THE LAW

OF

Defamation in Canada

A Treatise on the Principles of the Common Law and the Statutes of the Canadian Provinces concerning Slander and Libel as Civil Wrongs, with the Articles of the Criminal Code of Canada concerning Libel as an Indictable Offence . . . . . .

BY

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To place a bridle on men's tongues, so that they be restrained from calumny, without laying irksome fetters on the ordinary communications of society, and to curb the licentiousness, without, at the same time, cramping the salutary freedom of the press, is one of the most arduous, but, at the same time, valuable achievements of legislative wisdom.—STARKIE.

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TABLE OF CONTENTS.

Preface v

List of Chapters vii

Table of Cases cited xi

Table of Statutes cited xxxi

Table of Rules and Orders cited xxxv

List of Abbreviations xxxvi

Errata et Corrigenda xxxix

PREFACE.

Although a good deal of popular interest attaches to the law of defamation, no general exposition of the law in Canada has yet been published. The present treatise forms part of a larger work inconvenient for publication in a single volume. This was designed to embrace both the civil and criminal law of libel, and the law of contempt affecting publications prejudicial to the course of justice in the courts, and publications and proceedings in contempt of our legislatures, their committees and members. Treatises on the criminal division of the subject, and on these branches of the law of contempt, will be ready for the press during the present year. What is now published seeks to embody, in as complete a form as possible, the law of slander and libel in civil cases in Canada—the decisions and opinions of Canadian courts and judges on these branches of legal learning. It contains the substance of the common law of defamation and of the English decisions, a digest and commentary combined of the law peculiar to the several Canadian Provinces, and the libel sections of the Criminal Code which are applicable to the Dominion as a whole. These are supplemented by the chapters on Discussion of Matters of Public Interest, Privilege and Fair Comment, which relate in the main to libel both as a tort and a crime. The Articles in the *Code Civile* of the Province of Quebec, and the decisions of the courts of that Province, are also dealt with, and some references are given to United States decisions. Special attention has been paid to Canadian authorities, and an endeavour has been made to bring the case law of the Provinces down to the time of publication. Every reported decision of any importance has been assigned a place in the text, and, where necessary, in several places. No decision has been treated as being altogether obsolete or useless, and a few cases have been included which are of historic interest as indicating the development of the law.

The diversity of procedure and practice in the several Provinces prevents the same exposition of judicial decision on these matters as on the substantive law. A want of uniformity in Provincial legislation, under our Federal system of government, has produced different rules, and a varied adjudication, with respect to procedure in civil actions. No treatise on the law of defamation can do justice to these within reasonable limits. The text on the subject is practically confined to the system in Ontario, which is based on the English system, and is in harmony, generally speaking, with the procedure and practice under the Judicature Acts and Rules in other parts of the Dominion.

Some prominence, it will be noticed, has been given to newspaper libel. The newspaper has not only gained for itself a distinct legal status, but has really created a law of the press. Lord Campbell's Act (1843), 6 & 7 Vict. c. 96, was the first in England to recognize the distinction between a libel in a newspaper, and one contained in any other publication. The law has since then so far developed, both there and here, at least in some of the Provinces, that the nature of the wrong and the remedy now depends largely on whether or not the libel is published in a "Newspaper" as defined by the Provincial and Dominion Acts. For this the journalists of Canada, while grateful to the several legislatures, may not unfairly take some credit to themselves. In this country, as in England, the harassments of libel actions, speculative and otherwise, forced newspaper publishers to seek measures of self-protection, and the result has been a series of salutary reforms of the law of libel, civil and criminal, which have benefited alike the press and the public, without impairing any real immunities of character and reputation.

It would be presumption to say that the book is free from errors and imperfections; but for these the writer may fairly claim the indulgence which is generously given to any one who seeks to repay, however inadequately, the debt which he owes to his own profession.

Toronto, August, 1907.

J. K.

LIST OF CHAPTERS.

Part I.—Slander.

CHAPTER 1.

Introduction 1-8

CHAPTER 2.

Slander imputing Crime 9-36

CHAPTER 3.

Slander imputing a Contagious Disease 37-40

CHAPTER 4.

Slander imputing Unchastity 41-52

CHAPTER 5.

Slander of a Person in his Office 53-59

CHAPTER 6.

Slander of a Person in his Profession 60-67

CHAPTER 7.

Slander of a Person in his Trade or Business 68-83

CHAPTER 8.

When Slander not Actionable 84-96

CHAPTER 9.

Slander actionable only on Proof of Special Damage 97-105

CHAPTER 10.

Slander of Title 106-124

Part II.—Libel.

CHAPTER 11.

Libel: What is, and when Actionable 125-154

Part III.—The Law concerning Slander and Libel.

CHAPTER 12.

Publication 155-186

CHAPTER 13.

Malice 187-204

CHAPTER 14.

The law concerning Corporations and Companies 205-220

CHAPTER 15.

The law concerning Husband and Wife 221-236

CHAPTER 16.

Newspaper libel—What is a Newspaper? 237-250

CHAPTER 17.

Notice of Complaint before Action 251-261

CHAPTER 18.

Publication in Newspapers 262-277

CHAPTER 19.

Reports of Judicial Proceedings 278-297

CHAPTER 20.

Reports of Public Meetings 298-322

CHAPTER 21.

Discussion of Matters of Public Interest 323-327

Part IV.—Pleadings and Procedure.

CHAPTER 22.

The Plaintiff's Pleadings 328-370

CHAPTER 23.

The Innuendo 371-399

CHAPTER 24.

The Defendant's Pleadings 400-424

CHAPTER 25.

Variance in Pleadings 425-432

CHAPTER 26.

Security for Costs 433-463

CHAPTER 27.

Defences to Actions of Defamation 464-490

(1) Retraction and Apology.
(2) *Res Judicata.*
(3) Accord and Satisfaction.
(4) Release.
(5) Payment into Court.
(6) Statute of Limitations.
(7) Death of Party before Verdict.
(8) Counterclaim.
(9) Privilege.
(10) Justification.
(11) Fair Comment.

CHAPTER 28.

Privilege 491-544

CHAPTER 29.

Justification 545-579

CHAPTER 30.

Fair Comment 580-621

CHAPTER 31.

Particulars 622-634

CHAPTER 32.

Discovery and Production and Inspection of Documents 635-656

CHAPTER 33.

Interrogatories 657-661

CHAPTER 34.

The Trial—Duties of Judge and Jury 662-674

CHAPTER 35.

The Evidence for Plaintiff 675-704

CHAPTER 36.

The Evidence for Defendant 705-714

CHAPTER 37.

Evidence in Mitigation of Damages 715-742

CHAPTER 38.

Nonsuit 743-748

CHAPTER 39.

Damages 749-788

CHAPTER 40.

New Trial 789-815

CHAPTER 41.

Injunctions 816-827

CHAPTER 42.

Costs 828-848

TABLE OF CASES CITED.

A.

Abbey v. Lill, 272.
Abrath v. North Eastern Ry. Co., 199, 209.
Acme Silver Company v. Stacey Hardware, etc., Co., 140.
Adair v. Wade, 662.
Adams v. Coleridge, 201.
Adams v. Kelly, 168, 561, 678, 750.
Agar v. Escott, 333.
Ahern v. Maguire, 166.
Aish v. Gerish, 94.
Alabaster v. Harness, 648.
Albrecht v. Burkholder, 5, 14, 22, 49, 50.
Alexander v. Jenkins, 53, 55, 56.
Alexander v. N. E. Ry. Co., 141, 351, 563, 571.
Allbutt v. General Council of Medical Education, 308.
Allen v. Eaton, 64.
Allen v. London, etc., R. W. Co., 208.
Alleston v. Moor, 63, 75, 102.
Allhusen v. Labouchere, 647, 648.
Allsop *et ux.* v. Allsop, 41, 42, 766.
Amer v. Rogers, *et ux.*, 17, 86, 226, 228, 229, 230, 231.
Anderson v. British Bank of Columbia, 656.
Anderson v. Hamilton, 679.
Anderson v. Liebig's Extract of Meat Co., 111, 824.
Anderson v. Stewart, 128, 347.
Andrew v. Grove, 839.
Andrews v. Chapman, 291, 294, 306, 317.
Andrews v. Forsythe, 335.
Andrews v. Wilson, 127, 516, 808.
Andrews v. Woodmansee, 92.
Angers v. Pacaud, 775.
Angle v. Alexander, 67, 101.
Anonymous, 31, 62, 361, 371, 377, 399, 746.
Anonymous v. Eaton, 825.
Anthony v. Halstead, 789.
Antille v. Marcotte, 52.
Archambault v. Great North Western Tel. Co., 176, 503, 780.
Archibald v. Cummings, 399.
Armitage v. Dunster, 157.
Armstrong v. Armit *et al.*, 825.
Armstrong v. Barthe *et al.*, 337.
Ashdown v. Manitoba Free Press Co., 368, 419, 690, 693, 749, 763, 764, 812.
Ashford v. Choate, 23, 27, 115, 118, 365, 766.
Ashley v. Harrison, 117.
Ashmore v. Borthwick, 291, 445.
Astley v. Younge, 492, 502.
Atherley v. Harvey, 647.
Atkins v. Thornton, 751, 787.
Attorney-General for Canada v. Atty.-Genl. for Ontario, 450.
Attorney-General v. Bradbury & Evans, 242, 244, 249.
Attorney-General v. Gaskill, 635, 636, 645.
Attorney-General v. Hitchcock, 712.
Attorney-General v. Rogers, 808.
Attwood v. Emery, 468.
Aubin v. Edmond, 505.
Auburn v. Berthiaume, 176, 473, 724, 741, 750.
Australian Newspaper Co. v. Bennett, 87, 110, 806.
Aylmer v. Gray, 739.
Ayre v. Craven, 65, 101.

B

Baboneau v. Farrell, 67.
Badische Anilin, etc., v. Levinstein, 833.
Bainbridge v. Lax *et al.*, 478.
Baker v. Morfue or Morphew, 63.
Baker v. Pierce, 92, 100.
Baker *et al.* v. Piper, 113.
Ball v. Ray, 777.
Bankes v. Allen, 63.
Banning v. Perry, 474, 736.
Baretto v. Pirie, 548.
Barham's Case, 24.
Barker v. Westover, 228.
Barnard v. Molson, 504.
Barnes v. Holloway, 67, 157, 676.
Barnes v. Maltby, 838.
Barnett v. Allen, 34, 100, 140, 379, 386, 685, 696.
Barney v. United Telephone Co., 824.
Baron v. Laroche, 579.
Baron de Rutzen v. Farr, 799.
Barratt v. Kearns, 501.
Barrette v. Bonniere, 103.
Barrett v. Long, 146, 202, 350, 378.
Barrow v. Lewellin, 95, 155, 156, 162.
Barss v. Wallace, 830.

Barthe v. Boudreault, 152.
Barton v. Holmes, 91.
Bartram v. London Free Press Printing Co., 442, 443.
Barwick v. English Joint Stock Bank, 690.
Bateman v. Mail Printing Co., 477, 632, 643.
Bates v. Pilling, 122.
Baylis v. Lawrence, 194, 665, 823.
Beach *et ux.* v. Beach, 479.
Beamish v. Dairy Supply Co., 167, 806.
Beardsley v. Dibblee, 14, 27, 33, 365, 377.
Beaton v. Globe Printing Co., 343, 638, 639.
Beaton v. Intelligencer Printing and Publishing Co., 407, 416, 731, 732, 723, 731, 733, 841.
Beatson v. Skene, 515, 664, 680.
Beatty v. Gillbanks, 317.
Beatty v. Glenister, 317.
Beauchamps v. Croft, 502.
Beaudry v. Papin, 158.
Beaulieu v. Cochrane, 505.
Beaumont v. Kaye *et ux.* 479.
Beddow v. Beddow, 816.
Beecher v. Stephens, 244, 248, 249.
Behrens *et al.* v. Allen, 551, 571.
Bell v. Byrne, 426.
Bell v. Landon, 440.
Bell v. Parke, 720.
Bell *et al.* v. Stocker, 224.
Bell v. Wilson, 838.
Bellamy v. Burch, 53, 363.
Belleau v. Mercier, 136.
Belanger v. Carignan, 150.
Belanger v. Papineau, 103.
Belt v. Lawes, 47, 401, 402, 408, 545, 691, 751, 755, 769, 770.
Benbow v. Low, 630.
Benner v. Edmonds, 167, 531, 541, 798.
Bennett v. Deacon, 518.
Bennett v. Empire Printing Co., 238, 436, 454.
Bentsen v. Taylor, 441.
Berryman v. Wise, 677.
Berthelot v. Trudel, 575, 579.
Bertram v. Massey Mfg. Co. *et al.*, 835, 841.
Biddulph v. Chamberlayne, 556.
Biggs v. Great Eastern Ry. Co., 351.
Bignell v. Buzzard, 346.
Bill v. Neal, 59.
Birch v. Ridgway, 181.
Bishop v. Latimer, 75, 102, 318, 571.
Bittridge's Case, 33.
Blachford *et al.* v. Green *et al.*, 640.
Black v. Alcock, 25, 51, 348, 397, 512, 813.
Black v. Hunt, 72, 99.
Blackburn v. Blackburn, 194.
Blackburn v. Cameron *et al.*, 330.
Blackburn v. Cloutier, 509.
Blagden v. Bennett, 57, 407, 513, 592.
Blagg v. Sturt, 194, 398, 399, 685.
Blake v. Stevens *et al.*, 138, 551.
Blakeman v. Blakeman, 91.
Blanc v. Burrows, 641, 642.
Blanchard v. Richer, 105.
Bliss v. Stafford, 115.
Bloodworth v. Gray, 4, 37, 39.
Bolser v. Crossman, 361, 362, 541, 716.
Bond v. Douglas, 168, 181.
Bonnard v. Perryman, 817, 820, 822, 827.
Boosey v. Wood, 400, 478.
Booth *et al.* v. Briscoe, 332.
Booth v. Snell, 292.
Bostock v. Ramsey Urban District Council, 833, 840.
Botterill *et al.* v. Whytehead, 65, 439, 574, 609.
Boucher v. Casgrain, 103.
Boulton *et al.* v. Shields, 113.
Bourassa v. Drolet, 234.
Bourgard v. Barthelmes, 198, 514, 811.
Bourke v. Warren, 93, 681.
Bourn's Case, 94.
Bowden v. Hart, 778.
Bowden v. Russell, 818.
Bowen v. Hall, 41, 84, 749.
Bowers v. Hutchinson, 348, 349, 398.
Boxe v. Barnaby, 62.
Boxsius v. Goblet Frères, 156, 164, 167, 169, 170.
Boydell v. Jones, 318, 363.
Boydell v. Morrow, 543.
Boyle v. Wiseman, 185, 655, 678.
Bracegirdle v. Bailey, 720.
Bradbury v. Cooper, 624, 630.
Bradley v. Ricardo, 700.
Bradley v. McIntosh, 300, 680, 799.
Bradlaugh *et al.* v. The Queen, 253.
Brantford v. Freeman, 699.
Bray v. Ford, 47, 77, 700, 789.
Brayne v. Cooper, 31, 67, 101.
Bready v. Robertson, 436, 439, 460, 461.
Breay v. Royal British Nurses' Association, 209.
Breen *et ux.* v. McDonald, 47, 85, 365.
Breeze v. Sails, 61, 62, 365.
Brenon v. Ridgway, 583.
Brett v. Watson, 139, 202, 439.
Bricker *et al.* v. Campbell, 81.
Brine v. Bazalgette, 780.
Brinsmead v. Harrison, 473, 735.
British and Foreign Contract Co. v. Wright, 659.
Brock v. Tew, 258.
Bromage *et al.* v. Prosser, 188, 189, 190, 283, 561.

Bromley v. Graham, 656.
Bronson v. Bruce, 137.
Brook v. Evans, 818.
Brook v. Hook, 208.
Brook v. Rawl, 6, 106, 111, 758.
Brook v. Wise, 38.
Brooke v. Aveillon, 192.
Broome v. Gosden, 398, 681, 807.
Brossoit v. Turcot, 104.
Brotherton v. Metropolitan Dist. Ry., 843.
Brown v. Beatty, 99, 129, 367, 397, 411, 549, 554, 566, 567, 568.
Brown v. Citizens' Life Assurance Co., 690.
Brown v. City of Montreal, 780.
Brown v. Clark, 845.
Brown v. Croome, 345.
Brown v. Elder, 196, 590, 619.
Brown v. Feeney, 467.
Brown v. Hirley *et al.*, 84, 270, 335.
Brown v. Houston, 842.
Brown v. Mallet, 406.
Brown v. McCurdy, 513.
Brown v. Moyer, 409, 410, 574, 611, 612, 613, 661, 799, 800.
Brown v. Smith, 676, 749, 761.
Browne v. Dunn, 155.
Browne v. Murray, 691.
Bruce v. Nicolopulo, 678.
Bruce v. Smith, 767.
Bruce v. Soule, 39.
Brunswick (Duke of) v. Harmer, 185, 482, 685.
Bryce v. Rusden, 583, 598.
Brydone *et al.* v. The World, 837.
Bryce v. Rusden, 583, 598.
Bryson v. Hamilton, 799.
Buchanan v. Taylor, 660.
Bullen v. Templeman, 552, 623, 633.
Burgess v. Beaumont, 551.
Burkett v. McCarthy, 92.
Burnett v. Tak, 111, 825.
Burns v. Goudie, 674.
Burnstein v. Davis, 517.
Bursilo v. Tanner, 223.
Burwell v. London Free Press Printing Co., 253, 259-260.
Buscher v. Scully, 45.
Bush v. McCormack, 757, 760, 811.
Butler and Baker's Case, 206.
Butt v. Butt, 330.
Button v. Heyward, 1.
Byers v. Kidd, 833, 840, 841, 843.
Byrchley's Case, 63.

C.

Cæsar v. Curseny, 58.
Caldwell v. Buchanan, 358, 401, 402, 543.
Cameron v. Overend, 22, 90.
Camire v. Bergeron, 235.
Campbell *et ux.* v. Campbell, 93, 235, 565, 710, 765, 766.
Campbell v. Doherty, 330.
Campbell v. Linton, 843.
Campbell v. Scott, 637.
Campbell v. Spottiswoode, 324, 327, 408, 439, 493, 495, 561, 583, 587, 588, 594, 600, 604, 614.
Campbell *et ux.* v. White *et ux.*, 42.
Campeau v. Monette, 315, 505.
Canada Life Assurance Co. v. O'Loane, 550.
Cannell v. Curtis, 677.
Canning v. Turner, 838.
Cantin v. News Publishing Co., 646.
Capel v. Jones, 399.
Capel v. Powell *et al.*, 224.
Capital and Counties Bank v. Henty, 5, 50, 87, 88, 89, 253, 371, 399, 663.
Carey v. Pitt, 180.
Carnegie v. Cox *et al.*
Caron v. Larivé, 235.
Carpenters Company v. Hayward, 673.
Carr v. Duckett, 113, 124.
Carr v. Hood, 324 326, 601.
Carrier v. Garrant *et al.*, 66, 85, 335.
Carroll v. Pentberthy Injector Co., 164, 206.
Carslake v. Mapledoram, 4, 39.
Carsley *et al.* v. Bradstreet Co., 220, 517, 518.
Carter v. Andrews, 91.
Carter v. Leeds Daily News Co. *et al.*, 647.
Carter v. Saunders, 799.
Cartwright v. Wright, 427.
Carvill v. McLeod, 20, 516.
Case v. Buckley, 91.
Catteral v. Kenyon, 221.
Catton v. Gleason, 115, 117.
Caulfield v. Whitworth, 191, 194, 564.
Central Bank of Canada v. Osborne *et al.*, 489, 751.
Central News (Limited) v. Eastern Tel. Co., 656.
Chalin v. Gagnon, 750.
Chalmers v. Payne, 808.
Chalmers v. Shackell *et al.*, 571, 574, 715, 734.
Chaloner v. Lansdown & Sons, 313.
Chambers v. Jaffray *et al.*, 641, 653, 654.
Champagne v. Beauchamp, 599.
Chaplin v. Lee, 37.
Chappell v. Purday, 457.
Charest *et ux.* v. Tessier, 236.
Charlebois v. Bourassa, 150, 599.
Charlton v. Walton, 310.
Charthand v. Archambault,

Chowdry Deby Persad v. Chowdry Dowlut Sing, 704.
Christal v. Craig, 100.
Citizens' Insurance Co. v. Campbell, 622, 629, 631.
Chubb v. Flannigan, 269, 673.
Churchill v. Gedney, 87.
Churchill v. Hunt, 556.
Clark v. Cameron, 462.
Clark v. Molyneux, 189, 190, 194, 195, 202, 500, 521, 537, 561, 795, 798.
Clarke v. Morgan, 115.
Clarke v. Taylor, 551, 557, 571.
Clarkson v. Lawson, 551, 556.
Clegg v. Edmonson, 655, 656.
Clegg v. Laffer, 91.
Clement v. Fisher, 346, 680.
Clement v. Lewis *et al.*, 318, 571.
Cleveland v. Sherman, 420, 529.
Clifford v. Mabey, 346.
Clifton v. Wells, 38.
Cloutier v. Blackburn, 509.
Clunis v. Sloan, 191, 514, 797.
Clutterbuck v. Chaffers, 156, 162, 166.
Coallier v. Filiatrault, 633.
Coe v. Fenney, 324.
Codd v. Delap *et al.*, 441.
Coe v. Chambers, 94.
Colburn v. Patmore, 337.
Coleman v. West Hartlepool, etc. Co., 293, 818.
Collard v. Marshall, 822.
Collett v. Dickenson, 223.
Collier v. Simpson, 64.
Collins v. Carnegie, 65, 102.
Collins v. Welch, 844.
Collins v. Yates, 656.
Colman v. Godwin, 31.
Colonial Ins. Corporation v. Prosser, 627.
Colter v. McPherson, 636.
Colvin v. McKay, 196, 541, 669.
Commrs. of Govt. Railways v. Brown, 806.
Commonwealth v. Kneeland, 90, 186.
Conkey v. Thompson, 35.
Conmee v. Lake Superior Printing Co., 598.
Conmee v. Weidman, 253, 254, 255, 256, 257, 437, 457, 471.
Connick v. Wilson, 127, 347, 507.
Connors v. Justice *et ux.*, 66, 99.
Cook v. Cook, 694, 773.
Cook *et al.* v. Batchellor, 82.
Cook v. Cox, 426.
Cook v. Field, 574, 749.
Cook v. Ward, 267, 684.
Cooke v. Brogden & Co., 46.
Cooke v. Hughes, 677.
Cooke v. Smith, 354.
Cooke *et al.* v. Wildes, 189, 192, 497, 498, 500, 525, 537, 673.
Cooper v. Blackmore *et al.*, 202, 658.
Cooper v. Lawson, 294, 439, 550, 571, 583.
Corbett v. Hill, 349.
Corbett v. Jackson, 332.
Copeland v. Blenheim, 843.
Corcoran v. Corcoran, 749.
Corcoran v. Robb, 622.
Corelli v. Wall, 826.
Cornelius v. Van Slyck, 92.
Cornwall v. Richardson, 780.
Cossette v. Dun *et. al.*, 219, 522, 523, 774, 781.
Coster v. Merest, 813.
Cote v. Desrosiers, 420.
Cotton v. Beatty, 468, 673, 815.
Coulson v. Coulson, 817.
Cousins v. Merrill, 107, 109, 758, 793, 795, 810.
Coutu v. Lefebvre, 714.
Cowan v. Landell, 28, 503, 511, 512, 746.
Cox v. Cooper, 61, 62, 348, 399.
Cox v. Lee, 89, 743.
Coxhead v. Richards, 513.
Coyle v. Globe Printing Co., 299, 300.
Craft v. Boite, 95.
Crate v. McCallum, 537, 676, 689.
Crawfoot v. Dale, 76.
Crébassa v. Ethier, 740.
Creelman *et al.* v. Tupper, 712, 805.
Creen v. Wright, 843.
Creevy v. Carr, 340, 474, 733, 735, 736, 737.
Creighton v. Finlay, 733.
Crepeau v. Pacaud, 841.
Cresswell v. Jackson, 181.
Crisp v. Gill, 76.
Cristie v. Cowell, 33.
Critchley v. Brown, 5.
Croft v. Jodrey *et ux.*, 34, 837.
Cromwell's Case, 33.
Cross v. Richardson, 275.
Crosskill v. Morning Herald Printing and Publishing Co., 137, 185, 264, 269, 363, 365, 393, 397, 568, 672, 676, 678, 776, 793.
Crossley v. Ferguson, 343.
Crow's Nest Pass Coal Co. v. Bell, 598, 611.
Cucks v. Starre, 62.
Cuddington v. Wilkins, 18, 370, 563.
Cumming v. Green *et al.*, 547, 623.
Curless v. Graham, 599.
Curling v. Robertson, 845.
Currie v. Stairs, 393, 696, 801.
Curry v. Walter, 281.
Cuthbert v. Commercial Travellers' Association, 159, 527.
Cutler v. Cutler, 24, 91.

