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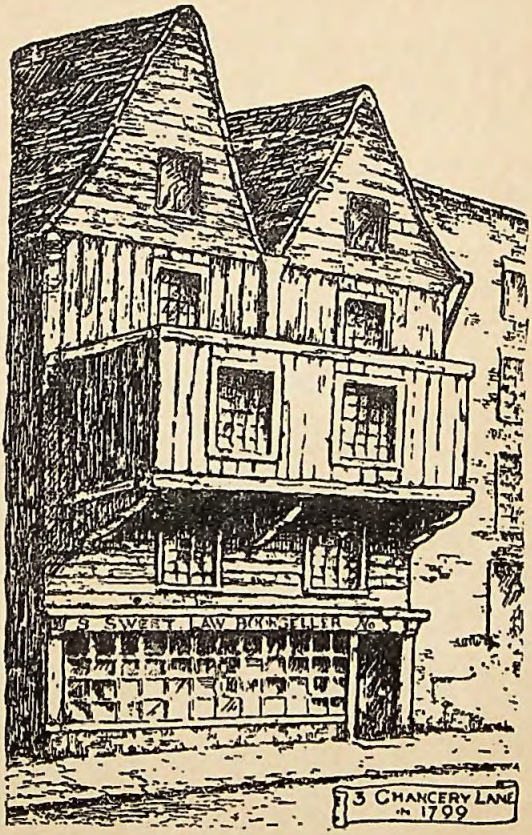

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TO MY FATHER

PRINCIPLES OF
THE LAW OF
LIBEL AND SLANDER

BY

WILFRED A. BUTTON, B.A.,

OF THE INNER TEMPLE AND MIDLAND CIRCUIT,
BARRISTER-AT-LAW.

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FOREWORD.

THE late Mr. Justice McCardie in the foreword he wrote to the second edition of Gatley on Libel and Slander described the book in these words:—

> "It is masterly in treatment, lucid in expression, and exhaustive in range and detail."

With the exception of the words "and exhaustive in range and detail" I have no hesitation in applying Mr. Justice McCardie's description of Gatley on Libel to this little book.

Mr. Button's object in writing the book is different from that which inspired Mr. Gatley in writing his exhaustive treatise. Mr. Gatley provided by his book a working tool for the legal profession. He dealt with the whole subject exhaustively, not merely for the purpose of stating the principles of law which are to be extracted from the innumerable decisions of the Courts, but also to provide a reference to all the cases that might be useful to professional advocates who might be called upon to advise clients, or to argue their cases in the Courts.

The law of Defamation has been so greatly elaborated and complicated by centuries of judicial decisions that Mr. Gatley found it necessary to

occupy over 1,000 pages of print, of which 141 pages are required for the list of cases, Statutes, and Rules cited in the text. It is hoped that some day the law of libel and slander will by codification be reduced to more manageable proportions.

On the other hand Mr. Button's object has been to state as shortly and clearly as possible the main principles of the law of defamation as they have been established by authoritative decisions of our Courts of Justice, and to support his précis of these principles by extracts from the reported judgments of eminent Judges in the Common Law Courts of first instance, in the Court of Appeal and the House of Lords, and by reference to decisions in leading cases.

The author has in my opinion succeeded in doing admirably what he set out to do, and I have no hesitation in recommending his little book to all who desire to lay a good foundation for an adequate and complete knowledge of the English law of defamation. It will prove useful to all students of law, whether they master its contents as students before acquiring professional status, or afterwards for professional or juristic purposes.

ARTHUR GREER.

ROYAL COURTS OF JUSTICE,
LONDON.
May 13, 1935.

PREFACE.

THE bulk of existing works on defamation led a Lord Justice to inquire, last June, in the course of a case before him, why no one had produced a book of more modest dimensions upon the subject. This observation was overheard by the author, and this book is the result.

No one who sets out to write a legal text-book can afford to ignore the assistance, which I gladly acknowledge, of previous treatises: and the reader is referred to the books written by the late Sir Hugh Fraser, Mr. Blake Odgers, Mr. Spencer Bower, and Mr. Clement Gatley, for detailed information upon this intricate subject.

The task of compressing the law of defamation within about two hundred pages has only been accomplished by a process of selection which has involved the omission of many important authorities. It is hoped, however, that the book contains sufficient information to present the principles of the law of Libel and Slander to the student or the solicitor in more detail than is to be found in the general text-books on torts without approaching the mass of technical matter with which the existing specialised works for practitioners are inevitably encumbered. It consists largely of quotations from judgments,

which will enable the reader to see for himself how far the case may be regarded as an authority for which it is cited; and my object has been to curtail rather than increase the number of cases referred to. While the utmost pains have been taken to ensure the accuracy of the references, I shall welcome complaints of any mistakes which must inevitably have crept into a first edition, and also any comments upon the scope or system of the book, including that of omitting the names of cases from the text.

I gratefully acknowledge my indebtedness to: Dr. Harold Potter, of King's College, who has read most of the manuscript and suggested many alterations while the work was in progress; to Mr. H. St. John Field, for reading the proofs, as a result of which many corrections of the first importance were effected; and to Mr. R. P. Croom Johnson, K.C., M.P., for the use of his extensive library.

For the book as published I am alone responsible.

W. A. BUTTON.

1 HARE COURT,
TEMPLE.
April, 1935.

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Whitney *v.* Moignard (1890), 24 Q. B. D. 630; 59 L. J. Q. B. 324; 6 T. L. R. 274 206

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Williamson *v.* Freer (1874), L. R. 9 C. P. 393; 43 L. J. C. P. 161; 30 L. T. 332; 22 W. R. 878 ..... 68, 71, 188
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Woodgate *v.* Ridout (1865), 4 F. & F. 202 104
Wright *v.* Lord Gladstone (1927), The Times, January 28—February 4 17

YOUSSOUPOFF *v.* Metro-Goldwyn-Mayer (1934), 50 T. L. R. 581 ... 2, 13, 14 39, 62, 63, 198

ADDENDA.

Libel by Photograph.—In *Honeysett* v. *News Chronicle* ("The Times," May 14, 1935) the plaintiff, a married woman, recovered damages for a libel by the publication of a composite photograph which represented her in cycling costume, accompanied by a young man, also in cycling costume, who was not her husband, as an illustration to an article entitled "Unchaperoned Holidays".

PRINCIPLES OF THE LAW OF LIBEL AND SLANDER

CHAPTER 1.

DEFINITION.

DEFAMATION may be broadly defined as a false and damaging statement. If it is published it becomes actionable.

Judicial definitions are:—

"A false statement about a man to his discredit" (*a*).

"A writing tending to injure and discredit the character of the person who is the object of it" (*b*).

"A publication without just cause or excuse which is calculated to injure the reputation of another by exposing him to hatred, ridicule, or contempt" (*c*).

"A defamatory statement is a statement concerning any person which exposes him to hatred, ridicule, or contempt, or which causes him to be shunned or avoided, or which has a tendency to injure him in his office, profession, or trade" (*d*).

(*a*) *Scott* v. *Sampson* (1882), 8 Q. B. D. 491, *per* Cave, J.
(*b*) Report of Select Committee of House of Lords to consider Defamation, 1843, *per* Lord Campbell, 4, 5.
(*c*) *Parmiter* v. *Coupland* (1840), 6 M. & W. 105, *per* Parke, B., at 108.
(*d*) Fraser on Libel and Slander (6th ed.), p. 1.

With regard to this latter definition, it may be observed that the last sentence is somewhat misleading: as although words may be actionable which injure a man in his office, profession, or trade, such actions may not necessarily be actions of defamation and cannot properly be said to fall within the definition of defamation, the somewhat intricate rules of which have no application to such actions.

The words "hatred, ridicule, or contempt" cannot, at the present day, be said to be sufficiently wide:—

> ". . . The Judge had directed [the jury] that defamatory words were words tending to expose the plaintiff to 'hatred, ridicule, or contempt' in the mind of a reasonable man. I do not myself think this ancient formula is sufficient in all cases, for words may tend to damage the reputation of a man as a business man, which no one would connect with hatred, ridicule, or contempt" (*e*).
>
> "There have been several formulæ for describing what is defamation. The learned Judge at the trial uses the stock formula 'calculated to bring into hatred, ridicule, or contempt,' and because it has been clearly established some time ago that that is not exhaustive, because there may be things which are defamatory which have nothing to do with hatred, ridicule, or contempt, he adds the words 'or causes them to be shunned or avoided.' I, myself, have always preferred the language which Mr. Justice Cave used (*ee*): 'a false statement about a man to his discredit'. I think that satisfactorily expresses what has to be found" (*f*).

(*e*) *Tournier* v. *National, etc., Bank*, [1924] 1 K. B. 461, *per* Scrutton, L.J., at 477.

(*ee*) See note (*a*) *ante*.

(*f*) *Youssoupoff* v. *Metro-Goldwyn-Mayer* (1934), 50 T. L. R. 581, *per* Scrutton, L.J., at 584.

The short definition at the beginning of this chapter will probably be found sufficient for practical purposes.

The word "damaging" is used because the damage, as has frequently been said, is the gist of the action: and the truth of this statement is not affected by the circumstance that in all libels and some slanders there is a presumption in favour of the plaintiff that he has suffered damage, which saves him the necessity of proving it.

The element of falsity is important because it is a good defence to an action for damages for defamation to prove that the statement complained of is true. But the falsity is not a necessary element in deciding whether the statement is defamatory; once established as capable of being defamatory, its falsity is presumed.

The element of reference to the plaintiff is purposely omitted from the definition. Recent authorities (*g*) have made it plain that a statement may affect the reputation of a person who is not mentioned in the statement at all, and that that person may recover damages. There may be circumstances in which a reference to A necessarily involves a libel on B, who is not referred to. For example, it has been held in America that it is defamatory to say that a person is illegitimate (*h*), and it obviously is; such a statement clearly involves imputations on persons other than the one person referred to; it is possible to imagine circumstances in which a number of persons might gravely be libelled by the statement in question (*i*).

Standard of Opinion.

"In what minds is it that the reputation must have been diminished? . . . It is obvious that some

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(*g*) *See Cassidy* v. *Daily Mirror*, [1929] 2 K. B. 331.
(*h*) *Sheilby* v. *Sun Printing Assocn.*, cited Odgers (6th ed.), p. 18.
(*i*) See *Huth* v. *Huth*, [1915] 3 K. B. 32, where four infant plaintiffs claimed damages for a libel on their mother by their father, imputing that he had never married her.

standard must exist from which and by which to measure injury to the reputation" (*k*).

The statement that the libel must have caused the plaintiff damage is subject therefore to this qualification, that the injury to the reputation must be injury in the minds of reasonable people, and not merely in the minds of a limited class of persons, whose views do not represent those of the general mass of the community.

"Reputation is not deemed to include a reputation acquired by reason or on account of illegal or immoral acts, conduct, or practices, or of any skill or proficiency therein, or a reputation amongst or with any community or class of persons whose standard of opinion the law does not recognise" (*l*).

"No thug or anarchist or member of a secret revolutionary society has ever yet invoked the aid of English justice to protect him against an insinuation of tenderness to human life, or submission to law and order . . . the law can only take notice of the 'arbitrium boni viri'" (*l*).

Thus in an Irish case an Irish priest claimed damages for having been represented as an informer against disloyal and criminal classes, but it was held that these were classes of whose estimation the law could take no account.

"Counsel for the plaintiff, however, argued that amongst certain classes who were either themselves criminal, or who sympathised with crime, it would expose a person to great odium to represent him as an informer or prosecutor, or otherwise aiding in the detection of crime; that is quite true, but we cannot be called upon to adopt that standard. The very circumstances which will make a person be regarded

(*k*) *Myroft* v. *Sleight* (1921), 90 L. J. K. B. 883, *per* McCardie, J., at 885.
(*l*) Spencer Bown on Actionable Defamation (1923), pp. 4, 252, cited with approval by McCardie, J., *supra*.

with disfavour by the criminal classes, will raise his character in the estimation of right thinking men. We can only regard the estimation in which a man is held by society generally" (*m*).

This case may be contrasted with a recent authority in which the facts were as follows. The plaintiff was a master of a trawler and a member of a fishermen's trade union. A strike of the union was called and the defendant stated that the plaintiff during its progress had gone down to the docks and asked for a ship. This statement clearly suggested a charge of hypocrisy, namely, that the plaintiff was acting in secret in a way entirely inconsistent with the strike which he was pretending to support in public, and it was held that the class to which this statement would appear libellous was sufficiently large.

"I imagine that it would not be defamatory merely to say of an ordinary trade unionist that he had left his union or that he had openly acted against the wishes of his union, or that he had openly continued at work in spite of the orders of his union. It should not be held defamatory to charge a man with independence of thought, or courage of opinion or speech, or manliness of action. These qualities are of the highest value at the present day. But a charge of trickery or of underhand disloyalty or of hypocrisy is a very different matter. Such a charge, to my mind, is as defamatory of a trade unionist as it is of any other man. All men, whatever their political or economic opinions, would deprecate bad faith or secret treachery in any post or status. Good faith is the binding duty of all."

"Hence I hold that the words here spoken by the defendant were upon the circumstances of this case defamatory. They were spoken of a man who

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(*m*) *Mawe* v. *Pigott* (1869), I. R. 4 C. L. 54, *per* Lawson, J., at 62.

had voted for the strike and supported the strike. The defendant, as he frankly admits, meant to charge the plaintiff with conduct which I think would be condemned by a just, fair-minded and reasonable citizen. The slander was regarded by all who heard it as an imputation on the plaintiff's honour as a straightforward man" (*n*).

Publication.—No action for damages can be brought upon any defamatory statement until it has been published to a third person. A man does not publish a libel by writing it himself (*o*), or by sending it or saying it to the defendant (*p*), though in criminal libel publication to the person defamed is sufficient (*q*). Extensive publication may increase the damages: but publication to a single person is sufficient to make the statement actionable unless indeed it is published on a privileged occasion and the publication is limited to what is conveniently called incidental publication, that is to say, only to clerks or servants of the publisher or the person libelled. But if the privilege is defeated by proof of malice, such publication will be sufficient to sustain the action.

The publication then of a damaging statement is a tort actionable at the suit of the person damaged, for it constitutes an infringement of the right to whatever reputation he has succeeded in establishing for himself.

"Indeed, if we reflect on the degree of suffering occasioned by loss of character, and compare it with that occasioned by loss of property, the amount of the former injury far exceeds that of the latter" (*r*).

"The law recognises in every man a right to have the estimation in which he stands in the opinion

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(*n*) *Myroft* v. *Sleight* (1921), 90 L. J. K. B. 883, *per* McCardie, J., at 884.
(*o*) *Pullman* v. *Hill*, [1891] 1 Q. B. 524.
(*p*) *Wennhak* v. *Morgan* (1880), 20 Q. B. D. 635.
(*q*) *Barrow* v. *Lewellin* (1615), Hobart 62 (Star Chamber).
(*r*) *De Crespigny* v. *Wellesley* (1829), 5 Bing. 392, *per* Best, C.J., at 406.

of others unaffected by false statements to his discredit" (*s*).

Evolution.—Our law of libel has been evolved entirely by judge-made decisions. No statute provides by its sections a foundation for the reader or indeed for the writer. For this reason a very large number of older decisions are unreliable guides at the present day and have been omitted from this book. It is not always easy to determine whether a decision of 1830 is still good law; lack of subsequent comment may suggest that it has never been questioned, but further investigation may reveal that it has never been followed. Older authorities are seldom overruled; they may be differed from or distinguished without a difference being made clear, while the flow of dicta tends to bring the law more into conformity with the practice and habits of the community.

In one respect at least this circumstance has resulted in a considerable simplification of the plaintiff's task.

For instance, it used to be the rule that a libel must be strictly proved, and must be construed *in mitiori sensu*, and that the slightest deviation from absolute accuracy would involve failure in the action. For example, in an old case (*t*) an imputation that "Sir Thomas Holt struck his cook on the head with a cleaver, and cleaved his head, the one part lying on one shoulder and the other part on the other" was held not to amount to a charge of killing the cook.

> "Slander ought to be direct, against which there may not be any intendment, but here, notwithstanding such wounding the party may yet be alive, and it is then but trespass" (*t*).

Our law has advanced since then, and juries are now

(*s*) *Scott* v. *Sampson* (1882), 8 Q. B. D. 491, *per* Cave, J., at 503.
(*t*) *Holt* v. *Astrig* (1607), Cro. Jac. 184.

directed to consider whether the words alleged or a material and defamatory part of them were in substance uttered. The defendant may be interrogated before the trial and required to state on oath whether he did not speak the words complained of, or words to the like effect; and further, if at the trial the plaintiff's version of what the defendant said differs substantially from the version which the defendant admits having said, the plaintiff may amend his claim there and then so as to rely on the version admitted by the defendant (*u*).

Again, a merchant who has been the victim of a trade libel which may well have brought his business to a standstill was formerly unable to establish a cause of action at all unless he was in a position to call some former customer who was prepared to state the reason why he severed his commercial relationship with the plaintiff. Such a requirement, when enforced, must frequently have worked the gravest injustice; but since 1892 (*x*) such a plaintiff may establish the special damage necessary to found the action by producing his books and proving from them that his business has fallen off, or has not increased in a way that might reasonably have been anticipated; and that this set-back is sufficiently contemporaneous with the publication of the libel to establish the relationship of cause and effect between the two circumstances.

In other respects, however, this system of evolution by judicial decisions has resulted in many complicated distinctions and refinements, want of acquaintance with which might place the litigant in a position of great difficulty; and while these refinements may be and in most cases are based upon some sound common-sense principle, it cannot be denied that they present what appears, at any rate at first sight, to be a confusing mass

(*u*) *Tournier* v. *National, etc., Bank*, [1924] 1 K. B. 461.
(*x*) *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524.

of artificial technicalities, which may wreck the chances of success at the outset.

Thus, it has been held by the House of Lords that a statement, the publication of which caused a run of a quarter of a million pounds on the bank to which it referred, was incapable of being construed by reasonable people as a libel on the bank (*y*).

On the other hand, another publication was defended up to the House of Lords on the ground of privilege alone; the point that it was incapable of being a libel was never taken, although the House of Lords clearly indicated, and counsel practically admitted, that the point was a substantial one and if argued might well have been successful (*z*).

Or, where the jury found a verdict for the plaintiff for £3,000, on the ground that "there must have been some vindictiveness" on the part of the defendant, the Judge refused to enter judgment in accordance with the verdict on the ground that there was no evidence in law on which malice could properly have been found (*a*).

On the other hand, even where the jury found on proper evidence that the libel was published maliciously, the plaintiff recovered only a farthing damages and the Court refused to set the verdict aside (*b*).

Again, where fair comment is pleaded as a defence, it has been held that it is relevant to know what information the defendant had when he published the libel complained of and also the source, reliable or otherwise, from which it was obtained; and that the plaintiff can obtain such information before the trial by administering interrogatories (*c*). But although such information is

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(*y*) *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741.
(*z*) *Adam* v. *Ward*, [1917] A. C. 309.
(*a*) *Adams* v. *Coleridge* (1884), 1 T. L. R. 84.
(*b*) *Cooke* v. *Brogden* (1885), 1 T. L. R. 497.
(*c*) *Elliott* v. *Garrett*, [1901] 1 K. B. 870.

obviously of the utmost assistance to the plaintiff when the libel is published in a newspaper, it has been held, somewhat anomalously, that newspapers are an exception to this rule and that no such information can be obtained from them (*d*).

In this book, the law is presented in the form of quotations from appropriate judgments, and illustrated by cases in which the facts are clear and likely to appeal to the memory. It will be appreciated that the cases useful for the former purpose are not always the most suitable for the latter. Further, the same case is frequently an authority on more than one point, and has to be cited several times, sometimes in the same chapter. A few points of practice likely to be useful have been noted at the end of each chapter, to which are added specimens of pleadings which show how the points dealt with in that chapter may be framed in language suitable for a defence or a statement of claim. In view of the shortness of the book, cross-references are confined to chapters only.

(*d*) *Lyle-Samuel* v. *Odhams Press*, [1920] 1 K. B. 135.

CHAPTER 2.

LIBEL.

HAVING attempted to make it clear what is defamatory, we may proceed to consider the different forms of defamation and the distinction between libel and slander.

Distinction Between Libel and Slander.—This is important and cannot be understood without some references to their historical development. The following passage is instructive:—

> "The action for slander has been evolved by the common law in a fashion different from that which obtains elsewhere. . . . There is a difference between libel and slander which has been established by the authorities (*a*) and which is not the less real and far-reaching because of the fact that it is explicable almost exclusively by the different histories of the remedies for two wrongs that are in other respects analogous in their characters. The greater importance and scope of the action for libel was mainly attributable to the appearance of the printing press. The Court of Star Chamber quickly took special cognisance of libel, regarding it not merely as a crime, punishable as such, but as a wrong carrying with it the penalty of general damages. . . . The history of the action for slander is radically different. Slander never became punishable in the civil courts as a crime. In early days, the old local courts took

(*a*) *Thorley* v. *Lord Kerry* (1812), 4 Taunt. 355.

cognisance of it as giving rise to claims for compensation. When these courts decayed, the entire jurisdiction in cases of defamation appears to have passed, not to the Courts of the King, but, at first, at all events, to the Courts of the Church. . . . Subsequently to the Reformation, when the authority of the Courts of the Church . . . began to wane, the Courts of the King commenced the full assertion of a jurisdiction in claims arising out of spoken defamation. . . . As might have been expected of civil courts, whose concern had been primarily with material rights, and not with discipline as such, the new jurisdiction in claims based on slander appears to have been directed to the ascertainment of the actual damage suffered and to a remedy limited to such damage. This explains the restricted character of the remedy, and the tendency to confine its scope by the assertion that actual damage was the gist of the action. . . . The rule thus established was to some extent relaxed in its form by decisions which in certain nominate cases treated particular types of slander as so injurious by their very nature that the suffering of actual damage might be presumed and need not be proved. These exceptional types of slander comprised imputations of the commission of serious criminal offences, imputations of suffering from certain noxious diseases, and imputations of special forms of misconduct which would manifestly prejudice a man in his calling" (*b*).

Written or printed defamation is clearly libel, and spoken defamation is as clearly a slander. But defamation may take other forms than writing or speech.

Conduct may be libel, as when the defendant erected a lamp and caused it to be lit and kept burning all day

(*b*) *Jones* v. *Jones*, [1916] A. C. 481, *per* Lord Haldane, at 489.

in front of and close to the plaintiff's house, so as to make it appear, according to the usage of the day, that the house was a brothel (*c*). A wax figure of the plaintiff, when placed between the figures of notorious criminals at an exhibition to which the public were admitted, was held to be a libel (*d*); the publication of an inferior story over the name of a celebrated novelist, who had not written it, has been held to be a libel (*e*); and it has recently been held—indeed, it seems to have been treated as too plain for argument—that a talking film is a libel and not a slander (*f*).

Two principles have been suggested to account for the distinction: (1) that libel is defamation addressed to the eye, while slander is defamation addressed to the ear; and (2) that libel is defamation crystallised into some permanent form, while slander is conveyed by some transient method of expression. This latter reason would seem to carry the greater weight, inasmuch as written slander, in spite of exceptional circumstances which may be suggested, such as a statement made in the Royal Exchange or broadcast by wireless, is, in general, capable of reaching a very much wider public than spoken defamation; a newspaper, it has been said, may "circulate the calumny through every region in the globe" (*g*).

A talking film is, of course, a libel by whichever principle it is considered:—

> "In my view, this action, as I have said, was properly framed in libel. There can be no doubt that, so far as the photographic part of the exhibition is concerned, that is a permanent matter to be seen by the eye, and is the proper subject of an action for

(*c*) *Jefferies* v. *Duncombe* (1809), 11 East 226 (decided on nuisance).
(*d*) *Monson* v. *Tussaud*, [1894] 1 Q. B. 671.
(*e*) *Pett Ridge* v. *English Illustrated Magazine* (1913), 29 T. L. R. 592.
(*f*) *Youssoupoff* v. *Metro-Goldwyn-Mayer* (1934), 50 T. L. R. 581.
(*g*) *De Crespigny* v. *Wellesley* (1829) 5 Bing. 392, *per* Best, C.J , at 402.

libel, if defamatory. I regard the speech which is synchronised with the photographic reproduction and forms part of one complex, common exhibition as an ancillary circumstance, part of the surroundings explaining that which is to be seen" (*h*).

In the case of a gramophone record, as to which there is as yet no legal decision, the two principles would compete for preponderance, for such a method of expression would be defamation which was addressed to the ear, but which was expressed in a permanent form. The view may, perhaps, be hazarded that the element of permanence would prove the deciding factor, though incidental publication of the written script might well avoid the necessity for a decision.

Results of Distinction.—The results of the distinction are important, and may be briefly summarised:—

(1) *Damage.*—In the case of a libel, the plaintiff is assisted by a presumption of law made in his favour that damage must result from the publication of the libel upon him.

In the case of slander, however, no such favourable presumption assists him. In order to establish a cause of action in slander, the plaintiff must prove that he has sustained actual, or, as it is sometimes called, "special" damage, except in four cases, namely, when the slander imputes:—

(a) The commission of a criminal offence.
(b) A contagious disorder of a particular kind.
(c) Conduct in relation to the plaintiff's trade, profession, or calling which would manifestly prejudice him therein.
(d) Adultery or unchastity to a woman or girl.

(*h*) *Youssoupoff* v. *Metro-Goldwyn-Mayer* (1934), 50 T. L. R. 581, *per* Slesser, L.J., at 587.

These four exceptional cases are sometimes spoken of as slander actionable *per se* and are dealt with in the following chapter.

(2) *Criminal Aspect.*—Secondly, a libel is not only a tort, that is to say, a civil wrong, but is also a criminal misdemeanour punishable on indictment or criminal information. Slander, however, is not a criminal offence. Spoken words do not constitute a criminal offence by reason only of their defamatory character, though they may otherwise bring the speaker within reach of the criminal law on the ground that they are blasphemous, seditious or obscene.

Distinction between Civil and Criminal Libel.—More than one reason has been put forward for this distinction. It is sometimes said that a libel is more serious than a slander because it is more easily disseminated and less easily forgotten. Another reason is the greater tendency of a libel to provoke a breach of the peace. "Written slander," it has been said, "is premeditated and shows design" (*i*), while verbal slander may well be spoken hastily and in the heat and anger of the moment. Whether words spoken in these circumstances are less likely to provoke a breach of the peace than a statement read in the evening paper may well be doubted. But, at all events, it seems to be the foundation for the important practical difference between the civil and criminal remedy which will be noticed immediately; and it is clear that the criminal remedy exists only in the case of libel, and is useful in cases where the libeller is either too poor, or too wealthy, for the civil remedy for damages to afford the injured person adequate protection.

Not every libel can be made the subject of criminal proceedings:—

"There must be something of a public nature

(*i*) *Clement* v. *Chivis* (1829), 9 B. & C. 172, *per* Bayley, J., at 174.

about a libel to justify the interfering of the Crown, as representing the public, in proceeding by indictment" (*k*).

"A criminal prosecution ought not to be instituted unless the offence be such as can be reasonably construed as calculated to disturb the peace of the community . . . private character should be vindicated in an action for libel, and an indictment for libel is only justified when it affects the public, as an attempt to disturb the public peace" (*l*).

This distinction has five important consequences:—

(i) It is no defence to a prosecution for libel, as it is in a civil action, for the defendant to plead that the words are true. The truer the imputation, the greater the tendency to provoke a breach of the peace. Hence the old maxim, "The greater the truth the greater the libel." Since 1843, however, this maxim no longer accurately expresses the law, even in criminal cases; for by Lord Campbell's Act (*m*) the truth of the imputations contained in the libel is now a defence to a criminal prosecution, provided that in addition the defendant proves that their publication was for the public benefit.

(ii) While in general it may be said that the civil liability of a master for torts committed by his servants in the course of their employment is well established (*n*), a master's criminal liability in respect of his servants' libels has been limited by the same Act (*o*), which provides that in such

(*k*) Charge to grand jury, Berks Assizes, *per* Lord Coleridge, 86 L. T. Jo. at 300.

(*l*) *Wood* v. *Cox* (1888), 4 T. L. R. 652, *per* Lord Coleridge, L.C.J., at 654.

(*m*) 1843 (6 & 7 Vict. c. 96, s. 6).

(*n*) *Citizens' Life Assce. Co.* v. *Brown*, [1904] A. C. 423; *Lloyd* v. *Grace Smith*, [1912] A. C. 716.

(*o*) 1843 (6 & 7 Vict. c. 96, s. 7).

a case it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and did not arise from want of care on his part.

(iii) It is not essential in a prosecution, as it is in order to found a civil action, that the libel should have been published to a third person. As will hereafter be seen, no civil action can be maintained in respect of a libel unless it has been communicated to some third person in a manner which amounts to publication (*p*).

(iv) No civil action may be maintained in respect of a libel upon a deceased person (*q*). But such a libel may be made the subject of criminal proceedings. If it is published

> "with a malevolent purpose, and with a view to injure his posterity, then it comes within the rule stated by Hawkins—then it is done with a design to break the peace, and then it becomes illegal" (*r*).

Such a design or intention must be alleged in the indictment and proved at the trial, and cannot be left to be inferred by the jury solely from the nature or tendency of the libel (*s*).

(v) Finally, when a libel reflects upon a class or body of persons, that class must be a definite and determinate class, in order that members of it may be referred to with sufficient particularity to entitle them to take civil proceedings. But criminal proceedings may be instituted in respect of a libel upon a very much larger class of persons, provided the libel tends to disturb the

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(*p*) See Chapter 7.

(*q*) See *Wright* v. *Lord Gladstone*, The Times, January 28—February 4, 1927.

(*r*) *R.* v. *Topham* (1791), 4 T. R. 126.

(*s*) *R.* v. *Ensor* (1887), 3 T. L. R. 366. But there is no instance of a successful prosecution for over one hundred years.

peace. It is not possible of course to lay down a definite numerical limit to either class; but in a case where the libel reflected upon "certain Jews lately arrived from Portugal and now living in Broad Street" the Court overruled an objection that the libel did not reflect on any specific individual with sufficient particularity (*t*); while a statement to three individuals "one of you three is perjured" has been held not to entitle any one of them to maintain a civil action for damages (*u*).

It will be observed that in the last three respects the criminal remedy is more extensive than the civil.

Practice.—One point of practice should be noted. By R. S. C., Ord. III, r. 9: "The indorsement of the writ shall state sufficient particulars to identify the publications in respect of which the action is brought."

(*t*) *R.* v. *Osborne* (1732), 2 Swanst. 503, note.
(*u*) *Sir John Bourn's Case*, Cro. Eliz. 497.

CHAPTER 3.

SLANDER.

A DEFAMATORY statement which is published by word of mouth or by gesture is termed slander.

Slander is a tort actionable at the suit of the person defamed by it; but there is this important distinction between libel and slander, that while in the case of the former the plaintiff is presumed to have suffered damage, no such presumption arises in the case of the latter. A plaintiff in a slander action must, with four exceptions, prove actual damage in order to succeed, that is to say, some temporal loss capable of being estimated in terms of money, which is not too remote; that is, damage which can be said to be the direct (*a*) result of the slander.

Slander Actionable Per Se.—There are, however, four exceptions to the rule that special damage must be alleged and proved in slander cases:—

1. when the words impute a crime punishable with imprisonment;
2. when the words impute leprosy or venereal disease;
3. when the words are spoken of a person in the way of his trade, profession, or calling, and impute to him misconduct in or unfitness for that trade, profession, or calling;
4. when the words impute unchastity or immorality to a woman or girl.

The first three of these cases are established by common law. Whether they are founded upon any logical principle is a matter on which conflicting judicial

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(*a*) See Chapter 14.

decisions have been expressed (*b*); but as has been said:—

> "It is not a matter of principle, but of judge-made law" (*c*).
>
> "The authorities have settled the law too firmly to admit of our extending the exceptions which have been made further than the decided cases go" (*d*).
>
> "The plaintiff must bring his case within the very limited class of cases in which slander has been held actionable. He must show that the imputation is such and the state of affairs is such that a presumption of damage as a matter of law has been made in the past under like circumstances" (*e*).

The fourth exception was introduced by the Slander of Women Act, 1891 (*f*).

1. Crime Punishable with Imprisonment.—Words which impute the commission of a criminal offence are actionable without proof of special damage, provided the crime is one which is punishable with imprisonment.

A catalogue of such crimes would be of little assistance; but it may be noted that it has been held that imputations that a man has brought a blackmailing action (*g*) or is a returned convict (*h*) are actionable *per se*. A charge of attempted murder (*i*) was also held actionable *per se* in an old case; and there would seem no reason why an imputation of an attempt to commit a crime should not be similarly actionable provided it is punishable by imprisonment.

A slander which amounts to no more than an

(*b*) See *Jones* v. *Jones*, [1916] 2 A. C. 481.
(*c*) *Hellwig* v. *Mitchell*, [1910] 1 K. B. 609, *per* Bray, J., at 613.
(*d*) *Jones* v. *Jones*, [1916] 2 A. C. 481, *per* Lord Haldane, at 492.
(*e*) *Jones* v. *Jones*, [1916] 2 A. C. 481, *per* Lord Wrenbury, at 506.
(*f*) 54 & 55 Vict. c. 51.
(*g*) *Marks* v. *Samuel*, [1904] 2 K. B. 287.
(*h*) *Fowler* v. *Dowdney* (1838), 2 Moo. & Rob. 119.
(*i*) *Scott* v. *Hilliar* (1611), Lane 98.

imputation that the plaintiff is under suspicion of having committed a crime is not within the rule (*k*).

Construction.—The language used must be reasonably capable of conveying the meaning complained of: see chapter on Construction (*l*). But it should be observed that the intention of the speaker is irrelevant in considering how the words should be interpreted (*m*) and, subject to the Judge's direction, it is for the jury to say in what sense they would have been understood by reasonable people.

From this it follows that if the hearers reasonably, in the Judge's view, understood the words to impute a crime, the speaker cannot defend himself by saying that he did not mean to convey such an imputation.

Conversely, if the defendant intended to commit a crime, but the crime imputed was one which the plaintiff could not commit, no action will lie. Thus, it has been held that an imputation that the plaintiff had "broken open a box belonging to his wife, in her room, and had robbed her of a sum of about £75" was not actionable as he was living with her at the time and, in those circumstances, could not commit the crime of stealing from her (*n*); or to say of a churchwarden that he stole the bell ropes of the parish church, for they are legally the churchwarden's property (*o*).

If the words were spoken by way of general abuse and were so understood by the hearers, no action will lie, although in the literal sense the words used might have conveyed a criminal imputation.

> "For mere general abuse spoken, no action lies" (*p*).

(*k*) *Simmons* v. *Mitchell* (1880), 6 App. Cas. 156 (P. C.).
(*l*) Chapter 5.
(*m*) *Hulton* v. *Jones*, [1910] A. C. 20.
(*n*) *Lemmon* v. *Simmons* (1888), 4 T. L. R. 306.
(*o*) *Jackson* v. *Adams* (1835), 2 Bing. N. C. 402.
(*p*) *Thorley* v. *Lord Kerry* (1812), 4 Taunt. 355, *per* Mansfield, C.J., at 365.

Imprisonment.—The test of actionability is the punishment with which the offence imputed may be visited.

> "The distinction seems a natural one, that words imputing that the plaintiff had rendered himself liable to the infliction of a fine are not slanderous, but that it is slanderous to say that he has done something for which he can be made to suffer corporally" (*q*).

It is sufficient therefore if the words complained of specify the punishment, without making any mention of the offence: *e.g.*, the words "I will have you locked up in Gloucester gaol next week: I know enough to put you there" were held actionable without proof of special damage (*r*).

The method or procedure by which the offence may be prosecuted is immaterial, provided imprisonment may follow.

> "A great number of offences which were dealt with by indictment twenty years ago are now disposed of summarily, but the effect cannot be to alter the law with respect to actions for slander" (*s*).

But the rule does require that the criminal offence imputed shall be one which is punishable by imprisonment: it is not sufficient that it renders the offender liable only to summary arrest and detention. In a case where the slander imputed that the plaintiff had been guilty of committing a breach of the peace, it was said:—

> "Strictly speaking it is incorrect to say that a person who commits a breach of the peace can be made to suffer corporally. The arrest in such a case is not a punishment: it is merely a method of preventing the continuance of the offence" (*t*).

Nor is it sufficient that the offence is one punishable

(*q*) *Webb* v. *Beavan* (1883), 11 Q. B. D. 609, *per* Pollock, B., at 610.
(*r*) *Webb* v. *Beavan* (1883), 11 Q. B. D. 609.
(*s*) *Hellwig* v. *Mitchell*, [1910] 1 K. B. 609, *per* Bray, J.
(*t*) *Hellwig* v. *Mitchell*, [1910] 1 K. B. 609, *per* Bray, J.

by fine, although the offender may be committed to prison in default of payment. Where the offence imputed was that of travelling first class with a third-class ticket, it was said:—

> "The offence of travelling first class with a third-class ticket with intent to avoid payment of the fare is punishable by fine only, although, as a means of exacting the fine, there can be imprisonment in default. It is settled by *Michael* v. *Spiers & Pond* (*u*) and *Helwig* v. *Mitchell* (*x*) that to accuse by spoken words a person of committing that class of offence is not actionable slander without special damage" (*y*).

2. Words Imputing Leprosy or Venereal Disease.—An imputation that the plaintiff is suffering from leprosy (*z*) or syphilis (*a*) is actionable without proof of special damage. Imputations of other forms of venereal disease are generally recognised as being similarly actionable, although there seems to be no English authority upon this point.

Certain *obiter dicta* (*b*) cannot, as is sometimes suggested, be regarded as authorities for including an imputation of scarlet fever within the scope of the rule.

It is essential that the words should impute that the plaintiff is suffering from the disease at the time of uttering the slander.

> "Charging another with having had a contagious disorder is not actionable, for unless the words spoken impute a continuance of the disorder at the time of speaking them, the gist of the action fails,

(*u*) *Michael* v. *Spiers & Pond* (1909), 101 L. T. 352.
(*x*) [1910] 1 K. B. 609.
(*y*) *Ormiston* v. *G. W. Ry.*, [1917] 1 K. B. 598, *per* Rowlatt, J., at 601.
(*z*) *Taylor* v. *Perkins* (1607), Cro. Jac. 144.
(*a*) *Bloodworth* v. *Gray* (1844), 7 M. & G. 334.
(*b*) See *Watkin* v. *Hall* (1868), L. R. 3 Q. B. 396, at 399; *Riding* v. *Smith* (1876), 1 Ex. D. 91, at 94.

for such a charge cannot produce the effect which makes it the subject of an action, namely, his being avoided by society" (*c*).

3. Slander in the Way of Business, Profession, or Calling.—Words which are spoken of a man in connection with his office, profession, or calling, and tend to damage him therein, are actionable without proof of special damage.

There appear to be two cases in which the connection of the words with the plaintiff's trade, profession, or calling will be presumed, namely, when the words impute insolvency to a tradesman or incontinence to a beneficed clergyman.

In all other cases, however, it is essential that the words be connected in some way with the plaintiff's means of livelihood so as to constitute an attack upon him in his public as distinct from his private capacity.

"The fact that the imputation is a gross and grievous attack upon the personal character is not of itself enough" (*d*).

"It is well settled that words spoken, although calculated to injure a person in his profession, vocation, or office, not relating to his conduct or capacity therein, are not actionable *per se*" (*e*).

In that case an action was brought by a schoolmaster in respect of an imputation of adultery with a married woman, a cleaner employed in the school. Although the jury had expressly found that the words were likely to injure the plaintiff in his profession of schoolmaster, the plaintiff failed on the ground that the words complained of contained no reference to his calling as a schoolmaster so that it could be said that they were spoken of him in

(*c*) *Carslake* v. *Mapledoram* (1788), 4 T. R. 473, *per* Ashhurst, J., at 475.
(*d*) *Jones* v. *Jones*, [1916] 2 A. C. 481, *per* Lord Wrenbury, at 506.
(*e*) *Jones* v. *Jones*, [1916] 1 K. B. 351, *per* Swinfen Eady, L.J., at 361.

the way of that calling; and consequently the imputation was not actionable without special damage.

Businesses.

"The law, it seems, will take notice of the fact that solvency is so essential a factor in the existence of a trader that to speak of him as insolvent will necessarily 'touch him in his trade'. It is an attack upon a necessary part of his trade equipment" (*f*).

Where a brewer sued for damages in respect of an imputation of insolvency it was said:—

"Here the imputation is one of insolvency, which must be injurious: for if a tradesman be incapable of paying all his debts, whether in or out of trade, his credit as a tradesman, which depends on his general solvency, must be impaired" (*g*).

