Ministers of France. The rule was granted against Haswell, the printer of the paper, on the joint affidavit of the Duke and another person. The Duke swore that he believed himself to be the person meant in the libel, and that it contained false, scandalous, and malicious aspersions and insinuations against him. On a subsequent day a rule was moved for against Bate as the publisher, when Lord Mansfield, C.J., said there was an objection to both rules, inasmuch as the prosecutor had not specifically denied the particular charges; but he thought the nature of the libel might be an exception to the general rule; that as to what was supposed to have been said by his Grace in Parliament, it was certainly unnecessary to answer that, because what passed there could be questioned nowhere else, and the rest of the libel, being general imputations, did not seem within the rule. Willes, J., said he did not well see how the Court could make any distinction between the Duke and the lowest individual; if the rule were general, it ought to be adhered to in that case, and no instance had been stated where it had been dispensed with. The other judges agreed, and ultimately the rule was granted as to that part of the libel referring to the Duke's conduct in the House of Lords. Subsequently the Duke filed an affidavit expressly denying all the specific charges in the libel.(*a*)

Where libel reflects on several persons.

Where, however, the libel reflects on several persons, the Court will grant the information, although the person moving for it may not be blameless;(*b*) and the Court will grant it for a libel on a public body of men without requiring an exculpatory affidavit.(*c*)

Delay in making application.

There must be no unnecessary delay in coming to the Court. In *Rex* v. *Jollie*,(*d*) Littledale, J., said: "The rule is, that the application must be made within two terms after the publication, sufficiently early to enable the defendant to show cause within that term."

(*a*) See also *Rex* v. *Wright* (2 Chitty, 162); *Rex* v. *Draper* (3 Smith, 390); *Rex* v. *Bickerton* (1 Str. 498).

(*b*) *Reg.* v. *Gregory* (8 A. & E. 907).

(*c*) *Rex* v. *Williams* (5 B. & Ald. 595), where the libel was on the clergy of a particular diocese.

(*d*) 1 N. & M. 484; 4 B. & Ad. 867.

If there is further delay, it must be reasonably accounted for; as, for instance, that the libel had not come to the knowledge of the prosecutor until some time after it was published.(*a*)

Other proceedings must not have been instituted.

The party who applies for the information must come to the Court in the first instance, as the Court will not assist him if he has instituted other proceedings.(*b*) He must place himself entirely in the hands of the Court for the vindication of his character; and if it appears that he has put himself in communication with the publisher for the purpose of retorting, or with a view of gaining redress, the court will not interfere.(*c*)

Trivial cases.

The Court will not grant an information in trivial cases.(*d*)

Where defendant is very poor.

Lord Mansfield laid it down that a proceeding by information was not proper against a very poor person.(*e*) We can find no later decision as to this, but in all probability it would be followed, if the attention of the Court were called to the circumstances of the defendant and to the authority just cited; as it is an undoubted hardship to compel him to incur the additional expense consequent upon that mode of prosecution, when the prosecutor may adopt the less cumbrous one of presenting a bill at the assizes.

Primâ facie evidence of publication, by defendant, not sufficient.

The affidavit must prove the publication by the defendant; and the Court will not be satisfied with merely *primâ facie* evidence where conclusive evidence is easily obtainable;(*f*) nor will the Court in any case accept less evidence than would warrant a grand jury in finding a bill.(*g*)

Proof of publication of newspapers.

Formerly, conclusive evidence of the publication of newspapers was readily obtainable from the Stamp Office; as the 6 & 7 Will. 4, c. 76, provided, under heavy penalties, that no person should print or publish any newspaper before there had been delivered to the Commissioners of Stamps, or to the properly authorized officer at the head office for stamps in Westminster, Edinburgh, or Dublin, or to the officer appointed by the said commissioners in and for the district within which the newspaper should be intended to be published, a declaration in writing setting forth the title of the paper, a description of the building wherein it was to

(*a*) See *Rex* v. *Robinson* (1 W. Bl. 542); *Prideaux* v. *Arthur* (Lofft. 393); *Rex* v. *Murray* (1 Jur. 37); *Reg.* v. *Heet* (4 Jur. 339); *Ex parte Hopper* (23 L. T. 164); *Rex* v. *Bishop* (5 B. & Ald. 612).

(*b*) *Rex* v. *Marshall* (4 E. & B. 475); *Reg.* v. *Gwilt* (11 A. & E. 587).

(*c*) *Reg.* v. *Lawson* (1 Q. B. 486).

(*d*) *Ex parte Beauclerk* (7 Jur. 373); *Reg.* v. *Proprietors of Nottingham Journal* (9 Dowl. 1044); *Rex* v. *Mead* (4 Jur. 1014).

(*e*) Anon. Lofft. 156. (*f*) *Reg.* v. *Baldwin* (8 A. & E. 168).

(*g*) *Rex* v. *Willett* (6 T. R. 294); *Ex parte Williams* (5 Jur. 1133).

be printed, and of the building wherein it was to be published; the name, addition, and abode of every person who was intended to conduct the actual printing, and of every person who was intended to be the publisher, and of the proprietor, &c.

After the repeal of this enactment it was sometimes very difficult to prove the publication.

By purchase of a copy in defendant's shop. By affidavit of accomplice.

Sometimes the proof was by affidavit of a person who had purchased a copy of the newspaper in defendant's shop. Or, the publication was proved, as in the case of *Rex* v. *Haswell and Bate*,(*a*) by the affidavit of an accomplice.

And where a rule had been granted on insufficient evidence of publication, the Court afterwards discharged it, although the affidavits filed by the defendant in opposition to the rule admitted the publication.(*b*)

44 & 45 Vict. c. 60.

The Newspaper Libel and Registration Act of 1881 (44 & 45 Vict. c. 60), has now established a register of newspapers, in which the names and addresses of the proprietors are to be entered, and copies of entries in or extracts from which are made evidence.(*c*)

Improper or irrelevant matter in affidavits.

It is necessary to guard against inserting improper or irrelevant matter in the affidavits, as there is danger of the Court refusing, on that ground, to interfere.

In the case of *Rex* v. *Burn*,(*d*) Lord Denman, C.J., said: "The prosecutor has stated a sufficient case for a criminal information; but he has, in the early part of his affidavit, introduced words irrelevant and reflecting on the character of the party against whom he applies; and afterwards, in explanation of something which he states to have passed, he goes into a narrative of matters impertinent to the cause, and calculated only to prejudice the minds of the Court. Parties who come before the Court with affidavits, are to confine themselves to the simplest statement of that which induces them to make the application, and not to enter upon discussions like this, unless the nature of the subject makes them absolutely necessary." The Court discharged the rule solely upon this ground.

Drawing up rule.

When the rule is obtained, care must be taken that it is properly drawn up. No documents can be referred to upon

(*a*) 1 Doug. 387. See also *Rex* v. *Steward* (2 B. & Ad. 12).
(*b*) *Reg.* v. *Baldwin* (8 A. & E. 168).
(*c*) Sects. 8, 9, 15. See the provisions of the Act set forth at length, *ante*, p. 315, 316.
(*d*) 7 A. & E. 193, and see *Reg.* v. *Doherty* (1 Arn. & Hodg. New Term Reports, 16).

the argument which are not referred to in the rule.(*a*) It must be drawn up "upon reading" the publication, which must be annexed to the affidavits and marked as an exhibit.

Service of rule.

The rule must be obtained from the Crown Office, and a copy of it served on the defendant personally, or by leaving it with some member of his family at his residence. The original should be shown to the person who is served with the copy.(*b*)

Showing cause against rule.

In showing cause against the rule, the defendant may urge the truth of the libel; for, as before stated, although the truth is, by itself, no answer to an *indictment*, the Court will not grant its aid, by information, to a tainted person.

In the case of *Rex* v. *Lee*,(*c*) a rule *nisi* had been granted against the publishers of the *Satirist* and the *Censor of the Times*, for the following libel: "Simon, but more commonly known in the play world as King Digby, from his skill in palming that card at écarté, and who long enjoyed an unenviable notoriety among the legs at the club at Brighton, is living in obscurity in Devonshire. He has been, however, recently in town, and was seen at Epsom during the races, *sharply* upon the look-out, it was presumed, for *flats*." Digby made an affidavit that he was never guilty of palming the king at "écarté," nor of unfair play at cards or any other game, and that he had not been at Epsom races for about seven years. The only affidavit in opposition was by one Thomas Shepard, who swore that he was intimately acquainted with Digby, and that on one occasion when Digby dined with him at defendant's residence in Shaftesbury Terrace, Pimlico, Digby played at écarté with him, won of him from £80 to £85, was detected by him in palming the king, confessed the fact, and returned the money. Upon this affidavit the Court discharged the rule. But afterwards a new rule was granted, and made absolute, on affidavits deposing that Shepard had, on oath, in the Consistory Court in London, contradicted his affidavit, and that Digby had preferred an indictment for perjury against him, and that the bill was found on Digby's oath denying the truth of the statements in Shepard's affidavits, and on the testimony of several other witnesses; that a warrant had been obtained for Shepard's arrest, but that he could not be found, and was believed to have left the country.

New rule.

The circumstances of the last cited case were peculiar. In general, where a rule for a criminal information has been

(*a*) *Rex* v. *Baldwin* (8 A. & E. 168); *Reg.* v. *Wolmer* (12 A. & E. 422).

(*b*) Cole on Criminal Informations, 59.

(*c*) 5 A. & E. 780. According to the principles laid down in *Reg.* v. *Labouchere*, *ante*, pp. 584, 585, an information would not now be granted in such a case.

discharged on the merits, the Court will not grant a new rule on a second application, in the same case, even upon additional affidavits. "A party moving for a criminal information," says Lord Denman, C.J.,(*a*) "has some great advantages, and he may reasonably be required to collect all the necessary materials for his application when he first makes it." To grant a new rule in such a case, would be, according to Parke, J.,(*b*) "a precedent for re-inquiry in almost every instance where a criminal information was moved for without success. It would rarely happen that the party would not be able to mend his case on a second motion. The prosecutor has another remedy."

The defendant may also submit that the affidavits on which the rule was granted fail, in substance or form, to satisfy the requirements of the Court, or that they are answered by affidavits made on his behalf.

Costs.

If the rule be discharged on a preliminary objection, the defendant will not generally obtain his costs;(*c*) but if it be discharged on the merits, the Court generally grants costs.

Recognisance on rule being made absolute.

On the rule being made absolute, the prosecutor must enter into the necessary recognisance, pursuant to 4 & 5 Will. & M. c. 18, s. 2, which enacts "that the clerk of the Crown shall not issue out process upon the information until he shall have taken, or had delivered to him, a recognisance from the person or persons procuring such information, to be exhibited with the place of his, her, or their abode, title, or profession, to be entered to the person or persons against whom such information or informations is or are to be exhibited, in the penalty of twenty pounds, that he, she, or they, will effectually prosecute such information or informations, and abide by and observe such orders as the said court shall direct, which recognisance the said clerk of the Crown, and every justice of the peace of any county, city, franchise, or town corporate (where the cause of any such information shall arise), are hereby empowered to take."

The security required by the statute is only in the penalty of £20. The Court will not require it for a larger amount.(*d*)

Form of information.

In substance, the information is the same as an indictment. Whatsoever certainty is requisite in an indictment, the same, at least, is necessary in an information; and consequently, as all material parts of the crime must be

(*a*) *Rex* v. *Smithson* (4 B. & Ad. 862). (*b*) *Ibid.*
(*c*) *Reg.* v. *Proprietors of Nottingham Journal* (9 Dowl. 1043).
(*d*) *Rex* v. *Brooke and others* (2 T. R. 190).

precisely found in the one, so must they be precisely alleged in the other, and not by way of argument or recital.(*a*)

A form of a criminal information will be found in the Appendix; and, as to the substance, the reader is referred to Section III. (*post*), where the requisites of an indictment are set out.

Subpœna and appearance.

After filing the information and taking the security mentioned above, the Crown Office issues a subpœna, which is made out by the prosecutor's attorney and a copy served on the defendant, who has four days (exclusive of Sunday) from the day of the return to appear.

Under 48 Geo. 3, c. 58, s. 1, a judge's warrant may be issued to bring the defendant before him, or some other judge of the Queen's Bench, in order to his being bound, with two sufficient sureties, in such sum as shall be expressed in the warrant, with condition to appear in the said court at the time mentioned in the warrant, and to answer to all and singular indictments or informations for any such offence.

Non-appearance of defendant.

It is more usual, however, to subpœna the defendant; and if he does not cause an appearance to be entered within the time allowed, the attorney for the prosecutor may, upon filing an affidavit of service of the subpœna, issue an attachment; and if the defendant cannot be found, he may be outlawed.

Rule to plead.

After appearance, the prosecutor may give a rule to plead within ten days after service, as well in term as in vacation;(*b*) and in case no plea is entered within the time allowed, judgment for want of such plea may be signed at the opening of the office on the following morning, unless an order of the court or of a judge, extending the time, shall have been obtained.(*c*)

Sending down record for trial.

When the plea has been entered, the record is made up and sent down, by a writ of *nisi prius*, into the county where the libel was published.

Trial.

The trial is conducted as an ordinary civil action, subject to the rules of evidence applicable to a criminal prosecution.

What evidence is admissible and sufficient to bring home the charge to the defendant; what pleas he may put on the record, and the evidence necessary to support them, are set out in Section III. (*post*).

(*a*) Hawkins' P. C. Bk. ii. c. 26, tit. "Informations," s. 4.
(*b*) See No. 17 of Rules of Court under 6 Vict. c. 20.
(*c*) Rule 19.

II.—JURISDICTION OF JUSTICES OF THE PEACE.

Ordinary mode of inquiring into crimes.

In the last section we dealt with the extraordinary means which may be invoked to protect society from blasphemous, seditious, or immoral publications, and, in some cases, to punish defamatory attacks upon private character. Those means are in addition to, and not a substitution for, the machinery by which all crimes are inquired into.

Summons or warrant.

Upon complaint that any person has published a libel, a justice of the peace may either summon the accused to appear before him or some other magistrate; or he may, if he think fit, issue his warrant for his apprehension. The more usual course is, in the first instance, to grant a summons, and if the defendant do not obey it, then to issue a warrant.

In the case of *Butt* v. *Conant*(*a*) it was argued that a magistrate had no authority to issue a warrant for the arrest and commitment of a person charged with having published a libel; but the Court were unanimous in deciding that he had. And, independently of that judgment, the matter is now set at rest by 11 & 12 Vict. c. 42, s. 1, which empowers any justice of the peace, upon a complaint being made before him that any person has committed, or is suspected of having committed, "any indictable offence whatsoever," within the limits of the jurisdiction of such justice, to issue a warrant for his apprehension; or he may, in the first instance, issue a summons.

Defence before magistrate.

Upon the inquiry before the magistrate, if the prosecution establish a *prima facie* case, the defendant may call witnesses to prove that he did not publish the libel, or, in some cases, that it is true.

There are, as will hereafter be seen, two charges upon which a person accused of publishing a defamatory libel, may be committed—viz., the common law offence, and the offence created by 6 & 7 Vict. c. 96, s. 4—*i.e.*, "maliciously publishing any defamatory libel, knowing the same to be false;" and, if he proved to the magistrate that the libel were true, he could not well be committed on this latter charge. This view was taken by the Court of Queen's Bench in the unreported case of *Ex parte* Ellisson,(*b*) where a mandamus was granted to the Lord Mayor of London to hear such evidence; and the decision in *Reg.* v. *Carden*(*c*) is not opposed to it, as the information there did not charge the libel to have been published by the defendants knowing it to be false; and Lush, J., in

(*a*) 1 B. & B. 548. (*b*) Referred to in Folkard's Starkie, 592.
(*c*) L. R. 5 Q. B. D 1.

that case distinctly says(*a*) that *Ex parte* Ellisson was well decided. "It was competent to the defendant," said that learned judge, "before the magistrates, to endeavour to get rid of the major charge by proving the libel to be true."

If, however, the charge be one of simply publishing a libel (not in a newspaper), the magistrate cannot receive evidence of the truth of the libel. This was decided by the Queen's Bench Division in *Reg.* v. *Carden*.(*b*) Cockburn, C.J., said, that even if evidence sufficient to prove the truth of the libel were given, the magistrate would still be bound to convict, "because by the statute(*c*) the truth of the libel does not constitute a defence until the statutory conditions are complied with; and they cannot be complied with at that stage of the inquiry. There must first be commitment or holding to bail, then indictment, and then a plea such as may satisfy the exigency of the statutory conditions."

A similar view had previously been taken by Montagu Smith, J., on circuit.(*d*)

Advantages of going into evidence for defence.

There are several advantages gained by going into evidence before the magistrate, supposing there to be a legitimate defence. The witnesses are bound over to appear at the trial; and, their evidence having been taken down in the same way as the evidence for the prosecution, there is less risk of their being tampered with in the meantime. In case of their death before, or serious illness at the time of, the trial, their depositions may be put in evidence; and, if they appear at the trial, the judge has power to allow their expenses, which could not be done unless they had been bound over.

Bail.

If the justices decide to send the case to trial, the defendant is entitled, as a matter of right, to be bailed; as at common law every misdemeanour is bailable, and libel is not one of those which have been excepted by statute.(*e*)

The bail demanded must be reasonable; and the only question the justices have to determine is, the sufficiency of the sureties: they cannot enter into any investigation of the character or opinions of the sureties.(*f*)

Requiring sureties for good behaviour.

Besides the power of demanding bail from the accused, to answer an indictment for libel, justices have claimed the right to determine themselves whether the defendant has been guilty of publishing a libel; and, instead of sending him to trial, to require sureties of good behaviour, and in default to commit him to prison.

Lord Camden, in the case of *Rex* v. *Wilkes*,(*g*) strenu-

(*a*) L. R. 3 Q. B. D. p. 13. (*b*) *Ibid.* (*c*) 6 & 7 Vict. c. 96.
(*d*) *Reg.* v. *Townsend* (10 Cox C. C. 356; 4 F. & F. 1089.
(*e*) 11 & 12 Vict. c. 42, s. 23. (*f*) *Reg.* v. *Badger*) 4 Q. B. 472).
(*g*) 2 Wils. 151. See also *per* Pratt, C.J., in *Rex* v. *Shuckburgh*. 1 Wils. 29.

ously denied that a libeller could be bound to find surety of the peace, saying there was only one authority for the proposition—"the case of the seven bishops, where three judges said that surety of the peace was required in the case of libel; Judge Powell, the only honest man of the four judges, dissented; and I am bold to be of his opinion, and to say that the case is not law. Upon the whole, it is absurd to require surety of the peace in the case of a libeller." In *Bull* v. *Conant*,(*a*) the authority of this statement was denied, Park, J., being very wroth with Lord Camden for his "denunciation of dishonesty against men who, from no other part of their lives, nor from anything appearing in the particular case, deserved such a stigma:" but the only point decided in *Bull* v. *Conant* was, that a justice of the peace has power to issue his warrant for the arrest of a person charged with having published a libel, and, in default of bail, to commit him for trial.

There is, so far as we have been able to discover, only one modern authority in support of the doctrine that justices may demand sureties of good behaviour from persons whom they may adjudge guilty of defamatory libels. *Haylock* v. *Sparke*,(*b*) the case which evoked this decision, was an action of trespass brought against the late Chancellor of the Diocese of Ely, who was justice of the peace for the Isle of Ely. Upon the plaintiff being brought before him, charged with having written on the pavement "Donkey Watt, the Railway Jackass," referring to a Mr. Watt, the master of the railway station at Ely, the justice ordered him to find two sureties, and to enter into his recognisance to keep the peace for three months, and, upon his refusing to do so, committed him to gaol. The warrant was signed on the 30th of April, 1852, and on the 6th of May, the plaintiff was brought up on *habeas corpus* before Coleridge, J., and discharged. The warrant was afterwards brought up by *certiorari* and quashed, and this action was then commenced; the defendant pleading not guilty (by statute). On the trial before Pollock, C.B., among other points which were taken for the defendant, it was argued that he had acted within his jurisdiction, and, the declaration not being in case, and not averring malice, that the action failed under stat. 11 & 12 Vict. c. 44, s. 13. The learned Chief Baron held that there was no jurisdiction, but directed a verdict for the defendant, on the ground that the notice of action required by the statute ought to have been given after the warrant was quashed. The Court of Queen's Bench held that the notice was properly given, but that a justice of the

(*a*) 1 B. & B. 548. (*b*) 1 E. & B. 471.

peace *has* jurisdiction to require sureties for good behaviour in some cases of libel(*o*) against private individuals; and that, if that were true, the defendant had jurisdiction in the matter out of which the action arose; and, though the proceedings were informal, and there was, in the opinion of the Court, a great want of discretion in requiring sureties upon such an occasion, the action would not lie.

We are not aware that since this case there has been another instance of an alleged libeller being required to find sureties for good behaviour; and it by no means follows, because the Court has decided that justices of the peace have a bare jurisdiction, and that, to support an action against them for its indiscreet exercise, malice must be alleged and proved, that the judges would not find reasons for nullifying any actual exercise of such a jurisdiction. Be that as it may, the power has only to be brought into use to be abolished, either by the Legislature or by the force of public opinion, as it would never be tolerated that in a matter so essentially concerning the liberty of the subject, magistrates should usurp the functions of the jury, and establish a new censorship of the press.

Obscene publications.

The powers given to stipendiary magistrates and to any two justices of the peace by the Act, "for more effectually preventing the sale of obscene books, pictures, prints, and other articles," have been sufficiently pointed out, *ante*, pp. 384–386.

III. INDICTMENTS.

Indictment need not be preferred before arrest of libeller.

In the last section it was observed that the power of justices of the peace to commit for trial on a charge of publishing a libel had been disputed in the case of *Batt* v. *Conant*.(*a*) It was there contended by Vaughan, Sergt., in a very instructive argument, that the law required an indictment to be found before the justices of the peace could cause the accused to be apprehended. It has been pointed out that this contention did not prevail with the Court; and a modern statute (Jervis's Act, 11 & 12 Vict. c. 42) removes all doubt upon the point.

Preferring indictment before grand jury direct.

Originally, when it was desired to indict a libeller, the prosecutor went directly before the grand jury and preferred a bill, without the intervention of the magistrates; and that course of procedure was frequently adopted, as the offence of libel was not, before 1881, included in the Vexatious Indict-

(*a*) Those which are calculated to produce a breach of the peace.
(*b*) 1 B. & B. 548. *Vide ante*, p. 597.

ment Act.(*a*) By section 6 of the Newspaper Libel and Registration Act, 1881(*b*) they are now made subject to the provisions of the Vexatious Indictment Act.

Power of Inquiry by Court of Summary Jurisdiction in newspaper prosecutions.

On the hearing of any charge against a proprietor, publisher, or editor, or any person responsible for the publication of a newspaper, for a libel published therein, a Court of Summary Jurisdiction may now, by section 4 of the Newspaper Libel and Registration Act, 1881, receive evidence as to the publication being for the public benefit, and as to the matters charged in the libel being true, and as to the report being fair and accurate and published without malice, and as to any matter which under this or any other Act, or otherwise, might be given in evidence by way of defence by the person charged on his trial or indictment; and the Court, if of opinion, after hearing such evidence, that there is a strong or probable presumption that the jury on the trial would acquit the person charged, may dismiss the case.

Dealing summarily with the case.

In such a case also, by sect. 5, the Court of Summary Jurisdiction, if of opinion that though the person charged is guilty, the libel was of a trivial character, and that the offence may be adequately punished by virtue of the powers of this section, shall cause the charge to be reduced to writing and read to the person charged, and then address a question to him to the following effect: "Do you desire to be tried by a jury, or do you consent to the case being dealt with summarily?" And if such person assents to the case being dealt with summarily, the Court may summarily convict him, and adjudge him to pay a fine not exceeding £50.

The decision in *Reg.* v. *Carden*(*c*) that a magistrate has no jurisdiction to hear evidence as to the truth of the libel, is, it must not be forgotten, still the law in all cases of common law libel which do not come within the provisions of the Newspaper Libel and Registration Act, 1881.

Juri-diction of Quarter Sessions.

An indictment for composing, printing, or publishing blasphemous, seditious, or defamatory libels cannot be tried at sessions;(*d*) but obscene libels are within their jurisdiction.

Framing indictment.

The points which it is necessary to keep in mind in drawing an indictment or criminal information for libel will now be considered.

Venue.

The bill must be preferred in the county where the publication which is relied on was made; but it often happens that the defendant has, by one act, published the libel in two counties. Thus, in *Rex* v. *Burdett*,(*e*) the Court (Bayley, J.,

(*a*) 22 & 23 Vict. c. 17. (*b*) 44 & 45 Vict. c. 60.
(*c*) L. R. 5 Q. B. D. 1; 49 L. J. M. C. 1.
(*d*) 5 & 6 Vict. c. 38. See *Re Armstrong* (9 Cox Crim. Cas. 342).
(*e*) 4 B. & Ald. 95.

dubitante) held that posting a sealed letter was a publication in the county where the post-office was situate, and that where a defendant writes a letter in one county with the intent to publish it in another, and does afterwards publish it there, he may be indicted in either county.

The most convenient course is to lay the indictment in the county where the libel was made manifest, or "published" in the popular sense of that word.(*a*)

Indictment must charge "publication"

The indictment must charge that the defendant "did publish;" as merely writing a libel is not a misdemeanour.(*b*)

How libel must be set out.

The libel itself must be accurately set out, either by transcribing it verbatim or by setting out the particular words complained of; and if there are several libellous passages in different parts of the writing, they should be set out in the following manner: "In a certain part of which said libel there was and is contained," &c., "and in a certain other part of the said libel there was and is contained," &c.(*c*)

It was held that an indictment for publishing an obscene libel, "to wit, an indecent, lewd, filthy, and obscene book called 'Fruits of Philosophy,'" which did not set out the obscene words, was bad either upon arrest of judgment or upon error, and that the defect was not cured by a verdict of guilty.(*d*)

Of the reasons assigned for the necessity of setting out in the indictment the words of the alleged libel, one, at any rate, according to Bramwell, L.J., delivering the judgment in that case of the Court of Appeal (which reversed the decision of the Queen's Bench Division), is to this day substantial, and cannot be disregarded. It is, "that a defendant is entitled to take the opinion of the Court, before which he is indicted, by demurrer, or by motion in arrest of judgment, or the opinion of a Court of Error by writ of error, on the sufficiency of the statements contained in the indictment."

In this case reference was made to a rule of practice said to prevail in the United States,(*e*) that when an indictment

(*a*) As to the venue in the case of indictments preferred at the Central Criminal Court, see 4 & 5 Will. 4, c. 36, s. 3; and *Reg.* v. *Gregory* (7 Q. B. 274; 14 L. J. 82, M. C.).

(*b*) *Reg.* v. *Burdett* (4 B. & Ald. 95).

(*c*) 1 Camp. 353; *Cook* v. *Coe* (3 M. & S. 116). See also *R.* v. *Sparling* (1 Str. 497); *R.* v. *Popplewell* (2 Str. 686); *R.* v. *Chaveney* (2 Ld. Raym. 1368); *R.* v. *Horne* (2 Cowp. 672); *Wright* v. *Clements* (3 B. & Ald. 503).

(*d*) *Bradlaugh* v. *The Queen* (L. R. 3 Q. B. D. 607).

(*e*) *The Commonwealth* v. *Holmes* (17 Massach. 336); *The Same* v. *Tarboe* (1 Cush., Mass., 66; *The People* v. *Girardin* (1 Mann., Mich., 90).

contains an averment that the words are so obscene that if set forth they would pollute the records of the Court, it is unnecessary to set them forth. Brett, L.J.(*a*), and Cotton, L.J.(*b*), were of opinion that this was not the law of England, and that no statement relevant to the issue to be tried could be removed from the records of the Court merely because it was impure.

Libel in foreign language.

If the words complained of are in a foreign language, they must be set out in the original, with a correct translation.(*c*) A mistranslation may vitiate the indictment.(*d*)

Indictment must charge publication "of and concerning" person libelled.

The indictment should charge the libel to have been written and published "of and concerning" the person libelled.

In the case of *Rex* v. *Marsden*(*e*) the omission of those words was held fatal, upon the ground that, without them, it did not conclusively appear that no other person than the prosecutor could have been intended, although it was averred that the defendant intended to vilify the prosecutor, he having been Mayor of Colchester, and to cause it to be believed that he, "as such mayor," had practised corruption, and been guilty of abuse in respect to granting a licence to one J. L. to retail beer; and although innuendoes pointed the different parts of the libel to the prosecutor, and to the granting of the licence.

Innuendoes.

The indictment must contain averments of any facts which are necessary to connect it with the prosecutor or the subject of the libel.

An innuendo means nothing more than the words "*id est*," "*videlicet*," or "meaning," or "aforesaid," as explanatory of a subject-matter sufficiently expressed before; as—"such a one," meaning the defendants, or "such a subject," meaning the subject in question.

Inasmuch as an innuendo is only used as a word of explanation, it cannot extend the sense of the expressions in the libel beyond their own meaning, unless something is put on the record for it to explain.

Thus, in an action upon the case against a man for saying of another, "He has burnt my barn," the plaintiff cannot there, by way of innuendo, say, "meaning his barn full of corn," because that is not an explanation of what was said before, but an addition to it. But if, in the introduction, it had been averred that the defendant had a barn full of corn, and that, in a discourse about that barn, the defendant had spoken the words charged in the libel of the plaintiff, an

(*a*) L. R. 3 Q. B. D. p. 638. (*b*) *Ibid.* p. 641.
(*c*) *Zenobio* v. *Axtell* (6 T. R. 162). *Rex* v. *Golstein* (3 B. & B. 201).
(*d*) 1 Wms. Saunders, 242; Sty. 263. (*e*) 4 M. & S. 164.

innuendo of its being the barn full of corn would have been good, says De Grey, C.J., delivering the unanimous opinion of all the judges to the House of Lords in the case of *Rex* v. *Horne*.(*a*)

Where innuendo is unnecessary.

Where the writing itself imports a libel no innuendo is necessary.

Thus, where it was contended that the words "Frozen Snake" could not be deemed libellous unless shown to be so by an innuendo, Coleridge, J., said: "As to the necessity of an innuendo, 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 the plaintiff acted like a 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."(*b*)

Innuendo bad or repugnant to words of libel.

If an innuendo is bad, and on the face of it repugnant to the words of the libel, it may be rejected as surplusage, and, if the words are libellous in themselves, the indictment remains good;(*c*) but if the words are capable of two senses, and the innuendo ascribes one meaning to them, and is good on the face of it, then it cannot be rejected, but must be proved.(*d*)

Removal of indictment by *certiorari*.

The indictment is frequently removed by *certiorari* into the Queen's Bench, so as to secure the advantage of a special jury, and the opportunity of moving the Court, in case of a verdict being found against the defendant.

The Court of Queen's Bench may order any indictment removed into that court by *certiorari*, to be tried at the Central Criminal Court.(*e*)

Proofs of publication.

The first allegation in the indictment which it is necessary for the prosecutor to prove is, that the defendant published the matter which is charged against him.

Who is a publisher.

This leads us to consider what constitutes a publication, and we cannot find a more comprehensive definition than that given

(*a*) Cowp. 682. See also the case of *Rex* v. *Burdett* (4 B. & Ald. 316). Abbott, C.J., says, with reference to the above-cited language of De Grey, C.J.: "The judgment of which the above is part has universally been considered the best and most perfect exposition of the law upon this subject."

(*b*) *Hoare* v. *Silverlock* (12 Q. B. 633); see *Harvey* v. *French* (2 Tyr. 585; 1 C. & M. 11).

(*c*) *Harvey* v. *French* (1 C. & M. 11; 2 Tyr. 585). *Barrett* v. *Long* (3 H. L. Cas. 413).

(*d*) *Williams* v. *Stott* (3 Tyr. 688; 1 C. M. 675).

(*e*) 19 Vict. c. 16, s. 1.

by Bayley, J., in the case of *Rex* v. *Carlile*.(*a*) He there says: "It is right that it should be known, not only that the party who originally prints, but that every party who utters, who sells, who gives, or who lends, a copy of an offensive publication will be liable to be prosecuted as a publisher."

Proof of publication when proceeding is against publisher.

Publication may be proved by evidence that the libel was bought in defendant's shop; and this is, perhaps, the readiest proof when the prosecution is directed against the person who, in the common acceptation of the word, is the publisher.

In the case of *Rex* v. *Almon*,(*b*) Lord Mansfield, in answer to one of the jury, said: "I have always understood, and take it to be clearly settled, that evidence of a public sale, or public exposal to sale, in the shop, by the servant or anybody in the house or shop, is sufficient evidence to convict the master of the house or shop, though there was no privity or concurrence in him, unless he proves the contrary, or that there was some trick or collusion." A new trial was moved for on the ground that a master is not answerable, in a criminal case, for the conduct of his servant where his privity is not proved; but the Court upheld Lord Mansfield's ruling, and refused to grant a rule.

When proceeding is against author.

If, however, the author, and not the publisher, is the defendant, it will be sufficient proof of publication against him to show that the manuscript is in his handwriting, and that it is printed and published, although there be no evidence that he directed the one or the other.(*c*)

Lord Holt held that where a libel is produced, written by a man's own hand, and the author of it is not known, he is taken in the mainer,(*d*) and that throws the proof upon him; and, if he cannot produce the composer, the verdict will be against him.(*e*)

Proof of handwriting.

Where the guilt of the defendant is to be established by proof of his handwriting, persons should be called who have seen him write, or who are acquainted with the character of his handwriting by receiving or seeing letters or papers which have purported to be written by him, the authenticity of which has not been disputed.

(*a*) *Rex* v. *Carlile* (3 B. & Ald. 169), and see *Lamb's case* (9 Coke, 59). (*b*) 20 How. St. Tr. 838.

(*c*) *Reg.* v. *Lovett* (9 C. & P. 463).

(*d*) Mainer, mainour, manour, or meinour, from the French *manier* —*i.e.*, *manu tractare*, in a legal sense denotes the thing taken away, found in the hand of the thief who took it.

(*e*) *Rex* v. *Beare* (1 Raym. 417; 12 Mod. 221; 2 Salk. 417).

Thus, a clerk in a merchant's office may be called to identify the writing, by his knowledge of letters of the defendant received at his master's counting-house.(*a*)

By comparison.

Formerly the law did not allow the comparison, by the jury or by witnesses, of the libel with other writings of the defendant; but now by 28 & 29 Vict. c. 18, s. 8, "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury, as evidence of the genuineness or otherwise of the writing in dispute."

Experts may make this comparison as well as witnesses who have personal knowledge of defendant's handwriting. In the recent case of *Reg.* v. *Waters*,(*b*) the evidence on which the Court made the rule absolute for a criminal information was the affidavit of an expert, who had compared the handwriting of an authentic paper with that of the letter in question.

Newspapers.

As to newspapers, *ride ante*, p. 591.

Requesting or procuring another to write libel.

It is not necessary to prove that the defendant put pen to paper; or with his own hands sold, gave, or lent the libel, or a copy thereof, to any person. If he requested or procured any other person to write or publish the libel he is equally guilty.

Thus in the case of *Reg.* v. *Cooper*,(*c*) the evidence against the defendant was that of the editor of the paper in which the libel was published. He stated that the defendant had expressed a wish to him that he would show up the prosecutor and his brother, and had told witness the story which formed the foundation of the libel; that the witness had told it to a reporter for the paper, and that the libel was substantially what was so communicated; that afterwards the defendant had remarked that the article had not appeared; that after its appearance defendant said he had seen it, and that he liked it very much; that the witness had heard the tale before the defendant told it him. Wightman, J., left it to the jury upon this evidence to say whether the defendant had caused the libel to be published, remarking that his approbation of it, after publication, was evidence to show that it was such an article as he wished to be published.