D.

Daines *et al.*, v. Hartley, 183, 372, 379, 381, 382, 696, 707, 799, 801.
Daley v. Bryne, 258.
Dalgleish v. Lowther, 643, 645.
Dallow v. Garrold, 285.
Dalrymple v. Leslie, 660, 661.
Daly v. White, 458.
Daoust v. Graham, 513.
Darby v. City of Toronto, 840.
Darby v. Ouseley, 678.
Davey v. Garrett, 354.
Davey v. Pemberton, 656.
Davies v. Snead, 496, 561.
Davies *et ux.*, v. Solomon, 41, 42, 766.
Davies v. Taylor, 40.
Davis v. Cutbush, 560.
Davis v. Gardiner, 42.
Davis v. Gray, 658.
Davis v. Hurd, 842.
Davis v. Lewis, 67, 78, 79, 560, 676.
Davis v. Miller *et ux.*, 73, 100.
Davis & Sons, v. Shepstone, 408, 596, 597, 614, 751.
Davis v. Stewart *et al.*, 131, 134, 397, 412, 563.
Davison v. Duncan, 284, 309, 318, 501.
Daw v. Eley, 818.
Dawkins v. Prince Edward of Saxe-Weimar, 501.
Dawkins v. Rokeby, 406, 501, 679.
Dawson v. Rogan, 631.
Day v. Bream, 155, 166, 183.
Day v. Brownrigg, 107, 124.
Day v. Buller, 63.
Day v. Robinson, 33.
De Bensaude v. Conservative Newspaper Co., 733.
Decow v. Tait, 21, 511, 692, 810.
De Crespigny v. Wellesley, 559, 561.
Delacroix v. Thevenot, 162, 166, 168, 673.
Delauney v. Mitchell, 692.
Delegal v. Highley, 293.
Delisle v. Beaudry, 420, 565.
Demers v. Chapleau, 153.
Demorest v. Haring, 90.
Denis v. Théorêt, 52.
Derouin v. Archambault, 48, 104.
Dery v. Fabre, 422.
Des Barres v. Tremaine, 532, 536.
Desilia v. Schunk, 335.
Desjardins v. Berthiaume, 294.
Desmarais v. Geoffrion, 740.
Desrosiers v. Lessard, 153.
De Trench, 441.
Devereux v. Clark, 551.
Dewe v. Waterbury, 362.
Deyo v. Brundage, 355.
Dibdin v. Swan *et al.*, 325, 608.
Dick v. Kennedy, 16.
Dick v. Yates, 839.
Dickerson *et al.*, v. Radcliffe *et al.*, 108, 145, 361, 662.
Dicks v. Brooks, 107, 826.
Dickson v. Wilton, 493.
Digby v. Financial News, 546, 621, 627.
Dille v. Belair, 516.
Dingwall v. Mason, 294.
Dion v. Faford, 740.
D'Ivry v. World Newspaper Co. *et al.*, 116, 211, 262, 440, 647, 651, 655.
Dixon v. Holden, 819.
Dixon v. Smith, 65.
Dockrill v. Dougall, 826.
Dod v. Robinson, 60, 62.
Dodge *et al.*, v. Smith, 632.
Dods v. Evans, 759.
Dodson v. Owen, 293.
Doe *dem.* Mudd v. Suckermore, 178, 179.
Doncaster v. Hewson, 158.
Donoghue v. Hervey, 512.
Donovan v. Herald Printing Co., 473, 513.
Douglas v. Stephenson, 324, 325, 618, 794, 842.
Dowling v. Browns, 345.
Downey v. Armstrong, 800.
Downey v. Roaf, 828.
Downey v. Stirton, 728, 729.
Downie v. Graham, 294.
Doyle v. Owen Sound Printing Co., 469.
Doyley v. Roberts, 53, 63, 102.
Drake v. Drake, 60.
Driffield and East Riding Linseed Co. v. Waterloo Mills Cake Co., 824.
Drumm v. O'Beirne, 437, 449.
Dryden v. Smith, 356, 405, 544, 731.
DuBost v. Beresford, 684.
Dubuc v. Trottier, 235.
Duffy v. The People, 668.
Duke of Brunswick v. Harmer, 185, 264, 379, 482.
Duncan v. Thwaites, 291, 559.
Duncombe v. Daniell, 560, 733.
Dunne v. Anderson, 323.
Duplaney v. Davis, 608.
Dupont v. St. Pierre, 294, 713.
Duquette v. Major, 153.
Durette v. Cardinal, 508.
Dussault v. Bacon, 780.
Dwyer v. Fireman's Journal Co., 94, 95.
Dwyer v. Meehan, 99.
Eade v. Jacobs, 641, 645.
Eakins v. Evans, 773.
Eamer v. Merle, 717.
Earle v. Kingscote, 86, 222, 231.
Early v. Smith, 630.
Eastwood v. Henderson *et al.*, 847.
Eastwood v. Holmes, 94, 324, 325.
Ecklin v. Little, 561, 750.

Eddison v. Dalziel, 342.
Edgar v. Newell, 36, 575, 578, 709, 717, 718, 721, 805, 806.
Edmondson v. Birch & Co. *et al.*, 494, 511, 659.
Edmondson v. Stevenson, 189.
Edsall v. Brooks, 450, 571.
Edsall v. Russell, 550.
Edwards v. Bell, 571.
Edwards v. Wooton, 2, 183.
Egan v. Cowan, 181.
Egan v. Miller, 442.
Eggington v. Mayor, etc., of Litchfield *et al.*, 208.
Eislie v. Walther, 96.
Elliott v. Garrett, 659.
Ellis v. Kimball, 94, 95.
Ellis v. Sherrin, 836.
Ellsworth v. Hayes, 95.
Emmens v. Pottle & Son, 155, 183.
Empson v. Fairfax, 843.
English v. Lamb, 789, 792.
Estes v. Estes, 91.
Evans v. Fraser, 153.
Evans v. Gwyn, 60.
Evans v. Harlow, 109.
Evans v. Harries, 115, 762, 764.
Evoy v. Star Printing and Publishing Co., 445.

F.

Fabrigas v. Mostyn, 753.
Fairman v. Ives, 507, 532.
Farquhar v. Robertson, 835, 839, 843.
Faulkner v. Brine *et al.*, 701.
Faund, v. Wallace, 789.
Farmer v. Hamilton Tribune Printing and Publishing Co. *et al.*, 321, 528.
Faucitt v. Booth, 192, 791.
Feaster v. Cooney, 436, 460.
Feize v. Thompson, 759.
Felgate v. Hegler, 462.
Fellowes v. Hunter, 67, 71, 72, 73, 100, 101, 365, 555, 556.
Fenner v. Wilson, 818.
Fenton v. Macdonald, 197, 506, 700.
Ferguson v. Inman, 399.
Fernie Lumber Co. v. Crow's Nest Southern Ry. Co. *et al.*, 71, 148.
Ferris v. Irwin, 20, 744.
Field v. Great Northern Ry. Co., 843.
Fisher v. Appollonaris Co., 826.
Fisher v. Clement, 194.
Fisher v. Owen, 647, 648.
Fisken v. Chamberlain *et al.*, 636, 637, 638, 639.
Fitch v. Lemmon, 133, 367, 554, 558.
Fitzgibbon v. Greer, 660.
Fitzgibbon v. Woolsley, 66.
Fitzsimmons v. Byrne *et ux.*, 152.
Fleetwood v. Curley, 22, 375, 385.
Fleming v. Dollar, 258, 479.
Fleming *et al.* v. Newton, 142, 818.
Flemming v. Bank of New Zealand, 848.
Flood v. Jackson, 144.
Floyd v. Barker, 501.
Flower v. Pedley, 426.
Forbes v. McClelland, 400, 415, 563.
Force v. Warren, 77.
Forrester v. Tyrell, 96.
Fortier v. Demers, 234.
Foster *et al.* v. Lawson, 81.
Foster *Re* v. Great Western Ry. Co., 839.
Foster v. Perryman, 551.
Foster v. Pointer, 185, 353, 427, 678.
Fougler v. Newcomb, 53, 57, 62, 67, 363.
Fountain v. Boodle, 194, 499, 521, 780, 798.
Fountain v. Rogers, 377.
Fournier v. Noreau *et ux.*, 718.
Fowler v. Dowdney, 9.
Foxcroft v. Lacy, 94.
Francis v. Roose, 377.
Frank v. Dunning, 91.
Fraser v. Berkeley, 604, 727.
Fraser *et al* v. Peltier, 235.
Fray v. Fray, 743.
Freeborn v. Singer Sewing Machine Co., 147, 199, 689, 745.
Frere v. Vidler, 824.
Frescoe v. May, 474, 735, 738.
Friedeberg, *Re*, 830, 833.
Fritz v. Hobson, 844.
Frost v. Brooke, 630.
Frost v. London Joint Stock Bank, 384.
Fryer v. Gathercole, 185, 269, 673, 678.
Fryer v. Kinnersley, 196, 537, 541.
Fulford v. Wallace, 414, 416, 417, 565.
Fullerton v. Berthiaume, 503.

G.

Gallagher v. O'Neill, 829.
Gallant v. Calder, 156, 362.
Gallwey v. Marshall, 53, 60, 61, 363.
Gamble v. Hirschfield, 13, 387, 768, 786
Ganong v. Fawcett, 28.
Gardner v. Irwin, 656.
Gardner v. Slade *et ux.*, 202.
Gareau v. Montpellier, 562.
Garneau v. Robitaille, 579.
Garnett v. Bradley, 830, 840.
Garrells v. Alexander, 180.
Gass v. Ford, 829.
Gates v. Lohnes *et al.*, 375, 377, 394, 512, 562, 685, 686, 697, 701, 813.
Gathercole v. Miall, 159, 185, 326, 600, 607, 678, 779.
Gaudet v. Esplin, 152.
Gauthier v. Amyot, 335, 475, 736, 788.

Gauthier v. Jeanotte, 137.
Gauthier v. St. Pierre, 503.
Gauvreau v. Chapais, 788.
Geach v. Ingall, 699.
Gee v. Lancashire, etc., Ry. Co., 848.
Gee v. Pritchard, 825.
Genest v. Normand, 565.
George v. Goddard, 497.
Georgian Bay Ship Canal, etc., Co. v. World Newspaper Co., 218, 436, 451.
Getting v. Foss, 518.
Gfroerer v. Hoffman, 775.
Gibb v. Shaw, 547, 555.
Gibson v. Evans, 641, 658.
Gidney v. Blake, 94.
Gilbert v. Crystal Fountain Lodge, 205.
Gilbert v. Municipality of Yarmouth, 224.
Gildner v. Busse, 193, 509, 757, 789.
Gillett v. Bullivant, 99.
Gilpin v. Fowler, 192, 525, 537, 677.
Gingras v. Desilets, 774, 777.
Girard v. Bradstreet, 219.
Glass v. Grant, 258.
Glossop v. Spindler, 190, 352.
Goddart v. Hoselfoot, 64.
Godin v. Ennis, 779.
Godson v. Home, 194.
Goffin v. Donnelly, 501.
Golderman v. Stearns *et ux.*, 38.
Goldstein v. Foss, 139, 346, 399.
Gomersall v. Davies, 168.
Gompas v. White, 258, 492.
Good v. Good, 791.
Goodburne v. Bowman *et al.*, 137, 138, 141, 363.
Goodwin v. Graves, 356, 544.
Gordon *et al.* v. McGibbon, 110, 111, 113.
Gordon v. Phillips, 637.
Gordon v. Star Printing and Publishing Co., 449.
Gordon v. Street, 167.
Gorman v. Urquhart, 509.
Gorst v. Barr, 15, 34.
Gosselin v. Belley, 273.
Goudie v. Legendre, 633.
Gould v. Beattie, 630, 631.
Gourand v. Fitzgerald *et al.*, 626, 631.
Gourley v. Plimsoll, 551, 639, 660.
Graeme v. Globe Printing Co., 437, 444, 445.
Graham v. Crozier, 541.
Graham v. Daoust, 154, 579.
Graham v. McKimm, 620, 699.
Graham v. Pelland, 579, 664.
Grand Trunk Ry. Co. v. McMillan, 476.
Grant v. Grant, 362.
Grant v. McRae, 417.
Grant v. Simpson, 36, 375, 382, 387, 393, 709, 801.
Granville v. Firth, 840.
Gravelle v. Belanger, 503.
Gray v. Webb, 487.
Green v. Button, 41.
Green v. Campbell, 27, 29, 30, 366, 389, 765.
Green v. Chapman, 325, 610.
Green v. London Omnibus Co. 208.
Green v. Miller, 699.
Green *et ux.* v. Minnes *et al.*, 141, 821.
Greenfield's Case, Sir R., 67.
Greenough v. Gaskill, 656.
Griffin v. Moore, 52.
Griffiths v. Lewis, 21, 76, 77.
Grimes v. Lovel, 38.
Grimwade v. Dicks *et al.*, 291.
Gugy v. Ferguson, 566.
Gurney Foundry Co. v. Emmett *et al.*, 257, 261.
Gutsole v. Mathers, 106, 113, 124.
Guy v. Gregory, 780.
Gwynn v. South Eastern Ry. Co., 351, 445, 563.

H.

Haddon v. Lott, 107, 118, 124.
Haire v. Wilson, 194.
Hakewell v. Ingram, 194.
Hall v. Carty, 24, 366.
Hall v. Gowanlock, 648.
Hall v. LeMaire de Montreal, 151.
Hall v. Smith, 676.
Hall v. Weedon, 74, 92.
Halsey v. Brotherhood, 107, 111, 825.
Hamel v. Amyot, 203, 513.
Hamel v. Lauzière, 540.
Handspicker v. Adams, 269, 426.
Hanes v. Burnham, 195, 419, 489, 490, 497, 514, 537, 746.
Hankinson v. Bilby, 69, 375, 379.
Hanmer v. Flight, 402, 705.
Hanna v. De Blaquiere, 535.
Harding v. Greening, 164.
Hardwick v. Chandler, 63.
Hardy v. Pickard, 844.
Hargrave v. Le Breton, 111, 188.
Hargreaves v. Sinclair, 810.
Harkins v. Doney, 804.
Harle v. Catherall *et al.*, 315, 324, 336, 439, 583, 734.
Harman v. Delainy, 109.
Harman v. Windsor World Co., 450.
Harnett v. Vise *et al.*, 833, 840.
Harper v. Hamilton Retail Grocers' Association, 168, 169, 505.
Harrington v. Fry, 180.
Harris v. Clayton, 158, 328, 348, 349, 352, 384, 425, 426, 686.
Harris v. Petherick, 834.
Harris v. Thompson, 664.
Harris v. Warre, 253, 352, 354.
Harrison v. Bevington, 81, 388, 676.
Harrison v. Bush, 202, 496, 497, 508, 672, 842.

Harrison v. Pearce, 738.
Harrison v. Stratton, 35, 101.
Hart v. Coy *et ux.*, 95.
Hart v. Therien, 153.
Hart *et al.*, v. Wall, 89, 107, 746.
Harttey v. Herring, 61.
Harvey v. Canadian Pacific Railway, 691.
Harvey v. French, 377, 389.
Harwood v. Astley, 137.
Hatchard v. Mège *et al.*, 345, 485.
Hately v. Merchants' Despatch Transportation Co., 441.
Hawkesley v. Bradshaw, 469, 479.
Hawkings v. Billhead, 401.
Hawkins v. N. O. Printing Co. 92.
Hay v. Bingham, 47, 352, 355, 357, 360, 399, 544.
Hayden v. Beasley, 837.
Hays v. Mather, 87.
Haythorne v. Lawson, 81.
Hayward v. Parke, 468.
Hayward & Co. v. Hayward & Sons, 291, 819.
Hea v. McBeath, 36, 363, 676.
Head v. Briscoe *et ux.*, 225, 231.
Hearne v. Stowell, 94, 310, 399, 507.
Hebditch v. McIlwaine *et al.*, 172, 173, 495.
Hebert v. Lapointe, 536.
Hedley v. Barlow *et al.*, 323, 324, 325, 584, 677.
Hellier v. Ellis, 636.
Helsham v. Blackwood, 131, 370, 549, 571.
Hemmings v. Gasson, 348, 398.
Henderson v. Scott, 51, 503.
Hennessy v. Wright, 627, 641, 642, 657, 658, 659, 660.
Henwood v. Harrison, 327, 670, 671, 672.
Herbert v. Jobin, 510.
Heriot v. Stuart, 324, 326.
Hermandez v. Drake, 248, 249.
Herrington v. McBay, 9, 33, 711, 793, 799.
Hewlett v. Cruchley, 753.
Hey v. Moorehouse, 478.
Hibbard v. Cullen, 503, 504.
Hibbins v. Lee, 324.
Hibbs v. Wilkinson, 324, 583, 604.
Hickinbotham v. Leach, 551, 563.
Hicks' Case, 156.
Hider v. Dorell, 260.
Highmore v. Countess of Harrington, 60.
Hill v. Hart-Davies, 816, 824, 825.
Hill v. Hogg, 576, 793.
Hill v. Wates, 630.
Hilliard v. Constable, 59.
Hindlip v. Mudford, 613, 661.
Hinds v. Town of Barrie, 335.
Hindrichs v. Berndes, 819.
Hirst v. Goodwin, 66, 750.
Hoar v. Wood, 504.
Hoare v. Silverlock, 401, 809.
Hodgson v. La Banque d'Hochelaga, 151.
Hodson v. Pare, 501.
Hodges v. Ancrum, 673.
Hogg v. Darrah, 102.
Hogg v. Ross, 634.
Hogle v. Hogle, 27.
Holliday v. Ontario Farmers' Mutual Fire Insurance Co., 198, 510, 539, 540, 578, 663, 664, 669, 776.
Hollingsworth v. Shaw, 101.
Hollis v. Briscow *et ux.*, 59.
Holmes v. Catesby, 551.
Holt v. Scholefield, 14, 15, 27, 33, 74, 92.
Holwood v. Hopkins, 42.
Home v. Bentinck, 679.
Homer v. Taunton, 377.
Hood v. The State, 45.
Hooper v. Truscott, 194, 537.
Hope v. Brash, 641, 642, 659.
Hopewell v. Kennedy, 190, 359, 402, 486, 505, 507, 514, 731.
Hopley v. Williams, 785.
Holwood v. Thorn, 61, 62, 73, 100.
Horne v. Lord Bentinck, 501.
Hoskins, *Re* v. Trusts, 828.
Hosser v. Arnold, 158.
Hoste v. Victoria Times Publishing Co., 418, 469, 470.
Howarth v. Kilgour, 508.
Huber v. Crookall, 372, 379, 381, 382, 384, 399.
Hubbuck v. Wilkinson, 826.
Huckle v. Reynolds, 31, 353.
Hugo v. Todd, 139.
Hughes v. Rees, 685.
Hull v. King, 244, 250.
Hume v. Marshall, 65.
Humphreys v. Stillwell, 497.
Humphries v. Connor, 317.
Humphries v. Taylor Drug Co., 624, 636, 645.
Hunning v. Williamson, 635.
Hunt v. Algar, 444, 736.
Hunt v. Bell, 57.
Hunt v. Goodlake, 87, 399, 663, 745.
Hunter *et ux.* v. Hunter *et ux.*, 16.
Hunter v. Sharpe, 324, 325, 389, 581, 583, 606, 809.
Huntley v. Ward, 194, 196.
Huot v. Noiseux, 66, 154.
Hus v. Lespérance, 66.
Huxley v. West London Extension R. W. Co., 833, 835, 836, 839, 844.

I.

I'Anson v. Stuart, 99, 129, 546, 551, 681.
Ingram v. Lawson, 437, 550, 571, 733.
Irons *et ux.* v. Field *et ux.*, 38.
Irvine v. Duverney *et al.*, 272.
Irvine v. McCrimmon, 633.

J.

Jackson v. Adams, 20, 58, 101, 744.
Jackson v. Hopperton, 537, 744.
Jackson v. Sir Richard Mayne, 315.
Jackson v. McLellan, 799.
Jackson v. Simpson, 762, 772.
Jackson v. Staley, 163.
Jacob v. Lawrence, 542.
Jacobs v. Schmaltz, 87.
James v. Brook, 101.
James v. Norton, 828.
James v. Rutlech, 4, 38, 94.
Jenkins v. Phillips, 353.
Jenkins v. Smith, 62, 75.
Jenner *et al.* v. A'Becket, 324, 606.
Jenour v. Delmage, 408.
Jesson v. Hayes, 75.
Joannes v. Burt, 100.
Johnson v. Hedge, 32, 157, 372, 376, 389.
Johnson v. Hudson *et al.*, 185, 266, 269, 673, 678.
Johnson v. Eastman, 716.
Johnson v. Ewart, 708.
Johnson v. Kidston, 36, 191, 509, 562, 688, 694, 780, 811.
Johnson v. Macdonald, 395, 687, 813.
Jones, *ex parte*, 818.
Jones v. Bewicke, 551.
Jones v. Bird, 255.
Jones *et al.* v. Broadhurst, 478.
Jones v. Curling, 833, 835, 838.
Jones v. Dovers, 354.
Jones v. Gallon, 635, 649, 650.
Jones v. Herne, 92.
Jones v. Littler, 78, 79, 363, 676.
Jones v. Nicholls, 255.
Jones v. Richards, 658.
Jones v. Stevens, 550, 717.
Jones v. Stewart, 149, 364, 531.
Jones v. Townsend's Administratrix, 137.
Journal Printing Co. v. Maclean, 217, 218, 451, 475, 681, 682, 685, 695, 749, 802.
Joyce v. Hart 781.
Joynt v. Cycle Trade Publishing Co., 327, 588.
Judge v. Berkeley *et al.*, 727.
Jenner *et al.* v. A'Beckett, 606.

K.

Kain v. Farrer, 680.
Kancher v. Blinn, 37.
Kane v. Mulvany, 501, 590.
Kavanagh v. Norwich Union Fire Ins. Co., 543.
Keegan v. Robson, 707.
Keene v. Ruff., 166.
Kellog v. Carrico *et al.*, 243, 248, 250.
Kelly v. Journal Printing Co., 663, 664, 806, 807.
Kelly v. O'Malley *et al.*, 299, 301, 303, 320, 321, 438, 613, 752.
Kelly v. Partington, 97, 328.
Kelly v. Sherlock, 729.
Kelly v. Tinling, 324.
Kennedy v. Shurtleff, 634.
Kerr v. Davison, 535, 663, 664.
Kerr v. Gandy, 819.
Kerr v. Hitt, 244, 246, 248, 249.
Kershaw v. Bailey, 439.
Key v. Thomas, 799.
Keyworth v. Hill, 221.
Kimber v. Press Association, 281, 284, 285, 292, 295, 317.
Kimmis v. Stiles, 100.
King v. Dollar, 726.
King v. Gillard, 838, 840.
King v. Lake, 63.
King v. Waring, *et ux.*, 400.
King v. Watts, 749.
Kirkpatrick v. Mills, 681, 682, 812.
Kitcat v. Sharp, 818.
Knickerbocker v. Ratz, 846, 847.
Knight v. Gibbs, 41.
Koenig v. Ritchie, 324.
Kuhliger v. Bailey, 645.
Kunahan v. McCullagh, 377.
Kurtz & Co. v. Spence & Sons, 825.
Kynaston v. MacKinder, 844.

L.

Lacasse v. St. Louis, 742.
La Compagnie de Publication du Canada Revue v. Mgr. Fabre, 421, 611.
Laflamme v. Mail Printing Co., 150, 151 723, 754, 771, 814.
Lafleur, v. Guilmette, 104.
Lafone v. Smith *et al.*, 469.
Lake v. King, 492, 501.
Lamb v. Munster, 647.
Lamb's Case, 181.
Lambin v. South Eastern Ry. Co., 777
Lambton v. Parkinson, 833.
Lancaster v. French, 67.
Lancaster v. Ryckman, 436, 443, 458, 459, 462.
Landry v. Choquette, 151.
Lane v. Applegate, 400 478.
Lane v. Howman, 551.
Lane v. Jackson, 704.
Lang v. Gilbert, 127, 147, 578, 815.
Langelier v. Brousseau, 579.
Langley v. Law Society of Upper Canada, 335.
Langlois v. Drapeau, 420.
Langlois v. Tasse, 42.
Langridge v. Levy, 767.
Lanos v. Landry, 356, 422.