A trader may of course sue for other imputations made upon him in the way of his business (provided the business is a lawful one (*h*)), *e.g.*, that he cheats his customers by using false weights and measures (*i*).

An imputation disparaging a trader's goods may of course involve an imputation on the trader himself.

"It is quite possible to make a reflection, which by the mere form of expression would seem to be only a criticism of goods, but nevertheless would involve a reflection upon the seller or maker. Could it be gravely argued that to say of a fishmonger that he was in the habit of selling decomposed fish would not be a libel upon him in the way of his trade? And, if so, would it not be a mere juggle with language to alter the form of that allegation and to say that all the fish in a shop is decomposed? Or to say of a baker that such a baker's bread is always unwhole-

(*f*) *Jones* v. *Jones*, [1916] 2 A. C. 481, *per* Lord Wrenbury, at 507.
(*g*) *Jones* v. *Littler* (1841), 7 M. & W. 423, *per* Parke, B., at 426.
(*h*) *Foulger* v. *Newcomb* (1867), L. R. 2 Ex. 327.
(*i*) *Griffiths* v. *Lewis* (1846), 7 Q. B. 61.

some? In each of these cases you could adopt a form of speech which would seem only to deal with the articles sold or manufactured, but in each case it would certainly tend to, and probably succeed in, destroying the trade of the person thus referred to" (*k*).

"To disparage a trader's goods, which is often, though inaccurately, spoken of as a trade libel, does not give ground for an action of libel, although if special damage is proved the plaintiff may recover in an action on the case. On the other hand, the words used, though directly disparaging goods, may also impute such carelessness, misconduct, or want of skill in the conduct of his business by the trader as to justify an action for libel" (*l*).

It is for the jury, subject to the Judge's direction, to say in each case what is a reasonable construction of the words.

An imputation upon the moral character of a clerk in a gas company, unconnected with his employment, was held not to be actionable without proof of special damage (*m*).

Professions.—An imputation of want of skill or knowledge necessary to carry on a profession is actionable *per se*. Thus, to impute to a barrister (*n*) or a solicitor (*o*) that he knows no law, or to a doctor want of skill (*p*) is actionable *per se*.

But an imputation of insolvency made against a barrister (*q*) or a solicitor (*r*) is not presumed to be

(*k*) *Linotype* v. *B. E. Typesetting Co.* (1899), 81 L. T. 331, *per* Lord Halsbury, at 333.
(*l*) *Griffiths* v. *Benn* (1911), 27 T. L. R. 346, *per* Cozens Hardy, M.R., at 350.
(*m*) *Lumby* v. *Allday* (1831), 1 Cr. & J. 301.
(*n*) *Bankes* v. *Allen* (1616), 1 Roll. Abr. 54.
(*o*) *Day* v. *Buller* (1770), 3 Wils. 59.
(*p*) *Southee* v. *Denny* (1848), 1 Exch. 196.
(*q*) *Doyley* v. *Roberts* (1837), 3 Bing. N. C. 835.
(*r*) *Dauncey* v. *Holloway*, [1901] 2 K. B. 441.

spoken of him in the way of his calling, as is the case of a similar imputation upon a tradesman, in the absence of any words connecting the imputation with the profession; and for such an imputation no action will lie without proof of special damage. Indeed, in the latter case the Court or Appeal held that the words "He has gone for thousands instead of hundreds this time" spoken of a solicitor, were incapable of conveying a meaning which was defamatory of the plaintiff in the way of his profession as a solicitor. Similarly it has been held that neither a doctor (*s*) nor a schoolmaster (*t*) can recover for imputations of immorality, in connection with their respective professions, unless of course they can show special damage.

Clergymen.—An imputation of immorality upon a beneficed clergyman will be presumed to affect his public character and is actionable *per se*; but if he is not beneficed, no action will lie without proof of special damage (*u*).

Offices.—A distinction must be drawn between paid and unpaid offices, or, as they are sometimes called, offices of profit and offices of honour or credit.

With regard to paid offices, it is sufficient if the slander imputes to the holder that he is unfit to hold the office; but in the case of an unpaid office, the slander must go further, and impute either malversation or dishonesty, if the office is one of public trust, or, if it is not, such misconduct as would, if true, be ground for depriving the plaintiff of the office in question.

Thus where the plaintiffs were paid officials of the National Union of Railwaymen, and complained of charges that their conduct at a meeting with the railway

(*s*) *Ayre* v. *Craven* (1834), 2 Ad. & E. 2. But immorality with a patient is now a ground for removing a doctor's name from the Medical Register.

(*t*) *Jones* v. *Jones*, [1916] 2 A. C. 481.

(*u*) *Gallwey* v. *Marshall* (1853), 9 Ex. 294.

companies had resulted in disadvantage to the members of their union, it was held that their action was maintainable without proof of special damage (*x*).

> "They acted as executive officers, and as such they received certain payments when they were engaged on the union's business. In these circumstances I think they occupied an office of profit, which does not, as I understand, mean an office that is actually and necessarily profitable, but an office in which, in respect of the work the person does in that office, he receives payment" (*y*).

But where the office is an unpaid one, one of honour or credit, the imputation of unfitness for office, which falls short of imputing misconduct, will not be actionable *per se*. Thus, while an imputation of partiality (*z*) or corruption (*a*) against a justice of the peace has been held to be actionable *per se*, yet a charge of drunkenness when made against a town councillor is not. Where a town councillor brought an action in respect of words which imputed to him that he was a habitual drunkard and was so drunk on the night of his election that he had to be carried home, the action failed on the ground that the charge, even if true, afforded no ground for depriving him of his office of town councillor, and therefore was not actionable without proof of special damage (*b*).

> "It is quite clear that as regards a man's business, or profession, or office, if it be an office of profit, the mere imputation of want of ability to discharge the duties of that office is sufficient to support an action. It is not necessary that there should be an imputation of immoral or disgraceful conduct. As was said in *Lumby* v. *Allday* by

(*x*) *Thomas* v. *Moore*, [1918] 1 K. B. 555.
(*y*) *Thomas* v. *Moore*, [1918] 1 K. B. 555, *per* Bankes, L.J., at 571.
(*z*) *Kemp* v. *Horsegoe* (1606), Cro. Jac. 90.
(*a*) *Atson* v. *Blagrave* (1724), 1 Strange 617.
(*b*) *Alexander* v. *Jenkins*, [1892] 1 Q. B. 797.

Bayley, B.: 'Every authority, which I have been able to find, either shows the want of some general requisite, as honesty, capacity, fidelity, etc., or connects the imputation with the plaintiff's office, trade or business . . .' But when you come to offices that are not necessarily offices of profit, the loss of which would not involve necessarily a pecuniary loss, the law has been differently laid down, and it is quite clear that the mere imputation of want of ability or capacity, which would be actionable if made in the case of a person holding an office of profit, is not actionable in the case of a person holding an office which has been called an office of credit or an office of honour. . . . All we have to deal with is merely an imputation of unfitness for the office—and there is no case in which an action of slander has been held to lie for an imputation that a man by reason of his conduct is unfit for an office except where by reason of that misconduct, if it existed, he could have been deprived of the office" (*c*).

A charge of dishonesty or malversation in an office of public trust or confidence is sufficient to support an action of slander without proof of special damage, whether there is either emolument or power of amotion or removal, or neither (*d*).

The plaintiff must allege and prove that he was holding the office in question at the time of speaking the words. Where the defendant alleged that the plaintiff was unfit to be a minister by reason of misconduct and dishonesty at a former period, when he was a tradesman, and before he became a minister, it was held that no action lay without proof of special damage (*e*).

(*c*) *Alexander* v. *Jenkins*, [1892] 1 Q. B. 797, *per* Lord Herschell, at 800.
(*d*) *Booth* v. *Arnold*, [1895] 1 Q. B. 571.
(*e*) *Hopwood* v. *Thorn* (1849), 8 C. B. 273.

4. Words Imputing Unchastity or Adultery to a Woman or Girl.—By the Slander of Women Act, 1891 (*f*), which was passed only after repeated protests from the Bench, it is enacted as follows:—

> "Words spoken and published after the passing of this Act which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable" (*g*).
>
> "Provided always, that in any action for words spoken and made actionable by this Act, a plaintiff shall not recover more costs than damages, unless the judge shall certify that there was reasonable ground for bringing the action" (*h*).

Although their views were *obiter*, the Court of Appeal have expressed the very definite view that an imputation that a woman has been the victim of a rape amounts to an imputation of unchastity within the meaning of the statute (*i*).

Pleading.—*Statement of Claim.*

On January 1, 1930, the defendant falsely and maliciously spoke and published to A B of and concerning the plaintiff and of him in the way of his profession as a doctor the words following, that is to say:—[*set out words complained of*].

By reason of the premises the plaintiff has been gravely injured in his credit and reputation in his said profession of a doctor and has suffered loss and damage.

(*f*) 54 & 55 Vict. c. 51.
(*g*) S. 1.
(*h*) S. 2.
(*i*) *Youssoupoff* v. *Metro-Goldwyn-Mayer* (1934), 50 T. L. R. 581.

Particulars of Special Damage.

On February 1, 1930, the X Hospital dismissed the plaintiff from his position as house-surgeon and refused to allow him to continue work at the said hospital, whereby the plaintiff has lost salary payable to him in his position as house-surgeon aforesaid.

Defence.

Denial of Publication.

The defendant denies that the words complained of, if spoken and published (which is denied) refer to the plaintiff or to him in his profession as a doctor as alleged or at all.

Damage.

The defendant will object that the said words are not actionable without proof of special damage, and that none is alleged.

Alternatively:—

The special damage claimed is too remote and not in law recoverable.

CHAPTER 4.

TRADE LIBEL.

Slander of Title—Slander of Goods—Trade Libel.—It may happen that damage is done to an individual by statements which reflect, not upon his personal character or reputation, but upon his title to property or upon his goods. If such statements cause him damage which can be specified, and if he can prove that they were false, and made with intention to injure him, a cause of action arises in respect of them.

Illustrations of the kind of case covered by this cause of action are afforded by cases where the false statement complained of has reflected on the title of a vendor of real or personal property and thereby deterred an intending purchaser, has been contained in a circular issued by traders cautioning recipients against the genuineness of some specified brand of goods on the ground that the sole right of dealing in it was vested in themselves, or has stated that a trader has ceased to carry on business.

Inasmuch as these causes of action arise from the publication of words spoken or written, they are inaccurately but not inaptly known as slander of title and slander of goods, or by the compendious term trade libel.

Distinction Between Trade Libel and Defamation.—The inaccuracy in description arises from the fact that such actions are not strictly speaking part of the law of defamation at all, inasmuch as they tend to damage the commercial rather than the personal reputation. This distinction carries with it this important consequence.

that no presumptions favourable to the plaintiff arise in such actions, but the plaintiff has to prove his whole case.

In actions for defamation, as has been seen, a presumption arises that the words are false, that they were maliciously spoken, and that they have caused the plaintiff damage. This presumption arises as soon as the plaintiff has established that words which refer to him, and are capable of bearing a defamatory meaning, were published by the defendant.

In the case of trade libel, however, the plaintiff must prove all the essential elements of his cause of action, which are three in number, namely:—

1. That actual damage has resulted;
2. That the statements are false;
3. That the words were published maliciously. Maliciously in this sense is not a mere term of pleading, but means a desire to injure the plaintiff as opposed to a desire to further or protect the interests or property of the defendant.

Burden of Proof.—The burden of proof lies upon the plaintiff of adducing evidence to establish all these essential elements of his case.

> "The action differs from an action for libel in this, that malice is not implied from the fact of publication, but must be proved, and that the falsehood of the statement complained of, and the existence of special damage, must also be proved in order to entitle the plaintiff to recover" (*a*).

1. Damage.—The gist of the action is the damage sustained.

> "We hold, therefore, that an action for slander of title is not properly an action for words spoken, or for libel written or published, but an action on

(*a*) *Hatchard* v. *Mège* (1887), 18 Q. B. D. 771, *per* Day, J., at 775.

the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title" (*b*).

"That an action will lie for written or oral falsehoods, not actionable *per se* or even defamatory, when they are maliciously published, and when they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law. Such an action is not one of libel or slander, but an action on the case for damage wilfully and intentionally done without just cause or excuse, analogous to an action for slander of title. To support it, actual damage must be shown, for it is an action which only lies in respect of such damage as has actually occurred" (*c*).

"Unless the plaintiff has in fact suffered loss which can be and is specified, he has no cause of action. The fact that the defendant acted maliciously cannot supply the want of special damage, nor can a superfluity of malice eke out a case wanting in special damage" (*d*).

"There is a class of case, of which this is one, the true legal aspect of which, however they may be described technically, is that they are actions for unlawfully causing damage. The damage is the gist of the action . . ." (*e*).

From a dictum in the House of Lords in 1895, it would appear that it is sufficient if a plaintiff can establish that although actual damage has not yet resulted, it must inevitably result in the future. The dictum is as follows:—

"It is true that in the present case the plaintiff,

(*b*) *Malachy* v. *Soper* (1836), 3 Bing. N. C. 371, *per* Tindal, C.J., at 383.
(*c*) *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524, *per* Bowen, L.J., at 527.
(*d*) *Royal Baking Powder Co.* v. *Wright, Crossley & Co.* (1900), 18 Pat. Cas. 95, *per* Lord Robertson, at 103.
(*e*) *Ibid.*, *per* Lord Halsbury, L.C., at 104.

who does not aver that he has sustained any special damage, only claims an injunction. That circumstance cannot make any difference in his favour. Damages and injunction are merely two different forms of remedy against the same wrong: and the facts which must be proved in order to entitle the plaintiff to the first of these remedies are equally necessary in the case of the second. The onus resting upon a plaintiff who asks an injunction and does not say that he has as yet suffered any special damage, is, if anything, the heavier, because it is incumbent upon him to satisfy the Court that such damage will necessarily be occasioned to him in the future" (*f*).

This dictum has been described as the "high-water mark in favour of the plaintiff on this point" (*g*) but has never been dissented from.

There is a further concession in favour of plaintiffs upon this point, namely that in such cases evidence of general loss of business, as distinct from the loss of particular known customers, constitutes sufficient special damage to support the action. Thus when the publication complained of was a statement in a local Welsh newspaper that the plaintiff had ceased to carry on business, and that the firm of Ratcliffe & Sons no longer existed, it was held that evidence of such general loss of business was admissible, inasmuch as it was impossible to specify the names of persons who might, but for the announcement complained of, have dealt with the plaintiff firm.

"This case (*h*) shows, what sound judgment itself dictates, that in an action for falsehood producing

(*f*) *White* v. *Mellin*, [1895] A. C. 154, *per* Lord Watson, at 165. See Chapter 14.

(*g*) *Dunlop* v. *Maison Talbot* (1904), 20 T. L. R. 579, *per* Collins, M.R., at 581.

(*h*) *Hargrave* v. *Le Breton* (1769), 4 Burr. 2422.

damage to a man's trade, which in its very nature is intended or reasonably likely to produce, and which in the ordinary course of things does produce, a general loss of business, as distinct from the loss of that known customer, evidence of such general decline of business is admissible. In *Hargrave* v. *Le Breton* (*h*) it was a falsehood openly promulgated at an auction. In the case before us to-day, it is a falsehood openly disseminated through the Press—probably read, and possibly acted on, by persons of whom the plaintiff never heard. To refuse with reference to such a subject-matter to admit such general evidence would be to misunderstand and warp the meaning of old expressions; to depart from, and not to follow, old rules; and in addition to all this, would involve an absolute denial of justice and of redress for the very mischief which was intended to be committed" (*i*).

2. **Falsity.**—The second essential ingredient which the plaintiff must establish in such a cause of action is the falsity of the statement he complains of.

"It is essential, in order to give a cause of action, that the statement should be false. . . . If the statement be true, if there really be the infirmity in the title that is suggested, no action will lie" (*k*). "Unless he shows falsehood and malice and an injury to himself, the plaintiff shows no case to go to the jury" (*k*).

With regard to actions for slander of goods, however, the rule must be taken as subject to this important qualification, namely, that if the statement complained of alleges no more than that the defendant's goods are

(*h*) (1769), 4 Burr. 2422.
(*i*) *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524, *per* Bowen, L.J., at 533.
(*k*) *Pater* v. *Baker* (1847), 3 C. B. 831, *per* Maule, J , at 868, 869.

better than the plaintiff's, such a statement, even if false, will give no cause of action (*l*).

In a case decided in 1895, the plaintiff, who was the proprietor of an article now well known as Mellin's Food, complained of the conduct of the defendant, who was a chemist and a retailer of Mellin's Food, in affixing to the wrappers of Mellin's Food which he sold a label, recommending to the public a rival food of which he was himself the proprietor, which was stated by the label to be "far more nutritious and healthful than any other preparation yet offered." The trial Judge held that the plaintiff's case disclosed no cause of action; the Court of Appeal ordered a new trial; but the House of Lords restored the judgment of the trial Judge, and after alluding to the absence of any proof either of malice or of special damage, Lord Herschell, L.C., proceeded as follows:—

> "But, my Lords, I cannot help saying that I entertain very grave doubts whether any action could be maintained for an alleged disparagement of another's goods, merely on the allegation that the goods sold by the party who is alleged to have disparaged his competitor's goods are better either generally or in this or that particular respect than his competitor's are. . . . In *Evans* v. *Harlow* (*l*), Lord Denman expressed himself thus: 'The gist of the complaint is the defendant's telling the world that the lubricators sold by the plaintiff were not good for their purpose, but wasted the tallow. A tradesman offering goods for sale exposes himself to observations of this kind, and it is not by averring them to be "false, scandalous, malicious and defamatory" that the plaintiff can found a charge of libel upon them. To decide so would open a very wide door to litigation,

(*l*) *Evans* v. *Harlow* (1844), 5 Q. B. 624.

and might expose every man who said his goods were better than another's to the risk of an action.' My Lords, those observations seem to me to be replete with good sense . . . and I think it is impossible not to see that, as Lord Denman says, a very wide door indeed would be opened to litigation, and that the Courts might be constantly employed in trying the relative merits of rival productions, if an action of this kind were allowed. . . . Indeed, Courts of law would be turned into a machinery for advertising rival productions, by obtaining a judicial determination which of the two was the better" (*m*).

Such a statement as is here referred to must be carefully distinguished, it need hardly be added, from statements which disparage goods in other respects, *e.g.*, by alleging that they contain deleterious ingredients. Thus, where the parties were rival manufacturers of artificial manure, and the defendants published a chemical analysis of four artificial manures, including their own and the plaintiffs', which stated that the plaintiffs' product "is altogether an article of low quality, and ought to be the cheapest of the four," it was held that this allegation was sufficient to support the declaration, or as we should now say, was sufficient, if true, to give the plaintiff a cause of action (*n*).

3. **Malice.**—The third ingredient which a plaintiff must establish in such an action is that the statement complained of was made maliciously, that is to say, with an intention of injuring the plaintiff, as opposed to a desire to protect or further the defendant's own interests.

"Lopes, L.J., adds the word 'maliciously', that it is actionable to publish maliciously without

(*m*) *White* v. *Mellin*, [1895] A. C. 154, *per* Lord Herschell, at 164.
(*n*) *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.* (1874), L. R. 4 Ex. 218. This case is wrong in reference to malice: see p. 41.

lawful occasion a false statement disparaging the goods of another person. By that it may be intended to indicate that the object of the publication must be to injure another person, and that the advertisement is not published *bona fide* merely to sell the advertiser's own goods, or at all events that he published it with a knowledge of its falsity. One or other of these elements, it seems to me, must be intended by the addition of the word 'maliciously'" (*o*).

Malice in this sense must be distinguished from the technical allegation made in every pleading in an action for defamation, that the words complained of were "falsely and maliciously" published.

> "The word maliciously, as used in a pleading, has only a technical meaning; but here we are dealing with malice in fact, and malice then means a wrong feeling in a man's mind" (*p*).

The law is now well settled, that in the class of action now under consideration, the plaintiff must satisfy the jury that the defendant published the statement complained of with malice, in the sense of an intention to injure him. The confusion, if any, which has arisen from some of the older authorities in dealing with this point arises from the various shades of meaning which are or have been attached to the word "malice," and the efforts of Judges to explain the sense in which they use it by the addition of expressions intended to be explanatory but which are actually misleading, such as "actual" malice, "express" malice, "without lawful justification or excuse," or "without an honest belief in the truth of the statement". Such explanations have been used to suggest that want of honest belief or of justification is

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(*o*) *White* v. *Mellin*, [1895] A. C. 154, *per* Lord Herschell, at 161.
(*p*) *Clark* v. *Molyneux* (1877), 3 Q. B. D. 237, *per* Brett, C.J., at 247.

equivalent to malice. While it is of course very relevant, in deciding whether a statement is made with intent to injure, to see whether it was believed when it was made, or whether there was any justification for making it, yet it is essential to distinguish evidence of malice, however convincing, from malice as a fact, which is what is required (*q*).

In 1813, Lord Ellenborough, in dissenting from the language of the summing-up in the case before him, said:—

> "In that way it might have been left to them [the jury] not if you think that no man of a rational understanding would have come to such a conclusion, but you will say whether you think that this defendant, with such an understanding as he possesses, did *bona fide* arrive at the conclusion which he has stated, or whether he did not use it as a mere pretence, colour or cloak for his malice. That would have been the way, without putting it on the rationality of the defendant's conclusion . . . the *bona fides* of the communication, and not whether a man of rational understanding would have done so and so, is the question to be canvassed. A man of intemperate passions, or of weak understanding, or a man acting under an erroneous impression, may be carried further than a man of more mature judgment; but still he would not be liable to an action of slander of this sort" (*r*).

The latter part of this passage was adopted by Wilde, C.J., in the following case.

A surveyor of highways attended a public auction at which some unfinished houses were to be put up for sale, and stated his intention of exercising a power which he

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(*q*) See *B. R. C.* v. *C. R. C. and L. C. C.*, [1922] 2 K. B. 260.
(*r*) *Pitt* v. *Donovan* (1813), 1 M. & S. 639, at 645.

supposed he had, of preventing the completion of the buildings by intending purchasers pending the repair of certain roadways. It was held that malice was not to be inferred from the circumstance that he had acted on an incorrect view of his duty, founded upon an erroneous construction of the statute under which he was appointed.

> "It seems to have been admitted—and indeed it could not well have been denied—that proof of actual malice was requisite to sustain the action" (*s*).
>
> ". . . The question is whether there was anything in it that could properly be submitted to a jury as evidence of malice; whether the defendant was actuated by a malicious intention to injure the plaintiff, and was not acting under a mere misconception of the power and authority vested in him by statute" (*s*).

In 1874 Bramwell and Pollock, BB., both seemed to think that malice was unnecessary:—

> "But if actual malice is necessary—which I do not think is the case" (*t*); and "Now I do not attach any special importance to the word 'maliciously' except so far as it may be taken with the words 'contriving and intending to injure the plaintiff'" (*t*).

But this case, though never overruled, must give way to later authorities in so far as it is inconsistent with them.

In 1881, Lord Coleridge, C.J., said:

> ". . . it is not enough that the statement should be untrue, but there must be some evidence, either from the nature of the statement itself or otherwise, to satisfy the Court or the jury that the statement [complained of] was not only untrue, but was made

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(*s*) *Pater* v. *Baker* (1847), 3 C. B. 831, at 855, 861.
(*t*) *Western Counties Manure* v. *Lawes Chemical Manure Co.* (1874), L. R. 4 Ex. 218, at 222, 223.

mala fide for the purpose of injuring the plaintiff, and not in the *bona fide* defence of the defendant's own property" (*u*);

and Lindley, L.J., said:

"If I say that honestly [that someone is infringing my patent], I am not liable to an action for damages. If I say it dishonestly, I am so liable, and if I know that what I say is untrue, it would not take much to persuade a jury that I was acting dishonestly" (*u*).

The parties were rival manufacturers of baking powder, and both claimed the right to use the words, "Royal Baking Powder" by way of a trade mark. The defendants were successful, and a few days later they issued a circular calling attention to the decision of the Court in their favour, and adding: "We are compelled to give notice to the trade generally that it is our intention to proceed against anybody selling American baking powder in tins bearing either of the labels which have been struck off the Register of the Court." It was held on the evidence that the circular was issued, not in good faith in support of a claim of right really made or intended to be exercised by the defendants who had issued it, but maliciously with intent to injure the business of the plaintiffs. Lord Davey said:

"To support such an action it is necessary for the plaintiffs to prove (1) that the statements complained of were untrue; (2) that they were made maliciously, *i.e.* without just cause or excuse; (3) that the plaintiffs have suffered special damage thereby. . . . It is only repeating the same proposition in another form if I add that the threat to sue must be shown to have been made for the

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(*u*) *Halsey* v. *Brotherhood* (1881), 19 Ch. D. 386, at 388, 392.

purpose of injuring the plaintiffs, and not for the *bona fide* protection of the defendants' rights" (*x*).

In 1904 Collins, M.R., is reported to have said that "It was not malice if the object of the writer was to push his own business. To make the act malicious, it must be done with the direct object of injuring that other person's business. Therefore, the mere fact that it would injure another person's business was no evidence of malice" (*y*).

Finally, in 1922, McCardie, J., in a judgment which contained an exhaustive review of all the relevant authorities, said:—

"It is strange indeed that at the present time a doubt should exist as to what the word 'malice' means. . . . I cannot help feeling that much of the confusion which exists on the question of malice in regard to actions for slander of title has arisen from the oft-cited passage from the judgment of Lord Davey. . . . He there says 'To support such an action it is necessary for the plaintiffs to prove: (1) that the statements complained of were untrue; (2) that they were made maliciously, *i.e.*, without just cause or excuse; (3) that the plaintiffs have suffered special damage thereby.' This passage is usually quoted by itself, and undoubtedly suggests that the absence of 'just cause or excuse' is equivalent to 'malice'. But in the words which follow the above-quoted passage Lord Davey rectifies, to some extent, the prior impression created. He proceeds: 'The damage is the gist of the action, and therefore, according to the old rules of pleading, it must be alleged and proved. It is only repeating the same proposition in another form if I add that the threat

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(*x*) *Royal Baking Powder Co.* v. *Wright, Crossley & Co.* (1900), 18 Pat. Cas. 95, at 99.

(*y*) *Dunlop* v. *Maison Talbot* (1904), 20 T. L. R. 579, at 581.

to sue must be shown to have been made for the purpose of injuring the plaintiffs, and not for the *bona fide* protection of the defendants' rights, and without any intention to follow it up by action or other legal proceedings.' Malice as a fact, must I think always be distinguished from the facts which afford proof of malice. The mere absence of just cause or excuse is not of itself malice. . . . In deciding that no malice is here proved, I do not overlook the fact that a person who says that which he knows to be false may and should as a rule be found guilty of actual malice" (*z*).

The authority of this judgment has not been affected by more recent decisions (*a*).

A finding by the jury that the defendant acted *mala fide* towards the plaintiff has been held not to amount to a finding of malice in the sense of an intention to injure the plaintiff, and this form of finding should therefore be avoided (*b*).

A claim for slander of title survives the death of the plaintiff, and may be continued by his personal representative to the extent of the damage done to the deceased's property (*c*). There would seem no logical reason why this authority should not equally apply in the case of slander of goods.

This action, which is technically known as an action for malicious words, is not confined to actions for words which have caused the plaintiff commercial damage. Provided the plaintiff can establish the three ingredients, namely, damage, falsity, and malice, he can succeed. Thus, where the plaintiff was a married woman, who was told by the defendant that her husband had met with an

(*z*) *B. R. C.* v. *C. R. C. and L. C. C.*, [1922] 2 K. B. 260, at 267, 271.
(*a*) *Shapiro* v. *La Morta* (1923), 40 T. L. R. 39; *Balden* v. *Shorter*, [1933] Ch. 427.
(*b*) *Shapiro* v. *La Morta* (1923), 40 T. L. R. 39.
(*c*) *Hatchard* v. *Mège* (1887), 18 Q. B. D. 771.

accident and had had both his legs broken, and became seriously ill in consequence, it was held that the action lay, as she proved that the words were false to the defendant's knowledge and that they were spoken maliciously (*d*).

(*d*) See *Janvier* v. *Sweeney*, [1919] 2 K. B. 316.

CHAPTER 5.

CONSTRUCTION.

THE question whether a particular statement is defamatory or was understood in a defamatory sense on the occasion on which it was published, is a question for the jury. But before the plaintiff can have this question left to them, he must satisfy the Judge that the statement is one which is reasonably capable of bearing a defamatory meaning.

This is an application of the general principle of law, that while questions of fact are for the jury to decide upon the evidence, the prior question whether there is any evidence upon which a rational verdict can be founded is a question of law for the Judge (*a*). From this it follows that before the jury's verdict can be taken on any particular publication, the Judge must first be satisfied that it is capable of being understood by reasonable people as a libel or slander, or, in other words, that it is reasonably capable of bearing a defamatory meaning.

The question whether a particular publication can be construed as a libel is a question of law for the Judge.

> "It has been stated over and over again and it is not in dispute that the question for the judge is whether the writing or publication complained of is capable of a libellous meaning. It is for the jury, if the judge so rules, to say whether it has that meaning" (*b*).

If the Court considers the document complained of incapable of a defamatory meaning, the Judge should

(*a*) *Henwood* v. *Harrison* (1872), L. R. 7 C. P. 606, *per* Willes, J., at 628.
(*b*) *Tolley* v. *Fry*, [1931] A. C. 333, *per* Viscount Dunedin, at 343.

not allow the jury's verdict to be taken upon that question, but should direct a verdict for the defendant. But this course will be adopted only in the clearest cases.

> "The Judge, in considering whether he should withhold from the jury a document which is complained of as libellous, ought to ask himself whether it would be wholly unreasonable to attribute a libellous meaning to it" (*c*).
>
> ". . . It is only when the Judge is satisfied that the publication cannot be a libel, and that, if it is found by the jury to be such their verdict will be set aside, that he is justified in withdrawing the question from their cognizance" (*d*).

Statement of Principles of Construction.—The principles upon which the Courts act in ascertaining the proper construction to be placed upon a document alleged to be libellous, may be stated in the language used in the House of Lords in 1882 (*e*). In that case the defendants, Messrs. Henty & Sons, were brewers in Chichester, and in consequence of a grievance which they imagined they had against the manager of a branch of the plaintiff bank, they circularised their customers in the following terms:—

> "Messrs. Henty & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of 'The Capital and Counties Bank'."

This circular caused a run on the bank which occasioned them considerable damage, and they thereupon took proceedings for libel.

The defendants contended that the circular was incapable of defamatory meaning. By the time the case

(*c*) *Beamish* v. *Dairy Supply Co.* (1897), 13 T. L. R. 484, *per* Esher, M.R., at 484.
(*d*) *Cox* v. *Lee* (1869), L. R. 4 Ex. 284, *per* Kelly, C.B., at 288.
(*e*) *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741.

reached the House of Lords, four Judges had already decided that it was so capable, and it was argued (*inter alia*) that in face of these decisions the House of Lords could hardly decide that the document was such that no reasonable man could place a defamatory construction upon it. This argument, however, did not prevail, and it was held that the words of the circular were incapable of a defamatory meaning. Lord Selborne laid down the law as follows:—

> "The test according to the authorities, is whether, under the circumstances in which the libel was published, reasonable men to whom the publication was made would be likely to understand it in a libellous sense" (*f*).

and Lord Blackburn:—

> "There are no words so plain that they may not be published with reference to such circumstances, and to such persons knowing these circumstances, as to convey a meaning very different from that which would be understood from the same words used under different circumstances" (*g*).
>
> "In construing the words to see whether they are a libel, the Court is, where nothing is alleged to give them an extended meaning, to put that meaning on them which the words would be understood by ordinary persons to bear, and to say whether the words so understood are calculated to convey an injurious imputation. The question is not whether the defendant intended to convey that imputation, for if he, without just cause or excuse, did what he knew or ought to have known was calculated to injure the plaintiff he must, at least civilly, be responsible for the consequences" (*h*).

(*f*) *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas., at 745.
(*g*) *Ibid.*, at 771.
(*h*) *Ibid.*, at 772.

". . . As Brett, L.J., says (*i*), it is unreasonable that when there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document" (*k*).

The rule thus laid down has been repeatedly referred to and acted upon, and may be accepted as authoritative.

The application of the rule to the facts of particular cases, however, is not always a matter of such simplicity as the language in which the rule has been expressed. In few reported cases have the Judges been unanimous in the view they have taken; and indeed of the eleven Judges who considered the cases in which the judgments just cited were delivered, no more than six adopted the view which ultimately prevailed in favour of the defendants.

Illustrations.—Illustrations of the application of the rule are afforded by the following cases in which the statement complained of has been held incapable in law of bearing a defamatory meaning:—

Termination of Business Relations.

"Messrs. Henty & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of 'The Capital and Counties Bank'" (*l*).

"The public are informed that X's connection with the Institute has ceased, and that he is not authorised to receive subscriptions on its behalf" (*m*).

"The Agency of Lord William Nevill has been closed by the Directors" (*n*).

"H. Beswick is no longer in our employ. Please

(*i*) *Capital and Counties Bank* v. *Henty* (1880), 5 C. P. D., at 541.
(*k*) *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741, at 786.
(*l*) *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741.
(*m*) *Mulligan* v. *Cole* (1875), L. R. 10 Q. B. 549.
(*n*) *Nevill* v. *Fine Arts, etc., Co.*, [1897] A. C. 68.

give him no order or pay him any money on our account" (*o*).

Endorsement of Cheques.

"Reason assigned—not stated" (*p*).

"R. D." (*q*).

Bills of Exchange.

"Number 19317 unpaid" (*r*).

Denial of Rumour.

"We are requested to state that the Hon. Sec. of the Tichborne Defence Fund is not and never has been a Captain in the Royal Artillery as he has erroneously been described" (*r*).

The following words were held capable of defamatory meaning:—

"The milk sent by you on the 15th was 3 quarts short. The attention of the railway official was called to it before we accepted the consignment. We received 4 barn gallons 5 quarts. Kindly see that this quantity is entered in your books" (*s*).

The following words were held incapable of a defamatory meaning, without evidence of extrinsic circumstances to show they bore a defamatory sense:—

Placing the name of a motor trader on the "Stop List" (*t*).

The following words were left to the jury, who found no libel:—

"We regret to inform you that we have been

(*o*) *Beswick* v. *Smith* (1907), 24 T. L. R. 169.
(*p*) *Frost* v. *L. J. S. Bank* (1906), 22 T. L. R. 760.
(*q*) *Flach* v. *L. S. W. Bank* (1915), 31 T. L. R. 334, *per* Scrutton, J., *obiter*.
(*r*) *Hunt* v. *Goodlake* (1873), 43 L. J. C. P. 54.
(*s*) *Beamish* v. *Dairy Supply Co.* (1897), 13 T. L. R. 484.
(*t*) *Ware and de Freville* v. *Motor Trade Assocn.*, [1921] 3 K. B. 41.

obliged to make a change in our representative, and we no longer have the services of Mr. Burke" (*u*).

Special Circumstances Giving Defamatory Meaning.—Language or conduct which in its natural and ordinary meaning is innocuous may be rendered defamatory by reason of special circumstances in which it was published. If these circumstances are, or ought to have been, known to those to whom the libel is published, the plaintiff has a cause of action: and it is immaterial that the publisher was ignorant of them, if they were known to reasonable people, who were led to understand the publication in a defamatory sense (*x*).

Illustrations.—Thus, where the defendant published an announcement containing the names of artistes engaged to sing at a concert, and placed the plaintiff's name third in the list, the plaintiff succeeded in an action for libel, by reason of the special circumstances in which the publication was made. The plaintiff was a celebrated singer, and complained of injury to her professional reputation by reason of the position in which her name was placed in the list. Evidence was given that the middle of such a list was considered an inferior position, as compared with the beginning and the end, and the Judge accordingly held that there was evidence to go to the jury of special circumstances, which might give the words a defamatory meaning. The Court of Appeal upheld the Judge's ruling, Lord Esher saying:—

> "Here a particular class of people and a particular publication were being dealt with, and evidence was given that . . . the order in which the names were placed had a particular meaning. It was stated in evidence . . . that the beginning and end

(*u*) *Burke* v. *Ellison*, The Times, January 27, 1910.
(*x*) *Cassidy* v. *Daily Mirror*, [1929] 2 K. B. 331.

in such announcements were superior positions as compared with the middle. . . . These circumstances, giving to the words a meaning other than their natural meaning, were matters which the Judge could not have withdrawn from the jury and it would have been impossible for him to say that the words could not be libellous" (*y*).

Again, the plaintiff was a well-known amateur golfer and the defendants published a caricature depicting him in the act of driving a golf ball. Such a caricature might have been harmless in itself: but the defendants were chocolate manufacturers, and the caricature was used as part of an advertisement for their chocolate. The plaintiff complained of injury to his amateur status as a golfer, on the ground that the caricature suggested that he had received payment for the use of the caricature. Evidence was given that such payment would imperil his amateur status, and the House of Lords held that this damaging inference was one which a jury might reasonably draw from the caricature, having regard to the circumstances in which it was published.

". . . I find that the caricature of the plaintiff, innocent in itself as a caricature, is so to speak embedded in an advertisement. It is held out as part of the advertisement, so that its presence there gives rise to speculation as to how it got there, or in other words provokes in the mind of the public an inference as to how and why the plaintiff's picture, caricatured as it was, became associated with a commercial advertisement. The inference that is suggested is that his consent was given either gratuitously or for a consideration for its appearance. . . . It seems to me that all this is within the province of a jury to determine. The idea of an inference in the

(*y*) *Russell* v. *Notcutt* (1896), 12 T. L. R. 195, *per* Esher, M.R., at 195.

circumstances is not so extravagant as to compel a Judge to say it was so beside the mark that no jury ought to be allowed to consider it" (*z*).

Or again, a wax figure of the plaintiff was exhibited to public view for payment. The plaintiff had been tried for murder in Scotland and a Scottish jury had returned a verdict of "not proven." It was held that the exhibition of this figure was defamatory by reason of the fact that it was placed in juxtaposition with other figures representing a convicted prisoner, a fugitive from justice not then captured, and another who escaped justice by suicide (*a*).

In cases where it is sought to make apparently innocent statements defamatory by proof of extrinsic facts or circumstances, it is not necessary that these facts or circumstances should be known to the person who published the document. It is sufficient if they are known to the person to whom the statement was published (*b*).

Thus, just as a libellous statement in a novel about a named character whom the author imagined to be fictitious, but who in fact existed, may be a libel upon the person who bears that name (*c*), so a statement about A may in certain circumstances be a libel upon B who is not mentioned; as, for instance, where the announcement of the engagement of a married man was held to be a libel on his wife, who was not mentioned, imputing that she was not married but had been his mistress; and the fact that the publishers were unaware that Mr. C was married was held to be no defence (*d*).

The Innuendo.—It is usual for the plaintiff in his statement of claim to place upon the words of which he

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(*z*) *Tolley* v. *Fry*, [1931] A. C. 333, *per* Lord Dunedin, at 342.
(*a*) *Monson* v. *Tussauds*, [1894] 1 Q. B. 671.
(*b*) *Cassidy* v. *Daily Mirror*, [1929] 2 K. B. 331.
(*c*) *Hulton* v. *Jones*, [1910] A. C. 20.
(*d*) *Cassidy* v. *Daily Mirror*, [1929] 2 K. B. 331.

complains, an innuendo which sets out the defamatory meanings which the plaintiff attributes to them. In strictness, such an innuendo is necessary only when the words in their natural and ordinary meaning are meaningless or innocent, and become defamatory only by reason of special circumstances. But it is now the very general practice to place an innuendo upon words which are complained of as a libel. Such a statement of claim will be taken as containing two counts, one with the innuendo (*dd*) and one without it. And if the plaintiff fails to establish that the words bear the meanings which he attributes to them by his innuendo, he may still succeed if he can show that in their natural and ordinary meaning the words are defamatory.

> "The innuendo must represent what is a reasonable, natural, or necessary inference to be drawn from the words used, regard being had to the occasion and the circumstances of their publication" (*e*).
>
> "It is for the Court to determine whether the words used are capable of the meaning alleged in the innuendo" (*f*).

Great care should therefore be taken to see that the innuendo placed upon the words complained of is not too wide (*ff*). The danger of doing so is aptly illustrated by two cases where actions for libel were brought upon identical publications with different innuendos and different results. The statement upon which the action in each case was brought was admittedly erroneous publication by the defendants of the name of the plaintiffs in their weekly list of persons against whom Decrees in Absence had been obtained in the Small Debts Courts in Scotland, the fact being (in each case) that the debt had been

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(*dd*) *Watkin* v. *Hall* (1868), L. R. 3 Q. B. 396.
(*e*) *Stubbs* v. *Russell*, [1913] A. C. 386, *per* Lord Shaw, at 399.
(*f*) *Australian Newspaper Co.* v. *Bennett*, [1894] A. C. 284, at 287.
(*ff*) See *Maisel* v. *Financial Times* (No. 1) (1915), 31 T. L. R. 192.

paid and the action dismissed. This list was headed by a note that, " . . . In no case does publication of the decree imply inability to pay."