The jury convicted the defendant, and the Court refused a rule for a new trial, Denman, C.J., saying: "If a man

(*a*) *Rex* v. *Slaney* (5 C. & P. 213). (*b*) MS.
(*c*) *Reg.* v. *Cooper* (8 Q. B. 533; 15 L. J. 206, Q. B.).

request another generally to write a libel he must be answerable for anything written in pursuance of his request. He contributes to a misdemeanour, and is therefore responsible as a principal. He takes the chance of what is to be published. . . . . 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. . . . . 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. . . . Here I have not the slightest doubt. There is, first, an employment; secondly, an identity of subject matter; thirdly, a complaint of delay in the publication; fourthly, an approval; fifthly, evidence that the libel is substantially that which was communicated." Coleridge and Wightman, J.J., concurred, principally on the ground that the defendant had approved of the article.

The case of *Parkes* v. *Prescott and another*, already referred to,(*a*) is still more conclusive upon this point. There an action of libel was brought against two guardians of the poor for defamatory statements which were made at a meeting of guardians, and afterwards published in two newspapers.

The only witnesses examined were the reporters who had been present at the meeting in the ordinary course of their duty. They proved the substantial accuracy of the reports, and that during the discussion the defendant Ellis said: "He hoped the local press would take notice of this very scandalous case," and requested the defendant Prescott to give an outline of it. This Prescott, who was in the chair, did, saying, "I am glad gentlemen of the press are in the room, and I hope they will take notice of it;" upon which the defendant Ellis added, "And so do I." Prescott also said he hoped publicity would be given to the matter. Martin, B., directed a verdict for the defendants on the ground that there was no evidence of publication. To this ruling a bill of exceptions was tendered, and the Court of Exchequer Chamber held it to be a misdirection, and awarded a *venire de novo*. The Court were not unanimous, the majority of the Court (Keating, Montague Smith, and Hannen, J.J.) holding that the case ought to have been left to the jury, on the ground that where a man requests another to publish defamatory matter of which, for the

(*a*) *Ante*, pp. 497–500, L. Rep. 4 Ex. 169; 38 L. J. 105, Ex.; 20 L. T. N. S. 537.

purpose, he gives him a statement, whether in full or in outline, and the agent publishes the sense and substance of it, although to some extent in his own language, the man making the request is liable to an action as the publisher.

Byles and Mellor, JJ., dissented, and to the learned judgment of Byles, J., we will call attention, as showing the distinction between the civil and criminal responsibility of a principal for the tortious acts of his agent.

Distinction between criminal and civil responsibility for act of agent.

Stated shortly, the grounds on which the learned judge supported the ruling of Martin, B., were: That there was no evidence of a direction to publish the precise words; that he doubted whether the expression of a hope that the press would take notice of the case, &c., amounted to an authority to publish in a newspaper defamatory and unjustifiable matter spoken at a meeting; that it is not sufficient at common law that expressions equivalent to those in the declaration were written and published by the defendant, but the libel must be proved as laid, and a variance is fatal; and, though a variance is now amendable, no amendment could cure the objection, as the evidence does not show what particular defamatory expressions were or were not authorized by the defendants. The learned judge threw out an opinion that an action on the case against the defendants for inciting the reporters to defame the plaintiff, would have been the proper remedy, without charging them with the words published by the reporters. He distinguished the case of *Reg.* v. *Cooper*(*a*) on the double ground that the defendant had expressed his approval of the article after it was published, and that *Reg.* v. *Cooper* was a criminal case. The learned Judge, upon this last point, said: "That case was, moreover, a criminal case. It was an indictment for libel; and there is a great distinction between the authority which will make a man liable criminally and the authority which will make him liable civilly. A principal is not *civilly* liable for the acts of his agent unless the agent's authority be by the agent duly pursued; but the principal may be *criminally* liable, though the agent have deviated very widely from his authority, or, as Lord Bacon puts it: 'Lawful authority is to receive a strict interpretation, *Mandata licita recipiunt strictam interpretationem, sed illicita latam et extensam.*' . . . . It is true that a libel is a criminal act; but in this case the plaintiff does not proceed for the criminal act, but for the civil injury. Reading the case of *Reg.* v. *Cooper* with the light of this distinction between civil and criminal proceedings, which distinction is clear law and

(*a*) *Ante*, p. 604.

sound sense, it may well be that when a defendant tells the editor of a newspaper, as he did in that case, to 'show another up,' and the editor of the newspaper does so in gross terms, unauthorized and not intended by the defendant, the latter may, nevertheless, be criminally liable, though he might not be *civilly liable*."(*a*)

Questions to witness.

A witness may be asked if he knows who wrote the libel, but, if he answer in the affirmative, he is not bound to name the person, because it may be himself.(*b*)

Proof of place of publication.

A publication must be proved at the venue laid in the indictment. We have seen that where a man writes a libel in one county, and is a party to its publication in another, he may be indicted in either.(*c*)

Putting in the libel.

After proving the publication, the next step is to put the libel in and have it read.

If the original is proved to be in the possession of the defendant, and notice has been given to him to produce it, and he fail to do so, a copy may be read.(*d*)

When a libel is printed, it would seem that all the impressions are original; and if the defendant is connected with the libel after it was printed, a copy may be put in, or rather duplicate, which he has not seen.(*e*)

Variance between libel and indictment.

The libel read must agree in all respects, save mere clerical errors—such as the misspelling of a word—with the indictment. If there is the slightest disagreement in the sense it will be fatal.(*f*)

It is no variance that only part of the libel is set out; but if any part qualifies the rest it may be given in evidence.(*g*)

Where the defendant was charged in several counts of the indictment with having "composed, printed, and published" a libel which, as set out in the indictment, differed from the printed libel, but agreed with the MS. which the defendant had delivered to the printer, it was held that he might be found guilty of the composing and publishing, and acquitted of the printing.(*h*)

Power to amend variance.

The Court has power to amend any variance which may appear between the written evidence and the recital thereof on the record, in matters not material to the merits of the case,

(*a*) See now *Reg.* v. *Holbrook* (L. R. 4 Q. B. D. 42, *post*, p. 612–614.
(*b*) *Rex* v. *Slaney* (5 C. & P. 215).
(*c*) *Ante*, pp. 599, 600, and see *Rex* v. *Johnson* (7 East, 65).
(*d*) *Rex* v. *Watson* (2 T. R. 201).
(*e*) *Rex* v. *Watson* (2 Camp. 129).
(*f*) *Rex* v. *Beach* (1 Leach, 135); and *Rex* v. *Hart* (1 Leach, 145).
(*g*) *Rex* v. *Beare* (2 Salk. 417; Ray. 414; 12 Mod. 221).
(*h*) *Rex* v. *Williams* (2 Camp. 646).

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and where the defendant cannot thereby be prejudiced in his defence on the merits.(*a*)

Proof of introductory averments.

After the libel has been read by the officer of the Court, the prosecutor proceeds to prove the introductory averments which are necessary to connect the libel with him.

For instance, if the libel reflects upon a man in any office or profession which may belong to many, it is necessary to aver that he acted in that capacity, and to prove it accordingly; and, though it suffices to allege that he held the particular office, yet, if the indictment state he was duly appointed, the appointment must be proved as laid.(*b*)

So, where an information stated "that before the publishing of the libel the King had issued a proclamation; that after the said proclamation and before the publishing of the libel thereinafter mentioned, divers addresses had on occasion of such proclamation been presented to his said Majesty, and that the defendant, well knowing the premises, but maliciously and seditiously intending to bring the said proclamation into contempt, &c., and to stir up sedition," published the libel in question, it was held necessary to prove the King's proclamation; but, *per* Buller, J., "the prosecutor need not have given any evidence at all of these addresses; the averment respecting these addresses seems unnecessary; for the information, after stating the proclamation and the addresses, charges the defendant with a seditious intent to bring the said proclamation into contempt, without noticing the addresses again. The distinction between material and immaterial averments is perfectly well settled; if the averment be material, that is, if it be connected with the charge, it must be proved; but if it be totally immaterial, and if the libel be not connected with the averment, it need not be proved."(*c*)

When introductory averments are necessary.

In short, it may be laid down that introductory averments are only essential when they make applicable to the prosecutor, and show to be libellous, statements which, on their face, do not naturally or inevitably refer to him or appear defamatory.

Where the statements are clearly libellous all explanatory averments may be rejected as surplusage.

Intent.

It has already been pointed out(*d*) that in a prosecution for libel on a dead person, it is essential to aver

(*a*) See 9 Geo. 4, c. 15; 11 & 12 Vict. c. 46, s. 4; 12 & 13 Vict. c. 45, s. 10; 14 & 15 Vict. c. 100, ss. 1, 24, 25.
(*b*) *Rex* v. *Martin* (2 Camp. 101). See *Rex* v. *Budd* (5 Esp. 230).
(*c*) *Rex* v. *Holt* (5 T. R. 446). (*d*) *Ante*, p. 495.

and prove that it was published with intent to bring contempt on the family of the deceased, and to stir up the hatred of the King's subjects against them, and to excite the relations of the deceased to a breach of the peace.(*a*)

This intent will generally be sufficiently proved by the libel.

Where the libellous words assume the existence of the extrinsic facts, they operate as an admission, and no further proof is needed.(*b*)

Proof of application of libel to prosecutor.

To prove the application of the libel to the prosecutor, witnesses should be called who are acquainted with him and with the circumstances which gave occasion to the libel, and who have read the libel; and they should be asked to whom they referred it.

In *Du Bost* v. *Beresford*, Lord Ellenborough held that the declarations made by spectators, while they looked at a picture, were evidence to show whom the figures were meant to represent.(*c*)

Malice.

Malice will be presumed from the act of publication; for, in the language of Lord Campbell, "malice, in the legal acceptation of the word, is not confined to personal spite against individuals, but consists in the conscious violation of the law to the prejudice of another. . . . . And it is a well-established maxim that every one must be taken to intend the necessary consequence of his deliberate acts."(*d*)

Sometimes, however, it becomes material to prove express malice, and, for this purpose, other publications by the defendant may be given in evidence.(*e*)

Falsehood need not be shown.

No evidence is required to show that the libel is false; for, at common law, "the truth or falsehood of a written or printed paper is not material to be left to the jury, upon the trial of an *indictment or information* for a libel. The epithet false is not applied to the proposition contained in the paper, but to the aggregate criminal result, *libel*. We say *falsus libellus* as we say *falsus proditor* in high treason."(*f*)

6 & 7 Vict. c. 96, s. 4.

The Legislature has, however, created a new offence by 6 & 7 Vict. c. 96, s. 4, which enacts: "That if any person shall maliciously publish any defamatory libel *knowing it to be false*, every such person on being convicted thereof shall

(*a*) *Rex* v. *Topham* (4 T. R. 126).

(*b*) See *Jones* v. *Stevens* (11 Price, 235); *Berryman* v. *Wise* (4 T. R. 366); *Yrisarri* v. *Clement* (3 Bing. 441). (*c*) 2 Camp. 512.

(*d*) *Ferguson* v. *Earl of Kinnoull* (9 Cl. & F. 321). See *Rex* v. *Harvey* (2 B. & C. 257); *Rex* v. *Burdett* (4 B. & Ald. 95).

(*e*) *Stuart* v. *Lovell* (2 Starkie N. P. 95).

(*f*) See opinion of the Judges delivered to the House of Lords (22 How. St. Tr. 297); and *Rex* v. *Burke* (7 T. R. 4).

be liable to be imprisoned in the common gaol or house of correction for any term not exceeding two years, and to pay such fine as the Court shall award."

And, although the prosecutor need not burden himself with the proof of the falsehood, to secure a conviction without alleging the *scienter*; yet it will be seen hereafter that the defendant may, under certain circumstances, give evidence of the truth of the matters charged.

Publishing or threatening to publish or abstain from publishing with intent to extort money.

By sect. 3 of the Act last referred to, it is enacted that "if any person shall publish or threaten to publish any libel upon any other person, or shall directly or indirectly threaten to print or publish, or shall directly or indirectly propose to abstain from printing or publishing, or shall directly or indirectly offer to prevent the printing or publishing, of any matter or thing touching any other person with intent to extort any money, or security for money or any valuable thing from such or any other person, or with intent to induce any person to confer or procure for any person any appointment or office of profit or trust, every such offender, on being convicted thereof, shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding three years."

Defence.

We come now to consider what answer the defendant can make to the indictment or information.

At common law he was restricted to the plea of not guilty.

Publication by mistake.

Under this plea the defendant may prove that he published the libel by mistake.

The cases which are sometimes quoted in support of this proposition do not, however, bear it out, and we are left to the dicta of judges; but there can be no doubt that, in the present day, proof that the only connection of the defendant with the libel was in innocently publishing it, would entitle him to the verdict.

In *Rex* v. *Topham*,(a) Lord Kenyon says: "There may indeed be cases, and so it was admitted in *Rex* v. *Nutt*, of a publication in point of law, where no criminal intention can be imputed to the party; as where a party delivers a letter without knowing its contents, or delivers one paper instead of another."

Rex v. *Nutt*(b) was the case of a criminal information against a woman for publishing a treasonable libel; and the evidence was, that the defendant kept a pamphlet shop, and that the libel was sold by her servant in her absence, and

(a) 4 T. R. 127.

(b) Fitzgib. 47; Barnard. 308. See also *Rex* v. *Paine* (5 Mod. 163).

that the defendant did not know the contents of it, "nor of its coming in or going out." Raymond, C.J., held that the defendant was guilty of publishing it, and that it would be very dangerous if the law were otherwise. And, in answer to a question from defendant's counsel as to whether a post-boy who carried a libel, sealed up, into the country, could be punished for it, the Chief Justice answered, "That there the question would be, whether the carrying by a post-boy should be deemed in law a publication; and in all those cases the mischief is equal, though the party's intention do not concur." The jury, however, in this case, could not agree to give a general verdict, and desired to give a special one, and eventually the Attorney-General consented to the withdrawal of a juror.

There is also a dictum of Lord Kenyon's in *Rex* v. *Lord Abingdon*, that an inadvertent publication would not be a libel.(*a*)

In a civil case, Patteson, J., ruled, that a porter who, in the course of his business, delivered parcels containing libellous handbills, was not liable to an action, if he were shown to be ignorant of their contents.(*b*)

Evidence to rebut presumption of publication.

It was always competent to the defendant to rebut the *primâ facie* presumption of publication, which is raised by the fact that the libel, importing on its title-page to be printed for him, was bought in his shop;(*c*) and now, by the 7th section of Lord Campbell's Act (6 & 7 Vict. c. 96): "Whensoever, upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall be given which shall establish a presumptive case of publication against the defendant, by the act of any other person by his authority, it shall be competent for such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from any want of due care or caution on his part."

There seems to have been some oversight in framing this section, as it contains no statement of what the effect of the evidence, which it allows to be given, shall be; nor does it appear to allow any evidence which was not formerly admissible at common law.

Before the passing of Lord Campbell's Act, the state of the law was this: "The proprietor of a newspaper which contained a personal libel was treated as a criminal, though he had not himself committed the criminal act, nor procured

(*a*) 1 Esp. 228. (*b*) *Day* v. *Bream* (2 Moo. & Rob. 55).
(*c*) *Rex* v. *Almon* (5 Burr. 2689).

or incited another to commit it, nor aided in its commission, nor knew that it was about to be committed."(*a*)

When the last edition of this work was published (1871), no decided case was to be found in which the defendant had succeeded in rebutting the presumption arising from the publication by his servants or agents.

In *Rex* v. *Walter*,(*b*) evidence was given that, though the defendant was proprietor of the paper in which the libel appeared, he lived entirely in the country, and that his son conducted the paper without interference on his part. Lord Kenyon told the jury that the defendant was liable.

In the case of *Rex* v. *Gutch and others*,(*c*) the libel was published in a London newspaper, and a witness for the defendant proved that, at the time of the publication, Gutch was living in Worcester, in an ill state of health, and was not interfering in the conduct of the paper at all. The counsel for Gutch (the late Sir F. Pollock), in a powerful argument, in which he reviewed all the cases, contended that his client could not be found guilty; but Lord Tenterden directed the jury that as the defendant derived profit from and found means to carry on the concern, and selected the person to conduct the publication, he was guilty of publishing what appeared in the paper, although it could not be shown that he was individually concerned in the particular publication, and that it would be exceedingly dangerous to hold otherwise; and the jury found him guilty. On the following day, another *ex officio* information was tried(*d*) against the same defendants, when Lord Tenterden said he did not mean that some possible case might not occur in which the proprietor of a newspaper would not be criminally answerable for what appeared in it.

In a note to Hawkins' "Pleas of the Crown,"(*e*) the possible case is suggested of the printer being confined in prison, to which his servants have no access, and their publishing a libel without his privity; in which case, it is there said, the libel shall not be imputed to him.

The point was distinctly raised in the recent case of *Reg.* v. *Holbrook*,(*f*) and the Queen's Bench Division (Cockburn, C.J., and Lush, J., *dissentiente* Mellor, J.) held that since Lord Campbell's Act (sect. 7) the proprietor of a newspaper is not criminally responsible for a libel published in it if he has given no authority, express or implied, for the publication;

(*a*) *Per* Lush, J., *Reg.* v. *Holbrook* (L. R. 4 Q. B. D. 49).
(*b*) 3 Esp. 21. (*c*) 1 M. & M. 433.
(*d*) 1 M. & M. 438. See also *Colbourn* v. *Patmore* (1 C. M. & R. 73).
(*e*) 1 Hawkins, bk. i. ch. 28 (tit. "Libels"), sect. 10, note 3.
(*f*) L. R. 4 Q. B. D. 42.

and that employing an editor with general authority to conduct the paper, and leaving it to his discretion what should appear in it, did not *per se* amount to evidence of consent or authority for the publication of the libel.

"The effect of sect. 7 of Lord Campbell's Act, read by the light of previous decisions, and read so as to make it remedial, must be," according to Lush, J., "that an authority from the proprietor of a newspaper to the editor to publish what is libellous is no longer to be, as it formerly was, a presumption of law, but a question of fact. Before the Act, the only question was whether the defendant authorized the publication of the paper; now it is whether he authorized the publication of the libel. It is true that the production of the paper which contains the libel, coupled with proof that the defendant is the proprietor, is *primâ facie* evidence that he caused the publication of the libel, and the onus is on him to prove the negative. But when he has proved that the literary department was entrusted entirely to an editor, the question what was the extent of the authority which that employment involved is to be tried upon the principle which is applicable to all other questions of authority, and I think the jury ought to be told, in this as in every other case, that criminal intention is not to be presumed, but is to be proved; and that, in the absence of any evidence to the contrary, a person who employs another to do a lawful act is to be taken to authorize him to do it in a lawful, and not in an unlawful, manner."(*a*)

Cockburn, C.J., referred to the notorious fact that in many, perhaps in the majority of instances, public journals are carried on for the benefit of proprietors who find the necessary capital, by editors employed by them, and to whom the conduct of the paper is committed without any immediate control or interference of the principals; and in his opinion it was intended to exempt principals so circumstanced, if able to satisfy a jury that they had not authorized, directly or indirectly, the insertion of libellous matter, from being held criminally liable.(*b*)

Cockburn, C.J., was clearly of opinion that it would not be enough for the principal to show that he had not specifically authorized the insertion of the matter complained of, if it should appear that he had given authority to insert matter, whether libellous or not, at the discretion of the editor. His Lordship considered it clear that "though in the authority originally given to the editor, no licence to

(*a*) *Ibid.* p. 50. Quoted with approval by Lord Coleridge. C.J., in his charge to the jury in *Reg.* v. *Foote and others.* 1 Cab & El. 132.
(*b*) *Ibid.* p. 60.

publish libellous matter may have been contained, still such an authority may be inferred from the conduct of the parties, as, for instance, from the fact that other libels have been published in the paper, which have come to the knowledge of the proprietor, and without his remonstrance or interference, or the removal of the editor, from which the assent of the proprietor might well be inferred."(*a*)

Lord Coleridge, C.J., held that the 7th section is applicable in the case of a prosecution for blasphemous libel.(*b*)

Privilege.

The defendant may likewise give evidence to show that the libel was privileged. As to this, we need only refer the reader to what has been said, in preceding chapters of this work, upon privileged publications.

Other grounds of defence.

The defendant may also prove that the libel is not capable of the innuendoes laid in the indictment, and that it does not refer to the prosecutor or to the transactions averred; and he may negative the material facts averred.

Other passages from book, &c. may be read.

For the purpose of showing the intention of the defendant, and explaining the meaning of the libel, he is entitled to have other passages from the book or newspaper which contains the libel read: and it is doubtful whether he may not explain his meaning by other works of his.(*c*)

So much as to the defences allowed by the common law.

Plea justifying libel.

Now, under Lord Campbell's Act, the defendant may, at his peril in case he fail, plead a justification of the libel, in addition to the plea of not guilty.

The 6th section of that Act(*d*) enacts "that on the trial of any indictment or information for a defamatory libel, the defendant having pleaded such plea as hereinafter mentioned, the truth of the matters charged may be inquired into, but shall not amount to a defence, unless it was for the public benefit that the said matters charged should be published; and that to entitle the defendant to give evidence of the truth of such matters charged as a defence to such indictment or information, it shall be necessary for the defendant, in pleading to the said indictment or information, to allege the truth of the said matters charged, in the manner now required in pleading a justification to an action for defamation, and, further, to allege that it was for the public benefit that the said matters charged should be published, and the particular fact or facts by reason whereof it was for the public benefit that the said matters charged should be published, to which plea the prosecutor shall be at liberty to reply generally, denying the whole thereof; and that if after such plea the defendant shall be convicted on such indictment or

(*a*) *Ibid.* p. 61. (*b*) *Reg.* v. *Bradlaugh* (15 Cox, C. C. 227).
(*c*) *Rex* v. *Lambert and Perry* (2 Camp. 398). (*d*) 6 & 7 Vict. c. 96.

information, it shall be competent to the Court, in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove or to disprove the same: Provided always that the truth of the matters charged in the alleged libel complained of by such indictment or information, shall in no case be inquired into without such plea of justification; Provided, also, that in addition to such plea it shall be competent to the defendant to plead a plea of not guilty; Provided, also, that nothing in this Act contained shall take away or prejudice any defence under the plea of not guilty, which it is now competent for the defendant to make, under such plea, to any action or indictment or information for defamatory words or libel."

Applies only to personal libels.

It is obvious, from the very nature of the case, that this section only applies to libels of a personally defamatory character; for the words require not only that the matter should be true, but that it should be for the public benefit that it should be published; and it would be absurd for any court of justice gravely to inquire whether the publication of blasphemous, obscene, or seditious matter were conducive to the public good.(*a*)

Contents and proof of plea.

The plea must set out the particular facts which are relied upon as proving the truth of the libel, and also the facts which render the publication for the public benefit; and the defendant must prove all the material allegations of the plea to the satisfaction of the jury, or the prosecutor will be entitled to the verdict. So that, if the libel contain several imputations, and the plea alleges the truth of all, if the evidence fail as to any of them, the verdict must be entered generally against the defendant, although the jury should find some of the imputations true.(*b*)

"It has uniformly been held that, even in a civil action for libel, the plea of justification is one and entire. It raises only one issue; and, unless the whole plea is proved, that issue must be found for the plaintiff. Some difference of opinion has prevailed as to how far a partial proof of the justification ought to operate in reduction of damages; but all authorities agree that there can be no partial finding for the defendant on the ground that the justification is partially established. In a criminal prosecution for a libel, had liberty been given by the Legislature to plead the truth as a defence, without any special direction as to the proceedings in case the whole plea is not proved, the jury could have had no right to

(*a*) See *Reg.* v. *Duffy* (2 Cox Crim. Cas. 45), followed in *Ex parte O'Brien* (15 Cox C. C. 180).

(*b*) *Reg.* v. *Newman* (1 E. & B. 558).

find that a part of the justification is proved; for there are no damages to be assessed, and the sentence to be pronounced rests exclusively with the Court. But all doubt upon the subject is removed by the express enactment that, wherever there is a conviction after a plea of justification, 'the court, in pronouncing sentence,' shall 'consider whether the guilt of the defendant is aggravated or mitigated by the said plea and by the evidence given to prove or disprove the same.' . . . . It is quite clear that the opinion expressed by the jury on any particular parts of the plea (the whole not being proved) could not be entered on the record."(*a*)

In the next chapter will be seen more fully the "manner now required in pleading a justification to an action."

Proof not allowed of libel having been previously published without proceedings taken.

It is not competent to the defendant to prove that the imputations contained in the libel have been previously published by other persons, and that the prosecutor, knowing of them, has not taken proceedings against the publisher.

Lord Campbell, C.J., refused to admit evidence of this nature on the trial of Dr. Newman for libelling Dr. Achilli;(*b*) and Coleridge, J., on motion for a rule for a new trial on the ground that the evidence was wrongly rejected, said, "It is said that you are to infer the truth of the statement made by one set of witnesses against the statement made by another set, because the same circumstances with respect to the same party have been stated before, and that this, having been brought to the knowledge of the party, he submitted. The fallacy is in the word 'submission.' It comes to this only, that he did not prosecute. There may have been many reasons for that—the anonymous nature of the article, the inability to fix on any particular person, the ignorance whether the charge proceeded from a man of character, the poverty of the party himself, and many other circumstances that might be suggested, preventing a man from instituting proceedings in a court of justice on the first occasion on which the charge was made."(*c*)

Defendant allowed to call co-defendant as witness.

Where of three persons jointly indicted for publishing blasphemous libels in a newspaper, two (the editor and publisher) had already been convicted of publishing similar libels in a previous number of the paper, and the case of the third was that he was not connected with the newspaper at all, Lord Coleridge, C.J., acceded to an application on his part that he should be tried separately, as this could not embarrass the prosecution, and a contrary course might prejudice his defence.(*d*)

This defendant was also allowed to call the other two defen-

(*a*) *Per* Lord Campbell, C.J., 1 El. & Bl. 577. (*b*) 1 E. & B. 269.
(*c*) *Ibid.* 272. (*d*) *Reg.* v. *Bradlaugh* (15 Cox, C. C. 221, 222).

dants as witnesses on his behalf, though it was contended, on the authority of *Reg.* v. *Winsor and Harris*(*a*) that this could not be done unless a verdict of acquittal was taken against them; and that by being called they would subject themselves to a cross-examination which might make them criminate themselves. Lord Coleridge pointed out that the case cited was not applicable, as there the fellow-prisoner was called on behalf of the Crown, and not, as here, for the defendant. As to the other ground of objection, his Lordship said that as the co-defendant was to be called simply to disprove publication by the defendant who called him, "any questions to show publication by anybody else would either not be admissible, or if they tended to criminate the witness, he would not be compelled to answer."

Fox's Libel Act.

The causes which led to the passing of Fox's Libel Act are matter of history. Erskine, by his intrepid and persistent defence of the Dean of St. Asaph, contributed perhaps more than any man, save Lord Camden, to gain this security for the Press, which, according to Lord Campbell, in effect defines a libel to be "a publication which, in the opinion of twelve honest, independent and intelligent men, is mischievous, and ought to be punished."(*b*)

Jury may give a general verdict on whole matter in issue.

The first section declares and enacts "That on every such trial" (*i.e.*, trial of an indictment or information for the making or publishing any libel), "the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information, and shall not be required or directed by the Court or judge, before whom such indictment or information shall be tried, to find the defendant or the defendants guilty, merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information."

Court or judge may give opinion on matter in issue.

Sect. 2 provides, "That on every such trial the Court or judge before whom such indictment or information shall be tried, shall, according to their or his discretion, give their or his opinion and directions to the jury on the matter in issue between the king and the defendant or defendants in like manner as in other criminal cases."

This enactment does not oblige the judge to give his opinion as to whether the publication is a libel, but leaves it to his discretion in each particular case.(*c*)

Special verdict.

By the 3rd section the jury are empowered to find a special verdict, as in other criminal cases.

General effect of Act.

"The onus always was on the prosecutor or plaintiff to show

(*a*) L. R. 1 Q. B. 289. (*b*) 5 Lives of the Chancellors, 350.
(*c*) *Baylis* v. *Lawrence* (11 A. & E. 920).

that the words conveyed the libellous imputation, and if he failed to satisfy that onus, whether he had done so or not being a question for the Court, the defendant was always entitled to go free. Since Fox's Act, at least, however the law may have been before, the prosecutor or plaintiff *must also satisfy a jury* that the words are such and so published as to convey the libellous imputation. If the defendant can get *either* the Court or the jury to be in his favour, he succeeds. The prosecutor or plaintiff cannot succeed unless he gets both the Court and the jury to decide for him."(*a*)

Commitment.

Where a defendant is convicted on a criminal information, unless the prosecutor consents to his being bailed, it is a matter of course that he should be committed pending the consideration of the judgment.(*b*)

Acquittal is final.

Should the jury acquit the defendant, the matter is determined for ever; for the Court will never grant a new trial, after an acquittal upon an indictment or information for a felony or misdemeanour, even where there has been a misdirection,(*c*) except where the case is of the nature of a civil action, such as an indictment for the non-repair of a highway.

Lord Campbell, in discharging a rule for a new trial, on an indictment for obstructing the navigation of a stream or sheet of water, said:(*d*) "The ground of my decision is that this is a criminal proceeding, and that the defendant ought not to be put twice in peril for the same cause. That rests upon a maxim of English law which will, I hope, always be held sacred. I, for my own part, reprobate the recent speculations as to the propriety of granting a new trial after acquittals for felony or murder. If there be an improper conviction, it should be set aside; but I hope the same practice will never prevail in the case of an acquittal. When an indictment is instituted purely to raise a question of civil right, I agree with the doctrine which I have found established. . . . . But where a real offence is charged, it would be creating a dangerous precedent to grant a new trial after an acquittal." We have quoted this judgment because some textbooks lay it down as the better opinion that the Court may grant a new trial after an acquittal in all cases of misdemeanour. There are certainly no modern cases to support this view; and so far back as the 12th Car. 2, its correctness was denied.(*e*)

(*a*) *Per* Lord Blackburn, *Capital and Counties Bank* v. *Henty* (L. R. 7 Ap. Cas. 775, 776).
(*b*) *Rex* v. *Waddington* (1 East. 159).
(*c*) *Rex* v. *Cohen and Jacob* (1 Starkie, 516).
(*d*) *Reg.* v. *Russell* (3 E. & B. 942, 950).
(*e*) See *Rex* v. *Read* (1 Lev. 9; see also 2 Burr. 665; *Rex* v. *Mann*, 4 M. & S. 337; *Rex* v. *Wandsworth* (1 B. & Ald. 63).

When Fox's Bill was before the House of Lords, Lord Thurlow wanted to introduce a clause authorizing the Court to grant a new trial, if it should be dissatisfied with the verdict given for the defendant; but Lord Camden, who had charge of the Bill in the Upper House, emphatically refused to consent.(*a*)

Motion in arrest of judgment or for new trial.

While, however, the Act gave to the Press the security of a real trial by jury, it did not take away such protection as the judges might give, on motions in arrest of judgment, and for a new trial.

The 4th section provides, that in case the jury finds the defendant or defendants guilty, he or they may move in arrest of judgment, on such ground and in such manner as by law might have been done before the passing of the Act.

This motion must be grounded on some objection appearing on the face of the record.

Grounds of motion.

Mere formal defects cannot be taken advantage of on such a motion; for, by the 25th section of 14 & 15 Vict. c. 100, every objection to any indictment for any formal defect apparent on the face thereof, shall be taken by demurrer or motion to quash the indictment, before the jury shall be sworn, and not afterwards; and every Court before which such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared.

Arrest of judgment.

Where, from want of proper introductory averments and innuendoes, the matter on the record does not appear to be libellous, the Court will arrest judgment; and it may be that in some cases, where prosecutions are instituted for alleged libels, no innuendoes or averments could put a libellous gloss on the matter.

The Dean of St. Asaph succeeded upon a motion in arrest of judgment, upon the ground that the indictment did not contain a sufficient charge of libel of and concerning the King and his Government. Mr. Justice Willes intimated an opinion that if the indictment had been properly drawn it might have been supported; but Lord Mansfield and Buller, J., gave no opinion upon the point.(*b*) So, in *Rex* v. *Topham*,(*c*) after verdict of guilty on an indictment for a libel on a dead man, judgment was arrested for want of an allegation that the libel was published with a design to bring contempt on the family of the deceased, and to stir up the hatred of the King's subjects against them, and to excite his relations to a breach of the peace.

(*a*) 29 Parl. Hist. 1537. (*b*) 21 St. Tr. 1043.
(*c*) 4 T. R. 126.

PART IV.
CHAPTER XI.

When motion in arrest of judgment must be made.

Where an indictment or information contains several counts, if any one of them is good the judgment will stand.(*a*)

The defendant must move before sentence, and if the indictment or information be not in the Queen's Bench, the motion must be made after verdict, at the Assizes; and the judge may, under 11 & 12 Vict. c. 78, reserve the point for the consideration of the Court of Crown Cases Reserved.

Arrest of judgment by court itself.

Although the defendant do not move, the Court will of itself arrest the judgment, if it appear that the defendant has not been found guilty of any offence at law.(*b*)

Effect of arrest of judgment.

The arrest of judgment sets aside all the proceedings, but is no bar to a fresh indictment.(*c*)

Motion for new trial.

When the information or indictment originated in the Court of Queen's Bench, or has been removed there by *certiorari*, the defendant may move for a new trial within the first four days of the next term.(*d*) If the motion cannot be made within those days, an intimation must be given, on one of them, that counsel is prepared to make the motion.(*e*)

The defendants must be present in Court when the motion is made, even though the counsel for the prosecution consent to their absence.(*f*)

Grounds on which new trial granted.

A new trial may be granted for misdirection, or the wrongful reception or rejection of evidence, or on the ground that the verdict was contrary to evidence, or on the ground of surprise,(*g*) or the misbehaviour of the jury.(*h*)

Where evidence, inadmissible for the purpose for which it is tendered, but admissible for another purpose not alluded to at the trial, has been rejected, the Court will not grant a new trial on the ground of an improper rejection of evidence.(*i*)

Venire de novo.

Where the verdict is imperfect, so that judgment cannot be given upon it, the Court will award a *venire de novo*.

Thus, in the case of *Rex* v. *Woodfall*, where the jury returned a verdict of "guilty of the printing and publishing *only*," the Court awarded a *venire de novo*, because it was impossible to say what the jury meant by the word "only."(*j*)

(*a*) *Rex* v. *Benfield and others* (2 Burr. 980, 985).
(*b*) *Rex* v. *Waddington* (1 East, 146).
(*c*) 4 Rep. 45. *Reg.* v. *Larkin* (23 L. J. 126, M. C.; Dears, C. C. 365).
(*d*) *Rex* v. *Holt* (5 T. R. 436). As to "terms," see now Judicature Act, 1873 (36 & 37 Vict. c. 66, s. 26).
(*e*) *Reg.* v. *Newman* (1 Ell. & Bl. 270).
(*f*) *Rex* v. *Askew* (3 M. & S. 9); *Rex* v. *Fielder* (2 D. & R. 46).
(*g*) *Reg.* v. *Whitehouse and another* (Dears, C. C. 1). See *Reg.* v. *Richardson* (8 Dow. 511).
(*h*) *Reg.* v. *Fowler* (4 B. & Ald. 273); see Hawkins' P. C., bk. ii. ch. 47, s. 12.
(*i*) *Rex* v. *Grant* (3 Nev. & Man. 106).
(*j*) *Rex* v. *Woodfall* (5 Burr. 2661).

