

## CRIMINATING INTERROGATORIES.

"that it would not be fair to submit to the defendant questions which he is not bound to answer." In *Bartlett v. Lewis* (31 L. J. C. P. 230) interrogatories were allowed, although they had a tendency to criminate. In *Baker v. Lane*, an action for libel, criminating interrogatories were refused, but no reasons were given for this judgment. The case was, however, subsequently explained by the same Court in *Bickford v. Darcy* (14 W. R. 900), when the ground of the decision in *Baker v. Lane* was stated to be that the Court thought that the interrogatories were not put *bonâ fide* for the purposes of the action. The decision in *Bickford v. Darcy* was that criminating interrogatories should be allowed in that case, as they were *bonâ fide*, and were not directly and necessarily criminating. The interrogatories in *McFadden v. The Mayor &c. of Liverpool* (16 W. R. 1212) were allowed, although of a criminating tendency. Bramwell, B., there says, "I think that unless we see the question to be clearly objectionable, we ought to allow it to be put, and let the objection be made when the party interrogated comes to answer the questions." Martin, B., dissented from the majority of the Court, on the ground that "a man ought not to be asked such questions that he must either criminate himself or refuse to answer them." *Edmunds v. Greenwood* (17 W. R. 142) was an action of libel. The interrogatories there went directly to the questions in issue between the parties. They asked the defendant as to the way in which the alleged libel was composed, as to its publication and as to surrounding circumstances from which legal malice might be inferred. The Court refused to allow these interrogatories to be administered, as "their direct and express tendency was to make the defendant criminate himself, and if he answered in the affirmative, to subject him to criminal proceedings." The judgment concludes by saying that, "the express and avowed object here, is to put questions in order to compel the defendant to criminate himself. But in the absence of special circumstances, we are of opinion that interrogatories ought not to be allowed in actions of this description." The last case in the common law courts was *Villesboinet Tobin* (17 W. R. 322), which was an action for misrepresentation. There the interrogatories were not allowed. Keating, J., observed in his judgment, "that the cases on the subject are numerous, and difficult to reconcile." Montague Smith, J., says, "The only intelligible rule to be deduced from all the cases, including *Edmunds v. Greenwood*, seems to be that when interrogatories are put *bonâ fide* to elicit what is relevant to the issue, they may be allowed, though the answers may tend to criminate; giving the party interrogated the option of answering or refusing to answer on that ground. But where interrogatories are so put the Court and the Judge at chambers will require a stronger case and reasons than in ordinary cases."

The result, therefore, of the cases in the common law courts on this subject seems to be that the mere fact that interrogatories have a tendency to criminate will not *per se* be a reason for refusing them. It is, however, always a matter for the discretion of the judge at chambers, or of the Court, whether interrogatories should be allowed in any action. Neither party to an action has an absolute right to administer interrogatories. He can only do so by obtaining leave or showing some reason why interrogatories ought to be allowed. This being so, it seems that the judge or Court will be slow to allow interrogatories having a tendency to criminate, unless there is some special reason for them.

This question has recently, in *The Mary or Alexandra* (17 W. R. 551), come for the first time before the Court of Admiralty, which, by 24 Vic. c. 10, s. 17, has all the powers possessed by any of the superior courts of common law, to compel either party in any cause or matter to answer interrogatories. Sir. R. Phillimore allowed criminating interrogatories, saying "if the defendant states upon oath his belief that an answer to any particular interrogatory would subject him to penalties, he will not be compelled to answer such interrogatory. This decision was given on the ground that the questions were relevant and reasonable, and that a statement on oath of the person interrogated is necessary, and that it is not enough that he should submit that they are not proper questions. The judgment in *The Mary or Alexandra* thus agrees with the decisions at common law, so far as any principle can be obtained from those cases.

It may, at least, be safely assumed that, whatever difficulty there is in reconciling all the cases on this subject, there is a recognised distinction between the right to administer criminating and non-criminating interrogatories. It is more difficult to obtain leave in the former than in the latter case.

It is always much to be regretted that there should be any conflict between decided cases, but when such conflict does exist, it is peculiarly the time for suggesting what the law on the disputed point ought to be. It seems to us that the simplest and the best way of deciding this matter would be to ignore, on the application for leave to administer interrogatories, the question whether they are or are not criminating. Let this matter be left until the answer is made. Of course, if interrogatories are not relevant to the purposes of the action, they ought not to be allowed, but this applies to all interrogatories. There seems no reason whatever why criminating interrogatories should stand on a different footing from others. There is, as we have said, no privilege from being *asked* a question either in equity or at a *Nisi Prius* trial. In each case the person questioned must claim his privilege on oath, and the same principle ought to be applied to common law interrogatories.