The rejection of the evidence tendered as to character opens a wide field for discussion.

1. Should it be permitted under any circumstances?

2. If admissible in mitigation of damages, can it be received after evidence offered in bar on a plea of justification?

It seems to me that the doubt suggested as to this evidence, is felt more by the text writers than the judges.

Mr. Taylor, in his last edition, page 355, after giving the different views, says, "Such being the arguments on either side of this vexed question, it remains only to observe that the weight of authority inclines slightly in favour of the admissibility of the evidence, even though the defendant has pleaded truth as a justification and has failed in establishing his plea."

He cites a great number of cases. I have examined them. The American authorities certainly support his view. I doubt if the English cases go so far. Most of the cases are *nisi prius* decisions. I am not aware of any express decision of the court in Banc except *Jones* v. *Stevens*, 11 Price, 235, which is directly against its reception.

In *Thompson* v. *Nye*, 16 Q. B. 175, the question rejected was whether the witness had not heard from other persons that the plaintiff was addicted to certain practices, the subject of the slander. The court refused to decide the general point, but held the question rightly rejected, as it should have been confined to rumours existing before the utterance of the slander. Patterson and Wightman, J. J., say they give no opinion on the general question. Coleridge, J., says, "I will only go so far as to say, that I do not wish it to be supposed that I am in favor of allowing the question to be put even in its most limited form. My present impression is against doing so." Erle, J., says, "It is not necessary to give any opinion as to the admissibility of the question in a qualified form. Many learned judges have admitted it, but they all acted on a decision at *Nisi Prius* (*Earl of Leicester* v. *Walter*), which it was not worth the plaintiff's while to question. But in *Jones* v. *Stevens* the point was brought before the full Court of Exchequer; and there the question was held inadmissible in its general form."

No doubt, *Earl of Leicester* v. *Walter*, 2 Camp. 251, is the chief authority. It was a decision of Sir James Mansfield, and as the plaintiff had a verdict he did not of course, move. In deciding to admit the evidence, Sir James says: "In point of reasoning, I never could answer to my own satisfaction the argument urged by my brother Best" (the objecting counsel) "at the same time, as it seems to have been decided in several cases that, if you do not justify, you may give in evidence anything to mitigate the damages, though not to prove the crime which is charged in the libel, I do not know how to reject these witnesses. Besides, the plaintiff's declaration says, that he had always possessed a good character in society, from which he had been driven by the insinuations in the libel. Now the question for the jury is, whether the plaintiff actually suffered this *gravamen* or not. Evidence to prove that his character was in as bad a situation before as after the libel, must therefore be admitted.

In a case in Ireland, in 1860, *Bell* v. *Parke* (11 Ir. C. L. Rep. 326,) Pigot, C. B., is decidedly of opinion, "that the great preponderance of authority is in favor of reception of the evidence." He cites the passage from Starkie on Slander, (vol ii., page 88,) relied on by Mr. Robinson in his very able and exhaustive argument on the authorities. Fitzgerald, B., treats it as an unsettled question, Hughes, B. concurring with him. In the last edition of Starkie on Evidence, the point is not touched upon.

In *Bracegirdle* v. *Bailey*, 1 F. & F. 536,—in slander, and not guilty alone pleaded—Byles, J., after consulting Willes, J., held, "that no evidence of bad character, or questions relating to the plaintiff's previous life or habits, tending to discredit him, and to mitigate damages, were admissible, either on cross-examination or examination in chief, and that he could not ask any thing to prove the libel true."

In this court, in *Myers* v. *Currie*, 22 U. C. R. 470, (slander imputing theft), a motion was made for a new trial, because Richards, C. J., rejected evidence of the plaintiff's general bad character previous to the speaking of the words. After consulting the judges of the Common Pleas, the judges of this court refused a rule, for the reasons given in the report.

In this state of the law we think we should discharge the rule for rejection of evidence, and leave the defendant, if he think proper, to endeavour to have the law finally settled by a court of Error.

If it be necessary to decide the point, I should say that I think the fact of defendant pleading specifically the truth of his words and endeavouring to prove them, as a matter of reason, if not of clear authority, should operate to the exclusion of evidence of rumours or of general bad character.

Where a defendant pleads only not guilty, and endeavours to shew that he was not actuated by any malice or actual desire to injure defendant, he stands, in my judgment, in a very different position from one who deliberately places a justification on the record. This at once takes away from his conduct that palliation which he can naturally urge on not guilty.

I am inclined to hold, notwithstanding the doubts expressed in *Thompson* v. *Nye*, that with only not guilty pleaded, a defendant might be allowed to shew, solely in mitigation of damages and to rebut the presumption of malice, that prior to his utterance of a specific charge, it was a common talk or rumour in the neighbourhood that the plaintiff had been generally spoken of as having done the thing charged.

This would tend to shew that defendant may have acted not from malice, but rather from heedlessness. If, on the other hand, he put a justification on record, he deliberately charges the plaintiff with the crime as a fact, and I think he should not be permitted to resort to what could only be a palliation and indication of the absence of malice. The justification suggests a wholly different idea of defendant's conduct, and is always held to aggravate it.

General evidence of the plaintiff's bad character for honesty, &c., seems to me to open a far wider