Should the defendant fail to have the verdict set aside by any of the above means, he will be brought up for judgment.

Where the case is not in the Court of Queen's Bench, the sentence will be passed as in other cases of misdemeanour tried at the assizes; and, of course, the defendant may urge any topic in mitigation which would be available in the Queen's Bench, and support it by witnesses or affidavits. We shall, therefore, pass on to the practice of the Court of Queen's Bench.

The rule of procedure laid down by Lord Kenyon, in *Rex* v. *Bunts*,(*a*) appears to be still in force—viz., that "When any defendant shall be brought up for sentence on any indictment or information *after verdict*, the affidavits produced on the part of the defendant, if any such be produced, shall be first read, and then any affidavits produced on the part of the prosecution shall be read; after which the counsel for the defendant shall be heard; and, lastly, the counsel for the prosecution. And when any defendant shall be brought up for sentence after judgment *by default*, the prosecutor's affidavits shall be first read, then the defendant's affidavits; after which the counsel for the prosecution shall be heard; and, lastly, the counsel for the defendants. If no affidavits should be produced, the counsel for the defendants shall be first heard, and then the counsel for the prosecution."(*b*)

"It is not the practice in general to give the defendant an opportunity of answering at a future time the affidavits produced by the prosecutor. . . . . When a defendant is brought up for judgment, the only object which the Court have in view is to discover the real truth of the transaction; and it is much more probable that that object will be attained by the practice which has hitherto prevailed, which requires that each party should come prepared to disclose all the circumstances of his case, than by a contrary practice, which would prove a source of infinite perjury. In the case of *Rex* v. *Archer*,(*c*) where the prosecutor produced affidavits, in aggravation, to show a continuance of the defendant's malice, by expressions used subsequent to the time of the indictment, the Court thought it reasonable to allow the defendant an opportunity of answering those affidavits, because it could not be supposed that he could come prepared to answer that which was not contained in the indictment."(*d*)

(*a*) 2 T. R. 683.

(*b*) The affidavits to be used on either side should be entitled "In the Queen's Bench, *The Queen* against *S.S.*"

(*c*) 2 T. R. 203, *in notis*.

(*d*) *Per Curiam*, *Rex* v. *Wilson* (4 T. R. 487).

Affidavits in mitigation of punishment.

The defendant was allowed, even so far back as 1774, to urge in mitigation that he was absent when the paper was published, and that on reading a copy he was much hurt with the contents, and immediately forbade the sale, and refused to let anybody see it. In consideration of these circumstances the defendant escaped with the (for those times) very light sentence of £100 fine and one month's imprisonment.(*a*)

Hone was allowed, on his trial at the Guildhall, to give evidence, in order to avoid the expense of an affidavit, that he had stopped the sale of the libellous work.(*b*)

Sir Francis Burdett was allowed, in mitigation of punishment, to put in an affidavit that he read statements in the newspapers which induced him to publish the libel; but affidavits that those statements were founded on truth were refused.(*c*)

And the Court will receive affidavits stating that, at the time of publication, the defendant believed the charges to be true, and setting forth reasonable grounds for such belief.(*d*)

In the case of *Reg.* v. *Shimmin* (not reported), affidavits from numerous inhabitants of Liverpool to the effect that the defendant's paper had always been well conducted, and had been the means of bringing about sanitary and other reforms in the town, were received. A memorial, not sworn, to the same effect was mentioned, but not allowed to be read.

Where defendant pleaded a justification under Lord Campbell's Act, an affidavit deposing that before and at the time of publication, and at the time of pleading, he believed the truth of the charges contained in the libel and plea, and that before the pleading he had received from Viterbo, in Italy, an affidavit made by a person named in the plea of justification, to the effect that she had been seduced by the prosecutor under the circumstances mentioned in the libel, was admitted to show why the plea was pleaded. "This part of the affidavit," said Lord Campbell, C.J., "is clearly admissible under the statute, to show why this part of the plea was placed on the record; the fact of the plea being one to be considered by the Court in apportioning the punishment."(*e*) But an affidavit which was rejected at the trial, for want of authentication by the place

(*a*) *Rex* v. *Williams* (Loft. 759).
(*b*) See 3 Burns' Justice, 350 (13th edition).
(*c*) 4 B. & Ald. 321. See also *Rex* v. *Halpin* (9 B. & C. 66), and *Rex* v. *Bradley* (2 Man. & Ry. 152).
(*d*) *Rex* v. *Halpin*, *ubi supra*.
(*e*) *Reg.* v. *Newman* (1 E. & B. 581, 582.

of custody or otherwise, was held inadmissible in confirmation of defendant's own affidavit that such a document was communicated to him before plea pleaded.(*a*)

Affidavits in aggravation punishment.

In aggravation, the prosecutor may produce affidavits showing that defendant, after the trial, has published other libels, or otherwise misconducted himself; but the defendant will be allowed time to answer such affidavits.(*b*)

In the case of *Rex* v. *Archer*(*c*) the Court received affidavits of expressions made use of by defendant, confirming and aggravating his guilt, which had been uttered in the hearing of two persons, and by them afterwards related to the persons making the affidavits, the prosecutor swearing to an application to those persons to come forward with their testimony, which they had refused; and it was strongly insinuated that they were under the influence of the defendant. The Court considered that they were under the influence of the defendant, but allowed them and the defendant an opportunity of answering such affidavits.

Affidavits of this kind will not be received unless they show that the persons to whom the libel was repeated, and who refuse to join in the affidavits, are under the control or influence of the defendant.(*d*)

Where the defendant, editor of a newspaper, pleaded guilty to an indictment for libel, on condition of being discharged on entering into his own recognisance to appear and receive judgment when called upon, and of not being called upon at all if he discontinued the publication of libels on the prosecutor, the Court refused to pass judgment unless the prosecutor produced an affidavit stating that the defendant had, since the trial, published libels respecting him.(*e*)

Punishment.

The Court has, at common law, absolute discretion as to the amount of punishment which it will inflict upon the defendant.(*f*) This may consist of fine, imprisonment, and even, it would appear, corporal punishment,(*g*) together with sureties for good behaviour for such period as the Court may deem fit.(*h*)

Security for good behaviour.

The right of the Court to adjudge a misdemeanant to give

(*a*) *Reg.* v. *Newman*, 1 E. & B. 581, 582.

(*b*) *Rex* v. *Withers* (3 T. R. 432); *Rex* v. *Archer* (2 T. R. 203, *in notis*).

(*c*) *Ubi supra.* (*d*) *Rex* v. *Pinkerton* (2 East, 357).

(*e*) *Reg.* v. *Richardson* (8 Dow. 511).

(*f*) As to amendment of the sentence and the record as to it, see *Gregory v. The Queen* (15 Q. B. 970), and *O'Connell* v. *The Queen* (11 Cl. & Fin. 155). (*g*) See Bac. Abr. tit. "Libel."

(*h*) It is true that corporal punishment has not been made part of the sentence in modern times; but there is no statute abolishing it as a common law punishment, save as regards women, although it is popularly thought to be abrogated.

security for his good behaviour, after the expiration of his imprisonment, was discussed before the House of Lords, on a writ of error, in 1810; and the question was put to the judges—Whether, by law, the Court of King's Bench can adjudge a person convicted of misdemeanour to give security for his good behaviour for a reasonable time, to be computed from and after the expiration of his imprisonment, himself in a sum named in such judgment, with two sufficient sureties each in a sum therein also mentioned? The unanimous opinion of the judges was in the affirmative.(*a*)

The question answered by the judges, it will be observed, was as to the power of adjudging security to be given for a reasonable time; but, nine years later, the Court sentenced Carlile, for two blasphemous libels, to pay a fine of £1,500, to be imprisoned for three years, and to find sureties for good behaviour *for the term of his life*.(*b*)

Term of imprisonment.

Lord Campbell's Act(*c*) limits the time of imprisonment for the publication of a defamatory libel to one year, except where the defendant published it, knowing it to be false, in which case double the length of imprisonment may be given.

Seizure of copies of blasphemous or seditious libels.

In case of verdict, or judgment by default, against any person for composing, printing, or publishing any blasphemous or seditious libel, the Court may make an order for the seizure, carrying away, and detaining in safe custody, all copies of the libel which shall be in the possession of the defendant, or in the possession of any other person named in the order for his use; evidence upon oath having been previously given, to the satisfaction of the Court or judge, that a copy or copies of the libel are in the possession of such other person for the use of the defendant.(*d*)

In case the judgment is reversed or arrested, the copies so seized are forthwith to be restored to the person from whom they have been taken, free of all charges and fees.(*e*)

If final judgment be entered upon the verdict against the defendant, then all copies seized are to be disposed of as the Court in which judgment is given shall order and direct.(*f*)

Costs.

If the Court imposes a fine upon the defendant, the prosecutor will be allowed his costs out of it to the extent of one-third of the fine.(*g*)

(*a*) *Rex* v. *Hart and White* (30 How. St. Tr. 1344; 47 H. of L. Journals, p. 271).

(*b*) 3 B. & Ald. 167; *sed vide Prickett* v. *Gratrex* (8 Q. B. 1029, 1030).

(*c*) 6 & 7 Vict. c. 96, ss. 4 and 5.

(*d*) 60 Geo. 3 and 1 Geo. 4, c. 8, s. 1. See *Rex* v. *Cator* (2 East, 361).

(*e*) *Ibid.*, s. 2. (*f*) *Ibid.*

(*g*) Cole on Crim. Inform. 109; 1 Ch. Crim. L. 871.

As a rule, the Crown neither gives nor receives costs in criminal cases; but, in addition to the practice of allowing a private prosecutor his costs out of the fine, the 8th section of Lord Campbell's Act provides "that in case of any indictment or information *by a private prosecutor*(*a*) for the publication of any defamatory libel, if judgment shall be given for the defendant, he shall be entitled to recover *from the prosecutor* the costs sustained by the said defendant by reason of such indictment or information."

On acquittal defendant entitled to costs.

The same section provides "that on a special plea of justification to such indictment or information, if the issue be found for the prosecutor, he shall be entitled to recover from the defendant the costs sustained by the prosecutor by reason of such plea, such costs, so to be recovered by the defendant or prosecutor respectively, to be taxed by the proper officer of the court before which the said indictment or information is tried."

If issue on special plea be found for prosecutor, he is entitled to costs of such plea.

Under 4 & 5 Will. & M. c. 18, s. 2, a defendant to a criminal information, who obtained a verdict, was entitled to costs, unless the judge at the trial, in open court, certified upon the record that there was reasonable cause for exhibiting the information; but by the later statute of 6 & 7 Vict. c. 96, a successful defendant is entitled to his costs, in spite of the judge's certificate.(*b*)

Costs on criminal information.

It appears that the proprietor of a newspaper, who has been convicted and fined for the publication of a libel in the paper, inserted without his knowledge and consent by the editor, cannot recover against the editor the damages sustained by such conviction.(*c*)

Newspaper proprietor fined cannot recover against editor

CHAPTER XII.

CIVIL REMEDY OF THE LIBELLED.

EVERY person of whom a libel is published has a right of action, although his only injury be that which the law presumes from the publication of the defamatory matter.(*d*)

Who may sue.

(*a*) See *Reg.* v. *Duffy* (2 Cox C. C. 49).
(*b*) *Reg.* v. *Latimer* (15 Q. B. 1077).
(*c*) *Colburn* v. *Patmore* (1 Cr. M. & R. 73).
(*d*) *Thorley* v. *Lord Kerry* (4 Taunt. 355); *Craft* v. *Boite* (1 Wms. Saunders, 246, b).

PART IV.
CHAPTER XII.

Libel by or on married woman.

As to married women, it is now provided by 45 & 46 Vict. c. 75,(*a*) s. 1, subsection 2, that "a married woman shall be capable of entering into, and rendering herself liable in respect of, and to the extent of her separate property, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *femme sole*, and her husband need not be joined with her as plaintiff or defendant . . . . and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise."

Partners.

Where a libel is published of persons in their trade, all the partners of the firm may join in the action;(*b*) but in such action they cannot recover damage for their private feelings, but only for the injury to their trade.(*c*)

In general, however, a joint action cannot be maintained, although many persons may be defamed by one and the same libel, as the wrong done to any one of them is not the wrong done to the others;(*d*) for, what one man may suffer from such a cause may altogether be different from the injury which will accrue to another.

Joint-stock companies and corporations.

The chairman of a joint-stock company, not incorporated, but having powers under an Act of Parliament to use the name of their chairman in actions for recovery of debts or enforcing claims or demands then due, or which thereafter might become due or arise to the company, and indictments for offences, was held entitled to sue for a libel on the company.(*e*)

"That a corporation at common law can sue in respect of a libel," says Pollock, C.B., "there is no doubt. It would be monstrous if a corporation could maintain no action for slander of title through which they lost a great deal of money. It could not sue in respect of an imputation of murder, or incest, or adultery, because it could not commit those crimes. Nor could it sue in respect of a charge of corruption; for a corporation cannot be guilty of corruption, although the individuals composing it may. But it would be very odd if a corporation had no means of protecting itself against wrong, and if its property is injured by slander,

(*a*) The Married Women's Property Act, 1882.
(*b*) *Foster and others* v. *Lawson* (11 Moo. 361; 3 Bing. 452); *Maitland* v. *Goldney* (2 East, 425).
(*c*) *Haythorn and another* v. *Lawson* (3 C. & P. 196).
(*d*) *Barratt* v. *Collins* (10 Moo. 451).
(*e*) *Williams* v. *Beaumont* (10 Bing. 260).

it has no means of redress except by action. Therefore it appears to me clear that a corporation at common law may maintain an action for a libel by which its property is injured. Then has a corporation created under the 19 & 20 Vict. c. 47, the same power? . . . . In order to carry on business, it is necessary that the reputation of such a corporation should be protected, and therefore, in case of libel or slander, it must have a remedy by action."(*a*) This reasoning clearly applies to all joint-stock companies, under whatever statutes they may be constituted.

Alien.

An alien friend, though domiciled abroad, may maintain an action for a libel on him published in England.(*b*)

Joinder of parties.

No cause or matter is now to be defeated by reason of the mis-joinder or non-joinder of parties, and the Court may in every case deal with the matter in controversy, so far as regards the rights and interests of the parties actually before it.(*c*)

The Court or a judge may, further, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary, in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added.(*d*)

Where a plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants to the intent that the question as to which, if any of them, is liable, and to what extent, may be determined as between all parties.(*e*)

As to the course of procedure where a defendant is added or substituted, see Order xvi. R. 13 of the Supreme Court Rules, 1883.

Time within which action must be brought.

The action must be brought within six years next after the publication relied upon;(*f*) but such publication need not be the first or substantial publication of the newspaper or book.

Thus, where a libel appeared in a newspaper, published

(*a*) *Metropolitan Saloon Omnibus Company* v. *Hawkins* (4 H. & N. 90; 28 L. J. 201, Ex.).
(*b*) *Pisani* v. *Lawson* (6 Bing. N. C. 90).
(*c*) Supreme Court Rules, 1883, Order xvi. R. 11.
(*d*) *Ibid.* (*e*) Order xvi. R. 7. (*f*) 21 Jac. 1, c. 16, s. 3.

in 1830, and at the trial, in 1849, two copies of the paper were produced, one of which copies came from the British Museum, and the other had been purchased before the commencement of the action, in 1848, at the newspaper office of the defendant, by a witness who had been sent by the plaintiff to make the purchase, and who had handed the paper so purchased to the plaintiff, the Court held this latter publication, although to the plaintiff's agent, sufficient to disprove the plea of the Statute of Limitation.(*a*)

Venue.

The action is transitory, and therefore the venue may be laid in any county the plaintiff elects for the trial, subject to the defendant's obtaining an order to change it.(*b*)

Change of venue.

This the defendant cannot often do, as the general affidavit, upon which an order to change the venue in transitory actions is made, does not usually apply to actions of libel; at any rate, not when the libel is in a book or newspaper, as the publication, which is the cause of action, is made in divers counties.(*c*)

In one case the Court made the rule absolute to change the venue, in an action for a libel contained in a Newcastle paper, from London to Newcastle, upon an affidavit of the defendant that several pleas of justification were to be pleaded, and that all the witnesses resided at Newcastle; that the paper was published there; that the expense would be greatly increased if the action were tried in London; and that the cause of action, if any, arose in Newcastle, and not elsewhere.(*d*)

Where the venue had been changed, upon the common affidavit, from Cumberland to Lancashire, the Court made absolute a rule to move it back again, upon an affidavit that the newspaper was published as much in one county as the other.(*e*)

Persons liable as defendants.

Whoever makes a publication of the libel, is liable to be sued, and cannot escape by alleging that other publishers are or have been sued for the same libel.(*f*)

Joint publication.

Where there has been a joint publication by several, the

(*a*) *Duke of Brunswick* v. *Harmer* (14 Q. B. 186).

(*b*) *Smith* v. *O'Brien* (26 L. J. 30, Ex.). See *Begg.* v. *Forbes* (13 C. B. 614). Local venue is now abolished. Supreme Court Rules of 1883, Order xxvi. R. 1.

(*c*) *Clissold* v. *Clissold* (1 T. R. 647); *Pinkney* v. *Collins* (1 T. R. 571; 1 Wils. 178).

(*d*) *Robson* v. *Blackwell* (2 Dow. 645).

(*e*) *Hobart* v. *Wilkins* (1 Dow. 460).

(*f*) *Harrison* v. *Pearce* (1 F. & F. 567); *Freecoe* v. *May* (2 F. & F. 123).

plaintiff may exercise a choice as to suing them all in one action or in several, as there is no contribution between wrongdoers;(*a*) but the Court might order them to be consolidated, unless reasons could be given why they should not.(*b*)

Infant.

An infant may be made defendant to an action for libel, as his nonage is no defence to those actions of tort which are not founded on contract.(*c*)

Corporations and joint-stock companies.

Corporations aggregate and joint-stock companies may be sued for libels published by their servants or agents.(*d*) Great injustice would be suffered by individuals if their remedy for libels published by authority of the company or corporation were limited to the agents employed. It is no answer to say that a corporation has no soul, and therefore cannot be guilty of malice; because, in the first place, as we have already seen, express malice need not be alleged; and, secondly, even if it need, there would be great difficulty in saying that, under certain circumstances, express malice may not be imputed to, and proved against, a corporation.(*e*)

Husband and wife.

Formerly it was necessary to join husband and wife as defendants in actions for libels by the wife, whether published before(*f*) or during coverture, and although the husband and wife might be permanently living apart.(*g*) See now 45 & 46 Vict. c. 75, s. 1, subsection 2, *ante* p. 626.

After a divorce *a vinculo matrimonii*, or a decree of judicial separation, the wife must be sued alone, though the libel were published before the divorce.(*h*)

The judgment of Erle, C.J., in the case which establishes this proposition, explains the reasons for the old rules as to joinder of husband and wife, as defendants, in suits arising solely out of the wife's conduct. The learned Judge said:(*i*) "During coverture the wife has no such existence as to enable her to be a suitor, in her own right, in any court; neither can she be sued alone. For any wrong committed by her she is liable, and her husband

(*a*) *Frescoe* v. *May* (*ubi supra*).

(*b*) See *Jones* v. *Pritchard* (6 D. & L. 529; 18 L. J. 104, Q. B.).

(*c*) *Defries* v. *Davies* (3 Dow. K. B. 629); Dicey on Parties, 474.

(*d*) *Whitefield* v. *South-Eastern Railway Company* (E. B. & E. 115; 27 L. J. 229, Q. B.); *Alexander* v. *North-Eastern Railway Company* (34 L. J. 152, Q. B.; 11 Jur. N. S. 619).

(*e*) See E. B. & E. 121.

(*f*) Bac. Abr. "Baron and Feme" (L); Com. Dig. "Baron & Feme" (Y).

(*g*) *Head* v. *Briscoe et ux.* (5 C. & P. 485, and 2 L. J. N. S. 101, C. P.).

(*h*) *Capel* v. *Powell* (17 C. B. N. S. 743; 34 L. J. 168, C. P.; 11 L. T. N. S. 421).

(*i*) 17 C. B. N. S. 748.

cannot be sued without her; neither can she be sued without joining her husband. Seeing that all her personal property is vested in the husband, it would be idle to sue the wife alone: the action would be fruitless. Where the husband is joined for conformity, if he dies, the action goes on against the wife; but if the wife dies, the action abates. It is clear to demonstration, therefore, that there is no cause of action against the husband. He is not liable for the wrong; but he is joined only by reason of the universal rule, that the wife during coverture cannot be either a sole plaintiff or a sole defendant. The reason does not apply where there has been a divorce *a vinculo matrimonii*. The woman is no longer under coverture. She is remitted to her former name and station, and is perfectly capable of suing and being sued as if she had never been married: consequently, the necessity of joining the husband no longer exists. One can well recognise the expediency of making a legislative provision" (20 & 21 Vict. c. 85, ss. 25, 26) "for the case of a decree of judicial separation; for there, notwithstanding the sentence, the relation of husband and wife is not entirely dissolved. But there was no need of legislation in the case of a sentence which dissolves the marriage."

Introductory averments.

The first Common Law Procedure Act (1852) rendered the declarations in actions of libel much less technical than indictments and criminal informations are, even at the present day.

The reader will remember what was said(*a*) as to the necessity of introductory averments in indictments, and the failures of prosecutions for the want of averments to support the innuendoes, as, for instance, the innuendo that the libel meant to charge the prosecutor with setting fire to the defendant's barn full of corn, which was bad for want of an averment that the prosecutor had a barn and full of corn.

The 61st section of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76) enacts, that "in actions of libel and slander the plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense, without any prefatory averment to show how such words or matter were used in that sense; and such averment shall be put in issue by the denial of the alleged libel or slander; and where the words or matter set forth, with or without the alleged

(*a*) *Ante*, pp. 601, 608, 609.

meaning, show a cause of action, the declaration shall be sufficient."

Form of pleading.

In the schedule B. No. 33, is given the following form of declaration in libel: "That the defendant falsely and maliciously printed and published of the plaintiff in a newspaper called '————,' the words following, that is to say, 'he is a regular approver under bankruptcies;' the defendant meaning thereby that the plaintiff had proved and was in the habit of proving fictitious debts against the estates of bankrupts, with the knowledge that such debts were fictitious."

Such a form satisfies very well the requirements of the New Rules as to Statements of Claim; and it may safely be used.

Allegation of malice not necessary.

The pleading would, it seems, be good without the allegation of malice.

This was decided in two very early cases. The report of the first case(*a*) does not contain the grounds of the judgment, but in the second(*b*) "it was adjudged no error because the words themselves were slanderous and malicious."

Allegation of falsehood.

The publication should be alleged to be false; although there are authorities which tend to show that even that is not necessary.

In an anonymous case in Styles (p. 392), Rolle, C.J., is reported to have said "that in an indictment a thing must be expressed to be done *falso et malitiose*, because that is the usual form; but in a declaration these words are not necessary." By some writers it is supposed that all he meant was, that, after verdict, the omission of those words would be helped in a declaration.(*c*) In an action for slander of title, it was objected that the declaration did not allege the publication to be false, but Lord Ellenborough held that the allegation that the paragraph or advertisement was "malicious, injurious, and unlawful," was sufficient.(*d*)

Although the omission of the words "falsely and maliciously" may not be fatal to the declaration, yet they are in the form given in the schedule to the Common Law Procedure Act, 1852; and it has always been usual, and is proper, to insert them.

Publication.

The Statement of Claim should show a publication, but no technical words are necessary: it is sufficient if such matter

(*a*) *Arkingsal* v. *Denny* (Moore, 459).
(*b*) *Mercer* v. *Sparke* (Ow. 51, S. C. Noy. 35).
(*c*) See Wms. Saunders, 242, *a* (n. 2); 2 Saunders' Pl. & Ev. by Lush, 914.
(*d*) *Rowe* v. *Roach* (1 M. & S. 309).

be stated as amounts to a publication, without the formal word "published."

In the case of *Baldwin* v. *Elphinston*(*a*) it was held that an allegation of "printing and causing to be printed" was a sufficient allegation of publication, on the ground that, though printing a libel may be an innocent act, yet, unless qualified by circumstances, it shall *primâ facie* be understood to be a publishing, as it must be delivered to the compositor and the other subordinate workmen. Lord Denman, however, in *Watts* v. *Fraser*,(*b*) upon a question of rejection of evidence, refused to act upon that case, saying that it "did not follow, as of course, from a work being printed, that the party sending it forth employed a compositor or other workman."

"Of and concerning" the plaintiff.

It should also be stated that the libel was published "of and concerning the plaintiff;" and this *colloquium* was held necessary, even where it was stated that the defendant published the libel with intent to impute the offence charged in it to the plaintiff.(*c*)

The Common Law Procedure Act seems to have made no difference in this respect. The statement in the marginal note to *Hemmings* v. *Gasson*,(*d*) that a declaration need state no *colloquium*, refers to the *colloquium* of the inducement and not of the plaintiff.

Setting out libel.

The libel itself should be set out. It was held insufficient to state its purport,(*e*) or substance merely.(*f*) The reason of the rule was, that the defendant was entitled to demur on the ground that the words did not amount to a libel.(*g*)

The words of the libel should still be set out, notwithstanding the abolition of demurrers,(*h*) and notwithstanding Order xix. R. 2 of the Supreme Court Rules, 1883; as the point of law may still be raised in the statement of defence, and may, by order of the Court or a judge, be heard and disposed of before the trial.(*i*)

(*a*) 2 W. Bl. 1037.

(*b*) 7 A. & E. 232. In this case it was held that the printer as well as the editor of a magazine was liable for a lithographic print, of a libellous character, contained in the magazine, though it was not printed by the printer; it being referred to in a part of the letter-press which was also libellous (S. C. 7 C. & P. 369).

(*c*) 1 Wms. Saunders, 242, *b* (n. 3), and *Clement* v. *Fisher* (7 B. & C. 459).

(*d*) E. B. & E. 346.

(*e*) *Wood* v. *Brown* (6 Taunt. 169); *Gutsole* v. *Mathers* (1 M. & W. 502).

(*f*) *Wright* v. *Clements* (3 B. & Ald. 503).

(*g*) See, in addition to the cases referred to in the two preceding notes, *Cook* v. *Cox* (3 M. & S. 110); *Solomon* v. *Lawson* (8 Q. B. 823); *Wood* v. *Adam* (6 Bing. 481).

(*h*) Rules of 1883, Order xxv. R. 1.

(*i*) *Ibid.* R. 2.

It was held unnecessary to set forth the whole of the libel; any passage complete in itself might be selected.(*a*)

Whole libel need not be set forth.

Thus it was held sufficient to set out part of the index of the *Quarterly Review*, which professed to relate to a work published by the plaintiff; although it was objected that, as the index was only a reference to the body of the work, it was necessary that the count should contain a reference to the whole, as otherwise that would appear to be unqualified which was, in fact, subject to a material qualification. Abbott, C.J., ruled that there was no ground for the objection, saying: "If one part of a book cannot be understood without reference to another, then you must set out both; but if it is intelligible without, then you need not. Suppose the matter referred to in the index had not been found in the volume. The index may contain a separate libel."(*b*)

But if two separate and divided parts of the publication are set out, they must not appear to be an entire and continuous part of the writing from which they are taken, but should be introduced after this manner: "in a certain part of which said libel there was and is contained, &c., and in a certain other part of which said libel there was and is contained, &c."(*c*)

Part material to sense must not be omitted.

It must, however, be borne in mind that the libel cannot be garbled by omitting that which is material to the sense of the part inserted. If the setting out the whole would enable the defendant to move in arrest of judgment, the omission of any part was considered a fatal variance.(*d*)

Where the plaintiff, in an action against a newspaper proprietor, averred that the defendant printed and published a libel on him—"as and purporting to be a letter written from A. to R. O'C., viz., 'I have sold all my property to B.; yet it may still go on in my name: and the rents are to be transmitted to H. Bell, Esq., 40, Charterhouse Square. *Mr. Bell has been for some time past confined in England on a charge of high treason;*' "—and it appeared at the trial that the paragraph in the newspaper which contained the libel stated that in a debate in the Irish House of Commons, several years before, the Attorney-General had read a letter from A. to R. O'C. in which were the words, "I have sold all my property to B., yet it may still go on in my name, and the rents are to be transmitted to Hugh Bell, Esq., 40, Charterhouse Square;" and then followed

(*a*) *Rex* v. *Brereton* (8 Mod. 328); *Rutherford* v. *Evans* (6 Bing. 458, 459).
(*b*) *Buckingham* v. *Murray* (2 C. & P. 47).
(*c*) *Tabart* v. *Tipper* (1 Camp. 353).
(*d*) *Rutherford* v. *Evans* (6 Bing. 459; 4 C. & P. 74).

the libellous words italicised above, without any parenthesis or brackets to distinguish them from the letter, in the middle of which they were printed—it was held by the Court that the libellous words were part of the speech of the Irish Attorney-General, and were not stated in the newspaper to be part of the letter, and that the publisher had not made a substantive statement of his own respecting the libellous fact stated of the plaintiff, but only asserted that the Irish Attorney-General had made such a declaration; and that the true description of the libel should have been, that the defendant purported to publish a speech of the Attorney-General of Ireland, in which was contained the libellous matter. Bailey, J., said: "The question is not whether the declaration might not have been so framed as to entitle the plaintiff to recover upon the facts proved at the trial, but whether he has made out in proof that which is stated in this declaration. It is a very different thing to assert a thing as in the party's own knowledge, and to say that another, whom he names, has told him so. The persons who hear the one must conclude that the party pledges his own knowledge of the fact, which in the other case they do not. Now, here the plaintiff takes upon himself, in the first four counts, to prove that the libel purported to be contained in a letter from A. to R. O'C.; but the libel proved does not state that there was any such letter containing such a charge, or that the writer pledged his own knowledge of there being such a letter, but only that the Attorney-General in Ireland had asserted the fact of the plaintiff having been confined, &c. . . . . There is no assertion by the defendant that the letter so read was a genuine letter, or that he pledged his knowledge of there being such a letter containing the libellous charge. Still less is the general allegation made out, that the defendant had asserted that the plaintiff had been for some time past confined in England on a charge of high treason; for, looking at the paper, it only appears that the defendant had stated that the Attorney-General for Ireland had said so. Now, though it may be libellous to state that another person said such and such things of the plaintiff—and in some cases it may be an aggravation of the libel to state it in that way—yet still it is a different libel, and the charge is open to a different defence."(*a*)

To the same effect is the case of *Cartwright* v. *Wright*.(*b*) There the declaration omitted two references, which were contained in the libellous paragraph, to Cobbett's writings, and it was held a fatal variance; as that which appeared in

(*a*) *Bell* v. *Byrne* (13 East. 554, 563).
(*b*) 5 B. & Ald. 615.

the declaration to be the defendant's observation was, in fact, Mr. Cobbett's assertion respecting the plaintiff.(*a*)

When a publication is set out which is only libellous by reference to the language of another publication, that other publication should be set out *verbatim*, and not merely in substance.(*b*).

Several libels in one publication.

As to several libellous paragraphs contained in one publication, it was considered, under the old form of pleading, that they might all be declared upon in one count; but that paragraphs in different numbers of a newspaper should form the subject of separate counts.(*c*)

Libel in foreign language.

If the libel be written in a foreign language, it must be set forth in the original; for the Court will arrest judgment if only a translation be given.(*d*)

At one time it was considered that a translation need not be given, and that it was better not to attempt one, as a mistranslation might jeopardize the action.(*e*) This view is supported by an anonymous case in Hobart (p. 126), where the Court gave judgment for the plaintiff in an action for slander in Welsh, although the declaration did not aver what the word meant; but the Court took information by Welshmen as to the meaning thereof. The learned reporter quotes two earlier cases where like judgment was given. However, Lord Kenyon, in the case of *Zenobio* v. *Axtell*,(*f*) said the plaintiff should have set out the original words, and then have translated them. And the case of *Rex* v. *Goldstein*(*g*) seems decisive upon the point. That was an indictment for the forgery of a Prussian treasury note, and there being no translation of the note in the indictment, the Court, upon that ground, arrested the judgment.

Innuendoes.

Although the Common Law Procedure Act of 1852 did away with the necessity for prefatory statements and inducements, innuendoes are still necessary where the words do not *primâ facie* and necessarily convey an imputation on the plaintiff.

The effect of the change brought about by the Act of 1852 is explained by Mr. Justice Blackburn in the case of *Cox* v. *Cooper*.(*h*) His Lordship there says: "The 61st section of the Common Law Procedure Act was intended to alter the form of pleading in an action of libel, but it was never intended to alter the law of libel. The law is that, where-

(*a*) See also *Tabart* v. *Tipper* (1 Camp. N. P. 353).
(*b*) *Solomon* v. *Lawson* (8 Q. B. 823; see pp. 838, 839).
(*c*) *Hughes* v. *Rees* (4 M. & W. 204).
(*d*) *Zenobio* v. *Axtell* (6 T. R. 162).
(*e*) Wms. Saunders, 242, n. (1); *Ross* v. *Lawrence* (Styles, 263).
(*f*) *Ubi supra*. (*g*) 3 B. & P. 201; S. C., 7 Moore, 1.
(*h*) 12 W. R. 76; 9 L. T. N. S. 329.

ever there are written words which tend to bring a man into contempt, they disclose a cause of action. By the old rules of pleading, the words used, if unexplained, ought to be taken in their ordinary sense; and if, in their ordinary sense, they did not disclose a cause of action, the pleader was obliged to explain them, and set out the circumstances under which they were written, and make averments that they were written of and concerning certain facts and in a particular sense—and this needed great care and particularity. I remember that there was an instance, a great many years ago, where there were numerous actions in which the libel consisted solely of these words, 'A. B. is a person fit to be a member of a certain society.' These words were not in themselves actionable; but it was averred in the declaration and proved at the trial, that the person who sent round the circular containing these words was the secretary of a society for the protection of tradesmen against swindlers, and that when he wrote round to warn his correspondents against any person, he said, 'He is a fit person to be a member of our society.' The declaration set out all these facts, and was so expressed as to be held perfectly good. But by the new form of proceeding, under the 61st section, it would have been sufficient to say, 'He is fit to be a member of our society,' meaning thereby 'He is a swindler,' and all the circumstances would have been admitted in proof at the trial, which formerly would have had to be set out with great particularity. But it would not have been sufficient to set these words out and say that they were used for the purpose of conveying some bad impression. There must be a distinct averment that the words, if they are not actionable in themselves, bear a specific meaning which is in itself actionable."

The conclusion to be drawn from this judgment, supported by the words of the Act itself, and subsequent authorities which will be noticed hereafter, is that it left innuendoes still necessary where they would have been required previously, but that in no case was the support of an inducement or prefatory averment requisite.

As to this latter proposition, we would refer the reader to what has been already said in this and the preceding chapter on the subject of prefatory averments, and also to the cases, to be presently cited, which illustrate the change which the Common Law Procedure Act of 1852 introduced in pleading.

Cases in which innuendoes are needed.

The cases in which innuendoes are needed may be divided into two classes—viz., (1) where the language, though purporting on the face of it to be written of the

plaintiff, is ambiguous, and capable of an innocent construction; or where apparently it can only bear an innocent meaning, but, taken in connection with extrinsic circumstances may be proved to be defamatory: (2) where the publication is plainly defamatory, but requires the aid of explanatory matter to make it appear that it was written or published of and concerning the plaintiff.

To explain ambiguity in language.