Laplante v. Paranteau, 153.
Lareau v. La Compagnie d'Imprimerie de Minerve, 136.
Latimer v. Western Morning News Company, 326.
Latta v. Fargey, 544.
Laughton v. Bishop of Sodor & Man., 359, 670, 689.
Laurent v. Doutre, 575, 579.
Lavergne v. Lainesse, 135.
Law v. Harwood, 115.
Law v. Llewellyn 501.
Lawless v. Anglo-Egyptian Cotton and Oil Co., 505, 539.
Lawrence v. Smith, 7.
Lawrie v. Maxwell, 357, 375.
Lay v. Lawson, 571.
Layer's Case, 185, 678.
Leach v. Thomas, 810.
Leduc v. Graham, 579.
Lee v. Collyer, 487.
Lee v. Gibbins, 822.
Lee v. Hopkins, 17, 86, 222, 228, 230, 231.
Le Fanu *et al.* v. Malcolmson *et al.*, 81, 93, 95, 130, 325, 680, 681, 736.
Lefebvre v. Godin, 530.
Lefebvre v. Lefebvre, 633.
Lefebvre v. Monette, 473.
Lefeunteum v. Beaudoin, 703.
Lefroy v. Burnside, 612, 615, 663.
Legault v. Legault, 536.
Leger v. Leger, 778.
Leicester (Earl of) v. Walter, 717.
Leith v. Pope, 753.
Lemay v. Chamberlain, 139, 496, 519, 520, 749, 758, 759, 787, 839.
Le Merchant's Case, 185, 678.
Lemieux v. Le Monde Newspaper Co., 422.
Lemon v. Simmons, 22.
Lennox v. Star Printing Co., 436, 445, 455, 456, 459.
Lenoir v. Jodoin, 103.
Leonard v. Allen, 91.
Leonard v. La Compagnie d'Imprimerie etc., de Montreal, 760, 779.
Lepage v. Wylie, 151.
Leslie v. Cave, 824.
Lever's Case, 70.
Levi (or Levy) v. Milne, 93, 668.
Levi v. Reed, 695, 774, 778, 780, 781.
Lewis v. Hudson, 46.
Lewis v. Levy, 281, 285, 287, 288, 289, 292, 293, 318.
Lewis v. Marshall, 269.
Lewis v. Sapio 180.
Lewis v. Walter, 137, 291.
Leyman v. Latimer *et al.*, 9, 18, 370, 563
L'Hemeux v. Heroux, 176.
Liebig's Extract of Meat Co., Limited v. Anderson, 824.
Lighthall v. Walker, 102.
Lilley v. Roney, 492, 502.
Lillie v. Price, 419.
Limpus v. London General Omnibus Co. 208.
L'Institut Canadien v. Le Nouveau Monde, 218.
Lion Brewery Co., Ltd. v. Bradstreet Co. 524.
Lister v. Perryman, 202, 497.
Liverpool Household Stores Assocn. v. Smith, 817, 822, 825, 826.
Livingston v. Trout, 196, 713, 719, 726.
Lockwood v. Bew, 657.
London v. Eastgate, 65.
Lonis v. Lacrosse *et al.*, 423.
Longworth v. Hyndman, 563.
Loog v. Bean, 8, 819, 824.
Loranger v. Beauchamp, 104.
Lord v. Wardell, 848.
Lortie v. Claude *et al.*, 154.
Lossing v. Wrigglesworth, 87, 88.
Lott v. Drewry, 78, 79, 676, 692, 746, 764.
Lovoie v. Gagnon, 28.
Lowden v. Blakey, 656.
Lowther v. Baxter, 502, 510.
Lucan (Earl of) v. Smith, 410.
Lucas v. Flinn, 100.
Ludlow v. Batson, 19, 42, 84, 98, 99.
Ludlow v. Irwin, 847.
Lumb v. Beaumont, 352.
Lumby v. Allday, 54, 67, 78, 79, 101.
Lumley v. Gye, 41, 84, 749.
Lynch v. Knight *et ux.*, 41, 42, 44, 84, 98, 99, 749, 765, 766.
Lyne v. Nicholls, 768.
Lytton (Earl of) v. Devey *et al.*, 825.

M.

Maccord v. Osborne, 89.
Macdonald v. Mail Printing Co., 145 148, 374, 378, 380, 383, 389, 560, 569, 570, 632, 691, 743, 745, 747.
Macdonald v. Sheppard Publishing Co., 631, 640.
Macdonald v. World Newspaper Co., 437, 448, 449, 451.
Macdonnell v. Robinson, 408, 528, 529.
Macdougall v. Knight & Son, 279, 282, 286, 289, 290, 295, 447, 473, 735.
Macfarlane v. Joyce, 504.
Macgregor v. Clay, 839.
Mackenzie v. Cunningham *et ux.*, 165, 809, 837.
Mackenzie v. Steinkopf, 658.
Mackett v. Commissioners of Herne Bay, 818.
Macleod v. Wakley, 275, 324, 583, 603
McAdam v. Weaver, 28.
McBean v. Williams, 157, 158, 429.

McCabe v. Foot, 9, 101.
McCann v. Kearney, 9, 12, 694, 764, 801.
McCann v. Preneveau, 526.
McCarthy v. Vespra, 258.
McCombs v. Tuttle, 166.
McCallum v. Grand Trunk Ry. Co., 480.
McDermid v. McDermid, 840.
McDonald v. Dun *et al.*, 421.
McDonald v. Moore, 27, 349.
McDonald v. Ryland, 509.
McDonald v. Ryland, 509.
McDonald v. Sydney Post Publishing Co., 332, 544, 563, 713.
McDougall v. Mason, 803, 808.
McEvoy, v. Wright, 335.
McFarlane v. Hulton, 270, 271.
McFarlane v. Murphy, 228.
McGowan v. Middleton, 487.
McGrath v. Cox, 159, 744.
McGregor v. Gregory, 556.
McInnes v. Ferguson, 703.
McIntee v. McCullough, 497, 521, 672, 744.
McIntyre v. McBean *et al.*, 191, 499, 535 689.
McKenzie v. McLaughlin, 644, 723, 752
McKenzie v. Scovill, 799.
McKergow v. Comstock, 644.
McLaughlin v. Cowley, 504.
McLay v. Corporation of Bruce, 209.
McLeod v. McLeod, 61, 354.
McLeod v. The Queen, 835.
McLean v. Campbell, 512, 751.
McLean v. Hamilton Street Ry. Co., 487
McMillan v. Birch, 62.
McMillan v. Boucher, 741.
McMillan v. Colwell, 624.
McNab v. McGrath, 24, 187.
McNally v. Oldham, 445.
McNaught v. Allen, 158, 429.
McPherson v. Daniels, 129, 352, 545. 559, 560.
McQuire v. Western Morning News Co. 605, 662, 663, 745.
Mail Printing Co. v. Canada Shipping Co., 203, 579, 793.
Maillet v. Desilets, 16.
Mair v. Culy, 124, 477, 550.
Maitland v. Bramwell, 498.
Maitland v. Globe Printing Co., 646.
Maitland *et al.* v. Goldney *et al.*, 82, 157. 160, 428, 561.
Major v. McGregor, 88, 148, 383, 384.
Major v. McKenzie, 844.
Malachy v. Soper, 106, 110, 114, 118 124.
Mallett v. Guay, 158.
Malloch v. Johnson, 844.
Mallon v. Smith, 155.
Mallory v. Pioneer Press Co., 92.
Maloney v. Bartley, 647.
Manitoba Farmers' Hedge and Wire Fence Co. v. Stovel, 788, 833, 834.
Manseau v. Manseau, 150.
Marcotte v. Therieu, 331.
Marks v. Conservative Newspaper Co., 478.
Marks v. Samuel, 451, 761.
Marriott v. Chamberlain, 624, 641, 645, 660.
Marsden v. Henderson, 75, 76, 130, 428.
Marsden v. Lancashire and Yorkshire Ry. Co., 844.
Marsh v. Isaacs, 789.
Marsh v. McKay, 46, 446, 643.
Marshall v. Central Ont. Ry. Co., 205.
Martin v. Kennedy, 474, 736.
Martin v. Loci, 379.
Martin v. Manitoba Free Press Co., 392. 409, 410, 573, 574, 593, 595, 613, 614, 615, 616, 692, 799, 800, 804, 807.
Martin v. Strong, 749.
Martin *et ux.*, v. Trustees British Museum *et al.*, 155, 658.
Martindale *et ux.* v. Murphy *et ux.*, 36, 48, 377.
Martineau v. Lussier, 633, 634.
Martineau v. Roy, 579.
Martins v. Upcher, 255.
Martyn v. Burlings, 63.
Masham v. Bridges, 58.
Mason v. Grand Trunk Ry. Co., 333.
Mason v. Meagher, 765.
Massey-Harris Co. v. De Laval Separator Co., 642, 658.
Massie v. Toronto Printing Co., 541, 618, 755, 770.
Mathieu v. Forget, 473.
Matte v. Ratté, 152.
Matthew v. Cross, 42.
May v. Brown, 734.
Mayne v. Digle, 12.
Mayor of Manchester v. Williams, 217, 218, 451, 452.
Mayrant v. Richardson, 102.
Maxwell v. Scarfe, 296.
Maxwell v. Viscount Wolesley ,467.
Melançon v. Archambeault, 424.
Mellin v. White, 824.
Mellnuish v. Collier, 712.
Menard v. Pigeon, 633.
Merivale *et ux.* v. Carson, 325, 327, 493, 494, 580, 583, 584, 585, 594, 605, 608.
Metcalf v. McNee *et al.*, 813.
Metropolitan Ry. Co. v. Wright, 806.
Metropolitan Saloon Omnibus Co. v. Hawkins, 107, 205, 206, 215, 216, 452, 656.
Migneron v. Compagnie de Publication de la Patrie, 335.

Milissich v. Lloyds, 279, 286, 291, 663, 664.
Miller v. Buckdon, 93 .
Miller v. David, 53, 363.
Miller v. Green, 193, 194, 199, 201, 202, 498, 500, 505, 789, 797, 801, 804, 848.
Miller v. Houghton, 35, 366.
Miller v. Johnston, 511.
Miller v. Parish, 46.
Miller's Case, 40.
Millette v. Little, 648.
Milligan v. Jamieson, 779, 787.
Millington v. Loring, 352, 355.
Mills *et ux.* v. Spencer *et ux.*, 717, 733.
Milman v. Pratt, 115.
Milner v. Gilbert, 329, 396, 570, 687, 691, 810.
Milner v. Reeve, 37.
Minet v. Morgan, 656.
Minors v. Leefard, 92.
Mitchell v. Vandusen, 845.
Mitrow v. Citizen Publishing Co., 283.
Mogul Steamship Co. v. McGregor, 826.
Molleur v. Faubert, 481.
Monks v. Monks, 39.
Monson v. Tussaud, 819, 824.
Montague v. Gazette Printing Co.,
Moody v. Canadian Bank of Commerce, 752, 753.
Moon v. Mathers, 624.
Moor v. Foster, 58.
Moor v. Roberts, 661.
Moore v. Gill, 834.
Moore v. Meagher, 41, 42, 97, 98, 99, 749, 766.
Moore v. Mitchell, 63, 414, 575, 715, 718, 721, 723,
Moore v. Scott, 440.
Moore v. Terrell *et al.*, 552.
Mordaunt v. Mordaunt, 344.
Morisette v. Jodoin, 75.
Morris v. Lansdale, 118, 119, 551.
Morrison v. Belcher, 324, 582, 605.
Morrison *et al.* v. Harmer *et al.*, 324, 571.
Morrison v. Western Assurance Co., 152, 424.
Mortimer v. McCallan, 678.
Mothersill v. Young, 702.
Mountney v. Walton, 129, 563, 571.
Monson v. Tussaud, 819, 824.
Mousseau v. Dougall *et al.*, 565.
Muldoon v. Johnston, 821.
Mulkern v. Ward, 323.
Müller v. Gerth, 625, 626, 627.
Mullett v. Hulton, 733.
Mulligan v. Cole *et al.*, 87, 663, 680, 745
Mullin v. Graham, 153.
Muma v. Harmer, 561.
Munro v. Quigley, 596.
Munster v. Cox, 474.
Munster v. Lamb, 501, 504.
Murphy v. Climie, 510.
Murphy v. Halpin, 528.
Murray v. Mail Printing Co., 646.
Murray v. McSwiney, 490.
Myers v. Currie, 720.
Myers v. Financial News, 834.
Meyers v. Defries *et al.*, 285, 295, 841, 844.

N.

Nagy v. Manitoba Free Press Co., 766.
Napier v. Daniel, 807.
Neil v. Norman, 442.
Nelson v. Staff, 42.
Neron v. Breton, 235.
Nettleton v. McFarlane *et al.*, 825.
Nevill v. Fine Art & General Ins. Co., 87, 89, 169, 399, 688, 796.
Newman v. Bailey, 551.
Newman v. Zachary, 115.
Newton v. Chaplin, 678.
Nicholson v. Jackson, 486.
Noel *es qual.* v. Chabot, 420.
Noiseux v. Huot, 154.
Nolan v. Tipping, 193, 499, 525, 744, 795.
Norman v. Farquhar, 513.
North v. Great Northern R. W. Co., 846.
North British & Mercantile Ins. Co. v. Tourville, 703.
Nunn v. Brandon, 161, 277, 792 .

O.

Oakes v. Keating, *et al.*, 146, 679, 744.
Oakley Hall v. Bryce, 622.
Obernier v. Robertson, 253, 254, 255, 257, 259, 261, 355, 484.
O'Brien v. Bryant, 100, 139, 566, 574.
O'Brien v. Clement, 93, 100, 131, 139, 346, 401.
O'Brien v. Marquis of Salisbury, 383.
O'Connor v. Star Newspaper Co. Ltd., 834, 836, 838.
Odell v Bennett, 489.
Odger v. Mortimer, 324, 806, 807.
Ogden v. Turner, 9, 32.
O'Kelly v. Harvey, 317.
Onslow v. Horne, 32, 53, 54, 59, 102, 363.
Ontario Copper Lightning Rod Co. v. Hewitt, 212, 772.
Ontario Industrial Loan and Investment Co. v. Lindsey *et al.*, 6, 107, 119, 120, 123.
Orjen v. Kerr, 638.
Orpwood v. Barkes, 158, 426.
Owen Sound Building and Savings Society v. Meier, 214, 218, 571.
Oxley v. Willis, 470.

P.

Pacaud v. Price, 150.
Padmore v. Lawrence, 15, 707, 791.
Pailler v. Demers, 503.
Paint v. Maclean, 68, 367, 692, 762.
Paladino v. Gustin, 371, 379, 436, 443, 459.
Palmer v. Solmes, 29, 42, 51, 765, 766.
Pankhurst v. Hamilton, 137, 526, 610, 660, 733.
Pankhurst v. Thompson, 59.
Pankhurst v. Sowler, 303, 318, 319.
Panter v. Williams, 673.
Paris v. Levy, 324, 606.
Parke v. Hale, 447, 461.
Parker v. Meader, 91.
Parkins *et ux.* v. Scott *et ux.*, 42, 561, 750.
Parmiter v. Coupland *et al.*, 138, 587, 613, 665, 823.
Parnell v. Walter, 641, 642, 658.
Parrett v. Carpenter, 60.
Parsons v. Lloyd, 123.
Parsons v. Queen Ins. Co., 529.
Parsons v. Surgey, 315.
Parsons v. Tinling, 830.
Pater v. Baker, 6, 106, 110, 111, 114, 202.
Paterson v. Collins, 70.
Paterson v. Dunn, 628.
Payne v. Beuwmorris, 66.
Paxton v. Douglas, 647.
Peacock v. Reynell, 106
Peard v. Jones, 63.
Pearman v. Burdett-Coutts, 838.
Pearson v. Gratton *et al.*, 104.
Pearson v. Lemaitre, 202, 734.
Peart v. Grand Trunk Ry., 743.
Pedder v. Moore, 828.
Pedley v. May, 502.
Peltier v. Miville, 714.
Pelletier v. Pacaud, 598.
Pemberton v. Colls, 60.
Penfold v. Wescote, 376.
Penny v. Stubbs, 732.
People v. Brooks, 712.
Pepin v. Pacaud, 714.
Perceval v. Phipps, 825.
Percy v. Glasco *et al.*, 727, 804, 805.
Perkins v. Smith, 122.
Perry v. Hooper, 66.
Peterborough v. Midland Ry., 731.
Peters v. Tardivel, 176.
Peters v. Wallace, 808.
Petrin v. Larochelle, 16, 420.
Pettibone v. Simpson, 42.
Pharmaceutical Society v. London and Provincial Supply Association, 211, 651.
Phelan v. St. Gabriel Total Abstinence and Benefit Society, 510, 543.
Phillips v. Jansen, 2, 4, 63 96.
Phillips v. Laviolette, 360, 424, 565.
Phillips v. Odell, 47.
Pickles v. Sinfield, 838.
Picton v. Jackman, 518.
Pierce v. Ellis, 310, 314.
Pierpoint v. Shapland, 692.
Pike v. Van Warmer, 39, 100.
Pinero v. Goodlake, 291.
Pink v. Federation of Trades, 820.
Pinnock v. Chapman and Hall, 681.
Pitt v. Donovan, 106, 113, 118, 119.
Plymouth Mutual v. Traders' Publishing Association, 660.
Poe's, Dr., Case, 93.
Poitevin v. Morgan, 103, 203, 530, 674.
Pollard v. Lyon, 37.
Ponsford v. Financial Times Ltd. *et al.* 299, 301, 315, 319, 320.
Pool v. Lewin, 838.
Pope v. Curl, 825.
Pope v. Post Printing and Publishing Co., 473.
Popham v. Pickburn, 310.
Porter v. McMahon, 19.
Powell v. Ford, 180.
Powell v. Ruskin, 442.
Powell v. Walkers, 511.
Power v. Ellis, 647.
Praed v. Graham, 733, 769, 806.
Preston v. Journal Printing Co., 529, 815.
Preston v. De Windt, 9.
Prevost v. Huard, 422, 424, 479, 490, 579.
Price v. Harris, 789.
Price v. Severn, 775.
Prior v. Wilson, 77.
Proctor v. Bayley, 835.
Proctor v. Owens, 46.
Proctor v. Smiles *et al.*, 656.
Proud v. Hawes, 62.
Prudential Assurance Co. v. Knott, 819.
Pugh v. Kerr, 845.
Pullen v. Snelus, 632.
Pullman v. Hill & Co., 95, 155, 156, 167, 168, 169, 170, 171, 493.
Punch v. Boyd *et al.*, 819.
Purcell v. Sowler, 310, 314, 321, 324.
Purnell v. Great Western Ry. *et al.*, 789.
Puterbaugh v. Gold Medal Furniture Manufacturing Co., 166, 168, 169, 171, 494, 511, 662.
Pybus v. Scudamore, 330.

Q.

Quartz Hill Mining Co. v. Beall, 816, 817, 822, 825.
Queen, The, v. Bradlaugh, 354.
Queen, The, v. Fall, 759.

Queen Victoria Park Commissioners v. Howard, 622.
Quin v. Hession, 486.
Quin v. Leathem, 767.
Quirk v. Dudley *et al.*, 7, 8, 818, 819, 824.

R.

Railton v. Lauder, 244, 246, 248.
Rainy v. Bravo, 678.
Ramsdale v. Greenacre, 67, 355.
Rassam v. Budge, 258, 416, 417.
Ratcliffe v. Evans, 3, 7, 42, 98, 99, 110, 111, 113, 115, 437.
Raven v. Stevens & Sons, 172.
Ravenhill v. Upcott, 112, 468.
Ray v. Corbett, 398, 618, 796.
Read v. Friendly Society, 767.
Read v. Huggonson, 92.
Rearick v. Wilcox, 724.
Redford v. Birley *et al.*, 316.
Rees v. Smith, 692.
Reeves v. Templar, 663.
Reginald's Case, 66.
Reid v. Langlois, 656.
Renaud v. Guenette, 503.
Renault v. Lortie, 740.
Republic of Costa Rica v. Erlanger, 786
Republic of Peru v. Peruvian Guano Co 259.
Restell v. Steward and Chart, 627.
Revis v. Smith, 501,
R. v. Abingdon, 501.
R. v. Aickles, 678.
R. v. Barnard, *Ex parte*, Lord R. Gower 681.
R. v. Benfield, *et al.*, 85, 335.
R. v. Berkshire Justices, 296.
R. v. Boucher, 678.
R. v. Brooke, 156, 284.
R. v. Burdett, 171, 272, 667.
R. v. Burt et al., 316.
R. v. Canning, 272.
R. v. Carlile, 185, 226, 279.
R. v. Clement, 279, 818.
R. v. Clerk, 66.
R. v. Coghlan, 102.
R. v. Cox, 21.
R. v. Creevey, 501.
R. v. Cruse *et ux.*, 226.
R. v. Davis, 344.
R. v. Dougall *et al.*, 204, 714, 718.
R. v. Dove, 344.
R. v. Dover, 186.
R. v. Dubois, 344.
R. v. Egre, 30, 51.
R. v. Ellis, 30, 51.
R. v. Farre, 59.
R. v. Fellowes, 555.
R. v. Flowers, 615.
R. v. Fox *et al.*, 653, 654.
R. v. Francis, 202.
R. v. Fursey, 316.
R. v. Garrett, 156.
R. v. Girdwood, 272.
R. v. Goldstein, 353.
R. v. Gray, 285, 291.
R. v. Great Northern of England, 210.
R. v. Hickson, 273.
R. v. Higgins, 2, 35.
R. v. Holmes, 272.
R. v. Holt, 155.
R. v. Hone, 204, 714.
R. v. Horne, 374.
R. v. Hunt *et al.*, 316.
R. v. Hurt, 684.
R. v. Ingram, 226.
R. v. Johnston, 183, 272.
R. v. Justices of Londonderry, 317.
R. v. Labouchere, 571.
R. v. Llanfaethly, 678.
R. v. Lord Mayor of London, 226.
R. v. Lovett, 181, 269, 673.
R. v. McNaughton, 317.
R. v. Newman, 571.
R. v. Nichol, 845.
R. v. O'Doherty, 818.
R. v. Owen, 344.
R. v. Oxford, 344.
R. v. Phillips, 2.
R. v. Plummer, 272.
R. v. Pocock, 2.
R. v. Price, 296.
R. v. Rosenstein, 678.
R. v. Schofield, 24, 35.
R. v. Sellars, 275.
R. v. Shelley and Gordon's Case, 677.
R. v. Skinner, 501.
R. v. Stanger, 185, 264.
R. v. Stansfield, 21.
R. v. Sullivan, 591.
R. v. Tasse, 588.
R. v. Vamplew, 344.
R. v. Vincent, 316.
R. v. Walter, 183.
R. v. Wason, 449.
R. v. Watson, 272, 678.
R. v. Wegener, 2, 156.
R. v. Wilkinson, 264, 590, 592, 793.
R. v. Wilkinson, *Re* Brown, 590, 592.
R. v. Woolner *et al.*, 185.
R. v. Wright, 318.
Ricard v. Jesmin, 153.
Rice v. Coolidge, 504.
Richards v. Boulton, 187, 191, 498, 791.
Richards v. Richards, 77, 717.
Rickett v. Sharp, 319.
Riddell v. Clydesdale Horse Society, 818.
Ridgway v. Smith, 641, 658.
Riding v. Smith, 41, 42, 70, 101, 115, 144, 561, 750, 764, 767.
Ridley v. Sutton, 845.

Rielle v. Bennings, 150.
Rielly v. Scripps, 724.
Riordan v. Willox, 612.
Risk Allah Bey v. Johnstone, 470.
Risk Allah Bey v. Whitehurst *et al.*, 326, 664, 779.
Ritchie v. Sexton, 87.
Roach v. Garvan, 92, 94, 684.
Roberts v. Brown, 134, 291, 556.
Roberts v. Camden, 4, 14, 27, 33, 349, 387, 394.
Roberts v. Climie, 510.
Roberts v. Jones, 836.
Roberts v. Oppenheim, 656.
Roberts v. Patillo, 128, 276, 374, 376, 387.
Roberts v. Roberts, 765, 766.
Roberts *et ux.* v. Roberts, 41, 42.
Robertson v. Bennett, 146, 378.
Robertson v. Cowan, 441.
Robertson v. Meyers, 727, 753.
Robbins v. Franks, 95.
Robinson *et al.* v. Boyle, 840.
Robinson v. Dun *et al.*, 164, 523, 525, 687, 792.
Robinson v. James, 167.
Robinson v. Jones, 175, 702.
Robinson v. May, 532.
Robinson v. Robinson, 155.
Robinson v. Sugarman, 144, 352, 360, 625, 627.
Robitaille v. Porteous, 156, 536.
Robshaw v. Smith, 515, 561.
Roche v. Patrick, 330.
Rochon v. Fraser, 503.
Rodgers v. Kline, 102.
Rodriguez v. Tadmire, 717.
Rodgers v. Noxon Company, 206, 361.
Rogers v. Clifton, 537.
Rogers v. Munns, 698, 787, 801.
Rogers v. Spalding, 534.
Rolland v. Jodoin, 103.
Ronayne v. Wood, 508.
Rondot v. Monetary Times Printing Co., 846.
Roselle v. Buchanan, 624, 630, 631.
Ross v. Bucke, 192, 419, 513, 691.
Rotheram v. Priest, 487.
Routley v. Harris, 9, 11.
Rowe v. Roach, 189, 550.
Roy v. Powell, 633.
Roy v. Turgeon, 154.
Royal Aquarium Society v. Parkinson, 490, 501, 502, 537.
Royer v. Loranger *et vir.*, 788.
Ruckley v. Keirnan, 559.
Ruel v. Tatnell, 87, 389, 394, 680.
Rumney v. Walter, 279, 318.
Rumney v. Wright 658.
Rumsey v. Webb, *et ux.*, 66, 516, 749.
Russell v. Notcutt, 5, 87.
Russell *et al.* v. Webster, 109, 110, 326, 332.
Russell *et al.* v. Wilkes, 133, 367, 415.
Rutherford v. Evans, 426, 427, 428, 677.
Rutzen v. Farr, 799.
Ryalls v. Leander *et al.*, 295, 318.
Ryder v. Wombwell, 668, 747.