The plaintiff in the first action pleaded that the words conveyed an imputation of insolvency, but the House of Lords held that the statement coupled with the explanatory note was not reasonably capable of bearing this meaning. Lord Shaw observed:—

> " These considerations illustrated the necessity for confining innuendos upon, and inferences from, words which in themselves are not libellous within the area which admits of their being made without strain and as an expression of the reasonable, natural, or necessary meaning of the words employed " (*g*).

In the second action the plaintiffs confined their innuendo to the imputation that they were " bad payers " and this innuendo was upheld by the House of Lords as a reasonable construction to place upon the publication (*h*).

" **Reasonably Capable.**"—The words must be reasonably capable of bearing the defamatory meaning alleged in the sense that they could be so understood by reasonable and unprejudiced people reading the publication for the first time. The mere fact that the plaintiff is in a position to call a witness who is prepared to say that he understood the words complained of in a libellous sense is not conclusive on the question of whether they are reasonably capable of bearing that meaning, in the absence of proof that the witness is a reasonable man.

> " The [plaintiff's] counsel relied on the fact that Messrs. Bartletts' cashier interpreted the slip [the publication complained of] in a defamatory sense.

(*g*) *Stubbs* v. *Russell*, [1913] A. C. 386, at 402.
(*h*) *Stubbs* v. *Mazure*, [1920] A. C. 66.

But this comes short of what is requisite. There was no evidence that the cashier was a reasonable person; on the contrary, he seemed to have acted unreasonably and precipitately" (*i*).

Publication must be Taken as a Whole.—The defendant is entitled to have the whole publication submitted to the jury, so that they may construe the entire document (*k*) and also any other documents referred to in the publication complained of which explain its meaning (*l*). The heading to a paragraph forms part of the paragraph (*m*). The plaintiff is not allowed to isolate certain passages which have a defamatory meaning. If

". . . In one part of the publication something disreputable of the plaintiff is stated, but that is removed by the conclusion, the bane and the antidote must be taken together" (*n*).

Conversely, the defendant cannot justify by proving the truth of isolated passages which have no defamatory meaning (*o*).

Intention of Writer Immaterial.—In determining the proper construction to be placed upon a statement complained of as defamatory, it is irrelevant to consider the meaning which the writer intended should be placed upon it.

"The question is not what the writer of an alleged libel means, but what is the meaning of the words he has used" (*p*).

(*i*) *Frost* v. *L. J. S. Bank* (1906), 22 T. L. R. 760, *per* Collins, M.R., at 762.

(*k*) See *Shipley* v. *Todhunter* (1836), 7 C. & P. 680, at 690.

(*l*) *Weaver* v. *Lloyd* (1824), 2 B. & C. 675.

(*m*) *Mangena* v. *Lloyd* (1908), 25 T. L. R. 26.

(*n*) *Chalmers* v. *Payne* (1835), 2 Cr. M. & R. 156, *per* Alderson, B., at 159.

(*o*) See Chapter 8.

(*p*) *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741, *per* Lord Bramwell, at 790.

"Liability for libel does not depend on the intention of the defamer, but on the fact of defamation" (*q*).

The following points of practice are worthy of notice:—

I. Evidence of Special Meaning.—A witness cannot be asked what he understood the words complained of to mean, until there is some evidence that they were understood in a meaning other than their natural and ordinary meaning.

"The proper course for counsel who proposes to get rid of the plain and obvious meaning of the words imputed to a defendant as spoken of the plaintiff is to ask the witness, not 'What did you understand by these words?' but 'Was there anything to prevent these words from conveying the meaning which obviously they would convey?' because if there was, evidence of that may be given and then the question may be put" (*r*).

II. Striking Out Statement of Claim.—A statement of claim in a libel action may, in the clearest cases, but only in the clearest cases, be struck out under Ord. XXV, r. 4, on the ground that the words complained of are incapable of a defamatory meaning. The question to be considered upon such an application is not whether the words are capable of a defamatory meaning, but whether the pleading discloses a reasonable cause of action, a question upon which the meaning of the words may not be conclusive (*s*). The chances of success in such an application must depend upon the circumstances of each particular case.

(*q*) *Cassidy* v. *Daily Mirror*, [1929] 2 K. B. 331, *per* Russell, L.J., at 354.
(*r*) *Daines* v. *Hartley* (1848), 4 Ex. 200, *per* Parke, B., at 206.
(*s*) *Moore* v. *Lawson*, [1915] 31 T. L. R. 418.

III. Verdict Usually Taken.—In order to obviate the necessity for a re-trial, it is usual to obtain a verdict of the jury upon the construction of the words, wherever possible. A verdict for the plaintiff on the ground that the jury consider the words defamatory will not prevent the trial Judge from entering judgment for the defendant if, upon further consideration, he decides that the words are incapable of a defamatory meaning.

> "When a judge at the conclusion of the plaintiff's case is asked to rule whether there is a case to go to the jury or not, he may certainly, I think, decline to rule that there is no evidence, may allow the defendants' evidence to be taken, may allow the verdict to go, and none the less give judgment for the defendants on the footing that there is no case" (*t*).

Pleading.—A denial of a defamatory meaning may be pleaded as follows:—

> "The defendants deny that the words complained of or any of them bore or were understood to bear or were capable of bearing the meanings alleged in the statement of claim or any of them or any defamatory meaning as alleged or at all."

(*t*) *Skeate* v. *Slaters, Ltd.*, [1914] 2 K. B. 429, *per* Buckley, L.J., at 438.

CHAPTER 6.

REFERENCE TO PLAINTIFF.

MATTERS dealt with in this chapter are really only one particular aspect of the law of Construction of Libel; but it has been thought convenient to treat this aspect separately in order to collect in one chapter the relevant authorities.

In order to found a cause of action in libel or slander, it is essential that the words complained of should refer to an ascertained individual, and that the plaintiff should establish by the evidence of reasonable people that that individual is himself.

Precise Description Unnecessary.—It does not matter if the individual is unnamed, provided he is sufficiently indicated by designation or description.

> "The question, if it be disputed whether the article is upon the plaintiff, is a question of fact for the jury, and in my judgment this question of fact involves not only whether the language used of a person in its fair and ordinary meaning is defamatory, but whether the person referred to in the libel would be understood by persons who knew him to refer to the plaintiff" (*a*).
>
> "Whether a man is called by one name or whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done, as if

(*a*) *Hulton* v. *Jones*, [1910] A. C. 20, *per* Lord Alverstone, at 25.

his name and christian name were ten times repeated" (*b*).

The defendant published a doggerel rhyme, of which the first verse was as follows:—

"*L——y the Bum.*

Come, follower, come,
Says L——y the bum;
We've rather a shy bird to nab to-day.
So their shandrydan
Mounted master and man
And o'er Oxford Street stones they rattled away."

The plaintiff, a bailiff, brought an action complaining that it referred to him; the jury found that it did not; but the Court held that the reference was so clear that the case was sent back for a new trial (*c*).

Again, where the plaintiffs (the respondents) were owners of a factory in the county of Waterford in Ireland, and the defendants published in their newspaper a letter drawing attention to certain cruelties which it was alleged were practised on the workpeople "in some of the Irish factories," and called their readers' attention to the letter by a paragraph which stated that "it seems that the abuses in the county of Waterford exceed even those committed in England," it was held that the libel was capable of referring and did refer to the plaintiffs (*d*).

Intention Immaterial.—The principle of construction, that the intention of the writer is immaterial in ascertaining the meaning to be placed upon the words, has been carried to extraordinary lengths in its application to the question under consideration.

(*b*) *Le Fanu* v. *Malcolmson* (1848), 1 H. L. C. 637, *per* Campbell, C.J., at 668.
(*c*) *Levi* v. *Milne* (1827), 4 Bing. 195.
(*d*) *Le Fanu* v. *Malcolmson* (1848), 1 H. L. C. 637.

A Manchester paper published by the defendants (the respondents), a firm called Hulton & Co., published what was supposed to be an amusing article about a gentleman named Artemus Jones, who, on one side of his life, was a blameless churchwarden at Peckham, and, on the other side of his life, indulged in wild carouses unfitted for such a churchwarden, at Le Touquet. A Mr. Artemus Jones—there may have been several—conceived that that article was a libel upon him and he brought an action accordingly. The editor and proprietors of the paper said, rightly or wrongly, that they had never heard of Mr. Artemus Jones as an existing being, and that they had not the slightest intention of libelling him. There was some unfortunate doubt whether the gentleman who wrote the article had not a personal grudge against the real Mr. Artemus Jones, but at any rate the proprietors and publishers of the papers said: "We are innocent of any intention to injure Mr. Artemus Jones, of whom we have never heard." It was nevertheless held that the intention of the publishers was irrelevant, and the plaintiff was entitled to recover. It was said in the judgment:—

> "If the intention of the writer is immaterial in considering whether the matter written is defamatory, I do not see why it need be relevant in considering whether it is defamatory of the plaintiff" (*e*).

Again, the plaintiff, a man who was sometimes called General Corrigan and sometimes Cassidy, being at a race meeting, conceived the idea of being photographed with a young lady to whom he said he was engaged. This photograph was sent up as an object of interest to a daily paper, which a once inserted it. Now, it so happened that the General was in fact married to a lady who lived in a London suburb and was visited by the suburban ladies in the vicinity who had hitherto considered that

(*e*) *Hulton* v. *Jones*, [1910] A. C. 20.

she was an honest married woman. When they took in the daily paper and saw that the gentleman known to them as the husband of the lady was represented as being engaged to somebody else, they very naturally, as respectable women, conceived evil ideas of the lady whom they had hitherto thought to be an honest woman and whom they now suspected of being the general's mistress. Thereupon the lady brought an action against the paper, who said: "We never heard of you, we had no intention of libelling you, and we did not know you existed. All we have done is to publish an interesting photograph, stating that the gentleman in the photograph says he is engaged to the lady in the photograph" (*ee*).

It was held that the fact that the publishers were clearly quite innocent of any libellous intention was no defence.

> "It is impossible for the person publishing a statement which, to those who know certain facts, is capable of defamatory meaning in regard to A, to defend himself by saying 'I never heard of A and did not mean to injure him'" (*f*).

In a recent case, the defendants issued a talking film entitled "Rasputin, the Mad Monk," depicting incidents in the life of a notorious Russian personality, including the rape by him of a Russian princess, and his subsequent assassination by that princess's betrothed. The plaintiff, who was a Russian princess, complained that the princess in the film referred to herself, and called evidence to show that the character had been so understood. There were also certain points of resemblance between the plaintiff's husband and the film assassin who afterwards became the husband of the film princess, and the jury

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(*ee*) Taken substantially from the judgment of Scrutton, L.J., in *Youssoupoff* v. *Metro-Goldwyn-Mayer* (1934), 50 T. L. R., at p. 583.

(*f*) *Cassidy* v. *Daily Mirror*, [1929] 2 K. B. 331, *per* Scrutton, L.J., at 341.

found that the plaintiff was the person referred to in the film, and the Court of Appeal refused to disturb their verdict.

> "We follow the law that though the person who writes and publishes the libel may not intend to libel a particular person and, indeed, has never heard of that particular person, the plaintiff, yet, if evidence is produced that reasonable people knowing some of the circumstances, not necessarily all, would take the libel complained of to relate to the plaintiff, an action for libel will lie" (*g*).

Evidence of Identification must be Reasonable.—The only limitation upon the application of those principles would seem to be that the persons by whom evidence of identification is given must be reasonable persons. This seems to follow from observations in the judgments quoted and particularly from the judgment in a case quoted in the preceding chapter:—

> "Counsel relied upon the fact that [the] cashier interpreted the slip [the publication complained of] in a defamatory sense. But this comes short of what is requisite. There was no evidence that the cashier was a reasonable person; on the contrary, he seems to have acted unreasonably and precipitately" (*h*).

An expressed disclaimer of intention of referring to any known person would clearly be no defence, but it might well be relevant, if given due prominence, on the question of the reasonableness of the evidence of identification.

Several Plaintiffs.—Subject to the relevant Rules of the Supreme Court, several persons injured by the same

(*g*) *Youssoupoff* v. *Metro-Goldwyn-Mayer* (1934), 50 T. L. R. 581, *per* Scrutton, L.J., at 583.

(*h*) *Frost* v. *L. J. S. Bank* (1906), 22 T. L. R. 760, *per* Collins, M.R., at 762.

libel may join in one action in respect of it. There is a limit to the number of persons who can complain of being libelled as a class, but what that precise limit is has never been laid down.

> "The declaration here alleges that the plaintiffs are partners in carrying on their factory in Ireland, and it alleges that the libel is speaking of them in their trade: and there are innuendos applying the different parts of the libel to the plaintiffs in their trade. . . . Now suppose that several persons were in partnership as grocers, and it was alleged that they sold by false measure or false weight, or that they adulterated their goods; they might bring a joint action for that; that would be an allegation as to the manner in which the business was carried on, and I apprehend whenever there is slander, whether written or spoken, imputing to partners that they fraudulently and contrary to law employ a particular mode to carry on business, that is a libel in which they must be jointly included as partners in their trade. I know of no case which at all impugns that proposition" (*i*).

Who is the Proper Plaintiff.—The question who is the proper plaintiff depends upon the construction of the libel. We have seen that a libel may be a reflection on a person not named in it. And similarly a libel may be a reflection either on the personal character or upon the trade or professional character, and it is not always easy to say whether it is one or the other, and if so which, or both.

> "Suppose the plaintiff was a merchant who dealt in wine, and it was stated that the wine which he had for sale of a particular vintage was not good

(*i*) *Le Fanu* v. *Malcolmson* (1848), 1 H. L. C. 637, *per* Campbell, C.J., at 669, 670.

wine; that might be so stated as only to import that the wine of that particular year was not good in whosesoever hands it was, but not to imply any reflection on his conduct of his business. In that case the statement would be with regard to his goods only, and there would be no libel, although such a statement, if it were false and were made maliciously, with intention to injure him, and it did injure him, might be made the subject of an action on the case. On the other hand, if the statement were so made as to import that his judgment in the selection of wine was bad, it might import a reflection on his conduct of his business, and show that he was an inefficient man of business. If so, it would be a libel. In such a case a jury would have to say which sense the libel really bore: if they thought it related to goods only, they ought to find that it was not a libel; but if they thought that it related to the man's conduct of business they ought to find that it was a libel" (*k*).

"It is quite possible to make a reflection which by the mere form of expression would seem to be only a criticism of goods, but nevertheless would involve a reflection upon the seller or maker. Could it be gravely argued that to say of a fishmonger that he was in the habit of selling decomposed fish would not be a libel upon him in the way of his trade? and if so, would it not be a mere juggle with language to alter the form of that allegation and to say that all the fish in a shop is decomposed? Or to say of a baker that such a baker's bread is always unwholesome? In each of these cases you could adopt a form of speech which would seem only to deal with the article sold or manufactured, but in each case it would

(*k*) *South Hetton Coal Co.* v. *N. E. News Assocn.*, [1894] 1 Q. B. 133, *per* Esher, M.R., at 139.

certainly tend to, and probably succeed in, destroying the trade of the person thus referred to" (*l*).

The defendants published a long article attacking a tramway system worked under patent owned by the plaintiffs, who brought an action for libel and recovered £12,000. The verdict and judgment were set aside by the Court of Appeal, who held the words incapable of being understood as a libel on the plaintiffs, and they further held that though the article complained of might be an attack upon their system, it was not actionable as amounting to slander of goods inasmuch as the plaintiffs had proved no special damage (*m*).

A statement may well be a reflection both upon the personal and upon the trading character of the plaintiff so as to enable him to sue both for libel and for trade libel. In an action for trade libel, additional difficulties are placed in the way of success of the plaintiff (*n*); but on the other hand he may very probably obtain a more substantial verdict.

Pleading.—*Statement of Claim.*—It is essential to insert the allegation that the words complained of were spoken "of and concerning the plaintiff", and also the words "meaning the plaintiff" after references to the plaintiff in the libel by a pronoun:—

> "The defendant falsely and maliciously wrote and published of and concerning the plaintiff the words following, that is to say: 'He (meaning the plaintiff) as good as killed John Smith.'"

Defence.—"The said words do not refer to the plaintiff."

(*l*) *Linotype Co.* v. *B. E. Typesetting Co.* (1899), 81 L. T. 333, *per* Lord Halsbury.

(*m*) *Griffiths* v. *Benn* (1911), 27 T. L. R. 346.

(*n*) See Chapter 4.

CHAPTER 7.

PUBLICATION.

No civil action (*a*) can be maintained in England (*b*) in respect of a defamatory statement unless the plaintiff can establish that it has been published to a third person, that is to say, to some person other than the plaintiff or defendant.

Publication to the Plaintiff Insufficient.—Publication to the plaintiff is not sufficient to found the action.

> "You cannot publish a libel of a man to himself" (*c*).

A man may tell his wife what he pleases of another person with impunity, for communication of the libel to the defendant's husband or wife does not amount to publication. Husband and wife are held to be one in law for this purpose, as long as they are living together (*d*); but if they are living apart, either divorced (*e*), or judicially separated (*f*), or under a separation order (*g*), such communication may amount to publication.

A libel on a man may be effectively published by telling his wife (*h*), though such publication may be privileged.

(*a*) *Aliter* in criminal proceedings.
(*b*) *Aliter* in Scotland: *Mackay* v. *McCaukie* (1883), 10 R. 537.
(*c*) *Pullman* v. *Hill*, [1891] 1 Q. B. 524, *per* Esher, M.R., at 527.
(*d*) *Wennhak* v. *Morgan* (1888), 20 Q. B. D. 635.
(*e*) *Wenman* v. *Ash* (1853), 15 C. B. (N.S.) 536.
(*f*) *Cuenod* v. *Leslie*, [1909] 1 K. B. 880.
(*g*) *Robinson* v. *Robinson* (1897), 13 T. L. R. 564.
(*h*) *Watt* v. *Longsdon*, [1930] 1 K. B. 130.

Burden of Proof.—The burden of proving publication is, in all cases, upon the plaintiff. In the case of a slander, publication must be proved out of the mouth of that indispensable witness who heard the slander uttered. In the case of libel publication must be proved, as a rule by calling a witness to say that the libel was read; but in certain cases of libel the plaintiff is assisted by certain presumptions which are made in his favour, which it is for the defendant to rebut if he can. Thus, there is a rebuttable presumption that a letter has been published to the addressee, which arises on proof of posting the letter (*i*). There is a presumption that the contents of a telegram have been published to the post office officials, which would seem irrebuttable from the practical point of view (*k*). There is also the presumption that the writing on a postcard will be read by somebody in the course of its transit.

> "It is assumed that what you write upon a postcard will be read. . . If the defendant could establish that the postcard was never read by a single person—although it is very difficult to conceive that such proof could be given—he would, notwithstanding the presumption, succeed in the action, because he would have proved that there was no publication" (*l*).

Similarly, the presumption will be effectively rebutted by proof that the message on the postcard omitted any intelligible reference to the plaintiff (*m*).

In all other cases the plaintiff must establish affirmatively that there was publication to a third person. Where publication is denied, it is generally easily proved by means of interrogatories.

(*i*) *Shipley* v. *Todhunter* (1836), 7 C. & P. 680; *Warren* v. *Warren* (1834), 1 C. M. & R. 250.
(*k*) *Williamson* v. *Freer* (1874), L. R. 9 C. P. 373.
(*l*) *Huth* v. *Huth*, [1915] 3 K. B. 32, *per* Reading, C.J., at 39.
(*m*) *Sadgrove* v. *Hole*, [1901] 2 K. B. 1.

What is Publication.—The question whether on the facts as admitted or proved there has been such communication to a third party as will amount to publication, is a question of law for the Judge. If there are any facts in dispute upon which this question depends they should be left to the jury to decide upon the evidence.

In order to amount to publication, the communication must have been made " maliciously ", that is to say, not in the sense of spitefulness or ill-will, but in the sense of absence of legal excuse. It is clear that negligence will amount to malice in this sense, for it has been held that the publisher of a statement which indirectly refers to an individual not named in it, and of whose existence the publisher had no knowledge and towards whom he could not entertain any intention, is liable for the resulting damage to the person so defamed (*n*).

It will therefore be convenient to divide the illustrations given into two categories :—

1. Intentional.
2. Unintentional or negligent.

Intentional Publication.—When the defendant has instigated or authorised or procured the publication he will of course be liable (*o*), and it is no defence in such a case for him to say that the publication was provoked by the plaintiff, as where the plaintiff sent his servant to purchase a back number of a newspaper which contained a libel upon him, and it was held that this fact constituted no defence (*p*).

A mistaken belief that the plaintiff had consented to the publication is no defence, as where the plaintiff told a humorous story against himself in an after-dinner speech and the defendants, wrongly thinking he would

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(*n*) *Cassidy* v. *Daily Mirror*, [1929] 2 K. B. 331.
(*o*) *Parkes* v. *Prescott & Ellis* (1869), L. R. 4 Ex. 169.
(*p*) *Duke of Brunswick* v. *Harmer* (1849), 14 Q. B. 185.

have no objection, published it in their newspaper the next day, and were held liable in damages (*q*).

Where the plaintiff's consent to the publication has been obtained, the maxim *volenti non fit injuria* would apply (*r*).

A man who reads aloud a letter containing a libel which he has previously read himself is liable as a publisher of the libel (*s*). Such publication is probably a libel, not a slander (*t*).

Incidental Publication.—There is a certain kind of publication which is held, although intentional, not to be actionable. Such publication may be described as incidental, and it includes the publication to any clerk or servant, whether in the employment of the plaintiff or the defendant, which may be said to be incidental to a reasonable method of communication between the parties. It is said that the reason for this is that such publication is covered by privilege. It may be that when a libellous document is addressed to a person between whom and the sender a privilege exists, the privilege of the occasion will extend to cover publication to the recipient's clerks, but it can hardly be said that the writer's clerks stand on the same footing; for a man cannot publish a libel to himself, and if such incidental publication is to be justified, it should logically be said, not that it was privileged, but that it did not amount to publication at all. At all events it is not actionable, provided the method of communication adopted was reasonable in the circumstances; and it is also clear that reasonable is a somewhat elastic term and that what was held unreasonable in 1891 might well be reasonable in 1930.

(*q*) *Cook* v. *Ward* (1830), 4 Moo. & P. 99.
(*r*) *Monson* v. *Tussaud*, [1894] 1 Q. B. 671; *Chapman* v. *Ellesmere*, [1932] 2 K. B. 431.
(*s*) *Forrester* v. *Tyrrell* (1893), 9 T. L. R. 287.
(*t*) *Osborn* v. *Boulter & Son*, [1930] 2 K. B. 226.

Thus the publication of a libel to a typist by a solicitor, who was dictating a letter on behalf of the defendant, was held not to be actionable (*u*). So was a similar publication of a bill of costs (*x*). Again, where directors of a company circulated the shareholders with a report containing a statement defamatory of the general manager and had had the report dictated to a typist, the publication was held not to be actionable (*y*); and similarly where directors of a company in England communicated with the directors of a company in Japan warning them against the plaintiffs, and had the letter dictated to their clerks (*z*).

In a recent case, a brewer and the licensee of a public-house were quarrelling by letter over the quality of the beer. The licensee complained to the brewers that their beer was thin; the brewers replied that if so it was because he had watered it. The letter was dictated to a typist who read it back from her notes, and it was held that such publication was privileged as incidental, this being a reasonable and ordinary method in commercial matters of writing letters, even though they might contain defamatory statements (*a*).

If, in the circumstances, the method of communication adopted was not reasonable, the publication will be actionable; as where the communication which was sent by telegram, and consequently read by the post office officials, might just as well have been sent in a closed letter, it was held no privilege attached to the publication (*b*).

Unintentional Publication.—The question whether an

(*u*) *Boxsius* v. *Goblet Frères*, [1894] 1 Q. B. 842.
(*x*) *Morgan* v. *Wallis* (1917), 33 T. L. R. 495.
(*y*) *Lawless* v. *Anglo-Egyptian Co.* (1869), L. R. 4 Q. B. 262.
(*z*) *Edmondson* v. *Birch*, [1907] 1 K. B. 371.
(*a*) *Osborn* v. *Boulter & Son*, [1930] 2 K. B. 226.
(*b*) *Williamson* v. *Freer* (1874), L. R. 9 C. P. 393.

unintentional communication amounts to publication depends on the question of fact, which is for the jury, whether the defendant's conduct was negligent; if so, the defendant cannot escape liability if the publication was the direct result (*c*) of his negligent act.

Thus, where the defendant dropped a letter in the street, which was picked up and read, he was held to have published its contents (*d*); and similarly where it was sent by mistake to the wrong person (*e*).

But when a sealed letter was opened and read by the plaintiff's partner (*f*), or by the plaintiff's father (*g*), or where the contents of an unsealed letter were extracted and read by the plaintiff's butler out of curiosity (*h*), it was found that the defendant's conduct was not negligent and the plaintiff failed to prove publication.

Innocent Dissemination.—The authorities have crystallised the law applicable to such persons as vendors of newspapers and proprietors of circulating libraries, who may be said to be innocent disseminators of libels in the publications they sell. The defendant in such a case can avoid liability if he can prove: (i) that he was ignorant of the existence of the libel in the issue in question; (ii) that there was nothing to put him on inquiry; and (iii) that his ignorance was not due to negligence; and in determining these questions it is relevant to consider the character both of the periodical containing the libel and the writer of the article complained of.

Where newspaper vendors had distributed copies of a periodical called "Money" which, entirely unknown to them, contained a libel on the plaintiffs, they obtained

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(*c*) See Chapter 14.
(*d*) *Weld-Blundell* v. *Stephens*, [1920] A. C. 956.
(*e*) *Tompson* v. *Dashwood* (1883), 11 Q. B. D. 43.
(*f*) *Sharp* v. *Skues* (1909), 25 T. L. R. 336.
(*g*) *Powell* v. *Gelston*, [1916] 2 K. B. 615.
(*h*) *Huth* v. *Huth*, [1915] 3 K. B. 32.

findings of fact in these terms, and were successful (*i*). In a later case, however, where the defendants were a circulating library, evidence was given by their manager that they did not employ a reader for their books and that it was cheaper for them to run an occasional risk of an action than to employ one. They were held to be liable for the publication of the libel (*k*).

The employment of a reader, however, is not the deciding factor in such cases, and in a similar case the defendants obtained these findings of fact in spite of the fact that they employed no reader, and the Court of Appeal refused to disturb the verdict.

> "It was quite impossible that distributing agents such as the respondents should be expected to read every book they had. There were some books as to which there might be a duty on the respondents or other distributing agents to examine them carefully because of their titles or because of the recognised propensity of their authors to scatter libels abroad. Beyond that the matter could not go" (*l*).

Further illustration is provided by a recent case in which Messrs. Woolworth distributed a magazine containing libels on Horatio Bottomley. They were sued for damages, but successfully pleaded the defence of innocent dissemination (*m*).

Repetition.—It is now well established that it is no defence to an action for libel or slander that the defendant was repeating what someone else had told him (*n*).

> "We do not hesitate to say . . . that such a justification cannot be pleaded to an action for

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(*i*) *Emmens* v. *Pottle* (1885), 16 Q. B. D. 354.
(*k*) *Vizitelly* v. *Mudie's Select Library*, [1900] 2 K. B. 170.
(*l*) *Weldon* v. *The Times Book Club* (1911), 28 T. L. R. 143, *per* Cozens-Hardy, M.R., at 144.
(*m*) *Bottomley* v. *Woolworth's, Ltd.*, (1932), 48 T. L. R. 521.
(*n*) *Watkin* v. *Hall* (1868), L. R. 3 Q. B. 306.

republication of a libel. . . . Because one man does an unlawful act to any person, another is not to be permitted to do a similar act to the same person. Wrong is not to be excused or even justified by wrong" (*o*).

"The person who repeats it gives greater weight to the slander" (*p*).

"If you repeat a rumour you cannot say it is true by proving that the rumour in fact existed: you have to prove that the subject-matter of the rumour is true" (*q*).

If, however, at the time of repeating a slander the repeater gives the name of his original informant, this fact may be urged in mitigation of damages (*r*) and the original utterer of the repeated slander is an admissible witness (*s*).

Liability of Original Publisher.—The liability of the original publisher of a libel for the consequences of its repetition is a question of remoteness of damage, and is dealt with in chapter 14.

(*o*) *De Crespigny* v. *Wellesley* (1829), 5 Bing. 392, *per* Best, C.J., at 404.
(*p*) *McPherson* v. *Daniels* (1829), 10 B. & C. 263, *per* Littledale, J., at 273.
(*q*) *Cookson* v. *Harewood*, [1932] 2 K. B. 478, *per* Greer, L.J., at 485.
(*r*) *Bennett* v. *Bennett* (1834), 6 C. & P. 588.
(*s*) *Duncombe* v. *Daniel* (1836), 2 Jur. 32.

CHAPTER 8.

JUSTIFICATION.

The truth of the charges contained in the libel is a complete defence in civil (*a*) proceedings, for the law "will not permit a man to recover damages for injury to a character which he does not or ought not to possess" (*b*).

Such a defence is known as a plea of justification, and in order to succeed in it the defendant must establish the substantial truth of the whole of the libel. The plea of justification

> "involves the justification of every injurious imputation which a jury may think is to be found in the alleged libel" (*c*).

Burden of Proof.—The burden of proving this defence lies upon the defendant, for once the plaintiff has established the publication by the defendant of words which refer to him and which are reasonably capable of bearing a defamatory meaning, a presumption of their falsity arises which it is for the defendant to rebut. It has been well said, however, that the plea of justification is a dangerous plea to place upon the record, for, by repeating the libel and persisting in it at the trial, the defendant gives it greater publicity, and thus an unsuccessful attempt to justify a libel which is entirely untrue may, and almost certainly will, aggravate the damages.

(*a*) *Aliter* in criminal proceedings : *Barrow* v. *Lewellin* (1615), Hobart 62 (Star Chamber).

(*b*) *McPherson* v. *Daniels* (1829), 10 B. & C. 263, *per* Littledale, J., at 273.

(*c*) *Digby* v. *Financial News*, [1907] 1 K. B. 502, *per* Collins, M.R., at 507.

"In a plea of justification the defence that a matter of opinion or inference is true is not that the defendant truly made that inference, or truly held that opinion, but is that the opinion and inference are both of them true. A counsel does not lightly accept a burden of that character, because the result is that, if it fail, the damages are in the ordinary case very substantially increased—the slander or libel being accentuated and continued in the proceedings at the trial itself" (*d*).

Four preliminary observations may be made.

1. Repetition no Defence.—Firstly, the fact that the defendant was merely repeating what someone else had told him, and said so at the time, will not if true constitute the defence of justification, or indeed any defence (*e*).

"If you repeat a rumour you cannot say it is true by proving that the rumour in fact existed: you have to prove that the subject-matter of the rumour is true" (*f*).

But proof that the defendant honestly believed on reasonable grounds, at the time of publication, that the libel was true, may mitigate the damages, provided that the libel is not repeated at the trial.

2. Defendant Must Accept Plaintiff's Version.—Secondly, a defendant who desires to justify must accept the plaintiff's version of the libel if it is different from his own. He cannot set up a version of his own of which the plaintiff has not complained and justify that.

"It is like pleading to a statement of claim, alleging that the defendant said the plaintiff stole a

(*d*) *Sutherland* v. *Stopes*, [1925] A. C. 47, *per* Lord Shaw, at 75.
(*e*) *McPherson* v. *Daniels* (1829), 10 B. & C. 263.
(*f*) *Cookson* v. *Harewood*, [1932] 2 K. B. 478, *per* Greer, L.J., at 485.

pair of boots, that what the defendant said was that the plaintiff's footman stole the boots and that that was true " (*g*).

The defendant may, of course, set up his own version of what he said, and the plaintiff may amend at the trial so as to rely upon the defendant's version, which the defendant is then at liberty to justify (*h*).

3. Rolled-up Plea.—Thirdly, the defence of justification is not raised by that part of the defence of fair comment which alleges the truth of the facts commented on. It is now settled that this plea, usually known as the rolled-up plea, raises one defence and one defence only, namely, fair comment.

> " The averment that the facts were truly stated is merely to lay the necessary basis for the defence on the grounds of fair comment. This averment is quite different from a plea of justification of a libel on the ground of truth under which the defendant has to prove not only that the facts are truly stated, but also that any comments upon them are true " (*i*).

4. Defendant Cannot Justify Without Pleading Justification.—Fourthly, the defendant cannot give evidence at the trial, either by cross-examination or otherwise, of facts which, if true, would constitute a justification of the libel, unless he has expressly pleaded justification in his defence.

> " Even in mitigation of damages it is well settled that you cannot go into evidence which, if proved, would constitute a justification. Nor does it appear to me that it makes any difference that the evidence is offered in cross-examination " (*k*).

(*g*) *Rassam* v. *Budge*, [1893] 1 K. B. 571, *per* A. L. Smith, L.J., at 577.
(*h*) *Tournier* v. *National, etc., Bank*, [1924] 1 K. B. 461.
(*i*) *Sutherland* v. *Stopes*, [1925] A. C. 47, *per* Lord Finlay, at 62.
(*k*) *Watt* v. *Watt*, [1905] A. C. 115, *per* Lord Halsbury, at 118.

Attempts are frequently made to mitigate the damages by cross-examining with the object of showing the truth of the libel, without undertaking to prove it affirmatively by pleading justification. The usual result of such an oblique attempt to justify is that the damages are aggravated instead; as where the defendants, who had neither apologised nor justified, attempted to show by cross-examination that the libel was true, and the jury returned a verdict for £2,500, which the Court of Appeal refused to set aside as excessive (*l*).

It is now settled that such cross-examination is not admissible to mitigate the damages. The plaintiff may be cross-examined upon any matters, including matters irrelevant to the issue, in order to show that he is unworthy of belief, and that therefore the jury should not accept his evidence on matters material to the issue (commonly called cross-examination to credit); but such cross-examination is not admissible to mitigate the damages by showing that the plaintiff's reputation is such that he has sustained no damage by the libel (*m*). Further, the answers of the witness on matters irrelevant to the issue must be accepted; his denials of specific instances of misconduct unconnected with the libel may not be conclusive, but the defendant cannot call evidence to show that they are false (*n*).

Typical Instances of Justification.—The nature and terms of the justification pleaded must correspond with those of the libel.

> "We must see what the charge in the libel is, and how far the allegations in the pleas correspond with and justify such charges" (*o*).

(*l*) *Hay* v. *Star Newspaper*, The Times, May 1, 1912.
(*m*) *Hobbs* v. *Tinling*, [1929] 2 K. B. 1. But see R. S. C., Ord. XXXVI, r. 37.
(*n*) *Att.-Gen.* v. *Hitchcock* (1847), 1 Ex. 91.
(*o*) *Goodbourne* v. *Bowerman* (1833), 9 Bing. 532, *per* Tindal, C.J.

The following instances of various types of libel illustrate the application of this rule.

Substance to be Justified.—The substance of the charge must be justified and the libel must be carefully examined to see what the substance really is.

> "As much must be justified as meets the sting of the charge, and if anything be contained in a libel which does not add to the sting of it, that does not need to be justified" (*p*).
>
> "If I write that the defendant on March 6th took a saddle from my stable and sold it the next day and pocketed the money all without notice to me, and that in my opinion he stole the saddle, and if the facts truly are found to be that the defendant did not take the saddle from the stable but from the harness room, and that he did not sell it the next day but a week afterwards, but nevertheless he did, without my knowledge or consent, sell my saddle so taken and pocketed the proceeds, then the whole sting of the libel may be justifiably affirmed by a jury notwithstanding these errors in detail."
>
> "In the second place, however, the allegation of fact must tell the whole story. If, for instance, in the illustration given, the facts as elicited show what my writing had not disclosed—namely, that the defendant had a saddle of his own lying in my harness room, and that he took by mistake mine away instead of his own and, still labouring under that mistake, sold it—then the jury would properly declare that the libel was not justified on the double ground that there were facts completely explaining in a non-criminal sense anything that was done, and the jury would disaffirm the truth of the libel because,

(*p*) *Edwards* v. *Bell* (1824), 1 Bing. 403, *per* Burroughes, J., at 409.

although meticulously true in fact, it was false in substance" (*q*).

Thus, where the libel charged the plaintiff with having been concerned in a swindling concern in Manchester, and it was further charged that the swindling operations were continued at Leeds, a defence of justification which was limited to the Manchester swindling was held sufficient to justify the substance of the libel, and the Court refused to enter a verdict for the plaintiff on the charge of swindling at Leeds, which was left unjustified (*r*). Referring to this decision it has been said:—

> "I venture to think that [it] is of the very highest authority for showing that in libel cases a view meticulously taken . . . of the words of the libel is not sought for, but the opinion of the jury is accepted as conclusive and final on justification if it applies truly to the substantial matter" (*s*).

The plaintiff complained of a libel which described his conduct as "monstrous" and as the "homicidal tricks of those impudent and ignorant scamps who had the audacity to pretend to cure all diseases with one kind of pill" and went on to allege that "several of the rotgut rascals had been convicted of manslaughter," and described the plaintiff's system as "wholesale poisoning". It was proved at the trial that the pills were very dangerous when administered in the doses recommended by the plaintiff, that in fact two persons had died of taking them in such quantities, and that successful proceedings for manslaughter had been instituted against the persons who administered the pills to the two patients who died. This was held to be a substantial justification of the libel, although the epithet "monstrous" and the

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(*q*) *Sutherland* v. *Stopes*, [1925] A. C. 47, *per* Lord Shaw, at 79.
(*r*) *Clarke* v. *Taylor* (1836), 2 Bing. N. C. 654.
(*s*) *Sutherland* v. *Stopes*, [1925] A. C. 47, *per* Lord Shaw, at 81.

expressions "scamps," "rotgut rascals" and "wholesale poisoning" had not been specifically justified (*t*).

Specific Offence.—When the libel charges the commission of a specific crime or the doing of a specific act, the defence must justify the charge with corresponding precision.

> "If you say of a man 'he stole a hatchet on such and such a day,' you must justify that particular allegation, and that is all. It is not relevant to say that he stole a hatchet the day after" (*u*).

Several Offences.

> "If the libel charges the commission of several crimes, or the commission of a crime in a particular manner, the plea must justify the charge as to the number of crimes or the manner of committing them. If the crime is charged with circumstances of aggravation . . . the plea is clearly bad if it omit to justify that" (*x*).

Thus, where the libel charged the plaintiff, the Mayor of Winchester, with having used his position to his own pecuniary advantage in two mayoralties, a plea that he did so in one mayoralty was held to be bad, as being insufficient, if proved, to justify the libel complained of (*y*).

And where the libel was that the plaintiff, a Proctor in the Probate Court, had been suspended from his office three times, a plea that he had been once so suspended was held to be bad.

> "The plea seems to fall clearly within that class of cases in which it has been held that a plea is bad

(*t*) *Sutherland* v. *Stopes*, [1925] A. C. 47.
(*u*) *Maisel* v. *Financial Times*, [1915] 3 K. B. 336, *per* Cozens-Hardy, M.R., at 339.
(*x*) *Helsham* v. *Blackwood* (1851), 11 C. B. 111, *per* Maule, J., at 127.
(*y*) *Goodbourne* v. *Bowerman* (1833), 9 Bing. 532.

> if it profess to be an answer to the whole of the declaration, but answers only a part. . . . I cannot but think . . . that if a party be believed to have committed three distinct offences his character is much more deeply affected than if he had only been charged with the commission of one" (*z*).

And where the defendant, who had charged the plaintiff with various acts of cruelty to a horse, including knocking out its eye, justified all the charges except the knocking out of the horse's eye, the justification was held to be insufficient (*a*).

Conduct.—If, taking the libel as a whole, it conveys a charge of habitual conduct of a particular kind, proof of a single instance of such conduct will not be sufficient justification.

Where the libel charged the plaintiff with being a "libellous journalist," it was held that proof that on one occasion he had been an unsuccessful defendant in a libel action, when damages of £100 were awarded against him, was insufficient to justify the libel.

> "I am perfectly satisfied that the words 'libellous journalist' do not mean that the plaintiff has been guilty, on one occasion only, of having published a libel, but that he has been guilty of gross misconduct as a journalist by the habit of libelling others" (*b*).

The heading to a paragraph which purports to be no more than an account of what took place on a single occasion may alter the meaning of the paragraph so as to convey a defamatory imputation of habitual conduct, which the truth of the isolated instance contained in the paragraph is insufficient to justify.