We shall notice first the cases in which innuendoes are required to explain a patent or latent ambiguity in the language.

"The Court," says Parke, B., "will inform itself of the meaning of English words, though unusual and peculiar to a particular country; a strong instance of which is the case in which the term 'Healer of Thieves' was expounded to mean a furtherer of felons, without any averment as to the local use of those terms (1 Roll. Abr. 86, L. Pl. 1). And such is the rule as to Welsh words: (Hob. 126). But the case of *Angle* v. *Alexander*,(*a*) in the analogous case of slander, decides that a distinct averment that particular English words had acquired some sense different from their natural one, was necessary, and that an innuendo without such averment was insufficient; and on the authority of that case, which was decided in the Exchequer Chamber. . . . we think that the averment of the meaning of the term 'black-sheep' is properly introduced by way of inducement."(*b*)

In the cases just cited from Rolle's Abr. and Hobart, there was neither introductory averment, nor innuendo as to the meaning of the Welsh or provincial terms used. But in the case from which Parke, B.'s, judgment is quoted there was an introductory averment that "the defendant used the word 'black-sheep' for the purpose of expressing and meaning, and the said word used by him was by divers, to wit, all the persons to whom the libel thereinafter mentioned was published, understood as expressing and meaning a person notorious by reason of bad character, and of stained and sullied reputation; and the defendant then also used the word 'black-legs' for the purpose of expressing and meaning, and the said last-mentioned word so used by him was by divers persons, to wit, all the persons to whom the libel thereinafter mentioned was published, understood as expressing and meaning a person guilty of cheating and defrauding others."(*c*)

The innuendo after the words "black-sheep" was—

(*a*) 7 Bing. 123; 1 C. & J. 143.
(*b*) *Per* Parke, B., *McGregor* v. *Gregory* (11 M. & W. 295). See also *Hoare* v. *Silverlock*, *ante*, p. 493.
(*c*) 11 M. & W. 287.

"meaning thereby that the plaintiff was a 'black-sheep' in the sense and meaning in which that word was so used by the defendant as aforesaid." That after "black-legs" was — "meaning thereby that the plaintiff was a black-leg in the sense and meaning in which that word was so used by the defendant as aforesaid."(*a*)

In contrast with these pleadings is the case of *Barnett* v. *Allen*,(*b*) which was litigated after the passing of the Common Law Procedure Act, 1852. It was an action for slander; but, as prefatory averments were required in slander equally with libel, it shows the change effected by that Act. The slanderous imputation was that the plaintiff was a "black-leg;" and the declaration simply stated that the defendant, contriving to injure the plaintiff, falsely and maliciously spoke of the plaintiff the words following, "I am surprised Mr. Reynolds should allow a black-leg (meaning the plaintiff) in this room" (meaning that the plaintiff obtained his living by dishonest gambling, and was a professed gamester, and a fraudulent gamester, &c.). The Court was equally divided as to whether the word "black-leg" was capable of meaning a *fraudulent* gamester.

In the case of *Angle* v. *Alexander*,(*c*) the last count of the declaration charged the defendant with speaking and publishing these words: "You (meaning the said plaintiff) are a regular prover under bankruptcy (meaning that the said plaintiff was accustomed to prove fictitious debts under commissions of bankruptcy)." The Court held that the natural meaning of the words did not bear out this innuendo, and that, as there was no prefatory averment that the defendant had been accustomed to employ the words in that sense, the innuendo could not enlarge the sense of the words. These words still require an innuendo; and it is given in the schedule (B.) to the Common Law Procedure Act, 1852, as follows: "The defendant, meaning thereby that the plaintiff had proved, and was in the habit of proving, fictitious debts against the estates of bankrupts, with the knowledge that such debts were fictitious."

To say of a person that he has wilfully set his own premises on fire, is not defamatory without an innuendo; as he may have done the act with an innocent purpose. Therefore, if the imputation intended be that he had done it to defraud an insurance company, or for some other im-

(*a*) 11 M. & W. 288.
(*b*) 3 H. & N. 376; 27 L. J. 412, Ex.
(*c*) 7 Bing. 122; 1 C. & J. 143.

proper purpose, such meaning must be pointed out by an innuendo.(*a*)

Where the libel complained of was that the plaintiff was a "Man Friday" to another, the count was held bad, for want of an averment that, by the term "Friday," subserviency and degradation were intended.(*b*) Lord Denman, distinguishing this case from *Hoare* v. *Silverlock*(*c*), where the term "Frozen Snake" was held not to require an innuendo, says: "The 'Friday' alluded to was a very respectable person. Black men have not been declared to be criminal by any Act of Parliament."(*d*)

Goldstein v. *Foss*(*e*) is a good example of the change introduced in the mode of pleading. The libel there complained of was a letter from the secretary of a trade protection society, to the following effect: "I am directed to inform you that the persons undernamed, or using the firms of Goldstein (meaning the plaintiff), Castles and Co., 51, Mark Lane, and Benjamin Porter Baker, Hackney Road, are reported to this Society as improper to be proposed to be balloted for as members thereof." The Court held that the letter, without an innuendo, was not libellous, Abbott, C.J., saying: "There may be so many reasons why a person may be deemed unfit to become a member of the Society without casting any injurious reflection upon him, that I think we cannot possibly say with any degree of certainty that such was the intention with which this alleged libel was published." This, no doubt, would be held by the Court at the present day. But the hardship of the judgment consisted in this, that the declaration contained an innuendo,(*f*) and also introductory averments, which the Court held would have constituted a good cause of action, but for the fact that the innuendo was not properly connected with the introductory averment. Now, as we have seen, introductory averments are not necessary.

Where libel is ironical.

Where the libel is ironical there should, of course, be an innuendo alleging that the defendant meant the opposite of what he wrote; and it might be as well to charge the pub-

(*a*) *Sweetapple* v. *Jesse* (5 B. & Ad. 27). See *Capel* v. *Jones* (4 C. B. 259); and *Rawlings* v. *Norbury* (1 F. & F. 341).

(*b*) *Forbes* v. *King* (1 Dowl. 672).

(*c*) *Vide ante*, p. 493; and see *Homer* v. *Taunton* (5 H. & N. 661; 29 L. J. 318, Ex.).

(*d*) 12 Q. B. 632; 17 L. J. 306, Q. B. See also *Cox* v. *Cooper* (9 L. T. N. S. 329; 12 W. R. 75).

(*e*) 6 B. & C. 154.

(*f*) The innuendo was "thereby then and there meaning that the said plaintiff was a swindler and sharper, and an improper person to be a member of the said Society."

lication in this form—"that defendant published a certain ironical, false, &c., libel;"(a) but this cannot be considered necessary since the Common Law Procedure Act of 1852.

The foregoing cases will sufficiently show the use of the innuendo to explain the nature of ambiguous imputations.

Innuendo to connect libel with plaintiff.

We have next to inquire when innuendoes should be inserted to apply the libel to the plaintiff.

The leading case upon this point is *Le Fanu* v. *Malcolmson*,(b) which came before the House of Lords on a writ of error from the Irish Court of Exchequer Chamber. The libel complained of was an article in the *Warder* newspaper upon "The Factory Question in Ireland," containing a letter from a correspondent, who complained of the tyranny which was carried on "in some of the Irish factories." Many alleged acts of cruelty and tyranny were mentioned, but there was no direct allusion to the plaintiffs. The declaration contained introductory averments that the plaintiffs were the owners of an extensive factory at Portlaw, in the county of Waterford; and that the defendants did publish of and concerning the said plaintiffs, and of and concerning the said factory, and of and concerning the manufacturing of cottons, linens, and other fabrics, carried on in the said factory, and of and concerning the said trade and calling of the said plaintiffs, the libel containing the false, &c., matter of and concerning the said plaintiffs, their factory, and the manufactory carried on therein, and of and concerning their conduct towards, and their treatment of, the persons employed by them in their said factory. Innuendoes applied the words "some factories," and the other ambiguous terms in which the plaintiff's factory was spoken of, to the factory of the plaintiffs, and the House of Lords held that the innuendoes did not extend the sense of the libel, but merely pointed out the particular individuals to whom, in fact, the libel applied, and that the declaration was good.

Lord Campbell, in the course of his judgment, said:(c) "Mr. Ellis relies on *Solomon* v. *Lawson*;(d) but the proposition there laid down, and which I adopt, is this—that where

(a) *Boydell* v. *Jones* (4 M. & W. 446); *Rex* v. *Dr. Brown* (11 Mod. 86; Holt. Rep. 425).

(b) 1 H. L. Cas. 637. (c) *Ibid.* 668.

(d) 8 Q. B. 823. The declaration in this case contained two counts. The first count, after reciting that the plaintiff was employed in supplying fresh water to ships at St. Helena, and had for that purpose fitted up a schooner with wooden tanks, and that the ship M. being at St. Helena, the plaintiff conveyed fresh water to her in the wooden tanks of his schooner, complained that the defendant published (in a letter to the *Times* newspaper, set out in the count) of and concerning

there is a publication, or a sentence spoken verbally, which clearly conveys an imputation of crime on some person, that in that case it may, by innuendo, be applied to the plaintiffs: if that proposition is well supported in law, the objection made here fails, because in this there clearly is a gross imputation on some individuals, and the question is whether it may not be applied to the plaintiffs. What is there to show that that proposition is not well founded according to authority? There is *Solomon* v. *Lawson*; but there it was an historical fact that was narrated: all that was there stated might be true without imputing blame to any person. There was no charge brought against either a class or an individual, and by mere innuendo you cannot give a new sense to words which they do not naturally bear. It comes round to the old rule that you cannot by innuendo extend the natural meaning of the words which are spoken or written, but by the innuendo you may point out the particular individual to whom these words apply; those words in themselves clearly imputing a crime upon the part of some individual."

The same observation applies to this case as well as to the others we have cited—viz., that the introductory averments would not, since the C. L. P. A., 1852, be necessary, and that it would be sufficient to add, after the words "some factories," "meaning the factories of the plaintiffs;" and after the words "the cruelties of the slave trade or the Bastile are not equal to those practised in some of the Irish factories," "meaning the factories of the plaintiffs, and meaning thereby that the

the plaintiff in his said employment, and concerning the water so supplied to the M., a statement that persons on board the M. had become ill soon after leaving St. Helena, where they had taken in fresh water, which illness was caused by the water; that the water was run into a copper tank, whence the casks were filled alongside; that the poison was imbibed from the tank, and that it behoved the authorities to order its removal and replace it with an iron one: thereby meaning that the plaintiff had been guilty of supplying bad and unwholesome water to the M. The Court arrested judgment on this count, because there was nothing in the letter which warranted the innuendo applying the imputation of misconduct to the plaintiff (see p. 838). The second count recited that defendant published a statement "in substance as follows" (setting out the publication charged in the first count), and charged that defendant afterwards published (in a further letter to the *Times*) of and concerning the plaintiff, &c., and of and concerning the first publication, a statement that the copper tank was fitted up in a schooner belonging to the plaintiff. The Court arrested judgment on this count also, on the ground that where a publication is not libellous, unless by reference to the language of a previous publication, such previous publication must be set out in the declaration *verbatim*, and not merely in substance.

plaintiffs had treated the persons in their employment in said factory with cruelty."

To a like effect is the subsequent case of *Turner* v. *Merry-weather*.(a) There the libel was as follows: "Extraordinary case in the Ecclesiastical Court by a barrister-at-law. . . . . Yet in defiance of all the watching there is strong reason for believing that a considerable sum of money was transferred from Mr. Turner's name in the books of the Bank of England, by power of attorney obtained from him by undue influence, after he became wholly incompetent to perform any act requiring reason or understanding." The declaration contained the proper introductory averments, and the following innuendo: "meaning thereby that the said plaintiff and the said J. H. Turner, had transferred or caused to be transferred the said money from the said W. Turner's name in the said books of the said Bank, by means of a power of attorney obtained by them from the said W. Turner, by undue influence exercised by them over the said W. Turner, at a time when the said W. Turner had become and was mentally incompetent to give a power of attorney and to perform any act requiring reason and understanding." This innuendo was held by the Court of Common Pleas and by the Exchequer Chamber to be well laid. Coltman, J.,(b) said, "The old decisions which support the argument that an innuendo cannot be allowed to make persons certain who were uncertain before, are not now sustainable."

Innuendo may put any construction on words of libel.

The Court of Queen's Bench decided, in the case of *Hemmings* v. *Gasson*,(c) "that sect. 61 of the Common Law Procedure Act, and the two forms in schedule B to that Act, enable the pleader to put any construction he pleases upon the words complained of, by innuendo; and that it is for the jury to say whether the words were spoken with such meaning."

If jury negative meaning put by innuendo.

But suppose the plaintiff's pleading put a meaning on the words of the libel which the jury negatived, could the plaintiff then fall back upon their natural meaning, and say they were libellous without any innuendo?

In answering this question, it may be well to state what the rule was under the old system of pleading. This is luminously stated by Parke, B., in delivering the unanimous opinion of the Judges to the House of Lords, in the case of *Barrett* v. *Long*.(d) He says, that if the innuendo "is more

(a) 7 C. B. 251; 18 L. J. 155, C. P.; and in error 19 L. J. 10, C. P.
(b) 18 L. J. 158, C. B. (c) E. B. & E. 346.
(d) 3 H. L. Cas. 395. See p. 413.

extensive than the words will bear, and therefore unwarranted by them, we are of opinion that it may be rejected as repugnant and void; and the words are libellous, and therefore actionable without its aid. That an innuendo which is bad, and on the face of it repugnant to the words, may be rejected, was decided, in the cases of *Corbett* v. *Hill*(*a*) and *Smith* v. *Cooker*;(*b*) and if the words are sufficient without the innuendo, the action is maintainable.(*c*) The same rule prevails where the innuendo unnecessarily introduces new matter, as in *Harvey* v. *French*.(*d*) The case would be different if the words are capable of two senses, and the innuendo ascribes one meaning to them, and is good on the face of it. *Williams* v. *Stott*(*e*) is an authority that in such a case it could not be rejected."

Common Law Procedure Act, 1852, s. 61.

The law was altered, in this respect, by sect. 61 of the Common Law Procedure Act, 1852, which enacted that "where the words or matter set forth, with or without the alleged meaning, show a cause of action, the declaration shall be sufficient." The change is thus described by Blackburn, J.: "Sometimes it was not easy to frame a declaration to meet this [*i.e.* the former] state of the law, which was a trap for nonsuits; and therefore the Legislature enacted the provision in sect. 61. The effect of the first clause is, that an innuendo cannot be rejected, as formerly, because not supported by the prefatory averment. And the last clause enacts, that instead of a declaration with many counts, with as many innuendos, a count for libel or slander, with an innuendo that the words were used in a particular sense, may be read as two counts, one with the innuendo and the other without it; and proof of either is sufficient."(*f*)

New form of pleadings.

Before statements of claim were substituted for declarations, wherever the precise words of the libel and the meaning to be attached to them were doubtful, it was considered prudent to insert several counts, because, although the plaintiff might obtain a verdict upon the libel, read without the innuendoes, he could not at the trial adopt a fresh innuendo.(*g*)

(*a*) Cro. Eliz. 609. (*b*) Cro. Car. 512.
(*c*) See also *Roberts* v. *Camden* (9 East, 93), cited by Parke, B., in *Wakley* v. *Healy* (7 C. B. 604, 605).
(*d*) 1 Cr. & M. 11. (*e*) 1 C. & M. 675, 687.
(*f*) *Watkin* v. *Hall* (9 B. & S. 286; S. C., L. Rep. 3 Q. B. 396; 18 L. T. N. S. 561; 37 L. J. 125, Q. B.; 16 W. R. 857).
(*g*) See *per* Willes, J., *Bremridge* v. *Latimer* (12 W. R. 879; S. C., 10 L. J. N. S. 816).

The abolition of declarations, with their counts, and the substitution of a short statement of facts in ordinary language has deprived the foregoing considerations of some, but not all, of their importance.

Everything must be pleaded which if not raised would be likely to take the opposite party by surprise.(*a*)

Claim of damages.

Damages need not be particularly stated unless the plaintiff claims special damage. The latitude allowed to juries, as to the amount of general damages which may be given, is so wide that in practice special damages are seldom if ever claimed in actions of libel; but, if it is desired to claim them, they should be particularized.(*b*)

Defence.

We have, in the next place, to consider the defences which it is open to the defendant to make.

His defence may be (1) a specific denial of each material allegation in the statement of claim; (2) that the occasion of publication was privileged; (3) a payment into court of a sum of money by way of satisfaction, in manner provided by Order xxii. R. 1; or (4) a justification of the libel as true; (5) an apology, coupled with the payment of a sum of money into court; (6) that the plaintiff has, either before or after the commencement of the action, agreed to accept certain acts of the defendant in full satisfaction and discharge of his right of action, and the damages and costs sustained by him in respect thereof, with an averment that the defendant has duly performed such agreement. The defendant may (7) set off, or set up, by way of counter-claim against the claim of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and this set-off or counter-claim is to have the same effect as a cross action.(*c*)

There was formerly another defence, by demurrer, which is now abolished.(*d*)

Old plea of not guilty.

The old plea of not guilty, technically called the general issue, denied the publication of the libel, the publication of it maliciously and in the defamatory sense imputed, and that the matter charged was libellous.(*e*) It threw upon the plaintiff the onus of proving all the material allegations in the declaration. Under this plea the defendant might contend that the publication was privileged.

(*a*) Supreme Court Rules, 1883, Order xix. R. 15.
(*b*) See the old Rule. 1 Wms. Saunders, 243, *d* (5).
(*c*) Rules of 1883, Order xix. R. 3.
(*d*) Supreme Court Rules, 1883, Order xxv. R. 1.
(*e*) *O'Brien* v. *Clement* (15 M. & W. 435; 3 D. & L. 676; 15 L. J. 285, Ex.); Rules of Pleading of Trin. Term, 1853, Rule 16.

because the fact of its being privileged rebuts the *primâ facie* presumption of malice.(*a*) In *Wason* v. *Walter*,(*b*) the defence that the matter charged to be a libel, in the first count of the declaration, was a faithful report of a debate in the House of Lords, and that the matter complained of in the second count was a fair comment on such debate as a matter of public interest, was allowed under the plea of not guilty, which was the only plea on the record.

The plea of not guilty is now available only where expressly allowed by statute.(*c*)

New Rules.

The defendant must now specifically deny each allegation of fact, except damages, in the plaintiff's pleading which he means to contest; otherwise he will be taken to admit it.(*d*) And a denial of any allegation of fact must not be evasive, but must answer the point of substance.(*e*)

Privilege.

The defence of privilege if intended to be relied on should now be specially pleaded. The defendant must now raise by his pleading all matters which show the action not to be maintainable, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise.(*f*)

Publication of parliamentary reports, &c.

The Legislature has provided a defence for persons who are sued for the publication of the proceedings, reports, papers, and votes of either House of Parliament, or extracts or abstracts therefrom.

3 & 4 Vict. c. 9.

By 3 & 4 Vict. c. 9, s. 1,(*g*) it is enacted that proceedings criminal or civil, against persons for the publication of papers, &c., under the authority of either House of Parliament shall be stayed upon the production in court (after twenty-four hours' notice) of the certificate of the Lord Chancellor, Speaker, Clerk of the Parliament, Speaker of the House of Commons, or the clerk thereof, stating that the paper complained of was published by order or authority of the House of Lords or House of Commons, together with an affidavit verifying such certificate.

The second section of the same statute enacts that proceedings for publishing a copy of any parliamentary paper, &c., shall be stayed at any stage thereof, upon the defendants laying before the Court or judge such report and such

(*a*) *Hoare* v. *Silverlock* (9 C. B. 20, 26). See also *Lillie* v. *Price* (5 A. & E. 645). See also *The Earl of Lucan* v. *Smith* (1 H. & N. 483; 26 L. J. 94, Ex.

(*b*) 8 B. & S. 671; L. Rep. 4 Q. B. 73; 19 L. T. N. S. 409; 38 L. J. 34, Q. B.; 17 W. R. 169).

(*c*) Rules of 1883, Order xix. R. 12.

(*d*) Rules of 1883, Order xix. Rs. 13 and 17.

(*e*) Order xix. R. 19.

(*f*) Order xix. R. 15.

(*g*) *Vide ante*, pp. 572, 573.

copy, with an affidavit verifying such report and the correctness of such copy.

The third section enacts that in any civil or criminal proceedings for printing any extract from, or abstract of, such report, &c., it shall be lawful, under the general issue, to give in evidence that such extract or abstract was published *bonâ fide* and without malice, and if such shall be the opinion of the jury, a verdict of not guilty shall be entered for the defendant.

Justification on ground of truth.

If the defendant desires to justify the libel on the ground that it is true, he must raise the point specially by his pleading.

Caution should be exercised in setting up such a defence, as, unless it is made out to the satisfaction of the jury, they will probably consider the futile attempt as an aggravation of the original wrong; and there are *dicta* to show that they would be justified in so regarding it.(*a*)

Justification where charge is general.

Where the libel, as set forth by the plaintiff, consists of general charges of criminal or improper conduct, the defence should justify by specifying the particular acts which support the imputations, so that the plaintiff may be aware of the defence which is to be set up.

Before the Common Law Procedure Act of 1852 a plea containing general charges of fraud or felony was bad on special demurrer; and since that Act the practice was either to strike it out, or to order particulars of the charges intended to be justified, to be delivered to the plaintiff.

In the case of *T'Anson* v. *Stuart*(*b*) the declaration was for printing of the plaintiff that he was a swindler; and the defendant pleaded that the plaintiff had been illegally, fraudulently, and dishonestly concerned and connected with, and was one of, a gang of swindlers and common informers, and had also been guilty of deceiving and defrauding divers persons with whom he had dealings and transactions. Upon special demurrer, the Court of King's Bench, reversing the judgment of the Common Pleas, held that the plea was bad, for not stating the particular instances of fraud upon which the defendant relied in support of it.

Buller, J.,(*c*) said: "If this plea were to be suffered, it would be to allow any person to libel another more on the records of the court than he could do in a public newspaper. If the plaintiff has been guilty of any acts of swindling, the de-

(*a*) See *Wilson* v. *Robinson* (7 Q. B. 68; 14 L. J. Q. B. 196); *Simpson* v. *Robinson* (12 Q. B. 514).

(*b*) 1 T. R. 748. (*c*) *Ibid.* 753.

fendant must be taken to know them. He could not prove the justification, as he had pleaded it, by general evidence; but he has no justification, unless he can prove the special instances; and, knowing them, he ought to put them on the record, that the plaintiff might be prepared to answer them. It has been said that this case is different from the case of *Newman* v. *Bailey*,(a) because that was a specific charge. But that is not so; for there the plaintiff was charged with pocketing *all the fines*, &c., which was as general as possible; and there the Court said it was necessary to specify the particular acts."

So in *Holmes* v. *Catesby*,(b) where the libel charged an attorney with gross negligence, falsehood, and prevarication, and excessive bills of costs in the business he had conducted for the defendant, a plea simply repeating the charges in the libel, without specifying particular acts of misconduct, was held bad on demurrer.

To a declaration for words imputing to the plaintiff, a pawnbroker, that he had committed the unfair and dishonourable practice of "dulling"—*i.e.*, of replenishing or doing up goods, being in his hands in a damaged or worn-out condition, and pledging them with other pawnbrokers—the defendant pleaded that the plaintiff did replenish and do up divers goods, being in his hands in a damaged or worn-out condition, and pledged them with other pawnbrokers. This plea was specially demurred to upon the ground that it did not state what goods or what kind of goods were so "dulled," nor with what pawnbroker they were pledged. And the Court held the plea bad.(c)

Parke, B., said: "It is a perfectly well-established rule in cases of slander that where the charge is general in its nature, the defendant, in a plea of justification, must state some specific instances of the misconduct imputed to the plaintiff. That is settled by the cases of *l'Anson* v. *Stuart*, *Newman* v. *Bailey*, and *Holmes* v. *Catesby*. In some of those cases, perhaps, the statement in the plea was not so specific as it is here, but still this is not specific enough: the plea should have stated the description of the goods, or at least the names of the pawnbrokers with whom they were pledged; as it is, the statement is so general that the plaintiff cannot know with what he is intended to be charged. The defendant is bound to give him information of some specific acts

(a) 2 Chitty R. 665; cited *arguendo* by Wood. See 1 T. R. 750.
(b) 1 Taunt. 543.
(c) *Hickinbotham* v. *Leach* (10 M. & W. 361).

with which he intends to charge him. This plea does not do that, and is therefore bad."

And Alderson, B., in the same case, referring to the argument used by the counsel for the defendants, that it must be peculiarly within the plaintiff's own knowledge what the goods were which he had replenished, and with what pawnbrokers he pledged them, said: "What the plaintiff has actually done in the course of his business is within his knowledge, but not what the defendant mistakenly or wickedly means to charge him with having done: that is peculiarly within the defendants' knowledge, and it is because it is so that he is to plead it.(*a*)

General plea of justification.

More laxity has been allowed in these pleas since the abolition of special demurrers; and even a general plea, that the matters in the declaration complained of are true in substance and fact, has been allowed, on condition that the defendant should furnish particulars of the charges intended to be justified.

The Court of Common Pleas allowed such a plea in the case of *Behrens* v. *Allen*,(*b*) where the libel consisted of charges against the plaintiff's honesty in having, at divers dates (which were specified), bought goods below cost price from a bankrupt firm. Willes, J., in the course of the argument, said: "*D'Anson* v. *Stuart* adverts to the distinction between the case where the plea states in justification an indictable matter, and where it states what is not of that character. In the latter case I have always, at chambers, allowed the plea, the defendant furnishing particulars." And Erle, C.J., said: "It is much the same question, to my mind, whether the plea or the particulars set out all the facts."(*c*)

In giving judgment in the same case, Willes, J., said: "*D'Anson* v. *Stuart* makes it clear that before the Common Law Procedure Act, 1852, a general plea of justification in these circumstances was not allowed, with the exception, possibly, of a case of a specific charge in the declaration, and a plea alleging the charge to be true. In such a case as this, where the charges are mostly specific, the real question may be raised by allowing a general plea of the part specified —a general plea to that part, and a special plea to the

(*a*) See also *O'Brien* v. *Clement* (16 L. J. Ex. 76; 16 M. & W. 159); *Jones* v. *Stevens* (11 Price, 235). (*b*) 8 Jurist, N. S. 118.

(*c*) See *Gourley* v. *Plimsoll* (L. R. 8 C. P. 362); where leave to administer interrogations to the plaintiff, for the purpose of enabling the defendant to supply particulars of his general plea of justification, was refused in the absence of an affidavit disclosing circumstances warranting a departure from the general rule.

other part. Nevertheless, I do not mean to say that on any future case I shall not reserve to myself to allow a plea of justification in libel, on such terms as will oblige the parties to try the real question between them, in the clearest possible form."

In an earlier case(*a*) the Court had refused to allow the defendant to plead one general justification to a declaration containing three counts for three separate libels, charging the plaintiff with swindling, although the defendant offered to deliver full particulars of the intended defence. The grounds of the refusal were stated by Williams, J., as follows: "The difficulty is this: If you set out in your pleas the facts upon which you rely, the Court has an opportunity of judging whether they do amount to a justification or not; whereas, by the course proposed, you prevent the matter from getting on the record at all."

An example of vagueness in pleading a justification carried to its furthest limits is furnished by the case of *Jones* v. *Bewicke*.(*b*) There the first count of the declaration stated that the defendant spoke and published of the plaintiff, as an attorney and solicitor, the words, "he is a bankrupt swindler." The second count charged the following libel: "Old Perjury Jones, of Goring Place, Llanelly, South Wales." "Mr. Bewicke has only to repeat that the attorney Jones did perjure himself. An action for libel will only prove the truth of the above facts, and clearly demonstrate to the public the gross perjury of the above parties." To this the defendant pleaded, first, "not guilty," and secondly, "that the defamatory matter in the declaration mentioned and complained of was and is true in substance and fact." Cleasby, B., dismissed a summons calling upon the plaintiff to show cause why he should not give particulars of the facts and matters relied on to justify the libels, and why, in default, the plea should not be struck out. But, on appeal to the Court of Common Pleas, the rule was made absolute in the term of the summons; Keating, J., doubting "whether such a plea should be allowed at all," and Montague Smith, J., saying, "The plea is clearly an embarrassing one, and ought not to be allowed without particulars."

Where charge in libel is specific.

Where the charge in the libel is specific, the defence need only allege that it is true.

This was the case even under the ancient system of pleading; as, where the words were "he stole two sheep of J. S.," a

(*a*) *Honess and another* v. *Stubbs* (7 C. B. N. S. 555; 29 L. J. 220, C. P.; 6 Jur. N. S. 682).

(*b*) L. Rep. 5 C. P. 32.

plea "that the plaintiff stole the said sheep" was held sufficient.(*a*) But a plea that the libel "is true in substance and effect," means that it is true in every material particular; so that where the libel charged the plaintiff with various acts of cruelty to a horse, and, amongst others, with knocking out an eye, and the defendant pleaded that the matters contained in the supposed libel were true in substance and effect, it was held that the justification was not sustained by a verdict that the libel was true in all respects, except that the eye was not knocked out.(*b*)

Where the publication complained of did not make a direct charge against the plaintiff, but reported defamatory statements made by others, a plea that the several matters and things contained in the alleged libel are true, was held bad; as such a plea might mean either that the report in the newspaper was a true report of what had been said by others, or that the facts mentioned were true.(*c*)

A libel imputing specific misdeeds to the plaintiff cannot be justified by a plea alleging that he was guilty of other misdeeds of the same nature. So that where, to an action for saying, "She is a thief to you and to me, and hath stolen twenty pounds from me, and forty pounds from you," the defendant pleaded that the plaintiff was a thief, and stole two hens from her on such a day feloniously, the plea was held bad.(*d*)

Justification to part of declaration.

The defendant might limit his plea of justification to part of the declaration:(*e*) but if it did not justify the whole of what it purported to answer, it would have been demurrable.(*f*)

Where the libel stated that the plaintiff's ship was unseaworthy, and had been bought by Jews to take out convicts, a plea to the whole declaration, that the allegation of unseaworthiness was true, was held bad for not justifying the allegation that she had been sold to Jews to take out convicts.(*g*)

And where the declaration was for a libel which imputed to the plaintiff that he had been guilty of murder in killing his opponent in a duel, and stated in reference to his trial upon the charge, "It was understood that the counsel for the

(*a*) Brooke's Abr. Action sur le case, Pl. 3 (27 H. 822).
(*b*) *Weaver* v. *Lloyd* (2 B. & C. 678).
(*c*) *Duncan* v. *Thwaites* (3 B. & C. 556).
(*d*) *Hilsden* v. *Mercer* (Cro. Jac. 677). See also *Johns* v. *Gittings* (Cro. Eliz. 239).
(*e*) *Clarke* v. *Taylor* (3 Scott, 95; 2 Bing. N. C. 654).
(*f*) 1 Wms. Saunders, 28, *a* (note 3), and 244, *b* (note *q*).
(*g*) *Ingram* v. *Lawson* (5 Bing. N. C. 66).

prosecution were in possession of a damning piece of evidence, viz., that the prisoner (meaning the plaintiff) had spent the whole of the night immediately preceding the duel in practising pistol firing," a plea alleging merely that the plaintiff killed his antagonist and was tried for murder, was held bad.(*a*)

Jervis, C.J., said,(*b*) "The whole Court is of opinion that the plea, which professes to justify the entire libel, but fails to justify what we hold to be a material part of it, is a bad plea. The libel, in substance, charges that the plaintiff was guilty of murder under circumstances of grave and malignant aggravation; and the justification states simply that the plaintiff committed murder by killing his antagonist in a duel. It does not lie in the mouth of the defendant to say that it matters not whether the murder was committed under one state of circumstances or another, because the very terms in which the libel is conceived—speaking of the plaintiff's conduct anterior to the meeting, and calling it 'a damning piece of evidence'—show that the defendants intended to impute to the plaintiff something which, in their estimation, was very much more culpable than murder under the circumstances which usually attend a hostile meeting of the kind alluded to. I think we should be doing a serious injury to public morals if we permitted ourselves to be influenced by the argument of Mr. Peacock, that it makes no difference, as to the quality of the libel, whether the alleged duel was fought fairly, as it is called, or unfairly. It certainly could not be said, upon a trial for killing in a duel, in a criminal court, that the question of murder or no murder was to depend upon whether or not the affair had been conducted with a due regard to the laws of honour. But to say that the Court is not at liberty to take the circumstance into consideration, when called upon to determine the question of libel or no libel, is quite a different matter. When the question is murder or no murder, in ascertaining the innocence or the guilt of the party charged, the Court cannot enter into an investigation of extenuating circumstances; but in a case like this, the circumstances must necessarily form a very large portion of the inquiry. If it were otherwise, the most opprobrious and defamatory language might be uttered of a man who had had the misfortune which is said to have befallen this gentleman, and the law would give him no redress." And Maule, J., in the same case, tersely

(*a*) *Helsham* v. *Blackwood and another* (11 C. B. 111).
(*b*) *Ibid.* p. 128.

Sufficient to justify substance of libel.

laid down the rule of law in a passage cited *ante*, pp. 465, 466.(*a*)

On the other hand, if the defence justifies the gist and substance of the libel, it is sufficient, although it may not cover every epithet or term of general abuse which may be found in the libellous imputation.

Thus, where the substantial charge in the libel was that the plaintiffs compounded and sold poisonous and deleterious pills, and that the defendant had crushed the system of poisoning pursued by the scamps and rascals, a plea to the whole declaration was held good, although it contained no justification of the terms scamps and rascals.(*b*)

A statement that the plaintiff was convicted of a special offence, and received a certain sentence, was held not justified by a plea alleging that he was convicted of the offence, and received a less sentence; because the Court could not, as a matter of law, say that the difference could not be libellous. But in the case of *Alexander* v. *The North-Eastern Railway Company*,(*c*) the defendants were allowed to amend such a plea by setting out the same sentence as the libel stated, although such statement was in fact false. To this amended plea the plaintiff replied by setting out the conviction verbatim; and the defendants rejoined that the conviction was described with sufficient accuracy and truth, both in the libel and the plea, and that the words, so far as they were libellous, appeared, from the allegations in the plea, to be and were true in substance. On demurrer to this rejoinder, the Court held the rejoinder good, as the substitution, in the alleged libel, of three weeks' for a fortnight's imprisonment (the actual sentence) was not necessarily libellous.(*d*)

It is a good defence to an action for libelling the plaintiff's character that a certain transaction took place, and that the libel was published of the plaintiff solely in reference to that transaction, and was justified by it.(*e*)

(*a*) See also *Macgregor* v. *Gregory* (11 M. & W. 287); *Clarkson* v. *Lawson* (6 Bing. 266); *Goodburne* v. *Bowman* (9 Bing. 532, 667); *O'Brien* v. *Bryant* (16 M. & W. 168); *Smith* v. *Parker* (13 M. & W. 459); *Mountney* v. *Watton* (2 B. & Ad. 673).

(*b*) *Morrison* v. *Harmer* (4 Scott, 524; see p. 534; 3 Bing. N. C. 759). See the passage from the judgment of the court cited *ante*, pp. 470, 471. See also *Edwards* v. *Bell* (1 Bing. 403); *Biggs* v. *Great Eastern Railway Company* (18 L. T. N. S. 482).

(*c*) 34 L. J. 152, Q. B.; 11 Jur. N. S. 619; 13 W. R. 651.

(*d*) *Ibid.*

(*e*) *Tighe* v. *Cooper* (7 E. & B. 641; 26 L. J. 215, Q. B.); see *Cromwell's case* (4 Rep. 13).