S.

Sadgrove v. Hole, 167.
Sadler v. Great Western Railway, 333.
Salmon v. Isaac, 279, 296.
Sandford v. Bennett, 345, 485.
Sangster v. Aikenhead, 641.
Sanitary Carbon Co., *Re*, 302.
Saunders v. Bate, 353.
Saunders v. Jones, 630.
Saunders v. Mills, 283, 733.
Saunderson v. Von Radick, 643.
Savage v. Robery, 72, 100.
Savile v. Jardine, 67, 72, 99, 129.
Saxby v. Easterbrook *et al.*, 816, 819.
Sayer v. Glossop, 179.
Scaife v. Kemp, 660.
Scammel v. Clarke, 787.
Scarll v. Dixon, 439.
Schmuck v. McIntosh, 641.
Scott v. Crerar, 181, 182, 685, 746, 805.
Scott *et ux.* v. Hilliar, 24, 36.
Scott v. Sampson, 413, 717, 719, 731.
Scripps v. Reilly, 183.
Seaman v. Bigg, 66.
Seaman v. Netherclift, 501.
Searles v. Scarlett, 142, 144.
Seer v. Treau de Ceoli, 34.
Seeley v. Fisher, 826.
Seeley v. Powers, 845.
Senecal v. La Cie d'Imprimerie de Quebec, 362.
Seroka *et ux.* v. Kattenburg *et ux.*, 222, 230, 231, 837.
Sewall v. Catlin, 315.
Seymour v. Butterworth, 324, 587, 610.
Shafer v. Ahalt, 52.
Shallow v. Gazette Printing Co., 502.
Sharland v. Mildon, 122.
Sharpe v. Dawes, 302.
Shaver v. Linton, 497, 515, 596.
Shea v. O'Connor, 362, 708, 804.
Sheahan v. Ahearne, 97.
Shepheard v. Whitaker, 138, 172, 173, 445.
Shepheard v. White, 508.
Shipley v. Todhunter, 202, 507.
Short v. Lewis, 727.
Sibthorpe's Case, Dr., 60.
Silver *et al.* v. Dominion Telegraph Co., 135, 173, 175, 211, 368, 684, 692, 693, 702, 749, 761, 768, 772.
Simard v. Townsend, 154.

Simmonds v. Dunne, 408.
Simmons v. Mitchell, 33, 101, 379, 389.
Simon v. La Bank Nationale, 441.
Simonde v. Chesley, 787.
Simpson v. Robinson, 192, 193, 499, 564, 780, 791.
Sinn v. Marcus, 517.
Skinner v. Mair, 843.
Skirving v. Ross, 65, 711, 745.
Slattery *et al.* v. R. G. Dun & Co., 245, 434.
Sloman v. Chisholm, 67, 75.
Slowman v. Dutton, 377.
Small v. Mackenzie, 573, 616, 799.
Smart v. Blanchard, 94.
Smiley v. McDougall, 354, 427, 613, 813.
Smith v. Andrews, 62.
Smith v. Armstrong, 508, 744.
Smith v. Ashley, 186.
Smith v. Binet, 516.
Smith v. Collins, 9, 18, 31.
Smith v. Harnor, 843.
Smith v. Harrison, 469.
Smith v. Hood *et al.*, 421.
Smith v. Knowelden, 158, 353.
Smith v. Mathews, 561.
Smith v. McIntosh, 701, 805.
Smith v. Miles, 91.
Smith v. Parker, 550, 574.
Smith v. Richardson, 715, 726.
Smith v. Scott, 285, 295, 734.
Smith v. Spooner, 113.
Smith v. Taylor, 675, 677.
Smith v. Thomas, 707, 749, 808.
Smith v. West Derby Local Board, 255.
Smith v. Wood, 400.
Smyth v. Carey, 394.
Smyth v. Stephenson, 437, 449, 450.
Smuthwaite v. Hanny, 335.
Snag v. Gee, 101.
Snag v. Gray, 63.
Snowden v. Smith, 717.
Snyder v. Andrews, 166.
Soane v. Knight, 608, 609.
Société Anonyme, etc. v. Tilghman's Patent Co., 826.
Solomon v. Bitton, 806.
Solomon v. Knight, 826.
Solomon v. Lawson, 94, 253, 352.
Solomons *et al.* v. Medex, 81.
Somers v. House, 371.
Somerville v. Hawkins, 189, 664, 672, 745.
South Hetton Coal Co. v. North Eastern News Association, 3, 215, 216, 217, 325, 476, 586, 587, 751.
Southam v. Allen, 70.
Southee v. Denny, 64.
Southey v. Sherwood, 7.
Southwick v. Hare, 442, 443, 463.
Soulieres v. De Repentigny, 66.
Spackman v. Gibney, 408.
Spahr v. Bean, 86, 233.
Speake, v. Hughes, 750.
Sparrow v. Hill, 842.
Speck v. Phillips, 715, 726.
Speight v. Gosney, 42, 561, 750.
Spenceley v. De Willet, 813.
Spike v. Golding 277.
Spill v. Maule, 202, 500, 520, 672.
Spooner v. Gardiner, 692.
Stace v. Griffith, 189, 678, 679.
Stanhope v. Blith, 74, 100.
Stanley v. Boswell, 58.
Stanley v. Litt, 788.
Stannus v. Finlay, 196.
Stanton v. Andrews, 187, 492, 533, 716.
Stanton v. Smith, 363.
Starr v. Gardner, 29, 60.
State, The v. Nashville Banner Publishing Co., 211.
Stebbing v. Warner, 92, 100.
Steele v. Brannan, 279.
Stein v. Tabor, 660.
Stees v. Kemble, 92.
Stephens v. Elwall, 122.
Sterry v. Foreman, 749.
Stevens v. Sampson, 293.
Stewart v. Moffatt, 828.
Stewart v. Rowlands, 554.
Stewart v. Sculthrop, 509.
Stewart v. Spottiswoode, 326.
Stirton v. Gummer, 727, 728, 729, 804, 805.
St. Louis v. Lacrosse *et al.*, 423.
Stober v. Green, 77.
Stockdale v. Onwhyn, 7.
Stockdale v. Tarte, 808.
Stocken v. Collin, 272.
Stockley v. Clement, 94, 681.
Stokes v. Arey, 92.
Stone v. Jaffray, 388, 756.
Stone v. Knapp, 228.
Stooke, v. Taylor, 841.
Stooke, v. Press Association, 342, 343.
Storey v. Challands, 749.
Storey v. Lord George Lennox, 645.
Storey v. Wallace, 183.
Strachan v. Barton, 377, 389, 415, 563.
Stratford v. Gordon, 258.
Strauss v. Francis, 324, 326, 602, 603.
Street v. Licensed Victuallers' Society, 317, 664.
Strode v. Holmes, 58.
Stroebel v. Wheney *et al.*, 46.
Strong v. Bank of British North America, 503.
Stuart v. Bell, 506, 513, 514, 537.
Stuart v. Lovell, 324, 326, 602.
Sturt v. Blagg, 399, 663, 664.
Suego's Case, 65, 102.
Summers v. City Bank, 225.
Surman v. Shelleto, 58.
Surprenant v. Gobeille, 504.

Sutcliffe v. Smith, 840.
Swabey v. Dovey, 657.
Swain v. Mail Printing Co., 436, 442, 443, 455, 459, 463.
Swan v. Clelland, 396, 508, 756, 811.
Swan v. Vines, 680.
Sweetapple v. Jesse, 24.
Sweth v. Carey, 58.
Switzer v. Laidman, 407, 413, 543, 576, 726.
Sydenham v. Man, 158.
Sylvester v. Hall, 692.

T.

Tabart v. Tipper, 324, 604.
Talbutt v. Clark, *et al.*, 733.
Tallee v. Munro, 150.
Tansey v. Graham, 600.
Tapp v. Brenot, 432, 748.
Tarpley v. Blabey, 168, 181, 727, 733.
Tasburgh v. Day, 118.
Tate v. Globe Printing Co., 637, 639.
Tangyes v. Inman & Co., 658.
Taylor v. Carr, 58, 363, 366.
Taylor v. Hall, 4, 39.
Taylor v. Hawkins, 189, 284.
Taylor v. How, 58.
Taylor v. Massey, 392, 531, 680, 681, 683, 685, 753, 803, 813.
Taylor v. Perkins, 4, 37, 40.
Taylor v. Perr, 38, 101.
Taylor v. Starkey, 62.
Taylor v. Thompson, 664.
Teacy v. McKenna, 743.
Tects v. Village of Middletown, 712.
Tempest v. Chambers, 34.
Tench v. Great Western Ry. Co., 163, 196, 205, 207, 497, 538, 539, 669, 670, 672.
Tench v. Swinyard, 351, 411, 481, 558, 559.
Tennant v. Bell, 296.
Tennant v. Hamilton, 712.
Territory v. Whitcomb, 45.
Terry v. Starkweather, 676.
Tetu v. Duhaine, 513.
Thayer v. Kirby, 504.
Thomas v. Blasdale, 93.
Thomas v. Bradbury, Agnew & Co., 603, 621.
Thomas v. Jackson, 77, 401.
Thomas v. Platt, 26.
Thomas v. Powell, 727.
Thomas v. Williams, 816, 819, 822, 824, 826.
Thompson v. Bernard, 33, 34.
Thompson v. Grimes, 87.
Thompson v. Knights, 846.
Thompson v. Nye, 717.
Thompson v. Shackell, 324, 602, 608.
Thorley's Cattle Food Co. v. Massam, 819.
Thornton v. Capstock, 353, 402, 624, 627, 629.
Thornton v. Stephen, 677.
Thorpe v. Gisburne, 180.
Thurman v. Wild *et al.*, 478.
Thynne v. Maur, 232.
Tibbs v. Smith, 92.
Tidman v. Ainslie, 561.
Tiffany v. McNee *et al.*, 813.
Tighe v. Cooper, 555.
Tighe v. Wicks, 62, 101.
Tobias v. Horland, 368, 693, 761.
Tobin v. Gannon, 2, 388, 395, 414, 514, 577, 687, 713.
Todd v. Dun Wiman & Co., 328, 348, 430, 431, 495, 496, 499, 520, 521, 523.
Todd v. Hawkins, 808.
Tomlinson v. Brittlebank, 14, 15, 27, 33.
Tompson v. Dashwood, 15, 138, 172, 173, 202.
Toogood v. Spyring, 15, 494, 539, 591, 671.
Townsend v. O'Keefe, 625.
Toser v. Mashford, 34.
Traviss v. Hales *et ux.*, 17, 86, 221, 222, 230.
Trenton Insurance Co. v. Perrine, 266.
Trevelyan v. Myers, 440.
Trollope v. London Building Trades Federation, 825.
Trudel v. Beemer, 579.
Tucker v. Lawson, 172, 340, 737.
Tunnicliffe v. Moss, 750.
Tupling v. Ward *et al.*, 658.
Turnbull v. Bird, 196, 323, 515, 583, 596.
Turner v. Ambler, 673.
Turner v. Hednesford Gas Co., 486.
Turner v. Heyland, 844.
Turner v. Meryweather, 130, 753.
Tuson v. Evans, 500.
Tutty v. Alewin, 64.
Twycross v. Grant *et al.*, 485.
Tyne Alkali Co. v. Lawson, 844.

U.

Underwood v. Parks, 622, 715.
Union Steamship Company of New Zealand v. Melbourne Harbor Trust Comm., 255.
United States v. Battiste, 668.
United States v. Greathouse, 668.
Usill v. Hales, 281, 285, 295.

V.

Vallée v. Canada Life Assurance Co., 420.
Vankeuren v. Griffis, 158, 429.
Vansycle v. Parish, 543, 723, 732.

Vaughan v. Ellis, 110.
Venables v. Fitt, 303, 319.
Vessey v. Pike, 557, 715.
Veilleux v. Lanouette, 714.
Vicars v. Wilcocks, 118, 119.
Vigneux v. Noiseux, 104.
Villars v. Mousley, 4, 38.
Vine v. Saunders, 221.
Vine, *Ex parte*, *In re Wilson*, 345.
Viscount Gart v. Rowney, 332.
Vye v. Alexander, 176, 178, 179, 678, 698, 794, 799, 802.
Vye v. Newman, 426.

W.

Wadeer v. E. Indian Co., 655.
Wagner v. Jefferson, 228.
Wainford v. Heyl, 231.
Waite v. Spurgin, 845.
Waithman v. Weaver, 717.
Wakley v. Cooke, 554.
Wakley v. Healey, 95, 130, 387, 675, 681.
Wakley v. Johnson, 733.
Walcot v. Walker, 7.
Waldron v. White, 741.
Walkem v. Higgins, 389, 390, 391, 712, 771, 848.
Walker v. Brogden, 330, 550.
Walker v. Great Western, 208.
Waller v. Loch, 496, 515, 516, 561.
Walls or Watts v. Rymes, 100.
Walter v. Emmott, 107.
Walton v. Singleton, 46.
Ward *et al.* v. Smith, 172.
Ward v. Weeks, 42, 72, 73, 99, 561, 750.
Waring v. McCaldin, 315.
Waring v. Pearman, 843.
Warman v. Hine, 571.
Warneau v. Hine, 363.
Warren v. Warren, 172, 272.
Warrington v. Leake, 462.
Warwick v. Foulkes, 192, 193, 499, 564, 780, 791.
Wason v. Walter, 280, 281, 283, 285, 323, 326, 501, 586, 591.
Waterbury v. Dewe, 156, 406, 497, 499, 509, 512, 776.
Waterer v. Freeman, 111.
Waters v. Earl of Shaftesbury, 655.
Watkins v. Hall, 134, 350, 373, 377, 559, 560, 726.
Watson & Sons v. Daily Record, 818, 826, 827.
Watson v. Jones, 501, 656.
Watson v. McEwan, 501, 656.
Watson v. Vanderlash, 65.
Watts v. Fraser *et al.*, 186, 266, 727, 735.
Weatherstone v. Hawkins, 400.
Weaver v. Lloyd, 571, 677.
Weaver v. Sawyer & Co., 843.
Webb v. Beavan, 4, 9, 11, 12, 13, 377.
Webb v. East, 655.
Webster v. Friedeberg, 806.
Weierbach v. Trone, 100.
Weiser v. Heintzman, 649, 652.
Welch v. Smith, 426, 429, 432.
Weldon v. De Bathe, 100.
Weldon v. Johnson, 303, 664.
Weldon v. Winslow, 222, 232.
Wellbanks v. Conger, 831.
Wells v. Lindop, 197, 362, 407, 542, 793, 795, 796, 804, 811, 813.
Wenman v. Ash, 162.
Wennhak v. Morgan, 96, 155.
Western Counties Manure Co. v. Lawes Chemical Manure Co., 7, 111, 140, 212.
Wheatcroft v. Mousley, 330.
Whiley v. Whiley, 462.
White & Co. v. Credit Reform Association and Credit Index, 642, 659.
White v. Mellin, 768.
White v. Nicholls, 175.
White v. Tyrrell, 559.
Whitely v. Adams, 508, 513, 672, 744.
Whitfield v. Powell, 38.
Whitfield *et al.* v. South Eastern Ry. Co., 135, 167, 175, 205, 206, 210, 211.
Whitney v. Moignard, 355.
Whittaker v. Scarborough Post Newspaper Co., 642, 658.
Whittington v. Gladwin, 70, 77, 676.
Widder v. Buffalo and Lake Huron Ry. Co., 813.
Wight v. Shaw, 835.
Wilby v. Elston, 41.
Wilcocks v. Howell *et al.*, 160, 190, 356, 475, 508, 736, 807.
Wilcox v. Stewart, 499, 794.
Wild v. Tomkinson, 343.
Wiles v. Victoria Times, 621.
Wiley v. Campbell, 92.
Wilkins v. Major, 151, 153, 423, 502.
Willeston v. Smith, 720.
Willey v. Great Northern Ry. Co., 836.
Williams v. Currie, 776.
Williams v. Beaumont, 214.
Williams v. Corby, 657.
Williams v. Gardiner, 95.
Williams *et ux.* v. Holdredge, 38.
Williams v. Morris, 577.
Williams v. Ramsdale, 624.
Williams v. Scott, 389.
Williams v. Smith, 143, 317.
Williams v. Stott, 20, 350, 394.
Williams v. Ward, 838.
Williamson v. Freer, 167, 174, 175, 702.
Williamson v. Merrill, 641, 644, 645.
Willmett v. Harmer *et al.*, 571, 574.
Wills v. Carman, 409, 469, 529, 612, 613, 661, 668, 752, 759, 794, 799, 800, 807, 816, 828, 840.

Wilson v. Fitch, 326, 717.
Wilson v. Reed *et al.*, 323, 606,
Wilson v. Roberts, 831, 837.
Wilson v. Robinson, 191, 192, 564, 780.
Wilson v. Thornbury, 658.
Wilson v. West *et ux.*, 17, 365.
Wilson v. Wilson, 441.
Wilson v. Woods, 63, 413, 575, 719, 721, 723.
Wilton v. Brignall, 658.
Wineberg v. Wener, 579.
Wingard v. Cox, 627.
Winnett v. Appelbe *et ux.*, 625, 631.
Wise v. Dunning, 317.
Wise v. Hewson *et al.*, 844.
Wolfenden v. Giles, 142, 818, 820, 822.
Wood v. Adams, 352.
Wood v. Brown, 352.
Wood v. Cox, 834.
Wood v. Mackey *et ux.*, 2, 96, 183, 234, 382, 696, 697, 799.
Wood v. Mackay, 829.
Woodcock v. Houldsworth, 272.
Woodgate v. Ridout, 291, 317, 324, 591.
Woolmer v. Latimer, 717.
Woolnoth v. Meadows, 4, 46, 172, 343.
Wornack v. Circle, 37.
Wren *et al.* v. Weild, 107, 124.
Wright v. Clements, 47, 355.
Wright v. Morning Herald Printing and Publishing Co., 185, 265, 266, 267, 269, 673, 678, 804.
Wright v. Shaw, 843.
Wright v. Tatham, 799.
Wright v. Woodgate, 500, 537, 677.
Wyatt v. Gore, 156.

Y.

Yarborough *et al.* v. Bank of England, 207.
Yorkshire Provident, etc. v. Gilbert *et al.*, 642.
Young v. Macrae, 140.
Young v. Sloan, 69, 375.
Yrisarri v. Clement, 57, 363, 675.

Z.

Zenobio v. Axtell, 353.
Zierenberg v. Labouchere, 623, 638, 639.
Zwicker v. Zwicker, 703, 713, 811.

TABLE OF STATUTES CITED.

IMPERIAL.

PAGE

Statute of Westminister, II., 13 Edw. 1, c. 24. 766
10 Anne, c. 19. 241
21 Jac. 1, c. 16. 828, 829
s. 6. 830
Bill of Rights, 1 Wm. & M., St. 2, c. 2. 501, 533
60 Geo. III. 1 Geo. IV., c. 9. 241, 242
3 Wm. IV., c. 3. 24
6-7 Wm. IV., c. 76, Schedule A. 241, 242
7 Wm. IV., c. 39. 26
C. L. P. Act, 1852 (15-16 Vict. c. 76), 7, 189 328, 329, 346, 347, 348, 350, 373, 411
C. L. P. Act, 1854 (17-18 Vict. c. 125).
s. 27. 180
8-9 Vict. c. 75.
s. 2. 467
24-25 Vict. c. 96.
s. 80. 21
33-34 Vict. c. 99. 241
42-43 Vict. c. 59, Schedule, Part 2. 467
44-45 Vict. c. 60. 241
46-47 Vict. c. 49.
s. 4. 467
Married Women's Property Act, 1882, (45-46 Vict. c. 75).
s. 12. 22, 230
Extradition Act (6-7 Vict. c. 76). 19
Fox's Libel Act (32 Geo. III., c. 60), 237, 665, 822, 823
Lord Campbell's Libel Act (6-7 Vict. c. 96). 126, 237, 467
Newspaper Libel and Registration Act, 1881, (44-45 Vict. c. 60). 237, 241, 280, 304, 310, 313, 318
Law of Libel Amendment Act, 1888, (51-52 Vict. c. 64). 237, 278, 280, 301, 313, 319, 340, 341, 734, 785, 786
County Courts Act, 1888, (51-52 Vict. c. 43). 5

PAGE

Slander of Women Act, 1891, (54-55 Vict. c. 51). 4, 41, 42, 459
Vagrant Act Amendment Act, 1873, (36-37 Vict. c. 38).
s. 3. 313

DOMINION.

Alien Labour Act (R. S. C. 1906, c. 97). 654
Act amending the Law of Libel (51 Vict. c. 44),
s. 1. 241
Canada Evidence Act (R. S. C. 1906., c. 145).
s. 2. 654
s. 4. 654
s. 5. 165, 181, 647, 649, 652, 653
s. 8 181
Malicious Injuries to Property Act, (R. S. C., 1886, c. 168).
s. 26. 11
Larceny Act (R. S. C. 1886, c. 164)
s. 65. 21
Consolidated Railway Act (C. S. C. 1886, c. 66) s. 83. 480
Great Western Railway Act (16 Vict. c. 99).
s. 10. 480
Supreme and Exchequer Courts Acts (R. S. C. 1886, c. 135).
s. 29. 781
Supreme and Exchequer Courts Acts (R. S. C. 1906, c. 139).
s. 46. 781

CRIMINAL CODE.

Criminal Code, 1892, (55-56 Vict, c. 29). 28, 30, 51, 237
Criminal Code, 1892, and subsequent amendments (R. S. C. 1906, c. 146).
s. 2 (22) 241
s. 17. 343
s. 18 344
s. 19 (1) (2) (3) 344
s. 87 316

PAGE

Criminal Code—*Continued.*
s. 88. 316
s. 132. 125
s. 135. 125
s. 170 (1). 74
s. 171 (2) 679
s. 204. 51
s. 205. 838
s. 207. 125
s. 218. 30, 51
s. 277. 12
s. 278. 12
s. 291. 30
s. 292. 30
s. 294. 30
s. 317. 2, 125, 126
s. 318. 2, 96, 155, 272, 455
s. 319. 530
s. 320. 502
s. 321. 307
s. 322. 279, 294, 307
305, 307
s. 324. 323, 618, 795
s. 325 (1) (2). 581, 606, 607, 618, 795
s. 326. 531
s. 327. 526
s. 328. 506
s. 329. 184
s. 329 (1) (2). 273
s. 329 (3). 274
s. 330. 184
s. 330 (1) (2). 274
s. 331. 545, 568, 718
s. 347 (1). 20
s. 354. 22
s. 390. 21
s. 406. 447
s. 443. 292
s. 454. 450
s. 852. 24, 355
s. 861 (2) (3). 348, 373
s. 870. 574
s. 873 (4). 574
s. 889. 24
s. 910. 545, 568, 569, 718
s. 911. 569
s. 951. 30

BRITISH COLUMBIA.

Married Woman's Property Act (R. S. B. C. 1897, c. 130).
ss. 5, 14, 31, 32. 224
Law of Defamation Amendment Act (R. S. B. C. 1897, c. 120).
s. 2. 249
s. 3. 278
s. 5. 4, 43 441
s. 6. 203, 437, 466, 467, 470, 472, 782

PAGE

Law of Defamation Amendment Act—*Continued.*
s. 7. 467
s. 8. 465
s. 9. 341, 734
s. 10. 347
s. 11. 665
s. 12. 340, 739
s. 13. 340, 784, 845
s. 15. 331
s. 16. 435
R. S. B. C. c. 31,
s. 14. 821
Supreme Court Act (3-4 Edw. VII., c. 15),
s. 100. 831

MANITOBA.