Thus where a paragraph containing an accurate

(*z*) *Clarkson* v. *Lawson* (1829), 6 Bing. 272, *per* Tindal, C.J., at 273.
(*a*) *Weaver* v. *Lloyd* (1824), 2 B. & C. 678.
(*b*) *Wakley* v. *Cook & Healey* (1849), 4 Ex. 511, *per* Parke, B., at 516.

account of how one client of the plaintiff had once been treated, was headed "How Lawyer B. Treats His Clients," it was held that the fact that the account in the paragraph was accurate was not sufficient to justify the imputation of habitual conduct conveyed by the heading (*c*).

General Character.—Where the libel attacks the character of the plaintiff by alleging that he is of such a nature and disposition that he is likely to do a particular kind of act if he had the chance, the defendant is entitled, in order to justify his charge, to adduce evidence of any acts on the part of the plaintiff which tend to support the allegation contained in it, even if such acts have occurred since the publication of the libel.

> "In a general allegation by way of justification of general character and general tendency, which are the only words I can think of at the minute as meaning 'likely,' I do not see how you can exclude events which happened, I do not say years after, but within a reasonable time after the publication" (*d*).
>
> "When the allegation complained of is that he is a person of a character likely to do a certain act if he had the opportunity, then it seems to me that it cannot be said to be irrelevant to prove that as soon as ever he got the opportunity a short time after the libel he did it" (*e*).

Particulars.—Where the defence of justification is pleaded, and particularly where the charge is a general charge such as is dealt with in the last paragraph, the plaintiff will be well advised to apply for particulars of the facts relied on in support of the plea of justification,

(*c*) *Bishop* v. *Latimer* (1861), 4 L. T. 775.
(*d*) *Maisel* v. *Financial Times*, [1915] 3 K. B. 336, *per* Cozens-Hardy, M.R., at 339.
(*e*) *Ibid.*, *per* Pickford, L.J., at 342.

in order to find out exactly what case he has to meet. The defendant will naturally be anxious to include in such particulars all facts which may assist him; and if some of the particular facts on which the defendant seeks to rely are remote from the issue, the plaintiff may apply to have them struck out as irrelevant. The tendency of the Courts, however, is against this course.

> "Sometimes the defendant seeks to rely on facts and matters which may or may not be admissible as evidence in chief in support of his plea of justification, and the future relevancy of which is a matter of doubt at the time they are stated in the particulars . . . whether they are to be admitted in evidence or not is a matter to be decided by the judge at the trial when the question comes up for decision: it can hardly be decided . . . on an application to strike out particulars" (*f*).

Severability.—If a libel contains several distinct and severable imputations, the defence of justification may be limited to a part only of the statement complained of, and the remainder defended in some other way, *e.g.*, by a plea of privilege or fair comment.

> "We consider it to be settled, that there may be a plea to a part of a libel which is separable from the rest . . . , for a plea of justification of this part, and not guilty as to the remainder, would not have been inconsistent; a part might be true, and the remainder excused by the occasion of the publication" (*g*).
>
> ". . . A justification need not be to the whole, but may be to a part. If a man says that a certain neighbour of his was guilty of manslaughter and also

(*f*) *Godman* v. *The Times Publishing Co.*, [1926] 2 K. B. 273, *per* Bankes, L.J., at 281, 282.

(*g*) *McGregor* v. *Gregory* (1843), 11 M. & W. 287, *per* Parke, B., at 294.

was a thief, it is perfectly open to him to take a plea in justification of either charge only" (*h*).

"There can be no doubt that a defendant may justify part only of a libel containing several distinct charges. . . . But if he omits to justify a part which contains libellous matter, he is liable in damages for that which he has omitted to justify. The plea in the present instance does not affect to justify the whole of the publication, and we are to see whether the part omitted would, by itself, form a substantive ground for an action of libel" (*i*).

But it must be made plain, in the defence, which particular portion or portions of the libel are intended to be justified, and which portions are not.

"The Courts would not tolerate a plea leaving in doubt what the defendant justified and what he did not" (*k*).

Nor can a defendant in an action for defamation

"Pick out of a slanderous sentence certain words which have no slanderous effect and justify them alone" (*l*).

A defendant may limit his justification to part of an innuendo if he desires to do so (*ll*).

Pleading.—The common form in which the defence of justification is pleaded is as follows:—

"If the defendant spoke the said words or any of them (which is denied), the said words in their natural and ordinary meaning are true in substance and in fact."

(*h*) *Sutherland* v. *Stopes*, [1925] A. C. 47, *per* Lord Shaw, at 78.
(*i*) *Clarke* v. *Taylor* (1836), 2 Bing. N. C. 654, *per* Tindal, C.J., at 664.
(*k*) *Fleming* v. *Dollar* (1889), 22 Q. B. D. 388, *per* Coleridge, L.C.J., at 392.
(*l*) *Edsoll* v. *Russell* (1842), 4 M. & G. 1090, *per* Maule, J., at 1103.
(*ll*) *Maisel* v. *Financial Times* (No. 1) (1915), 31 T. L. R. 192.

CHAPTER 9.

FAIR COMMENT.

It is a good defence to an action for defamation that the words complained of are fair comment upon a matter of public interest. The defence can be shortly stated in the language of pleading, in the common form used in pleading, namely, that in so far as the words complained of consist of statements of fact they are true, and in so far as they consist of expressions of opinion they are fair comment upon a matter of public interest.

Illustrations of the type of case in which this defence may properly be pleaded are provided by cases arising out of published criticisms upon musical, literary or dramatic works, or upon the conduct or speeches of public men. With regard to such criticisms, which reflect upon the work rather than upon the personal character of the person criticised, the Courts of Law have shown a tendency to allow great latitude: and this tendency has increased consistently with a growing desire on the part of the community to promote and encourage complete freedom of speech on the part of honest critics, upon matters which invite or call for public attention.

> "Our law of libel has in many respects only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in recent times been recognised" (*a*).

Burden of Proof.—In order to establish a case for a

(*a*) *Wason* v. *Walter* (1868), L. R. 4 Q. B. 73, *per* Cockburn, C.J., at 193.

defendant who pleads fair comment to meet, the plaintiff must allege and prove that the defendant has published comments or criticisms upon his work, conduct or speech, which the Judge thinks are capable of being considered unfair. If the Judge thinks they are not so capable, the case should be withdrawn from the jury.

> "It is always for the judge to say whether the document is capable in law of being a libel. It is, however, for the plaintiff who rests his claim upon a document which on his own statement purports to be a criticism of a matter of public interest to show that it is a libel—*i.e.*, that it travels beyond the limit of fair criticism; and therefore it must be for the judge to say whether it is reasonably capable of being so interpreted. If it is not, there is no question for the jury and it would be competent for him to give judgment for the defendant" (*b*).

Once the plaintiff has established the publication by the defendant of defamatory words which are capable of being construed as an unfair comment, the burden of proof shifts to the defendant.

Fair Comment Distinguished from Plea of No Libel.—Before considering the defence of fair comment, it is desirable to make clear what fair comment is not. Firstly, fair comment should be distinguished from the plea that the words were not defamatory. There are *dicta* in some of the older cases which undoubtedly suggest that the plea of fair comment is equivalent to a plea of no libel, for instance:—

> "If the comment is beyond the limits of fair criticism, it becomes a libel; and the question therefore in this case was, libel or no libel" (*c*).

(*b*) *M'Quire* v. *Western Morning News*, [1903] 2 K. B. 100, *per* Collins, M.R., at 111.

(*c*) *Campbell* v. *Spottiswoode* (1863), 32 L. J. Q. B. 185, *per* Mellor, J., at 283.

> "The question is not whether the article is privileged, but whether it is a libel" (*d*).
>
> "It is only when the writer goes beyond the limits of fair criticism that his criticism passes into the region of libel at all" (*e*).

The question is academic rather than practical, but it is submitted that this view is wrong, and that the true view is that the law permits reasonably fair criticism to be made upon matters which are of public interest to the community, even if such criticism involves comments defamatory of individuals. Support for this view is to be found in the judgment of Lord Loreburn :—

> "The plea of fair comment does not arise if the plea of justification is made good, nor can it arise unless there is an imputation on a plaintiff. It is precisely where the criticism would otherwise be actionable as libel that the plea of fair comment comes in" (*f*).

Again, Scrutton, J., is reported as saying that

> "It seemed clear that a defamatory statement might be fair comment. Fair comment was not wanted as a defence unless the statement was defamatory" (*g*).

Fair Comment Distinguished from Qualified Privilege.—Again, the defence of fair comment must be carefully distinguished from the plea of qualified privilege. Here, again, confusing *dicta* occur in the older authorities. It was at one time thought, on the authority of Crompton, J. (*h*), that the defence of fair comment was a branch of the law of qualified privilege; but this view has since

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(*d*) *Merivale* v. *Carson* (1887), 20 Q. B. D. 275, *per* Esher, M.R., at 280.
(*e*) *Ibid.*, *per* Bowen, L.J., at 283.
(*f*) *Dakhyl* v. *Labouchere*, [1908] 2 K. B. 325, at 327.
(*g*) *Homing Pigeon* v. *Racing Pigeon* (1913), 29 T. L. R. 389, at 390.
(*h*) *Campbell* v. *Spottiswoode* (1863), 32 L. J. Q. B. 185, at 200.

been negatived and the true relative positions of the two defences explained by Lord Esher:—

> "A privileged occasion is one on which the privileged person is entitled to do something which no one, who is not within the privilege, is entitled to do on that occasion. A person in such a position may say or write about another things which no other person in the kingdom is entitled to say or write. But in the case of a criticism upon a published work every person in the kingdom is entitled to do and is forbidden to do exactly the same thing, and therefore the occasion is not privileged" (*i*).

Fair Comment Distinguished from Justification.—Finally, the defence of fair comment must be distinguished from the defence of justification. In order to succeed in the defence of fair comment, it is essential, as will hereafter be shown, that the facts upon which the comments complained of are based should be truly stated: and the defendant is therefore under the obligation at the outset of establishing the truth of the facts upon which he has commented. He is also under the obligation of establishing the fairness of his comments. But these obligations are not nearly so wide as those undertaken by a defendant who pleads justification. In order to justify a libel the defendant must establish the truth of every injurious imputation which the jury think is contained in it (*k*), but in fair comment

> "The allegation of truth is confined to the fact averred, and the averment as to the comments is not that they are true but only that they were made in good faith and that they are fair and do not exceed the proper standard of comment upon such matters" (*l*).

(*i*) *Merivale* v. *Carson* (1887), 20 Q. B. D. 275, at 280.
(*k*) See Chapter 8.
(*l*) *Sutherland* v. *Stopes*, [1925] A. C. 47, *per* Lord Finlay, at 62.

The defence of fair comment consists of three ingredients: (a) the truth of the facts commented on; (b) the fairness of the comments; and (c) that the matter commented on is one of public interest. These will be dealt with in their order.

Distinction Between Fact and Comment.—There is in nearly every case the preliminary difficulty of drawing the line between what is fact and what is merely comment. It is all very well to offer general advice that critics and journalists should make it clear which is which, but it seldom falls to the lot of the practitioner to consider cases in which this advice has been followed. The question what is fact and what is comment is one for the jury, and in order to obtain the advantage of the protection afforded by this defence, the defendant must satisfy them that the statements complained of are comment only and do not amount to statements of fact, to which the only defence will be privilege or justification. If he chooses to be ambiguous he runs the risk of having treated as statements of fact statements which, had he been more specific, might well have ranked only as comment.

> "Comment in order to be justifiable as fair comment must appear as comment and must not be so mixed up with the facts that the reader cannot distinguish between what is report and what is comment. . . . The justice of this rule is obvious. If the facts are stated separately and the comment appears as an inference drawn from those facts, any injustice it might do will be to some extent negatived by the reader seeing the grounds upon which the unfavourable comment is based. But if fact and comment be intermingled so that it is not reasonably clear what portion purports to be inference, he will naturally suppose that the injurious statements are based on adequate grounds known to the writer

though not necessarily set out by him. In the one case the insufficiency of the facts to support the inference will lead fair-minded men to reject the inference. In the other case it merely points to the existence of extrinsic facts which the writer considers to warrant the language he uses. . . . Any matter therefore which does not indicate with reasonable clearness that it purports to be comment and not statement of fact cannot be protected by the plea of fair comment" (*m*).

It is plain therefore from the foregoing passage that if what is intended to be comment is stated so as to mislead the reader into thinking it is fact, it will be treated as fact; and the writer will not be able to plead fair comment, but must fall back upon the defence of privilege or justification.

There appears, however, to be one class of case in which statements apparently of fact will be treated as amounting to comments only, namely, when the statement is quoted as an extract from a privileged document. In a case where the statements complained of, which included allegations of fact defamatory of the plaintiff, had been previously printed in a parliamentary paper, it was said:—

> "The plaintiff says it cannot be fair comment because it is founded on untrue statements. No doubt when there is one published document in which the writer partly alleges and partly comments, and of which the sum total is defamatory, the document cannot be justified unless the facts are true and the comment fair, because if the facts do not warrant defamatory comment, the comment is not fair, and if the facts as alleged warrant defamatory comment they are defamatory and must be proved to be true.

(*m*) *Hunt* v. *Star Newspaper*, [1908] 2 K. B. 309, *per* Fletcher Moulton, L.J., at 319.

But when one person alleges and another comments this reason does not apply. I think this view, if true in other cases, is especially true when the allegation as distinct from the comment is made in a privileged document. If by some unfortunate error a vote in parliament recites, or a judge in giving the reasons for his judgment states, that which is derogatory to some person, and the charge is mistaken or ill-founded, and a newspaper reports such vote or judgment, and proceeds in another part of its issue to comment on the character of the person affected in terms which would be fair if the charge were well founded, the newspaper which so reports and comments should be entitled to the protection of fair comment" (*n*).

The "Rolled-up" Plea.—It may be convenient here to notice that the defence of fair comment is usually pleaded in the form referred to earlier in this chapter, *i.e.*

"In so far as the words consist of allegations of fact the same are true in substance and in fact; and in so far as they consist of expressions of opinion they are fair comment made in good faith and without malice upon the said facts, which are matters of public interest" (*o*).

This form is now accepted, though disapproved of by the House of Lords (*o*), and it has now been decided that it raises one defence and one defence only, namely, that of fair comment and not the alternative defence of justification.

"It is not partly justification and partly fair comment, but fair comment pure and simple, no

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(*n*) *Mangena* v. *Wright*, [1909] 2 K. B. 958, *per* Phillimore, J., at 976.
(*o*) See *Sutherland* v. *Stopes*, [1925] A. C. 47.

doubt in an altered form from the old one but nevertheless fair comment only" (*p*).

Further, the use of the words "the said facts" in the pleading will limit the allegations of fact to such facts as are set out in the alleged libel, and in general the defendant will not be required to furnish any further particulars of the facts relied on in support of his plea.

> "It cannot possibly assist the plaintiff that the defendants should be required to pick out statements which they say are statements of fact and those which they say are matters of opinion, for the category to which the several statements belong is a question for the jury subject to the direction of the judge. . . . With respect to any statements as to which it was doubtful to which class they belonged, the defendants would be entitled to say that it was a question for the jury, that they might be fact or they might be comment, and that under the circumstances the defendants relied on them as both. If they did it would be impossible to strike out particulars so framed" (*q*).

Truth of the Facts.—In order to lay the foundation for the defence of fair comment, the defendant must establish the truth of the facts upon which he has commented. This is fundamental.

> "The comment must be such that a fair mind would make under the circumstances, and it must not misstate facts, because a comment cannot be fair which is built upon facts which are not truly stated, and further it must not convey imputations

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(*p*) *Sutherland* v. *Stopes*, [1925] A. C. 47, *per* Lord Carson, at 99.
(*q*) *Aga Khan* v. *Times Publishing Co.*, [1924] 1 K. B. 675, *per* Bankes, L.J., at 680, 681.

of an evil sort except in so far as the facts truly stated warrant the imputation" (*r*).

again:—

"Comment, in order to be fair, must be based upon facts, and if a defendant cannot show that his comments contain no misstatements of fact, he cannot prove the defence of fair comment" (*s*).

again:—

"If the facts upon which the comment purports to be made do not exist, the foundation for the plea fails" (*t*).

An illustration of this principle is afforded by a case in which the plaintiff complained of a criticism upon his play, which suggested that it had an immoral tendency, on the ground that one of the characters was an adulterous wife. There was no such character in the play; and it was held that such a misstatement was not entitled to the protection of fair comment.

"The jury had to deal with a case of positive misdescription, a question not of opinion but of fact" (*u*).

The Fairness of the Comment.—We must now consider the question what constitutes a fair comment, and what is the test of fairness; and upon this point there appears, at any rate at first sight, to be considerable conflict of judicial opinion as to whether the comment must be one which the jury consider is a reasonable inference from the facts, *i.e.*, one which the jury consider fair judged by their knowledge of the world; or whether it must be fair

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(*r*) *Joynt* v. *Cycle Trade Publishing Co.*, [1904] 2 K. B. 292, *per* Kennedy, J., at 294.

(*s*) *Digby* v. *Financial News*, [1904] 1 K. B. 502, *per* Collins, M.R., at 507.

(*t*) *Hunt* v. *Star Newspaper*, [1908] 2 K. B. 309, *per* Fletcher Moulton, L.J., at 320.

(*u*) *Merivale* v. *Carson* (1887), 20 Q. B. D. 275, *per* Bowen, L.J., 284.

in the sense that the jury consider it a correct inference from the facts, or in other words whether the jury agree with it. It is submitted that the former is the correct view.

The conflict appears to be founded upon the judgment of Cockburn, C.J., in a case decided in 1863. The plaintiff in that case was the leader of a religious party of Protestant dissenters and had published, in a paper called *The British Ensign*, a list of subscribers to a fund created with the object of promoting Christianity among the Chinese. The statement complained of was an article written by the defendant in *The Saturday Review*, headed "The Heathen's Best Friend," which imputed (*v*) that the plaintiff was himself appropriating the funds of a fictitious subscription list. Cockburn, C.J., said as follows:—

> "But it seems to me that a line must be drawn between hostile criticism on a man's public conduct and the motives by which that conduct is supposed to be influenced; and that you have no right to impute to a man in his conduct as a citizen—even though it be open to ridicule or disapprobation—base, sordid, dishonest or wicked motives, unless there is so much ground for the imputation that a jury shall be of opinion, not only that you may have honestly entertained some belief upon the subject, but that your belief is well-founded and not without cause" (*x*).

It is upon the construction of these words, and in particular the inconsistency between "well-founded" and "not without cause," that the conflict of judicial opinion seems to have arisen.

(*v*) "In the meantime, there can be no doubt that he is making a very good thing indeed out of the spiritual wants of the Chinese."

(*x*) *Campbell* v. *Spottiswoode* (1863), 32 L. J. Q. B. 185, *per* Cockburn, C.J., at 199.

In 1887, Lord Esher, in a case of a criticism upon a play, defined fair comment as follows (*y*):—

"What is the meaning of a 'fair comment'? I think the meaning is this: is the article in the opinion of the jury beyond that which any fair man, however prejudiced or however strong his opinion may be, would say of the work in question? Every latitude must be given to opinion or to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment on the work. It is very easy to say what would be clearly beyond that limit; if, for instance, the writer attacked the private character of the author. But it is much more difficult to say what is within the limit. That must depend upon the circumstances of the particular case. . . . Mere exaggeration, even gross exaggeration, would not make the criticism unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit. The question which the just must consider is this—would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said of the work criticised?"

Lord Bowen adopted words used in an earlier case (*z*).

"Whatever is fair, and can reasonably be said of the works of an author or of themselves, as connected with their works, is not actionable, unless it appears that, under the pretext of criticising the works, the defendant takes an opportunity of attacking the character of the author: then it will be a libel."

In 1893, in a case of a criticism of the sanitary

(*y*) *Merivale* v. *Carson* (1887), 20 Q. B. D. 275, at 280.
(*z*) *Macleod* v. *Wakley* (1828), 3 C. & P. 311, at 313.

condition of houses provided for their employees by a colliery company, Lopes, L.J., said:—

> "It is for the jury to consider what impression would be produced in the mind of an unprejudiced reader who reads the report straight through, knowing nothing about the case beforehand. They must not dwell too much on isolated passages, they must consider the report as a whole. If there are such deviations from absolute accuracy as to make the comment unfair, they must find for the plaintiff; but if there are no such deviations, or if the deviation is minute and within the latitude of fair discussion, and within the region of that diversity of opinion which may fairly and reasonably be entertained by different persons upon the same subject-matter, they should find for the defendant" (*a*).

In 1903, in another case of a criticism upon a play, Collins, M.R., said, in delivering the considered judgment of the Court of Appeal:—

> "The jury have no right to substitute their own opinion of the literary work in question for that of the critic, or to try the 'fairness' of the criticism by any such standard. 'Fair,' therefore, in this collocation certainly does not mean that which the ordinary reasonable man, 'the man on the Clapham omnibus' as Lord Bowen phrased it, the juryman common or special, would think a correct appreciation of the work: and it is of the highest importance to the community that the critic should be saved from any such possibility" (*b*).

In the following year, in dealing with a case of a criticism of the conduct of a solicitor at a shareholders'

(*a*) *South Hetton Coal Co.* v. *N. E. News Assocn.*, [1894] 1 Q. B. 133, at 143.

(*b*) *McQuire* v. *Western Morning News*, [1903] 2 K. B. 100, at 109.

meeting, which imputed dishonesty, Kennedy, J., used these words in directing the jury:—

> "The comment must be such that a fair mind would use under the circumstances, and it must not misstate facts, because a comment cannot be fair which is built upon facts which are not truly stated, and further, it must not convey imputations of an evil sort, except so far as the facts truly stated warrant the imputation" (*c*).

This statement of the law, especially the concluding words, is undoubtedly in apparent conflict with the decision last quoted, which Vaughan Williams, L.J., distinguished in the following passage:—

> "The Master of the Rolls was then dealing with a case which, whether you look at the actual words of the libel or the innuendo, was manifestly that of a criticism of a literary production—of a play which had been produced and acted; and, as the Master of the Rolls pointed out, in such a case you cannot say that, because a critic thinks and says that the play is dull, vulgar, or degrading, or any of the other things which were said in the criticism there, the writer is guilty of defamation, because in the opinion of the jury the criticism was not justified. If critics were put into such a position criticism would be an impossibility. But, even in the case of a criticism upon a literary production, if the writer goes on to make suggestions and reflections disparaging the character of an author, even as an author, he cannot rely upon the defence of fair comment. As I suggested during the argument, if an author had published a novel, and the critic suggested that the novel was not original, that, although published under the author's name, it was really a piece of

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(*c*) *Joynt* v. *Cycle Trade Publishing Co.*, [1904] 2 K. B. 292, at 296.

plagiarism, a reproduction of a book previously written by someone else, although not well known—a criticism which contained such a suggestion could not be justified under the plea of fair comment, unless facts were proved which made it reasonable to make such a suggestion" (*d*).

After a reference to Crompton, J.'s, judgment (*e*), he continues:—

"In my opinion it is clear law that when a criticism, whether of a literary production or of a trade advertisement or of a public man, includes such an imputation" (*i.e.*, of sordid motives) "there being no facts to warrant it, it is open to the jury to find, not only that the publication complained of is libellous, but also that the defence of 'fair comment' has no application" (*d*).

In 1908, however, in a case of a criticism upon a returning officer which charged him with improper conduct at a municipal election, Fletcher Moulton, L.J., referred to the language of Kennedy, J., already quoted and continued:—

"It is based on the judgments in *Campbell* v. *Spottiswoode*, a case of the highest authority, and is, in my opinion, unquestionably a true statement of the law. The only portion of the statement which requires examination is the phrase 'except so far as the facts truly stated warrant the imputation.' Speaking for myself, the words 'warrant the imputation' can bear but one meaning, and that meaning is stated so plainly by Lord Atkinson in the opinion delivered by him in the case of *Dakhyl* v. *Labouchere* (*f*) in the House of Lords that I cannot do better than quote his language: 'Whether the

(*d*) *Joynt* v. *Cycle Trade Publishing Co.*, [1904] 2 K. B. 292, at 297.
(*e*) In *Campbell* v. *Spottiswoode* (1863), 32 L. J. Q. B. 185.
(*f*) [1908] 2 K. B. 325. The defendant referred to the plaintiff as "a quack of the rankest species."

personal attack in any given case can reasonably be inferred from the truly stated facts upon which it purports to be a comment is a matter of law for the determination of the judge before whom the case is tried, but if he should rule that this inference is reasonably capable of being drawn, it is for the jury to determine whether, in that particular case, it ought to be drawn.' In other words, a libellous imputation is not warranted by the facts unless the jury hold that it is a conclusion which ought to be drawn from those facts. Any other interpretation would amount to saying that, where facts were only sufficient to raise a suspicion of a criminal or disgraceful motive, a writer might allege such motive as a fact and protect himself under the plea of fair comment. No such latitude is allowed by English law. To allege a criminal intention or a disreputable motive as actuating an individual is to make an allegation of fact which must be supported by adequate evidence. I agree that an allegation if put may be justified by its being an inference from other facts truly stated, but, as Lord Atkinson says in the passage just quoted, in order to warrant it the jury must be satisfied that such an inference ought to be drawn from the facts" (*g*).

In 1913 this passage was considered by Scrutton, J., and stated by him to be the direct opposite to the judgment of Collins, M.R. (*h*).

"He protested against criticism being limited to what the jury should think ought to be made, or was the correct criticism. . . . He would have much preferred to take the view that the phrase 'warrant the imputation' meant 'capable in reason of supporting the imputation', not that 'the conclu-

(*g*) *Hunt* v. *Star Newspaper*, [1908] 2 K. B. 309, at 320, 325.
(*h*) Note (*b*), *ante*.

sion ought to be drawn from the facts . . .' But he felt bound to follow the clear language of the latest decision in the Court of Appeal " (*i*).

The imputation in that case was one of commercial dishonesty.

It is suggested, with the greatest deference to the views of Scrutton, J., that no such inconsistency exists as is suggested by him between this judgment and those upon which it is founded, and the judgment of Collins, M.R., in *McQuire's Case*, with which it is said to be in conflict; but that the different tests were never meant to be of universal application, but were intended to meet different classes of case.

The difficulty is not unconnected with the difficulty of distinguishing between fact and comment. "It would have startled a pleader of the old school," says Fletcher Moulton, L.J. (*k*), "if he had been told that, in alleging that the defendant 'fraudulently represented,' he was indulging in comment. By the use of the word 'fraudulently' he was probably making the most important allegation of fact in the whole case."

The true solution may be that the test of unfairness varies with the nature of the criticism, and that the more specific the criticism the more exact and stringent the test. The cases in which it has been laid down that a criticism must be warranted by the facts, *i.e.*, must be a correct criticism, are cases where, under the guise of criticism, the defendant has made a specific imputation of dishonesty or fraud; and it is submitted that they cannot be regarded as authorities in cases such as that of the criticism of a play, *e.g.*, as "dull, vulgar and degrading". Some support can be found for the explana-

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(*i*) *Homing Pigeon* v. *Racing Pigeon* (1913), 29 T. L. R. 389, at 390.
(*k*) *Hunt* v. *Star Newspaper*, [1908] 2 K. B. 309, at 320.

tion here offered in the words of Cockburn, C.J., in his original direction to the jury (*l*):—

> "But I do not assent that you may go further and say, that because a man is a public man you are entitled, not only to point out the want of judgment, want of discretion, the want of wisdom in his conduct, but that you may ascribe to him corrupt, dishonest, and wicked motives. I do not think the privilege of a public writer goes to the extent contended for."

Malice.—It remains to observe, with regard to the fairness of a comment, that no comment can be fair which is written by a critic who, in writing it, is actuated by a spirit of malice in the sense of personal spite or ill-will towards the plaintiff. The relevant authorities are dealt with by Collins, M.R., and their effect summed up by him in the following words:—

> "It is of course possible for a person to have a spite against another and yet to bring a perfectly dispassionate judgment to bear upon his literary merits; but, given the existence of malice, it must be for the jury to say whether it has warped his judgment. Comment distorted by malice cannot in my opinion be fair on the part of the person who makes it. I am of opinion, therefore, that evidence of malice actuating the defendant was admissible" (*m*).

To hiss a play or an actor, with the deliberate and preconcerted intention of wrecking the performance, amounts not only to malice but also to an actionable conspiracy (*n*).

> "The audience have certainly a right to express by applause or hisses the sensations which naturally present themselves at the moment. . . . But if any

(*l*) *Campbell* v. *Spottiswoode* (1863), 32 L. J. Q. B. 185, at 192.
(*m*) *Thomas* v. *Bradbury Agnew*, [1906] 2 K. B. 627, at 641, 642.
(*n*) *Gregory* v. *Duke of Brunswick* (1843), 6 M. & G. 953.

body of men were to go to the theatre with the settled intention of hissing an actor, or even of damning a piece, there can be no doubt that such a deliberate and preconcerted scheme would amount to a conspiracy" (*o*).

To sum up the effect of the authorities:—

(1) Malice on the part of the critic will always render the criticism unfair (*p*).

(2) If the criticism contains specific imputations of fraud or dishonesty, the defence of fair comment will not succeed unless the jury think they were warranted by, in the sense of being correct inferences from, the facts as admitted or proved (*q*).

(3) Fact and comment are inextricably intermixed at the risk of the writer, who may be called on to justify as fact statements which otherwise expressed might have amounted only to comment (*r*).

(4) Finally, a comment on a literary or dramatic work, at any rate, may be fair, however violent or exaggerated, if the jury think it is reasonable, although they may not agree with it (*s*).

The Press.—Particular mention is only made of the Press in this connection in order to make it clear that, while in practice juries may and often do afford it greater latitude, yet the Press enjoys no privilege of free speech greater than that enjoyed by a private individual.

"The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever

(*o*) *Clifford* v. *Brandon* (1809), 2 Camp. 358, *per* Lord Mansfield, at 369.
(*p*) *Thomas* v. *Bradbury Agnew*, [1906] 2 K. B. 627.
(*q*) *Hunt* v. *Star Newspaper*, [1908] 2 K. B. 309.
(*r*) *Hunt* v. *Star Newspaper*, [1908] 2 K. B. 309.
(*s*) *McQuire* v. *Western Morning News*, [1903] 2 K. B. 100.

lengths the subject in general may go, so also may the journalist, but apart from statute law, his privilege is no other and no higher. The responsibilities which attach to his power in the dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful; but the range of his assertions, his criticisms, or his comments, is as wide as, and no wider than, that of any other subject. No privilege attaches to his position" (*t*).

The statute law here referred to is dealt with in chapters 10 and 11.

Public Interest.—It is now necessary to consider what matters are matters of public interest.

Matters may be said to be of public interest if by their nature they are of public or national importance, or if they have attracted or their author has invited public attention or criticism. An attempt has been made to classify these under subheads as follows:—

(1) Parliamentary matters.
(2) Judicial matters.
(3) Administrative matters.
(4) Church matters.
(5) Artistic matters.
(6) Other matters which invite criticism.

(1) *Parliamentary Matters.*

The debates in either House are matter of public interest, upon which comments may be made (*tt*).

(2) *Judicial Matters and Proceedings.*

Proceedings in Courts of Justice (*u*).

(*t*) *Arnold* v. *The King Emperor* (1914), 30 T. L. R. 462, *per* Lord Shaw, at 468.

(*tt*) *Wason* v. *Walter* (1868), L. R. 4 Q. B. 73; *Henwood* v. *Harrison* (1872), L. R. 7 C. P. 606.

(*u*) *Woodgate* v. *Ridout* (1865), 4 F. & F. 202. "The administration of justice is a matter of interest to the whole public": *per* Cockburn, C.J., at 212.

Verdicts of and directions to juries, and decisions of Judges (*x*).

Evidence given before a Parliamentary Committee (*y*).

An inquiry by Benchers into the conduct of a Member of the Bar, who was an M.P. and Recorder (*z*).

A letter to an Inspector of the Charity Commissioners with reference to an inquiry held by him, if published as part of his report (*a*).

A petition to Parliament for the removal of a Judge (*b*).

(3) *Administrative Matters.*

The local administration of the poor law (*c*).

The conduct of persons at an election meeting (*d*).

The conduct of a Returning Officer (*e*).

(4) *Church Matters.*

A dispute between a vicar and a churchwarden about the conduct of divine service (*f*).

Probably a sermon (*g*).

(N.B.—But a private local charity does not become a matter of public interest because it is run by the vicar (*h*).)

(*x*) *R.* v. *White* (1808), 1 Camp. 559.
(*y*) *Hedley* v. *Barlow* (1865), 4 F. & F. 224.
(*z*) *Seymour* v. *Butterworth* (1862), 3 F. & F. 372.
(*a*) *Cox* v. *Feeney* (1863), 4 F. & F. 13.
(*b*) *Wason* v. *Walter* (1868), L. R. 4 Q. B. 73.
(*c*) *Purcell* v. *Sowler* (1877), L. R. 2 C. P. 215. "It seems to me that whatever is a matter of public concern when administered in one of the Government departments is a matter of public concern when administered by one of the subordinate authorities": *per* Cockburn, C.J., at 218.
(*d*) *Davis* v. *Duncan* (1874), L. R. 9 C. P. 396.
(*e*) *Hunt* v. *Star Newspaper*, [1908] 2 K. B. 309.
(*f*) *Kelly* v. *Tinling* (1865), L. R. 1 Q. B. 699. "The maintenance of decency and propriety in conducting public worship and the sanctity of the sacred edifice and all connected with it is surely a matter of the greatest public concern. The very use of the term 'public worship' shows this": *per* Cockburn, C.J., at 701.
(*g*) *Gathercole* v. *Miall* (1846), 15 M. & W. 319.
(*h*) *Ibid.*, at p. 333.

(5) *Artistic Matters.*

A dramatic (*i*), or

A musical (*k*) work, if publicly performed.

A picture publicly exhibited (*l*).

The architecture of a public building (*m*).

A book publicly circulated (*n*).

An advertisement or handbill publicly circulated (*o*).

(6) *Miscellaneous.*—The list of subjects which have been held to be matters of public interest, of which the preceding cases are to be taken as examples only, may be extended so as to cover subjects which become of public or national importance by virtue of their magnitude or their nature, or by having invited public comment.

> "The private life of an M.P.," said Scrutton, L.J., "may be material to his fitness to occupy his public office. This private life may be such as to show that he is quite unfit to exercise any public function or to occupy any public office" (*p*).

It has been held that the sanitary condition of miners' cottages, housing over two thousand inhabitants, supplied by the employers as part of the miners' wages, is a matter of public interest (*q*).

Horse-racing (*r*) and greyhound-racing (*s*) appear to be matters of public interest.

Proposals made to the Admiralty affecting the stability of the British Navy are of public concern (*t*); so are the

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(*i*) *Merivale* v. *Carson* (1887), 20 Q. B. D. 100.
(*k*) *McQuire* v. *Western Morning News*, [1903] 2 K. B. 309.
(*l*) *Whistler* v. *Ruskin*, The Times, November 26 and 27, 1878.
(*m*) *Soane* v. *Knight* (1827), Moo. & Mal. 74.
(*n*) *Thomas* v. *Bradbury Agnew*, [1906] 2 K. B. 627. *Quære* a book printed for private circulation: see *Gathercole* v. *Miall*, note (*g*), *supra*, at p. 333.
(*o*) *Paris* v. *Levy* (1860), 9 C. B. (N.S.) 342.
(*p*) *Lyle-Samuel* v. *Odhams' Press*, [1920] 1 K. B. 135, at 146.
(*q*) *South Hetton Coal Co.* v. *N. E. News*, [1894] 1 Q. B. 133.
(*r*) *Aga Khan* v. *Times Publishing Co.*, [1924] 1 K. B. 675.
(*s*) *Prichard* v. *Greyhound Racing Co.*, The Times, November 9, 1933.
(*t*) *Henwood* v. *Harrison* (1872), L. R. 7 C. P. 606.

terms upon which a Local Education Authority employs an architect (*u*).

Public Interest Question of Law.—The question whether or not the subject-matter of the libel is a question of public interest is a question of law which is exclusively the province of the Judge to decide.

> "It would be abolishing the law of privileged discussion, and deserting the duty of the Court to decide upon this as upon any other question of law, if we were to hand over the decision of privilege or no privilege to the jury. A jury, according to their individual views of religion or policy, might hold the church, the army, the navy, parliament itself, to be of no national or general importance" (*x*).
>
> "The Court decides whether the measure commented on is one of public interest" (*y*).

If there are any facts upon which the opinion of the jury may properly be taken in order to assist the Judge in deciding upon the question of law, these may be left to them; but the question cannot be left to them in a general form (*z*).

Practice.—The source of the defendant's information is of course of importance in a case where fair comment is pleaded as a defence; and interrogatories may be administered for the purpose of finding out what it was (*a*) unless they are administered solely for the purpose of bringing an action against the informers (*b*).

(*u*) *Leng* v. *Langlands* (1916), 32 T. L. R. 225.
(*x*) *Henwood* v. *Harrison* (1872), L. R. 7 C. P. 606, *per* Willes, J., at 628.
(*y*) *South Hetton Coal Co.* v. *N. E. News*, [1894] 1 Q. B. 133, *per* Lopes L.J., at 141.
(*z*) *Adam* v. *Ward*, [1917] A. C. 309; see *per* Lord Dunedin, at 332
(*a*) *Elliott* v. *Garrett*, [1902] 1 K. B. 871.
(*b*) *Edmondson* v. *Birch*, [1905] 2 K. B. 523.

But it has been decided that where the defendants are a newspaper, such interrogatories will not be allowed in the absence of special circumstances (*c*) and it has also been decided that an undertaking given by the plaintiffs not to bring actions against the persons who supplied the information is not a special circumstance (*d*).

Pleading.—The defence of fair comment is usually pleaded as follows:—

> In so far as the words complained of consist of allegations of fact they are true in substance and in fact, and in so far as they consist of expressions of opinion they are fair comment made in good faith and without malice upon a matter of public interest, namely, the question whether cinematograph theatres should be open to the public on Sundays.

(*c*) *White* v. *Credit Reform Assocn.*, [1905] 1 K. B. 523.
(*d*) *Lyle-Samuel* v. *Odhams' Press*, [1920] 1 K. B. 135.

CHAPTER 10.

ABSOLUTE PRIVILEGE.

"There are few, not many, cases where untrue communications or statements which are defamatory are by the law of England treated as absolutely privileged, so that, although they are untrue, defamatory and malicious, the law does not allow any action to be brought in reference to them. The reason is that there are certain relations of life in which it is so important that the persons engaged in them should be able to speak freely that the law takes the risk of their abusing the occasion and speaking maliciously as well as untruly, and in order that their duties may be carried on freely and without fear of any action being brought against them it says: 'We will treat as absolutely privileged any statement made in the performance of those duties'" (*a*).

The occasions which give rise to an absolute privilege are limited in number, exceptional in character, and well settled by law. They may be grouped under the following heads:—

1. (a) Judicial proceedings;
   (b) fair, accurate and contemporaneous reports of judicial proceedings.
2. (a) Parliamentary proceedings;
   (b) authorised reports of Parliamentary proceedings.
3. State communications.

(*a*) *More* v. *Weaver*, [1928] 2 K. B. 520, *per* Scrutton, L.J., at 521.

1. (a) **Judicial Proceedings.**—No action will lie against any Judge, advocate, party or witness in respect of any oral or written statement made in their respective capacities in the course of a judicial proceeding.

> "The authorities establish beyond all question this: that neither party, witness, counsel, jury nor judge can be put to answer civilly or criminally for words spoken in office; that no action of libel or slander lies, whether against judges, counsel, witnesses or parties, for words written or spoken in the course of any proceeding before any Court recognised by law, and this though the words written or spoken were written or spoken maliciously, without any justification or excuse, and from personal ill-will and anger against the person defamed. This 'absolute privilege' has been conceded on the grounds of public policy to insure freedom of speech where it is essential that freedom of speech should exist, and with the knowledge that Courts of Justice are presided over by those who from their high character are not likely to abuse the privilege, who have the power and ought to have the will to check any abuse of it by those who appear before them. It is, however, a privilege which ought not to be extended" (*b*).

(i) *Judges.*—The immunity of Judges from actions for libel in respect of words spoken in office is only one aspect of a very much larger immunity from the consequences of all acts done in their judicial capacity.

> "It is a principle of our law that no action will lie against a judge of one of the Superior Courts for a judicial act, though it be alleged to have been done maliciously and corruptly; therefore the proposed allegation would not make the declaration good. The public are deeply interested in this rule, which,

(*b*) *Royal Aquarium, etc.* v. *Parkinson*, [1892] 1 Q. B. 431, *per* Lopes, L.J., at 451.

indeed, exists for their benefit, and was established in order to maintain the independence of judges, and prevent their being harassed by vexatious actions" (*c*).