Although the defendant might formerly demur or plead to part of a libel, he could only do so when it contained distinct imputations; "but no case has been, nor can any be, produced, in which, where many statements tend to one conclusion and imputation, a single sentence or portion of a sentence may be selected and separately dealt with, either by plea or demurrer."(*a*)

Plea or demurrer to part of libel.

Where the libel is set out by the plaintiff with innuendoes, the defendant may deny that the words have the meaning given by the innuendo, and justify as to them without the meaning; or he may justify as to them with the meaning in the innuendo, and also as to them without the meaning;(*b*) but care should be taken to limit the defence to that construction which it is intended to answer.

Justification of words with or without meaning in innuendo.

Where a libel contains several distinct imputations on the plaintiff, and the plaintiff sets out only some of them, the defendant will not be allowed to plead that the other charges were also contained in the libel, and to justify the whole article.(*c*)

Where all imputations in libel are not set out.

It is no justification to an action for libel that the libellous matter has previously been published by a third person —notwithstanding the fourth resolution in the Earl of Northampton's case,(*d*) viz.: "In a private action for slander of a common person, if J. L. publish that he hath heard J. N. say that J. G. was a traitor, or thief, in an action on the case, if the truth be such, he may justify." Pollock, C. B., in the case of *Tidman* v. *Ainslie*,(*e*) said that this doctrine, "assuming it to be law, has never been applied to written slander, in which the repetition, by being more largely circulated, produces a greater injury to the individual slandered."

Previous publication by another no justification.

Although, as has already been seen, it was formerly not necessary or usual to plead specially the defence of privilege, yet it was sometimes done, in order to raise the question on the record by demurrer.

Privilege especially pleaded.

In one of those cases it was held that a plea that the alleged libel was a report of a trial, should aver that it was a true and accurate account, and not merely that it was in substance a true report;(*f*) although it would suffice to *prove*

(*a*) *Per* Lord Abinger, C.B., *Eaton* v. *Jones* (1 Dowl. N. S. 608).
(*b*) See *Watkin* v. *Hall* (L. Rep. 3 Q. B. 396; 18 L. T. N. S. 561; 37 L. J. 125, Q. B.; 16 W. R. 857).
(*c*) *Brembridge* v. *Latimer* (12 W. R. 878). (*d*) 12 Rep. 133.
(*e*) 10 Ex. 66. See also *M'Pherson* v. *Daniels* (10 B. & C. 270; 1 Wms. Saunders, 244).
(*f*) *Flint* v. *Pike* (4 B. & C. 473); *Lewis* v. *Walter* (4 B. & A. 605).

that it was a fair and impartial (though not verbatim) report.(*a*)

If the publication contain comment on the trial, the defence must justify that as well as the report.(*b*)

In strictness, a defence on the ground of privilege ought to aver that the matter was published *bonâ fide*, and without malice.(*c*)

So, in the old days of pleading, a plea of justification which did not formally confess the publication of the libel was bad.(*d*)

Payment of money into court by way of satisfaction.

The defendant may now, in every action for debt or damages, either before or at the time of delivering his defence, or at any later time by leave of the Court or a judge, pay into court a sum of money by way of satisfaction, which shall be taken to admit the claim or cause of action in respect of which the payment is made; but in the case of libel or slander, he cannot do this with a defence denying liability.(*e*)

Defence of apology and payment into court.

The next defence which requires notice is that specially provided by the Legislature for the protection of the liberty of the Press.

The 6 & 7 Vict. c. 96, s. 2, enacts "that in an action for a libel contained in any public newspaper, or other periodical publication, it shall be competent to the defendant to plead that such libel was inserted in such newspaper or other periodical publication without actual malice, and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper or other periodical publication a full apology for the said libel, or, if the newspaper or periodical publication in which the said libel appeared should be ordinarily published at intervals exceeding one week, had offered to publish the said apology in any newspaper or periodical publication to be selected by the plaintiff in such action; and that every such defendant shall, upon filing such plea, be at liberty to pay into court a sum of money by way of amends for the injury sustained by the

(*a*) *Lewis* v. *Levy* (E. B. & E. 537; see p. 553).

(*b*) *Cooper* v. *Lawson* (8 A. & E. 746).

(*c*) *Smith* v. *Thomas* (2 Bing. N. C. 372).

(*d*) *Johns* v. *Gillings* (Cro. Eliz. 239; see 1 Wms. Saunders, 244, *a*); but long before the New Rules of Pleading, this formality had ceased to be considered requisite, and in practice it was never observed. See Stephens on Pleading, 185.

(*e*) Rules of 1883, Order xxii. R. 1. Before the Rules of 1883, payment of money into court, with a denial of liability, was allowed in actions of libel. See *Hawkesley* v. *Bradshaw*, L. R. 5 Q. B. D. 302.

publication of such libel, and such payment into court shall be of the same effect, and be available in the same manner, and to the same extent, and be subject to the same rules and regulations as to payment of costs and the form of pleading, except so far as regards the pleading of the additional facts hereinbefore required to be pleaded by such defendant, as if actions for libel had not been excepted from the personal actions in which it is lawful to pay money into court, ... and that to such plea to such action it shall be competent to the plaintiff to reply generally,(*a*) denying the whole of such plea."

Unless the defendant pay money into court at the time of pleading the above plea, the plaintiff is empowered by 8 & 9 Vict. c. 75, s. 2, to treat the plea as a nullity.

The payment into court is conditional on the plea being proved, and is not to be taken as an absolute admission of liability.(*b*)

Whether other pleas could be pleaded with plea of apology and payment into court.

It was considered doubtful whether it was allowable to the defendant to plead any other plea, together with this special plea, to the same part of the declaration.

In *O'Brien* v. *Clement*,(*c*) the defendant obtained a judge's order, allowing the following pleas—viz., first, not guilty to the whole declaration; secondly, a justification as to part of the libel; and thirdly, the statutory plea of an apology and payment of money into court. The Court of Exchequer amended the order by confining the general issue to such part of the declaration as the plea of payment into court did not apply to.

Parke, B., in delivering the judgment of the Court, said: "It seems to me that we ought not to allow this special plea together with the general issue; for if it were, and the verdict for the general issue should be for the defendant, there would be a difficulty as to the judgment. What would become of the damages paid into court? because the special plea would show, on the record, a cause of action in

(*a*) This means that the plaintiff shall be at liberty to deny the whole *or any part* of such a plea: the plaintiff is not bound to deny the whole of the plea: (*Chadwick* v. *Herepath*, 3 C. B. 885.) A replication which admitted that the libel was inserted in a newspaper, and the payment of money into court, and traversed the insertion of the libel without actual malice, and without gross negligence, and the sufficiency of the money paid into court as amends, was held good (*Ib.*).

(*b*) *Lafone* v. *Smith* (4 H. & N. 158; 28 L. J. 33, Ex.); *Jones* v. *Mackie* (L. Rep. 3 Ex. 1; 17 L. T. N. S 151; 37 L. J. 1, Ex.; 16 W. R. 109).

(*c*) 15 M. & W. 435; 3 D. & L. 676.

respect of which the plaintiff ought to recover them. . . . . The only respect in which payment of money into court under this statute differs from a payment into court in cases under the new rules is, that those rules give a *general* plea, applicable to all cases except such as are therein specified; whereas this statute makes that general form insufficient, in cases to which the statute applies; and if you pay money into court under it, you must bring your case within the description of libel to which it refers. The intention plainly was to extend to certain actions of libel the benefit of the plea of payment of money into court, as it existed in other forms of action."

The difficulty of disposing of the money paid into court arises, however, in those cases which we have just noticed, where the jury find that the plea of apology is not proved, and give a less amount than the defendant has paid into court. In the case of *Jones* v. *Mackie*,(*a*) Chunnell, B., said that the defendant, by his plea of apology and payment into court, "in effect says, 'I published this libel without malice or negligence, and if you will accept my apology, I will give you £5;' but he does not bind himself to give anything if his terms are not accepted." If this be so, the reasons of the Court for refusing to allow other pleas would seem not to apply.

Evidence of apology in mitigation of damages.

The first section of the Act just mentioned contains a provision, which is not limited to actions for libels contained in newspapers or other periodicals, but applies to any action for defamation, and 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." This section rather tends to support the view taken by some, that the Legislature intended to allow the general issue, or other pleas, together with the plea of apology and payment into court, as it expressly allows a man to take advantage of an apology and to plead to the declaration at the same time.

Defence of accord and satisfaction.

A plea in accord and satisfaction is a good defence to an action for libel, and may be pleaded to its further

(*a*) *Ubi supra.*

maintenance when the matter has taken place after action brought.

Thus, an agreement by the plaintiff to waive his action in consideration that the defendant would destroy certain documents in his possession, imputing the same crime to the plaintiff as the slander, is a bar to the action.(*a*)

So, a parol agreement after action, between the plaintiff and defendant, to accept the publication of mutual apologies, in satisfaction and discharge of the causes of action, damages, and costs, executed by the defendant, is a good accord and satisfaction.(*b*)

Statute of Limitations.

In addition to a defence on the merits of the case, the Statute of Limitations may sometimes furnish an answer to the plaintiff's suit;(*c*) but it must be pleaded specially.(*d*)

A plea of the Statute of Limitations, to an action for a libel published in a newspaper seventeen years before, was held to be negatived by proof that a copy had been purchased from the defendant, by an agent of the plaintiff, within the six years.(*e*)

Defence in actions for libel on wife.

Before the Common Law Procedure Act of 1860 it was a good plea in bar to an action by husband and wife for defamation of the wife, that the female plaintiff was not the wife of the other plaintiff, "inasmuch," according to Pollock, C.B., "as it shows that the alleged husband, if he be not such in fact, has no right to sue at all. It is not a plea in abatement, giving the wife a better writ; but matter in bar, showing that he who is in one sense the substantial plaintiff, if he be not in fact the husband, has no right to sue at all."(*f*) And now, if the supposed husband joined a claim for special damage to himself, no doubt such a defence would still be good, so far as regards the claim of the supposed husband.

No question of the like kind can now arise in an action for defamation of a female plaintiff as, if married, she can sue or be sued in tort, contract, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by, or taken against

(*a*) *Lane* v. *Applegate* (1 Starkie, 97). In the marginal note it is said "when executed by the burning of the papers;" but the judgment of Lord Ellenborough does not contain those words.
(*b*) *Boosey* v. *Wood* (3 H. & C. 484; 34 L. J. 65, Ex.).
(*c*) *Vide ante*, p. 627.
(*d*) See Rules of the Supreme Court, 1883, Order xix. R. 15.
(*e*) *Duke of Brunswick* v. *Harmer* (14 Q. B. 185).
(*f*) *Chantler and Wife* v. *Lindsey* (16 M. & W. 82).

her; and any damages or costs recovered against her in any such action or proceeding, shall be payable out of her separate property, and not otherwise.(*a*)

Plea in abatement.

A plea in abatement, on the ground of the nonjoinder of a party who ought to be a co-plaintiff, was rarely available in actions of libel; for, even in the case of libels upon mercantile or trading firms, the defamation of the firm was generally a libel upon each member of it, and entitled him to a remedy for his individual injury. And, even if one partner in such action had claimed damages for the injury to the firm, a plea in abatement would have been bad, as being a plea to the damages and not to the cause of action.(*b*)

Pleas and defences in abatement are now abolished.(*c*)

Demurrer.

The defendant might formerly demur to the statement of claim, on the ground that it stated no libel; for it was not enough to entitle a plaintiff to judgment that he should charge malicious motives and a calumnious tendency; he must also show that there was a libel.(*d*)

There are not many instances to be found of demurrers to libels, because, where the words were capable of a calumnious meaning, the jury were the proper judges as to whether they bore it.

Reeves v. *Templar*,(*e*) however, was such a case. There the court, *dubitante* Parke, B., gave judgment for the defendant, on the ground that the letter set out in the declaration was not libellous. Parke, B., said the rule to be applied in deciding the demurrer was, whether judgment could be arrested after verdict.

The effect of a demurrer was to submit the whole record to the judgment of the Court; so that if the plaintiff demurred to the defendant's plea, he might be called upon to support his own declaration, and in this way might sometimes be hoist with his own petard. See for an example of such a case, *Clay* v. *Roberts*(*f*).

Demurrers abolished. Proceedings in lieu of demurrer.

Demurrers are now abolished in all cases.(*g*)

But any party is entitled to raise by his pleading any point of law, and any point so raised is to be disposed of by the judge who tries the cause at or after the trial. If the

(*a*) 45 & 46 Vict. c. 75. s. 1 subsection 2.

(*b*) *Robinson* v. *Marchant* (7 Q. B. 918; 15 L. J. 134, Q. B.). See also *Forster* v. *Lawson* (3 Bing. 452).

(*c*) Rules of 1883, Order xxi. R. 20.

(*d*) *Per* Lord Denman, C.J., *Hearne* v. *Stowell* (12 A. & E. 731).

(*e*) 2 Jur. 137. See also *Cox* v. *Cooper* (12 W. R. 75; 9 L. T. N. S. 329).

(*f*) 11 W. R. 649; 8 L. T. N. S. 397; 9 Jur. N. S. 580).

(*g*) Rules of 1883, Order xxv. R. 1.

parties consent, or the court, or a judge, on the application of either party, so orders, the point of law so raised may be set down for hearing and disposed of at any time before the trial.(*a*)

If in the opinion of the Court or a judge the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, counter-claim, or reply therein, the Court or judge may thereupon dismiss the action, or make such order therein as may be just.(*b*)

Replication.

The plaintiff usually replies to defendant's statement of defence by joining issue; but occasion may render it advisable to reply specially.

Alexander v. *North-Eastern Railway Company*(*c*) furnishes an example of a replication, setting out the conviction relied upon in the plea as a justification, a rejoinder, and a demurrer to the rejoinder.

If the justification in the plea were that the plaintiff had committed a certain crime, a replication pleading a pardon would be good;(*d*) but when the libel was, that the plaintiff was convicted of a crime, Blackburn, J., in the case of *Alexander* v. *North-Eastern Railway*, said: "It is perfectly immaterial whether the conviction is still subsisting or not; for if the plaintiff was convicted, the libel is true."

New assignment.

Where the declaration charged a publication generally, and the defendant pleaded that he had published it lawfully, as to the members of a committee of the House of Commons, and the plaintiff proceeded for a publication to other persons, it was formerly necessary for him to new assign such illegal publication.(*e*) The plea of not guilty to the new assignment raised the same issue precisely as if the libel new assigned had been set out in the declaration, and the defendant had pleaded not guilty only.(*f*)

New assignments are now abolished. Everything which was formerly alleged by way of new assignment may now be introduced by amendment of the statement of claim, or by way of reply.(*g*)

Discovery.

After joinder of issue is the proper time for the plaintiff to seek the aid of the Court in obtaining information from

(*a*) Rules of 1883, Order xxv. R. 2. (*b*) *Ibid.* R. 3.
(*c*) 34 L. J. 152, Q. B.; 11 Jur. N. S. 619; 13 W. R. 651. *Vide ante*, p. 652.
(*d*) *Cuddington* v. *Wilkins* (Hobart, 81).
(*e*) See 2 Lush's Saunders, 945; 1 Wms. Saunders, 133.
(*f*) *Duke of Brunswick* v. *Pepper* (2 C. & K. 685).
(*g*) Rules of 1883, Order xxiii. R. 6.

the defendant, which may be necessary or material to prove his case.

It will be seen, however, that this assistance will only be granted under very special circumstances.

The Newspapers, Printers, and Reading-rooms Act, 1869 (32 & 33 Vict. c. 24), repealing many former enactments, left certain statutory provisions for assisting the plaintiff in proving the publication by the defendant of the newspaper containing the libel.

39 Geo. 3, c. 79, s. 29,(*a*) renders it obligatory (under a penalty) on every printer to keep, for six months after the printing thereof, a copy of every paper printed by him, with the name of his employer written or printed thereon; which he is to show to any justice of the peace who, within the six months, may require to see it. 6 & 7 Will. 4, c. 76, s. 19, provided for the discovery of the proprietors, printers, or publishers of newspapers, by filing a bill for discovery in equity;(*b*) but the whole of this Act has been repealed by 33 & 34 Vict. c. 99.

Register of newspaper proprietors.

And now the Newspaper Libel and Registration Act of 1881,(*c*) which does not extend to Scotland, provides(*d*) for the establishment of a register of newspaper proprietors for England and Ireland, showing the title of the newspaper, the names of the proprietors, and the places of business and of residence of the proprietors.(*e*)

Every certified copy of an entry in, or extract from, the register, is in all proceedings, civil or criminal, to be accepted as sufficient *primâ facie* evidence of all the matters and things thereby appearing, unless and until the contrary thereof be shown.(*f*)

Interrogatories.

The plaintiff may also, if so minded, administer interrogatories to the defendant.

For the present practice, see the various rules of Order xxxi. of the Supreme Court Rules, 1883.

In *Tupling* v. *Ward*(*g*) the Court of Exchequer held that it was unfair to submit questions which a party is clearly not bound to answer, the object being either to compel him to answer when not bound, or to refuse, and so create a preju-

(*a*) See the enactment set out, *ante*, pp. 312, 313.

(*b*) The only reported case in which the power given by 6 & 7 Will. 4. c. 76 s. 19 has been used, is that of *Dixon* v. *Enoch* (L. R. 13 Eq. 392).

(*c*) 44 & 45 Vict. c. 60. (*d*) Sect. 8.

(*e*) See the provisions of the Act set forth, *ante*, pp. 315–318.

(*f*) Sects. 14 & 15.

(*g*) 6 H. & N. 449; 30 L. J. 222. Ex. See also *Baker* v. *Lane* (3 H. & C. 544; 34 L. J. 57, Ex.).

dice against him. On this ground the Court refused to allow interrogatories to be put to the defendant, as to whether he composed the article complained of? whether he knew who composed it? whether the name on the title-page was real or fictitious? whether he had been, or expected to be, indemnified? with other questions of a like kind.

Two years later, the Court of Common Pleas rescinded an order made by Keating, J., allowing interrogatories to be put to the defendant, as to whether he spoke the slander charged in the declaration, Erle, C.J., saying: "I do not mean to say that in no case will the Court allow interrogatories in an action of slander; but, before I will consent to allow them, I must be satisfied that there are very peculiar circumstances of grievance and oppression to justify so novel a proceeding."(*a*)

These cases were followed in the case of *Edmunds* v. *Greenwood*,(*b*) the Court there holding that very special circumstances ought to appear before interrogatories, the express object of which was to make the defendant criminate himself, were allowed.

But in an action for sending to the *Times* newspaper a libellous extract from a letter, to which the defendant pleaded not guilty, and a justification, Blackburn, J., without any affidavit showing special circumstances, allowed the following interrogatory, and others of a like nature: "Did you, on or about the 10th March, 1870, write, and send to the *Times* for publication, a letter signed 'Z.,' accompanied by what purported to be an extract from the letter from a Halifax merchant?" and the Court refused to interfere with the discretion of the judge.(*c*)

The question may be taken to have been settled by the decision of the Court of Appeal in *Fisher* v. *Oven*,(*d*) that an interrogatory as to the commission of an indictable offence, if relevant, could not be struck out, and that the defendant's only remedy was to decline to answer, on the ground that his answer might tend to criminate him. "It does not appear to me," said Jessel, M.R., "that the ancient practice of the Court of Chancery on this head has been abolished or interfered with by the Judicature Act, or by the Orders." In the sub-

(*a*) *Stern* v. *Seaustopulo* (14 C. B. N. S. 737). See also *Villeboisnet* v. *Tobin*, L. R. 4 C. P. 184.

(*b*) L. Rep. 4 C. P. 70; 19 L. T. N. S. 423; 38 L. J. 115, C. P.; 17 W. R. 142.

(*c*) *Inman* v. *Jenkins* (L. Rep. 5 C. P. 738; 22 L. T. N. S. 659; 39 L. J. 258, C. P.; 18 W. R. 897).

(*d*) L. R. 8 C. D. 645.

sequent case of *Allhusen* v. *Labouchere*,(a) James, L.J., said: "I am bound to say from my experience of interrogatories in the Courts of Chancery, that the decision in *Fisher* v. *Owen* was entirely in accordance with everything that has been decided here. Nobody was ever allowed to object to a relevant question because that question tended to criminate himself. He might object to answer it, but it was never a ground of demurrer to an interrogatory, or a ground for striking it out, that the answer might involve him in a crime." Cotton, L.J., pointed out(b) that what had always been the practice of the Court of Chancery was now, by s. 25 subsection 11 of the Judicature Act of 1873, the universal practice in all Divisions of the High Court. Brett, L.J., doubted whether the equity doctrine was properly applicable in common law cases; but he added: "That, however, is past controversy; and the question has been settled by a Court of Appeal."(c)

Refusal to give answers tending to criminate.

If, however, the defendant refuses to answer the interrogatories of the plaintiff, or any of them, on the ground that the answers would tend to criminate him, the Court cannot compel him to do so.

Thus, in *Bowden* v. *Allen*,(d) the defendant declined, on this ground, to say whether he was the publisher of the newspaper containing the libel; and Bramwell, B., dismissed a summons for further and better answers. On appeal, the Court of Common Pleas held that he was right in so doing, as sect. 19 of the 6 & 7 Will. 4, c. 76 (re-enacted by 32 & 33 Vict. c. 24) was confined to a bill of discovery in Chancery, and did not apply to interrogatories at common law, and the Court had no power to supply the omission.

An incorporated company, however, would probably be compelled to answer, as it could not be made criminally responsible for the publication.(e)

An objection to answer on the ground that the answers "might tend to criminate" the defendant, was held sufficient in the recent case of *Lamb* v. *Munster*.(f) It was contended in that case that the defendant should have sworn that he was "advised" or "believed" that his answers would have the effect of criminating him; but the Court was of opinion that no particular form of words was necessary, provided it is satisfied on the oath of the witness, that he does object on

(a) L. R. 3 Q. B. D. 654.
(b) See p. 666. (c) See p. 662.
(d) 39 L. J. 217, C. P.; 22 L. T. N. S. 342; 18 W. R. 695.
(e) *King of the Two Sicilies* v. *Wilcox* (1 Simon, N. S. 335).
(f) L. R. 10 Q. B. D. 110.

the ground mentioned by him, and that his objection is *bonâ fide*.

Inspection of documents by plaintiff.

If the defendant justifies the libel, and has in his possession documents which tend to disprove the truth of such justification, the plaintiff will be allowed inspection of them.(*a*)

Commission to examine witnesses.

The defendant sometimes desires the assistance of the Court to enable him to procure evidence material to the issues which lie upon him to prove.

If the libel relates to transactions which occurred abroad, the defendant is entitled to a commission for the examination of witnesses on the spot;(*b*) but the Court may make it a condition of the order that the defendant state what he expects them to prove.(*c*)

Inspection by defendant.

On an affidavit denying that he is the author, the Court will allow him, his attorney, and witnesses (without naming them) to inspect and take facsimile copies of the documents referred to in the plaintiff's pleading.(*d*)

The Court will not, however, allow him to inspect books and papers in the custody of the plaintiff in order to establish the truth of the libel. *Macaulay* v. *Shackell*(*e*) is often quoted as an authority to the contrary; but Pollock, C.B., stated in the case of the *Metropolitan Saloon Omnibus Company* v. *Hawkins*,(*f*) that that case merely decided that the defendant was entitled to a commission to examine witnesses at the place where the events happened. He added: "A person who ventures to publish a libel, or utter slander, should be in a condition to justify his conduct, and not come to the court to ask for assistance to get up some proof." Martin, B., in the same case, said: "Looking at the case of *Macaulay* v. *Shackell*, although it is difficult to collect from it any distinct proposition as to the right of a defendant in an action for libel, I am not prepared to say that in no case would he be entitled to an inspection; but he would be bound to give the tribunal to which he applied reason to believe that there was some particular document, which he could specify and put his hands upon, which would support his case; and neither a court of law or equity would give him an opportunity of searching the plaintiffs' books, in order to get up a defence."(*g*)

(*a*) *Collins* v. *Yates and another* (27 L. J. 150, Ex.).
(*b*) *Thorpe* v. *Macaulay* (5 Madd. 230); *Macaulay* v. *Shackell* (2 Sim. & Str. 79); S. C., Dom. Proc. 1 Bl. N. S. 96; *Metropolitan Saloon Omnibus Company* v. *Hawkins* (4 H. & N. 146).
(*c*) *Barry* v. *Barclay* (15 C. B. N. S. 849).
(*d*) *Davey* v. *Pemberton* (11 C. B. N. S. 628).
(*e*) *Ubi supra*. (*f*) *Ubi supra*.
(*g*) 4 H. & N. 150, 151.

CHAPTER XIII.

PROCEEDINGS AT AND AFTER TRIAL OF ACTION.

Right to begin.

THE plaintiff, at the trial, is always entitled to begin, even where the onus of proving all the issues lies on the defendant.

The practice upon this point remained for a long time unsettled;(*a*) but in the year 1833 a resolution was come to by the judges that "In actions for libel, slander, and injuries to the person, the plaintiff shall begin, although the affirmative issue is on the defendant."(*b*) In *Mercer* v. *Whall*, Lord Denman said that this was not at all intended to introduce a new practice, but was limited to a declaration of that rule, which they never would have promulgated if they had not believed it to be law.(*c*)

Proof of publication.

Where the publication is not admitted, the plaintiff's first step will be to give *primâ facie* evidence of the publication, by the defendant, of the libel. As to this, there is little to add to what has been said in Chapter XI. upon the evidence sufficient to sustain an indictment.(*d*)

Comparison of handwriting.

Sect. 27 of the Common Law Procedure Act, 1854, provides that "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute."

Admission of defendant.

Publication may be proved by the admission of the defendant; but an admission of writing the libel is no evidence of publishing; and an admission that the defendant was the editor of a periodical at a certain date is not evidence to connect him with a libel published in that periodical subsequently to that date.(*e*)

Where libel is lost.

If the libel is lost, secondary evidence may be given to connect the defendant with its publication.(*f*)

(*a*) *Cooper* v. *Wakley* (3 C. & P. 474; 1 M. & M. 248); *Cotton* v. *James* (3 C. & P. 505, and 1 M. & M. 278, where see a learned note by the reporter).

(*b*) *Carter* v. *Jones* (6 C. & P. 64; 1 M. & R 281.

(*c*) 5 Q. B. 463. (*d*) *Vide ante*, pp. 576 *seq.*

(*e*) *The Seven Bishops' case* (4 St. Tr. 300); *Macleod* v. *Wakley* (3 C. & P. 311). (*f*) See *Gathercole* v. *Miall* (15 M. & W. 319).

Thus, in the case of *Johnson* v. *Hudson and Morgan*,(a) where the libel complained of was a song, which had been published by singing in the street. The copy which was sung had been destroyed, but it appeared that it had been sung from a printed paper taken from the defendant Hudson's shop from a parcel containing about 300 copies. The person who sang it swore that it corresponded with a printed song which was produced, and which had Morgan's name on it as printer; and one of Morgan's journeymen swore that the printed song produced corresponded with that which Morgan had printed and delivered to Hudson. This was held sufficient secondary evidence to connect Morgan with the libel.

So, in the case of *Gathercole* v. *Miall*,(b) after proof that a newspaper had been left at a literary institution, and had been removed without authority, and was believed to have been lost or destroyed, secondary evidence was admitted to identify it with the paper containing the libel. But in this case the evidence was offered, not to connect the defendant with the publication of that particular copy, but to show that the libel had obtained an extensive circulation.

Evidence that the libel was in the handwriting of the daughter of the defendant, who usually wrote his letters of business, was held to be no evidence of publication by the defendant, in the absence of evidence to show that it was written by his procurement; and it was held that the daughter could not be called to say by whose authority she wrote it, as it might criminate her.(c) This latter proposition, however, is not law now. The daughter would be obliged to take the oath; but, when the question was put to her, she would be allowed to refuse to answer if the answer might tend to criminate her.

Libel addressed to State officer or department.

Where the libel is contained in a communication to a State officer or department, the judge must decide first whether it is privileged from being produced on grounds of public policy; and if he decides that it is, then no evidence can be given of its contents.

In the case of *Anderson* v. *Hamilton*,(d) Lord Ellenborough observed: "It is said that the fact that there

(a) 7 A. & E. 233, *in notis*.
(b) 15 M. & W. 319. (c) *Harding* v. *Greening* (1 Moore, 479).
(d) 2 B. & B. 157, n.; cited by Lord Chelmsford in *Stace* v. *Griffith* (L. Rep. 2 P. C. 428; S. C., 6 Moore, P. C. C. N. S. 18; 20 L. T. N. S. 197).

has been a complaint made against the defendant by the plaintiff to Lord Liverpool, is the only fact sought to be put in evidence on this occasion; but it is not competent for the defendant to get at that fact, if it be embodied in an official letter. Neither can an extract of such a letter be admitted, for the plaintiff must be entitled to the whole or none."

Putting in the libel.

After sufficient evidence has been given to connect the defendant with the publication, the libel should be put in and read.

Amendment of variance.

Should there appear to be any variance in the libel read from the matter charged in the statement of claim, the Court or the judge has ample power to amend the record, as in his discretion he may think most conducive to the ends of justice.(*a*)

Where the declaration merely set out the effect of a libellous letter, Wightman, J., allowed it to be amended by setting out the letter *verbatim*, with the words "meaning thereby" immediately before the libel charged in the declaration, and offered to postpone the trial to enable the defendant to justify the amended declaration; but the defendant declined to avail himself of the offer, and the jury found a verdict for the plaintiff. On a motion for a new trial, the Court of Exchequer held that the amendment was properly made.(*b*)

Where the declaration stated that the defendant published a libel "contained in, and being an article, in a certain weekly publication or paper called the *Paul Pry*," and at the trial the publication proved was that the defendant had given a printed slip of paper, appearing to have been cut from the *Paul Pry*, to several persons to read, the declaration was amended by striking out the words quoted above.(*c*)

Introductory averments.

As introductory averments are no longer necessary, it is apprehended that, if inserted, they may be treated as surplusage, and need not be proved.

Proof of innuendoes.

To prove that the words have the meaning which is attached to them by the innuendoes, and that they refer to the plaintiff, it often becomes necessary to call witnesses who are acquainted with the circumstances out of which the libel arose, and who are therefore capable of saying to whom it applies, and what meaning it bears when read by the light

(*a*) Rules of 1883, Order xxviii. R. 1.
(*b*) *Saunders* v. *Bate* (1 H. & N. 402).
(*c*) *Foster* v. *Pointer* (9 C. & P. 718).

of surrounding circumstances.(*a*) For the purpose of identifying the plaintiff with the subject of the libel, evidence of his having been laughed at at a public meeting is admissible.(*b*)

But where a meaning is sought to be put upon words which differs from their ordinary construction, a foundation must be laid for it by showing that something occurred which gave them a special meaning, and then the witnesses may be asked, with reference to those occurrences, what was the sense in which they understood the words.(*c*)

It is not necessary to give evidence of the meaning of words which are in common use, although they may not have existed long enough to be found in the last edition of the English dictionary ;(*d*) nor is it necessary to explain by evidence ordinary historical, figurative, or parabolical terms and allusions.(*e*)

It is the duty of the judge to say whether the publication is capable of the meaning ascribed to it by the innuendo ; but when the judge is satisfied of that, it must be left to the jury to say whether the publication has the meaning so ascribed to it.(*f*)

Evidence of malice to rebut privilege.

When the inference of malice is rebutted by the occasion of the publication, it will be necessary for the plaintiff, in order to avoid a nonsuit, either to show that the libel contains intrinsic evidence of malice, or to give extrinsic proof of it.

Once the judge has ruled that the occasion of the publication is privileged, the onus is upon the plaintiff of showing that the defendant acted maliciously.(*g*) This is not proved by showing that the defendant had no reasonable grounds for his belief, if as a matter of fact he did believe in the truth of his assertions.(*h*) For "a man," as observed by Cotton, L.J., "may be wanting in reasoning power, or he may be very stupid ; still he may be acting *bonâ fide*, honestly intending to discharge a duty."(*i*)

It is a matter of law to be decided by the judge whether

(*a*) See 2 Starkie on Evidence, 628.
(*b*) *Cook* v. *Ward* (4 M. & P. 99; 6 Bing. 412); and see *Du Bost* v. *Beresford* (2 Camp. 512).
(*c*) See *Daines* v. *Hartley* (3 Ex. 200); *Broome* v. *Gosden* (1 C. B. 728); *Barnett* v. *Allen* (3 H. & N. 376; 27 L. J. 412, Ex.); *Brunswick (Duke of)* v. *Harmer* (3 C. & K. 10).
(*d*) *Homer* v. *Taunton* (5 H. & N. 661).
(*e*) *Hoare* v. *Silverlock* (12 Q. B. 624).
(*f*) *Blagg* v. *Sturt* (10 Q. B. 899. See p. 908).
(*g*) *Clark* v. *Molyneux* (L. R. 3 Q. B. D. 237).
(*h*) *Ibid.* (*i*) *Ibid.* p. 249.

the legal presumption of malice is rebutted; but when there is any evidence of malice the matter must be left to the jury to determine.(*a*)

The language of the libel is sometimes evidence of express malice—*e.g.*, if, in a report of facts, the writer goes out of his way to impute motives which are not a necessary inference from the facts;(*b*) and therefore the libel itself should be submitted to the jury, so that they may judge from it, as well as from the extrinsic circumstances, whether it is malicious.(*c*)

"It is no doubt true," said Montagu Smith, J., delivering the judgment of the Privy Council in *Hoot* v. *Grampeeh*,(*d*) "that malice may in some cases be inferred from the defamatory statements themselves; but where representations, if *bonâ fide*, are privileged by the occasion on which they are made, the mere circumstance that they are defamatory does not furnish that proof. It must be shown, either from the nature of the language employed, or by extrinsic evidence, that they were prompted by bad feeling or wrong motives, and it is not sufficient in such cases that the representations are consistent with the existence of malice: they must be inconsistent with *bonâ fides* and honesty of purpose."

Proof that the libel is false in a part of the statement, is evidence for the jury to renew the presumption of malice which has been rebutted by the occasion of the publication.(*e*)

Evidence that the plaintiff and defendant lived on bad terms is evidence from which the jury may infer malice, and this, whether the provocation was given by the defendant or the plaintiff.(*f*)

A communication which would be privileged if made by letter may lose its privilege by being unnecessarily sent by telegram.(*g*) It is in this respect like the case of a libel contained on the back of a post card.(*h*)

Acts done by the defendant subsequently to the publication

(*a*) *Cooke* v. *Wildes* (5 E. & B. 328); *Somerville* v. *Hawkins* (10 C. B. 583); *Taylor* v. *Hawkins* (16 Q. B. 308); *Stace* v. *Griffith* (L. Rep. 2 P. C. 429); 20 L. T. N. S. 197; 6 Moore P. C. C. N. S. 18).

(*b*) *Cooke* v. *Wildes* (5 E. & B. 332); *Gilpin* v. *Fowler* (9 Ex. 516; 23 L. J. 152, Ex.); *Tuson* v. *Evans* (12 A. & E. 733); *Wright* v. *Woodgate* (2 C. M. & R. 573).

(*c*) *Gilpin* v. *Fowler* (*ubi supra*); *Fryer* v. *Kinnersley* (15 C. B. N. S. 422; 33 L. J. 96, C. P.; 9 L. T. N. S. 415; 12 W. R. 155).

(*d*) L. R. 4 P. C. 460.

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

(*f*) *Simpson* v. *Robinson* (12 Q. B. 511). See also 15 C. B. N. S. 431.