Married Woman's Property Act (R. S. M. 1902, c. 106),
ss. 11, 15, 16. 224
King's Bench Act (R. S. M. 1902, c. 40).
s. 59. 662
s. 471. 719
s. 931. 831, 834
Libel and Slander Act, 1887, (50 Vict. c. 22),
s. 11. 690, 762, 764, 812.
Libel and Slander Act (R. S. M. 1902, c. 97).
s. 2 (a). 240
s. 2 (b). 305
s. 3. 278
s. 4 (1). 305
s. 5. 251, 458, 472
s. 6. 347
s. 7. 465
s. 8. 203, 466
s. 9. 467
s. 10. 435
s. 11. 331
s. 12. 665
s. 13. 831, 832, 834
s. 14. 237, 263, 457
Newspaper Act (R. S. M. 1902, c. 125), 237, 240, 262, 263, 278, 305, 419, 457

NEW BRUNSWICK.

21 Jac. 1, c. 16, 829
31 Geo. 3, c. 5. 36, 48, 377
45 Vict. c. 9.
s. 7. 829
Married Woman's Property Act (C. S. N. B. 1903, c. 78).
s. 3 (2). 224
s. 4 (3). 223
s. 10. 739, 784, 845

PAGE

Married Woman's Property Act—*Continued.*
s. 14. 839
s. 15. 739
s. 16. 739
C. S. N. B. 1903, Appendix, p. 2397. 51
C. S. N. B. Title 39, c. 145.
s. 3. 30
Libel Act (C. S. N. B. c. 136).
s. 2 (1). 240
s. 3. 305
s. 4. 251, 472
s. 5. 465
s. 6. 466
s. 7. 467
s. 8. 331
s. 9. 665
s. 10. 340
s. 11. 263
Judicature Act (6 Edw. VII., c. 37). 239
s. 27. 662
s. 31. 662
s. 32. 662

NOVA SCOTIA.

R. S. N. S. 5th Series, c. 104, Appendix, p. 1143. 829
Judicature Act (R. S. N. S. 1900, c. 155), Ord. 19, R. 29. 43
Married Woman's Property Act (R. S. N. S. 1900, c. 112).
ss. 13, 14, 24, 25, 26 224
Newspaper Libel Act (R. S. N. S. 1900, c. 180).
s. 1 (a). 240
s. 1 (b). 305
s. 2. 306

UPPER CANADA AND ONTARIO.

C. S. U. C. 1859, c. 103, s. 2. 558
Practice of the Superior Courts, 16 Vict., c. 175. 828
Amending C. L. P. Act, 31 Vict., c. 24. 828
Married Woman's Property Act, 1872, 36 Vict. c. 16, 227, 228, 230
Practice of the Superior Courts (42 Vict. c. 15), s. 7. 646
Evidence Amendment Act, 1882, 45 Vict. c. 10. 650
Married Woman's Property Act, 1884, 47 Vict. c. 19, 86, 228, 229, 230, 231, 232
Law Courts Act, 1896, 59 Vict. c. 18, s. 6. 651
Administration of Justice Act (R. S. O. 1877, c. 49) s. 5. 332

PAGE

C. L. P. Act (R. S. O. 1877, c. 50) 156, 635
s. 156. 650
Registry Act (R. S. O. 1877), c. 111.
s. 2. 120
Evidence Act (R. S. O. 1877), c. 73.
s. 27. 680
Married Woman's Property Act (R. S. O. 1877), c. 125. 227, 229
s. 20. 226
Ontario Medical Act (R. S. O. 1877, c. 142).
Married Woman's Property Act, R. S. O. 1887, c. 132.
s. 3 (2). 232
Interpretation Act (R. S. O. 1897, c. 1).
s. 8 (23) 677
s. 21. 64, 65
Newspaper Libel Act, 1882 (40 Vict. c. 9).
s. 3. 322
Law of Slander Amendment Act, 1889, 52 Vict. c. 14, consolidated in R. S. O. 1897, c. 68. 4, 43, 49
Statute of Limitations (R. S. O. 1897, c. 72) 185, 401, 479, 482
ss. 3, 4, 5. 480
Protection of Public Officers' Act (R. S. O. 1897, c. 136).
s. 1. 120, 121
s. 2 (1). 121
Evidence Act (R. S. O. 1897, c. 73).
s. 5. 165, 649, 651, 655
s. 8. 644
s. 27. 799
Election Act (R. S. O. 1897, c. 9).
s. 2 (8). 256, 456, 471
Security for Costs to Justices (R. S. O. 1897, c. 89).
s. 1. 441, 461, 462
County Courts Act (R. S. O. 1897, c. 55).
s. 22 (3) 832
Judicature Acts, 124, 190, 239, 328, 329, 332, 334, 335, 352, 355, 400, 401, 402
s. 72. 844
s. 102. 108, 361, 662
s. 108. 662
s. 112. 662
Married Women's Property Act (R. S. O. 1897, c. 163) 85
s. 3 (2). 221
s. 16. 222, 226
s. 17. 223, 225, 231
s. 18. 223, 225
Libel and Slander Act (R. S. O. 1897, c. 68).
s. 1. 239, 243

PAGE

Libel and Slander Act—*Continued.*
s. 2. 665, 447
s. 3. 347, 558
s. 4. 465
s. 5. 43, 46, 333, 788
s. 6. 203, 251, 256, 257, 259, 355, 401, 434, 437, 456, 466, 468, 470, 471, 472, 484, 782
s. 7. 401, 467
s. 8. 322
s. 9. 278, 445
s. 10. 434, 435, 449, 454, 457
s. 11. 331
s. 13. 482, 483, 484
s. 14. 339, 340, 739, 784, 845
s. 15. 435
s. 16. 341, 734
s. 17. 336, 337
Statute Law Amendment Act, 1904, (4 Edw. VII., c. 10).
s. 21. 156, 647, 651, 652, 653, 655, 661
Amending Libel and Slander Act (6 Edw. VII., c. 22).
s. 1. 239, 244, 308
s. 2. 322

PAGE

PRINCE EDWARD ISLAND.

Amending Law of Libel (28 Vict. c. 25).
s. 2. 203
Libel Act, 1865, (52 Vict. c. 9). 240
Evidence Act (52 Vict. c. 9).
s. 54. 241, 264
Married Woman's Property Act, 1903, (3 Edw. VII. c. 9).
ss. 3 (2), 12, 13, 14. 224

QUEBEC.

R. S. Q. 1888, Article 1598. 481
R. S. Q. 1888, Articles 2924-2938. 237, 288, 241, 263, 335
Code Civile. 102, 239, 328
Article 262. 150
Article 833. 788
Articles 1053-1054. 149, 219, 517, 521, 522, 775
Article 1294. 234
Article 2262. 480
C. C. P. 215. 236
North-West Territories Consolidated Ordinances, 1898, c. 30. 4, 43
Yukon Consolidated Ordinances, 1902, c. 28. 4, 44

TABLE OF ORDERS AND RULES CITED.

BRITISH COLUMBIA.

	PAGE
Supreme Court Rules, 1890, Order 36, Rule 329.	662
1900, Order 65, Rule 75 (1).	831
1900, Rule 359.	719

MANITOBA.

King's Bench Act (R. S. M. 1902, c. 40) Rule 926.	788

NOVA SCOTIA.

Order 19, Rule 29.	4, 43
22, Rule 1.	479
34, Rule 30.	719
37, Rule 4.	711
Rule 42 (1) (a)	662
63, Rule 1.	831

ONTARIO.

Consolidated Chancery Orders, 138-148.	635, 638
Consolidated Rule 300, O.J.A.	81
345, O.J.A.	81
384, O.J.A.	729, 730
399, O.J.A.	730
573, O.J.A.	730
Rule 2, O.J.A.	830
127, O.J.A.	487, 488, 489
168, O.J.A.	487, 489
178, O.J.A.	489
185, O.J.A.	332, 333
186, O.J.A.	334, 336
192, O.J.A.	334
197, O.J.A.	343
Rule 206, O.J.A.	333, 334
217, O.J.A.	344
227, O.J.A.	646
251-254 O.J.A.	486, 489
254, O.J.A.	487
259, O.J.A.	403, 730
260 O.J.A.	403
261, O.J.A.	256, 257, 258, 404
268, O.J.A.	359, 402, 705, 729, 730, 731
269, O.J.A.	403, 705
270, O.J.A.	403
271, O.J.A.	705
272, O.J.A.	403, 675, 705
286, O.J.A.	352, 403
298, O.J.A.	258, 353, 355, 401
313, O.J.A.	333
374, O.J.A.	489
394, O.J.A.	345, 485
419, O.J.A.	479
420, O.J.A.	479
439, O.J.A.	646, 647
461, O.J.A.	719
488, O.J.A.	644, 719, 730, 731, 732, 847
529 O.J.A.	329
578, O.J.A.	787, 788
615, O.J.A.	663
780, O.J.A.	544
785, O.J.A.	780
1130, O.J.A.	831, 839, 841, 844
1132, O.J.A.	831
1175, O.J.A.	845
1176, O.J.A.	847
1198, O.J.A.	433, 439, 485, 636, 637
1208, O.J.A.	440
1248 O.J.A.	439

LIST OF ABBREVIATIONS.

(Omitting the Abbreviations of English Reports)

Abb. Pr. R. (N.Y.)	Abbot's New York Practice Reports.
Allen	Allen's New Brunswick Reports.
Amer. R.	American Reports.
Barbour (N.Y.)	Barbour's New York Supreme Court Reports.
Berton	Berton's New Brunswick Reports.
B. C. R.	British Columbia Reports.
Bush. (Ky.)	Bush's Kentucky Reports.
Cal.	California Reports.
C. C.	Criminal Code of Canada.
(C. C.)	Circuit Court of Quebec.
C. L. J.	Canada Law Journal.
C. L. T. (Occ. N.)	Canadian Law Times, Occasional Notes.
Chipman	Chipman's New Brunswick Reports.
Cowen (N.Y.)	Cowen's New York Reports.
C. S. N. B.	Consolidated Statutes of New Brunswick.
Cush.	Cushing's Massachusetts Reports.
Daly (N.Y.)	Daly's New York Common Pleas Reports.
Drap. Rep.	Draper's Upper Canada King's Bench Reports.
E. & A.	Upper Canada Error and Appeal Reports.
E. L. R.	Eastern Law Reporter.
Ex. R.	Exchequer Court of Canada Reports.
Ga.	Georgia Reports.
G. & R.	Geldert and Russell's Nova Scotia Reports.
Grat. (Va.)	Grattan's Virginia Reports.
Gray (Mass.)	Gray's Massachusetts Reports.
How Pr. (N.Y.)	Howard's New York Practice Reports.
Ill.	Illinois Reports.
Ind.	Indiana Reports.
James	James' Nova Scotia Reports.
Johns. (N.Y.)	Johnson's New York Reports.
Kerr	Kerr's New Brunswick Reports.
La. Ann.	Louisiana Annual Reports.
Lathrop's Rep.	Lathrop's Massachusetts Reports.
Lea Tenn.	Lea's Tennessee Reports.
L. C. J.	Lower Canada Jurist.
L. C. L. J.	Lower Canada Law Journal.
L. C. R.	Lower Canada Reports.

L. N. ..... Legal News (Quebec).
Mass. (Met.) ..... Metcalf's Massachusetts Reports.
Mass. (Pick.) ..... Pickering's Massachusetts Reports.
Me. ..... Maine Reports.
Mich. ..... Michigan Reports.
Minn. ..... Minnesota Reports.
Miss. ..... Mississippi Reports.
Mo. ..... Missouri Reports.
Monroe (Ky.) ..... Monroe's Kentucky Reports.
Montana T. ..... Montana Territory Supreme Court Reports.
M. L. R. ..... Manitoba Law Reports.
Mon. L. R., K. B. ... Montreal Law Reports, King's Bench.
Mon. L. R., Q. B. ..... Montreal Law Reports, Queen's Bench.
Mon. L. R. S. C. ..... Montreal Law Reports, Superior Court.
Neb. ..... Nebraska Reports.
N. B. R. ..... New Brunswick Reports.
N. E. Rep. ..... North Eastern Reporter.
N. H. ..... New Hampshire Reports.
N. J. ..... New Jersey Reports.
N. S. D. ..... Nova Scotia Decisions.
N. W. Rep. ..... North Western Reporter.
N. Y. ..... New York Reports.
N. Y. Suppl. ..... New York Supplement.
Oldright ..... Oldright's Nova Scotia Reports.
O. A. R. ..... Ontario Appeal Reports.
O. L. R. ..... Ontario Law Reports (since 1900).
O. P. R. ..... Ontario Practice Reports.
O. R. ..... Ontario Reports (before 1900).
O. W. R. ..... Ontario Weekly Reporter.
Otto (U.S.) ..... Otto's United States Supreme Court Reports.
Pa. ..... Pennsylvania State Reports.
Penn. St. ..... Pennsylvania State Reports.
Pickering (Mass.) .... Pickering's Massachusetts Reports.
Porter (Ala.) ..... Porter's Alabama Reports.
P. & B. ..... Pugsley and Burbidge's New Brunswick Reports.
Pugs. ..... Pugsley's New Brunswick Reports.
Q. L. R. ..... Quebec Law Reports.
Q. O. R. (K.B.) ..... Quebec Official Reports, King's Bench.
Q. O .R. (Q.B.) ..... Quebec Official Reports, Queen's Bench.
Q. O. R. (S.C.) ..... Quebec Official Reports, Superior Court.
Q. R., K. B. ..... Quebec Reports, King's Bench.
Q. R., Q. B. ..... Quebec Reports, Queen's Bench.
Q. R., S. C. ..... Quebec Reports, Superior Court.
R. L. ..... Revue Légale (Quebec).
Rev. de Leg. ..... Revue de Législation (Quebec).
R. and G. ..... Russell and Geldert's Nova Scotia Reports.
R. S. C. ..... Revised Statutes of Canada.
R. S. B. C. ..... Revised Statutes of British Columbia.
R. S. M. ..... Revised Statutes of Manitoba.

R. S. N. S. ..... Revised Statutes of Nova Scotia.
R. S. O. ..... Revised Statutes of Ontario.
R. S. Q. ..... Revised Statutes of Quebec.
Sawyer (U.S.) ..... Sawyer's United States Circuit Court Reports.
S. C. R. ..... Supreme Court of Canada Reports.
Sumner (U.S.) ..... Sumner's United States Circuit Court Reports.
Tay. Rep. ..... Taylor's Upper Canada King's Bench Reports.
Thacker's C. C. ..... Thacker's Massachusetts Criminal Cases.
U. C. C. P. ..... Upper Canada Common Pleas Reports.
U. C. Q. B. ..... Upper Canada Queen's Bench Reports.
U. C. R. (O. S.) .... Upper Canada Queen's Bench Reports, Old Series.
Vt. ..... Vermont Reports.
Wis. ..... Wisconsin Reports.
Wend. ..... Wendell's New York Reports.
W. L. R. ..... Western Law Reporter.

ERRATA ET CORRIGENDA.

Page 2, note (*c*), *for* Cannon, *read* Gannon.
" 2, note (*d*), *for* MacKay, *read* Mackey.
" 26, line 14, *for* defence, *read* offence.
" 39, line 4, *for* where action, *read* when action.
" 43, line 2, *for* was affected, *read* was effected.
" 51, note (*u*), Sec. 176, *add* now Sec. 204.
" 58, notes (*p*) and (*s*), *for* Carseny, *read* Curseny.
" 66, note (*pp*), *for* Beunmarris, *read* Beuwmorris.
" 87, note (*o*), *for* Countess, *read* Counties.
" 96, note (*u*), *for* MacKay, *read* Mackey.
" 134, note (*bb*), *for* p. 134, *read* p. 130.
" 160, note (*d*), *for* Willcocks, *read* Wilcocks.
" 165, note (*j*), *for et al.*, *read et ux.*
" 181, line 11, *for* by jury, *read* by the jury.
" 183, note (*o*), *for* MacKay, *read* Mackey.
" 196, note (*f*), *for* Stanns, *read* Stannus.
" 234, note (*y*), *for* MacKay, *read* Mackey.
" 237, note (*e*), *add*, now R. S. C. 1906, c. 146.
" 241, note (*s*), *for* R. S. O., *read* R. S. Q.
" 276, note (*n*), *for et al., read et ux.*
" 291, note (*y*), *for* Haywood, *read* Hayward.
" 293, line 17, *for* (*d*), *read* (*dd*).
" 382, note (*i*), *for* MacKay, *read* Mackey.
" 485, line 28, *for Actio personalis moritur cum personâ*, *read Actio personalis cum personâ moritur.*
" 532, note (*dd*), *for* Tremaint, *read* Tremaine.
" 579, note (*z*), *for* (S.C.) 348, *read* 8 (S.C.) 348.
" 603, note (*bb*), *for* evidence on malice, *read* evidence of malice.
" 755, line 2, *for* (*l*), *read* (*t*).
" 829, note (*d*), *for* P. & D., *read* P. & B.

THE LAW OF DEFAMATION.

CHAPTER I.

INTRODUCTION.

Slander and libel defined.

The law of defamation embraces slander, or oral defamation, and libel, or written defamation, *i.e.*, "written" in the sense of being also printed, or painted, or otherwise so represented as to distinguish it from oral defamation. In either case the defamatory words, statements, or representations, must be false, and must be calculated to expose the complainant to hatred, ridicule, or contempt, or cause him to be shunned or avoided, or have a tendency to injure him in his office, profession, business, or calling. If the words or statements are spoken, or are communicated by signs or gestures, *e.g.*, the language of the deaf mute, they constitute slander; if they are in writing, printing, or any other permanent form, *e.g.*, a picture or effigy, and are published or exhibited, they constitute libel. An action lies in respect of any wilful communication oral or written to the damage of another, in law or in fact, made without lawful justification or excuse(*a*).

When words actionable per se, and when not.

Spoken words, which are *primâ facie* injurious to the person referred to, are clearly defamatory; and, if false, are actionable without proof of any particular damage, as, *e.g.*, to charge a person with perjury, or, if he is a trader, with being insolvent. They are then said to be actionable *per se*, because, on the face of them, they are plainly hurtful to the complainant's personal or business character or reputation. To use the phrase of Fortescue, J., in *Button* v. *Heyward*(*b*), they "sound to the disreputation" of the plaintiff. Proof of damage for such words is unnecessary; the law presumes damage from the use of the words themselves. Words, however, which merely *might* tend to injure a person's

(*a*) Folkard's Law of S. & L., 6th Ed., 78.
(*b*) (1722) 8 Mod. 24.

reputation are *primâ facie* not defamatory, and even if false are not actionable, unless the complainant can prove that he has sustained damage, *i.e.*, special damage, from their employment. Where the words are not actionable *per se*, the plaintiff cannot recover damages for their publication without an innuendo, which must be specific and distinctly aver a definite actionable meaning(*c*). Libel is actionable without proof of special damage.

Publication.

But defamation, whether oral or written, is not actionable unless it be published, *i.e.*, communicated, in the case of slander, intelligibly by words or gestures, and, in the case of libel, by writing, signs or representations, to some third person. Such a communication solely to the person defamed, and not in the hearing, or, as in some cases, in the sight of any other person is harmless; it does not constitute a tort or civil wrong since no damage ensues from the act(*d*). But at common law, or under the Criminal Code (R.S.C. 1906, c. 146) publication of the libellous matter to the person defamed is criminal and indictable on the ground of its tendency to produce a breach of the peace(*e*). In fact the mode of publication of defamatory matter, and its consequences, constitute one of the marked distinctions between slander and libel(*f*).

Distinctions between slander and libel.

Slander is a tort or civil wrong, unless the words are blasphemous, seditious, or grossly immoral or obscene, or unless they solicit, or are intended to provoke, the commission of a crime(*g*), or are a contempt of court(*h*), in any of which cases they may amount to a crime. Libel, on the other hand, is both a civil wrong and an indictable offence. Slander, which is often the ebullition of the moment, is less injurious than libel on the principle of the Latin phrase, *vox emissa volat; litera scripta*

(*c*) *Per* Ritchie, J., in Tobin v. Cannon (1901) 34 N.S.R. 9.

(*d*) Wood v. MacKay *et ux.* (1881) 21 N.B.R. 109; Edwards v. Wooton (1608) 12 Coke's Rep. 35; Phillips v. Jansen (1798) 2 Esp. 624; R. v. Wegener (1817) 2 Stark. 245.

(*e*) R. v. Wegener, *supra.*

(*f*) See C.C. ss. 317, 318, as to how defamatory matter may be expressed and as to the definition of "publishing."

(*g*) Rex v. Higgins (1801) 2 East, 5; Rex v. Philipps (1805) 6 East, 464.

(*h*) Rex v. Pocock (1741) 2 Str. 1157.

manet, and there is, therefore, but one remedy, a civil action, for the wrong, while for libel, which is deliberate, more extensive in its evil influence, and tends to a breach of the peace, there are two remedies, a civil action and an indictment or criminal information.

The remedies civil and criminal.

An indictment involves an inquiry by a magistrate upon a sworn complaint laid before him, and a further inquiry by a grand jury; a criminal information is a charge preferred by the Provincial Attorney General *ex officio*, either without the leave of the Superior Court of the Province, or at the instance of a private prosecutor, called the relator, with the leave of such court, and without the intervention of the grand jury. The remedy by information has been usually resorted to only in urgent cases, or for very imperative reasons. It is rarely invoked, and, if refused by the court, leaves the remedy by indictment, or, if the court permits it, by civil action also, still open to the applicant.

When proof of special damage unnecessary.

Another noticeable distinction between slander and libel is, that an action will not lie for slander without proof of special damage, except in the four cases hereinafter mentioned, whereas an action will lie for libel in every case even though no special damage can be proved. The reason is, that in libel the defamatory statement being either written or printed, or in some other permanent form, the law assumes that the person defamed has necessarily suffered damage, and, therefore, is entitled to maintain an action, even though he does not and cannot prove that he has sustained any definite temporal loss, or, as it is technically called, special damage(*i*). In slander, on the other hand, the defamatory statement being merely verbal, the plaintiff cannot succeed without proof of special damage, except in the following cases, viz.:—

Imputation of criminal offence.

1. Where the words spoken impute to the plaintiff the commission of a criminal offence punishable by law(*j*).

(*i*) Ratcliffe v. Evans (1892) 2 Q.B. at p. 529; *per* Kay, L.J., in South Hetton Coal Co. v. N. E. News Association (1894) 1 Q.B. at p. 144.

(*j*) Com. Dig. Action on the case for defamation (D. 1-10) (F. 1-7,

Imputation of contagious disease.

2. Where the words spoken may have the effect of excluding the plaintiff from society, as, *e.g.*, by imputing that he has some infectious or contagious disease(*k*), which he was suffering from at the time the words were spoken(*l*).

Words hurtful to a person in his office, profession, etc.

3. Where the words spoken of the plaintiff are in relation to his office, profession, trade, or means of livelihood, and may impair or hurt him in that relation(*m*).

Imputations of unchastity.

4. Where, under certain Provincial Acts and Territorial Ordinances, the words spoken of any woman impute or mean that she has committed, or has been guilty of, adultery, fornication, or concubinage(*n*). Prior to the passing of these enactments no action lay in such a case without proof of special damage. The English Act on the subject is 54-55 Vict. c. 51, passed August 5, 1891, and differs somewhat from the Ontario statute. It relates to "words . . . which impute unchastity or adultery to any woman or girl," and provides that "a plaintiff shall not recover more costs than damages, unless the judge shall certify that there was reasonable ground for bringing the

12-18). See, also, 3 Wils. 186; 2 W. Bl. 750; 959, Cowp. 275; 2 Wils. 300; 6 T.R. 694; Roberts v. Camden (1807) 9 East 92; Woolnoth v. Meadows (1804) 5 East 463; 2 N.R. 335; 4 Price 46; 7 Taunt. 431; Webb v. Beavan (1883) 11 Q.B.D. 609; 52 L.J.Q.B. 544; 49 L.T. 201; 47 J.P. 488.

(*k*) Com. Dig. Action on the case for Defamation (D. 28, 29) (F. 11, 19) 2 Burr. 930; Villiers v. Mousley (1769) 2 Wils. 403; Taylor v. Perkins (1607) Cro. Jac. 44; 1 Roll. Abr. 44; Bloodworth v. Gray (1844) 7 M. & G. 334. *Per contra*, James v. Rutlech (1599) 4 Rep. C.; Villiers v. Mousley, *supra*.

(*l*) *Per* Ashurst, J., in Carslake v. Mapledoram (1788) 2 T.R. at p. 475. See, also, Taylor v. Hall (1742) 2 Str. 1189.