"By the common law of England it is the law that no such action will lie. The ground alleged from the earliest times as that on which this rule rests is that if such an action would lie the judges would lose their independence, and that the absolute freedom and independence of the judges is necessary for the administration of justice. . . . To my mind there is no doubt that this proposition is true to its fullest extent, that no action lies for judicial acts done or words spoken by a judge in the exercise of his judicial office, although his motive is malicious and the acts or words are not done or spoken in the honest exercise of his office. If a judge goes beyond his jurisdiction a different set of considerations arise" (*d*).

The principle has been held to extend to a consul acting as Judge in the consular Court (*e*), a county court Judge (*f*), a justice of the peace (*g*), and coroner (*h*); and it is submitted that upon principle the immunity would extend to every person exercising judicial functions in a judicial proceeding, an expression as to which there is some authority.

Provided therefore that the words are spoken "in office," *i.e.*, in a judicial capacity, no action will lie. It is not easy to establish that an act done by a Judge sitting in Court is otherwise than "in office." A finding that the defendant had "overstrained his judicial powers, and had acted in the administration of justice oppressively

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(*c*) *Fray* v. *Blackburn* (1863), 3 B. & S. 576, *per* Crompton, J., at 579.
(*d*) *Anderson* v. *Gorrie*, [1895] 1 Q. B. 668, *per* Esher, M.R., at 670, 671.
(*e*) *Haggard* v. *Pelicier Freres*, [1892] A. C. 61.
(*f*) *Scott* v. *Stansfield* (1868), L. R. 3 Ex. 223.
(*g*) *Usill* v. *Hales* (1878), 3 C. P. D. 319.
(*h*) *Thomas* v. *Churton* (1862), 2 B. & S. 475.

and maliciously, to the prejudice of the plaintiff and the perversion of justice" was held by the Court of Appeal to negative, not to support, the contention that the defendant had acted in excess of his jurisdiction (*i*).

Moreover, the expression "in office" has received a very wide interpretation. An abuse of office, even if established as a fact, would according to the case last cited be insufficient to oust the privilege, in spite of a dictum of Cockburn, C.J., to the contrary (*k*); but an act done in excess of jurisdiction would seem, according to the same case, to be outside the privilege. Exactly what acts if done by a Judge while sitting on the bench would amount to an excess of jurisdiction is a question as to which there is little available authority. It has been held that no action will lie in respect of words spoken by a magistrate in refusing to entertain an application for a summons on the ground of want of jurisdiction (*l*); and this case might well be held to cover an admonition of a defamatory character spoken from the bench in discharging a prisoner who had been acquitted by the jury.

(ii) *Advocates.*—The term "advocates" is used to cover either counsel or solicitors acting as advocates. The position of a solicitor acting in an advisory capacity is different, and is dealt with in the succeeding paragraph.

> "Of the three classes—judge, witness, counsel,—it seems to me that a counsel has a special need to have his mind clear from all anxiety. A counsel's position is one of the utmost difficulty. He is not to speak of that which he knows; he is not called upon to consider whether the facts with which he is dealing are true or false. What he has to do is to argue as best he can without degrading himself, in order to maintain the proposition which will carry

(*i*) *Anderson* v. *Gorrie*, [1895] 1 Q. B. 668.
(*k*) See *Thomas* v. *Churton* (1862), 2 B. & S. 475, at 479.
(*l*) *Usill* v. *Hales* (1878), 3 C. P. D. 319.

with it either the protection or the remedy which he desires for his client. If amidst the difficulties of his position he were to be called upon during the heat of the argument to consider whether what he says is true or false, whether what he says is relevant or irrelevant, he would have his mind so embarrassed that he could not do the duty he is called upon to perform. Far more than a judge, infinitely more than a witness, he wants protection on the ground of benefit to the public. The rule of law is that what is said in the course of the administration of the law is privileged; and the reason of that rule covers a counsel even more than a judge or a witness. . . . With regard to counsel, the questions of malice, *bona fides*, and relevancy cannot be raised; the only question is, whether what is complained of has been said in the course of the administration of the law. If that be so, the case against a counsel must be stopped at once" (*m*).

This case dealt with words spoken by a solicitor appearing for the defence in a police court, although the word "counsel" is used throughout the judgments.

(iii) *Solicitors*.—In considering the position of solicitors with regard to absolute privilege a distinction must be made at the outset between privilege for the purposes of defamation proceedings, and the privilege of non-disclosure in evidence in a Court of law. It is well settled that the privilege of non-disclosure is the privilege of the client and may be waived by him; and it is only after such waiver that the question in this chapter arises for consideration. The matter is not free from doubt, but would seem to depend on the answer to the question whether a professional relationship has been created between solicitor and client (*n*). Once it has been, it

(*m*) *Munster* v. *Lamb* (1883), 11 Q. B. D. 588, *per* Brett, L.J., 603, 604.
(*n*) *Minter* v. *Priest*, [1930] A. C. 558.

would seem that the balance of authority is in favour of holding that communications made by a solicitor to a client, at any rate so long as they are germane to the occasion, are covered by absolute privilege. It is clear that it is not necessary that the solicitor should have been either consulted upon or actually retained for the purpose of legal business: the business of a solicitor is not confined to giving legal advice.

> "I am not prepared to assent to a rigid definition of what must be the subject of discussion between a solicitor and his client in order to secure the protection of professional privilege" (*o*).
>
> "It seems to me that when communications pass between a solicitor and those whom he reasonably believes will desire to retain him, and to whom he makes a communication in relation to that, and who do retain him, the whole of those communications leading up to the retainer and relevant to it, and having that and nothing else in view, are privileged communications, that the whole occasion is throughout privileged. There is no authority, so far as I know, to the contrary, and it seems to me that to lay down any other doctrine would be very gravely contrary to the public interest" (*p*).
>
> "I myself have no doubt at all, in the absence of authorities, that if a solicitor has reason to believe that his services may be required by a possible client who does afterwards retain him, what passes between the solicitor and the client on the subject of the retainer, and relevant to the retainer, is covered by professional privilege. There is another and more serious point, a point of law, which I desire to keep open so far as my opinion is concerned. I very much doubt when a professional

(*o*) *Minter* v. *Priest*, [1930] A. C. 558, *per* Lord Buckmaster, at 568.
(*p*) *Browne* v. *Dunn* (1893), 6 R. 67, *per* Lord Herschell, at 72.

relation is created between solicitor and client . . . the fact that the solicitor is animated by malice in what he says of the third person would render him liable to an action provided he does not say anything which is outside what is relevant to the communications which he is making as solicitor to his client" (*q*).

To hold that the occasion of a professional interview is one of absolute privilege would be to grant complete protection to all the relevant communications made at that interview, irrespective of whether they were made by the client or solicitor, and would be in accordance with the views in the judgments above cited, and with the principles of privilege which have been laid down by Lord Dunedin (*r*). But the point cannot be regarded as finally decided, and was expressly reserved by the House of Lords (*s*).

The only qualification which this view, if right, would seem to require would be that the communication in question must have been germane to the purpose of the interview.

"The protection of course attaches to the communications made by the solicitor as well as by the client. If, therefore, the phrase is expanded to professional communications passing for the purpose of getting or giving professional advice, and it is understood that the profession is the legal profession, the nature of the protection is I think correctly defined. One exception to this protection is established. If communications which otherwise would be protected pass for the purpose of enabling either party to commit a crime or fraud the protection will be withheld. It is further desirable to

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(*q*) *Browne* v. *Dunn* (1893), 6 R. 67, *per* Lord Bowen, at 80.
(*r*) *Adam* v. *Ward*, [1917] A. C. 309, at 352.
(*s*) *Minter* v. *Priest*, [1930] A. C. 558.

point out, not by way of exception but as a result of the rule, that communications between solicitor and client which do not pass for the purpose of giving or receiving professional advice are not protected. It follows that client and solicitor may meet for the purpose of legal advice and exchange protected communications, and may yet in the course of the same interview make statements to each other not for the purpose of giving or receiving professional advice but for some other purpose. Such statements are not within the rule" (*t*).

(iv) *Witnesses.*

"If there is anything as to which the authority is overwhelming it is that a witness is privileged to the extent of what he says in the course of his examination. Neither is that privilege affected by the relevancy or irrelevancy of what he says: for then he would be obliged to judge of what is relevant or irrelevant, and questions might be, and are, constantly asked which are not strictly relevant to the issue" (*u*).

"I can see many reasons why a witness should be absolutely protected for anything he said in the witness-box. If he did voluntarily make a scandalous attack while giving evidence, he would be guilty of a gross contempt of Court, and might be committed to prison by the presiding judge; or, if he were before an inferior tribunal, and he persevered in his scandalous statements, he might be liable to an indictment for obstructing the course of justice" (*u*).

The privilege does not extend to cover statements made "altogether out of the character and sphere of a

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(*t*) *Minter* v. *Priest*, [1930] A. C. 558, *per* Lord Atkin, at 581.
(*u*) *Seaman* v. *Netherclift* (1876), 2 C. P. D. 53, *per* Cockburn, C.J., at 56; *per* Amphlett, J.A., at 61.

witness, or what he may say *dehors* the matter in hand," or " something having no reference to the cause or matter of inquiry " (*x*), to use Cockburn C.J.'s words. " Relevant ", according to Bramwell, J.A. (*y*), is not the right word. It is clearly not for the witness to decide whether he will be making an unprivileged statement in answering a question put to him by counsel, and it is a little difficult to visualise evidence being given in a judicial proceeding, conducted according to modern procedure, which would be outside the privilege. In the case under consideration the witness was completing an answer, in spite of the magistrates' efforts to stop him, to a question put to him in cross-examination, which the Court of Appeal considered ought not to have been allowed. The question was an " ingeniously suggestive " one (*z*) and the answer was made in order to justify the witness and meet the discreditable suggestion contained in the question; and it is submitted on the authority of this case that any answer given by a witness for his own protection, in answer to any question which is in fact allowed to be put to him, would be covered by the privilege.

Provided that the statement is made by the witness in his capacity of witness, *e.g.*, by a witness after leaving the box, but while still under the sanction of an oath (*a*), the privilege extends to cover it. It also extends to cover a statement made in an affidavit (*b*), a written summary of the witness's evidence handed to the Court after the evidence had been given, or a statement by an intended witness to a client or solicitor for the purpose of preparing his proof for trial (*c*).

" It is very obvious that the public policy which

(*x*) *Seaman* v. *Netherclift*, *supra*, at 56.
(*y*) *Seaman* v. *Netherclift*, *supra*, at 59.
(*z*) *Seaman* v. *Netherclift* (1876), 1 C. P. D. 540, *per* Coleridge, C.J., at 547.
(*a*) *Hope* v. *Leng* (1907), 23 T. L. R. 243.
(*b*) *Gompas* v. *White* (1889), 6 T. L. R. 20.
(*c*) *Watson* v. *M'Ewan*, [1905] A. C. 480.

renders the protection of witnesses necessary for the administration of justice must as a necessary consequence involve that which is a step towards and is part of the administration of justice—namely, the preliminary examination of witnesses to find out what they can prove" (*d*).

(v) *Parties.*—In so far as a party appears in a judicial proceeding and makes statements in the capacity of witness, he will be covered by the privileges summarised in the preceding section.

In so far as a party conducting his case in person makes statements in the capacity of counsel, he will be covered by the privileges attaching to counsel set out in the relevant preceding section.

In addition, communications made by a party to a solicitor for the purpose of getting legal advice are covered by absolute privilege. This applies not only to advice in a civil matter (*e*) but also to communications made for the purpose of being advised with reference to a criminal charge (*f*). But if communications which would otherwise be protected pass for the purpose of enabling either party to commit a crime or a fraud, the protection will be withheld (*g*).

Judicial Proceeding.—It remains to consider what tribunals are recognised by law as constituting a judicial proceeding, a question upon the determination of which depends the existence of all the privileges enumerated in the preceding sections. The question has always been treated as a question for the Court; and while it is difficult to lay down any satisfactory principle to be deduced from the authorities, it may be said that the

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(*d*) *Watson* v. *M'Ewan*, [1905] A. C. 480, *per* Halsbury, L.C., at 487.
(*e*) *More* v. *Weaver*, [1928] 2 K. B. 520.
(*f*) *R.* v. *Cox & Railton* (1884), 14 Q. B. D. 153.
(*g*) *O'Rourke* v. *Darbyshire*, [1920] A. C. 581.

power to compel the attendance of witnesses is an important, if not the paramount factor in deciding whether a particular tribunal is or is not a judicial proceeding (*h*).

It is possible to do little more than to tabulate, in the most convenient manner, the tribunals which have been the subject of judicial decision.

The following have been held to be judicial proceedings for the purposes considered in this chapter:—

Arbitration by County Court Judge under the Workmen's Compensation Acts (*i*).

Bishop's Commission under the Pluralities Acts, 1838—1885 (*k*).

Committee, Select, of the House of Commons (*l*).

Consul sitting as Judge in colonial consular Court (*m*).

Coroner's Court (*n*).

County Court (*o*).

Court Martial (*p*).

Law Society, charge before (*q*).

Lunacy, application to Disciplinary Committee of magistrate for detention (*r*).

Magistrates' Court—petty sessions (*s*).

Magistrates' Court—application for warrant for arrest (*t*).

Official Receiver—report under Companies (Winding up) Act (*u*).

(*h*) *Dawkins* v. *Rokeby* (1873), 8 Q. B. 255, *per* Kelly, C.B., at 267.
(*i*) *R.* v. *Crossley*, [1909] 1 K. B. 411.
(*k*) *Barrett* v. *Kearns*, [1905] 1 K. B. 504.
(*l*) *Goffin* v. *Donelly* (1881), 6 Q. B. D. 307.
(*m*) *Haggard* v. *Pelicier Freres*, [1892] A. C. 61.
(*n*) *Thomas* v. *Churton* (1862), 2 B. & S. 475.
(*o*) *Scott* v. *Stansfield* (1868), L. R. 3 Ex. 220.
(*p*) *Dawkins* v. *Rokeby* (1875), L. R. 7 H. L. 744
(*q*) *Lilley* v. *Roney* (1892), 8 T. L. R. 642.
(*r*) *Hodson* v. *Pare*, [1899] 1 Q. B. 455.
(*s*) *Law* v. *Llewellyn*, [1906] 1 K. B. 487.
(*t*) *Johnson* v. *Evans* (1800), 3 Esp. 32.
(*u*) *Burr* v. *Smith*, [1909] 2 K. B. 306.

The following have been held to be merely administrative, and not judicial proceedings :—

A meeting of a committee of the L.C.C. for granting music and dancing licences (*v*).

A meeting of the Licensing Justices (*w*).

1. (b) Contemporaneous Newspaper Reports of Judicial Proceedings.—Having regard to the provisions of section 3 of the Law of Libel Amendment Act, 1888 (*x*), it is submitted that contemporaneous newspaper reports of judicial proceedings are absolutely privileged. The protection has, however, been granted in language so ambiguous as to leave it open to doubt as to whether the privilege granted is absolute or qualified; and while it is submitted that it is absolute, this case of absolute privilege must be taken, in the absence of any judicial interpretation of the section, to be a doubtful one.

Fair and accurate reports of judicial proceedings have long had at common law a qualified privilege dependent on the absence of an improper motive for their publication (*y*). In 1888, however, the following provision was incorporated in the Law of Libel Amendment Act (*z*) :—

> "A fair and accurate report in any newspaper of proceedings publicly heard before any Court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged: provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter."

Three slight modifications upon the existing common law were clearly introduced by this section :—

(i) "Publicly heard."

It is not necessary for the common law

(*v*) *Royal Aquarium, etc.* v. *Parkinson*, [1892] 1 Q. B. 431.
(*w*) *Attwood* v. *Chapman*, [1914] 3 K. B. 275.
(*x*) 51 & 52 Vict. c. 64.
(*y*) See Chapter 12.
(*z*) 51 & 52 Vict. c. 64, s. 3.

protection that the proceeding should have been publicly heard; it was and is sufficient if the proceeding was such as to constitute a judicial proceeding.

(ii) "Newspaper."

It is not necessary for the common law protection that the report shall be published in a newspaper. Moreover, by section 1 of this Act, the expression "newspaper" is to bear the same meaning as it bears in the Newspaper Libel and Registration Act (*a*), which is, shortly, that it must be a periodical published at intervals not exceeding twenty-six days.

(iii) "Contemporaneously."

It is not necessary for the common law protection that the report should be published contemporaneously with the proceedings reported. Indeed, it was formerly disputed whether the report could be published till the proceedings were finally concluded. Delay in publication did not deprive the report of the protection unless the jury held it was evidence of malice in the publisher. There has been no decision on the meaning of "contemporaneously"; to interpret the word literally would deprive the protection given by the statute of any value at all.

As to the interpretation to be placed upon the word "privileged" in this section, there is considerable doubt whether it means absolute or qualified privilege; and in the absence of explanatory epithets in the statute, attempts may be made to elucidate its meaning by comparison with language used elsewhere.

On the one hand, it is said that the word used by itself means qualified privilege; and in support of this it

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(*a*) 44 & 45 Vict. c. 60.

is pointed out that, while the expression "absolutely privileged" was used in the original Bill, the word "absolutely" was deliberately omitted from the final draft in accordance with amendments made in the committee stage. And it is further said that there is no public interest which demands that the limited class of absolutely privileged occasions should be extended to newspaper reports, as distinguished from other reports, of judicial proceedings.

In reply, it may be observed, firstly, that it is well settled that the intention of the Legislature must be gathered from the language used to express it (*b*), and that in construing ambiguous language the Parliamentary history of the Act is inadmissible (*c*); and secondly that the consequences of an Act of Parliament, unless they are quite extravagant or impossible, cannot be relevant in construing the meaning of its sections.

On the other hand, it is said that the word "privileged" means "absolutely privileged" for the following reasons: first, that in the absence of any qualifying epithet it must be construed literally, and that that is its literal meaning; second, that when the section is read in the light of section 4, where it is plainly stated that proof of malice shall defeat the privilege, some contrast must have been intended between the two, for from a change of language one would expect a change of meaning; third, that if it was intended that a qualified privilege only should have been granted, there was no need to deal separately with the subject-matter of the two sections; and finally, that to construe the word as meaning "qualified privilege" would be in substance to declare and not to amend the common law as it existed at the passing of the Act, and would therefore be inconsistent with the

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(*b*) *Huntoon* v. *Kolynos*, [1930] 1 Ch. 528, *per* Lawrence, L.J., at 553.
(*c*) *Viscount Rhondda's Claim*, [1922] 2 A. C. 339, *per* Lord Dunedin, at 390.

intention of the enactment as indicated by the title ("An Act to Amend the Law of Libel") and the preamble ("Whereas it is expedient to Amend the Law of Libel") both of which are admissible in construing ambiguities in the language of the enacting sections (*d*).

It is submitted that this latter view is the correct one, and is in accordance with the balance of opinion of text-writers who deal with the subject (*e*).

2. (a) Parliamentary Proceedings.—Words spoken in the Houses of Parliament are absolutely privileged, and no action can be brought in respect of them.

This complete freedom of speech within the walls of the House is one of the Privileges of Parliament as established by the Bill of Rights.

> "The freedom of speech, and debates and proceedings in Parliament, ought not to be impeached or questioned in any Court or place out of Parliament" (*f*).

2. (b) Authorised Reports of Parliamentary Proceedings.—By virtue of the provisions of the Parliamentary Papers Act, 1840 (*g*), reports, papers, votes and proceedings published under the authority of either House are absolutely privileged, and the proceedings will be stayed on production of a certificate to this effect.

This protection does not extend to other than authorised reports. Such reports are protected only if they are fair and accurate, and not made maliciously (*h*). The publication of a single speech is not a fair and

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(*d*) *Fielding* v. *Morley Corpn.*, [1899] 1 Ch. 1; *Powell* v. *Kempton Park*, [1899] A. C. 143, at 185. See Maxwell on Interpretation of Statutes, 7th (1929) ed., p. 36.

(*e*) See Fraser, 6th (1925) ed., p. 199; Odgers, 6th (1929) ed., p. 267; Spencer-Bower, 2nd (1923), ed., p. 406; Gatley, 2nd (1929) ed., p. 351.

(*f*) 1 Will. & Mary, sess. 2, c. 2.

(*g*) 3 & 4 Vict. c. 9, s. 1, passed in consequence of the decision in *Stockdale* v. *Hansard* (1839), 9 A. & E. 1.

(*h*) See Chapter 13.

accurate report; if published by a member to his constituents it may be privileged on the ground of common interest (*i*); publication outside the constituency is not privileged at all (*k*).

3. State Communications.—Absolute privilege attaches to "anything in the nature of an Act of State, *e.g.*, to every communication relating to State matters made by one minister to another, or to the Crown" (*l*).

Where the plaintiff sued the Secretary of State for India for a statement in a despatch recommending his removal from the army on half-pay, it was said by Lord Esher:—

> "It would seem from the form of the action that it is meant to be brought against him in his official capacity, treating him as a corporation, not against him personally. But it would have made no difference if it had been brought against him as an individual. . . . If an officer of State were liable to an action of libel in respect of such a communication as this, actual malice could be alleged to rebut a plea of privilege, and it would be necessary that he should be called as a witness to deny that he acted maliciously. That he should be placed in such a position, and that his conduct should be so questioned before a jury, would clearly be against the public interest, and prejudicial to the independence necessary for the performance of his functions as an official of State. Therefore the law confers upon him an absolute privilege in such a case" (*m*).

The fact that a communication relates to commercial

(*i*) *Davison* v. *Duncan* (1857), 7 E. & B. 229.
(*k*) *Duncombe* v. *Daniell* (1838), 8 C. & P. 222.
(*l*) Fraser, 6th ed., at 197, adopted by Lord Esher in *Chatterton* v. *Secretary of State for India*, [1895] 2 Q. B. 189, as accurate.
(*m*) *Chatterton* v. *Secretary of State for India*, [1895] 2 Q. B. 189, *per* Lord Esher, 190, 191.

matters does not of itself preclude it from being one relating to State matters (*n*).

Practice.—A statement of claim in an action for libel may be struck out (*o*) and the action dismissed as frivolous and vexatious under Ord. XXV, r. 4 (*p*), in so far as the words complained of were published upon an occasion of absolute privilege.

(*n*) *Isaacs* v. *Cook*, [1925] 2 K. B. 391.
(*o*) *Law* v. *Llewellyn*, [1906] 1 K. B. 487.
(*p*) *Burr* v. *Smith*, [1909] 2 K. B. 306.

CHAPTER 11.

QUALIFIED PRIVILEGE.

By the law of England there are occasions when a person may make untrue and defamatory statements about another without incurring any liability for them. These occasions are called privileged occasions, and are based on the public policy which requires that in certain circumstances a person shall be entitled to speak his mind freely without fear of the consequences.

Communications which are made on such occasions are protected so long as they are made *bona fide* for that limited purpose for which the privilege exists. But if they are made in circumstances which constitute an abuse of the occasion, that is to say, if they are prompted not by *bona fides* but by some improper motive, the protection afforded by the privilege will be lost. This does not mean, however, that the occasion is any the less a privileged occasion; it simply means that by reason of the improper motive with which the statement is made the privilege of the occasion will not protect it.

An obvious instance is the giving of a reference concerning a servant to that servant's prospective employer. If two persons were simultaneously to be asked for a reference for their former servants and one were to give the servant an unfavourable character in good faith and the other were to give the servant a similar bad character not in good faith, but with the object of injuring the servant, or inducing the servant to remain in his employment, the occasion in each case

would be a privileged occasion; but the communication would be protected by the privilege in the former instance, while in the latter it would not.

The expression "qualified privilege" is used to cover two somewhat different classes of case. It includes on the one hand a number of reports in newspapers and elsewhere which do not enjoy an absolute privilege such as has been dealt with in the previous chapter (*a*). It also includes statements made on a number of miscellaneous occasions which may for convenience be grouped under three heads:—

1. When the speaker has a duty to communicate and the recipient has an interest in receiving the libellous communication.
2. When the statement is made in pursuance of or in protection of a common interest.
3. When the statement is made in legitimate self-defence of the speaker's own interests.

In all such cases the existence of any improper motive on the part of the speaker will "defeat" the privilege. Such improper motive is called malice. Malice in this sense means much more than spite or ill-will: its meaning is fully dealt with in Chapter 14; but for the purpose of this chapter it may be taken to mean not only spite or ill-will, but any motive other than the fulfilment of the purpose for which the privilege exists—*e.g.*, negligence, blackmail or a desire to injure some other person than the plaintiff.

No exact catalogue or list can be made of all the occasions which will give rise to privilege, which vary infinitely with the changing circumstances of life or business. The effect of establishing that in any particular circumstances a privileged occasion has arisen,

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(*a*) See Chapter 12.

however, is always the same: namely, to rebut the presumption that the words were maliciously spoken which would otherwise arise from proof of publication of defamatory words, and to cast upon the plaintiff the additional burden of proving malice in fact, or, as it is sometimes called, actual or express malice.

Principles of Law.—The principles upon which the law of qualified privilege rests have frequently been stated, but never in quite the same words. They may be deduced from a study of the following passages:—

> "In general, an action lies for the malicious publication of statements which are false in fact and injurious to the character of another (within the well-known limits of verbal slander) (*b*), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorised communications, and affords a qualified defence, depending on the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society: and the law has not restricted the right to make them within any narrow limits" (*c*).
>
> "A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, although in certain criminatory matter which,

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(*b*) See Chapter 3.
(*c*) *Toogood* v. *Spyring* (1834), 1 C. M. & R. 181, *per* Parke, B., at 193.

without this privilege, would be slanderous and actionable" (*d*).

"The principle upon which these cases are founded is a universal one, that the public convenience is to be preferred to private interests, and that communications which the interests of society require to be unfettered may freely be made by persons acting honestly without malice, notwithstanding that they involve comments defamatory of individuals" (*e*).

"A statement that is defamatory and untrue, and which may do irreparable damage, is yet protected under certain conditions, on the ground that it is better for the general good that individuals should occasionally suffer than that the freedom of communication between persons in certain relations should be impeded. But the freedom of communication which it is desired to protect is honest and kindly freedom. It is not expedient that liberty should be made a cloak for maliciousness, and in such a case the general law applies" (*f*).

"The rule is, I think, this: that when the circumstances are such as to cast upon the defendant the duty of making the communication to a third person, the communication is privileged. So again, when he has an interest in making the communication to a third person, and the third person has an interest in receiving it" (*g*).

"The reason for holding any occasion privileged is the common convenience and welfare of society, and it is obvious that no definite line can be drawn so as to mark off with precision those cases which

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(*d*) *Harrison* v. *Bush* (1855), 5 E. & B. 344, *per* Campbell, C.J., at 348.
(*e*) *Henwood* v. *Harrison* (1872), L. R. 7 C. P. 606, *per* Willes, J., at 622.
(*f*) *Bowen* v. *Hall* (1881), 6 Q. B. D. 333, *per* Coleridge, C.J., at 343.
(*g*) *Pullman* v. *Hill*, [1891] 1 Q. B. 524, *per* Lopes, L.J., at 529.

are privileged, and separate them from those which are not. . . . I take moral or social duty to mean a duty recognised by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civilly or criminally" (*h*).

"The principle on which the law of qualified privilege rests is, I think, this: that when words are published, which are both false and defamatory, the law presumes malice on the part of the person who publishes them. The publication may, however, take place under circumstances which create a qualified privilege. If so, the presumption of malice is rebutted by the privilege, and in an action for libel or slander founded upon a privileged occasion, the plaintiff has to prove express malice on the part of the person responsible for the publication. The effect of proving express malice is sometimes spoken of as defeating the privilege. This is a convenient expression, and conveys in a single word what has really happened, namely, that although the occasion remains a privileged occasion, the privilege afforded by the occasion ceases to be an effective weapon of defence. The reason of this is obvious. Qualified privilege is a defence only to the extent that it throws on the plaintiff the burden of proving express malice. Directly the plaintiff succeeds in doing this, the defence vanishes, and it becomes immaterial that the publication was on a privileged occasion" (*i*).

"The circumstances that constitute a privileged occasion can never be catalogued and rendered exact. New arrangements of business, even new habits of life, may create unexpected combinations of circumstances which, though they differ from well-known

(*h*) *Stuart* v. *Bell*, [1891] 2 Q. B. 341, *per* Lindley, L.J., at 347, 350.
(*i*) *Smith* v. *Streatfield*, [1913] 3 K. B. 764, *per* Bankes, J., at 769.

instances of privileged occasion, may none the less fall well within the plain yet flexible language of the definition to which I have referred" (*k*).

"A privileged occasion is, in reference to qualified privilege, an occasion when the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest to receive it. This reciprocity is essential" (*l*).

"Except in the case of communications based on common interest, the principle is that either there must be an interest in the recipient and a duty to communicate in the speaker, or an interest to be protected in the speaker and a duty to protect it in the recipient. Except in the case of common interest justifying intercommunication, the correspondence must be between duty and interest. There may, in the common interest cases, be also a common or reciprocal duty. [Previous statements of the law] I think should be expanded into either (1) a duty to communicate information believed to be true to a person who has a material interest in receiving the information, or (2) an interest in the speaker to be protected by communicating information, if true, relevant to that interest, to a person honestly believed to have a duty to protect that interest, or (3) a common interest in and a reciprocal duty in respect of the subject-matter of the communication between speaker and recipient. . . . In my opinion Horridge, J., went too far in holding that there could be a privileged occasion on the ground of interest in the recipient without any duty to communicate on

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(*k*) *L. A. P. T.* v. *Greenlands*, [1916] A. C. 15, *per* Lord Buckmaster, at 22.

(*l*) *Adam* v. *Ward*, [1917] A. C. 309, *per* Lord Atkinson, at 334.

the part of the person making the communication" (*m*).

The foregoing passages constitute a fairly comprehensive though by no means exhaustive exposition of the principles to be applied in determining whether, in a given set of circumstances, a privileged occasion has arisen or not.

Before proceeding to consider illustrations of the application of these principles certain preliminary observations may usefully be made:—

(1) Distinction between a Privileged Occasion and a Protected Communication.—It is important to distinguish, and always to bear in mind the distinction, between a privileged occasion and a protected communication. The word "privileged" is properly applied only to the occasion; the communication made on that occasion is protected by the privilege only in so far as it is not maliciously made. Proof of malice, however, does not render the occasion an unprivileged occasion; its effect is to deprive that particular publication of the protection which, but for the malicious motive with which it was made, would have been afforded by the privilege.

> "If the judge rightly holds the occasion to be privileged, though a libel has been proved, in the absence of anything further the defence is perfect" (*n*).
>
> "The occasion is privileged, the communication is protected" (*o*).

An attempt is made for the sake of clarity to preserve this distinction in the pages which follow.

It may be added that this distinction is an irrelevant

(*m*) *Watt* v. *Longsdon*, [1930] 1 K. B. 130, *per* Scrutton, L.J., at 147.
(*n*) *Nevill* v. *Fine Arts*, [1895] 2 Q. B. 156, *per* Esher, M.R., at 169.
(*o*) *Adam* v. *Ward*, [1917] A. C. 309, *per* Lord Shaw, at 348.

one in considering absolute privilege, as this privilege throws over communications made on the occasions to which it applies a complete protection which is not capable of being defeated by the proof of malice.

(2) Distinction between Privilege and Malice.—It is further essential for the proper understanding of the law of privilege that the reader should appreciate and bear constantly in mind the distinction between two entirely separate questions: (i) whether on the facts as admitted or proved the occasion may properly be held to be a privileged occasion; and (ii) if so whether there is any evidence of malice on the part of the defendant which would defeat the privilege. Even in the highest judicial dicta this distinction is not always clearly made. The question of malice does not arise for determination at all until the question of privilege has been determined in the affirmative.

> "Confusion is often made between a privileged communication and a privileged occasion. It is for the jury to say whether the communication is privileged, but the question whether an occasion is privileged is for the judge, and that question only arises when there has been publication to a third party. If the judge holds that the occasion was privileged there is an end of the plaintiff's case unless express malice is proved" (*p*).

(3) Privilege a Question for the Judge.—It is well settled that the question of privilege is for the Judge, and for the Judge alone to decide; though where the facts upon which the claim to privilege is based are in dispute these facts should be found by the jury upon evidence.

> "The question whether the occasion is privileged

(*p*) *Pullman* v. *Hill*, [1891] 1 Q. B. 524, *per* Lopes, L.J., at 529.

if the facts are not in dispute is a question of law only for the judge, not for the jury. If there are questions of fact in dispute upon which this question depends they must be left to the jury; but where the jury have found the facts it is for the judge to say whether they constitute a privileged occasion" (*q*).

(4) Malice a Question for the Jury.—The question of malice is pre-eminently a question for the jury. There is always the prior question, however, whether there is any evidence of malice for the jury's consideration, and this is a question for the Judge, and is often one of some considerable difficulty. In order to avoid the necessity for re-trial of the case if he should prove to be wrong in holding that there is no evidence of malice, the Judge usually directs the verdict of the jury to be taken, except in the very clearest cases, leaving the defendant to appeal to have the verdict set aside on the ground that there was no evidence upon which it could be founded.

"It certainly is not necessary, in order to enable the plaintiff to have the question of malice submitted to a jury, that the evidence is such as necessarily leads to the conclusion that malice existed, or that it should be inconsistent with the non-existence of malice; but it is necessary that the evidence should raise a probability of malice, and be more consistent with its existence than with its non-existence" (*r*).

If there is obviously no evidence of malice for the jury to consider, the Judge's duty is of course to withdraw the case from them and enter a verdict for the defendant (*s*).

(5) Burden of Proving Privilege on the Defendant.—The burden of proving that the occasion is privileged lies

(*q*) *Hebditch* v. *M'Ilwaine*, [1894] 2 Q. B. 54.
(*r*) *Somerville* v. *Hawkins* (1851), 10 C. B. 590.
(*s*) *Stuart* v. *Bell*, [1891] 2 Q. B. 341.

upon the defendant who is making the allegation. It is for him to adduce evidence to prove any facts upon which his claim to privilege is based, and to satisfy the Judge that the authorities support his contention.

> "It is for the defendant to prove that the occasion was privileged. If the defendant does so, the burden of proving actual malice is cast upon the plaintiff; but unless the defendant does so, the plaintiff is not called upon to prove actual malice" (*t*).

(6) Burden of Proving Malice upon the Plaintiff.—Once the defendant has established his claim to privilege, the burden of proving actual malice is cast upon the plaintiff. The circumstance that the words were published on a privileged occasion rebuts the presumption that the words were maliciously spoken which would otherwise arise on proof of the publication of defamatory words. In other words, once the occasion is proved to be a privileged one, the defendant will be presumed, until the contrary is proved, to have acted *bona fide*, and to have made the communication honestly for the purpose for which the privilege exists, and not for some other motive.

> "When once the learned judge has laid down that the occasion was privileged, the only question for the jury to consider was whether the defendant acted from a sense of duty or was actuated by some improper motive, and the onus of proving that the defendant was influenced by some improper motive, that is, that he acted maliciously, was on the plaintiff . . . it is clear that it was not for the defendant to prove that he was acting from a sense of duty, but for the plaintiff to satisfy the jury that the

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(*t*) *Hebditch* v. *McIlwaine*, [1894] 2 Q. B. 54, *per* Esher, M.R., at 58.

defendant was acting from some other motive than a sense of duty" (*u*).

"The privilege would be worth very little if a person making a communication on a privileged occasion were to be required, in the first place and as a condition of immunity, to prove affirmatively that he honestly believed the statement to be true. In such a case *bona fides* is always presumed" (*x*).

(7) Stage of Case when Rulings may be Given.

(i) *Privilege.*—The question of privilege ought to be disposed of before the question of malice is decided, though both may be left till the conclusion of the evidence.

"The learned judge who tried the case took what I believe is a very unusual course. . . . He disposed of the question of malice while the question of privilege was still unsettled. I do not know if this can be said to be wrong, but at least it is highly inconvenient" (*y*).

(ii) *Malice.*—The Judge may be, and almost invariably is, asked to rule that there is no evidence of malice against the defendant as soon as the plaintiff's case has been closed; but he is entitled to postpone his ruling on this point until he has heard the evidence for the defendant, whose witnesses may very well supply under cross-examination evidence of malice which was wanting in the plaintiff's case. On the other hand, he is also entitled, after having left the case to the jury and obtained their verdict, to enter judgment for the defendant on the ground that, despite the verdict of the jury, there was no evidence of malice upon which that verdict could be

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(*u*) *Clark* v. *Molyneux* (1877), 3 Q. B. D. 237, *per* Cotton, L.J., at 249, 251.

(*x*) *Jenoure* v. *Delmege*, [1891] A. C. 73, at 79 (P. C.).

(*y*) *Adam* v. *Ward*, [1917] A. C. 309, *per* Lord Dunedin, at 331.

reasonably founded, and that the case ought not to have been left to them at all.

"Where the judge at the conclusion of the plaintiff's case is asked to rule whether there is a case to go to the jury or not, he may certainly, I think, decline to rule that there is no evidence, may allow the defendant's evidence to be taken, may allow the verdict to go and none the less may give judgment for the defendant on the footing that there is no case. Such a course is often convenient, for if the Court of Appeal should think that the judge's ruling was erroneous the advantage is gained that it is unnecessary to send the case back for re-trial before another jury. Further, if the judge at the conclusion of the plaintiff's case rules as he did here" (*i.e.* that the case must go to the jury) "there is nothing, I think, to prevent him at the termination of the hearing from reviewing his first opinion. This he may do, in my judgment (if he has not disposed of the case), by finding upon further consideration that upon the plaintiff's evidence there was after all no case. But, further, I think he may and ought upon all the evidence in the case (including the defendant's evidence) so to rule if, upon the case as a whole, he finds that the evidence fails to disclose a case upon which the jury could reasonably find a verdict for the plaintiff" (*z*).

"According to the present practice the judge has a discretion whether he will rule on the matter at the close of the plaintiff's case, or whether he will defer ruling until the whole of the evidence has been called. In the latter event the defendant's counsel must then elect whether he will rely on his objection that there is no evidence of malice, or call evidence

(*z*) *Skeate* v. *Slaters, Ltd.*, [1914] 2 K. B. 429, *per* Buckley, L.J., at 438.

for the defendant at the risk of supplying evidence for the plaintiff which the jury may accept as proving malice" (*a*).

(8) Privilege only Needed for Defamatory Statements.—It is perhaps unnecessary to point out that the defence of privilege only arises when the words have been proved to be defamatory and assumed to be untrue. "The appellant says the statements are untrue; they may be, but privilege is only designed to shelter untrue statements" (*b*).

From this it follows that qualified privilege may be, and usually is, pleaded as an alternative to any other defence or defences, *e.g.*, a denial of publication, a denial of reference to the plaintiff, a denial of defamatory meaning, fair comment, justification or absolute privilege.

(9) Use of the Word "Privilege".—Although it may be suggested that the word "privilege" is neither the most exact nor the most appropriate word for the purpose, it is used throughout this chapter because its meaning in relation to the law of libel is very definitely and clearly understood. Indeed, it has become appropriated to this meaning by centuries of use, both in text-books and by the most eminent and careful Judges; and, as has been said,

> "There is no decision that the word privilege . . . is not as good a word as any substitute that can be found to express the right by which, in certain circumstances, writings defamatory of another person may be published with impunity, because the presumption of malice is negatived" (*c*).

(*a*) *Marbé* v. *Geo. Edwardes*, [1928] 1 K. B. 269, *per* Bankes, L.J., at 277.

(*b*) *More* v. *Weaver*, [1928] 2 K. B. 520, *per* Scrutton, L.J., at 526.

(*c*) *Hebditch* v. *M'Ilwaine*, [1894] 2 K. B. 54, *per* Esher, M.R., at 59.

"There is, indeed, danger of confusion if new words are used to define or explain what is already well established and clear" (*d*).

(10) Reciprocity of Interest Essential.—The paramount consideration, in determining the existence of privilege, is the reciprocity of interest or duty between the communicating parties. It is frequently difficult, though usually unnecessary, to decide whether in a particular case there is merely an interest, or whether that interest amounts to a duty, either moral or social. But unless there is the element of mutuality, that is to say, unless there is not only a duty or interest on one side, but also a corresponding interest or duty on the other, no claim to privilege can be made except in the cases where the claim to privilege is based on a reasonable desire to protect the speaker's own interests.

From this it follows that the fact that a person to whom defamatory matter is published has an obvious interest in the matter is not of itself enough to make the occasion on which it is published a privileged occasion. In order to create a privilege, the person making it must have an interest in the matter communicated, or a duty to make it to the person receiving it.

For example, although both parties to a marriage clearly have an interest in receiving communications concerning the matrimonial delinquencies of the other, there are in general few people who are under any duty to communicate such information to either of them, at any rate without such a prior request as would create a duty to make the communication (*e*).

