O'Brien v. *Clement*, 3 D. & L. 676; Cook on Defamation, 100.

Robt. A. Harrison, supported the summons, citing, *Turnbull* v. *Bird*, 2 F. & F. 508–524, *Paris* v. *Levy*, 2 F. & F. 71; *Seymour* v. *Butterworth*, 3 F. & F. 372; *Campbell* v. *Spottiswoode*, 3 F. & F. 421; *Morrison* v. *Belcher*, 3 F. & F. 614; *Hunter* v. *Sharpe*, 4 F. & F. 983; *Healy* v. *Barlow*, 4 F. & F. 224–230.

Adam Wilson, J.—The alleged libel purports to be founded on information given to the defendant by "an old repealer, a resident of Toronto, yesterday," that is, the day before the publication, while his plea professes to rest the excuse and justification for the publication, upon the fact that the matters of the libel were the subject of public notoriety.

These do not seem to me to be at all consistent with each other. The defendant is apparently shifting his ground from that which was expressly taken at the time of the publication. That which he learned afterwards—assuming that he did so learn it all—can, in the nature of things, be no excuse or justification for what he did before he did learn it.

It would not be proper on the eve of the trial, to make any observations not strictly called for by the nature of the present application, and therefore I say nothing more on the facts submitted to me; but for the reason before mentioned, as well as on the ground stated in the case of *Lucan* v. *Smith*, I cannot allow the plea as at present framed; but, if the defendant choose to frame it as a general plea, that the publication was a fair and *bona fide* comment, &c., I will allow it for what it may be worth, reserving to myself full liberty to deal with the plea afterwards, whether upon the trial or otherwise, as if I had not made the order for its allowance.

In an action of this kind, the defendant should be allowed every reasonable opportunity to excuse or justify his conduct, consistent with the plaintiff's rights, and the fair and convenient prosecution of the action.

Re Davidson.

Insolvent act—Allowance of appeal—Notice—Amendment.

An application of an insolvent for a discharge was dismissed by the County Judge on 16th September. On the 23rd September the insolvent gave notice of an intended application on the 24th September to a judge at Osgoode Hall, for leave to appeal. *Held*, that this notice was clearly insufficient, but on the authority of *Re Owen*, 12 Grant. 446, and in favor of the liberty of a subject, the notice was amended.

Quære as to the materials that should be before the judge on such an application.

(Chambers, Sept. 30, 1867.)

The Judge of the County Court of the County of Wentworth, on the 16th day of September last, made an order discharging the insolvent's application to be relieved from custody on a warrant for his arrest for contempt in not obeying an order of the judge.

Notice of appeal was served on the 20th of September, to the effect that an application would be made to a judge of one of the Superior Courts of Common Law at Osgoode Hall, on the 23rd day of the same month, for leave to appeal against the above order.

This did not arrive in time, and another notice was served on the 23rd of September, that a motion would be made before a judge at Osgoode Hall on the following day.

This last notice was the one which was relied upon as the effective one between the parties.

W. Sidney Smith, for the plaintiff, objected that this notice was irregular, inasmuch as one clear day's notice had not been given according to sec. 11, sub sec. 9 of Insolvent Act of 1864. That the eight days allowed to apply to appeal by the Act of 1865, sec. 15, if computed from the service on the 16th September, expired on the 24th, and then the notice should have been served on the 22nd for the 24th, and so the service on the 23rd did not afford the creditor the time he was entitled to after notice and before the motion was made; and that the material upon which the appeal was asked was insufficient. He cited *Re Sharpe*, 2 Chan. Cham. 75; and distinguished *Re Owen*, 12 Grant. 446; 3 U. C. L. J. N. S. 22.

Curran, for the defendant.

Adam Wilson, J.—The question argued before me was whether the petitioner was in a position to entitle him to the allowance of his appeal?

By the act of 1865, sec 15, the right of appeal is given against any order of a judge made upon any of the matters or things upon which he is authorised to adjudicate or to make any order by the acts of 1864 or 1865, and the delay for applying for the allowance of an appeal is, by the act of 1865, extended to eight days—which period is by sec. 7, sub-sec. 3, of the act of 1864, to be eight days "from the day on which the judgment of the judge is rendered."

By the act of 1864, sec 11, sub-sec 9, it is provided, under the head "Of procedure generally," that one clear day's notice of any petition, motion or rule shall be sufficient, if the party notified resides within fifteen miles of the place where the proceeding is to be taken, &c."

This service was made in Toronto on the 23rd, the one day's *clear* notice must therefore exclude the day of service and the day of hearing, so that either the service should have been on the 22nd for the 24th or the motion on the 25th upon a service on the 23rd; but the service on the 23rd and the motion on the 24th do not give the one clear day's notice.

Then it is said that I can amend the notice, and *Re Owen*, 12 Grant 446, is referred to for that purpose. That case goes the full length for which it was cited, and although I am not satisfied with the decision of the learned Vice-Chancellor, I am content to follow it on the present occasion.

It was also argued that the case was not complete without all the papers which were before the judge below. I conceive it is only necessary that I should have before me such materials as will enable me to say whether the learned judge in the court below came to such a decision as should fairly and justly be reviewed, and I perceive in the petition before me, that after the order for the alleged contempt or disobedience of which the prisoner has been arrested, it is stated that the prisoner "was not asked for said books and documents, but nevertheless on the 17th of August, without any notice to me or any opportunity to show cause against it, a warrant was issued by the County Court Judge on the *ex-parte* application of the plaintiff, ordering me to be imprisoned for six months, on which I was