(*m*) Finch L. 186. See cases in Com. Dig. *ubi supra* (D. 22-27) (F. 9, 10) Fitz. 121; 2 W. Bl. 750; 3 Wils. 59; 186; 2 Str. 898; 2 Stark. N.P.Rep. 245, 297; 4 Esp. 191; 3 Bos. & P. 372; 3 Bing. 184; 5 B. & C. 150; I. C. & J. 143; 2 A. & E. 2; 5 M. & W. 249; Phillips v. Jansen (1798) 2 Esp. 624.

(*n*) The Ontario Law of Slander Amendment Act, 1889 (52 Vict. c. 14, s. 1), now consolidated in R.S.O. 1897, c. 68, s. 5. There are enactments to the same effect in British Columbia (R.S.B.C. 1897, c. 120, s. 5), in Nova Scotia under the rules of the Judicature Act (R.S.N.S. 1900, c. 155 Ord. 19, R. 29), in the North-West Territories of Canada (Consolidated Ordinances, 1898, c. 30), and in the Yukon Territory (Consolidated Ordinances, 1902, c. 28); but none, strange to say, in any of the other Provinces.

action"(*o*). Although, in England, an action for libel or slander may be remitted to the County Court, under certain circumstances(*p*), it has been held that, where the alleged slander was an imputation upon the chastity of a married woman, the imputation was sufficiently grave to make an action fit to be tried in the High Court(*q*).

In the above four cases the words are said to be actionable *per se*. In any other case no action for slander will lie unless the plaintiff can prove that, in consequence of the words complained of, he has sustained some special damage.

With respect to both libel and slander it must appear that the defamatory statement referred to the complainant; and the statement itself must be construed in its natural or ordinary meaning, or, if not defamatory in that sense, it must be taken in the sense in which it was understood by the persons to whom it was addressed(*r*).

The intention of defendant immaterial.

On the presumption that every person intends the natural consequence of his acts, a defendant cannot escape liability for either oral or written defamation by alleging innocence of intent to injure. Whatever his intent, motive, or purpose when he spoke the words, or published the writing complained of, or however harmless in their consequences he may have thought they were, if he has in fact injured the plaintiff, he is liable. Proof of the innocence of his intent can only go in mitigation of damages.

An exception to the rule.

This is the rule, but it has an important exception or qualification. When the defendant has made the defamatory statement *bonâ fide*, *e.g.*, when he had an interest in making it to a person who had a corresponding interest in receiving it, or when it was his duty to make it, this mutuality of interest, or the

(*o*) S. 1.

(*p*) Under the County Courts Act, 1888, 51-52 Vict. c. 43.

(*q*) Critchley v. Brown (1886) 2 T.L.R. 238.

(*r*) Capital and Counties Bank v. Henty (1882) 7 App. Cas. 741; 47 L.T. 662; 52 L.J.Q.B. 232; Russell v. Natcutt (1896) 12 L.T.R. 195. See, also, the rule as stated by Street, J., in Albrecht v. Burkholder (1889) 18 O.R. 287, where Capital and Counties Bank v. Henty, *supra*, is referred to.

defendant's duty to speak or write as he did, regardless of the consequences, constitutes what is called privilege.

Defamatory statements which are privileged.

The statement is privileged or protected by reason of the *occasion* of its publication, which simply means the circumstances under which the publication took place. The privilege may be absolute or qualified, also called conditional. In the former case it is a complete answer to the proceedings, civil or criminal, and whether for oral or written defamation. In the latter case it is also an answer, unless the plaintiff can prove that the defendant, in making the publication, has exceeded what was necessary for the occasion, or has not acted *bonâ fide*, in other words, was actuated by some improper or indirect motive. The chapter on Privilege deals fully with this important doctrine.

Slander of title.

Slander of title is also conveniently dealt with in works on the law of defamation, although in strictness it forms no part of that law, because it does not affect reputation.

When actionable.

Where a person has any interest in property, real or personal, and his title thereto is falsely and maliciously denied or impugned, either orally or in writing or printing, and special damage ensues, he may maintain an action for slander of title. The statements complained of must be false, malicious, and the cause of special damage(*s*). By "malicious" is meant a want of good faith, or any wrong or bad motive; the damage sustained must be some actual temporal loss.

Slander of goods.

There may also be slander of goods manufactured or sold by another; which may concurrently be slander of the *person* as well as of the *thing*, if fraud or dishonesty of any kind be imputed to the manufacturer or seller.

(*s*) *Per* Parke, B., in Brook v. Rawl (1849) 19 L.J. Ex. at p. 115; *Per* Maule, J., in Pater v. Baker (1847) 3 C.B. at p. 831; *Per* Proudfoot, J., in Ontario Industrial Loan and Investment Co. v. Lindsey, *et al.* (1883) 4 O.R. 473, at p. 484.

Definition of the wrong.

Slander of goods has been defined by Bramwell, B.(*t*), as a false statement, oral, written, or printed, published maliciously, or without lawful occasion, disparaging a man's goods, and causing him special damage. It is actionable. "Such an action," said the court in *Ratcliffe* v. *Evans*(*u*), "is not one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title. To support it, actual damage must be shewn, for it is an action which only lies in respect of such damage as has actually occurred." Slander of goods like slander of title, is, strictly speaking, no part of the law of defamation, and the rules of law relating to both of these wrongs are entirely different from those relating to slander and libel.

Injunctions against libels and slanders.

The granting of an injunction against the threatened publication of defamatory matter, whether written or oral, and against the repetition or renewal of the publication, is no longer in question as it once was(*v*). Libel being a crime, and specially a question for the jury, it was held repeatedly, in England, prior to the Common Law Procedure Act, 1852, and until the passage of the Judicature Act, 1873, that the courts had no jurisdiction to restrain the publication of a libel as such, unless it was a contempt of court, or unless it was injurious to property. "The publication of a libel," said Lord Eldon, C., "is a crime; and the Court of Chancery has no jurisdiction to prevent the commission of crimes"(*w*). And for the same reason it was held, that that court could not interfere by injunction to prevent the publication of works impugning, or tending to impugn, the doctrines of the Holy Scriptures, or works of a blasphemous, obscene, or immoral character(*x*). The proper remedy, it was

(*t*) In Western Counties Manure Co. v. Lawes Chemical Manure Co. (1874) L.R. 9 Ex. 218, 222; 43 L.J. Ex. 171.

(*u*) (1892) 2 Q.B. at p. 527.

(*v*) *Per* Boyd, C., in Quirk v. Dudley *et al.*, 4 O.L.R. (1902) 532.

(*w*) 2 Swanst. 413.

(*x*) Lawrence v. Smith (1822) 1 Jacob 471. See, also, Southey v. Sherwood *et al.* (1817) 2 Mer. 435; Walcot v. Walker (1802) 7 Ves. 1; Stockdale v. Onwhyn (1826) 5 B. & C. 173.

said, was by indictment or information. But *Loog* v. *Bean*(*y*) shews that oral slander may be restrained, and that the court has jurisdiction in a clear case to restrain even that unruly member the tongue(*z*). The law of Canada as to injunctions in libel and slander has always been the same as the law of England; and, as noticed in the chapter on Injunctions, the changes in English procedure and practice have been followed by corresponding changes in this country.

Slander when actionable without special damage.

We shall now consider when an action for slander, as affecting reputation, will lie without proof of special damage. It lies, as we have seen, in the following cases:—

1. Where the words impute a criminal offence to the plaintiff.

2. Where they impute a contagious or infectious disease of a particular kind.

3. Where they convey an injurious imputation affecting the plaintiff's office, profession, business, or calling.

4. Where, in some of the Provinces and Territories, they impute unchastity or adultery to any woman or girl.

The rules which regulate the action in each of these cases, and the cases illustrating them, will be considered in the following chapters.

(*y*) (1884) 26 Ch. D. 306.

(*z*) *Per* Boyd, C., in Quirk v. Dudley *et al.*, *supra*.

PART I. SLANDER.

CHAPTER II.

Slander Imputing Crime.

Grounds of action and rule governing it.

The grounds of action for the imputation of a criminal offence are the plaintiff's presumed degradation in society and his exposure to criminal liability, or to such criminal censure as arises from his being charged with a crime for which punishment has been suffered or pardon granted(*a*). The general rule to be deduced from the authorities is, that where the words contain an imputation of a crime punishable by imprisonment, *i.e.*, for which corporal punishment may be inflicted in the first instance, they are actionable without proof of special damage. But where the words impute an offence punishable only by penalty or fine, *or*, in default of payment of the fine, by imprisonment, an action will not lie, except on proof of special damage, imprisonment not being the primary and immediate punishment for such an offence(*b*).

Action lies although the person slandered is not jeopardized thereby.

It is not essential, however, to the maintenance of an action that the person against whom the imputation is made should thereby be placed in jeopardy.

Opinion of Robinson, C.J.

In one of the early decisions in Upper Canada(*c*), Robinson, C.J., said: "Without going into an examination of the multitude

(*a*) McCann v. Kearney (1880) 20 N.B.R. (4 P. & B.) 84; Fowler v. Dowdney (1838) 2 Moo. & Rob. 119; Leyman v. Latimer *et al.* (1877-8) 3 Ex. D. 15, 352; 46 L.J. 765; 47 L.J. 470.

(*b*) Ogden v. Turner (1705) 6 Mod. 104; 2 Salk. 696; Holt 40; McCabe v. Foot, 18 Ir. Jur. (Vol. 11 N.S.) 287; 15 L.T. 115; Preston v. DeWindt (1884) Times 7 July; Herrington v. McBay (1888) 29 N.B.R. 670; Routley v. Harris (1889) 18 O.R. 405; Webb. v. Beavan (1883) 11 Q.B.D. 609; 52 L.J.Q.B. 544; 49 L.T. 201; 47 J.P. 488.

(*c*) Smith v. Collins (1846) 3 U.C.Q.B. at pp. 2, 3.

of decisions in actions of slander, many of which (among the older cases) are directly opposed to each other, we take it not to be at this day necessary to an action for slander, that it should impute some crime for which the plaintiff would still be liable to be punished or harassed, if the charge were believed to be true. No doubt it was at one time held, that the words, to be actionable in themselves, must charge a crime, for which a party might, in consequence of the charge made, be still in danger of being *indicted*, and, upon conviction, punished by loss of life or limb, or at least by some infamous corporal punishment. And several cases have been decided on this principle, and a remedy denied, because the person slandered could not be brought in danger; as when a person, said to have been murdered by the plaintiff, was shewn to be living, but the law is not so now; it is sufficient if the words maliciously impute a crime to the plaintiff of *that nature* that it would, considered merely with respect to the legal character of the offence, subject any one who should commit it to corporal punishment(*d*). It is not indispensable that the person slandered should, by reason of the words, actually stand in danger of being so punished. . . . And as the law is now settled, I conceive that what is meant by the principle that the words must impute an offence is, that they must contain some charge of a definite crime known to our law, for which a person committing it might be punished in a temporal court by death, banishment, imprisonment, or other corporal punishment (admitting that the punishment must be of this description), taking this standard merely as characterizing the gravity of the imputation."

When slander lies for imputing a criminal offence.

As already stated, slander lies without proof of special damage for imputing a criminal offence punishable by imprisonment; but not, without proof of special damage, for imputing an offence punishable merely by pecuniary penalty. In an action for slander the words uttered were alleged to have publicly charged the plaintiff with maliciously injuring the defendant's growing crops, and throwing down his fences "for the purpose and with the effect" of letting horses and cattle in to destroy said crops, this being an offence under an Act respect-

(*d*) Bac. Abr.: Slander.

ing malicious injuries to property(*e*), and exposing the guilty person to a money penalty *or* to imprisonment. The plaintiff also alleged that defendant uttered words against him referable to an offence under section 27 or section 59 of the same statute, the breach of which did not involve imprisonment, but only a pecuniary penalty. The material parts of the statement of claim alleging these slanders were demurred to on the ground that they did not disclose any cause of action which was actionable without proof of special damage, none of the offences charged in the alleged slander being indictable offences.

Opinion of Boyd, C.

The demurrer, which was to the whole claim, was disallowed by Boyd, C., who said that "any defamatory charge referable to wrong-doing under either the 26th or 58th sections would be actionable without special damage; but, if such defamation imports wrong-doing under the 27th or 59th sections, then I take it special damage must be alleged according to the principles recognized in *Webb* v. *Beavan*(*f*). Pollock, B., there says, 'the distinction seems a natural one, that words imputing that the plaintiff has rendered himself liable to the mere 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 (p. 610). . . The other charge as to cutting the bands of oat sheaves, is not so pleaded as to indicate that the offence imputed is under the 58th section rather than the 59th. As against the pleader I should read it as referable to the 59th section, the breach of which involves only pecuniary liability' "(*g*).

Webb v. Beavan (1883).

In *Webb* v. *Beavan*, thus referred to, the words were: "I will lock you up in Gloucester gaol next week. I know enough to put you there"; meaning thereby that the plaintiff had been and was guilty of having committed some criminal offence or offences. The words were demurred to on the ground that they were not actionable, as they did not necessarily impute an indictable offence; but the court held, that a criminal act was

(*e*) R.S.C. 1886, c. 168, s. 26.
(*f*) (1883) 11 Q.B.D. 609.
(*g*) Routley v. Harris (1889) 18 O.R. 405.

imputed by the words, and that this was sufficient, thus modifying the old rule that the offence imputed must be not merely criminal, but also indictable.

There are some offences which, although not now indictable, as they once were, are yet punishable by imprisonment on summary conviction. *Webb* v. *Beavan* decides that words imputing a criminal offence punishable by imprisonment are actionable *per se*, but that where the offence is only punishable by penalty or fine, there must be proof of special damage. Where, therefore, the defendant spoke of the plaintiff the following words: "He tore the robes of the priest at W., and, as a judgment for such, has a withered hand"; meaning that the plaintiff had been guilty of an assault upon the Roman Catholic priest at W., and had torn the clerical vestments of the priest, and for such assault had been visited with a withering of the hand, it was held, that the words were actionable without proof of special damage. "The reason given," said Allen, C.J., "is, that the immediate and obvious consequence resulting from such a charge is, that it exposes a party to criminal liability, which may produce a temporal deprivation of his liberty until his innocence can be made manifest, and his consequent degradation in society. Either of these consequences is enough for the purpose"(*h*).

Words imputing a crime under Criminal Code ss. 277 and 278.

Where the words alleged and proved were: "He is a bad man with the women; he drugged Mrs. A.M.," the innuendo being that plaintiff was an immoral and bad character, and had committed a crime on the person of the said Mrs. A.M., special damage was alleged, but not proved. The County Court judge, who tried the action without a jury, found in favour of the plaintiff and $25 damages. Upon an appeal by the defendant to the Supreme Court of Nova Scotia, it was held, that the words proved imputed a crime under the Criminal Code, sections 277 and 278(*i*), and were actionable without proof of special damage; that the plaintiff having failed to prove special damage as alleged, the trial judge was wrong in awarding damages on

(*h*) McCann v. Kearney (1880) 20 N.B.R. (4 P. & B.) 84. See, also, Mayne v. Digle (1672) Freeman's Rep. 45.

(*i*) Sections 277 and 278 of the Criminal Code make it an indictable offence to administer to any person any poison or other destructive or noxious thing, with intent to injure, aggrieve, or annoy such person.

that ground; but, as the amount assessed was not larger than it should have been for the slander proved without proof of special damage, the appeal should be dismissed with costs. The facts and the law applicable brought the case within *Webb* v. *Beavan* (*supra*), in which it was held, as stated, that words imputing that the plaintiff has been guilty of a criminal offence will support an action for slander without special damage, and that it is not necessary to allege in the statement of claim that they impute an indictable offence(*j*).

The term "rebel" not actionable unless used in a treasonable sense.

The question whether the term "rebel" is actionable or not, was determined in a New Brunswick case. The action arose out of an election contest in which the plaintiff was one of the candidates, and which was held prior to the Canadian insurrection of 1837-38. The declaration contained five counts, one of which alleged the following as the words complained of: "What, has old P. (the plaintiff) got ahead of C.! (another candidate at the election). Who is supporting him (plaintiff)? None but blackguards would do it. He (plaintiff) was driven out of this place and has since been kicked out of Canada, on account of his being a d——d old rebel, and it would be a disgrace to put such a man in the House of Assembly." The jury found for the plaintiff and £250 damages. A rule *nisi* to arrest the judgment on the grounds that the words in themselves did not necessarily import a crime; and that the declaration contained no innuendo to make them so, *i.e.*, to shew that the words were used in a treasonable sense, nor any averment of special damage, was made absolute. The court (Botsford, J., partially dissenting), held, that the term "rebel" is not actionable, unless it be used in a treasonable sense, and that this sense must appear on the record.

Word "rebel" used in three senses.

It is pointed out in the judgments of Chipman, C.J., and Carter, J., that the term "rebel" may be used in three senses, namely: (1) Where it means the levying of war by subjects against the Sovereign within the realm; (2) where it means a person under a commission of rebellion, a process issued by the courts of equity to enforce appearance, in which the persons named in it are described as "rebels and contemners of the law";

(*j*) Gamble v. Hirschfield (1894) 26 N.S.R. 468.

and (3) where applied in a loose and colloquial sense, to denote a person of disloyal principles and disaffected to the government, without imputing the actual commission of treason. "It is obvious," said Chipman, C.J., "that in order to make this word of itself actionable, it must appear on the record to have been used in the sense first above mentioned, namely, as imputing the actual commission of treason; for if used in either of th two other senses which I have mentioned, it is clearly not actionable." Carter, J., referred to *Roberts* v. *Camden*(*k*), *Tomlinson* v. *Brittlebank*(*kk*), and *Holt* v. *Scholefield*(*l*), and deduced this principle, "that where a word has two legal senses one of which imports an offence punishable by law, which the other does not—in order to support an action for using such words in speaking of a person, it must appear on the record that it is used in the sense which imports an offence punishable by law. . . In the case before us, the word "rebel" has two legal meanings: one importing a person under commission of rebellion, for which he is not indictable, the other meaning one who has been guilty of levying war against the government, which is indictable. It appears to me, that in order to support an action for calling a man a "rebel," it must appear in the declaration by introductory averment, by colloquium and innuendo, that the term was used in that sense which imports an indictable offence. This not being the case on the record now before us, I think the judgment should be arrested"(*ll*).

Roberts v. Camden (1807); Tomlinson v. Brittlebank (1833), and Holt v. Scholefield (1796).

Of the cases above referred to by Carter, J., it was held in *Roberts* v. *Camden*, that the rule of construction as to slanderous words is to construe them in their plain and popular sense, *i.e.*, the sense in which an ordinary hearer would have understood them at the time they were spoken(*m*). And, therefore, the defendant saying of the plaintiff, that "he was under a charge of prosecution for perjury; and that G.W. (an attorney

(*k*) (1807) 9 East, 92.

(*kk*) (1833) 4 B. & Ad. 630.

(*l*) (1796) 6 T.R. 691.

(*ll*) Beardsley v. Dibblee (1841) 3 N.B.R. (1 Kerr) 246.

(*m*) See remarks of Street, J., to same effect, in Albrecht v. Burkholder (1889) 18 O.R. 287.

of that name) had the Attorney General's directions to prosecute the plaintiff for perjury," was actionable. For after verdict (by which the jury, who are the judges of the intent of the speaker, must be taken to have negatived that he meant to speak of a prosecution for a perjury which the plaintiff had not committed), the words, not having been justified, must be taken to be false; and being unqualified by any context, and unexplained by any occasion to warrant them, the law infers malice from the falsehood of an accusation, which, in the common acceptation of the words, impute perjury to the plaintiff. In *Tomlinson* v. *Brittlebank* (*supra*), it was held, that to say of a person, "He robbed John White," was actionable as imputing an offence punishable by law, but that the defendant might shew that that was not the sense in which the words were understood by those who listened to the whole conversation, though previously unacquainted with the matter to which the words related. And so also in *Holt* v. *Scholefield* (*supra*), in which the words were, "He hath forsworn himself," it was held that the term "forsworn" was not actionable, unless it appeared from the circumstances under which the words were spoken that it was intended and understood to impute the offence of perjury.

Imputations of theft.

Words imputing stealing or theft have given rise to a variety of decisions in which the real question appears to have been whether or not the imputation was of felonious stealing. It must be shewn, from the circumstances of the publication and the application of the words, that a crime was intended to be charged, otherwise the words are not actionable. *Gorst* v. *Barr*(*o*) was an action for an alleged slander of that character, which the court held was not maintainable for the reasons that the words were privileged and spoken without malice(*p*), that they did not impute a criminal offence(*q*), but amounted simply to an assertion of suspicion or belief on defendant's part that the plaintiff had taken the money in question.

(*o*) (1887) 13 O.R. 644.

(*p*) *Per* Williams, J., in Tompson v. Dashwood (1883) 11 Q.B.D. at p. 45.

(*q*) Toogood v. Spyring (1834) 1 C.M. & R. 181), and Padmore v. Lawrence. (1840) 11 A. & E. 380.

Charge of stealing field produce.

Where the words were: "Go home, you whore, and steal more potatoes from Peggy's field, and steal more chemises from us," they were held to be actionable because they imputed that the person addressed had previously stolen other things of the same kind; and because the potatoes might have been severed from the realty, and so become the subject of larceny(*r*).

Some Quebec decisions.

In an action in Lower Canada, now the Province of Quebec, for calling the plaintiff a thief, the defendant being in his employ as a shoemaker, and it being proved that the parties were in the habit of addressing one another in that way for a long time, and that the plaintiff had not suffered by it to any material extent, judgment was given for $10 damages and costs(*s*). So where one person reproached another with having been convicted of theft, and called him a thief, an action for slander was held to be maintainable, even though the statement were true(*t*). The defendant, who was a member of the entertaining committee at a dinner given by volunteers, noticing that a box of cigars had disappeared from the place where he had left it, said some one must have taken or stolen it. The plaintiff, who was one of those present at the time, insisted on being searched, though no charge of theft was made against him, and he subsequently sued the defendant for slander. It was held, that the defendant had a right to make inquiry respecting the disappearance of the cigars which were in his charge, and that, under the circumstances, there was no ground for the action(*u*).

Action against husband and wife for words of the wife imputing theft.

Under the former law affecting married women in Ontario, by which the husband had to be sued jointly with the wife for the torts of the wife, a husband and wife were sued for the following words alleged to have been addressed by the defendants to the granddaughter of the plaintiff: "Your grandfather was nothing but a saddle thief." The plaintiff proved the

(*r*) Hunter *et ux.* v. Hunter *et ux.* (1865) 25 U.C.Q.B. 145.
(*s*) Maillet v. Desilets (1865) 1 L.C.L.J. 31 C.C.
(*t*) Petrin v. Larochelle (1872) 4 L.R. 286, C.C.
(*u*) Dick v. Kennedy (1895) 9 Q.O.R. (S.C.) 312.

speaking of the words by the female defendant, but not by her husband, who was not present when the words were spoken. The trial judge was of opinion that, as the two defendants were admitted to be man and wife, and as the husband must be sued jointly with the wife for words spoken by her, the evidence was sufficient to go to the jury in support of the charge stated in the declaration. The jury found for the plaintiff and £35 damages. Upon the argument of a rule for a new trial counsel for plaintiff asked leave to amend the declaration by stating that the female defendant, being the wife, etc., spoke the words complained of. The court held, that the declaration should have alleged that the action was brought against the defendants for words spoken by the female defendant, being the wife, etc., and that it was not, therefore, supported by the evidence; but leave was given to amend the declaration on payment of the costs of the motion, the rule to be then discharged, otherwise a new trial without costs(*v*).

Imputation of theft committed in a foreign country.

The courts have also had to determine whether words imputing theft or any other criminal offence, committed in a foreign country, are actionable *per se*, and they have invariably held that they are. Where the words were: "Old S. (plaintiff) over the way is a d——d thief; he stole a cow in the States"; meaning that the plaintiff was a thief, and was guilty of feloniously stealing a cow in the United States of America, it was objected at the trial that the slander charged was not actionable, because it did not impute any offence for which the plaintiff could be indicted in Upper Canada; that stealing a cow was not shewn to be a crime in the United States; and that if it were, yet it was not an offence for which the plaintiff could be surrendered to the Canadian authorities under the Extradition Treaty. These objections were overruled, and the jury gave a verdict for the plaintiff and £3 damages, on this and another count for a slander charging plaintiff with keeping a disorderly house. The court held that the slander was actionable, and refused to disturb the verdict for the plaintiff.

(*v*) Wilson v. West *et ux.* (1861) 11 U.C.C.P. 127. As to the liability of the husband for the torts of the wife see Amer v. Rogers *et ux.* (1880) 31 U.C.C.P. 195; Lee v. Hopkins (1890) 20 O.R. 666; Traviss v. Hales, 6 O.L.R. (1903) 574.

Opinion of Robinson, C.J.