Conversely, where the speaker has a duty to make or an interest in making the communication, but the

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(*d*) *L. A. P. T.* v. *Greenlands*, [1916] 2 A. C. 15, *per* Lord Buckmaster, at 22.

(*e*) *Watt* v. *Longsdon*, [1930] 1 K. B. 130, *per* Scrutton, L.J., at 148.

recipient is under no duty to receive it, no privilege exists. In other words, it is no defence that the speaker was under a duty to tell somebody, if in fact he told the wrong person. Thus in an action where the defendants who were ratepayers of a parish and entitled to vote at an election of the office of guardians of the poor, had reason to complain of irregularities which they suspected had occurred at the election in question, and made a written complaint to the Board of Guardians defamatory of the plaintiff, suggesting that the plaintiff had been guilty of the irregularities complained of, it was held that the communication was not privileged inasmuch as the Board of Guardians had no duty or power to take any action upon the defendants' complaint, and that the fact that the defendants thought they had was irrelevant in considering the question of privilege.

"It was argued that, although the Board of Guardians had no power or duty or interest in the matter, nevertheless the occasion was privileged because the defendants honestly and reasonably believed that the Board had such a duty or power or interest and were asking them for redress in the matter which they believed they could give. Assuming that the defendants had such a belief, though I confess I cannot see how there could be any reason in such a belief, the argument in substance seems to come to this: that the belief of the defendants that the occasion was privileged makes it privileged. I cannot accept the proposition so put forward. I cannot see how the belief of the defendants, who have made a mistake, and have published a libel to persons who have no interest or duty or power in the matter, can affect the question. The belief of the defendants might have a bearing on the question of malice; if it be assumed that the occasion was privileged, the belief of the defendants might be

strong to show that the communication was privileged, as being made without malice, but I do not think it has anything to do with the question whether the occasion was privileged" (*f*).

Illustrations.—We may now proceed to examine the way in which the law has been applied by illustrations from decided cases. A great number of authorities are contained in the Law Reports, and it is only proposed to offer for the guidance of the reader a few authorities to illustrate the five main categories into which they fall, namely: Legal Duty, Social Duty, Moral Duty, Common Interest, and Self-Interest.

Legal Duty.—It is not necessary in this book to give detailed instances of occasions when a legal duty might arise to make a libellous communication; for instance, there is clearly a duty to give information to the police such as supplying them with the number of a car suspected of dangerous driving, or to pick out an individual for police purposes in an identification parade.

> "As to legal duty, the judge should have no difficulty; the judge should know the law; but as to moral or social duties of imperfect obligation the task is far more troublesome" (*g*).

Social or Moral Duty.—The question of moral duty raises a point of great difficulty, upon which there will always be honest difference of opinion amongst honest men. In what circumstances will A be justified in telling B something he has heard to C's discredit? The point has been dealt with by the law in a manner which is in accord alike with justice and with common sense. It is obvious that no general answer can be given to this

(*f*) *Hebditch* v. *M'Ilwaine*, [1894] 2 Q. B. 54, *per* Esher, M.R., at 59.
(*g*) *Watt* v. *Longsdon*, [1930] 1 K. B. 130, *per* Scrutton, L.J., at 144.

question; each case must be considered on its individual merits; and the only principles which can guide either the defendant, who has to decide whether to make the communication, or the Judge, who has to decide whether it was properly made, are two: namely, first, that it must have been honestly made and not prompted by motives of private spite or personal advantage to be gained at the expense of the person defamed; and second, that there must be a mutual interest in the subject-matter between the communicating parties. This second principle raises a very practical and logical distinction between the respective positions of, *e.g.*, a close personal friend or a business associate, and a person who is an entire stranger, from which it follows that a person in the former position may well be morally justified in making a communication which would be unpardonable if made by the latter. This moral justification is, in general, attended by legal protection.

> "The question of moral or social duty being for the judge to decide, each judge must decide it as best he can for himself. I take moral or social duty to mean a duty recognised by English people of ordinary intelligence and moral principles, but at the same time a duty not enforceable by legal proceedings, whether civil or criminal" (*h*).
>
> "The true mode of judging is to try and put oneself as much as possible in the position of the defendant" (*i*).
>
> "I think these tests are as near as one can reasonably get to the tests to be applied in forming an opinion on the question of whether a privileged occasion arising out of a social or moral duty has or has not arisen" (*k*).

(*h*) *Stuart* v. *Bell*, [1891] 2 Q. B. 341, *per* Lindley, L.J., at 350.
(*i*) *Stuart* v. *Bell*, *supra*, *per* Kay, L.J., at 359.
(*k*) *Watt* v. *Longsdon*, [1930] 1 K. B. 130, *per* Greer, L.J., at 153.

Social Duty.—One of the commonest and most obvious illustrations of a social duty is that of an employer in giving a reference to a servant or employee. The employer is under no legal obligation to give a reference; but if in fact he does so, the occasion will be a privileged occasion, and the employer will be protected in what he says so long as he gives his opinion fairly and honestly. The duty to give a reference extends of course to the subsequent correction of a reference already given, if the employer should afterwards find out that he gave it under a false impression, though the correction be unfavourable to the servant.

> "If I have given a servant a good character and afterwards find out that I have been deceived, and that the servant is dishonest, I am bound to make the same communication then, as I should have made before if the facts were known to me" (*l*).

Similarly, if one tradesman asks another for a trade reference concerning the financial standing and stability of a third, the occasion on which it is given will be a privileged occasion, for the request in such a case creates a duty to reply and to reply truthfully (*m*).

Trade references which are supplied for profit create a somewhat different problem, as to which the two most recent authorities are somewhat difficult to reconcile. When the inquiry is made through an agency or a combination of persons whose business it is to supply such information, the deciding factor seems to be whether the references are given for profit or not, for motives of private gain may exclude the possibility of the communication being made from any sense of duty.

In the first case (*n*) the reference was supplied by the Mercantile Agency, a company whose business con-

(*l*) *Gardener* v. *Slade* (1849), 18 L. J. Q. B. 334, *per* Coleridge, J., at 336.
(*m*) *Bromage* v. *Prosser* (1825), 4 B. & C. 247.
(*n*) *Macintosh* v. *Dun*, [1908] A. C. 390.

sisted in obtaining information as to the commercial credit and standing of persons in New South Wales and supplying it upon request to persons who were subscribers to the agency, in order to help such persons in determining the propriety of giving credit to the persons concerned. The company charged a fee for supplying this information, which was stated to be confidential. It was held by the Privy Council that no privilege attached to a communication made in such circumstances.

> "What is their motive? Is it a sense of duty? Certainly not. It is a matter of business with them. Their motive is self interest. They carry on their trade, just as other traders do, in the hope and expectation of making a profit . . . it is only right that those who engage in such business, touching so closely very dangerous ground, should take the consequences if they overstep the law" (*o*).
>
> "The duty to communicate does not arise when the communication is made in pursuance of a contract made for the private gain of a speaker" (*p*).

In the second case (*q*) the facts were very similar, with this difference: that although the association who supplied the reference in fact made a profit, they did not trade, or at any rate did not purport to trade, with the object of making a profit. This seems the only ground upon which a distinction can be drawn between the two decisions, for in the first case the communication was held to be made on a privileged occasion, and in distinguishing it from the second it was said:—

> "That decision leaves untouched the wider question, as to whether groups of people, however large, may not combine together in order to

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(*o*) *Macintosh* v. *Dun*, *supra*, *per* Lord Macnaghten, at 400.
(*p*) *Watt* v. *Longsdon*, [1930] 1 K. B. 130, *per* Scrutton, L.J.
(*q*) *L. A. P. T.* v. *Greenlands*, [1916] 2 A. C. 15.

provide the necessary information for carrying on business" (*r*).

The methods by which the information is obtained would seem to be irrelevant to the decisions, for they were disapproved of in each case.

It may be that the true effect of these decisions is this, that while payment cannot create a privilege it cannot take it away. A duty or an interest which already exists cannot be destroyed because the information supplied in pursuance of it is paid for; but on the other hand, no duty will be created on the part of a vendor of information which is libellous merely by reason of the fact that the purchaser has paid for it. If this is right there are many commonplace illustrations of cases where information is supplied at considerable risk, *e.g.*, by private detectives.

A communication passing between two directors of a company with regard to the character of a third director is privileged on the ground of duty, the speaker having a duty, both from a moral and a material point of view, to communicate the information to the chairman of the company, who, apart from questions of present employment, might be asked for a testimonial to a future employer (*s*).

Again, where the directors of a company circulated to the shareholders a report of the auditors, which contained comments defamatory of the manager, it was held that the report was privileged on the same ground.

> "I confess I cannot bring myself to understand how it can be thought that the directors of a company, who have been obliged by the articles of association to employ auditors to investigate their accounts and to receive from those auditors a report expressing their opinion upon the state of the

(*r*) *L. A. P. T.* v. *Greenlands*, *supra*, *per* Lord Buckmaster, at 27.
(*s*) *Watt* v. *Longsdon*, [1930] 1 K. B. 130.

accounts, can be held to be acting beyond the scope of their duties in communicating, simpliciter without one word of comment of their own, that report of the auditors to their shareholders. I confess that I go so far as to say that I think it was the duty of the directors to do so, and that the failure of the directors to report to the shareholders a statement made by the auditors upon their own responsibility of what they found to be the state of the accounts might have led the directors into a position of great difficulty" (*t*).

Similarly, a letter written by one vicar in reply to another, stating his reasons for refusing to assist in the settlement of a dispute between two members of their respective parishes, is privileged.

> "It seems to me that, under all the circumstances, it was the social and moral duty of the defendant as a clergyman towards Mr. Cleaver as another clergyman to give him true and correct information on the subject on which he was writing. I say emphatically that I think he was discharging a social and moral duty; and I also think it was his interest, if he wished to stand well with those whose religious opinions coincided with his own, to satisfy them that he was not shrinking from the performance of his duty as a clergyman, in declining to act the part of a peacemaker" (*u*).

Again, where the defendant, a vicar, repeated to the vicar of a neighbouring parish, whose curate was to preach in the defendant's church, rumours discreditable to the curate, to the effect that he had led a profligate life at Cambridge, been expelled from the army for cheating at cards, and had admitted seducing two girls in a

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(*t*) *Lawless* v. *Anglo-Egyptian Co.* (1869), L. R. 4 Q. B. 263, *per* Hannen, J., at 269.

(*u*) *Whiteley* v. *Adams* (1863), 15 C. B. (N.S.) 392, *per* Erle, C.J., at 416.

parish where he was formerly curate, it was held that the communication was privileged.

> "I am of opinion that when the relation between two persons is so intimate socially and professionally as that between a rector or a vicar and his curate, and when it can be said that the vicar is consulting with his curate either upon the conduct of the curate or of the vicar in ecclesiastical matters, that is an occasion which is privileged" (*x*).

And where the defendant repeated to the rector of her parish a rumour that she had heard, and which she considered important for him to know, it was held that the communication was made on a privileged occasion.

> "I cannot help thinking that when a parishioner hears matters injurious to the clergyman, which would injure his authority and influence as a clergyman, if those facts are *bona fide* told under the belief that they are important for him to know, they come within the category of privileged communications" (*y*).

Moral Duty.—The question whether in a particular set of circumstances a person who has received information, which may damage the character of the person to whom it refers, is justified in communicating that information to somebody else, so that it may be said he had a moral duty to make the communication, is a question which has been responsible for considerable difference of judicial opinion and one which is not lessened by the circumstance that the information which is the subject of the libel may have been volunteered. This circumstance may have relevance in determining whether a duty to communicate has been cast upon the speaker by prior circumstances, or whether it depends on the nature of the prior request

(*x*) *Clark* v. *Molyneux* (1877), 3 Q. B. D. 237, *per* Brett, L.J., at 248.
(*y*) *Davies* v. *Snead* (1870), L. R. 5 Q. B. 608, *per* Blackburn, J., at 611.

whether a duty to communicate has arisen or not. But it is mainly relevant on the question of malice.

The defendant received a letter from a friend of his, the mate of a ship, stating that the plaintiff, the captain of the ship, had by his drunken habits endangered its safety and the lives of the crew. After consideration, he sent the letter to the owner of the ship, to whom he was a complete stranger, who dismissed the captain. The captain thereupon sued the defendant. The four Judges of the Court were equally divided on the question whether the circumstances were such as to impose upon the defendant a moral duty to do what he did. Tindal, C.J., and Erle, J., held that there was such a duty.

> "I do not find the rule of law is so narrow and restricted by any authority, that a person having information materially affecting the interests of another, and honestly communicating it, in the full belief, and with reasonable grounds for the belief, that it is true, will not be excused, though he has no personal interest in the subject-matter. Such a restriction would surely operate as a great restraint upon the performance of the various social duties by which men are bound to each other, and by which society is kept up" (*z*).

The other two Judges (Coltman and Cresswell, JJ.) held that there was no duty; the duty to make the communication, if it existed, being no greater than the duty not to slander your neighbour. But the repeated approval which the judgment cited has received (*a*) shows at any rate a tendency to enlarge the area within which a moral duty may be said to exist.

(*z*) *Coxhead* v. *Richards* (1846), 2 C. B. 569, *per* Tindal, C.J., at 596.

(*a*) *Amann* v. *Damm* (1860), 8 C. B. (N.S.) 597. "If it had been necessary, I should have been prepared to go the full length of the doctrine laid down by Tindal, C.J., and Erle, J.," *per* Willes, J., at 602. *Stuart* v. *Bell*, [1891] 2 Q. B. 341, *per* Lindley, L.J., at 347; *Watt* v. *Longsdon*, [1930] 1 K. B. 130, *per* Scrutton, L.J., at 146.

Again, the communication of a report, which was made by the secretary of a charitable organisation to an intending benefactor, to the effect that the object of her benevolence was unworthy of assistance, was held to have been made on a privileged occasion.

> "A duty of imperfect obligation attaches on everyone to do what is for the good of society. In that sense it is the duty of those who have knowledge as to persons seeking charitable relief to communicate it, when asked by persons who wish to know whether the applicants are deserving objects" (*b*).

A brother is justified in communicating to his sister information concerning the character of her intended husband, and the occasion of such a communication will be privileged on the ground of moral duty (*c*).

But the circumstances in which a stranger or a friend will be justified in communicating to a husband or wife information concerning the other party to the marriage occasion some difficulty.

> "I am clear that it is impossible to say he is always under a moral or social duty to do so; it is equally impossible to say he is never under such a duty. It must depend on the circumstances of each case, on the nature of the information, and the relation of the speaker and the recipient. . . . The decision must turn on the circumstances of each case, the judge being much influenced by the consideration that as a general rule it is not desirable for anyone, even a mother-in-law, to interfere in the affairs of man and wife" (*d*).

The Court of Appeal was divided in the following case. The Newcastle police received a communication from the Edinburgh police to the effect that the plaintiff, who was

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(*b*) *Waller* v. *Lock* (1881), 7 Q. B. D. 619, *per* Cotton, L.J., at 622.
(*c*) *Adam* v. *Coleridge* (1884), 1 T. L. R. 84.
(*d*) *Watt* v. *Longsdon*, [1930] 1 K. B. 130, *per* Scrutton, L.J., at 149.

valet to Stanley, the explorer, was under suspicion, upon very slender grounds, for theft. The Newcastle police sent the letter to the defendant, the Mayor of Newcastle, with whom Stanley was staying. As Stanley was on the point of leaving, the defendant told him of these suspicions. Stanley dismissed the plaintiff, who sued the Mayor; and it was held by a majority that the communication was made on a privileged occasion (*e*).

The majority appear to have based their decision on the existence of the relationship of host and guest, a relationship which Lopes, L.J., the dissenting Judge, agreed would give rise to a privileged occasion if it existed. His disagreement seems to have been based partly on the cessation of this relationship with the termination of the visit, and partly on the fact that the defendant did not pass on the suspicion to Stanley in the same exceedingly guarded terms in which he received it. He did not show him the letter. It is submitted that this fact is material only as evidence of malice; and although his judgment did not prevail it shows the wisdom of passing on such information in the precise form in which it is received, for what it is worth.

Common Interest.—It is not always easy to separate those cases in which it may be said that there is a common interest from those in which there is a duty. What is clear beyond all doubt is that the interest must be a common interest, *i.e.*, one which is shared not only by the recipient, but also by the person making the communication. The following cases furnish examples of a common interest as distinct from a social or moral duty.

The plaintiff, a guard in the service of the defendants, a railway company, was dismissed for neglect of duty. The defendants published in a monthly circular addressed

(*e*) *Stuart* v. *Bell*, [1891] 2 Q. B. 341.

to their servants, his name, the fact of his dismissal and the reasons for it. The guard sued the railway company but the occasion was held to be privileged on the ground of common interest.

> "Can anyone doubt that a railway company, if they are of opinion that their servants have been doing things which, if they were done by the servants, would seriously damage their business, have an interest in stating this to their servants? And how can it be said that the servants to whom that statement is made have no interest in hearing that certain things are being treated by the company as misconduct, and that, if any of them should be guilty of such misconduct, the consequence would be dismissal from the company's service? I cannot imagine a case in which the reciprocal interest could be more clear" (*f*).

The shareholders of a company received a circular from a solicitor acting on behalf of a section of their number, which contained statements reflecting upon the directors, and asking for their co-operation at a proposed meeting to protect the shareholders' interests. The company applied for an interlocutory injunction to prevent the solicitor repeating the libel, which was refused on the ground that the communication was obviously privileged and *prima facie* not malicious.

> "The circular appears on the face of it to be in the nature of a privileged communication. It is issued by one shareholder to his brother shareholders, asking for their co-operation in putting an end to the company or reconstituting it" (*g*).

The common interest must exist at the time of making the communication. If it ever existed, its continuance

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(*f*) *Hunt* v. *G. N. Ry.*, [1891] 2 Q. B. 189, *per* Lord Esher, M.R.
(*g*) *Quartz Hill, etc., Co.* v. *Beall* (1882), 20 Ch. D. 501, *per* Jessel, M.R.

at the time of the communication complained of is a question for the jury.

> "When once a confidential relation is established between two persons with regard to an inquiry of a private nature, whatever takes place between them relevant to the same subject, though at a time and place different from those in which the confidential relation began, may be entitled to protection as well as what passed at the original interview; and it is a question for the jury whether any further conversation on the same subject, though apparently casual and voluntary, does not take place under the influence of the confidential relation already established between them, and is therefore entitled to the same protection" (*h*).

But where the chairman and agent of a political organisation complained to the agent of the rival party of bribery among the rival's supporters, and the communication containing the complaint was not made until two days after polling day, it was held that the common interest, if any, had ceased, and the claim to privilege on that ground failed.

> "The defendants were committee men of one candidate, and Hall was the agent of the other, and if the election had been proceeding, possibly an interest or duty might have been held to exist. But on the 24th" (the date of the communication) "the election was at an end. Hall had no authority to prosecute the plaintiff, nor any legal control over him. His interest or duty, if he ever had one, had ceased" (*i*).

Self-Interest.—A communication which is made in reasonable protection of one's own interests, and *a fortiori*

(*h*) *Beatson* v. *Skene* (1860), 5 H. & N. 838, *per* Pollock, C.B., at 855.
(*i*) *Dickeson* v. *Hilliard* (1874), L. R. 9 Ex. 79.

if made in the public interest, will be held to be made on a privileged occasion.

Thus, where a memorial was sent to a Secretary of State, praying for the removal of the plaintiff, a justice of the peace, from the commission of the peace, it was held that the occasion was privileged.

> "In this land of law and liberty, all who are aggrieved may seek redress; and the alleged misconduct of any who are clothed with public authority may be brought to the notice of those who have the power and duty to inquire into it, and to take steps which prevent the repetition of it" (*k*).

On similar grounds a complaint of the conduct of a sanitary inspector, alleging that he had been guilty of bribery, and addressed to the Privy Council, is entitled to qualified privilege (*l*).

The defendant, a merchant, had reason to suspect the plaintiff, who was a clerk in the employment of another merchant with whom the defendant had frequent dealings, of the theft of a valuable mathematical box while on a visit to his premises in the course of his employment. The defendant communicated his suspicions to the plaintiff's employers, and the plaintiff thereupon sued the defendant for slander. It was held that the occasion was privileged.

> "It seems to me that it was but acting with a reasonable regard to his own interest for the defendant, if he believed that the plaintiff had been guilty of the abstraction of the box, to go to the employers and state what had taken place. If he really believed the plaintiff to have acted so dishonestly, he would naturally object to his being sent to his premises again" (*m*).

(*k*) *Harrison* v. *Bush* (1855), 5 E. & B. 344, *per* Campbell, C.J., at 349.
(*l*) *Proctor* v. *Webster* (1885), 16 Q. B. D. 112.
(*m*) *Amann* v. *Damm* (1860), 8 C. B. (N.S.) 597, *per* Erle, C.J., at 601.

The defendant, a bishop, made observations defamatory of the plaintiff, a barrister, in the course of a charge to his clergy. The observations related to an attack made upon the bishop by the plaintiff in the course of an argument upon a private bill in parliament, and they were made for the purpose of refuting those charges; and the charge to the clergy was sent to the Press for publication. It was held that the occasion was privileged (*n*).

The plaintiff, who was formerly an officer in a cavalry regiment and was subsequently elected an M.P., in a speech in the House of Commons, falsely charged the general of the brigade of which his late regiment formed part with sending to headquarters confidential reports on officers under his command containing wilful misstatements. The general having referred the matter to the Army Council, the defendant, as secretary to the Council and by their direction, wrote a letter to the general, vindicating him against the charge made by the plaintiff and containing defamatory statements about the plaintiff. This letter was sent to the Press agencies, and in due course was given publicity in the Press; and this publication was held by the House of Lords to be made upon a privileged occasion, arising out of a duty publicly to vindicate the general's reputation which had been cast upon the defendant by the plaintiff's original slander in circumstances of absolute privilege (*o*).

Pleading.—A common form in which the defence of qualified privilege is pleaded is as follows:—

If the defendant published the words complained of or any of them, which is denied, such publication was made *bona fide* and without malice upon a privileged occasion.

(*n*) *Laughton* v. *Bishop of Sodor and Man* (1872), L. R. 4 P. C. 495.
(*o*) *Adam* v. *Ward*, [1917] A. C. 309.

Particulars.

Before the publication of the said letter the plaintiff, who had formerly been in the employment of the defendant as a chauffeur, was desirous of entering into the service of Mrs. X. The said Mrs. X by a letter dated January 1, 1930, inquired of the defendant as to the plaintiff's character, asking in particular the reasons for the termination of the plaintiff's service with the defendant. Thereupon it became and was the duty of the defendant truthfully to inform the said Mrs. X of her knowledge of the plaintiff's character and the reason for her dismissal of the plaintiff. The defendant will therefore contend that the occasion of the publication of the said words was privileged.

or :—

Particulars.

The said words were published, if at all, solely to one A B the managing director of X company, with whom therefore the defendant as a co-director of the X company had a common interest in respect of the affairs of the said company, and in particular in respect of the former employment of the plaintiff as the servant of the said company. The said words were spoken, if at all, in reasonable protection of the interests of the said company, and with reasonable belief in their truth in good faith and without malice. The words complained of were therefore spoken, if at all, upon a privileged occasion.

or :—

Particulars.

The said words were spoken and published, if at all, with an honest belief in their truth in reasonable protection of the property of the defendants, and were therefore privileged.

CHAPTER 12.

QUALIFIED PRIVILEGE (REPORTS).

THERE is a large class of reports which, though they do not fall within the cases of absolute privilege dealt with in Chapter 10, are privileged provided they are fair and accurate, and are published *bona fide* and without malice.

They may conveniently be divided into two classes :—

1. Those to which a qualified privilege attaches at common law, namely reports of judicial and parliamentary proceedings, and
2. Those protected by statute, namely reports of the proceedings at certain public meetings.

1. At Common Law.

We have already seen that words spoken in a Court of law, or in Parliament, are absolutely privileged, so that no action can be brought in respect of them although they were spoken maliciously and with knowledge that they were utterly false.

Information given to the public in the form of reports of such proceedings is also protected, but the protection given to the reports of the words is not so extensive as the protection given to those who utter them. The privilege which attaches at common law to such reports is a qualified privilege, which only protects them provided they are fair and reasonably accurate reports, and are published in good faith and without any improper motive on the part of the writer or publisher.

(1) **Reports of Judicial Proceedings.**—At common law a report of judicial proceedings is privileged, provided it is

(a) Fair and accurate.
(b) Not forbidden by law.
(c) Not maliciously published.

The principle upon which this privilege is afforded is clearly stated in the language of Campbell, C.J. :—

> "A fair account of what takes place in a Court of Justice is privileged. The reason is 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" (*a*).

Report.—The report need not be in a newspaper. The privilege of the Press, if any, is no higher in this respect than the privilege afforded to any subject of the realm. The Law of Libel Amendment Act (*b*) gave special protection to fair and accurate reports of judicial proceedings which appear in newspapers, provided they are published "contemporaneously" with such proceedings (*c*), but at common law no discrimination exists between a report in a newspaper and any other report: as, for instance, a report of the judgment of an action published in the form of a pamphlet by the successful parties, and circularised amongst their friends, which the jury found to be a fair report, published without malice and which was held to be privileged (*d*).

(*a*) *Davison* v. *Duncan* (1857), 7 E. & B. 229.
(*b*) 51 & 52 Vict. c. 64.
(*c*) See Chapter 10.
(*d*) *M'Dougall* v. *Knight* (1889), 14 App. Cas. 200.

Judicial Proceedings.

JUDICIAL TRIBUNALS.—The Courts which have been held to be Judicial Tribunals are dealt with elsewhere (*e*); but it may be convenient to repeat the list of the most important tribunals which have been held to come within the description for the purpose of the privilege now under consideration :—

1. *The High Court.*

"The Courts 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 took place and is put in a position to form an opinion upon the conduct of the jury, the judge, and the witnesses" (*f*).

2. *The County Court.*

"On such a question the dignity of the court cannot be regarded; and we must look only to the nature of the alleged judicial proceeding which is reported" (*g*).

"I do not think the privilege is confined to the superior Courts; it is not the tribunal but the nature of the alleged judicial proceeding which must be looked at" (*h*).

3. *Magistrates' Courts.*

i. *Actual hearing of case.*—Provided the magistrates have jurisdiction to hear the case a report of the actual hearing of a prosecution for an offence which is triable summarily is clearly within the rule (*i*). It may be noted that there are now many such offences in which the

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(*e*) Chapter 10.
(*f*) *Andrews* v. *Chapman* (1853), 3 C. & K. 286, *per* Campbell, C.J., at 289.
(*g*) *Lewis* v. *Levy* (1858), E. B. & E. 537, *per* Campbell, C.J., at 554.
(*h*) *Usill* v. *Hales* (1878), 3 C. P. D. 319, *per* Lopes, L.J., at 329.
(*i*) *Usill* v. *Hales*, *supra*.

jurisdiction of the magistrates depends on the consent of the accused (*k*).

ii. *Preliminary inquiry into offences not triable summarily.*—It is now clear that a report of a preliminary inquiry will also be within the privilege (*l*), though formerly it was doubted.

> "An inquiry before a magistrate into a charge of murder, for instance, which he certainly has no power to deal with and as to which he is only inquiring in a preliminary way whether there is a case for committing the accused person for trial, is clearly a judicial proceeding though it is preliminary to the trial" (*m*).

The magistrates have a discretionary power to exclude the public from the conduct of such preliminary inquiries, and it is the practice in the majority of Courts to do so. A report published in such circumstances would be unlawful and a contempt of court.

iii. *Application for summons.*—An application for a summons, though *ex parte*, is a judicial proceeding; and a report of such an application is privileged, although no evidence is called, and although the person against whom the summons is applied for has no opportunity of contradicting the allegations which may be made against him. Such a proceeding is clearly within the privilege.

> "An application was made to the magistrates for the issue of a summons against a person who is now plaintiff in the action, on

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(*k*) Criminal Justice Act, 1925.
(*l*) *Lewis* v. *Levy* (1858), E. B. & E. 537.
(*m*) *Bottomley* v. *Brougham*, [1908] 1 K. B. 584, *per* Channell, J., at 588.

> a charge of perjury. Now the magistrates undoubtedly had jurisdiction to entertain such an application. They were undoubtedly a properly constituted tribunal, having jurisdiction to consider and determine whether or not the summons should be issued" (*n*).

It is believed to be the invariable practice for magistrates to close their courts during the hearing of such applications and, as has been observed, reports published in such circumstances would be unlawful, and would amount to a contempt of court.

QUASI-JUDICIAL TRIBUNALS.—The reports of proceedings before quasi-judicial tribunals, or domestic tribunals exercising judicial functions, are covered by the privilege.

Thus where the General Medical Council after due inquiry passed a resolution that the plaintiff had been guilty of infamous conduct in a professional respect, and ordered his name to be erased from the register of medical practitioners, the publication of the terms of the resolution and the erasure of the plaintiff's name from the register in accordance with it was held to fall within the privilege (*o*).

> "It seems to us, having regard to the nature of the tribunal, the character of the report, the interests of the public in the proceedings of the Council, and the duty of the Council towards the public, that this report stands on principle in the same position as a judicial report" (*o*).

(a) Fair and Accurate.—The question of the fairness and the accuracy of the report is in all cases a question for the jury, provided that there is any evidence of

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(*n*) *Kimber* v. *Press Assocn.*, [1893] 1 Q. B. 65.
(*o*) *Allbutt* v. *General Medical Council* (1889), 23 Q. B. D. 400, *per* Lopes, L.J., at 410.

unfairness or inaccuracy for them to consider. The burden of proving unfairness or inaccuracy is upon the plaintiff.

(1) *Fair.*—A report cannot be fair unless it is impartial, and presents a reasonable view of both sides of the case. It is not necessary that the report should be a verbatim account; it is sufficient if it is substantially a fair account of what took place (*p*).

The summing-up or judgment of the Judge is *prima facie* a fair report of the case, standing alone (*q*); and the fact that it forms part of a report which contains other portions of the case, which by themselves may be subject to the objection of partiality, such as the speech of counsel on one side only, is sufficient to necessitate the jury's verdict on the question of fairness being taken. A report is not necessarily unfair because it is incomplete (*r*).

A report which contains part only of a judgment selected so as to give an effect adverse to the plaintiff has been found not to be a fair report (*s*). A report of a trial which gives the impression that the witnesses on the successful side were not telling the truth is not a fair report, as where it was stated that "the jury, under the direction of the learned Judge, were obliged to give a verdict of acquittal, to the great regret of a crowded Court, on whom the statement and the evidence, so far as it went, made a strong impression of their guilt" (*t*). Nor is a report fair which states that the prisoner was brought up in the police court a week before and charged with obtaining money by false pretences, and goes on to add, "a number of other charges will be brought against

(*p*) *Andrews* v. *Chapman* (1853), 3 C. & K. 289.
(*q*) *M'Dougall* v. *Knight* (1890), 25 Q. B. D. 1.
(*r*) *Milissich* v. *Lloyds* (1877), 46 L. J. C. P. 404.
(*s*) *Grimwade* v. *Dicks* (1886), 2 T. L. R. 627.
(*t*) *Lewis* v. *Walter* (1821), 4 B. & Ald. 605.

him," when in the intervening period the prisoner had been brought up on remand and discharged (*u*).

A report of a trial which lasts more than one day is not unfair or inaccurate because it only reports the proceedings of one day.

> "I think it must be so. If it were not, the ridiculous result would follow that, where the trial of a case of the greatest public interest lasted fifty days, no report could be published until the case was ended. I am, therefore, of opinion that where the proceedings are such as will result in a final decision being given, a fair and accurate report, made *bona fide*, of those proceedings is privileged, although it be published before the final decision is given" (*x*).

(2) *Accurate.*—A report which misstates the facts of the case reported is not an accurate report.

Thus a report of a trial at which no evidence was given, that "the witnesses proved all that had been stated by counsel for the prosecution," was held to be inaccurate (*y*). And so was a report which made it appear that certain statements were made in evidence, when in fact no evidence had been called, and the statements were taken from the opening speech of the prosecuting solicitor (*z*).

Again, where the defendants published a book on "The Law of Attorneys" containing a report of a case *In re Blake* (*a*), which inaccurately stated that the plaintiff Blake had been punished by being struck off the Rolls, when in fact he was only suspended for two years, was held not to be privileged (*b*).

(*u*) *Grimwade* v. *Dicks* (1886), 2 T. L. R. 627.
(*x*) *Kimber* v. *Press Assocn.*, [1893] 1 Q. B. 65, *per* Lord Esher, M.R., at 71.
(*y*) *Lewis* v. *Walter* (1821), 4 B. & Ald. 605.
(*z*) *Ashmore* v. *Borthwick* (1885), 2 T. L. R. 209.
(*a*) Reported in (1860), 30 L. J. Q. B. 32.
(*b*) *Blake* v. *Stevens* (1864), 4 F. & F. 232.

(b) **Not Forbidden by Law.**—In certain cases reports of judicial proceedings may be forbidden by law, either :—

(1) *At Common Law.*

(i) When the matter reported amounts to a blasphemous, seditious or obscene libel.

(ii) When the Court itself has prohibited publication, as it has power to do, at any rate pending the completion of the trial (*c*).

or :—

(2) *By Statute.*

Considerable restrictions were introduced by the Judicial Proceedings (Regulation of Reports) Act, 1926, which prohibits the publication :—

(i) In any judicial proceedings, of any indecent matter, or indecent medical, surgical or physiological details, publication of which is calculated to injure public morals.

(ii) In Divorce Court proceedings of anything at all except

(a) The names, addresses and occupations of the parties and witnesses.

(b) A concise statement of the charges advanced and counter-charges in support of which evidence has been given.

(c) Submissions on any point of law, and the decision of the Court thereon.

(d) The summing-up of the Judge and the finding of the jury, if any, and the judgment of the Court and the observations made by the Judge in giving judgment (*d*).

(*c*) *R.* v. *Clement* (1821), 4 B. & Ald. 218.
(*d*) 16 & 17 Geo. 5, c. 61, ss. 1 and 2.

(c) **Not Maliciously Published.**—If the plaintiff can establish, from the circumstances in which the report was published, that the publisher was actuated by some improper motive, the protection of the privilege will be lost.

Thus, for example, where the defendant had a report published of the proceedings in two county court actions which the plaintiff had had to bring, in order to recover money owing to him from customers, and had this report printed in pamphlet form and extensively circulated on market days, it was found that the publication was malicious, as having been published with the improper motive of frightening intending customers from dealing with the plaintiff; and therefore it was held that the report was not protected by the privilege (*dd*).

(2) **Reports of Parliamentary Proceedings.**—On the same principle, reports of proceedings in either House of Parliament, which are themselves protected by absolute privilege, are protected by the common law in so far as they are fair and accurate and made *bona fide* and without malice.

This was finally settled in 1868, when the proprietor of *The Times* was unsuccessfully sued for a libel on the plaintiff contained in a report in *The Times* of the proceedings in the House of Lords. The plaintiff had been severely censured by Lord Derby in the course of the debate, for his action in having induced a Member of the House of Lords to present a petition for the removal of the Chief Baron, upon a charge which the plaintiff knew was totally unfounded. The jury were directed that provided the report was fair, impartial and accurate, and made *bona fide* and without malice, it was privileged; the jury found that it was, and this direction was

(*dd*) *Salmon* v. *Isaac* (1869), 20 L. T. 885.

unanimously upheld on appeal by the Queen's Bench Division (*e*).

But the report must be a fair report of the debate, or of the day's proceedings. The speech of a single member, out of several delivered, cannot be regarded as a fair report of the debate; and if printed and circulated to the public, even for the purpose of correcting a misapprehension, will not be privileged (*f*).

Proof of malice will, of course, defeat the privilege (*ff*).

2. By Statute.

There are certain other reports which are privileged by virtue of statutory provision.

(i) Extracts from Parliamentary Papers.—This privilege rests on the Parliamentary Papers Act, 1840, s. 3 (*g*), which provides as follows:—

> "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 show that such extract or abstract was published bona 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."

(ii) Reports of Public Meetings, and of Official Documents by Official Request.—By the Law of Libel Amendment Act, 1888, s. 4 (*h*), it is provided as follows:—

> "A fair and accurate report published in any newspaper of the proceedings of a public meeting,

(*e*) *Wason* v. *Walter* (1868), L. R. 4 Q. B. 73.
(*f*) *R.* v. *Creevy* (1813), 1 M. & S. 273.
(*ff*) *Wason* v. *Walter* (1868), L. R. 4 Q. B. 73.
(*g*) 3 & 4 Vict. c. 9.
(*h*) 51 & 52 Vict. c. 64.

or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a vestry, town council, school board, board of guardians, board or local authority formed or constituted under the provisions of any Act of Parliament, or of any committee appointed by any of the above-mentioned bodies, or of any meeting of any commissioners authorised to act by letters patent, Act of Parliament, warrant under the Royal Sign Manual, or other lawful warrant or authority, select committees of either House of Parliament, justices of the peace in quarter sessions assembled for administrative or deliberative purposes, and the publication at the request of any Government office or department, officer of State, commissioner of police, or chief constable of any notice or report issued by them for the information of the public, shall be privileged, unless it shall be proved that such report or publication was published or made maliciously: provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter: provided also, that the protection intended to be afforded by this section shall not be available as a defence in any proceedings if it shall be proved that the defendant has been requested to insert in the newspaper in which the report or other publication complained of appeared a reasonable letter or statement by way of contradiction or explanation of such report or other publication, and has refused or neglected to insert the same: provided further, that nothing in this section contained shall be deemed or construed to limit or abridge any privilege now by law existing, or to protect the publication of any matter not of public concern and the publication of which is not for the public benefit. For the purposes of this section "public meeting" shall

mean any meeting bona fide and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted."

A few short comments are necessary upon this section :—

Public Meeting.—It has been held that a Sunday service at a Congregational Chapel is not a public meeting within the meaning of this section (*i*).

Lawful Purpose.—Thus the protection would not extend to a report of proceedings at an unlawful assembly.

An assembly may be an unlawful assembly if it assembles for an unlawful purpose or in an unlawful manner, or which is held in any circumstances which are likely to provoke a breach of the peace.

But an assembly is not unlawful because the promoters have reason to suppose that it will arouse opposition which may lead to a breach of the peace, provided there is nothing unlawful in their purpose or manner of assembly (*j*).

Public Concern and Public Benefit.—The concurrence (*k*) of these two conditions combines to make the protection given a particular and not a general one. The Act does not make use of the expression "public interest," which is a somewhat wider phrase; and the question whether a particular publication is within this requirement of the Act is not to be answered by reference to the general question whether that kind of information was for the public interest (*l*).

Reports of irrelevant personal interruptions of the

(*i*) *Chaloner* v. *Lansdowne* (1894), 10 T. L. R. 290. But see *Hope* v. *Morris*, The Times, March 7, 8, 9, 13, 14, 1935.
(*j*) *Beatty* v. *Gilbanks* (1882), 9 Q. B. D. 308.
(*k*) Fraser considers them alternative : see 6th ed., p. 217.
(*l*) *Pankhurst* v. *Sowler* (1886), 3 T. L. R. 193.

speaker at a public meeting are not within the protection of the statute (*m*). Nor are accusations of dishonesty against the cashier or secretary of a company made by a chairman at the annual general meeting, in order to account for a deficiency in the accounts (*n*).

Accurate.—Publication of an inaccurate copy of an entry in a register under the Deeds of Arrangement Act, 1887, has been held not to be covered by the privilege (*o*).

Report.—The privilege does not extend to cover the headline of a paragraph in a newspaper (*p*).

Malice.—If the plaintiff can establish by the circumstances that the publication was malicious, it will be protected by no privilege.

(iii) Contemporaneous Reports of Judicial Proceedings.—There is a further provision (section 3) of the same Act (*q*) which extends privilege to contemporaneous reports of judicial proceedings published in a paper which is a newspaper within the meaning of the Act. This case of privilege has already been dealt with at the end of Chapter 10, where the view has been put forward that the privilege conferred by this enactment is absolute; but in view of the uncertainty of the language used, it has been thought proper to mention the case again in this chapter for the sake of completeness, in case this view should be held to be wrong, and the case to fall within the class of reports which are protected by qualified privilege only.

(*m*) *Kelly* v. *O'Malley* (1889), 6 T. L. R. 62.
(*n*) *Ponsford* v. *Financial Times* (1900), 16 T. L. R. 248.
(*o*) *Reis* v. *Perry* (1895), 64 L. J. Q. B. 566.
(*p*) *Mangena* v. *Edward Lloyd* (1908), 25 T. L. R. 26.
(*q*) Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64).

CHAPTER 13.

MALICE.