(*g*) *Williamson* v. *Freer* (L. R. 9 C. P. 393).

(*h*) *Per* Brett, J. (*Ibid.* 395).

of the libel may indicate the existence of motives at a former period; and therefore where the plaintiff expressed in court his willingness to accept an apology and nominal damages, if the defendant would withdraw his plea of justification, and the defendant refused to do so, but offered no evidence in support of it, it was held that the judge was right in leaving this to the jury as evidence of express malice;(*a*) but such evidence would not be admissible upon the issue as to whether the communication was privileged.(*b*)

But where the action is brought against the bookseller or trade publisher, evidence of the personal malice of the writer of the libel is not admissible.(*c*)

By letters from defendant to plaintiff.

Letters of the defendant, addressed to the plaintiff about the same period as the publication of the libel, may be given in evidence to show *quo animo* the libel was published;(*d*) and anonymous letters have been admitted for this purpose.(*e*)

By evidence of other defamatory publications or statements of defendant.

At one time it was a moot question whether other libels or actionable slanders could be received in evidence to prove express malice. There were numerous *nisi prius* cases which supported the affirmative and negative of the proposition. These will be found reviewed by the Court of Common Pleas in the case of *Pearson* v. *Le Maitre*,(*f*) where that Court decided that, even in cases where there was no pretence for saying that the publication was privileged, the plaintiff might show the spirit and intention of the party publishing a libel, although the evidence tending to prove it disclosed another and different cause of action. And in the case of *Barrett* v. *Long*(*g*) it was held by the House of Lords that where the defendant pleaded the general issue, and also a plea under the statute 6 & 7 Vict. c. 96, denying actual malice, and stating the publication of an apology set forth in the plea, the plaintiff might give in evidence other publications by the defendant—some of them more than six years before the publication complained of—of and concerning the plaintiff, in order to prove malice on the part of the defendant.

Parke, B., in delivering the opinion of the judges upon this question, in the case last referred to, said: "We are all of opinion that, under such a plea, the publication of previous libels on the plaintiff by the defendant, is admissible

(*a*) *Simpson* v. *Robinson* (12 Q. B. 511). See also 15 C. B. N. S. 431.
(*b*) *Wilson* v. *Robinson* (7 Q. B. 68).
(*c*) *Robertson* v. *Wylde* (2 M. & Rob. 101).
(*d*) *Tarpley* v. *Blaby* (2 Scott, 642).
(*e*) *Hughes* v. *Lady Dinorben* (32 L. T. 271).
(*f*) 5 M. & G. 700. See p. 719.
(*g*) 3 H. L. C. p. 395. See p. 413.

evidence to show that the defendant wrote the libel in question, with actual malice against the plaintiff. A long practice of libelling the plaintiff may show in the most satisfactory manner, that the defendant was actuated by malice in the particular publication, and that it did not take place through carelessness or inadvertence; and the more the evidence approaches to the proof of a systematic practice, the more convincing it is. The circumstance that the other libels are more or less frequent, or more or less remote from the time of the publication of that in question, merely affects the weight, not the admissibility, of the evidence."(*a*)

Where evidence is given of statements made by the defendant a long time after the publication of the libel charged in the declaration, the judge should point out to the jury distinctly the interval between the libel and the subsequent statements, and suggest to them to take into their consideration the possibility that such statements might refer to something which happened after the libel, so as not to show malice at the time of the publication.(*b*)

By reference to defendant's pleas.

It has sometimes been sought to prove express malice by reference to the defendant's pleas.

In the case of *Wilson* v. *Robinson*(*c*) the Court of Queen's Bench held that the fact that the defendant had pleaded a justification of the libel, which he abandoned at the trial, was no evidence of malice, for the purpose of depriving him of the protection which he derived from the libel being a privileged communication, and that, at the utmost, the plea could only have been urged in aggravation of damages, if the jury had found that the libel was not a private communication in the course of business.

In the case of *Simpson* v. *Robinson*,(*d*) the plaintiff expressed in court his willingness to accept an apology and nominal damages, the defendant not persisting in a justification of the truth which he had pleaded. The defendant refused this offer; and, though he gave no evidence in support of the justification, he did not withdraw the charge. Erle, J., told the jury that they might consider the whole of the defendant's conduct, with reference to the question of malice, and that acts, although subsequent, might indicate the existence of motives at a former time; and, with reference to the question of damages, he remarked that the jury should consider the nature of the imputation, how it had

(*a*) 3 H. L. C. p. 414.
(*b*) *Hemmings* v. *Gasson* (El. Bl. & El. 346; 27 L. J. 252. Q. B.).
(*c*) 7 Q. B. 68. (*d*) 12 Q. B. 511.

been made, and how it had been persisted in down to the time of the verdict, and they should calmly consider what damages would reinstate the plaintiff's character; and the Court of Queen's Bench upheld this direction. Lord Denman, C.J., in delivering the judgment of the Court, said: "The defendant's conduct in putting a justification on the record which he does not attempt to prove, and will not abandon, may be taken into consideration as proving malice and aggravating the injury. And, if the defendant's conduct in that respect may at all affect the verdict, every other part of his conduct showing the same disposition may equally be laid before the jury: refusing to make reparation for unjustifiable slander may have that effect; and the malice proved to exist at the time of the trial, but connected with the subject matter of it, may well be believed to have existed at the time of speaking the words."(*a*)

Some strong observations of Willes, J., to a contrary effect, are to be found in *Caulfield* v. *Whitworth*(*b*) (an action for slander), where his Lordship said: "The other circumstance relied on was the plea of justification; but the rule is clear that when there are more issues than one, the pleadings on one of them cannot be used as evidence to establish the opponents' case on another. It would be astonishing if the plea of justification of itself were sufficient to establish the allegations in the declaration. . . . . The decision in *Simpson* v. *Robinson* does not come up to the statement in the marginal note, for it had reference to the damages only. I am free to say that I consider that the decisions on this subject which were given about the time of the case of *Simpson* v. *Robinson* are not creditable to the law, and I hope that they will at some time be revised."

When question of express malice should be left to jury.

The question of express malice ought not to be left to the jury, unless the evidence raises a probability of malice, and is more consistent with its existence than with its non-existence; for the onus of proving malice lies on the plaintiff.(*c*)

Where, however, the question of privilege involves matters of fact, which are disputed, it will be for the jury to find the

(*a*) 12 Q. B. 513, 514.
(*b*) 18 L. T. N. S. 527; 16 W. R. 936.
(*c*) *Somerville* v. *Hawkins* (10 C. B. 590); *Taylor* v. *Hawkins* (16 Q. B. 308); *Caulfield* v. *Whitworth* (18 L. T. N. S. 527); *Laurless* v. *Anglo-Egyptian Cotton Company* (L. Rep. 4 Q. B. 262: 38 L. J. 129, Q. B.); *Spill* v. *Maule* (L. Rep. 4 Ex. 232; 38 L. J. 138, Ex.; 20 L. T. N. S. 675; 17 W. R. 805).

facts, and for the judge to decide whether the facts so found make the publication privileged.(*a*)

Evidence of damage.

The next part of the plaintiff's case which requires to be considered is the evidence to be offered in respect to the damages claimed.

The amount of general damages is entirely a matter for the jury, who may assess the damages, on proof of the publication of the libel, without any evidence of actual damage.(*b*)

The plaintiff may rest his case upon the character of the imputations, or he may offer evidence, in aggravation, of the injury he has sustained. For the latter purpose he may prove that the libel has been extensively circulated, although such circulation be not traced to the defendant;(*c*) or that the libel has caused him to be the subject of laughter;(*d*) and he may prove the manner of the publication.(*e*)

Where there are actions pending against other parties for publishing the same libel, the jury are not to take them into account, as the plaintiff has a right to recover against the defendant all the damage which arose from his wrongful act.(*f*)

The conduct of the defendant may also influence the amount of the verdict; and, therefore, the plaintiff may give evidence of express malice, the nature of which has already been treated of.(*g*) But, where other libels are read for this purpose, the jury should be cautioned not to give damages in respect of them, but only to consider them so far as they prove the malicious nature of the libel which is the subject of the action they have to try.(*h*) The omission of the judge to do this is not, however, a misdirection.(*i*)

Not only is express malice a proper matter for the jury to consider, in determining the amount of damages, but gross negligence in inserting a libel in a newspaper is also a reason for giving a substantial sum.(*j*)

(*a*) *Beatson* v. *Skene* (5 H. & N. 838; 29 L. J. 430, Ex.); *Stace* v. *Griffith* (L. Rep. 2 P. C. 420; 6 Moore, P. C. C. N. S. 18; 20 L. T. N. S. 197).

(*b*) *Tripp* v. *Thomas* (3 B. & C. 427); *Ingram* v. *Lawson* (6 Bing. N. C. 212); *Shepheard* v. *Whitaker* (L. R. 10 C. P. 502).

(*c*) *Gathercole* v. *Miall* (15 M. & W. 319).

(*d*) *Cook* v. *Ward* (6 Bing. 409).

(*e*) *Vines* v. *Serrell* (7 C. & P. 163).

(*f*) *Fresene* v. *May* (2 F. & F. 122); *Harrison* v. *Pearce* (1 F. & F. 567).

(*g*) *Vide ante*, p. 668, 699.

(*h*) *Pearson* v. *Le Maitre* (5 M. & G. 700).

(*i*) *Darby* v. *Ousley* (1 H. & N. 1; 25 L. J. 229; Ex.).

(*j*) *Smith* v. *Harrison* (1 F. & F. 565).

Evidence of pecuniary damage sustained.

Where the libel is published of the plaintiff in the way of his trade, he may give general evidence of a decrease in his trade, even after the commencement of the action, and although his pleading contains no allegation of special damage. Thus, where the declaration averred generally that, by reason of the libel, the plaintiff was injured in his reputation as shipowner and master mariner, and it was believed that his ship was unfit for freight and passengers of respectability, and that he had conducted himself dishonestly and improperly in relation to an intended voyage, the plaintiff was allowed to prove what was the average profit to a captain of a ship upon an East India voyage, and that, upon the first voyage which he took after the publication of the libel, and after the commencement of the action, his profits were nearly £1,500 below the average. On a motion for a new trial, on the ground of misdirection, the Court held that the evidence was properly admitted. Coltman, J., said: "With respect to the damages, the jury must have some mode of estimating them; and they could not be in a condition to do so unless they knew something of the nature of the plaintiff's business, and of the general return from his voyages." And Maule, J., who had tried the case, said the evidence was admitted "only that the jury might know what sort of business the plaintiff carried on; for the same amount of damages ought not to be given in respect of a libel on a plaintiff in the way of his business, where his trade is small, as where his trade is large."(*a*)

And in the more recent case of *Harrison* v. *Pearce*,(*b*) which was an action for libel upon a newspaper proprietor, the Court of Exchequer held that Martin, B., had properly admitted evidence to prove that the circulation of the plaintiff's papers had greatly declined after action brought, as "the damage proved was general damage, not special; the action was maintainable without it; and in many ready-money businesses it was impossible to give evidence of specific customers lost." "If," said Pollock, C.B., in this case,(*c*) "a period has elapsed between the commencement of the action and the trial of the cause, which has disclosed circumstances calculated to throw light upon the question of general damage, the plaintiff, in my opinion, has a right to give it in evidence, in order that the

(*a*) *Ingram* v. *Lawson* (6 Bing. N. C. 212).

(*b*) 1 F. & F. 567. See p. 570, *in notis*, and 32 L. T. Rep. 298. See also *Ashley* v. *Harrison* (1 Esp. 48); *Evans* v. *Harries* (1 H. & N. 251).

(*c*) 32 L. T. 298.

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jury may be able more correctly and satisfactorily to judge."(*a*)

It should be noted here that, although written slander is actionable without proof of special damage, or of its having been published of the plaintiff in the way of his trade, cases may occur where there is no imputation upon the plaintiff's character, and nothing in the libel which could injure him in the esteem of those who might believe the statements complained of, but in which, nevertheless, the publication may be defamatory of, and damaging to, the plaintiff in the exercise of his profession, trade, or occupation. In cases such as these the averment of the plaintiff's avocation is material, and, if traversed, must be proved,(*b*) unless it is admitted on the face of the libel.(*c*) It is sufficient to prove that the defendant acted in the capacity in which he is libelled, and he need not burden himself with proof that he was duly appointed or is legally qualified, unless the libel charges the contrary.(*d*)

The plaintiff will not be allowed to give any evidence of special damage which is not stated in his pleading; and the special damage must be the legal and natural result of the publication of the libel.(*e*)

Evidence to rebut defence.

The foregoing is an outline of the evidence which is necessary to prove the issues which lie upon the plaintiff; and it is usual for him to rest his case there, and call upon the defendant, if there are pleas of justification on the record, to establish his defence, reserving the right to rebut such defence by fresh evidence; but he may anticipate the justification if he thinks fit, and give all his evidence at the outset. He will not, however, be allowed to give part of such evidence in the first instance, and reserve the remainder for the reply.(*f*)

Defence.

At the close of the plaintiff's case the defendant's counsel frequently finds it advisable to abstain from calling evidence, so as to gain the advantage of making the last speech to the jury. The defendant should, however, be prepared, so

(*a*) As to remoteness of damage, see *Chamberlain* v. *Boyd* (L. R. 11 Q. B. D. 407).

(*b*) *Manning* v. *Clement* (7 Bing. 362); *Wakley* v. *Healey and another* (4 Ex. 53).

(*c*) *Trisurri* v. *Clement* (3 Bing. 441; *Jones* v. *Stevens* (11 Price, 235).

(*d*) *Rutherford* v. *Evans* (6 Bing 451); *Jones* v. *Stevens* (*ubi sup.*); *Bergman* v. *Wise* (4 T. R. 366); *Long* v. *Chubb* (5 C. & P. 55).

(*e*) See 1 Wms. Saunders, 243 d.; and *Vicars* v. *Wilcocks* (8 East, 1; 2 Smith's L. C. p. 487).

(*f*) *Browne* v. *Murray* (1 Ry. & Moo. 254).

far as the facts will allow him, to rebut the plaintiff's proofs by evidence.

Omission of part of publication.

Where the case made out against the defendant is, that he was the author of the libellous publication, he may prove that the publisher of it has omitted portions of his manuscript which materially qualify and render less offensive the part which has been published. But the omission of matter which does not qualify or diminish the libellous tendency of the remainder does not make the defendant less responsible than he would have been if the whole had been printed.(*a*)

Publication brought about by plaintiff.

It is doubtful how far evidence that the publication was brought about by the plaintiff's contrivance will bar the action. The cases would seem to show that, to establish such a defence, it is necessary to prove that the plaintiff caused both the creation of the libel and the particular publication of it for which he sues.

In the case of *Rex* v. *Waring*,(*b*) Lord Alvanley held that where the libel was written in answer to a letter sent not with a view to obtaining a character, but with the intention of obtaining such an answer as should be the ground of an action for libel, the action could not be sustained. And where it was sought to prove the publication of a libellous caricature by a witness who, having heard that the defendant had a copy of it, had gone to his house and requested to see it, Lord Ellenborough ruled that this was not sufficient evidence of publication to support an action.(*c*)

In a contrary direction are the cases of *Cook* v. *Ward*,(*d*) and the *Duke of Brunswick* v. *Harmer*.(*e*) In the first of these it was held that the fact that the plaintiff had put in circulation a ridiculous story of himself, did not justify the defendant's publishing it in a newspaper. In the second case the only evidence of publication was the sale of a copy of the newspaper to a person who had been sent by the plaintiff to purchase it, and who had handed it when purchased to the plaintiff. But a copy of the same paper, purporting to have been published more than six years before the commencement of the action, was also produced from the British Museum. The Court held that the publication was proved, and Coleridge, J., in delivering the judgment of the Court,(*f*) said: "The defendant, who, on the application of a stranger, delivers to him the writing which libels a third person, publishes the libellous matter to him, though he may have been sent for the

(*a*) *Tarpley* v. *Blabey* (2 Scott. 655, 656).
(*b*) 5 Esp. 14.
(*c*) *Smith* v. *Wood* (3 Camp. 323).
(*d*) 6 Bing. 409.
(*e*) 14 Q. B. 185.
(*f*) *Ibid.* 189.

purpose of procuring the work by that third person. So far as in him lies, he lowers the reputation of the principal in the mind of the agent, which, although that of an agent, is as capable of being affected by the assertions as if he were a stranger. The act is complete by the delivery; and its legal character is not altered, either by the plaintiff's procurement or by the subsequent handing over of the writing to him."

In the case last referred to there could be no doubt that the plaintiff had not caused the original publication of the libel, but had only adopted a ruse to procure evidence which might disprove the plea of the Statute of Limitations. Had the plaintiff entrapped the defendant into composing the libel, it is submitted that the maxim *Volenti non fit injuria* would have furnished the defendant with a complete answer to the action.

Proof that defendant was not author, and that he published innocently.

The defendant may prove that he was not the author of the libel, and that he published it innocently, as, for instance, that it was inserted in a magazine which he sold without knowledge of the contents,(*a*) or that he delivered it as a porter.(*b*) But it is doubtful whether such evidence would entitle him to the verdict, although it would materially affect the damages, as well as (possibly) the plaintiff's title to costs.

Privilege.

When the defence to be established is that the publication is privileged, the defendant should be prepared with evidence of the circumstances under which it was published. As a rule, however, literary publications, when privileged, are their own witnesses to the fact.

It is not necessary to repeat here what has been said in former chapters(*c*) as to the essential requisites of a privileged publication.

Denial of plaintiff's trade.

In the last chapter it was stated that the plea of not guilty threw upon the plaintiff the onus of proving all the material allegations in the declaration; but there was an exception to this rule; for, where the averment of the plaintiff's trade or business was material, the defendant was obliged to traverse it specially if he intended to question it at the trial. When such a plea was on the record, the defendant might give evidence to prove that the plaintiff did not carry on the business or follow the avocation alleged in the declaration; and it was no objection to such evidence that it also showed the libel

(*a*) *Chubb* v. *Flannagan* (6 C. & P. 431).
(*b*) *Day* v. *Bream* (2 M. & Rob. 54).
(*c*) *Vide ante*, chaps. vii., viii., and ix.

to be true.(*a*) The new rules make no alteration in this respect.

Justification.

If the old plea of justification was not proved in every material part the plaintiff was held entitled to the verdict upon the entire issue;(*b*) but where the part not sustained by the evidence related to only a small portion of the libel, the judge might amend the plea by limiting it to so much of the libel as was justified by the evidence; the effect being to entitle the plaintiff to some damages on the part not covered by the plea, and the defendant to the verdict on the remainder.(*c*)

Where libel charges commission of crime.

Where the libel imputes the commission of a crime to the plaintiff, the evidence to support the defence of justification must be such as would warrant a verdict of guilty on an indictment for the crime.(*d*) And it would appear that if the jury find that the charges in the libel are proved, the plaintiff may be put on his trial for the offence, without the intervention of a grand jury.(*e*)

The record in a criminal case is not admissible evidence either to prove or disprove the truth of the libel, because it is *res inter alios acta*: the parties are not the same, neither are the rules of decision and the course of proceedings.(*f*)

In an action for saying of the plaintiff that he was a thief and a murderer, Lord Kenyon said that if there had been a plea of justification on the record, he would have tried the truth of the charges, notwithstanding the acquittal.(*g*) But if the libel charges that the plaintiff was convicted of the offence, the fact must be proved by producing a copy of the record, omitting the formal parts thereof, certified under the hand of the officer having the custody of the records of the court, or his deputy.(*h*) It will then be a question for the jury whether the libel substantially agrees with the conviction.(*i*)

(*a*) *Manning* v. *Clement* (7 Bing. 368). See also *Eastwood* v. *Holmes* (1 F. & F. 347).

(*b*) *Weaver* v. *Lloyd* (2 B. & C. 678).

(*c*) *Cory* v. *Bond* (2 F. & F. 241).

(*d*) *Chalmers* v. *Shackell and others* (6 C. & P. 475); *Wilmett* v. *Harmer and another* (8 C. & P. 695).

(*e*) See note (*b*) to *Prosser* v. *Rowe* (2 C. & P. 422), and *Cook* v. *Field* (3 Esp. 133).

(*f*) *Justice* v. *Gosling* (12 C. B. 39); 2 Taylor on Evidence, sect. 1505.

(*g*) *England* v. *Bourke* (3 Esp. 80). See also *Cook* v. *Field* (3 Esp. 133).

(*h*) 14 & 15 Vict. c. 99, s. 13.

(*i*) *Alexander* v. *North-Eastern Railway Company* (34 L. J. 152, Q. B.; 6 B. & S. 240); 13 W. R. 651).

Evidence must justify sting of libel.

The gist and sting of the libel must be justified by the facts brought forward in support of the defence. Proof of one act done by the plaintiff is not sufficient to justify the imputation of a certain character to him. So that where the defendants pleaded by way of justification to the words "libellous journalist," that the plaintiff, intending to injure one B. B. Cooper, in his profession as a surgeon, published of him a false, scandalous, malicious and defamatory libel (setting out the libel), the Court held that the plea was not proved by the production of the record in the case stated in the plea, which showed that £100 damages had been recovered against the plaintiff. Parke, B., said: "I am perfectly satisfied that the words 'libellous journalist' do not mean that the plaintiff had been guilty, upon one occasion only, of having merely published a libel, but that he has been guilty of gross misconduct as a journalist, by the habit of libelling others. . . . . I take it to be clear that the publication of a libel which may make a man civilly liable only, does not necessarily lead to the conclusion that he has been guilty of any moral misconduct. The words 'libellous journalist,' may be understood in that sense; but it appears to me that the plea does not convey a charge of libelling, but an imputation that the plaintiff published from the malicious motive of injuring Mr. Cooper. With regard, therefore, to the last point, as to the effect of the production of the record in the case of *Cooper* v. *Wakley*, I think it would only go to show that an action had been brought, and that the plaintiff in that case had obtained a verdict for so much; but it did not prove the plaintiff to be a libellous journalist within the meaning of the words of the fifth plea."(*o*)

Where the moral quality of the act is ambiguous, and the libel puts a bad construction upon it, the evidence must prove circumstances which justify the complexion given to it.

An article imputed to the plaintiffs that they had bought goods from bankrupt traders under the market price, and while they were insolvent, and that the plaintiffs must have known they were insolvent, and were disposing of the goods in fraud of their creditors: innuendo that they had been guilty of dishonest dealings. The defendants pleaded that the libels were true in substance and effect; and in support of the plea proved that a bankrupt had sold to the plaintiffs a large quantity of cloth, which was not usually sold at all,

(*o*) *Wakley* v. *Cooke and another* (4 Ex. 511, 517).

worth about £12,000 at prices greatly under the market value, and at a loss of about £1,300; and that such sales were on a promise by the plaintiffs not to resell them in the Manchester market, and were not in the usual way in the markets, but by private arrangements, and that the last purchase was a few days before the bankruptcy. There was no express evidence that the plaintiffs knew the circumstances of the bankrupts at the time, or supposed them to be insolvent; and, on the contrary, people generally supposed them to be solvent. Erle, C.J., left it to the jury to say whether it was proved that the plaintiffs had bought the goods knowingly, under such circumstances as that they were guilty of dishonest dealings, and the jury found a verdict for the plaintiffs.(*a*)

In *Warman* v. *Hine*(*b*) the libel accused the plaintiff of being a "great defaulter" in his accounts as poor law guardian, and not paying the balance due from him till an execution to levy it was issued. In support of a plea of justification, it was proved that the plaintiff had used the parish money; that when he went out of office he made himself debtor to the parish in about £130; that he was applied to for payment repeatedly by his successors; and that he finally borrowed money, or a subscription was made for him by his friends, and with this money he at last paid the parish; but no execution was issued. Lord Denman, C.J., left it to the jury to say whether the facts proved came up to the imputation of the plaintiff's being a "great defaulter;" and they found a verdict for the plaintiff. On a motion being made for a new trial, the Court refused to grant a rule, on the ground that the fact that the plaintiff was a defaulter did not prove him to be a "great defaulter." Patteson, J., said: "Taking the plea altogether, it means that the plaintiff did not pay over the money, but made great default and paid in small sums, and did not till a long time. The question, therefore, was, whether there was a criminal default. The jury have found for the plaintiff on this issue, being of opinion, I presume, that the defendant was not a criminal defaulter. I cannot say the jury were wrong: therefore I can see no ground for setting aside the verdict, and I do not see how the judge could, on this evidence, have told the jury that they must find for the defendant."

Apology and payment into court.

In order to prove the plea of apology and payment into court under Lord Campbell's Act, the defendant must prove that the libel was inserted in the newspaper

(*a*) *Behrens* v. *Allen* (3 F. & F. 135). (*b*) 1 Jur. 820.

without actual malice or gross negligence, and that the apology is sufficient.(*a*)

The apology must be printed in proper type, and placed in a part of the paper where ordinary readers would be likely to see it.

In the case of *Lafone* v. *Smith*(*b*) the apology was in small type, amongst the notices to correspondents; and the jury found that, though it was sufficient in its terms, the type should have been larger, and the apology should have been inserted in a more prominent part of the newspaper; they also found that the forty shillings paid into court was sufficient to cover the damages, whereupon Martin, B., directed a verdict for the plaintiffs with one shilling damages, but reserved to the defendants leave to move to enter the verdict for them or to strike out the damages; but the court refused to grant a rule, on the ground, as stated by Pollock, C.B., that "an apology means the insertion of something which may operate as an apology. Inserting an expression of regret in small type, suitable only to a notice to correspondents, amounts to this, that the defendant did not insert an apology."

Accord and satisfaction.

The evidence to support the defence of accord and satisfaction must depend entirely upon the nature of the case.

Evidence to rebut express malice and in mitigation of damages.

The defendant is not confined to evidence in proof of his pleas, but is at liberty to offer certain matters in mitigation of damages, and to negative actual malice. To this end he is entitled to have read, as part of the plaintiff's case, other passages of the publication from which the words declared on are taken;(*c*) but this right is subject to certain limits. In the case of *Darby* v. *Ousley*.(*d*) a passage from a subsequent number of the defendant's newspaper having been given in evidence by the plaintiff, for the purpose of showing actual malice, the defendant's counsel proposed to read as part of the same evidence another paragraph in the same paper, relating to the action, but Willes, J., ruled that it could not be so read, as it did not in any degree mitigate, modify, or explain the article put in as evidence of actual malice. On appeal to the Court of Exchequer it was held that the learned judge had properly refused to allow it to be read. In the course of the argu-

(*a*) *Risk Allah Bey* v. *Johnstone* (18 L. T. N. S. 620); *Jones* v. *Mackie* (L. Rep. 3 Ex. 1; 17 L. T. N. S. 151; 37 L. J. 1, Ex.; 16 W. R. 109).

(*b*) 3 H. & N. 735.

(*c*) *Cooke* v. *Hughes* (1 R. & M. 112). See also *Hedley* v. *Barlow* (4 F. & F. 227).

(*d*) 25 L. J. 227, Ex.; S. C., 1 H. & N. 1.

ment, Pollock, C.B., stated the rule to be "that other paragraphs or passages of a document put in by the plaintiff, are to be read as part of his evidence, if they are connected with, or construe, or control, modify, qualify, or explain the passages which have been read by the plaintiff; but that was not the case in the present instance. Not only was the article an entirely distinct one, but it did not at all interpret, modify, or explain the passages put in by the plaintiff, and it was entirely irrelevant to it; except that it related to the plaintiff, it was upon a different subject. It did not in the least control the sense of the libel or of the article put in as evidence of the malice of the libel."(*a*)

Where the alleged libel consists entirely of a criticism on the plaintiff's book, the book ought to be put in as part of his case, and if he refuses to do so he will run the risk of not keeping his verdict.(*b*)

The defendant may prove in mitigation of damages that he did not originate the libel, but copied it from a newspaper.(*c*)

Evidence of existence of rumours to same effect as libel.

Though it would seem that evidence of the plaintiff's general bad reputation may be given by the defendant, evidence that at the time of the publication of the libel there were rumours and reports afloat to the same effect as the libel, is, it is submitted, not admissible.

It is true that such evidence has sometimes been admitted: thus in the case of *The Earl of Leicester* v. *Walter*(*d*) a witness was allowed to prove that, before and at the time of the publication of the libel, there was a general suspicion of the plaintiff's character and habits; that it was generally rumoured that such a charge as the libel imputed had been brought against him; and that his relations and former acquaintances had on this ground ceased to visit him. The counsel for the plaintiff objected that, if such evidence were admitted, no plaintiff ought to come into court, since a malicious and artful defendant might ruin his character by shaping the defence a little short of a justification. The learned judge, Sir Jas. Mansfield, C.J., admitted that he never could answer to his own satisfaction this objection, but said: "At the same time, as it appears to have been decided in several cases that, if you do not justify, you may give in evidence anything to mitigate the damages, though not to prove the crime which is charged in the libel, I do not know how to

(*a*) 25 L. J. 229. Ex.

(*b*) *Per* Erle, C.J., and Cockburn, C.J., *Strauss* v. *Francis* (4 F. & F. 941, 1169).

(*c*) *Pearson* v. *Le Maitre* (5 M. & G. 719); *Saunders* v. *Mills* (6 Bing. 213).

(*d*) 2 Camp. 251.

reject these witnesses. Besides, the plaintiff's declaration says that he had always preserved a good character in society, from which he had been driven by the insinuations in the libel. Now the question for the jury is, whether the plaintiff actually suffered this gravamen or not. Evidence to prove that his character was in as bad a situation before as after the libel must therefore be admitted." This case was followed by the King's Bench, in an action for words imputing to the plaintiff unnatural practices.(*a*) The declaration contained an averment, as in the preceding case, of the plaintiff's good character, and, to contradict this, Grose, J., allowed a witness, on cross-examination, to be asked whether he had not heard reports in the neighbourhood that the plaintiff had been guilty of similar practices. Upon this, the plaintiff's counsel submitted to a nonsuit, and afterwards moved the Court to set it aside on the ground that the evidence was improperly received, to contradict that which was matter of inducement only and immaterial. The Court conceded that the inducement was immaterial, but said that the evidence was not admitted in bar, but in diminution of damages, and Lord Ellenborough, C.J., added: "And certainly a person of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished: and it is competent to show that by evidence." The rule was refused.(*b*)

But the later cases are against admitting such evidence. In *Thompson* v. *Nye*.(*c*) the declaration, without any previous averment of the plaintiff's good character, charged the defendant with speaking words imputing to the plaintiff the practice of unnatural crimes. At the trial the defendant's counsel proposed to ask a witness, in cross-examination, whether he had not heard from other persons that the plaintiff was addicted to practices of this kind. Wilde, C.J., ruled that the question could not be put. On a motion for a new trial, on the ground of the wrongful rejection of this evidence, the Court, without expressly deciding the general point, held that the question was rightly rejected, as it was not confined to reports existing before and at the time of the uttering of the slander, and, therefore, the reports might have been set on foot by the defendant himself. Although the Court based its judgment upon this narrower ground, it is clear from the report which way the

(*a*) —— v. *Moor* (1 M. & S. 284).

(*b*) See also *Richards* v. *Richards* (2 M. & Rob. 557); *Eamer* v. *Merle* (referred to *arguendo* in *Leicester* v. *Walter*); *Williams* v. *Callender* (Holt, N. P. 307); *Moore* v. *Oastler* (2 St. on Evid. 641).

(*c*) 16 Q. B. 175.

opinion of the judges leaned. Coleridge, J., said: "I am clearly of opinion that the question was here proposed in too general a form, and is liable to the objection stated by my brother Patteson, whose example I shall follow in abstaining from an opinion on the general point. I will go only so far as to say, that I do not wish it to be supposed that I am in favour of allowing the question to be put even in its most limited form; my present impression is against doing so." And Erle, J., said: "It is not necessary to give any opinion as to the admissibility of the question in a qualified form: many learned judges have admitted it; but they all acted on a decision at *Nisi Prius*, *Earl of Leicester* v. *Walter*, which it was not worth the plaintiff's while to question.(*a*) But in *Jones* v. *Stevens*,(*b*) the point was brought before the full Court of Exchequer; and there the question was held to be inadmissible in its general form."

Byles, J., after consulting Willes, J., rejected questions of this nature at *Nisi Prius*. The action was for slander imputing forgery: and, at the close of the plaintiff's case, the plaintiff himself was put into the box and tendered for cross-examination. The counsel for the defendant proposed to ask him questions as to his past conduct and life; but Byles, J., said that, as there was no plea of justification, no question could be asked which would go to the justification: and, after consulting with Willes, J., his Lordship held "that no evidence of bad character or questions relating to the plaintiff's previous life or habits, or tending to discredit him and to mitigate damages, were admissible either on cross-examination or examination in chief."(*c*)

The question was distinctly raised before Mathew and Cave, JJ., in the recent case of *Scott* v. *Sampson*(*d*), in which Lord Coleridge, C.J., rejected the evidence at *Nisi Prius*. This ruling was upheld by the Divisional Court, *per* Mathew, J., on the ground that the older authorities to the contrary have no application to the pleadings required by the Judicature Acts, which must set forth the material facts on which the defendant intends to rely; *per* Cave, J., after an elaborate examination of all the cases, also on the further ground that the weight of authority and principle was against the admission of such evidence.(*e*)

(*a*) In that case the jury, notwithstanding the evidence, returned a verdict for the plaintiff for £1,000 (1 Camph. 255).

(*b*) 11 Price, 235. See *Snowden* v. *Smith* (1 M. & S. 286, *note*).

(*c*) *Bracegirdle* v. *Bailey* (1 F. & F. 538). See also *Waithman* v. *Weever* (11 Price, 257, *n*).

(*d*) L. R. 8 Q. B. D. 491).

(*e*) See also *per* Fitzgerald and Hughes, B.B., in *Bell* v. *Parke* (11 Ir. C. L. Rep. 413).

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As to a third kind of evidence sought to be given in this case—viz., evidence of particular facts tending to show the character and disposition of the plaintiff, Cave, J., was of opinion that not a single authority could be cited in support of its admissibility.

Apart from these authorities, there appears to be very good reason why such evidence should be rejected, as the plaintiff is not allowed to give evidence of his good character,(*a*) nor (unless the defence set up be that the charges are true, or that the publication is privileged) to prove that the libel is false.(*b*)

When defendant may prove imputations to be true.

Where, the occasion of publication being privileged, the plaintiff, to show actual malice on the part of the defendant, gives evidence of the falsity of the imputations, the defendant is bound to show that he believed them to be true,(*c*) and, as the most conclusive evidence of that, may, of course, prove that in fact they are so.

Defendant not allowed to inquire into plaintiff's religious opinions.

The defendant will not be allowed, for the purpose of mitigating damages, or of justifying the libel, to inquire into the plaintiff's religious opinions, even where the libel concerns his religious creed.(*d*)

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.(*e*)

Evidence of plaintiff's conduct to mitigate damages.

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.(*f*)

And evidence may be given of libels on the defendant, published by the plaintiff, respecting the same subject-matter. In the words of Sir James Mansfield, C.J., "If a man is in the habit of libelling others, he complains with a very bad grace of being libelled himself; and he cannot be supposed to suffer much injury from this source."(*g*) 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

(*a*) *Cornwall* v. *Richardson* (1 Ry. & Moo. 305).
(*b*) *Stuart* v. *Lovell* (2 Starkie, 93); *Thompson* v. *Nye* (16 Q. B. 175).
(*c*) *Fountain* v. *Boodle* (3 Q. B. 5); *Brown* v. *Croome* (2 Starkie, 297).
(*d*) *Darby* v. *Ouseley* (1 H. & N. 1); *sed vide Turnbull* v. *Bird* (2 F. & F. 508).
(*e*) *Ibid.*
(*f*) *Kelly* v. *Sherlock* (L. Rep. 1 Q. B. 686; 35 L. J. 209, Q. B.).
(*g*) *Finnerty* v. *Tipper* (2 Camp. 72).

libels on the defendant on some other matter unconnected with that which is the subject of the action;(*a*) and it must also be proved that they came to the defendant's knowledge before he libelled the plaintiff.(*b*)

Evidence of apology.