"I think," said Robinson, C.J., "the good sense of the rule as now maintained is, that the charging a man with committing abroad such a crime as would subject him to the punishment of felony here by the common law, fixes with equal certainty the character of the imputation, and places the man in fully as degraded a position in society. Indeed, to charge a man with committing, in another country, an offence so disgraceful and pernicious that it must be an offence everywhere, may be more injurious to his character than it would be to impute to him the having committed a similar offence here, for the having left the country in which he had once lived and removed to this gives some colour of probability to the charge. People would be apt to think that he had found it convenient to fly from justice, and the accusation could not be so readily refuted if it were false"(*x*).

In an old case of *Cuddington* v. *Wilkins*(*y*), cited by Robinson, C.J., in the above judgment, it was held to be actionable, without proof of special damage, to call a man a "thief" or a "felon" even though he had committed larceny, if, after conviction, he was pardoned either under the great seal or by some general statute of pardon. *Leyman* v. *Latimer et al.*(*z*) is to the same effect.

Imputation of murder committed in U.S.

The New Brunswick courts have also held that an imputation of crime committed in a foreign country is actionable *per se*. The words spoken of an unmarried woman were: "J. had a bastard child at the factory and done away with it; and I can prove it"; the factory being in the State of Maine, and the alleged meaning of the words "done away with it" being that the plaintiff had destroyed the child's life. Upon a motion for a new trial, after a verdict for plaintiff, it was contended that the words were not actionable *per se*, even if the charge had been that the offence had been committed in the Province of New Brunswick; that the court could not take notice what the

(*x*) Smith v. Collins (1846) 3 U.C.Q.B. 1.

(*y*) (1616) 1 Hob. 81.

(*z*) (1877-8) 3 Ex. D. 15, 352; 46 L.J. Ex. 765; 47 L.J., Ex. 470; 25 W.R. 751; 26 W.R. 305; 37 L.T. 360, 819.

criminal law of the United States was; and that proof of that law should have been given at the trial, in order to make the words actionable. The court held, that the words "done away with it," if spoken of the plaintiff's conduct in Canada, would have imputed the criminal offence of murder and be actionable *per se*, without any innuendo; and that having regard to the Extradition Act (6 & 7 Vict. c. 76), the Canadian courts must take notice that murder is punishable as a crime in the United States. A new trial was refused(*a*).

Obtaining money by false pretences.

The alleged defamatory words were, that the plaintiff, who received an allowance for the maintenance of his wife's niece from her father's estate, had put in a fictitious account and was paid by one of the executors of the estate, the innuendo being that the plaintiff had obtained payment by false pretences and was guilty of an indictable offence. Special damage was also alleged, in that the niece and plaintiff's wife had left plaintiff and refused to live with him. The trial judge (Street, J.) held, that no such special damage was proved as would render the words actionable, and he dismissed the action. His judgment was affirmed on appeal by the Divisional Court. "It was manifest on the evidence," said the court, "that the words were not capable of the meaning charged," etc.(*b*).

Embezzlement of school moneys by school trustee.

Imputations of embezzlement were formerly actionable when made of a person in relation to his office, but not where the offence could not have been committed, as, *e.g.*, where the plaintiff was not the "servant, clerk, or employee of some superior." This appears in an Upper Canada case in which a school trustee sued for the words following: "T. F. (plaintiff) embezzled £25 of the school moneys of 1855"; meaning the school moneys of a certain school section for the year 1855, received by plaintiff as trustee on account of the said school section, whereby he became liable to be prosecuted for the crime of embezzlement. The plaintiff was a school trustee during 1856 and 1857, and the slander actually proved was, that the defendant said that plaintiff had embezzled the money belonging

(*a*) Porter v. McMahon (1885) 25 N.B.R. 211.
(*b*) Ludlow v. Batson, 5 O.L.R. (1903) 309.

to the school section. The jury awarded 1s. damages. Upon a subsequent motion for a nonsuit, the court held, that as it appeared that the plaintiff, as a school trustee, had money in his hands, not as secretary and treasurer of the school board, or in any official capacity, he could not embezzle the money, his duty as trustee not requiring or authorizing him to receive it, and the rule for a nonsuit was made absolute. Draper, C.J., referred to *Jackson* v. *Adams*(*c*) as authority for the nonsuit(*d*).

In *Jackson* v. *Adams*, thus cited, it was held, that it was no slander to say of a church warden that he stole the bell ropes of the parish church in which he held office, because an indictment for larceny could not be supported against a church warden under such circumstances, he having, by virtue of his office, the possession of the goods of the church. So also, as in *Ferris* v. *Irwin* (*supra*), where embezzlement could not have been committed, the plaintiff being neither clerk nor servant within the meaning of the statute, the words charging the offence were not actionable(*e*). And where certain words spoken of the plaintiff as a clerk were alleged to impute theft, it was held, after a verdict for plaintiff and £35 damages, that although the words were actionable *per se*, and might amount to a charge of embezzlement, which was not alleged in the declaration, they did not impute larceny; and a new trial was directed with leave to amend the declaration(*f*).

What was formerly embezzlement, as illustrated by these cases, is now simply theft under the Criminal Code, which does not constitute "embezzlement," *eo nomine*, as a distinct indictable offence(*g*).

Charge of criminal breach of trust under C.S.C. c. 92, s. 51 (C.C. s. 390).

The Consolidated Statute of Canada, c. 92, s. 51, enacted that "if any person being a trustee of any property for the benefit, either wholly or partially, of some other person, or for any public or charitable purpose, does, with intent to defraud,

(*c*) (1835) 2 Bing. N.C. 402.
(*d*) Ferris v. Irwin (1860) 10 U.C.C.P. 116.
(*e*) Williams v. Stott (1833) 1 C. & M. 675; 3 Tyrw. 688.
(*f*) Carvill v. McLeod (1859) 9 N.B.R. (4 Allen) 332.
(*g*) See C.C. s. 347 (1).

convert or appropriate the same, or any part thereof, to or for his own use or purposes," he was guilty of a misdemeanour(*h*). A merchant who was also engaged in the construction of a public bridge, and was the trustee of large sums of money which he received for that purpose, complained that the defendant had, on several occasions, charged him with having robbed or defrauded the public of $1,500, the funds of the bridge committee, and with using the money in his business for years; that it was not the only money which he had used in that way; that he had made his money in that way; and that, no matter what report the auditors might make, he (defendant) could shew that plaintiff had got that amount of money, and more too, and was using it in his business. The only plea was not guilty. The jury, upon a charge to which no exception was taken, found in favour of the plaintiff and $400 damages. Upon a motion for a new trial the court held that the plaintiff had been charged with the misdemeanour defined in the above enactment, and that the words, as explained by the innuendo, were actionable without special damage.

Griffiths v. Lewis (1846).

Reference is made in the judgment of Draper, C.J., to the judgment of Lord Denman in *Griffiths* v. *Lewis*(*i*) as to the effect of the innuendo in that case upon words capable of a non-injurious, and, therefore, non-actionable meaning. The motion was refused(*j*). In *Griffiths* v. *Lewis* the plaintiff was a butcher, and had a son, M., in her service. The words spoken by the defendant were: "M. uses two balls to his mother's steelyard"; "meaning that plaintiff, by M., her agent and servant, used improper and fraudulent weights in her said trade, and defrauded and cheated in her said trade." After verdict for the plaintiff, it was held that the words, as stated and explained in the innuendo, were actionable.

To say of a married man that he had broken open a box belonging to his wife and robbed her of £75, is not actionable,

(*h*) This enactment, originally taken from 24-25 Vict. c. 96, s. 80 (Imp.), was re-enacted in the Larceny Act, R.S.C. 1886, c. 164, s. 65, and subsequently embodied in the Code as s. 363, now s. 390. See Reg. v. Cox (1888) 16 O.R. 228, and Reg. v Stansfield (1885) 8 L.N. 123.

(*i*) (1846) 8 Q.B. 850-51.

(*j*) Decow v. Tait (1866) 25 U.C.Q.B. 188.

because it is not an indictable offence for a husband to take his wife's money whilst they are living together, unless the money was taken within the meaning of the Married Women's Property Act, 1882(*k*), "when leaving or deserting, or about to leave or desert, his wife." But it would be otherwise if they were living apart(*l*); and the law is the same under the Code(*m*).

The rule as disclosed by the pleadings and evidence.

The rule already stated, as applicable to verbal charges of theft, applies equally to all other words alleged to impute a criminal offence. The plaintiff's pleadings should shew that the words complained of impute to the plaintiff some act of a criminal nature punishable by law; the evidence at the trial should establish the allegations as pleaded, and particularly the application and intention of the imputation as understood by the hearers. This is to be gathered from the circumstances attending the use of the words, and is a question for the jury. "The slander and the damage consist in the apprehension of the hearers"(*n*). Where, from the words used, the imputation is equivocal or doubtful, the plaintiff's pleadings should shew that the words are capable of the defamatory meaning alleged, and the evidence should shew that the words bear that meaning, the rules of construction in such case, as appears in the chapter on the Innuendo, being the same in regard to both slander and libel. If the words are capable of being reasonably understood in a slanderous sense, it should be left to the jury to find whether or not they were so used, and the plaintiff should not be non-suited on the ground that the words did not necessarily impute the commission of a crime(*nn*).

Imputation of fraudulent and dishonest conduct.

A crime punishable at common law, or under a statute, must be clearly imputed; a charge of fraud or dishonesty, except in the conduct of a person's trade, is not actionable without proof

(*k*) 45-46 Vict. c. 75, s. 12 (Imp.).

(*l*) Lemon v. Simmons (1888) 57 L.J.Q.B. 260; 36 W.R. 351.

(*m*) Sec. 354.

(*n*) Fleetwood v. Curley (1619) Hob. 268. See, also, the remarks of Street, J., in Albrecht v. Burkholder (1889) 18 O.R. 287, referred to in the chapter on Slander imputing Unchastity.

(*nn*) Cameron v. Overend (1905) 15 M.L.R. 408.

of special damage. Where, therefore, the words charged were: "J. A. (plaintiff) is a great scoundrel; he has robbed me of $130"; meaning that plaintiff had, by fraudulent and dishonest means, deprived defendant of said sum, whereby plaintiff was much injured in his fair name, credit and reputation, and lost the friendship, assistance and hospitality of (setting out the names) and many others of his neighbours, divers of whom refused and were unwilling, as theretofore, to deal with and transact business with plaintiff, and from whose friendship, hospitality and business dealings, plaintiff had derived profit and advantage, it was held, on demurrer, that the words were not actionable *per se*, and that the allegations of special damage were insufficient(*o*).

Imputation of fraud involving an indictable offence.

Where, however, a charge of fraud was alleged merely as "cheating," but the circumstances of the case shewed that it involved an indictable offence, the Supreme Court of Nova Scotia refused to disturb a verdict for the plaintiff. The charge *in extenso* was, that the plaintiff had written the will of an illiterate person contrary to his instructions, and had read it to him inaccurately, for the purpose of getting the testator's property into the plaintiff's hands, for his own benefit, whereby the testator was induced to execute the will. The declaration laid the words as accusing the plaintiff of "cheating." There was an averment of special damage, but no evidence was given under it. It appeared at the trial that the testator had revoked the will in question before his decease, and had executed a new will. A verdict for the plaintiff was moved against on the grounds that none of the words laid were actionable without special damage being laid and proved; that the charge against the plaintiff was at the most a charge of an unsuccessful attempt to commit a forgery which had been defeated by the revocation of the will; and that the offence charged, being a mere private fraud, was not indictable, even if it had been consummated. Bliss, J., who delivered the judgment of the court, said that the words used amounted to a charge of forgery against the plaintiff, and that the declaration was sufficient to sustain the verdict, although such a charge was not expressly complained of. A doubt is apparently expressed in the judgment whether a charge

(*o*) Ashford v. Choate (1870) 20 U.C.C.P. 471.

of a gross private fraud would sustain an action for libel without special damage(*p*). If, as appears to have been argued in this case, the words charged an unsuccessful attempt to commit forgery, they would be actionable *per se*, an attempt to commit an indictable offence being itself indictable(*q*).

Imputations of statutory offences.

Where the offence alleged to have been imputed is of a statutory character, but the words are not strictly within the language of the statute, it has been held that an action does not lie. Some of the decisions on this line are highly technical, but the technicalities have been removed by the Code(*r*).

Arson.

In an action, *e.g.*, for words charging the crime of arson, the evidence shewed that a building, which was fitted up with shelves and had been occupied as a shop, although not so used for a year or more, was set fire to. Some goods were stored in the building, but were not exposed there for sale; otherwise it was an empty building, and was not inhabited for any purpose. The fire in the building having become the subject of general conversation, defendant said that the plaintiff "had set the store on fire and none but him." A verdict for the plaintiff was moved against and new trial granted, on the ground that the action was not maintainable, because it appeared from the evidence that the burning of the building, with which the plaintiff had been charged, would not have constituted the crime of arson under the statute (3 Wm. IV. c. 3) then in force(*s*). So also the words, "He has set his own premises on fire," have been held not to be actionable, unless the defendant meant those who heard the words to understand that the house was set on fire purposely with intent to defraud the insurers(*t*). But the words, "I never set my premises on fire," were held sufficiently clear to be actionable(*u*).

(*p*) Hall v. Carty (1855) 2 N.S.R. (James) 379.

(*q*) See R. v. Scofield (1784) Caldecott, 397; Scot *et ux.* v. Hilliar (1657) Lane 98; 1 Vin. Abr. 440, *supra*.

(*r*) See C.C. ss. 852, 889.

(*s*) McNab v. McGrath (1837) 5 U.C.R. (O.S.) 516.

(*t*) Sweetapple v. Jesse (1833) 5 B. & Ad. 27; 2 N. & M. 36. See, also, Barnham's Case (1602) 4 Rep. 20; Yelv. 21.

(*u*) Cutler v. Cutler (1846) 10 J.P. 169.

Imputation of incontinence and not of criminal conduct.

And where the imputation is one of incontinence and not of criminal conduct, on the part of an unmarried woman, the words are not actionable *per se*. At a coroner's inquest held on the body of an infant, found on the defendant's premises, whose death the jury found was caused by desertion and exposure by persons to them unknown, the defendant said to a constable attending the inquest: "Why did you not bring Miss B. (plaintiff) down with you? She has had time to change her appearance. I could see the child looked like the mother, Miss B., because she has red hair and so had the child"; meaning that the plaintiff, an unmarried woman, was the mother of the child, and had deserted and exposed it, or caused and procured it to be exposed, on or near the defendant's premises, in consequence of which the child died. The defendant was also charged with saying, in answer to a question as to who was the mother of the child, that the plaintiff was the mother, and that the child was the very image of the mother, the innuendo being the same. A verdict for the plaintiff was set aside and a new trial granted, on the ground that the innuendoes were not supported by the evidence, which failed to shew that the defendant was speaking of or alluding to the cause of the child's death, or that he meant to accuse plaintiff of causing the death of the child. The evidence proved incontinence rather than criminal conduct on the part of the plaintiff, and incontinence would not be actionable without express averment and proof of special damage(*v*).

Words imputing perjury. "False swearing" or "a false oath."

The question whether charges of "false swearing," or of having "taken a false oath," constitute actionable charges of perjury, or are mere breaches of morality which are not actionable, has given rise to some diversity of judicial opinion. The test applied by the earlier decisions following the common law, that an action does not lie in certain cases, unless the oath has been taken in a judicial proceeding, is not accepted by the later cases, which hold that the question is for the jury, who must say whether the words were really intended to impute the offence of wilful and corrupt perjury.

(*v*) Black v. Alcock (1861) 12 U.C.C.P. 19.

Imputation of perjury not sustainable.

In an action in which the decision was based on the common law rule, damages were claimed for an alleged charge of perjury which had been made against plaintiff in connection with a municipal election. The defendant justified, alleging that plaintiff had committed false swearing by taking an oath, duly administered to him by the returning officer of a certain ward, that he was the person described in a certain list of voters for the said ward. This plea was demurred to on the ground that the statute, 7 Wm. IV. c. 39, under which the oath mentioned in the plea was administered, did not make the false swearing perjury. The court gave judgment for the plaintiff on the demurrer, holding that the statute was silent on the subject, and that the alleged defence was not covered by any express enactment(*w*).

Charge of "a false oath" not taken in a judicial proceeding.

The same rule was followed where, subsequent to the Common Law Procedure Act, the declaration charged an imputation of perjury for the words following: "He (defendant) was going to put D. H. (plaintiff) through for taking a false oath"; and also the words: "D. H. took a false oath; he (defendant) could prove it." The declaration contained no explanation as to the occasion or proceeding in which the alleged false oath was taken. The evidence shewed that defendant, an uncle of the plaintiff, had, in conversation with certain persons, accused plaintiff of having improperly possessed himself of a watch which had belonged to a relative who had died. The defendant had made no charge with a view to prosecution. The plaintiff, in order to satisfy defendant, and relieve himself from the imputation, went voluntarily before a justice of the peace, and swore to an affidavit in which he stated that the watch was not the watch which belonged to his deceased uncle, but had been purchased by the plaintiff's father at T., and he denied that he had obtained, or had seen, his uncle's watch. The plaintiff was sworn to this affidavit at his own request and left it with the magistrate. Upon a motion for a new trial, or to arrest the judgment, after a verdict for plaintiff, the court arrested the judgment, and held that, although the words imputed the

(*w*) Thomas v. Platt (1844) 1 U.C.Q.B. 217.

taking of a false oath, they were not actionable because they did not impute the taking of such an oath in any judicial proceeding, or on any occasion when it would be an offence in law, and that the 110th clause of the C.L.P. Act did not help the plaintiff's case(*x*).

Allegation that oath in judicial proceeding unnecessary.

On the other hand, in a later case where a declaration in slander charged that the defendant had accused the plaintiff of having taken a false oath, meaning thereby that he was guilty of wilful and corrupt perjury, it was held, on motion in arrest of judgment, that this was sufficient, and that no allegation of the oath having been made in a judicial proceeding was necessary. *Hogle* v. *Hogle* (*supra*) and *Green* v. *Campbell* (*infra*) were cited on the argument for the defendant.

Opinion of Hagarty, C.J.

"The words," said Hagarty, C.J., "that the plaintiff took a false oath, do not necessarily impute judicial perjury, but where it is added that such was the meaning of the speaker, and that they were meant to be, or were naturally to be, understood as meaning that the plaintiff had thereby committed perjury, we think, in the present state of the law of pleading, we ought to hold it to be sufficient. We do not think that either of the cases cited affects this decision"(*y*).

Words charging perjury before magistrates who had no jurisdiction.

Where the words complained of as charging perjury had reference to sworn statements made by the plaintiff on a hearing or examination before two justices of the peace on an information for unlawfully killing cattle, and the plaintiff obtained a verdict, a nonsuit was directed by the court on the ground, that the proceedings before the justices being for a mere trespass in which they had no jurisdiction, the oath administered to the plaintiff was extra-judicial, and, for any false statements

(*x*) Hogle v. Hogle (1858) 16 U.C.Q.B. 518.

(*y*) McDonald v. Moore (1876) 26 U.C.C.P. 52. See, also, Beardsley v. Dibblee (1841) 3 N.B.R. (1 Kerr) 246 (noted *supra*), as to the criminal sense of the term "Rebel," and the decisions in Roberts v. Camden and Holt v. Scholefield, referred to therein and noted thereafter, as to imputations of perjury, and in Tomlinson v. Brittlebank and Ashford v. Choate, *supra*, as to charges of robbery.

made thereunder, a charge of perjury would not lie(*z*). Where in an action in the Province of Quebec against a person who had acted as attorney in an action for slander, the complaint was that the defendant, upon the examination of the plaintiff as a witness in the cause, had stated that plaintiff was not to be believed on oath, it was held that the expressions complained of must be proved to be true(*a*).

Imputation of perjury by a layman acting for defendant in magistrate's court.

A charge of perjury against a witness for the prosecution, at the hearing of a criminal case before a magistrate, by the father of the accused acting on behalf of his son, who was alleged but not proved to be a minor, and who was not shewn to have authorized the father to act for him, is not privileged. But (*per* Cameron, C.J.) if the father was acting in good faith and without malice, under the belief that it was his duty to inform the magistrate of the witness's bad character, he might have a qualified privilege; but the question of malice would be for the jury(*b*).

Charges of incest.

Until the passage of the Criminal Code, 1892, incest was not a criminal offence in the provinces, and words, therefore, which imputed incest were not actionable without proof of special damage, unless the imputation tended to deprive the plaintiff of his office or employment.

Against a minister of the gospel.

In an action for words imputing incest to a paid preacher or lay exhorter of the Methodist Church, and in which there was a verdict for the plaintiff, it was held by Robinson, C.J., and Jones, J. (Macaulay and Hagerman, JJ., *diss.*), that the words were in themselves actionable, without shewing special damage arising from the slander, on the ground that the tendency of the slander was to occasion the loss of plaintiff's employ-

(*z*) Ganong v. Fawcett (1874) 15 N.B.R. (2 Pugsley) 129. See, also, McAdam v. Weaver (1843) 4 N.B.R. (2 Kerr) 176, in which the same rule of law had been previously laid down.

(*a*) Lovoie v. Gagnon (1860) 10 L.C.R. (Q.B.) 185.

(*b*) Cowan v. Landell (1886) 13 O.R. 13.

ment or office; and that it was no objection to such an action that the slander was not spoken with reference to the office(*c*). Where the imputation had no such tendency the case was different.

Where no proof of special damage.

And so in an action in which the declaration averred that the defendant imputed incest and adultery with the plaintiff's daughter, and alleged special damage for the loss of the society of friends, and illness and expenses consequent on the charge, it was held on demurrer, that the words were not actionable without proof of special damage, incest not being a crime cognizable in the Canadian courts(*d*), and that the special damage alleged was insufficient(*e*). So, also, in an action by the married daughter of the plaintiff in the case last mentioned, for words imputing incest and adultery with her father, it was held on demurrer, that the imputation was not, as the law stood at that time, actionable *per se;* but was actionable on proof of special damage, viz.: the loss of the *consortium* of the plaintiff's husband, and the loss of the society of friends, whose names, however, should have been set out in the declaration(*f*).

Green v. Campbell (1856).

In *Green* v. *Campbell*, which was an action tried in Upper Canada in 1856, the words were: "G. (plaintiff) you have been mad with me since I caught you with your daughter"; meaning sexual intercourse with his daughter, she being at the time referred to under the age of twelve years. Under the then provincial law the carnal knowledge of a girl under the age of ten years was a felony, and, if she were above ten and under twelve years of age, a misdemeanour. But, as the court subsequently held, to make words import either the one charge or the other, it was necessary to aver in the declaration that the plaintiff had a daughter either under the age of ten years, or above that age and under twelve, and then to aver the words spoken by defendant had relation to such daughter. There being no such averments in the declaration the plaintiff was non-

(*c*) Starr v. Gardner (1843) 6 U.C.R. (O.S.) 512.
(*d*) Referring to Green v. Campbell, *infra*.
(*e*) Palmer v. Solmes (1880) 30 U.C.C.P. 481.
(*f*) Palmer v. Solmes (1880) 45 U.C.Q.B. 15.

suited, and a rule *nisi* to set aside the nonsuit was discharged. The court said that, with regard to the charge of incest, it had been settled that it was not actionable, because, as was determined in England, it was a matter cognizable only in the spiritual courts which had no existence in Canada; and that the crime was not one for the commission of which the offender was punishable by our laws. The nonsuit was right, for the words in themselves imported incest or fornication, but not the statutory offences, or either of them, and the innuendo alone could not affix this signification to them(*g*).

Incest indictable under the Code and some unrepealed provincial enactments.

Incest, it should be observed, where the offenders are aware of their consanguinity, was subsequently made an indictable offence by the Criminal Code, 1892(*h*), which came into force on the first day of July, 1893. The offence is punishable with fourteen years' imprisonment, and the male offender is also liable to be whipped. But a verdict of common or indecent assault may be given(*i*), if the evidence warrants it (s. 951).

Adultery.

Adultery is not indictable under the Code, but conspiracy by false pretences, false representations, or other fraudulent means, to induce any woman to commit adultery or fornication is indictable under section 218. Adultery is also an indictable offence under the unrepealed statute, c. 145, of the Revised Statutes of New Brunswick, 1903(*j*).

Keeping a disorderly house.

Where the words were alleged to impute the keeping of a common bawdy house and disorderly house, and the jury so found, a new trial was refused on the ground that the words were actionable in themselves as imputing an offence for which the plaintiff might be indicted and punished by imprison-

(*g*) Green v. Campbell (1856) 6 U.C.C.P. 50.

(*h*) 55-56 Vict. c. 29, s. 204.

(*i*) Sections 292, 294, 291.