Malice in libel has three meanings:—

1. The technical pleading sense.
2. The popular sense of spite or ill-will.
3. The wider sense of any improper motive.

Malice in the first sense is sometimes called malice in law.

> "'Malice in law' is the vaguest possible phrase; it merely denotes 'absence of legal excuse.' The plaintiff is never called upon to prove the existence of 'malice in law'; the defendant has to show the existence of some legal excuse. In short, to say that a libel must be published 'maliciously' is untrue; absence of malice is no defence, unless the words be published on a privileged occasion" (*a*).

Malice in this sense includes negligence.

> "That unfortunate word 'malice' has got into cases of actions for libel. We all know that a man may be the publisher of a libel without a particle of malice or improper motive" (*b*).

It is with the third sense that we are concerned in this chapter, in which the term is one of very wide significance. Not only is it not confined to the technical meaning which it frequently bears when used in pleading, but also its meaning is far wider than that of personal spite or ill-will which it usually suggests to the layman.

(*a*) Odgers on Libel and Slander, Author's Preface, p. xi.
(*b*) *Abrath* v. *N. E. Ry.* (1886), 11 App. Cas. 247, *per* Lord Bramwell, at 253.

"Malice in fact is not confined to personal spite and ill-will, but includes every unjustifiable intention to inflict injury on the person defamed, or in the words of Brett, L.J. (*c*) every wrong feeling in a man's mind" (*d*).

"What is malice? It is desirable, I think, at once to exclude that meaning of the word which indicates a merely conventional phrase of lawyers. It is common in libel cases, even where no question of privilege can possibly arise, to allege that the defendant published the defamatory words maliciously. The word in such a case as that adds nothing to the allegation of publication. It is a formal assertion only. . . . But there yet remains the meaning of the word when it is used to indicate the actual state of mind of a defendant when he commits an alleged tort. It is a matter of regret that a full explanation of the meaning of the word 'malice,' when employed in other than a formal sense, is not to be found. Perhaps the word is incapable of a complete definition. There appear, however, to be at least two distinct heads of actual malice when that word is used to indicate a state of mind in such actions as defamation or malicious prosecution. The first head is indicated by 'spite or ill-will.' This head is well understood by juries, and the proof of a prior insult to, and the resultant vindictive feeling of, a defendant frequently disposes of the plea of privilege. . . . But the second head is equally important. 'Malice' in the actual sense may exist, even where there be no spite or desire for vengeance in the ordinary sense. The jurist has enlarged the layman's notion of malice. This is observable both in defamation and in malicious prosecution. In the

(*c*) *Clark* v. *Molyneux* (1877), 3 Q. B. D. 237, at 247.
(*d*) *Stuart* v. *Bell*, [1891] 2 Q. B. 341, *per* Lindley, L.J., at 351.

defamation cases the decisions and dicta are broad in their scope" (*e*).

Malice therefore certainly includes malice in the popular sense of spite and hatred; but in relation to a privileged occasion it also includes any motive other than the honest fulfilment of the purpose for which the occasion is privileged.

> "The jury need not say what the wrong motive was if they can say that there was a wrong motive; and if the defendant was actuated by some motive other than that which alone would excuse him, the jury may find for the plaintiff" (*f*).

This passage has been constantly relied upon and cited with approval; and little further light is shed upon the question by other *dicta* which rather tend to limit the meaning of malice to that which is appropriate to the particular circumstances of the case. It is clearly as impossible to catalogue the circumstances from which malice may be inferred, as it is to catalogue the circumstances from which privilege may be inferred; but an attempt is made to deal with some of the circumstances most frequently relied upon as evidence of malice, and to show the principles upon which the decisions have been based.

Evidence of malice may be broadly divided under two heads.

Intrinsic Evidence.—Intrinsic evidence consists of the terms of the statement itself, and anything which may be gathered from its language to indicate the state of mind of the writer.

It is one of the grounds most frequently relied upon,

(*e*) *Pratt* v. *British Medical Assocn.*, [1919] 1 K. B. 244, *per* McCardie, J., at 275.

(*f*) *Clark* v. *Molyneux* (1877), 3 Q. B. D. 237, *per* Bramwell, L.J., at 245.

as, in libel cases at all events, the terms of the statement are nearly always available. But it is only when the language used is excessively violent or strong, or is absolutely beyond and disproportionate to the facts, or contains the grossest exaggerations or the most complete irrelevancies, that it will be held to be evidence of malice. This is made clear by an examination of the relevant authorities.

The plaintiff and defendant were two creditors of a firm which was being wound up. The plaintiff being in dispute with his partner over the distribution of the assets, took a parcel of bills from the firm's cash-box, and directed the clerk to debit his account with the amount they represented. The defendant wrote a letter in which he commented on the plaintiff's conduct by saying that it "has been most disgraceful and dishonest, and the result has been to diminish materially the available assets of the estate." The plaintiff relied on this language as evidence of malice, but it was held that no such inference could be drawn from the document.

> "The question then arises, whether the language is too strong for the occasion, the terms applied to the plaintiff's conduct being 'most disgraceful and dishonest.' Now, the communication being privileged, the presumption is in favour of the absence of malice in the defendant and in order to rebut this presumption the plaintiff must show actual malice, and he may no doubt show this by reference to the terms of the libel as utterly beyond and disproportionate to the facts. . . . Now, the presumption of law being in favour of the absence of malice in the defendant, and the only evidence of malice being his description of acts done by the plaintiff which were capable of a two-fold construction, the presumption of innocence which attaches to the writer must also, while his act is capable of a double aspect,

still attend him. . . . We have not to deal with whether the plaintiff did or did not act disgracefully: all we have to examine is whether the defendant stated no more than he believed, and what he might reasonably believe; if he stated no more than this, he is not liable, and unless proof to the contrary is produced, we must take it that he did state no more" (*g*).

Again, the plaintiff, who was a barrister, complained of a libel upon him by the Bishop of Sodor and Man, contained in a written charge read by the Bishop to his clergy assembled in Convocation and afterwards published by his authority in a newspaper called the "Manx Sun". The charge purported to be a reply to a previous attack made upon the Bishop by the plaintiff in the course of a speech by him in the House of Keys, opposing a bill which would have increased the Bishop's patronage. Part of the charge consisted of an attack upon the plaintiff's character, imputing to him that he had made slanderous statements under the apparent sanction of well-informed persons, that he had made statements with an entire disregard to truth, that he had been guilty of bearing false witness against his neighbour, and that he had exceeded his instructions. It was argued that these statements and their publication in the Press amounted to evidence of malice; but the argument failed. Delivering the judgment of the Privy Council, Sir Robert Collier said (*h*):—

"Considering that the speech impugning his character and conduct was addressed to both clergy and laity, and conveyed to both by the Press, their Lordships are of opinion that the Bishop was privileged in addressing his defence to both through the

(*g*) *Spill* v. *Maule* (1869), L. R. 4 Ex. 232, *per* Cockburn, C.J., at 236.
(*h*) *Laughton* v. *Bishop of Sodor and Man* (1872), L. R. 4 P. C. 495 (P. C.), *per* Sir Robert Collier, at 504 to 509.

same channel which had conveyed the attack, provided he did this *bona fide* for the purpose of vindicating himself, or of informing the public upon matters which they were concerned to know, and not of defaming or injuring the appellant. . . . It has been said . . . that malice is to be inferred from the language of the Bishop's charge, and undoubtedly a privileged communication may be couched in language so much too violent for the occasion as to afford in itself evidence of malice, whereby the privilege is forfeited. . . . Some expressions here used undoubtedly go beyond what was necessary for self defence, but it does not, therefore, follow that they afford evidence of malice to go to a jury. To submit the language of privileged communications to a strict scrutiny, and to hold all excess beyond the absolute exigency of the occasion to be evidence of malice would in effect greatly limit, if not altogether defeat, that privilege which the law throws over privileged communications. . . . It is enough that, having regard to the circumstances and nature of the attack on him, the Bishop may, in their Lordships' opinion, have honestly believed that everything which he said was true, and proper for his own vindication, although, in fact, some of his expressions exceed what was necessary for it."

The plaintiff, formerly an officer in the army, made a speech in the House of Commons attacking his late general, whom he accused of making untrue and unfavourable reports to headquarters upon his brother officers. The Army Council after inquiry exonerated the general, and sent to the Press a statement of its decision, which was not confined to a brief report of the findings of the Council, but included statements about the plaintiff which he complained of as defamatory. It was argued that the defamatory statements were unnecessary,

and that their inclusion in the Press notice was evidence of malice; but the House of Lords negatived this view.

"It has been said that [the Army Council's] observations as to the plaintiff, Major Adam, were not relevant to their vindication of Major-General Scobell, and that privilege does not extend to cover this portion of the letter. These observations appear to me to be directly relevant. The plaintiff did not mention in his speech in the House of Commons that he himself was interested in the matter, and anyone who heard or read his speech would have been left under the impression that he was a perfectly disinterested person who had taken up the case of a brother officer. The vindication of Major-General Scobell would have been incomplete if the true relation of Major Adam to these proceedings had been left out" (*i*).

"A grave charge had been made against General Scobell, but it had been made in the guise of calling attention to the grievance of brother officers—particularly one officer—of the plaintiff. It was relevant to show that in doing so the plaintiff was really airing his own grievance" (*k*).

"These authorities (*l*) in my view clearly establish that a person making a communication on a privileged occasion is not restricted to the use of such language merely as is reasonably necessary to protect the interest or discharge the duty which is the foundation for the privilege; but that, on the contrary, he will be protected, even though his language should be violent or unnecessarily strong, if, having regard to all the circumstances of the case, he might have honestly and on reasonable

(*i*) *Adam* v. *Ward*, [1917] A. C. 309, *per* Lord Finlay, L.C., at 319.
(*k*) *Adam* v. *Ward*, *supra*, *per* Lord Dunedin, at 329.
(*l*) *Spill* v. *Maule* (1869), L. R. 4 Ex. 232; *Laughton* v. *Bishop of Sodor and Man* (1872), L. R. 4 P. C. 495; *Nevill* v. *Fine Arts*, [1897] A. C. 68

grounds believed that what he wrote or said was true and necessary for the purpose of his vindication, though in fact it was not so" (*m*).

The scarcity of reported authorities which will serve as illustrations of the kind of language which will be regarded as excessive is strong to show the difficulty of establishing malice from intrinsic evidence.

Extrinsic Evidence.—The jury may also be asked to infer malice from extrinsic evidence, showing that the defendant was actuated by some motive other than that for which the privilege exists and "which alone would excuse him".

The obvious method of doing this is by showing that he entertained feelings of spite or ill-will towards the plaintiff; and for this purpose, evidence of almost anything that can throw light upon the relations between them or upon the state of the defendant's mind is relevant and admissible for what it is worth.

Malice in the sense used in this chapter, however, is not confined to spite or ill-will towards the plaintiff or anyone else whom the defendant might design to injure by defaming the plaintiff. It includes, *e.g.*, blackmail, or the personal advantage of the defendant at the expense of the plaintiff, and indeed any motive which is inconsistent with a *bona fide* desire to make proper use of the privilege.

Honest Belief in the Truth of the Statement.—Honest belief in the truth of the statement will in general be conclusive evidence that the defendant acted without malice. He need not have acted reasonably, provided he acted honestly.

"The question here is not what judgment a sensible and reasonable man would have found in

(*m*) *Adam* v. *Ward*, *supra*, *per* Lord Atkinson, at 339.

this case, but whether the defendant did or did not entertain the opinion he communicated" (*n*).

"I am further of opinion that the direction to the jury—that, assuming that the occasions were privileged, if they thought that the defendant wrote the letter and made the statements *bona fide*, and in the honest belief that they were true, not merely that he believed them himself, but honestly believed them, which means he had good grounds for believing them to be true—left the jury to suppose that, although the defendant did believe them in fact, yet that belief did not protect him unless his belief was reasonable; whereas the only question was whether the defendant did, in fact, believe what he said, and not whether a reasonable man would have believed it. The question of wilful blindness, or of obstinate adherence to an opinion, may be tests by which a jury may be led to consider whether the defendant did or did not really believe the statements he made; whereas the learned judge, by the way he directed the jury, left them to understand, as I think, that although the defendant did believe the statements, yet if his belief was founded on a wrong reasoning that he was not within the protection of the privilege. In this respect the learned judge's direction to the jury was erroneous" (*o*).

Knowledge that the Statement was False.—Knowledge that the statement was false, on the other hand, will generally be conclusive evidence that the defendant was actuated by malice.

"If a man is proved to have stated that which he knew to be false, no one need inquire further. Everybody assumes thenceforth that he was malici-

(*n*) *Pitt* v. *Donovan* (1813), 1 M. & S. 647, *per* Bayley, J., at 649.
(*o*) *Clark* v. *Molyneux* (1877), 3 Q. B. D. 237, *per* Brett, L.J., at 247.

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ous, that he did do a wrong thing from some wrong motive" (*p*).

Absence of Honest Belief. — Between these two extremes there are various considerations which may tend to indicate the existence of malice.

The mere absence of honest belief in the truth of the statement does not necessarily involve knowledge of its falsity. A person may be under a duty to communicate information in the form in which he receives it, without making any inquiry as to its truth or falsity, *e.g.*, where suspicion has fallen upon the person defamed, and it is essential that some other person should be informed of the suspicion without loss of time, so that the person has no opportunity to make any inquiry as to the truth of, or justification for, the suspicion.

The defendant was the mayor of Edinburgh and extended his hospitality to Stanley the explorer, and to Stanley's valet, who was the plaintiff in the action. During the visit the defendant was informed by the Edinburgh police that the London police were making inquiries about a theft which had been committed in the London hotel where Stanley had previously been staying, and that suspicion, on very slender grounds, had fallen upon the plaintiff. The defendant told Stanley of this at the station as he was about to leave, and Stanley thereupon dismissed the plaintiff, who sued the mayor; and it was held by a majority of one that the communication was made in pursuance of a duty and was therefore privileged.

"I wish to remark that a person may honestly make on a particular occasion a defamatory statement without believing it to be true; because the statement may be of such a character that on that

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(*p*) *Clark* v. *Molyneux*, *supra*, *per* Brett, L.J., at 247.

occasion it may be proper to communicate it to a particular person who ought to be informed of it" (*q*).

"[A defendant] may believe [a statement] to be untrue, and yet be perfectly justified in publishing it to persons with whom he is in communication, and with whom it may be his duty to communicate freely on the subject of the information he has received" (*r*).

The defendant company hired a motor lorry from the plaintiffs on hire purchase, the lorry remaining the property of the plaintiffs during the currency of the hire-purchase agreement. In pursuance of certain statutory regulations the defendants, the L.C.C., issued to their co-defendants, the company (the hirers), a document called a registration book, in which the defendants were described as the owners of the lorry. This description was admittedly erroneous and was said to be misleading and a slander of the plaintiffs' title as owners of the lorry; but it was in accordance with the regulations, in which the owner was defined not as the legal owner but as the person by whom the vehicle was kept and used. The defendants, the L.C.C., published the registration book, including the description of the company as owners, solely in accordance with statutory directions. It was held that these facts constituted no evidence of malice against either of the defendants (*s*).

Want of Reasonable Grounds for Honest Belief.—The fact that the defendant made no inquiries to verify the truth of the libel, or published it on information received from obviously unreliable sources, may be a relevant

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(*q*) *Clark* v. *Molyneux*, *supra*, *per* Bramwell, B., at 244.
(*r*) *Botterill* v. *Whytehead* (1879), 41 L. T. 588, *per* Kelly, C.B., at 590.
(*s*) *B. R. C.* v. *C. R. C. and L. C. C.*, [1922] 2 K. B. 260.

consideration for the jury in determining the question of malice.

> "The informant may be a person who has been convicted of perjury, or a well-known libeller who has frequently been cast in damages; he may be a person of such a character that, if called as a witness, any jury would say that anyone who acted on that person's information deserved whatever happened to him" (*t*).

Interrogatories are admissible in order to ascertain whether the defendant had any information which induced him to believe that the words were true, and if so, from whom the information was obtained (*u*) (except where the libel was published in a newspaper (*x*)).

> "The issue being as to the state of mind of the defendants when the libel was published, and whether they were actuated by malice, an important factor would be, not merely what inquiry they made into the truth of the statement published, but to whom such inquiry was addressed. If there is to be an investigation into the motives of the person publishing the libel, it is essential to know all the facts; and it is obvious that, if the information on which he acted was procured from a person or persons who could not possibly know anything about the matter in question, and he nevertheless published the statements as if they were based on sufficient information, that might be cogent evidence of malice" (*y*).

> "It is obvious that the best test of the value of

(*t*) *Lyle-Samuel* v. *Odhams' Press*, [1920] 1 K. B. 135, *per* Scrutton, L.J., at 143.
(*u*) *Elliott* v. *Garrett*, [1902] 1 K. B. 870.
(*x*) *Lyle-Samuel* v. *Odhams' Press*, [1920] 1 K. B. 135.
(*y*) *White* v. *Credit Reform Assocn.*, [1905] 1 K. B. 653, *per* Collins, M.R., at 658.

information would be the character and position of the persons from whom it was obtained" (z).

Unreasoning Prejudice.—Lack of inquiry into the truth of the statement may be due to neglect, or to indifference as to whether the statement was true or false; or it may be due to prejudice or bias on the part of the person making the statement. Such prejudice will be evidence of malice for the consideration of the jury.

The defendant attended an entertainment at Brighton for which the plaintiffs were responsible, and afterwards gave evidence in opposition to their application for a licence for music and dancing. He there described the performance he had witnessed as "the most indecent that could possibly be imagined". It turned out that the defendant had no very clear view of the stage and that his opinion was based upon the misconception that one of two costumed figures upon the stage at a particular time was a female, whereas in fact it was a male. There was evidence that he was prejudiced against the plaintiffs' performances, and it was held that in all the circumstances, including his failure to verify the sexes of the persons on the stage, his statement must be taken to have been made maliciously.

> "There is a state of mind, short of deliberate falsehood, by reason of which a person may properly be held by a jury to have abused the occasion, and in that sense to have spoken maliciously. If a person from anger or some other wrong motive has allowed his mind to get into such a state as to make him cast aspersions on other people, reckless whether they are true or false, it has been held, and I think rightly held, that a jury is justified in finding that he has abused the occasion. Therefore, the question seems to me to be whether there is evidence of such

(z) *White* v. *Credit Reform Assocn., supra, per* Mathew, L.J., at 660.

a state of mind on the part of the defendant. It has been said that anger would be such a state of mind; but I think that gross and unreasoning prejudice, not only with regard to particular people, but with regard to a subject-matter in question, would have the same effect. If a person charged with the duty of dealing with other people's rights and interests has allowed his mind to fall into such a state of unreasoning prejudice in regard to the subject-matter that he was reckless whether what he stated was true or false, there would be evidence on which a jury might say he had abused the occasion" (*a*).

Volunteered Statements. — In certain circumstances the fact that the statement, for which privilege is claimed, was not made in answer to an inquiry, but was volunteered, may be important in considering the question of malice.

"Communications injurious to the character of another may be made in answer to inquiry or may be volunteered. If the communication be made in the legitimate defence of one's own interest, or plainly under a sense of duty such as would be 'recognised by English people of ordinary intelligence and moral principle (*b*)', to borrow again the language of Lindley, L.J., it cannot matter whether it is volunteered or brought out in answer to an inquiry. But in cases which are near the line, and in cases which may give rise to a difference of opinion, the circumstance that the information was volunteered is an element for consideration certainly not without some importance" (*c*).

"Though the fact that a communication is

(*a*) *Royal Aquarium, etc., Society* v. *Parkinson*, [1892] 1 Q. B. 431, *per* Esher, M.R., at 444.
(*b*) *Stuart* v. *Bell*, [1891] 2 Q. B. 341, at 350.
(*c*) *Macintosh* v. *Dun*, [1908] A. C., 390, *per* Lord Macnaghten, at 399.

volunteered is material on the question of malice —was the defendant a fussy busybody acting ultroneously, or a person discharging a genuine social duty?—it is not conversely true that the issue of privilege or no privilege can generally turn on this circumstance. Privilege must depend on the relations of the parties, on the duty thereout arising, and on the occasion which is used or abused, not on the mere accident who spoke first. When this is critical it is on account of the nature of the duty, the discharge of which may or may not be consistent with volunteering the statement. There is no general rule that statements which would be privileged if made in answer to an inquiry cease to be so when the informant has not waited to be asked" (*d*).

The importance of this circumstance may be twofold. In the first place, it may be relevant, as has already been seen (*e*), in considering whether or not there is a duty which will give rise to privilege. There may be circumstances in which the duty to communicate information will not arise until there has been an inquiry or a request which calls for a reply; and while an inquiry clearly cannot create an interest, it may disclose the existence of the interest for the first time.

But the circumstance may be relevant also on the question of malice. In a case (*f*) where the defendant met in the street an intending customer of the plaintiff, and without waiting to be asked, said to him: "If you have anything to do with Strong you will live to repent it, he is a most unprincipled man," a verdict was directed for the plaintiff on the ground that the statement was volunteered.

(*d*) *Greenlands* v. *Wilmshurst*, [1913] 3 K. B. 507, *per* Hamilton, L.J., at 535.
(*e*) Chapter 11.
(*f*) *Storey* v. *Challands* (1837), 8 C. & P. 234.

Time when Statement was Made.—The time when the statement is made is also an element for the consideration of the jury on the question of malice. For instance, the fact that a fair and accurate report of a case, the result of which is defamatory of the plaintiff, and which is not published contemporaneously with the proceedings so as to fall within the category of absolutely privileged communications, but is published a long time afterwards, so as to revive matters which normally would have been long since forgotten, may be evidence, in such or in any case, on which the jury may find that the publication was made maliciously, in order to damage the plaintiff.

Conversely, a charge which is made too late may suggest a malicious motive and throw doubt upon the genuineness of the statement. Where a domestic servant, who had been for many years in the service of her master, asked for a character, and was then charged by her master with theft for the first time—a charge which he offered to withdraw if she would remain in his service —it was held that this circumstance was a relevant consideration for the jury in deciding whether the charge was made *bona fide*, or was merely trumped up in order to frighten the servant into remaining in the master's service (*g*).

Excessive Publication.—Malice may be inferred from publication of the libel which is excessive, that is to say, reaches persons who are outside the privilege. The question what extent of publication amounts to excess is one which depends on the nature of the particular case and the circumstances which give rise to the privilege.

In general it may be said that the publication of a privileged communication to anybody who is outside the

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(*g*) *Kelly* v. *Partington* (1833), 4 B. & Ad. 700.

privilege, that is to say, a person between whom and the publisher no privilege exists on the ground of interest or duty in receiving the communication, is a circumstance which calls for some explanation. But the explanation may not be difficult to supply. For example, the matter may be so urgent that it is vital to communicate it immediately, without waiting till the recipient is alone; or the speaker may justifiably take the precaution of ensuring the presence of a witness in order to protect himself; or the business methods of making the communication may justifiably involve incidental publication to clerks, typists, etc.; or the matter may be one of such wide interest that it is impossible to inform interested persons without the risk of informing those who are not; or a publication in the Press may have been invited or incited by the action of the plaintiff, who was being replied to for observations which he had previously made through the same medium concerning the defendant.

In a case where the defendant, the tenant of a farm, suspected the plaintiff, a workman employed at repairing it, of having broken open his cellar door and having got drunk on his cider, it was held that he was justified in making his suspicions known to the plaintiff when he met him in the street the next day, although the plaintiff happened to have a friend with him (*h*).

And where a master in dismissing a servant called in a friend to hear what took place, it was held that he did not thereby lose the privilege.

> "Where [the master] was dismissing a servant for theft, it was material to his interest that a third person should be present who might bear witness to the dissolution of the contract, and to the reason; and it would be hard if an action lay against a master for doing, in such a case, no more than

(*h*) *Toogood* v. *Spyring* (1834), 1 C. M. & R. 181.

he was bound to do in duty to himself and to society" (*i*).

But where the defendant, a customer of the plaintiff, thinking he had reason to complain of dishonesty on the part of the plaintiff, stood outside the door of the plaintiff's shops, and made his complaint in a voice so loud and in language so abusive that it attracted the attention of passers-by, it was held that the method adopted by the defendant was evidence of malice for the jury to consider (*k*).

The plaintiff had been elected by the inhabitants of Barnsley to the office of parochial constable, and appeared before a special petty sessional meeting of the justices for the purpose of being sworn in. The defendant appeared before the justices and objected to the plaintiff holding the office on the ground that he was an improper person, and the plaintiff sued for slander. It was argued that the privilege, if any, was lost, the statement having been made to all the justices and certain other persons, but it was held that this was not the case.

> "I think the defendant chose the most proper occasion for making his objection, and that it was his bounden duty to do so. Was he to stand by and see a person elected whom he believed to be perjured, and not take any objection?" (*l*).

The incidental publication of a privileged libel to clerks, typists, etc., will not avoid the privilege, provided the method of communication which is chosen is in the circumstances a reasonable one. The clerks of the publisher of the libel are placed in the same position as the clerks of the recipient in this respect: publication to both are alike said to be "incidental" and therefore privileged, although it would clearly be more logical to hold

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(*i*) *Taylor* v. *Hawkins* (1851), 16 Q. B. 308, *per* Campbell, C.J., at 321.
(*k*) *Oddy* v. *Lord George Paulet* (1865), 4 F. & F. 1009.
(*l*) *Kershaw* v. *Bailey* (1848), 1 Ex. 743.

that while publication to the recipient's clerks was privileged as incidental, publication by the libeller to his own clerks did not amount to publication at all, for a person cannot "publish" a libel to himself. No distinction, however, seems to be drawn between the two cases, at any rate on the authorities as they exist to-day.

Thus it has been held that such incidental publication of letters or telegrams passing between the directors of a company in England and a company situated abroad did not take away the privilege, the publication to unprivileged persons being merely in the ordinary course of business (*m*).

But where the plaintiff was a shop assistant whom the defendant, her employer, suspected of theft, and the defendant sent two telegrams to the plaintiff's father informing him of the suspicion which had fallen on his daughter, and requesting his immediate presence if he wished to save her from prosecution, it was held that the incidental publication of the transmission by telegraph was not within the privilege, as the communication might just as well have been made by letter. In this case it was left to the jury to say whether the method of transmission adopted was reasonable, and it was found that it was not.

> "The question then is whether the character of an innocent person is to be destroyed because the libeller thinks fit to send the libel in this shape rather than in a sealed letter. I do not mean to say that there was malice in fact here. But I agree with my Lord [Coleridge, C.J.] in thinking that sending the messages by telegraph when they might have been sent by letter was evidence of malice. I desire, however, to put this higher. I think that a communication which would be privileged if made by

(*m*) *Edmondson* v. *Birch*, [1907] 1 K. B. 371.

letter becomes unprivileged if sent through the telegraph office because it is necessarily communicated to all the clerks through whose hands it passes " (*n*).

In cases where there is a duty to communicate information to a number or to a class of persons, all of whom have an interest in receiving it, the privilege will not be lost if a reasonable method of communication is adopted merely because the information thereby becomes available to other persons than those concerned.

Thus, where the directors of a company received from the auditors a report defamatory of the manager, which it was clearly their duty to communicate to the shareholders, it was held that they were entitled to embody the auditors' report in their own, which was circulated to the shareholders and read at the shareholders' meeting; and that the incidental publication to the printers, and the presence of reporters at the meeting, did not take away the privilege (*o*).

But publication in the public Press of a statement which concerns only a limited class, save in special circumstances dealt with hereafter, has repeatedly been held to be too wide. Thus, where the plaintiff was standing as Parliamentary candidate for the borough of Finsbury, and the defendant, an elector in the constituency, procured the publication of a libel upon him in the *Morning Post*, it was held that the privilege was exceeded, although it would have been privileged if the publication had been restricted to the constituents of Finsbury.

> " However large the privilege of electors may be, it is extravagant to suppose that it can justify the publication to all the world of facts injurious to a person who happens to stand in the situation of candidate " (*p*).

(*n*) *Williamson* v. *Freer* (1874), L. R. 9 C. P. 393, *per* Brett, L.J., at 395.

(*o*) *Lawless* v. *Anglo-Egyptian Cotton Co.* (1869), L. R. 4 Q. B. 262.

(*p*) *Duncombe* v. *Daniell* (1837), 8 C. & P. 222, *per* Denman, C.J., at 229.

Similarly, where the plaintiff, a horse-trainer, was warned off the Turf by the Stewards of the Jockey Club, and a notice to the effect that he had been warned off was published in the *Racing Calendar* and *The Times*, it was held that the former publication, being addressed to a limited class of interested persons, was privileged, but that the latter publication, addressed to the general public, was not.

> "There is no authority which protects the statement in the newspaper, when it is not made in answer, but as a fresh item on which a general interest, as distinguishable from a particular interest already aroused, prevails" (*q*).
>
> "I am unable to find in the authorities any reason to suppose that the law has protected a general publication in cases when there is only a sectional interest and a consequential duty to inform only part of the public" (*r*).

It has since been held, on the authority of this case, that the publication of a libel on a Hornchurch town councillor, privileged if communicated to the inhabitants of Hornchurch, was excessive when published in the *South Essex Recorder*, apparently on the ground that the newspaper might have been purchased by uninterested persons passing through Hornchurch Station (*s*). This decision does not appear to have been the subject of appeal, but it is submitted that the effect given to the authorities by it is too narrow.

When the libel is a reply to a previous attack made upon the defendant by the plaintiff, different considerations apply; and the defendant is entitled to give his

(*q*) *Chapman* v. *Ellesmere*, [1932] 2 K. B. 431, *per* Hanworth, M.R., at 456.

(*r*) *Chapman* v. *Ellesmere*, *supra*, *per* Slesser, L.J., at 467. This case appears to be impossible to reconcile with *Cookson* v. *Harewood*, [1932] 2 K. B. 478.

(*s*) *Standen* v. *South Essex Recorder* (1934), 50 T. L. R. 365.

reply the widest publicity reasonably necessary to overtake the original attack.

The plaintiff, a barrister, made a violent attack upon the defendant, the Bishop of Sodor and Man, during the course of a speech in the House of Keys in opposition to a private Bill. The speech was reported in the *Manx Sun*. Thereupon the Bishop replied, defending himself and making a counter-attack upon the plaintiff in his charge to the assembled clergy. This speech was sent to the *Manx Sun* for publication. It was held that the latter publication was not too wide.

> "Considering . . . that the speech impugning his character and conduct had been addressed to both clergy and laity, and conveyed to both by the Press, their Lordships are of opinion that the Bishop was privileged in addressing his defence to both through the same channel which had conveyed the attack, provided that he did this *bona fide* for the purpose of vindicating himself, or of informing the public upon matters which they were concerned to know, and not of defaming or injuring the appellant [the plaintiff]" (*t*).

Where an attack on a General in the British Army had been made in the House of Commons, and circulated, as was intended, through Hansard's Reports, it was held that the Army Council were justified in publishing his vindication in the public Press.

> "I think it may be laid down as a general proposition that where a man, through the medium of Hansard's Reports of the proceedings in Parliament, publishes to the world vile slanders of a civil, naval, or military servant of the Crown in relation to the discharge by that servant of the duties of his office, he selects the world as his audience, and that it is

(*t*) *Laughton* v. *Bishop of Sodor and Man* (1872), L. R. 4 P. C. 495, *per* Sir Robert Collier, at 404.

the duty of the heads of the service to which that servant belongs, if on investigation they find the charge against him groundless, to publish his vindication to the same audience to which his traducer has addressed himself" (*u*).

"It may be said in general terms that whenever the character of one person is made the subject of a false charge communicated to another in a public manner, that other has the right to overtake the charge wherever it may have reached, and if possible to eradicate the falsehood by the refutation" (*x*).

Extraneous Matter.

"The privilege extends only to a communication upon the subject with respect to which privilege exists, and does not extend to a communication upon any other extraneous matters which the defendant may have made at the same time. The introduction of such extraneous matter may afford evidence of malice which will take away protection on the subject to which privilege attaches, and the communication on the extraneous matter is not made upon a privileged occasion at all, inasmuch as the existence of privilege on one matter gives no protection to irrelevant libels introduced into the same communication" (*y*).

Conduct.—Finally, the defendant's conduct, from any previous time down to and including the course of the proceedings at the trial, may be given in evidence to show malice on his part. For example, a practice of libelling the plaintiff may well be sufficient to prove malice, by negativing carelessness or negligence.

(*u*) *Adam* v. *Ward*, [1917] A. C. 309, *per* Lord Atkinson, at 343.
(*x*) *Adam* v. *Ward*, *supra*, *per* Lord Shaw, at 347.
(*y*) *Adam* v. *Ward*, *supra*, *per* Finlay, L.C., at 318.

"The publication of previous libels on the plaintiff by the defendant is admissible 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 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 publication of that in question, merely affects the weight, not the admissibility, of the evidence" (z).

The mere fact that the defendant has pleaded justification is of itself no evidence of malice. But when the defendant refused at the trial either to call evidence in support of his plea of justification or to withdraw it, it was held that this did amount to evidence of malice.

"Another part of the direction [to the jury in the Court below] was said to be wrong. The plaintiff had 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; this the defendant refused; and though he offered no evidence in support of the justification he never withdrew the charge. On this the learned judge remarked, with reference to the question of malice, that the whole of the defendant's conduct might be considered by the jury, 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 been made, and how it had been persisted in

(z) *Barrett* v. *Long* (1851), 3 H. L. C. 395, *per* Parke, B., at 414.

down to the time of the verdict, and they should calmly consider what damages would reinstate the plaintiff's character. We see no objection to this direction. 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 an unjustifiable slander may have that effect; and 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*).

From this it is clear that while the occasion when the words are written or spoken is the only moment when malice is relevant, yet the existence of malice at a later date may be evidence that it existed before. It is now clear law (*aa*) that the conduct of the defendant at the trial and also the conduct of his counsel (who must be taken to be acting on his client's instructions) may be evidence of a malicious feeling on the part of the defendant, of such a character that the jury may well think that some such feeling must have prompted the defendant at the time of the publication of the libel.

Burden of Proof.—The burden of proving malice, in a case where privilege is claimed, is upon the plaintiff (*b*).

"I apprehend the moment the judge rules that the occasion is privileged, the burden of proving that the defendant did not act in respect of the reason

(*a*) *Simpson* v. *Robinson* (1848), 12 Q. B. 511.
(*aa*) *Praed* v. *Graham* (1889), 24 Q. B. D. 53.
(*b*) *Clark* v. *Molyneux* (1877), 3 Q. B. D. 237.

of the privilege, but from some other and indirect motive, is thereupon thrown upon the plaintiff" (*c*).

"It is clear that it is not for the defendant to prove that he was acting from a sense of duty, but for the plaintiff to satisfy the jury that the defendant was acting from some other motive than a sense of duty" (*d*).

In discharging this burden of proof, however, the plaintiff is not confined to the evidence of his own witnesses, but may rely upon the evidence given by the defendant's witnesses, if he has called any, in order to establish malice against him. This may, and frequently does, place the defendant's counsel in a position of some difficulty. The Judge is entitled to postpone his ruling upon the question of malice until he has heard the whole case (*e*), and thus the defendant's counsel, if he is unable to obtain a ruling at the conclusion of the plaintiff's case, may have to elect whether to call evidence or not without knowing what the ruling is going to be.

If he decides to call no evidence, the Judge may decide there is evidence of malice, and the jury may give their verdict against him on this ground. His only course, in order to put the matter right, will then be to ask the Court of Appeal to set the verdict aside on the ground that there was no evidence of malice to be submitted to the jury and the Judge was wrong in holding that there was.

If on the other hand, he decides to call evidence, he does so at the risk of supplying evidence of malice, which was wanting at the end of the plaintiff's case. This course may be necessary because the facts relevant to some other issue, which is vital to the defendant's case, are in dispute; for instance, it may be necessary to call

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(*c*) *Clark* v. *Molyneux* (1877), 3 Q. B. D. 237, *per* Brett, L.J., at 247.
(*d*) *Clark* v. *Molyneux*, *supra*, *per* Cotton, L.J., at 251.
(*e*) *Marbé* v. *George Edwardes*, [1928] 1 K. B. 269.

evidence to establish the facts on which the defendant claims his privilege, or there may be an issue of fact arising out of some other cause of action which has been joined with the claim for libel, *e.g.*, wrongful dismissal (*f*).

This matter, which at first sight appears somewhat technical, is dealt with here because it is frequently of vital importance at the very outset of the case to either the plaintiff or the defendant, to know whether the presence of the defendant in the witness-box can be ensured or avoided. Careful pleadings, and the judicious use of appropriate interlocutory proceedings such as interrogatories, notice to admit facts, and discovery, may result in admissions which will dispose of all the other issues of fact in the case; hence the paramount importance, in an action for defamation, of giving the most careful consideration to the proceedings in their early stages, on which the ultimate success or failure of the case may depend.

Pleading.—It is invariably alleged in the statement of claim that the defendant "falsely and maliciously" published the words complained of, and the defendant should reply by alleging that the words were spoken "*bona fide* and without malice" save when pleading the defence of justification, when the question of malice is irrelevant.

(*f*) *Marbé* v. *George Edwardes*, [1928] 1 K. B. 269.

CHAPTER 14.

DAMAGES.

DAMAGES in an action for defamation are entirely a matter for the jury; they may be mitigated or aggravated, contemptuous or exemplary; and the sum which a jury may award by way of compensation to the plaintiff for the injury he has sustained to his reputation may vary from a farthing to many thousands of pounds.

In actions for libel, or slander, actionable *per se*, general damages will be presumed and need not be alleged or proved.

> "The law presumes that some damage will flow in the ordinary course of things from the mere invasion of [the plaintiff's] absolute right to reputation" (*a*).

The plaintiff may also recover special damage in addition if he alleges it and proves at the trial, that he has sustained it and that it is not too remote (*b*).

In actions for slander not actionable *per se*, the plaintiff must allege that he has suffered special damage and prove it at the trial before he can establish that he has a cause of action at all (*c*). If he succeeds, he is entitled to recover in addition such general damages as the jury think fit to award.

Assessment of General Damages.—In assessing general damages, the jury are entitled to consider the conduct of the parties prior to and during the hearing of the case.

> "It is a rule of law in actions of libel that the jury in assessing the damages are entitled to look at

(*a*) *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524, *per* Bowen, L.J., at 528.
(*b*) *Ratcliffe* v. *Evans*, *supra*.
(*c*) See Chapter 3.

the whole conduct of the defendant from the time that the libel was published down to the very moment of their verdict" (*d*).

"Upon principle, we think that the spirit and intention of the party publishing a libel are fit to be considered by a jury, in estimating the injury done to the plaintiff; and that evidence tending to prove it cannot be excluded simply because it may tend to disclose another and different cause of action" (*e*).

It is proper for the jury to take the conduct of both parties into account either by way of aggravation or mitigation of damages. A detailed examination of the authorities upon the point is, however, outside the scope of this book (*f*).

If the damages are excessive, the verdict may be set aside, but this is very seldom done. The tests applicable in deciding if a particular verdict is excessive are clearly stated in the following passages:—

"[The jury] have to consider the nature of the libel as they understand it, the circumstances in which it was published, and the circumstances relating to the person who publishes it right down to the time when they give their verdict, whether the defence made is true, and, if so, whether that defence has ever been withdrawn—the whole circumstances of the case. It is not the judge who has to decide the amount. The constitution has thought, and I think there is great advantage in it, that the damages to be paid by a person who says a false thing about his neighbour are best decided by a jury representing the public, who may state the view of the public as to the action of the man who makes a false statement about his neighbour, the plaintiff.

(*d*) *Praed* v. *Graham* (1889), 24 Q. B. D. 53, *per* Esher, M.R., at 55.
(*e*) *Pearson* v. *Lemaitre* (1843), 5 M. & G. 700, *per* Tindal, C.J., at 720.
(*f*) See Gatley and Odgers on Libel and Slander, references to *Praed* v. *Graham*.

It is for that reason that it is extremely rare for the Court of Appeal to interfere with the verdict of the jury as to the amount of damages when the libel is established. It is very often the case that the individual judges of the Court of Appeal, if they had been asked their verdict on the amount of damages, would have given a smaller sum. Sometimes they would have given a larger sum, but the question is not what amount the judges would have given. The question is what amount the jury, as representing the public, the community, have fixed, and it is extremely rare to have that amount interfered with by the Court. A test has been formulated, and it is this, as has been correctly stated several times: the Courts will interfere only if the amount of damages is such that in all the circumstances no twelve reasonable men could have given it. If the Court comes to that view, it will interfere with the verdict, but even then it cannot fix the amount itself, but must send the case back to another jury who may very easily repeat their first verdict, and the Court cannot go on sending the case back to a jury until at last they get a verdict with which the judges agree. Those are the reasons which justify the relation of the Court of Appeal to the amount of damages found by juries" (*g*).