Lastly, the defendant may (after notice in writing of his intention so to do, duly given to the plaintiff at the time of delivering his defence) give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff, before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case the action was commenced before he had such opportunity.(*c*)

Judge not bound to state his opinion.

The judge is not bound to state to the jury his opinion whether the publication be libellous or not. Fox's Libel Act (32 Geo. 3, c. 60) in terms applies only to criminal cases; but there is no distinction between the law in criminal and that in civil cases in this respect; and that Act leaves it to the discretion of the judge to give his opinion, or not, as he thinks proper.(*d*)

Functions of court and jury.

"In principle the only difference made by that statute is, that if the written instrument can be a libel, then it is for the jury to say whether it is a libel."(*e*)

"Though no doubt the Court has more power to set aside verdicts in civil cases, there is no reason why the functions of the Court and jury should be different in civil proceedings for a libel and in criminal proceedings for a libel. And accordingly it has been for some years generally thought that the law in civil actions for libel was the same as it had been expressly enacted that it was to be in criminal proceedings for libel."(*f*)

Question for jury.

The proper question for the jury is, not whether the intention of the publisher was to injure the plaintiff, but whether the tendency of the publication is injurious to him(*g*).

Bill of exceptions abolished.

Before the Judicature Acts, when it was desired to except to the ruling of the judge, a bill of exceptions might be

(*a*) *May* v. *Brown* (3 B. & C. 113); *Tarpley* v. *Blaby* (2 Bing. N. C. 437); *Wakley* v. *Johnson* (1 Ry. & Moo. 422).

(*b*) *Watts* v. *Fraser and another* (7 Ad. & E. 223).

(*c*) *Vide ante*, p. 656.

(*d*) *Baylis* v. *Lawrence* (11 Ad. & E. 920); *Parmiter* v. *Coupland* (6 M. & W. 105).

(*e*) *Per* Brett, L.J., *Bradlaugh* v. *The Queen* (L. R. 3 Q. B. D. 433); and see *Fray* v. *Fray* (34 L. J. C. P. 45); and *per* Lord Coleridge, C.J., in *Hird* v. *Wall* (L. R. 2 C. P. D. 149). See also *Miller* v. *David* L. R. 9 C. P. 118).

(*f*) *Per* Lord Blackburn, *Capital and Counties* v. *Hendy* (L. R. 7 App. Cas. 775).

(*g*) *Fisher* v. *Clement* (10 B. & C. 472), cited with approval by Lord Blackburn in *Capital and Counties Bank* v. *Hendy* (*ubi supra*).

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tendered before verdict; but bills of exceptions were rarely in modern times resorted to in actions in the superior courts, their object being in most cases obtained by a motion for a new trial.(*a*) They were abolished altogether, as well as proceedings in error, by Order lviii. R. 1 of the Rules of Court, 1875. Though this rule is now itself repealed, sect. 6 of the Statute Law Revision Act of 1883(*b*) prevents the revival of the old procedure.

Assessing damages.

If the jury find the plea of apology under Lord Campbell's Act not proved, they must assess the damages irrespectively of the amount paid into court.(*c*)

Costs.

The costs of, and incident to, all proceedings in the Supreme Court, are now (subject to the provisions of the Judicature Acts and Rules) in the discretion of the Court or judge: provided that where any action, cause, matter or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the Court shall, for good cause, otherwise order.(*d*)

By force of this provision, a plaintiff to whom a jury awards any sum, however small, in an action for libel, will be entitled to his costs, unless the judge or Court shall, for good cause, otherwise order. For sect. 67 of the Judicature Act of 1873 makes applicable sects. 5, 7, 8, and 10 of the County Courts Act, 1867, only to those actions in the High Court "in which any relief is sought which can be given in a County Court;"(*e*) and an action for libel cannot be brought in a County Court,(*f*) (9 & 10 Vict. c. 95, s. 58).

The discretion now given is of the widest possible kind; and it has been held that a judge has power, for good cause, even to order a plaintiff who recovers but a nominal sum, in an action tried before a jury, to pay the defendant's costs.(*g*)

Remitting action to County Court.

Though an action for libel cannot be commenced in a county court, it may be remitted to that court for trial by an order of a judge of the superior court in which it is brought, upon the application of the defen-

(*a*) See 2 Lush's Practice, 654.

(*b*) 46 & 47 Vict. c. 49.

(*c*) *Jones* v. *Mackie* (L. Rep. 3 Ex. 1; 17 L. T. N. S. 151; 37 L. J. 1. Ex.; 16 W. R. 109); *Lafone* v. *Smith* (3 H. & N. 735; 28 L. J. Ex. 33).

(*d*) Rules of 1883, Order lxv. R. 1.

(*e*) The effect of the cases of *Sampson* v. *Mackay* (L. R. 4 Q. B. 643), and *Gray* v. *West* (L. R. 4 Q. B. 175), is done away with by sect. 67 of the Judicature Act, 1873. *Supra.*

(*f*) See *Garnett* v. *Bradley* (L. R. 3 app. cas. 944); *Parsons* v. *Tinling* (L. R. 2 C. P. D. 119).

(*g*) *Harris* v. *Petherick* (L. R. 4 Q. B. D. 611); *Fane* v. *Fane* (L. R. 13 C. D. 307). Cf. *Cooper* v. *Whittingham* (L. R. 15 C. D. 501).

dant, supported by an affidavit that the plaintiff has no visible means of paying the costs of the defendant, should a verdict not be found for the plaintiff. The order to be thereupon made is, that unless the plaintiff shall, within a time to be therein mentioned, give full security for the defendant's costs, to the satisfaction of one of the masters of the said court, or satisfy the judge that he has a cause of action fit to be prosecuted in the superior court, all proceedings in the action shall be stayed, or, in the event of the plaintiff being unable or unwilling to give such security, or failing to satisfy the judge as aforesaid, that the cause be remitted for trial before a county court to be therein named.(*a*)

The county court has also jurisdiction to try the action by the consent of both parties, given in writing, signed by them or their respective attorneys.(*b*)

Jury should not be told what damages will carry costs.

The jury ought not to be told what amount of damages will carry costs; and it was held that if the counsel for the plaintiff informed them that the plaintiff would probably not get his costs unless they gave a verdict for so much, the Court would grant a new trial without imposing terms.(*c*) "The Legislature," observes a learned judge, "in express terms, says that it is the judge, and not the jury, who shall have the power of deciding whether or not the plaintiff shall have costs. . . . . It is most important that the province of the judge and that of the jury should be kept distinct. . . . . I think it would lead to a most inconvenient inequality in the administration of the law, if the question of costs were in any shape left to the consideration of the jury."(*d*)

Costs, where several issues.

The party entitled to the general costs of the cause was held entitled to the costs of all such witnesses as were not called exclusively on the issues which were found against him; so that where all the witnesses called were material to both the issues of not guilty and a justification, and the verdict was found for the plaintiff on the second issue, and for the defendant on the first, it was held that the plaintiff was not entitled to the costs of any witness, and that the defendant was entitled to the costs of all the witnesses called by him.(*e*)

(*a*) 30 & 31 Vict. c. 142, s. 10.
(*b*) 19 & 20 Vict. c. 108, s. 23.
(*c*) *Poole* v. *Whitcomb* (12 C. B. N. S. 770; and see *Kelly* v. *Sherlock* (L. Rep. 1 Q. B. 691; 35 L. J. 209, Q. B.).
(*d*) *Per* Willes, J., 12 C. B. N. S. 775.
(*e*) *Harrison* v. *Bush* (5 E. & B. 344; 25 L. J. 99, Q. B.).

The next subject to be considered is, under what circumstances the defeated party may prevail upon the Court *in banc* to set aside the verdict which has been given against him.

The Court will grant a new trial when the jury have found a verdict for the defendant upon the general issue, in a case in which no question is made as to the fact of publication of the libel, or as to its application to the plaintiff, and when there can be no doubt that the matter complained of is libellous.

The leading case upon this point is *Halsted* v. *Ingram*.(*a*) The libel was contained in a newspaper article, on the subject of the want of some efficient protection to married women. The writer mentioned two cases as showing the necessity for legislation; one case being described as that of a husband who acted towards his wife like "a sot and a brute." The article then proceeded: "The other is that of Mrs. H." (meaning the wife of the plaintiff), "who, having been restored to her husband's protection by a decree of the Ecclesiastical Court, found her misery so aggravated by the restitution of her conjugal rights that she was compelled to resort to the police-court for the little help the law gives:" and it concluded by saying that the law did not meet such cases; and that "the condition of woman, when the brute intervenes, is more oppressive than that of the negro." It was not disputed at the trial that the passage applied to the plaintiff, and Crowder, J., told the jury that, in his opinion, the passage was a libel, but that the question was for them. The jury found a verdict for the defendant.

On showing cause against a rule for a new trial, on the ground that the verdict was against the evidence and was perverse, it was contended for the defendant that it was for the jury alone to say whether the matter was libellous. The Court, however, held otherwise, and made the rule absolute. Jervis, C.J., said: "The true effect of the statute(*b*) was this: before the statute it was the habit of the judges to state their opinion whether the paper was a libel, as a matter of law, and confine the jury to the question of publication. And the statute said that the case of libel shall be like any other case of criminal proceeding, the judge defining the law, and the jury having a right to determine, by a general verdict, upon the whole question, guilty or not guilty. Although the Act is confined in its terms to criminal proceedings, yet, as Lord Chief Justice Best stated in the case cited, 'It is in principle a practice applicable to

(*a*) 2 C. L. Rep. 1397. (*b*) Fox's Libel Act.

civil cases.' In *Pormiter* v. *Coupland*,(*a*) Parke, B., points out that; and though, in criminal proceedings for libel, there may be no review, in civil matters there are cases in which verdicts for the defendant are set aside, upon the ground that the matter was a libel, though the jury found that it was not. A case was referred to in which that course was taken; and there is no technical rule to prevent us from applying the ordinary practice of reviewing the decision of the jury, when they have come to a wrong conclusion." Maule, J., although he dissented from the judgment of the rest of the Court upon the particular case, concurred as to the power of the Court to grant a new trial, when it could "say with certainty that the jury must have miscarried in finding a verdict of not guilty."

In an earlier case, where the jury had inquired whether a shilling would carry costs, and, being answered in the affirmative, had found a verdict for the defendant, notwithstanding that the matter was clearly libellous, the Court granted a new trial.(*b*)

A new trial will not, however, be granted, unless it appears to the Court that the jury have done manifestly wrong in finding the publication not to be libellous.(*c*)

New trial not granted merely because damages too low.

The Court will not grant a new trial merely because the damages are low, unless there has been some misdirection on the part of the judge, or a mistake of their duty on the part of the jury, or unfair practice on the part of the defendant. We have not found any case reported where a new trial has been ordered, on this ground, in an action for libel, although in one case the Court of Queen's Bench went so far as to grant a rule *nisi* which was finally discharged, Shee, J., dissenting.(*d*) In an unreported case of *Moyell* v. *Gambier*, the Court of Common Pleas held that the practice was so inexorable as to preclude the Court from entertaining the motion.(*e*) On the other hand, it is a very rare thing for

(*a*) 6 M. & W. 105. (*b*) *Lee* v. *Milne* (4 Bing. 195).

(*c*) See *per* Tindal, C.J., *Broome* v. *Cossden* (1 C. B. 731).

(*d*) *Kelly* v. *Sherlock* (L. Rep. 1 Q. B. 686; 35 L. J. 209, Q. B.). See *Rendall* v. *Hayeard* (3 Bing. N. C. 424); *Forsdike* v. *Stone* (L. Rep. 3 C. P. 607; 37 L. J. 301, C. P.; 18 L. T. N. S. 722; 16 W. R. 976); *Armytage* v. *Haley* (L. R. 4 Q. B. 917).

(*e*) Since the last edition of this work, the Court of Queen's Bench (Quain and Archibald, JJ.), made absolute a rule for a new trial on the ground of inadequacy of damages, in an action for slander, imputing to the plaintiff that he had been convicted of perjury and fined, when the jury returned a verdict for the plaintiff with one farthing damages. The Court considered that under the circumstances of the case the verdict was a species of compromise and no true verdict at all (*Falvey* v. *Stanford*, L. R. 10 Q. B. 54).

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the Court to interfere on behalf of the defendant, when the damages are excessive.

Or because jury have expressed opinion inconsistent with verdict.

A new trial will not be granted on the ground that the jury have, after the close of the evidence, and during the summing up, expressed an opinion inconsistent with their formal verdict.(*a*)

Leave to move.

The most common applications to the court *in banc*, have been with reference to the question of privilege; and it was not an unfrequent practice for the judge, at *Nisi Prius*, to reserve leave to the party against whom he decided, to move to enter a nonsuit or a verdict, if the Court should be of opinion that the direction to the jury was wrong, or that the verdict was contrary to the evidence; the advantage of this leave being that, if the rule were made absolute, no second trial was required.(*b*)

Arrest of judgment.

When the statements charged in the declaration appeared on their face not to be libellous, and yet the jury found a verdict for the plaintiff, the practice before the Judicature Acts was for the defendant to move the Court in arrest of judgment. The same objections might be taken to the declaration, upon a motion in arrest of judgment, that could have been taken by demurrer; and Lord Coke's advice to the pleader was not to demur in actions of slander, but just to take advantage of the matters of fact, and leave the matters in law, which always arise upon the matters in fact, *ad ultimum*.(*c*)

Judgment for defendant.

Motions in arrest of judgment in civil cases may now be considered obsolete, as the Court has power upon motion for judgment, or upon an application for a new trial, if satisfied that it has before it all the materials necessary for determining the questions in dispute, to give judgment for the defendant.(*d*)

It was said in *Shepheard* v. *Whitaker*,(*e*) that the judgment would be arrested only where the words cannot by possibility amount to a libel; but Lord Blackburn, in the latest case of *Capital and Counties Bank* v. *Henty*,(*f*) expressed the opinion that though the words might by

(*a*) *Napier* v. *Daniel* (3 Bing. N. C. 77).

(*b*) *Gardner* v. *Slade* (13 Q. B. 796); *Lewis* v. *Levy* (E. B. & E. 562; 27 L. J. 282, Q. B.); *Harrison* v. *Bush* (5 E. & B. 344; 25 L. J. 28, Q. B.).

(*c*) 4 Reports, 14 *a*. For examples of cases where judgment has been arrested, see *Hearne* v. *Stowell* (12 Ad. & El. 719); *Goldstein* v. *Foss* (6 B. & C. 154).

(*d*) Order xl. R. 10.

(*e*) L. R. 10 C. P. 502). See also *Mulligan* v. *Cole* (L. R. 10 C. P. 559).

(*f*) L. R. 7 App. Cas. 782.

possibility be libellous, yet (it being no longer necessary to place on the record the materials for deciding the question whether the words were used in the defamatory sense charged) when the proof is complete, and all that can properly be found on that proof in favour of the plaintiff is found for him, if the Court is of opinion that, if all which could be found had been put on the record under the old system, the judgment would have been arrested, it should now give judgment for the defendant.

Motion for judgment *non obstante veredicto.*

The motion for judgment *non obstante veredicto* was made by the plaintiff, when the plea of justification was defective in point of law, and the plaintiff, instead of demurring to it, had joined issue upon it, and that issue had been found for the defendant.(*a*)

Appeal.

It has already been pointed out, *ante*, p. 686, that bills of exceptions and proceedings in error have been abolished. All appeals to the Court of Appeal are now by way of rehearing, and are to be brought by notice of motion in a summary way, no case or formal proceeding other than such notice of motion being necessary.(*b*)

Injunction in cases of libel.

The doctrine was well established that the Court of Chancery had no jurisdiction to restrain the publication of a libel.(*c*). Malins, V.C., however, held, in two cases,(*d*) that the Court could restrain any libellous publication which tended to the destruction of property. In a third case, which came before the Court of Appeal, Lord Cairns and Mellish and James, L.JJ., overruled these cases and laid it down in the broadest terms that the Court had no jurisdiction to restrain the publication of a libel, even though it was injurious to property.(*e*). This was on the 20th of January, 1875, before the Judicature Act of 1873 came into operation.

Sect. 25, sub-section 8 of the Act of 1873,(*f*) gives the High Court of Justice power to grant an injunction "in

(*a*) *Clement* v. *Lewis* (10 Price, 184); *Morrison* v. *Harmer* (3 Bing. N. C. 759); 2 Wms. Saunders, 319 *d*.

(*b*) Rules of 1883, Order lviii., R. 1.

(*c*) *Gee* v. *Pritchard* (2 Sw. 402, 413), *per* Lord Campbell, *Emperor of Austria* v. *Day* (3 D. F. & T. 217); *per* Lord Langdale (*Clark* v. *Freeman* (11 Beav. 112); *Wright* v. *Martin* (6 Sim. 297); *Fleming* v. *Norton* (1 H. L. Cas. 363); *Malkern* v. *Hall* (L. R. 13 Eq. 619).

(*d*) *Springhead Spinning Co.* v. *Riley* (L. R. 6 Eq. 551); *Dixon* v. *Holden* (L. R. 7 Eq. 488).

(*e*) *Prudential Assurance Company* v. *Knott* (L. R. 10 Ch. App. 142).

(*f*) 36 & 37 Vict. c. 66, the period of its coming into force having been postponed to the 1st November, 1875, by 37 & 38 Vict. c. 83, s. 2.

all cases in which it shall appear to the Court to be just or convenient." Since this enactment came into force injunctions have frequently been granted to restrain the publication of libels injurious to property. The Court of Appeal (James, Baggallay, and Bramwell, L.JJ.,), affirming Malins, V.C., in the case of *Thorley's Cattle Food Company* v. *Massam*,(*a*) held that the publication of an advertisement warning customers against the course pursued by the plaintiff's company "in seeking to foist upon the public an article which they pretend is the same as that manufactured by the late Joseph Thorley," ought to be restrained, at it contained untrue representations calculated to injure the company in their trade. On similar grounds an injunction was granted by Fry, J., in *Thomas* v. *Williams*,(*b*) holding that proof of actual special damage was not necessary where the libel was calculated to injure the plaintiff in his trade.

In a case(*c*) where the publication injurious to trade had been found by a jury to be libellous, the Common Pleas Division (Lord Coleridge, C.J., and Lindley, J.,) also granted an injunction to restrain the further publication of it. Both these learned judges appear to have rested their judgment on the fact that a jury had already found the publication to be libellous, and that it was injurious to the plaintiff's property. But, according to the two last previously cited cases, it is not necessary that that question should have been determined by a jury.

An injunction was granted by Kay, J., to restrain the publication of a circular containing inaccurate statements as to the financial condition of a friendly society, likely to injure it in its business.(*d*)

Injunction refused where occasion privileged.

Although, however, a publication be injurious to the trade of the plaintiff and be untrue in point of fact, an injunction will not be granted if the occasion is privileged.

If the holder of a patent issues notices warning purchasers against certain articles as infringements of his patent, *bonâ fide*, though erroneously, believing them to be so, it was held by Jessel, M.R., affirmed by the Court of Appeal (Lord Coleridge, C.J., Baggallay and Lindley, J.J.,), that such publication would not be restrained by injunction. If, however, after they are proved to be unfounded in fact, a further publication of them is threatened, it would, in the opinion of Jessel, M.R., and (*semble*) Lindley, L.J., be restrained.(*e*)

(*a*) L. R. 14 C. D. 763. (*b*) L. R. 14 C. D. 864.
(*c*) *Saxby* v. *Easterbrook* (L. R. 3 C. P. D. 338.)
(*d*) *Hill* v. *Hart Davies* (L. R. 21 C. D. 798).
(*e*) *Halsey* v. *Brotherhood* (L. R. 15 C. D. 514; 19 C. D. 386).

Interlocutory application for injunction.

The Court of Appeal has held that there is jurisdiction to restrain, even on interlocutory application, the publication of a libel, though great caution is to be used in the exercise of it.(*a*)

As a general rule, the applicant for such an interlocutory injunction must prove the falsity of the alleged libel; and where there is a case to try and no immediate injury to be expected from the further publication of the libel, it would be very dangerous to restrain it by interlocutory application.(*b*)

(*a*) *Quartz Hill Co.* v. *Beall* (L. R. 20 C. D. 501; 51 L. J. Chy. 874).

(*b*) *Per* Jessel, M.R., *Ibid.*

APPENDIX.

8 GEO. 2, CAP. 13.

An Act for the Encouragement of the Arts of designing, engraving, and etching historical and other Prints, by vesting the Properties thereof in the Inventors and Engravers during the Time therein mentioned.

8 Geo. 2, c. 13.

WHEREAS divers persons have, by their own genius, industry, pains, and expense, invented and engraved, or worked in mezzotinto, or chiaro oscuro, sets of historical and other prints, in hopes to have reaped the sole benefit of their labours; and whereas printsellers and other persons have of late, without the consent of the inventors, designers, and proprietors of such prints, frequently taken the liberty of copying, engraving, and publishing, or causing to be copied, engraved, and published, base copies of such works, designs, and prints, to the very great prejudice and detriment of the inventors, designers, and proprietors thereof: for remedy thereof, and for preventing such practices for the future, may it please your Majesty that it may be enacted; and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the twenty-fourth day of June, which shall be in the year of our Lord one thousand seven hundred and thirty-five, every person who shall invent and design, engrave, etch, or work, in mezzotinto or chiaro oscuro, or from his own works and invention shall cause to be designed and engraved, etched, or worked, in mezzotinto or chiaro oscuro, any historical or other print or prints, shall have the sole right and liberty of printing and reprinting the same for the term of fourteen years, to commence from the day of the first publishing thereof, which shall be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints; and that if any printseller or other person whatsoever, from and after the said twenty-fourth day of June, one thousand seven hundred and thirty-five, within the time limited by this Act, shall engrave, etch, or work, as aforesaid, or in any other manner copy and sell, or cause to be engraved, etched, or copied and sold, in the whole or in part, by varying, adding to, or diminishing from the main design, or shall print, reprint, or import for sale, or cause to be printed, reprinted, or imported for sale, any such print or prints, or any parts thereof, without the consent of the proprietor or proprietors thereof first had and obtained in writing signed by him or them respectively in the presence of two or more credible witnesses, or, knowing the same to be so printed or reprinted without the consent of the proprietor or proprietors, shall publish, sell, or expose to sale, or otherwise or in any other manner dispose of, or cause to be published, sold, or exposed to sale, or otherwise or in any other manner disposed of, any such print or prints, without such consent first had and obtained as aforesaid, then such offender

After 24th June, 1735, the property of historical and other prints vested in the inventor for fourteen yea

Proprietor's name to be affixed to each print.

Penalty on printsellers or others pirating the same.

9 Geo. 2, c. 13. or offenders shall forfeit the plate or plates on which such print or prints are or shall be copied, and all and every sheet or sheets (being part of or whereon such print or prints are or shall be so copied or printed), to the proprietor or proprietors of such original print or prints, who shall forthwith destroy and damask the same, and further, that every such offender or offenders shall forfeit five shillings for every print which shall be found in his, her, or their custody, either printed or published, and exposed to sale or otherwise disposed of, contrary to the true intent and meaning of this Act, the one moiety thereof to the King's most excellent Majesty, his heirs and successors, and the other moiety thereof to any person or persons that shall sue for the same, to be recovered in any of his Majesty's courts of record at Westminster, by action of debt, bill, plaint, or information, in which no wager of law essoign, privilege, or protection, or more than one imparlance, shall be allowed.

Not to extend to purchasers of plates from the original proprietors.

2. Provided nevertheless, that it shall and may be lawful for any person or persons who shall hereafter purchase any plate or plates for printing from the original proprietors thereof to print and reprint from the said plates without incurring any of the penalties in this Act mentioned.

Limitation of actions for anything done in pursuance of Act.

General issue.

3. And be it further enacted by the authority aforesaid, that if any action or suit shall be commenced or brought against any person or persons whatsoever for doing or causing to be done anything in pursuance of this Act, the same shall be brought within the space of three months after so doing; and the defendant and defendants in such action or suit shall or may plead the general issue, and give the special matter in evidence; and if upon such action or suit a verdict shall be given for the defendant or defendants, or if the plaintiff or plaintiffs become nonsuited, or discontinue his, her, or their action or actions, then the defendant or defendants shall have and recover full costs, for the recovery whereof he shall have the same remedy as any other defendant or defendants in any other case hath or have by law.

Limitation of actions for offences against this Act.

4. Provided always, and be it further enacted by the authority aforesaid, that if any action or suit shall be commenced or brought against any person or persons for any offence committed against this Act, the same shall be brought within the space of three months after the discovery of every such offence, and not afterwards, anything in this Act contained to the contrary notwithstanding.

5. Clause relating to J. Pyne. (Repealed 30 & 31 Vict. c. 59.)

Public Act.

6. And be it further enacted by the authority aforesaid, that this Act shall be deemed, adjudged, and taken to be a public Act, and be judicially taken notice of as such by all judges, justices, and other persons whatsoever, without specially pleading the same.

15 GEO. 3, CAP. 53.

5 Geo. 3, c. 53. *An Act for enabling the two Universities in England, the four Universities in Scotland, and the several colleges of Eton, Westminster, and Winchester, to hold in perpetuity their Copyright in Books, given or bequeathed to the said Universities and Colleges for the advancement of useful learning and other purposes of education; and for amending so much of an Act of the eighth year of the reign of Queen Anne, as relates to the delivery of books to the warehouse keeper of the Stationers' Company, for the use of the several libraries therein mentioned.*

Preamble.

WHEREAS authors have heretofore bequeathed or given, and may hereafter bequeath or give, the copies of books composed by them, to

or in trust for one of the two universities in that part of Great Britain called England, or to or in trust for some of the colleges or houses of learning within the same, or to or in trust for the four universities in Scotland, or to or in trust for the several colleges of Eton, Westminster, and Winchester, and in and by their several wills or other instruments of donation, have directed or may direct that the profits arising from the printing and reprinting such books shall be applied or appropriated as a fund for the advancement of learning and other beneficial purposes of education within the said universities and colleges aforesaid: and whereas such useful purposes will frequently be frustrated, unless the sole printing and reprinting of such books, the copies of which have been or shall be so bequeathed or given as aforesaid, be preserved and secured to the said universities, colleges, and houses of learning respectively in perpetuity; may it therefore please your Majesty that it may be enacted; and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that the said universities and colleges respectively shall, at their respective presses, have, for ever, the sole liberty of printing and reprinting all such books as shall at any time heretofore have been, or (having not been heretofore published or assigned) shall at any time hereafter be bequeathed or otherwise given by the author or authors of the same respectively, or the representatives of such author or authors, to or in trust for the said universities, or to or in trust for any college or house of learning within the same, or to or in trust for the said four universities in Scotland, or to or in trust for the said colleges of Eton, Westminster, and Winchester, or any of them, for the purposes aforesaid, unless the same shall have been bequeathed or given, or shall hereafter be bequeathed or given, for any term of years, or other limited term; any law or usage to the contrary hereof in anywise notwithstanding.

Universities, &c. in England and Scotland to have, for ever, the sole right of printing, &c. such books as have been, or shall be, bequeathed to them,

unless the same have been, or shall be, given for a limited time.

2. And it is hereby further enacted that if any bookseller, printer, or other person whatsoever, from and after the twenty-fourth day of June, one thousand seven hundred and seventy-five, shall print, reprint, or import, or cause to be printed, reprinted, or imported, any such book or books; or knowing the same to be so printed or reprinted, shall sell, publish, or expose to sale, or cause to be sold, published, or exposed to sale, any such book or books; then such offender or offenders shall forfeit such book or books, and all and every sheet or sheets, being part of such book or books, to the university, college, or house of learning respectively, to whom the copy of such book or books shall have been bequeathed or given as aforesaid, who shall forthwith damask and make waste paper of them; and further, that every such offender or offenders shall forfeit one penny for every sheet which shall be found in his, her, or their custody, either printed or printing, published or exposed to sale, contrary to the true intent and meaning of this Act; the one moiety thereof to the King's most excellent Majesty, his heirs and successors, and the other moiety thereof to any person or persons who shall sue for the same; to be recovered in any of his Majesty's courts of record at Westminster, or in the Court of Session in Scotland, by action of debt, bill, plaint, or information, in which no wager of law, essoin, privilege, or protection, or more than one imparlance, shall be allowed.

After June 24, 1775, persons printing or selling such books shall forfeit the same and also 1*d.* for every sheet;

one moiety to his Majesty, and the other to the prosecutor.

3. Provided, nevertheless, that nothing in this Act shall extend to grant any exclusive right otherwise than so long as the books or

Nothing in this Act to extend to

15 Geo. 3. c. 53.

grant any exclusive right longer than such books are printed at the presses of the universities,

Universities may sell copyrights in like manner as any author.

No person subject to penalties for printing, &c. books already bequeathed, unless they be entered before June 24, 1775.

copies belonging to the said universities or colleges are printed only at their own printing-presses within the said universities or colleges respectively, and for their sole benefit and advantage; and that if any university or college shall delegate, grant, lease, or sell their copyrights, or exclusive rights of printing the books hereby granted, or any part thereof, or shall allow, permit, or authorise any person or persons, or bodies corporate, to print or reprint the same, that then the privileges hereby granted are to become void and of no effect, in the same manner as if this Act had not been made; but the said universities and colleges, as aforesaid, shall nevertheless have a right to sell such copies so bequeathed or given as aforesaid, in like manner as any author or authors now may do under the provisions of the statute of the eighth year of her Majesty Queen Anne.

4. And whereas many persons may through ignorance offend against this Act, unless some provision be made whereby the property of every such book as is intended by this Act to be secured to the said universities, colleges, and houses of learning within the same, and to the said universities in Scotland, and to the respective colleges of Eton, Westminster, and Winchester, may be ascertained and known, be it therefore enacted by the authority aforesaid, that nothing in this Act contained shall be construed to extend to subject any bookseller, printer, or other person whatsoever, to the forfeitures or penalties herein mentioned, for or by reason of the printing or reprinting, importing, or exposing to sale, any book or books, unless the title to the copy of such book or books, which has or have been already bequeathed or given to any of the said universities or colleges aforesaid, be entered in the register-book of the Company of Stationers kept for that purpose, in such manner as hath been usual, on or before the twenty-fourth day of June, one thousand seven hundred and seventy-five; and of all and every such book or books as may or shall hereafter be bequeathed or given as aforesaid, be entered in such register within the space of two months after any such bequest or gift shall have come to the knowledge of the vice-chancellors of the said universities, or heads of houses and colleges of learning, or of the principal of any of the said four universities respectively; for every of which entries so to be made as aforesaid, the sum of sixpence shall be paid, and no more; which said register-book shall and may, at all seasonable and convenient times, be referred to and inspected by any bookseller, printer, or other person, without any fee or reward; and the clerk of the said Company of Stationers shall, when and as often as thereunto required, give a certificate under his hand of such entry or entries, and for every such certificate may take a fee not exceeding sixpence.

All books that may hereafter be bequeathed, must be entered within two months after such bequest shall be known,

6*d.* to be paid for each entry in the register-book,

which may be inspected without fee.

Clerk to give a certificate being paid 6*d.*

5. And be it further enacted, that if the clerk of the said Company of Stationers for the time being shall refuse or neglect to register or make such entry or entries, or to give such certificate, being thereunto required by the agent of either of the said universities or colleges aforesaid, lawfully authorized for that purpose, then either of the said universities or colleges aforesaid, being the proprietor of such copyright or copyrights as aforesaid (notice being first given of such refusal by an advertisement in the *Gazette*), shall have the like benefit as if such entry or entries, certificate or certificates, had been duly made and given; and the clerk so refusing shall, for every such offence, forfeit twenty pounds to the proprietor or proprietors of every such copyright; to be recovered in any of his Majesty's courts of record at Westminster, or in the Court of Session in Scotland, by action of

If clerk refuse or neglect to make entry, &c.

Proprietor of such copyright to have like benefit as if such entry had been made,

and the clerk shall forfeit 20*l.*

debt, bill, plaint, or information, in which no wager of law, essoin, privilege, protection, or more than one imparlance, shall be allowed. 15 Geo. 3, c. 53.

6. [Repealed by Statute Law Revision Act, 1861.]

7. [And be it further enacted by the authority aforesaid, that if any action or suit shall be commenced or brought against any person or persons whatsoever, for doing, or causing to be done, anything in pursuance of this Act, the defendants in such action may plead the general issue, and give the special matter in evidence;] and if upon such action a verdict, or if the same shall be brought in the Court of Session in Scotland, a judgment be given for the defendant, or the plaintiff become nonsuited, and discontinue his action, then the defendant shall have and recover his full costs, for which he shall have the same remedy as a defendant in any case by law hath. Costs.

The part within brackets is repealed by the Statute Law Revision Act, 1861.

8. And be it further enacted by the authority aforesaid, that this Act shall be adjudged, deemed, and taken to be a public Act; and shall be judicially taken notice of as such, by all judges, justices, and other persons whatsoever, without specially pleading the same. Public Act.

17 Geo. 3, cap. 57.

An Act for more effectually securing the Property of Prints to Inventors and Engravers, by enabling them to sue for and recover Penalties in certain Cases. 17 Geo. 3, c. 57

WHEREAS an Act of Parliament passed in the eighth year of the reign of his late Majesty King George the Second, intituled "An Act for the Encouragement of the Arts of designing, engraving, and etching Historical and other Prints, by vesting the Properties thereof in the Inventors and Engravers, during the Time therein mentioned:" And whereas by an Act of Parliament passed in the seventh year of the reign of his present Majesty, for amending and rendering more effectual the aforesaid Act, and for other purposes therein mentioned, it was (among other things) enacted, that from and after the first day of January one thousand seven hundred and sixty-seven, all and every person or persons who should engrave, etch, or work in mezzotinto or chiaro oscuro, or cause to be engraved, etched, or worked, any print taken from any picture, drawing, model, or sculpture, either ancient or modern, should have, and were thereby declared to have, the benefit and protection of the said former Act and that Act, for the term thereinafter mentioned, in like manner as if such print had been graved or drawn from the original design of such graver, etcher, or draughtsman: And whereas the said Acts have not effectually answered the purposes for which they were intended, and it is necessary, for the encouragement of artists, and for securing to them the property of and in their works, and for the advancement and improvement of the aforesaid arts, that such further provisions should be made as are hereinafter mentioned and contained: May it therefore please your Majesty that it may be enacted; and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from Recital of Acts Geo. 2, and Geo. 3.