". . . If the Court of Appeal comes to the conclusion that the damages are so much that no reasonable jury could have given them without taking into consideration something which they were bound to exclude from their consideration, or are in any other way unreasonably excessive, the Court of Appeal is entitled to interfere and order a new trial on that

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(*g*) *Youssoupoff* v. *Metro-Goldwyn-Mayer* (1934), 50 T. L. R. 581, *per* Scrutton and Greer, L.JJ., at 584, 586.

ground, however unfortunate it may be for the parties if they are compelled to do so" (*g*).

The defendants published a statement that a certain Miss Rosie Boote, a leading actress of the day, was the daughter of a Miss Hetty Chattell, then the principal boy in the Hippodrome pantomime. Miss Chattell, who was unmarried, sued for libel. During the course of the interlocutory proceedings the defendants applied for further time to deliver their defence. At the trial of the action, counsel for the plaintiff told the jury that this delay was obtained for the defendants for the purpose of giving them time to ransack all England to find something against the plaintiff which would prevent her from going into the witness box. The jury returned a verdict for £2,500; and it was held on appeal that they must have taken into consideration something which it was improper for them to consider and that there must be a new trial on the ground that the damages were excessive (*h*).

Or again, where counsel read to the jury a letter which he thought, and continued to think till he got to the House of Lords, was an open letter, but which was in fact marked "without prejudice," a new trial was ordered for similar reasons (*i*).

The jury may also take the bad character of the plaintiff into account in mitigation of damages; but the defendant cannot give evidence by cross-examination or otherwise of the plaintiff's bad character, unless the plaintiff has previously given evidence of good character which the defendant is entitled to rebut (*k*).

On the other hand, if the damages show that the jury must have arrived at an improper compromise, the Court will set it aside (*l*).

(*h*) *Chattell* v. *Daily Mail* (1901), 18 T. L. R. 165.
(*i*) *Watt* v. *Watt*, [1905] A. C. 115.
(*k*) *Scott* v. *Sampson* (1882), 8 Q. B. D. 491. But see Ord. XXXVI, r. 37.
(*l*) *Cook* v. *Brogden* (1885), 1 T. L. R. 497, *per* Coleridge, C.J., at 498.

Costs.—By R. S. C., Ord. LXV, r. 1 (*m*) "the costs of and incident to all proceedings in the Supreme Court . . . shall be in the discretion of the Court or Judge." This discretion must be exercised judicially (*n*).

Under the previous rule (*o*), the successful plaintiff could be deprived of his costs only if the Judge "for good cause" otherwise ordered. Due weight would doubtless be given to the authorities which suggest that contemptuous damages are good cause, if the true interpretation of the verdict is that the action is one which ought not to have been brought (*p*).

Special Damage.

> "In all actions . . . on the case, where damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which the acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done" (*q*).

In order to prove special damage, the plaintiff must establish that he has suffered some temporal loss which is capable of being estimated in money (*r*). Thus, loss of employment (*s*), loss of a situation (*t*), loss of a

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(*m*) Subject to statutory provisions; *e.g.*, Slander of Women Act, 1891.
(*n*) See *Wootton* v. *Sievier* (1913), 30 T. L. R. 165.
(*o*) Prior to 1929.
(*p*) *Wood* v. *Cox* (1889), 5 T. L. R. 272; *O'Connor* v. *Star Newspaper* (1893), 68 L. T. 146. But see *Martin* v. *Benson*, [1927] 1 K. B. 771.
(*q*) *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524, at 532.
(*r*) *Chamberlain* v. *Boyd* (1883), 11 Q. B. D. 412.
(*s*) *Ecklin* v. *Little* (1890), 6 T. L. R. 366.
(*t*) *Rumsey* v. *Webb* (1842), Car. & M. 104.

client (*u*), loss of marriage (*x*), loss of the consortium of husband or wife (*y*), or loss of hospitality, though gratuitous (*z*), constitute special damage. Mental pain and suffering do not by themselves constitute special damage, though if special damage is proved, the jury may take injured feelings into account (*a*).

Such special damage must be specifically pleaded, and proved at the trial. Particulars may be asked for of the names of customers who have ceased to deal with, or persons who have ceased to employ, the plaintiff. It may be noted that it is essential that these persons should give evidence at the trial themselves; and owing to the relations which may then exist between them and the plaintiff it may sometimes be a matter of difficulty to secure their attendance. They must prove that they ceased to trade with or to employ the plaintiff, and that they did so in consequence of the slander; evidence of their statements to other persons on this point are inadmissible. Thus, where the plaintiff was a baker who had been charged with using adulterated flour in his bread, and called a shopkeeper, who dealt in his bread, to say that certain customers now refused to buy it, it was held that the shopkeeper could not be asked if the customers had given any reason for the refusal.

> "You might call these customers, who are unnamed in the declaration, and might ask them, on their oaths, what was the reason of their not continuing to take the plaintiff's bread; but I am clearly of opinion that what they said to the salesman is not evidence" (*b*).

(*u*) *King* v. *Watts* (1838), 8 C. & P. 614.
(*x*) *Speight* v. *Gosnay* (1891), 60 L. J. Q. B. 231.
(*y*) *Lynch* v. *Knight* (1861), 9 H. L. C. 589. The authority of this case to-day may be doubted.
(*z*) *Moore* v. *Meagher* (1807), 1 Taunt. 39.
(*a*) *Lynch* v. *Knight* (1861), 9 H. L. C. 589.
(*b*) *Tilk* v. *Parsons* (1825), 2 C. & P. 201, *per* Best, C.J., at 202.

General Loss of Business.—In certain cases, evidence of general loss of business is sufficient to establish the special damage necessary for the maintenance of the action.

> "The nature and circumstances of the publication of the falsehood may accordingly require the admission of evidence of general loss of business as the natural and direct result produced, and perhaps intended to be produced. . . . In an action for falsehood producing damage to a man's trade, which in its very nature is intended or reasonably likely to produce, and which in the ordinary course of things does produce, a general loss of business, as distinct from this or that known customer, evidence of such general decline of business is admissible" (*c*).

Thus, where the defendants published a trade libel on the plaintiff, namely, that he had gone out of business and his firm had ceased to exist, it was held that the evidence of the plaintiff that his business had fallen off and his profits diminished since the date of the publication was sufficient special damage to support the action, without requiring specific evidence of any particular customer who was known to have left him (*c*).

Risk of Damage Not Enough.—In order to prove special damage, the plaintiff must show that he has actually suffered temporal loss. The imminent risk of temporal loss is not sufficient; until some loss, however slight, has actually been suffered, the plaintiff has no cause of action (*d*).

The defendant slandered a candidate for the Reform Club, by making statements about his conduct at another club in Melbourne. The plaintiff had already sought

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(*c*) *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524, *per* Bowen, L.J., 533.
(*d*) See Chapter 3. But see also *White* v. *Mellin*, [1895] A. C. 154, *per* Lord Watson, at p. 165.

election once and had failed; and there was a proposal before the committee to amend the rules which would have improved his chances of election. In consequence of the defendant's statements no amendment was made; the plaintiff sued the defendant, but it was held he had no cause of action, for he had failed to show any special damage.

> "All that is stated is that the plaintiff was prevented from again seeking to be elected, that is that the determination of the club to retain the regulations under which the plaintiff had been rejected made him think it not worth his while to stand again for election. The defendant's words did not deprive the plaintiff of all chance of being elected; they only deprived him of 'a' chance. And 'a' chance is a word expressive only of the measure of the uncertainty of a man's own mind. Putting the case in the strongest manner for the plaintiff it only comes to this—that the refusal to alter the regulations kept him in a position in which an election might or might not result in his being chosen a member. But that appears to me to leave the damage too remote, and to place it beyond the line which the law has wisely drawn. The risk of a temporal loss is not the same as temporal loss. The risk of suffering injury is not the same as to suffer injury. If it were otherwise, the limitation which the law imposes on liability to action for words spoken would be entirely done away with, because the party defamed could always urge that he had lost the chance of an advantage or had run the risk of an injury. But the 'chance' of an advantage is not the same as the advantage, and the risk of an injury is not the same as the injury. The law has said that in order to support an action for words spoken not importing crime, misconduct in a trade or profession, or disease, there must be a loss

of some temporal benefit, and the plaintiff has failed to show any" (*e*).

The defendants had the plaintiff ejected from their licensed premises on the ground that he was drunk. The plaintiff told his father, who threatened to remove him from the board of directors of a company which he controlled, unless he cleared his character against the charge. The plaintiff brought an action for slander against the defendants in order to do so, and alleged his father's threat by way of special damage, but it was held that the mere risk of damage, however imminent, was not sufficient to sustain the action (*f*).

Remoteness of Damage.—In order to amount to special damage, the temporal loss proved must be sufficiently closely connected with the slander to be said not to be too remote.

The test of remoteness in all actions of tort, as recently laid down, is whether the damage can be said to be the direct consequence of the negligent act.

> "I still venture to think that direct cause is the best expression" (*g*).
>
> "The presence or absence of reasonable anticipation of damage determines the legal quality of the act as negligent or innocent. If it be then determined to be negligent the question whether particular damages are recoverable depends only on the answer to the question whether they are the direct consequence of the act" (*h*).

The question of remoteness of damage has frequently arisen in the past in cases which turn upon the repetition

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(*e*) *Chamberlain* v. *Boyd* (1883), 11 Q. B. D. 407, *per* Bowen, L.J., at 416. But see *Chaplin* v. *Hicks*, [1911] 2 K. B. 786.

(*f*) *Michael* v. *Spiers & Pond* (1909), 101 L. T. 532.

(*g*) *Weld-Blundell* v. *Stephens*, [1920] A. C. 956, *per* Lord Sumner, at 983.

(*h*) *Re Polemis, Furness, Withy & Co.*, [1921] 3 K. B. 560, *per* Warrington, L.J., at 574.

of a slander. The principles enunciated above were applied by the House of Lords to the case of the republication of a libel.

The plaintiff wrote a letter to the defendant which contained statements libellous of A and B. The defendant negligently left the letter about; somebody found it and, before returning it to the defendant, showed it to A and B, who successfully sued the plaintiff for libel. The plaintiff sued the defendant, claiming the damages he had had to pay to A and B; but although it was said that "taking men as we find them, few things are more certain than the repetition of a calumny confidentially communicated, even on an honourable undertaking of secrecy," it was held that the republication of the libel by the person who found it was a consequence too remote from the defendant's negligence to be said to be directly the cause of it (*i*).

This decision would seem to take the place of the numerous older authorities (*k*) on the republication of slanders, except in so far as they are consistent with the principle on which it is based; and on the authority of this case it may be said that the damages which flow from the unauthorised repetition of a slander will be held to be too remote a consequence of the original publication for the original utterer to be responsible for them, and further, that in determining his liability the question whether a reasonable man might have foreseen the consequences which flowed from the repetition, while relevant on the question of negligence, is irrelevant on the question of the remoteness of the damage (*l*).

Intentional Repetition.—Where there is evidence that the defendant, though he spoke only to A, intended and

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(*i*) *Weld-Blundell* v. *Stephens*, [1920] A. C. 956.

(*k*) *E.g.*, *Ward* v. *Weeks* (1830), 7 Bing. 211; *Lynch* v. *Knight* (1861), 9 H. L. C. 577; *Parkins* v. *Scott* (1862), 1 H. & C. 153; *De Crespigny* v. *Wellesley* (1829), 5 Bing. 392.

(*l*) *Re Polemis*, [1921] 3 K. B. 560.

desired that A should repeat his words, or expressly requested him to do so, here the defendant is liable for all the consequences of A's repetition of the slander, for A had become his agent (*m*).

Where the plaintiff was a doctor's assistant, and a widow said to her lady companion: "I hear he is a divorced man; you had better inquire," and the companion told the doctor's wife, who told the doctor, who told the plaintiff he would accept his resignation if it was offered, the plaintiff succeeded in the action (*n*).

And where the defendant was the printer and publisher of the London edition of the *New York Herald*, and published a libel upon the plaintiff, evidence was held to be admissible that the defendant well knew that the libel would be repeated and published in editions of the paper published in France and other countries (*o*).

(*m*) Odgers on Libel and Slander (6th ed.), at 147, cited with approval in *Whitney* v. *Moignard* (1890), 24 Q. B. D. 630, at 631. See also *Parkes* v. *Prescott and Ellis* (1869), L. R. 4 Ex. 169.

(*n*) *Ecklin* v. *Little* (1890), 6 T. L. R. 366.

(*o*) *Whitney* v. *Moignard* (1890), 24 Q. B. D. 630.

CHAPTER 15.

INJUNCTION.

Interim Injunction.—The plaintiff may apply *ex parte* for an interim injunction to restrain further publication of the libel pending the trial of the action, immediately after the publication complained of. He should do so without loss of time; delay may be prejudicial (*a*).

The jurisdiction of the Court to grant an interim injunction is based on the Supreme Court of Judicature (Consolidation) Act, 1925, which provides:—

> "The High Court may grant a mandamus or an injunction or appoint a receiver in all cases in which it appears to the Court to be just and convenient so to do" (*b*).

From this and the decided cases it follows that no injunction will be granted unless three conditions are satisfied:—

(a) Unless there is a probability of the repetition of the libel; and

(b) There is no reasonable prospect that the defendants will succeed at the trial; and

(c) Unless the injury done be irreparable injury for which damages would be no adequate compensation.

(a) Probability of Repetition.—There must be some reasonable ground for apprehending a further repetition of the libel (*c*), and there must be—

(*a*) *Monson* v. *Tussauds, Ltd.*, [1894] 1 Q. B. 671.

(*b*) 15 & 16 Geo. 5, c. 49, s. 45 (1), repealing and substantially re-enacting s. 25 (8) of the Judicature Act, 1873.

(*c*) See *Pryce* v. *Pioneer Press* (1925), 42 T. L. R. 29.

"Such immediate and pressing injury to property threatened by the defendant's proceedings as make it desirable . . . that [the Court] should interfere" (*d*).

"When there is no ground for apprehending the repetition of a wrongful act there is no ground for an injunction" (*e*).

(b) No Reasonable Prospect that the Defence Will Succeed.—Thus—

(i) No injunction will be granted unless the words complained of are such an obvious libel that a verdict to the contrary would be set aside as perverse.

> "It could not be denied that the Court had jurisdiction to grant an interim injunction before trial. It was, however, a most delicate jurisdiction to exercise because . . . the question of libel or no libel was for the jury. It was for the jury and not for the Court to construe the document and say whether it was a libel or not. To justify the Court in granting an interim injunction it must come to a decision upon the question of libel or no libel before the jury decide whether it was a libel or not. Therefore the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the Court would set aside the verdict as unreasonable. The Court must also be satisfied that in all probability the alleged libel was

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(*d*) *Quartz Hill, etc., Co.* v. *Beall* (1882), 20 Ch. D. 508, *per* Jessel, M.R., at 509.

(*e*) *Proctor* v. *Bayley* (1889), 42 Ch. D. 390, *per* Fry, L.J., at 401.

untrue, and, if written upon a privileged occasion, that there was malice on the part of the defendant. It followed from those three rules that the Court could only on the rarest occasions exercise the jurisdiction" (*f*).

(ii) No injunction will be granted when the defendant has pleaded justification and appears, on proper grounds, to have a reasonable chance of success.

"We cannot feel sure that the defence of justification is one which, on the facts which may be before them, the jury may find to be wholly unfounded" (*g*).

(iii) No injunction will be granted if the words are *prima facie* privileged and do not appear to have been spoken with malice (*h*).

(iv) No injunction will be granted if the words are *prima facie* a fair comment on a matter of public interest (*i*).

(c) **Irreparable Injury.**—No injunction will be granted unless the injury sustained is of such a nature that damages would be no adequate compensation.

"If the injury done to the plaintiff can be fully compensated for in damages the Court ought not to interfere by an interim injunction to restrain publication of the libel until the trial of the action" (*k*).

Special Damage.—Further, in cases where special damage is necessary to found the action, such special

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(*f*) *Coulson* v. *Coulson* (1887), 3 T. L. R. 846, *per* Esher, M.R., at 846. But see *Dunlop* v. *Dunlop*, [1921] A. C., *per* Birkenhead, L.C., at 372, who thought that to say that the Court must be "prepared confidently and completely to anticipate the view of a jury when it tried the case" would be stating the principle too high.

(*g*) *Bonnard* v. *Perryman*, [1891] 2 Ch. 269.

(*h*) *Quartz Hill, etc., Co.* v. *Beall* (1882), 20 Ch. D. 508.

(*i*) *Armstrong* v. *Armit* (1886), 2 T. L. R. 887.

(*k*) *Monson* v. *Tussauds*, [1894] 1 Q. B. 671.

damage must be alleged and proved in order to obtain an injunction.

> "If special damage was necessary to the maintenance of the action, and special damage was not shown, a tort in the eye of the law would not be disclosed and no injunction would be granted" (*l*).
>
> "Damages and injunction are merely two different forms of remedy against the same wrong; and the facts which must be proved in order to entitle a plaintiff to the first of these remedies are equally necessary in the case of the second" (*m*).
>
> "It would certainly be a strange and novel chapter of equity if a party could get a perpetual injunction to restrain an act which is not an illegal act" (*n*).

But it should be noted that in the same case Lord Watson expressed the view that it would be sufficient if the plaintiff could satisfy the Court that damage "would necessarily be occasioned to him in the future" (*o*). This *obiter dictum* has since been described as the "high-water mark in favour of the plaintiffs upon this point" (*p*).

McCardie, J., obviously agreed with this view in 1922, though his remarks were also *obiter*.

> "Apart from authority, I should have been prepared to hold that . . . an injunction might properly be granted in a case of threat and slander of title when damage would either necessarily or probably result. This, I think, is the just and common-sense view of the matter" (*q*).

(*l*) *White* v. *Mellin*, [1895] A. C. 154, *per* Herschell, L.C., at 163.
(*m*) *Ibid.*, *per* Lord Watson, at 167.
(*n*) *Ibid.*, *per* Lord Morris, at 170.
(*o*) *Ibid.*, *per* Lord Watson, at 167.
(*p*) *Dunlop* v. *Maison Talbot* (1904), 20 T. L. R. 579, *per* Collins, M.R., at 581.
(*q*) *B. R. C.* v. *C. R. C. and L. C. C.*, [1922] 2 K. B. 260, at 272.

The point would still appear to be open for final decision.

Injunction at the Trial.—If the plaintiff succeeds, an injunction to restrain further publication will usually be granted as part of the relief to which he is entitled, and may be granted although not specifically prayed for (*r*).

There must, however, be some probability that the publication will be repeated unless restrained. If the circumstances are such that repetition is impossible or unlikely, the Court will not grant an injunction.

Where the parties were printers for rival candidates at an election and the plaintiffs printed a poster in the following terms: "Have you recorded what Labour has done for you? If not see record below" with a large blank space underneath, and the defendants printed a similar poster with the space filled up with the purported achievements of the Labour Party, an injunction to restrain the defendants from further publication was refused (*s*).

(*r*) R. S. C., Ord. L, r. 12.
(*s*) *Pryce* v. *Pioneer Press* (1925), 42 T. L. R. 29.

APPENDIX.

STATUTES.

Fox's Libel Act, 1792.
32 Geo. 3, c. 60.

An Act to remove Doubts respecting the Functions of Juries in Cases of Libel. [A.D. 1792.]

"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, that, on every such trial, the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information; and shall not be required or directed, by the court or judge before whom such indictment or information shall be tried, to find the defendant or defendants guilty, merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information.

2. Provided always, that on every such trial, the court or judge before whom such indictment or information shall be tried, shall, according to their or his 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.

3. Nothing herein contained shall extend or be construed to extend, to prevent the jury from finding a special verdict, in their discretion, as in other criminal cases.

4. 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.

PARLIAMENTARY PAPERS ACT, 1840.
3 & 4 Vict. c. 9.

An Act to give Summary Protection to Persons employed in the Publication of Parliamentary Papers.

[14th April, 1840.]

WHEREAS it is essential to the due and effectual exercise and discharge of the functions and duties of Parliament, and to the promotion of wise legislation, that no obstructions or impediments should exist to the publication of such of the reports, papers, votes, or proceedings of either House of Parliament as such House of Parliament may deem fit or necessary to be published: AND WHEREAS obstructions or impediments to such publication have arisen, and hereafter may arise, by means of civil or criminal proceedings being taken against persons employed by or acting under the authority of the Houses of Parliament, or one of them, in the publication of such reports, papers, votes, or proceedings; by reason and for remedy whereof it is expedient that more speedy protection should be afforded to all persons acting under the authority aforesaid, and that all such civil or criminal proceedings should be summarily put an end to and determined in manner hereinafter mentioned: BE IT THEREFORE ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons in this present Parliament assembled, and by the authority of the same, that it shall and may be lawful for any person or persons who now is or are, or hereafter shall be, a defendant or defendants in any civil or criminal proceeding commenced or prosecuted in any manner soever, for or on account or in respect of the publica-

tion of any such report, paper, votes, or proceedings by such person or persons, or by his, her, or their servant or servants, by or under the authority of either House of Parliament, to bring before the Court in which such proceeding shall have been or shall be so commenced or prosecuted, or before any judge of the same (if one of the Superior Courts at Westminster), first giving twenty-four hours' notice of his intention so to do to the prosecutor or plaintiff in such proceeding, a certificate under the hand of the Lord High Chancellor of Great Britain, or the Lord Keeper of the Great Seal, or of the Speaker of the House of Lords, for the time being, or of the Clerk of the 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.

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

3. And be it enacted, that it shall be lawful in any civil

or criminal proceeding to be commenced or prosecuted for printing any extract from or abstract of such report, paper, votes, or proceedings, to give in evidence under the general issue such report, paper, votes, or proceedings, and to show that such extract or abstract was published bona fide and without malice; and if such shall be the opinion of the jury, a verdict of not guilty shall be entered for the defendant or defendants.

4. Provided always, and it is hereby expressly declared and enacted, that nothing herein contained shall be deemed or taken, or held or construed, directly or indirectly, by implication or otherwise, to affect the privileges of Parliament in any manner whatsoever.

LORD CAMPBELL'S LIBEL ACT, 1843.
6 & 7 Vict. c. 96.

An Act to amend the Law respecting Defamatory Words and Libel. [24th August, 1843.]

1. In any action for defamation it shall be lawful for the defendant (after notice in writing of his intention so to do, duly given to the plaintiff at the time of filing or delivering the plea in such action) to give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such apology.

2. In an action for 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 to such plea to such action it shall be competent to the plaintiff to reply generally denying the whole of such plea.

9. Wherever throughout this Act, in describing the plaintiff or the defendant, . . . words are used importing the singular number or the masculine gender only, yet they shall be understood to include several persons as well as one person, and females as well as males, unless when the nature of the provision or the context of the Act shall exclude such construction.

10. . . . nothing in this Act contained shall extend to Scotland.

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8 & 9 Vict. c. 75. (1845.)

An Act to amend an Act passed in the Session of Parliament held in the Sixth and Seventh Years of the Reign of Her present Majesty, intituled "An Act to amend the Law respecting Defamatory Words and Libel."

[31st July, 1845.]

2. It shall not be competent to any defendant in such action, whether in England or in Ireland, to file any such plea, without at the same time making a payment of money into Court by way of amends, but every such plea so filed without payment of money into Court shall be deemed a nullity and may be treated as such by the plaintiff in the action.

(And see R. S. C., Ord. XXII, particularly rule 4.)

COMMON LAW PROCEDURE ACT, 1852.
15 & 16 Vict. c. 76.

61. In actions of libel and slander the plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense without any prefatory averment to show how such words or matter were used in that sense; and such averment shall be put in issue by the denial of the alleged libel or slander; and where the words or matter set forth, with or without the alleged meaning, show a cause of action, the declaration shall be sufficient.

NEWSPAPER LIBEL AND REGISTRATION ACT, 1881.
44 & 45 Vict. c. 60.

An Act to amend the Law of Newspaper Libel and to provide for the Registration of Newspaper Proprietors.

[27th August, 1881.]

1. In the construction of this Act, unless there is anything in the subject or context repugnant thereto, the several words and phrases hereinafter mentioned shall have and include the meanings following; (that is to say,)

The word "registrar" shall mean in England the registrar for the time being of joint stock companies, or such person as the Board of Trade may for the time being authorise in that behalf, and in Ireland the assistant registrar for the time being of joint stock companies for Ireland, or such person as the Board of Trade may for the time being authorise in that behalf.

The phrase "registry office" shall mean the principal office for the time being of the registrar in England or Ireland, as the case may be, or such other office as the Board of Trade may from time to time appoint.

The word "newspaper" shall mean any paper containing public news, intelligence, or occurrences, or any remarks or observations therein printed for sale, and published in England

or Ireland periodically, or in parts or numbers at intervals not exceeding twenty-six days between the publication of any two such papers, parts, or numbers.

Also any paper printed in order to be dispersed, and made public weekly or oftener, or at intervals not exceeding twenty-six days, containing only or principally advertisements.

The word "occupation" when applied to any person shall mean his trade or following, and if none, then his rank or usual title, as esquire, gentleman.

The phrase "place of residence" shall include the street, square, or place where the person to whom it refers shall reside, and the number (if any) or other designation of the house in which he shall so reside.

The word "proprietor" shall mean and include as well the sole proprietor of any newspaper, as also in the case of a divided proprietorship the persons who, as partners or otherwise, represent and are responsible for any share or interest in the newspaper as between themselves and the persons in like manner representing or responsible for the other shares or interest therein, and no other person.

7. Where, in the opinion of the Board of Trade, inconvenience would arise or be caused in any case from the registry of the names of all the proprietors of the newspaper (either owing to minority, coverture, absence from the United Kingdom, minute subdivision of shares, or other special circumstances), it shall be lawful for the Board of Trade to authorise the registration of such newspaper in the name or names of some one or more responsible "representative proprietors".

8. A register of the proprietors of newspapers as defined by this Act shall be established under the superintendence of the registrar.

9. It shall be the duty of the printers and publishers for the time being of every newspaper to make or cause to be made to the Registry Office, . . . in the month of July in every year, a return of the following particulars according to the Schedule A hereunto annexed; that is to say,

(*a*) The title of a newspaper;

(*b*) The names of all the proprietors of such newspaper together with their respective occupations, places of business (if any), and places of residence.

10. If within the further period of one month after the time hereinbefore appointed for the making of any return as to any newspaper such return be not made, then each printer and publisher of such newspaper shall, on conviction thereof, be liable to a penalty not exceeding twenty-five pounds, and also to be directed by a summary order to make a return within a specified time.

11. Any party to a transfer or transmission of or dealing with any share of or interest in any newspaper whereby any person ceases to be a proprietor or any new proprietor is introduced may at any time make or cause to be made to the Registry Office a return according to the Schedule B hereunto annexed and containing the particulars therein set forth.

12. If any person shall knowingly and wilfully make or cause to be made any return by this Act required or permitted to be made in which shall be inserted or set forth the name of any person as a proprietor of a newspaper who shall not be a proprietor thereof, or in which there shall be any misrepresentation, or from which there shall be any omission in respect of any of the particulars by this Act required to be contained therein whereby such return shall be misleading, or if any proprietor of a newspaper shall knowingly and wilfully permit any such return to be made which shall be misleading as to any of the particulars with reference to his own name, occupation, place of business (if any), or place of residence, then and in every such case every such offender being convicted thereof shall be liable to a penalty not exceeding one hundred pounds.

13. It shall be the duty of the registrar and he is hereby required forthwith to register every return made in conformity with the provisions of this Act in a book to be kept for that purpose at the Registry Office and called "the register of newspaper proprietors," and all persons shall be at liberty to search and inspect the said book from time to time during

the hours of business at the Registry Office, and any person may require a copy of any entry in or an extract from the book to be certified by the registrar or his deputy for the time being or under the official seal of the registrar.

14. There shall be paid in respect of the receipt and entry of returns made in conformity with the provisions of this Act, and for the inspection of the register of newspaper proprietors, and for certified copies of any entry therein, and in respect of any other services to be performed by the registrar, such fees (if any) as the Board of Trade with the approval of the Treasury may direct and as they shall deem requisite to defray as well the additional expenses of the Registry Office caused by the provisions of this Act, as also the further remunerations and salaries (if any) of the registrar, and of any other persons employed under him in the execution of this Act, and such fees shall be dealt with as the Treasury may direct.

15. Every copy of an entry in or extract from the register of newspaper proprietors, purporting to be certified by the registrar or his deputy for the time being, or under the official seal of the registrar, shall be received as conclusive evidence of the contents of the said register of newspaper proprietors, so far as the same appear in such copy or extract without proof of the signature thereto or of the seal of office affixed thereto, and every such certified copy or extract shall in all proceedings, civil or criminal, be accepted as sufficient prima facie evidence of all the matters and things thereby appearing, unless and until the contrary thereof be shown.

16. All penalties under this Act may be recovered before a court of summary jurisdiction in manner provided by the Summary Jurisdiction Acts.

Summary orders under this Act may be made by a court of summary jurisdiction, and enforced in manner provided by section thirty-four of the Summary Jurisdiction Act, 1879; and, for the purposes of this Act, that section shall be deemed to apply to Ireland in the same manner as if it were re-enacted in this Act.

18. The provisions as to the registration of newspaper proprietors contained in this Act shall not apply to the case

of any newspaper which belongs to a joint stock company duly incorporated under and subject to the provisions of the Companies Acts, 1862 to 1879.

19. This Act shall not extend to Scotland.

20. This Act may for all purposes be cited as the Newspaper Libel and Registration Act, 1881.

The Schedules to which this Act refers:—

SCHEDULE A.

Return made pursuant to the Newspaper Libel and Registration Act, 1881.

Title of the Newspaper.	Names of the Proprietors.	Occupations of the Proprietors.	Places of Business (if any) of the Proprietors.	Places of Residence of the Proprietors.

SCHEDULE B.

Return made pursuant to the Newspaper Libel and Registration Act, 1881.

Title of Newspaper.	Names of Persons who cease to be Proprietors.	Names of Persons who become Proprietors.	Occupation of new Proprietors.	Places of Business (if any) of new Proprietors.	Places of Residence of new Proprietors.

LAW OF LIBEL AMENDMENT ACT, 1888.
51 & 52 Vict. c. 64.

An Act to amend the Law of Libel. [24th December, 1888.]

1. In the construction of this Act the word "newspaper" shall have the same meaning as in the Newspaper Libel and Registration Act, 1881.

3. A fair and accurate report in any newspaper of proceedings publicly heard before any court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged: Provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter.

4. A fair and accurate report published in any newspaper of the proceedings of a public meeting, or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a vestry, town council, school board, board of guardians, board or local authority formed or constituted under the provisions of any Act of Parliament, or of any committee appointed by any of the above-mentioned bodies, or of any meeting of any commissioners authorised to act by letters patent, Act of Parliament, warrant under the Royal Sign Manual, or other lawful warrant or authority, select committees of either House of Parliament, justices of the peace in quarter sessions assembled for administrative or deliberative purposes, and the publication at the request of any Government office or department, officer of state, commissioner of police, or chief constable of any notice or report issued by them for the information of the public, shall be privileged, unless it shall be proved that such report or publication was published or made maliciously: Provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter: Provided also, that the protection intended to be afforded by this section shall not be available as a defence in any proceedings if it shall be proved that the defendant has been requested to insert in the newspaper in which the report or other publication complained of appeared a reasonable letter or statement by way of con-

tradiction or explanation of such report or other publication, and has refused or neglected to insert the same: Provided further that nothing in this section contained shall be deemed or construed to limit or abridge any privilege now by law existing, or to protect the publication of any matter not of public concern and the publication of which is not for the public benefit.

For the purposes of this section "public meeting" shall mean any meeting bona fide and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted.

5. It shall be competent for a judge or the court, upon an application by or on behalf of two or more defendants in actions in respect to the same, or substantially the same, libel brought by one and the same person, to make an order for the consolidation of such actions, so that they shall be tried together; and after such order has been made, and before the trial of the said actions, the defendants in any new actions instituted in respect to the same, or substantially the same, libel shall also be entitled to be joined in a common action upon a joint application being made by such new defendants and the defendants in the actions already consolidated.

In a consolidated action under this section the jury shall assess the whole amount of the damages (if any) in one sum, but a separate verdict shall be taken for or against each defendant in the same way as if the actions consolidated had been tried separately; and if the jury shall have found a verdict against the defendant or defendants in more than one of the actions so consolidated, they shall proceed to apportion the amount of damages which they shall have so found between and against the said last-mentioned defendants; and the judge at the trial, if he awards to the plaintiff the costs of the action, shall thereupon make such order as he shall deem just for the apportionment of such costs between and against such defendants.

6. At the trial of an action for a libel contained in any newspaper the defendant shall be at liberty to give in evidence

in mitigation of damages that the plaintiff has already recovered (or has brought actions for) damages or has received or agreed to receive compensation in respect of a libel or libels to the same purport or effect as the libel for which such action has been brought.

SLANDER OF WOMEN ACT, 1891.
54 & 55 Vict. c. 51.

An Act to amend the Law relating to the Slander of Women.
[5th August, 1891.]

1. Words spoken and published after the passing of this Act which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable.

Provided always, that in any action for words spoken and made actionable by this Act, a plaintiff shall not recover more costs than damages, unless the judge shall certify that there was reasonable ground for bringing the action.

JUDICIAL PROCEEDINGS (REGULATION OF REPORTS) ACT, 1926.
16 & 17 Geo. 5, c. 61.

An Act to regulate the publication of reports of judicial proceedings in such manner as to prevent injury to public morals. [15th December, 1926.]

1.—(1) It shall not be lawful to print or publish, or cause or procure to be printed or published—

(*a*) in relation to any judicial proceedings any indecent matter or indecent medical, surgical or physiological details being matter or details the publication of which would be calculated to injure public morals;

(*b*) in relation to any judicial proceedings for dissolution of marriage, for nullity of marriage, or for judicial

separation, or for restitution of conjugal rights, any particulars other than the following, that is to say :—

(i) the names, addresses and occupations of the parties and witnesses;

(ii) a concise statement of the charges, defences and countercharges in support of which evidence has been given;

(iii) submissions on any point of law arising in the course of the proceedings, and the decision of the court thereon;

(iv) the summing-up of the judge and the finding of the jury (if any) and the judgment of the court and observations made by the judge in giving judgment :

Provided that nothing in this part of this subsection shall be held to permit the publication of anything contrary to the provisions of paragraph (*a*) of this subsection.

(2) If any person acts in contravention of the provisions of this Act, he shall in respect of each offence be liable, on summary conviction, to imprisonment for a term not exceeding four months, or to a fine not exceeding five hundred pounds, or to both such imprisonment and fine :

Provided that no person, other than a proprietor, editor, master printer or publisher, shall be liable to be convicted under this Act.

(3) No prosecution for an offence under this Act shall be commenced in England and Wales by any person without the sanction of the Attorney-General.

(4) Nothing in this section shall apply to the printing of any pleading, transcript of evidence or other document for use in connection with any judicial proceedings or the communciation thereof to persons concerned in the proceedings, or to the printing or publishing of any notice or report in pursuance of the directions of the court; or to the printing or publishing of any matter in any separate volume or part of any bonâ fide series of law reports which does not form part of any other publication and consists solely of reports of proceedings in courts of law, or in any publication of a

technical character bonâ fide intended for circulation among members of the legal or medical professions.

(5) In the application of this section to Scotland, for any reference to judicial proceedings for restitution of conjugal rights there shall be substituted a reference to an action of adherence or of adherence and aliment.

2.—(1) This Act may be cited as the Judicial Proceedings (Regulation of Reports) Act, 1926.

(2) This Act does not extend to Northern Ireland.

COUNTY COURTS ACT, 1934.
24 & 25 Geo. 5, c. 53.

An Act to consolidate certain enactments relating to County Courts. [31st July, 1934.]

40.—(1) A county court shall have jurisdiction to hear and determine any action founded on contract or on tort where the debt, demand or damage claimed is not more than one hundred pounds, whether on balance of account or otherwise :

Provided that a county court shall not, except as in this Act provided, have jurisdiction to hear and determine—

(*a*) any action for the recovery of land; or

(*b*) any action in which the title to any hereditament or to any toll, fair, market or franchise is in question; or

(*c*) any action for libel, slander, seduction or breach of promise of marriage.

43. If, with respect to any action assigned for the time being to the King's Bench Division of the High Court, the parties to the action agree, by a memorandum signed by them or by their respective solicitors, that a county court specified in the memorandum shall have jurisdiction in the action, that court shall have jurisdiction to hear and determine the action accordingly.

45.—(1) In any action commenced in the High Court to which this section applies, any party may at any time apply

to the High Court or a judge thereof for an order that the claim and counterclaim (if any) or, if the only matter remaining to be tried is a counterclaim, the counterclaim, shall be transferred—

(*a*) to any county court in which the action might have been commenced if the subject matter and the amount thereof had been within the jurisdiction of the court; or

(*b*) if the only matter remaining to be tried is a counterclaim, to any county court in which the counterclaim might have been commenced if it had been an action and the subject matter thereof had been within the jurisdiction of the court; or

(*c*) to any county court which the High Court or judge may deem the most convenient to the parties;

and the High Court or judge may thereupon, if the Court or judge thinks fit, order that the claim or counterclaim or both (as the case may be) be so transferred accordingly.

(2) This section applies to any action where—

(*a*) the plaintiff's claim is founded either on contract or on tort and the amount claimed or remaining in dispute in respect thereof does not exceed one hundred pounds, whether the action could or could not have been commenced in a county court, and whether the defendant does or does not set up, or intend to rely on, a counterclaim, and whether the counterclaim (if any) is founded on contract or on tort, and whether the amount claimed on the counterclaim (if any) exceeds or does not exceed one hundred pounds; or

(*b*) the only matter remaining to be tried between the parties is a counterclaim founded either on contract or on tort and the amount claimed or remaining in dispute in respect of the counterclaim does not exceed one hundred pounds, whether the counterclaim, if it had been an action, could or could not have been commenced in a county court:

Provided that this section shall not apply to any action to which section fifty-four or section fifty-eight of this Act applies.

46.—(1) Where any action founded on tort is commenced in the High Court, the defendant may, on an affidavit made by himself or by any person on his behalf showing that the plaintiff has no visible means of paying the costs of the defendant should a verdict not be found for the plaintiff, apply to the High Court or a judge thereof for an order to transfer the action to a county court.

(2) On any such application, the High Court or judge, unless the plaintiff satisfies the Court or judge that he has such means as aforesaid, may, if the Court or judge having regard to all the circumstances of the case thinks fit so to do, make an order that, unless the plaintiff within a time to be limited in the order gives security for the defendant's costs to the satisfaction of the Court or a judge, the action shall be transferred to such county court, to be named in the order, as the Court or judge may deem the most convenient to the parties.

73. Where an action, counterclaim or matter is ordered to be transferred—

(*a*) from the High Court to a county court; or

(*b*) from a county court to the High Court; or

(*c*) from one county court to another county court;

the costs of the whole proceedings both before and after the transfer shall, subject to any order made by the court which ordered the transfer, be in the discretion of the court to which the proceedings are transferred, and that court shall have power to make orders with respect thereto and as to the scales or columns on or under which the costs of the several parts of the proceedings are to be taxed, and the costs of the whole proceedings shall be taxed in that court:

Provided that, as regards so much of the proceedings in any action transferred from the High Court to a county court as take place in the High Court before the transfer—

(i) the costs thereof shall be subject to the provisions of section forty-seven of this Act; and

(ii) the powers of the High Court or judge thereof under subsection (3) of that section to make an order allowing costs on the High Court scale, or on or under any county court scale or column, shall, subject to any order of the High Court or the judge by whom the transfer was ordered, be exerciseable by the judge of the county court.

74.—(1) Where an action, counterclaim or matter is ordered to be transferred from the High Court to a county court—

(*a*) any party may lodge with the registrar of the county court named in the order, or cause to be lodged with him, the order and the writ, or copies thereof, and such other documents (if any) as the High Court or a judge thereof may direct; and

(*b*) the proper officer of the Supreme Court shall, on the application of that party and on production of the order and the filing of a copy thereof, send by post to the registrar of the county court all pleadings, affidavits and other documents filed in the High Court relating to the action, counterclaim or matter.

(2) On the documents aforesaid being so lodged or sent, the action and counterclaim (if any) or the counterclaim or matter shall be transferred to the said county court, and subject to county court rules all further proceedings therein shall be taken and tried as if the action, counterclaim or matter had been originally commenced in that county court, and the county court shall have jurisdiction to deal therewith, notwithstanding any enactment to the contrary :

Provided that the transfer shall not affect any right of appeal in the High Court or to the Court of Appeal from the order directing the transfer, or the right to enforce in the High Court any judgment signed, or order made, in that Court before the transfer.

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