17 Geo. 3, c. 57.

After June 24, 1777, if any engraver, &c. shall, within the time limited by the aforesaid Acts, engrave or etch, &c. any print, without the consent of the proprietor, he shall be liable to damages [and double costs].

and after the twenty-fourth day of June one thousand seven hundred and seventy-seven, if any engraver, etcher, printseller, or other person, shall, within the time limited by the aforesaid Acts, or either of them, engrave, etch, or work, or cause or procure to be engraved, etched, or worked, in mezzotinto or chiaro oscuro, or otherwise, or in any other manner copy in the whole or in part, by varying, adding to, or diminishing from the main design, or shall print, reprint, or import for sale, or cause or procure to be printed, reprinted, or imported for sale, or shall publish, sell, or otherwise dispose of, or cause or procure to be published, sold, or otherwise disposed of, any copy or copies of any historical print or prints, or any print or prints, of any portrait, conversation, landscape, or architecture, map, chart, or plan, or any other print or prints whatsoever, which hath or have been, or shall be engraved, etched, drawn, or designed, in any part of Great Britain, without the express consent of the proprietor or proprietors thereof first had and obtained in writing, signed by him, her, or them respectively, with his, her, or their own hand or hands, in the presence of and attested by two or more credible witnesses, then every such proprietor or proprietors shall and may, by and in a special action upon the case, to be brought against the person or persons so offending, recover such damages as a jury on the trial of such action, or on the execution of a writ of inquiry thereon, shall give or assess [together with double costs of suit].

The part within brackets is repealed by the Statute Law Revision Act, 1861.

32 GEO. 3, CAP. 60.

[Fox's Libel Act.]

32 Geo. 3, c. 60.

An Act to remove Doubts respecting the Functions of Juries in Cases of Libel.

Preamble.

WHEREAS doubts have arisen whether on the trial of an indictment or information for the making or publishing any libel, where an issue or issues are joined between the king and the defendant or defendants, on the plea of not guilty pleaded, it be competent to the jury impanelled to try the same to give their verdict upon the whole matter in issue: Be it therefore declared and enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that, on every such trial, the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information; and shall not be required or directed, by the court or judge before whom such indictment or information shall be tried, to find the defendant or defendants guilty, merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information.

On trial of an indictment for a libel, jury may give a general verdict upon the whole matter put in issue, and shall not be required by the court to find the defendant guilty merely on proof of publication, and of the sense ascribed to it in the information.

2. Provided always, that, on every such trial, the court or judge before whom such indictment or information shall be tried, shall, according to their or his discretion, give their or his opinion and directions to the jury on the matter in issue between the king and the defendant or defendants, in like manner as in other criminal cases.

But court shall give their opinion and directions on matter in issue, as in other criminal cases.

3. Provided also, that nothing herein contained shall extend or be construed to extend, to prevent the jury from finding a special verdict, in their discretion, as in other criminal cases. 32 Geo. 3, c. 60. Jury may find a special verdict.

4. Provided also, that in case the jury shall find the defendant or defendants guilty, it shall and may be lawful for the said defendant or defendants to move in arrest of judgment, on such ground and in such manner as by law he or they might have done before the passing of this Act; anything herein contained to the contrary notwithstanding. Defendants may move in arrest of judgment, as before passing this Act.

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54 Geo. 3. cap. 56.

An Act to amend and render more effectual an Act of His present Majesty, for encouraging the Art of making new Models and Casts of Busts, and other things therein mentioned; and for giving further Encouragement to such Arts.—[18th *May*, 1814.] 54 Geo. 3, c. 56.

Whereas by an Act, passed in the thirty-eighth year of the reign of his present Majesty, intituled "An Act for encouraging the Art of making new Models and Casts of Busts, and other things therein mentioned;" the sole right and property thereof were vested in the original proprietors, for a time therein specified: And whereas the provisions of the said Act having been found ineffectual for the purposes thereby intended, it is expedient to amend the same, and to make other provisions and regulations for the encouragement of artists, and to secure to them the profits of and in their works, and for the advancement of the said arts: May it therefore please your Majesty that it may be enacted; and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That from and after the passing of this Act, every person or persons who shall make or cause to be made any new and original sculpture, or model, or copy, or cast of the human figure or human figures, or of any bust or busts, or of any part or parts of the human figure, clothed in drapery or otherwise, or of any animal or animals, or of any part or parts of any animal combined with the human figure or otherwise, or of any subject being matter of invention in sculpture, or of any alto or basso relievo representing any of the matters or things hereinbefore mentioned, or any cast from nature of the human figure, or of any part or parts of the human figure, or of any cast from nature of any animal, or of any part or parts of any animal, or of any such subject containing or representing any of the matters and things hereinbefore mentioned, whether separate or combined, shall have the sole right and property of all and in every such new and original sculpture, model, copy and cast of the human figure or human figures, and of all and in every such bust or busts, and of all and in every such part or parts of the human figure, clothed in drapery or otherwise, and of all and in every such new and original sculpture, model, copy and cast, representing any animal or animals, and of all and in every such work representing any part or parts of any animal combined with the human figure or otherwise, and of all and in every such new and original sculpture, model, copy and cast of any subject, being matter of invention in sculpture, and of all and in every such new and original sculpture, model copy and cast in alto or basso 38 Geo. 3, c. 71. The sole right and property of all new and original sculpture, models, copies, and casts, vested in the proprietors for fourteen years.

54 Geo. 3, c. 56.

relievo, representing any of the matters or things hereinbefore mentioned, and of every such cast from nature, for the term of fourteen years from first putting forth or publishing the same; provided, in all and in every case, the proprietor or proprietors do cause his, her, or their name or names, with the date, to be put on all and every such new and original sculpture, model, copy or cast, and on every such cast from nature, before the same shall be put forth or published.

Works published under the recited Act, vested in the proprietors for fourteen years.

2. And be it further enacted, that the sole right and property of all works, which have been put forth or published under the protection of the said recited Act, shall be extended, continued to and vested in the respective proprietors thereof, for the term of fourteen years, to commence from the date when such last-mentioned works respectively were put forth or published.

Persons putting forth pirated copies or pirated casts, may be prosecuted.

3. And be it further enacted, that if any person or persons shall, within such term of fourteen years, make or import, or cause to be made or imported, or exposed to sale, or otherwise disposed of, any pirated copy or pirated cast of any such new and original sculpture, or model or copy, or cast of the human figure or human figures, or of any such bust or busts, or of any such part or parts of the human figure clothed in drapery or otherwise, or of any such work of any animal or animals, or of any such part or parts of any animal or animals combined with the human figure or otherwise, or of any such subject being matter of invention in sculpture, or of any such alto or basso relievo representing any of the matters or things hereinbefore mentioned, or of any such cast from nature as aforesaid, whether such pirated copy or pirated cast be produced by moulding or copying from, or imitating in any way, any of the matters or things put forth or published under the protection of this Act, or of any works which have been put forth or published under the protection of the said recited Act, the right and property whereof is and are secured, extended and protected by this Act, in any of the cases as aforesaid, to the detriment, damage, or loss of the original or respective proprietor or proprietors of any such works so pirated; then and in all such cases the said proprietor or proprietors, or their assignee or assignees, shall and may, by and in a special action upon the case to be brought against the person or persons so offending, receive such damages as a jury on a trial of such action shall give or assess, together with double costs of suit.

Damages and double costs.

Purchasers of copyright secured in the same.

4. Provided nevertheless, that no person or persons who shall or may hereafter purchase the right or property of any new and original sculpture or model, or copy or cast, or of any cast from nature, or of any of the matters and things published under or protected by virtue of this Act, of the proprietor or proprietors, expressed in a deed in writing signed by him, her, or them respectively, with his, her, or their own hand or hands, in the presence of and attested by two or more credible witnesses, shall be subject to any action for copying or casting, or vending the same, anything contained in this Act to the contrary notwithstanding.

Limitation of actions.

5. Provided always, and be it further enacted, that all actions to be brought as aforesaid, against any person or persons for any offence committed against this Act shall be commenced within six calendar months next after the discovery of every such offence, and not afterwards.

An additional term of fourteen years, in case the maker of the

6. Provided always, and be it further enacted, that from and immediately after the expiration of the said term of fourteen years, the sole right of making and disposing of such new and original

sculpture, or model, or copy, or cast of any of the matters or things hereinbefore mentioned, shall return to the person or persons who originally made or caused to be made the same, if he or they shall be then living, for the further term of fourteen years, [excepting in the case or cases where such person or persons shall by sale or otherwise have divested himself, herself or themselves, of such right of making or disposing of any new and original sculpture, or model, or copy, or cast of any of the matters or things hereinbefore mentioned, previous to the passing of this Act.] 54 Geo. 3, c. 56. original sculpture, &c. shall be living.

The part within brackets is repealed by the Statute Law Revision Act, 1873.

60 Geo. 3, cap. 8.

An Act for the more effectual Prevention and Punishment of Blasphemous and Seditious Libels.—[30*th December*, 1819.] 60 Geo. 3, c. 8.

Whereas it is expedient to make more effectual provision for the punishment of blasphemous and seditious libels; be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this Act, in every case in which any verdict or judgment by default shall be had against any person for composing, printing, or publishing any blasphemous libel, or any seditious libel, tending to bring into hatred or contempt the person of his Majesty, his heirs or successors, or the Regent, or the Government and Constitution of the United Kingdom as by law established, or either House of Parliament, or to excite his Majesty's subjects to attempt the alteration of any matter in Church or State as by law established, otherwise than by lawful means, it shall be lawful for the judge, or the court before whom or in which such verdict shall have been given, or the court in which such judgment by default shall be had, to make an order for the seizure and carrying away and detaining in safe custody, in such manner as shall be directed in such order, all copies of the libel which shall be in the possession of the person against whom such verdict or judgment shall have been had, or in the possession of any other person named in the order for his use; evidence upon oath having been previously given to the satisfaction of such court or judge, that a copy or copies of the said libel is or are in the possession of such other person for the use of the person against whom such verdict or judgment shall have been had as aforesaid; and in every such case it shall be lawful for any justice of the peace, or for any constable or other peace officer acting under any such order, or for any person or persons acting with or in aid of any such justice of the peace, constable, or other peace officer, to search for any copies of such libel in any house, building, or other place whatsoever belonging to the person against whom any such verdict or judgment shall have been had, or to any other person so named, in whose possession any copies of any such libel, belonging to the person against whom any such verdict or judgment shall have been had, shall be; and in case admission shall be refused or not obtained within a reasonable time after it shall have been first demanded, to enter by force by day into any such house, building, or place whatsoever, and to carry away all copies of the libel there found, and to

Court to make order for the seizure of copies of the libel in possession of the persons against whom verdicts shall have been had, &c.

60 Geo. 3, c. 8.

detain the same in safe custody until the same shall be restored under the provisions of this Act, or disposed of according to any further order made in relation thereto.

Copies of libels so seized to be restored, if judgment for defendant; otherwise to be disposed of as the court shall direct.

2. And be it further enacted, that if in any such case as aforesaid judgment shall be arrested, or if, after judgment shall have been entered, the same shall be reversed upon any writ of error, all copies so seized shall be forthwith returned to the person or persons from whom the same shall have been so taken as aforesaid, free of all charge and expense, and without the payment of any fees whatever; and in every case in which final judgment shall be entered upon the verdict so found against the person or persons charged with having composed, printed, or published such libel, then all copies so seized shall be disposed of as the court in which such judgment shall be given shall order and direct.

Court of Justiciary in Scotland to make order for seizing copies of libels, &c.

3. Provided always, and be it enacted, That in Scotland, in every case in which any person or persons shall be found guilty before the court of justiciary, of composing, printing, or publishing any blasphemour or seditious libel, or where sentence of fugitation shall have been pronounced against any person or persons, in consequence of their failing to appear to answer to any indictment charging them with having composed, printed, or published any such libel, then and in either of such cases, it shall and may be lawful for the said court to make an order for the seizure, carrying away, and detaining in safe custody, all copies of the libel in the possession of any such person or persons, or in the possession of any other person or persons named in such order, for his or their use, evidence upon oath having been previously given to the satisfaction of such court or judge, that a copy or copies of the said libel is or are in the possession of such other person for the use of the person against whom such verdict or judgment shall have been had as aforesaid; and every such order so made shall and may be carried into effect, in such and the same manner as any order made by the Court of Justiciary, or any circuit Court of Justiciary, may be carried into effect according to the law and practice of Scotland: Provided always, that in the event of any person or persons being reponed against any such sentence of fugitation, and being thereafter acquitted, all copies so seized shall be forthwith returned to the person or persons from whom the same shall have been so taken as aforesaid; and in all other cases, the copies so seized shall be disposed of in such manner as the said court may direct.

Punishment of persons convicted of second offence.

4. And be it further enacted, that if any person shall, after the passing of this Act, be legally convicted of having after the passing of this Act composed, printed, or published any blasphemous libel or any such seditious libel as aforesaid, and shall, after being so convicted, offend a second time, and be thereof legally convicted before any commission of oyer and terminer or gaol delivery, or in his Majesty's Court of King's Bench, such person may, on such second conviction, be adjudged, at the discretion of the court, either to suffer such punishment as may now by law be inflicted in cases of high misdemeanors [or to be banished from the United Kingdom, and all other parts of his Majesty's dominions, for such term of years as the court in which such conviction shall take place shall order].

The part within brackets is repealed by 11 Geo. 4 and 1 Will. 4, c. 73.

5. Repealed by 11 Geo. 4 and 1 Will. 4, c. 73.

6. Repealed by 11 Geo. 4 and 1 Will. 4, c. 73.

Certificate to be given of conviction of former libel.

7. And be it further enacted, that the clerk of assize, clerk of the peace, or other clerk or officer of the court having the custody of the records where any offender shall have been convicted of having composed, printed, or published any blasphemous or seditious libel, shall, upon request of the prosecutor on His Majesty's behalf, make out and give a certificate in writing, signed by him, containing the effect and substance only (omitting the formal part) of every indictment and conviction of such offender, to the justices of assize, oyer and terminer, great sessions, or gaol delivery, where such offender or offenders shall be indicted for any second offence of composing, printing, or publishing any blasphemous or seditious libel, for which certificate six shillings and eightpence and no more shall be paid, and which certificate shall be sufficient proof of the conviction of such offender.

Limitation of actions.

General issue may be pleaded.

8. And be it further enacted, that any action and suit which shall be brought or commenced against any justice or justices of the peace, constable, peace officer, or other person or persons, within that part of Great Britain called England, or in Ireland, for anything done or acted in pursuance of this Act, shall be commenced within six calendar months next after the fact committed, and not afterwards; [and the venue in every such action or suit shall be laid in the proper county where the fact was committed, and not elsewhere; and the defendant or defendants in every such action or suit may plead the general issue, and give this Act and the special matter in evidence at any trial to be had thereupon]; and if such action or suit shall be brought or commenced after the time limited for bringing the same, or the venue shall be laid in any other place than as aforesaid, then the jury shall find a verdict for the defendant or defendants; and in such case, or if the jury shall find a verdict for the defendant or defendants upon the merits, or if the plaintiff or plaintiffs shall become nonsuit, or discontinue, his, her, or their actions after appearance, or if, upon demurrer, judgment shall be given against the plaintiff or plaintiffs, the defendant or defendants shall have double costs, which he or they shall and may recover in such and the same manner as any defendant can by law in other cases.

Double costs.

From the words "and the venue" to "thereupon" is repealed by the Statute Law Revision Act, 1873, and also the whole section so far as relates to justices of the peace.

Limitation of actions, &c. in Scotland.

9. And be it further enacted, that every action and suit which shall be brought or commenced against any person or persons in Scotland, for anything done or acted in pursuance of this Act, shall in like manner be commenced within six calendar months after the fact committed, and not afterwards, and shall be brought in the Court of Session in Scotland; and the defender or defenders may plead that the matter complained of was done in pursuance of this Act, and may give this Act and the special matter in evidence; and if such action or suit shall be brought or commenced after the time limited for bringing the same, then the same shall be dismissed; and in such case, or if the defender or defenders shall be assoilzied, or the pursuer or pursuers shall suffer the action or suit to fall asleep, or a decision shall be pronounced against the pursuer or pursuers upon the relevancy, the defender or defenders shall have double costs, which he or they shall and may receive in such and the same manner as any defender can by law recover costs or expenses in other cases.

Double costs.

Not to alter the law of Scotland

10. Provided always, and be it further enacted, that nothing in this Act contained shall be held or considered as in any respect altering the

6o Geo. 3, c. 8. In respect to punishment for libels.

law or practice of Scotland regarding the punishment of persons convicted of composing, printing, publishing, or circulating any blasphemous or seditious libel.

11. Repealed; Statute Law Revision Act, 1873.

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3 WILL. 4, CAP. 15.

3 Will. 4, c. 15.

An Act to amend the Laws relating to Dramatic Literary Property.
[10*th June*, 1833.]

54 Geo. 3, c. 156.

WHEREAS by an Act passed in the fifty-fourth year of the reign of his late Majesty King George the Third intituled "An Act to amend the several Acts for the Encouragement of Learning, by securing the Copies and Copyright of printed Books to the Authors of such Books, or their Assigns," it was amongst other things provided and enacted, that from and after the passing of the said Act the author of any book or books composed, and not printed or published, or which should thereafter be composed and printed and published, and his assignee or assigns, should have the sole liberty of printing and reprinting such book or books for the full term of twenty-eight years, to commence from the day of first publishing the same, and also, if the author should be living at the end of that period, for the residue of his natural life: and whereas it is expedient to extend the provisions of the said Act: be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this Act the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed, and not printed and published by the author thereof or his assignee, or which hereafter shall be composed, and not printed or published by the author thereof or his assignee, or the assignee of such author, shall have as his own property the sole liberty of representing, or causing to be represented, at any place or places of dramatic entertainment whatsoever, in any part of the United Kingdom of Great Britain and Ireland, in the Isles of Man, Jersey, and Guernsey, or in any part of the British dominions, any such production as aforesaid, not printed and published by the author thereof or his assignee, and shall be deemed and taken to be the proprietor thereof; and that the author of any such production, printed and published within ten years before the passing of this Act by the author thereof or his assignee, or which shall hereafter be so printed and published, or the assignee of such author, shall, from the time of passing this Act, or from the time of such publication respectively, until the end of twenty-eight years from the day of such first publication of the same, and also, if the author or authors, or the survivor of the authors, shall be living at the end of that period, during the residue of his natural life, have as his own property the sole liberty of representing, or causing to be represented, the same at any such place of dramatic entertainment as aforesaid, and shall be deemed and taken to be the proprietor thereof: provided nevertheless, that nothing in this Act contained shall prejudice, alter, or affect the right or authority of any person to represent or cause to be represented, at any place or places of dramatic entertainment whatsoever, any such production as aforesaid, in all cases in which the author thereof or his assignee shall, previously to the passing of this Act, have given his consent to or authorised such representation, but that such sole liberty of the author or his assignee shall be subject to such right or authority.

The author of any dramatic piece shall have as his property the sole liberty of representing it or causing it to be represented at any place of dramatic entertainment.

Proviso as to cases where, previous to the passing of this Act, a consent has been given.

2. And be it further enacted, That if any person shall, during the continuance of such sole liberty as aforesaid, contrary to the intent of this Act, or right of the author or his assignee, represent, or cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment within the limits aforesaid, any such production as aforesaid, or any part thereof, every such offender shall be liable for each and every such representation to the payment of an amount not less than forty shillings, or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages, to the author or other proprietor of such production so represented contrary to the true intent and meaning of this Act, to be recovered, together with double costs of suit, by such author or other proprietors, in any court having jurisdiction in such cases in that part of the said United Kingdom or of the British Dominions in which the offence shall be committed; and in every such proceeding where the sole liberty of such author or his assignee as aforesaid shall be subject to such right or authority as aforesaid, it shall be sufficient for the plaintiff to state that he has such sole liberty, without stating the same to be subject to such right or authority, or otherwise mentioning the same.

3 Will. 4, c. 15.

Penalty on persons performing pieces contrary to this Act.

3. Provided nevertheless, and be it further enacted, That all actions or proceedings for any offence or injury that shall be committed against this Act shall be brought, sued, and commenced within twelve calendar months next after such offence committed, or else the same shall be void and of no effect.

Limitation of actions.

4. And be it further enacted, That whenever authors, persons, offenders, or others are spoken of in this Act in the singular number or in the masculine gender, the same shall extend to any number of persons and to either sex.

Explanation of words.

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5 & 6 Will. 4, cap. 65.

An Act for preventing the Publication of Lectures without Consent. [9th *September*, 1835.]

5 & 6 Will. 4, c. 65.

Whereas printers, publishers, and other persons have frequently taken the liberty of printing and publishing lectures delivered upon divers subjects without the consent of the authors of such lectures, or the persons delivering the same in public, to the great detriment of such authors and lecturers: Be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the first day of September, one thousand eight hundred and thirty-five, the author of any lecture or lectures, or the person to whom he hath sold or otherwise conveyed the copy thereof, in order to deliver the same in any school, seminary, institution, or other place, or for any other purpose, shall have the sole right and liberty of printing and publishing such lecture or lectures; and that if any person shall, by taking down the same in shorthand or otherwise in writing, or in any other way, obtain or make a copy of such lecture or lectures, and shall print or lithograph or otherwise copy and publish the same, or cause the same to be printed, lithographed, or otherwise copied and published, without leave of the author thereof, or of the person to whom the author thereof hath sold or otherwise conveyed the same, and every person who, knowing the same to have been printed or

Authors of lectures, or their assigns, to have the sole right of publishing them.

Penalty on other persons publishing, &c. lectures without leave.

5 & 6 Will. 4, c. 65.

copied and published without such consent, shall sell, publish, or expose to sale, or cause to be sold, published, or exposed to sale, any such lecture or lectures, shall forfeit such printed or otherwise copied lecture or lectures, or parts thereof, together with one penny for every sheet thereof which shall be found in his custody, either printed, lithographed, or copied, or printing, lithographing, or copying, published, or exposed to sale, contrary to the true intent and meaning of this Act, the one moiety thereof to his Majesty, his heirs or successors, and the other moiety thereof to any person who shall sue for the same, to be recovered in any of his Majesty's Courts of Record in Westminster, by action of debt, bill, plaint, or information, in which no wager of law, essoign, privilege, or protection, or more than one imparlance, shall be allowed.

Penalty on printers or publishers of newspapers publishing lectures without leave.

2. And be it further enacted, that any printer or publisher of any newspaper who shall, without such leave as aforesaid, print and publish in such newspaper any lecture or lectures, shall be deemed and taken to be a person printing and publishing without leave within the provisions of this Act, and liable to the aforesaid forfeitures and penalties in respect of such printing and publishing.

Persons having leave to attend lectures not on that account licensed to publish them.

3. And be it further enacted, That no person allowed for certain fee and reward, or otherwise, to attend and be present at any lecture delivered in any place, shall be deemed and taken to be licensed or to have leave to print, copy, and publish such lectures only because of having leave to attend such lecture or lectures.

Act not to prohibit the publishing of lectures after expiration of the copyright.

4. Provided always, That nothing in this Act shall extend to prohibit any person from printing, copying, and publishing any lecture or lectures which have or shall have been printed and published with leave of the authors thereof or their assignees, and whereof the time hath or shall have expired within which the sole right to print and publish the same is given by an Act passed in the eighth year of the reign of Queen Anne, intituled "An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors or Purchasers of such copies during the times therein mentioned," and by another Act passed in the fifty-fourth year of the reign of King George the Third, intituled "An Act to amend the several Act for the Encouragement of Learning, by securing the Copies and Copyright of printed Books to the Authors of such Books, or their Assigns," or to any lectures which have been printed or published before the passing of this Act.

8 Anne c. 19.

54 Geo. 3. c. 156.

Act not to extend to lectures delivered in unlicensed places, &c.

5. Provided further, That nothing in this Act shall extend to any lecture or lectures, or the printing, copying, or publishing any lecture or lectures, or parts thereof, of the delivering of which notice in writing shall not have been given to two justices living within five miles from the place where such lecture or lectures shall be delivered two days at least before delivering the same, or to any lecture or lectures delivered in any university or public school or college, or on any public foundation, or by any individual in virtue of or according to any gift, endowment, or foundation; and that the law relating thereto shall remain the same as if this Act had not been passed.

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6 & 7 Will. 4, cap. 59.

6 & 7 Will. 4, c. 59.

An Act to extend the Protection of Copyright in Prints and Engravings to Ireland.—[13*th August*, 1836.]

17 Geo. 3, c. 57.

Whereas an Act was passed in the seventeenth year of the reign of his late Majesty King George the Third, intituled "An Act for more

effectually securing the Property of Prints to Inventors and Engravers, by enabling them to sue for and recover Penalties in certain cases:" and whereas it is desirable to extend the provisions of the said Act to Ireland; be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That from and after the passing of this Act all the provisions contained in the said recited Act of the seventeenth year of the reign of his late Majesty King George the Third, and of all the other Acts therein recited, shall be and the same are hereby extended to the United Kingdom of Great Britain and Ireland.

6 & 7 Will. 4, c. 59.

Provisions of recited Act extended to Ireland.

2. And be it further enacted, That from and after the passing of this Act, if any engraver, etcher, printseller, or other person shall, within the time limited by the aforesaid recited Acts, engrave, etch, or publish, or cause to be engraved, etched, or published, any engraving or print of any description whatever, either in whole or in part, which may have been or which shall hereafter be published in any part of Great Britain or Ireland, without the express consent of the proprietor or proprietors thereof first had and obtained in writing, signed by him, her or them respectively, with his, her, or their own hand or hands, in the presence of and attested by two or more credible witnesses, then every such proprietor shall and may, by and in a separate action upon the case, to be brought against the person so offending in any court of law in Great Britain or Ireland, recover such damages as a jury on the trial of such action or on the execution of a writ of inquiry thereon shall give or assess, together with double costs of suit.

Penalty on engraving or publishing any print without consent of proprietor.

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3 Vict. cap. 9.

An Act to give summary Protection to Persons employed in the Publication of Parliamentary Papers.—[*14th April*, 1840.]

3 Vict. c. 9.

Whereas it is essential to the due and effectual exercise and discharge of the functions and duties of Parliament, and to the promotion of wise legislation, that no obstructions or impediments should exist to the publication of such of the reports, papers, votes, or proceedings of either House of Parliament as such House of Parliament may deem fit or necessary to be published: And whereas obstructions or impediments to such publication have arisen, and hereafter may arise, by means of civil or criminal proceedings being taken against persons employed by or acting under the authority of the Houses of Parliament, or one of them, in the publication of such reports, papers, votes, or proceedings; by reason and for remedy whereof it is expedient that more speedy protection should be afforded to all persons acting under the authority aforesaid, and that all such civil or criminal proceedings should be summarily put an end to and determined in manner hereinafter mentioned: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that it shall and may be lawful for any person or persons, who now is or are, or hereafter shall be, a defendant or defendants in any civil or criminal proceeding commenced or prosecuted in any manner soever, for or on account or in respect of the publication of any such report, paper, votes, or proceedings by such person or persons, or by his, her, or their

Proceedings, criminal or civil, against persons for publication of papers printed by order of Parliament, to be stayed, upon

3 Vict. c. 9.

delivery of a certificate and affidavit to the effect that such publication is by order of either House of Parliament.

servant or servants, by or under the authority of either House of Parliament, to bring before the court in which such proceeding shall have been or shall be so commenced or prosecuted, or before any judge of the same (if one of the superior courts at Westminster), first giving twenty-four hours' notice of his intention so to do to the prosecutor or plaintiff in such proceeding, a certificate under the hand of the Lord High Chancellor of Great Britain, or the Lord Keeper of the Great Seal, or of the Speaker of the House of Lords, for the time being, or of the Clerk of the Parliaments, or of the Speaker of the House of Commons, or of the Clerk of the same House, stating that the report, paper, votes, or proceedings, as the case may be, in respect whereof such civil or criminal proceeding shall have been commenced or prosecuted, was published by such person or persons, or by his, her, or their servant or servants, by order or under the authority of the House of Lords or of the House of Commons, as the case may be, together with an affidavit verifying such certificate; and such court or judge shall thereupon immediately stay such civil or criminal proceeding, and the same, and every writ or process issued therein, shall be, and shall be deemed and taken to be finally put an end to, determined, and superseded by virtue of this Act.

Proceedings to be stayed when commenced in respect of a copy of an authenticated report, &c.

2. And be it enacted, That in case of any civil or criminal proceeding hereafter to be commenced or prosecuted for or on account or in respect of the publication of any copy of such report, paper, votes, or proceedings, it shall be lawful for the defendant or defendants at any stage of the proceedings to lay before the court or judge such report, paper, votes, or proceedings, and such copy, with an affidavit verifying such report, paper, votes, or proceedings, and the correctness of such copy, and the court or judge shall immediately stay such civil or criminal proceeding, and the same, and every writ or process issued therein, shall be and shall be deemed and taken to be finally put an end to, determined, and superseded by virtue of this Act.

In proceedings for printing any extract or abstract of a paper, it may be shown that such extract was *bonâ fide* made.

3. And be it enacted, that it shall be lawful in any civil or criminal proceeding to be commenced or prosecuted for printing any extract from or abstract of such report, paper, votes, or proceedings, to give in evidence under the general issue such report, paper, votes, or proceedings, and to show that such extract or abstract was published *bonâ fide* and without malice; and if such shall be the opinion of the jury, a verdict of not guilty shall be entered for the defendant or defendants.

Act not to affect the privileges of Parliament.

4. Provided always, and it is hereby expressly declared and enacted, that nothing herein contained shall be deemed or taken, or held or construed, directly or indirectly, by implication or otherwise, to affect the privileges of Parliament in any manner whatsoever.

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5 & 6 Vict. cap. 45.

5 & 6 Vict. c. 45. *An Act to amend the Law of Copyright.*—[*1st July*, 1842.]

1. Repealed by Statute Law Revision (2) Act of 1874, 37 & 38 Vict. c. 96.

Interpretation of Act.

2. And be it enacted, that in the construction of this Act the word "book" shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published; that the words "dramatic piece" shall be construed to mean and include every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment; that the word "copyright" shall be construed to mean the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied;

that the words "personal representative" shall be construed to mean and include every executor, administrator, and next of kin entitled to administration; that the word "assigns" shall be construed to mean and include every person in whom the interest of an author in copyright shall be vested, whether derived from such author before or after the publication of any book, and whether acquired by sale, gift, bequest, or by operation of law, or otherwise; that the words "British Dominions" shall be construed to mean and include all parts of the United Kingdom of Great Britain and Ireland, the Islands of Jersey and Guernsey, all parts of the East and West Indies, and all the colonies, settlements, and possessions of the Crown which now are or hereafter may be acquired; and that whenever in this Act, in describing any person, matter, or thing, the word importing the singular number or the masculine gender only is used, the same shall be understood to include and to be applied to several persons as well as one person, and females as well as males, and several matters or things as well as one matter or thing, respectively, unless there shall be something in the subject or context repugnant to such construction.

Endurance of term of copyright in any book hereafter to be published in the lifetime of the author;

3. And be it enacted, that the copyright in every book which shall after the passing of this Act be published in the lifetime of its author shall endure for the natural life of such author, and for the further time of seven years, commencing at the time of his death, and shall be the property of such author and his assigns: Provided always, that if the said term of seven years shall expire before the end of forty-two years from the first publication of such book, the copyright shall in that case endure for such period of forty-two years; and that the copyright in every book which shall be published after the death of its author shall endure for the term of forty-two years from the first publication thereof, and shall be the property of the proprietor of the author's manuscript from which such book shall be first published, and his assigns.

If published after the author's death.

In cases of subsisting copyright, the term to be extended, except when it shall belong to an assignee for other consideration than natural love and affection; in which case it shall cease at the expiration of the present term, unless its extension be agreed to between the proprietor and the author.

4. And whereas it is just to extend the benefits of this Act to authors of books published before the passing thereof, and in which copyright still subsists; Be it enacted, that the copyright which at the time of passing this Act shall subsist in any book theretofore published (except as hereinafter mentioned) shall be extended and endure for the full term provided by this Act in cases of books thereafter published, and shall be the property of the person who at the time of passing of this Act shall be the proprietor of such copyright: Provided always, that in all cases in which such copyright shall belong in whole or in part to a publisher or other person who shall have acquired it for other consideration than that of natural love and affection, such copyright shall not be extended by this Act, but shall endure for the term which shall subsist therein at the time of passing of this Act, and no longer, unless the author of such book, if he shall be living, or the personal representative of such author, if he shall be dead, and the proprietor of such copyright, shall, before the expiration of such term, consent and agree to accept the benefits of this Act in respect of such book, and shall cause a minute of such consent in the form in that behalf given in the schedule to this Act annexed to be entered in the book of registry hereinafter directed to be kept, in which case such copyright shall endure for the full term by this Act provided in cases of books to be published after the passing of this Act, and shall be the property of such person or persons as in such minute shall be expressed.

Judicial Committee of the

5. And whereas it is expedient to provide against the suppression of books of importance to the public; be it enacted, that it shall be

5 & 6 Vict. c. 45

Privy Council may license the republication of books which the proprietor refuses to republish after death of the author.

lawful for the Judicial Committee of Her Majesty's Privy Council, on complaint made to them that the proprietor of the copyright in any book after the death of its author has refused to republish or to allow the republication of the same, and that by reason of such refusal such book may be withheld from the public, to grant a licence to such complainant to publish such book, in such manner and subject to such conditions as they may think fit, and that it shall be lawful for such complainant to publish such book according to such licence.

Copies of books published after the passing of this Act, and of all subsequent editions, to be delivered within certain times at the British Museum.

6. And be it enacted, that a printed copy of the whole of every book which shall be published after the passing of this Act, together with all maps, prints, or other engravings belonging thereto, finished and coloured in the same manner as the best copies of the same shall be published, and also of any second or subsequent edition which shall be so published with any additions or alterations, whether the same shall be in letter-press, or in the maps, prints, or other engravings belonging thereto, and whether the first edition of such book shall have been published before or after the passing of this Act, and also of any second or subsequent edition of every book of which the first or some preceding edition shall not have been delivered for the use of the British Museum, bound, sewed, or stitched together, and upon the best paper on which the same shall be printed, shall, within one calendar month after the day on which any such book shall first be sold, published, or offered for sale within the bills of mortality, or within three calendar months if the same shall first be sold, published, or offered for sale in any other part of the United Kingdom, or within twelve calendar months after the same shall first be sold, published, or offered for sale in any other part of the British dominions, be delivered, on behalf of the publisher thereof, at the British Museum.

Mode of delivering at the British Museum.

7. And be it enacted, that every copy of any book which under the provisions of this Act ought to be delivered as aforesaid shall be delivered at the British Museum between the hours of ten in the forenoon and four in the afternoon on any day except Sunday, Ash-Wednesday, Good Friday, and Christmas Day, to one of the officers of the said museum, or to some person authorized by the trustees of the said museum to receive the same, and such officer or other person receiving such copy is hereby required to give a receipt in writing for the same, and such delivery shall to all intents and purposes be deemed to be good and sufficient delivery under the provisions of this Act.

A copy of every book to be delivered within a month after demand to the officer of the Stationers' Company, for the following libraries: the Bodleian at Oxford, the Public Library at Cambridge, the Faculty of Advocates at Edinburgh, and that of Trinity College, Dublin.

8. And be it enacted, that a copy of the whole of every book, and of any second or subsequent edition of every book containing additions and alterations, together with all maps and prints belonging thereto, which after the passing of this Act shall be published, shall, on demand thereof in writing, left at the place of abode of the publisher thereof, at any time within twelve months next after the publication thereof, under the hand of the officer of the Company of Stationers who shall from time to time be appointed by the said company for the purposes of this Act, or under the hand of any other person thereto authorized by the persons or bodies politic and corporate, proprietors and managers of the libraries following (*videlicet*), the Bodleian Library at Oxford, the Public Library at Cambridge, the Library of the Faculty of Advocates at Edinburgh, the Library of the College of the Holy and Undivided Trinity of Queen Elizabeth near Dublin, be delivered, upon the paper of which the largest number of copies of such book or edition shall be printed for sale, in the like condition as the copies prepared for sale by the publisher