(*j*) See the revised statutes c. 115, s. 39, and Appendix, p. 2397. See, also, Reg. v. Egre (1877) 1 P. & B. 189, and Reg. v. Ellis (1883) 22 N.B.R. 440.

ment(*k*). And where the words spoken to the plaintiff's wife were, that she was a "bawd," and that her house was "no better than a bawdy house," the words were held to be actionable for the same reason, and that the wife was an unnecessary party to the action, because if the words were true of the wife the husband could be indicted(*l*). But there must be certainty in the imputation(*m*). "The meaning of the words is to be gathered from the vulgar import, and not from any technical legal sense"(*n*). Words imputing a crime are actionable, although they describe it in vulgar language, and not in technical terms. (*Ibid.*)

Imputations of sodomy.

An imputation of sodomy is also actionable without proof of special damage. In an action for calling the plaintiff a "sodomite," the declaration contained no innuendo, and at the trial before Gwynne, J., the plaintiff was nonsuited after his counsel had opened to the jury. The nonsuit was moved for on the grounds that "sodomite" was a term having no legal signification; that it was not a statutory offence; that it was only known as an ecclesiastical term; and that no innuendo was contained in the declaration respecting it. Leave to amend the declaration by adding an innuendo stating the felonious nature of the offence charged against the plaintiff was refused. Upon a motion to set aside the nonsuit the court held that the declaration sufficiently imputed the charge of an indictable offence without any innuendo; but that, in any event, defendant having by his plea justified the words as imputing a statutable crime, an amendment by adding the innuendo should have been allowed(*o*).

Charge of sodomy insufficiently pleaded.

In another case in which a similar imputation was complained of, it was held by the Upper Canada Court of Queen's Bench (Draper, J., Macaulay, J., Robinson, C.J., *diss.*), that the

(*k*) Smith v. Collins (1846) 3 U.C.Q.B. 1.

(*l*) Huckle v. Reynolds (1859) 7 C.B. (N.S.) 114.

(*m*) Brayne v. Cooper (1839) 5 M. & W. 249.

(*n*) *Per* Buller, J., in Colman v. Godwin (1782) 3 Dougl. 90; 2 B. & C. 285*n*.

(*o*) Anonymous (1869) 29 U.C.Q.B. 462.

declaration was technically defective on account of the insufficient inducement or statement of prefatory matter, to which the innuendoes could refer, and, therefore, that, on the face of it, the declaration did not disclose any actionable slander(*p*).

Words imputing trespass or petty theft, etc.

The words sued for, however, may not involve imprisonment as the primary and immediate punishment for the offence, as, *e.g.*, in the case of trespass or petty thefts of flowers, growing fruit, etc. Words imputing the theft of such things are not actionable, except on proof of special damage, even though imprisonment may be imposed in default of payment of the pecuniary penalty. In *Ogden* v. *Turner*(*q*), Holt, C.J., held, that where, under 5 Wm. & M. c. 10, the words imputed merely a trespass in pursuit of game, punishable primarily by fine alone, no action lay without proof of special damage, although imprisonment might be inflicted in default of payment of the fine. Certain *dicta* in the same case, which appeared to go further, were disapproved of in *Onslow* v. *Horne*(*r*).

Words prima facie imputing a crime used in a different sense.

So, also, where the words *primâ facie* impute a crime, they may be shewn to have been used in a different sense, *e.g.*, as imputing trespass, which would prevent them being actionable without proof of special damage. Defendant, finding plaintiff cutting trees on land claimed by him (defendant), said to plaintiff: "You are pilfering and stealing, and always at it"; meaning, it was alleged, that the plaintiff was guilty of stealing. The words were spoken in the presence of plaintiff's brother, who knew that the charge thus made related to the cutting of the trees, and that the plaintiff also claimed them. A verdict for the defendant was sustained by the court, who were of opinion that the words used imported a charge of trespass and not of felony, and that evidence as to ownership and value of the trees, which was objected to by plaintiff, was admissible, on the part of the defendant, in order to shew that the trees were not worth $25, the amount required by R.S.C. 1886, c. 164, s. 18, to make the cutting of trees, with intent to steal, a felony,

(*p*) Johnson v. Hedge (1849) 6 U.C.Q.B. 337.
(*q*) (1705) Holt, 40; 6 Mod. 104; 2 Salk. 696.
(*r*) (1771) 3 Wils. 186; 2 W. Bl. 750.

and also to enable the jury to find whether the words "pilfering and stealing" were used in their ordinary signification, or whether the defendant only intended to charge the plaintiff with committing a trespass in cutting the trees. Where words *primâ facie* importing felony are used in a different sense, they are not actionable. This has always been the law(*s*). Allen, C.J., who delivered the judgment of the court in the case last mentioned, referred to *Lord Cromwell's Case*(*t*), where the rule is stated in the quaint language of the time.

Words must be used in a felonious sense.

This, like many other of the old decisions, shews that, in slander, the words immediately preceding or following may very much qualify or modify those complained of and relied on by the plaintiff. And so to call a man a thief is not actionable where other words accompanying the expression clearly denote that the speaker did not intend to impute an indictable offence to the party charged. And where, in such case, it plainly appears from the context that words *primâ facie* imputing felony were not used in a felonious sense, the plaintiff will be nonsuited upon his own shewing(*u*). In the case in which this was done the words were: "T. is a d——d thief; and so was his father before him; and I can prove it"; but these words followed: "T. received the earnings of the ship, and ought to pay the wages." Lord Ellenborough held that the latter words qualified the former and shewed that no felony was imputed, the person to whom the words were spoken being the master of the ship, and acquainted with all the circumstances referred to(*v*).

Words of suspicion, belief or opinion.

Words of suspicion of a person's having committed a criminal act are not sufficient to support an action for slander without proof of special damage(*w*); nor words of suspicion or

(*s*) Herrington v. McBay (1888) 29 N.B.R. 670.

(*t*) (1578) 4 Rep. 13, 14.

(*u*) Thompson v. Bernard (1807) 1 Camp. 48.

(*v*) See, also, Bittridge's Case (1602) 4 Rep. 19*b*; Cristie v. Cowell (1790) 1 Peake 4; Day v. Robinson (1834) 1 A. & E. 554; 4 N. & M. 884; Beardsley v. Dibblee (1841) 3 N.B.R. (1 Kerr) 246, *supra;* and the cases of Roberts v. Camden, Tomlinson v. Brittlebank and Holt v. Scholefield, referred to therein and noted thereafter.

(*w*) Simmons v. Mitchell (1880) L.R. 6 App. Cas. 156, at p. 162; 50 L.J.P. C.C. 11.

belief(*x*); and in the Province of Quebec, words of suspicion only, addressed without malicious intent and with probable cause, to a detective officer, by a person whose house had been burnt down, against a person whom public rumour accused of being the man who had set the house on fire, were held to be not actionable *per se*(*y*). Words of suspicion or opinion, which do not impute any criminal act, are not actionable(*z*). It is for the jury to say whether the words were words of mere suspicion, or whether they really imputed a crime(*a*). And the jury must find that the words imputed an absolute charge, and not a mere suspicion, of an indictable offence, otherwise the plaintiff is not entitled to a verdict; if they find a mere suspicion the verdict should be for the defendant. A direction to this effect to the jury by Pollock, C.B., and a verdict for the defendant based upon it, were held to be right(*b*).

Words of vulgar or general abuse.

So, also, in the absence of special damage, words which are understood as vulgar abuse, and not as imputing a criminal offence, are not actionable(*c*). In an action against husband and wife for words spoken by the wife imputing theft and other indictable offences, the defendants' pleas did not allege, as they might properly have done, that the words spoken were words of mere general abuse uttered in an altercation between the parties. Meagher, J., who heard an appeal by plaintiff on a point of practice, indicated an opinion that, if the defendants had pleaded as stated, the learned trial judge, who tried the case without a jury, would, on the facts disclosed, have been warranted in dismissing the action(*d*).

Words referring prospectively to some criminal act, or importing an inclination or intent.

Neither will an action lie for words referring prospectively to some act which, if committed, would be a crime; nor for

(*x*) Gorst v. Barr, *infra*.

(*y*) Seer v. Treau de Ceoli (1888) 11 L.N. 338 C.C.

(*z*) Com. Dig. Action on the case for Defamation, F., 13; 10 Mod. 196.

(*a*) Tempest v. Chambers (1815) Stark. 67.

(*b*) Tozer v. Mashford (1851) 6 Ex. 539; 20 L.J. Ex. 225.

(*c*) Barnett v. Allen (1858) 3 H. & N. (N.S.) 376; 27 L.J. Ex. 412; Thompson v. Bernard (1807) 1 Camp. at p. 48.

(*d*) Croft v. Jodrey *et ux.* (1895) 28 N.S.R. 78.

words importing only an inclination or intent. Such words are not actionable *per se*. In an action in which the language complained of was of this character, the defendant was charged in several counts of the declaration with slandering the plaintiff by imputing to him the crime of sodomy and sodomitical practices. A motion to arrest the judgment, or for a new trial after a general verdict for the plaintiff, was made on various grounds. The court arrested the judgment on the ground, that no action will lie for slanderous words spoken when they only refer prospectively to some act which, if committed, would be a crime(*e*). "To impute evil inclinations to a man," said Lord Ellenborough, C.J.(*f*), "which were never brought into action, is not actionable. Words to be actionable should be unequivocally so."

Words imputing an attempt to commit a crime.

But although words imputing a criminal intention are not actionable, as soon as any step is taken, or act done, to carry out such intention, an attempt to commit a crime has been made which is in itself indictable(*g*). Words, therefore, imputing any attempt to commit an indictable offence are actionable, for such an attempt constitutes an indictable offence at common law(*h*), under statutes prior to the Code, and also under the Code. The words charged were: "It's my soul's opinion that nothing else kept that girl in the house last winter but taking medicine to banish the young baker"; meaning that the plaintiff had been taking medicine to procure abortion. Upon a motion against a verdict for the plaintiff it was held, that although the trial judge seemed to be of opinion that the declaration did not charge a substantially good cause of action on the ground that the words imputed no crime but a mere intention to commit a crime, the declaration did in fact charge a good cause of action and with sufficient certainty(*i*). Where the words were: "She would have cut her husband's throat, and did attempt it," it was held that no action lay for the words

(*e*) Conkey v. Thompson (1857) 6 U.C.C.P. 238.

(*f*) In Harrison v. Stratton (1803) 4 Esp. 218.

(*g*) *Per* Lord Mansfield in R. v. Scofield (1784) Caldecott, 397.

(*h*) R. v. Higgins (1801) 2 East, 5. See judgments of the court at p. 15 *et seq.*

(*i*) Miller v. Houghton (1853) 10 U.C.Q.B. 348.

"She would have cut her husband's throat," but that an action was maintainable for the remaining words which charged an "attempt," *i.e.*, an act done(*j*).

Miscellaneous cases.

Where the action was for calling a woman a whore, it was held sufficient under a New Brunswick Act(*k*), to aver in the declaration an imputation of unchastity without further explanation, the words not being doubtful or ambiguous, and indicating an offence punishable by the temporal courts(*l*). Words alleged to impute dishonesty to a party in his employment or service, but which, independently of that, were actionable *per se*, as imputing an indictable offence, do not require either averment in the declaration or proof of the particular employment(*m*).

Rumours of the offence charged.

Where the words charged imputed a criminal offence, and not guilty only was pleaded, it was held that the defendant might shew, solely in mitigation of damages and to rebut the presumption of malice, that, before speaking the words, it was a common rumour in the neighbourhood that plaintiff had been guilty of the specific offence charged(*n*). But where words not actionable *per se* were alleged to impute a criminal offence, evidence of rumours in the neighbourhood, unknown to the defendant, in proof of the innuendo that the plaintiff had committed the offence, were held to be inadmissible(*o*). Where the only publication of a criminal charge is to the plaintiff and her parents, who came with plaintiff to defendant and asked for particulars, the occasion is privileged, and plaintiff must adduce evidence of express malice. Malice cannot be implied in such a case from the mere publication of the defamatory words(*p*).

(*j*) Scot *et ux.* Hilliar (1657) Lane, 98; 1 Vin. Abr. 440, pl. 9.
(*k*) 31 Geo. 3, c. 5.
(*l*) Martindale *et ux.* v. Murphy *et ux.* (1835) 2 N.B.R. (Berton) 161.
(*m*) Hea v. McBeath (1843) 4 N.B.R. (2 Kerr) 301.
(*n*) Edgar v. Newell (1865) 24 U.C.Q.B. 215.
(*o*) Grant v. Simpson (1878) 12 N.S.R. (3 R. & G.) 141.
(*p*) Johnston v. Kidston (1898) 31 N.S.R. 283.

CHAPTER III.

Slander Imputing a Contagious Disease.

Words imputing a contagious or infectious disease.

Another case in which slanderous words, falsely spoken, are actionable without proof of special damage, is where a person is charged with having a contagious or infectious disease, and the effect of the charge, if believed, would be to exclude him from society(*a*).

Grounds of action.

"Man being formed for society and standing in almost constant need of the advice, comfort and assistance of his fellow-creatures, it is highly reasonable that any words, which import the charge of having a contagious distemper, should be in themselves actionable; because all prudent persons will avoid the company of a person having such distemper. It makes no difference whether the distemper be owing to the visitation of God, to accident, or to the indiscretion of the party therewith afflicted; for, in every one of the cases, the being avoided, from whence the damage arises, is the consequence"(*b*).

The rule of law thus stated is more comprehensive than the reported decisions warrant. The only diseases which have been distinctly held to be within the rule are leprosy, as, *e.g.*, to say of the plaintiff: "Thou art a leprous knave"(*c*); or "He is a leper"(*d*); or a venereal disease, as, *e.g.*, to say: "He has the great pox"(*e*); or a venereal disease where special damage is claimed but the proof of it fails(*f*); or to say of a man: "Thou art a pocky knave. Get thee home to thy pocky wife; her nose

(*a*) Pollard v. Lyon (1875) 1 Otto (91 U.S.) 225; Kancher v. Blinn (1875) 29 Ohio 62; Chaplin v. Lee (1885) 18 Neb. 440; Wornack v. Circle (1877) 29 Grat. (Va.) 192.

(*b*) 9 Bac. Abr. (Am. Ed. 1869) p. 45.

(*c*) Taylor v. Perkins (1607) 2 T.R. 473; Cro. Jac. 144; 1 Roll. Abr. 44.

(*d*) 9 Bac. Abr. (Am. Ed. 1869) 45.

(*e*) Milner v. Reeve, 1 Roll. Abr. 43.

(*f*) Bloodworth v. Gray (1844) 7 M. & G. 334.

is eaten with the pock"(*g*); or to call a woman, "A pocky whore"(*h*); or, possibly, for imputing to a person that "He has the plague"(*i*); but not for saying, "He buried people who died of the plague in his house," because special damage was laid and proved(*j*); nor for saying of a person, "He hath the falling sickness," unless it be spoken of him in relation to his trade or profession(*k*); nor for saying "He hath the itch," although it would be actionable if written(*l*); nor for saying, "He has smallpox"(*m*).

The law in the United States.

The law is the same in the United States. The charge against a person of having the venereal disease is held to be actionable, not because the charge imputes any legal or moral offence, but solely because it tends to exclude him from society as a person having a disgusting and contagious disease, and with whom it is unsafe to associate(*n*). In the case in which the law was so laid down, the words were: "G. has the venereal disease. It is an old affair, and being married has brought it on again. He is the guilty one; he has given it to his wife." So also to say of a married woman: "She has the venereal disease," "She has the clap," "She has the pox"(*o*); or to say of a woman: "I will tell you what the matter with her is, she has had the pox"(*p*), is actionable *per se*. Where the words complained of by plaintiff as having been spoken of him were: "He has a loathsome disease, and that is what is the matter with him, and now he is trying to get a pension for some other disease," and "He has got it, and has had it ever since he came out of the army,"

(*g*) Brook v. Wise (1601) Cro. Eliz. 878.

(*h*) Whitfield v. Powel (1699) 12 Mod. 248; Grimes v. Lovel (1699) 12 Mod. 242; Clifton v. Wells (1699) 12 Mod. 634.

(*i*) *Per* Wilmot, C.J., and Gould, J., in Villars v. Mousley (1769) 2 Wils. 403.

(*j*) Kit. 173*b*., 1 Com. Dig. 377.

(*k*) Taylor v. Perr (1607) 1 Roll. Abr. 44.

(*l*) Villars v. Mousley, *supra*.

(*m*) James v. Rutlech (1599) 4 Rep. 17*b*; Villars v. Mousley, *supra*.

(*n*) *Per* Metcalf, J., in Golderman v. Stearns *et ux*. (1856) 7 Gray (73 Mass.) 181.

(*o*) Williams *et ux*. v. Holdredge (1854) 22 Barb. (N.Y.) 396.

(*p*) Irons *et ux*. v. Field *et ux*. (1869) 9 R.I. 216.

it was held, that the defendant had sufficiently charged that plaintiff had contracted a disorder from the effects of which he was still suffering(*q*).

Where action does not lie.

But charging another with *having had* a contagious disorder is not actionable; for, unless the words impute a continuance of the disorder at the time of speaking them, the gist of the action fails; for such a charge cannot produce the effect which makes it the subject of an action, namely, exclusion from society. To make such words actionable some special damage must be alleged in consequence of them(*r*). It was observed, in the first of the two cases just cited, that this doctrine was justified by all the cases, except one which was loosely reported(*s*). In *Bruce* v. *Soule* (*supra*), the words were: "He was about dead with the bad disorder." They were held not actionable, because they did not charge the plaintiff with having the "bad disorder" at the time the words were spoken, but that "he was" (in the past tense) about dead with it. Where, however, the words impute that the plaintiff is at present afflicted with a disgusting and contagious disease, they are actionable *per se*, because they import a present unfitness to be admitted into society, which is not the case where one has had a contagious disorder(*u*).

Rule of construction of words used.

The imputation may be conveyed either in express terms, as in the case above referred to of calling a person a "leprous knave," the meaning of which is unmistakeable, or it may be plainly implied from the circumstances of the publication. In this respect the rule of construction of the language used is the same as in other cases of actionable slander. The action lies where the circumstances shew that the defendant intended the hearers to understand that the plaintiff, at the time the defamatory words were uttered, was afflicted with any of the contagious diseases above mentioned. The meaning may be disclosed by

(*q*) Monks v. Monks (1889) 20 N.E. Rep. 744.

(*r*) Carslake v. Mapledoram (1788) 2 T.R. 473, at p. 475. See, also, Taylor v. Hall, *infra*.

(*s*) See, also, Taylor v. Hall (1742) 2 Str. 1389; Pike v. Van Turner (1850) 5 How. Pr. (N.Y.) 171; Bruce v. Soule (1879) 69 Me. 562.

(*u*) Bloodworth v. Gray, *supra*.

reference to the mode in which the disease was communicated, the symptoms(*v*) with which it is attended, its effects upon the person(*w*), or constitution, the means of cure(*x*), the necessity of avoiding the person infected(*y*); or, in short, by any other allusion capable of conveying the offensive imputation(*z*).

(*v*) Holt, 653.

(*w*) Taylor v. Perkins, *supra;* Miller's Case, Cro. Jac. 430.

(*x*) Miller's Case, *supra;* Davies v. Taylor, Cro. Eliz. 648; Roll. Rep. 420.

(*y*) Miller's Case, *supra.*

(*z*) Bac. Abr. Tit. Slander, 267.

CHAPTER IV.

Slander Imputing Unchastity.

Imputations of unchastity.

The law with respect to imputations of unchastity to females has only within a comparatively recent period been placed on anything like a satisfactory footing, and in some of the Provinces of Canada, it is still in need of amendment. Until the passage in England of the Slander of Women Act, 1891(*a*), words imputing unchastity or adultery to any woman or girl were not actionable without proof of special damage(*aa*).

The rules as to special damage.

As to special damage, "any words by which a party has a special damage" are actionable(*b*). Undoubtedly all words are actionable if a special damage follows(*c*). The rule to be deduced from the cases is: that all words published without lawful occasion, and which have in fact produced such special damage to the plaintiff as the law does not deem too remote, are actionable(*d*). The special damage must be the natural and probable consequence of the words complained of(*e*); and, therefore, the original publisher of the words is not liable for damage caused

(*a*) 54-55 Vict, c. 51.

(*aa*) Wilby v. Elston (1849) 18 L.J.C.P. 320; 8 C.B. 142; Allsop *et ux.* v. Allsop (1860) 5 H. & N. 534; 29 L.J. Ex. 315; 8 W.R. 449; 6 Jur. (N.S.) 433; 36 L.T. (O.S.) 290; Davies *et ux.* v. Solomon (1871) L.R. 7 Q.B. 112; 41 L.J.Q.B. 10; 20 W.R. 167; 25 L.T. 799; Riding v. Smith (1876) 1 Ex. D. 91; 45 L.J. Ex. 281; 24 W.R. 487; 34 L.T. 500; Lynch v. Knight *et ux.* (1861) 9 H.L. 577; 8 Jur. (N.S.) 724; 5 L.T. 291; Roberts *et ux.* v. Roberts (1864) 5 B. & S. 384; 33 L.J.Q.B. 249; 10 Jur. (N.S.) 1027; 12 W.R. 909; 10 L.T. 602. These leading English cases are, of course, applicable to the law in any of the Canadian Provinces in which there has been no legislation on the subject.

(*b*) Com. Dig. Action upon the case for Defamation. (D. 30).

(*c*) *Per* Heath, J., in Moore v. Meagher (1807) 1 Taunt. 39, at p. 44; 3 Smith, 135.

(*d*) Knight v. Gibbs (1843) 1 A. & E. 43; 3 N. & M. 469.

(*e*) Lumby v. Gye (1853) 2 E. & B. 216; 22 L.J.Q.B. 463; *per* Lord Wensleydale in Lynch v. Knight *et ux.*, *supra*, 9 H.L.C. at p. 600; Bowen v. Hall (1881) 6 Q.B.D. 333. See, also, Green v. Button (1835) 2 C.M. & R. 707.

by their repetition, unless he authorized such repetition, or unless the repetition was the natural and probable consequence of his own publication(*f*). The special damage must consist of some actual temporal loss, as, *e.g.*, the loss of the hospitality of friends(*g*), or of the *consortium* of the husband(*h*), or of a marriage(*i*); but not mental or bodily pain or suffering(*j*); nor exclusion from the Bible society and congregation of a religious sect(*k*); nor, as the natural and reasonable results, the separation of husband and wife or the loss of a boarder(*l*).

The English Slander of Women Act, 1891.

The English Slander of Women Act, 1891(*m*), above referred to, provides that words imputing unchastity or adultery to any woman or girl shall not require special damage to render them actionable; and that where they are actionable under the statute, a plaintiff shall not recover more costs than damages, unless the judge shall certify that there was reasonable ground for bringing the action(*n*). The same rule of law as to such words not being actionable without proof of special damage prevailed in all the Provinces and Territories of Canada with one exception, until the comparatively recent changes by special legislation(*o*). The exception was in what is now the Province of Quebec, where it was held as early as 1820, that to call a woman a "whore" was actionable without proof of special damage(*p*).

(*f*) Speight v. Gosnay (1891) 60 L.J.Q.B. 231; 55 J. P. 501; Ratcliffe v. Evans (1892) 2 Q.B. at p. 530. See, also, Ward v. Weeks (1830) 7 Bing. 211; 4 M. & P. 796; Riding v. Smith, *supra;* Parkins *et ux.* v. Scott *et ux.* (1862) 1 H. & C. 153.

(*g*) Moore v. Meagher, *supra;* Lynch v. Knight *et ux.*, *supra;* Davies *et ux.* v. Solomon, *supra;* Pettibone v. Simpson (1873) 66 Barb. (N.Y.) 492.

(*h*) Lynch v. Knight *et ux.*, *supra.*, at p. 589.

(*i*) Davis v. Gardiner (1593) 4 Rep. 16; 2 Salk. 694; Matthew v. Cross (1614) Cro. Jac. 323; Nelson v. Staff (1618) Cro. Jac. 422; Holwood v. Hopkins (1600) Cro. Eliz. 1787.

(*j*) Allsop *et ux.* v. Allsop, *supra.*

(*k*) Roberts *et ux.* v. Roberts, *supra.* See, also, Campbell *et ux.* v. White *et ux.* (1856) 5 Ir. C.L.R. 312.

(*l*) Ludlow v. Batson, 5 O.L.R. (1903) 309; 2 O.W.R. 41; 23 C.L.T. Occ. N. 151.

(*m*) 54-55 Vict. c. 51.

(*n*) Sec. 1.

(*o*) See Palmer v. Solmes, *infra.*

(*p*) Langlois v. Tasse (1820) 2 Rev. De Leg. 334 (K.B.).

Proof of special damage not required in Ontario.

In Ontario the change in the law was affected by the Law of Slander Amendment Act, 1889(*q*), which is now consolidated in the Provincial Act respecting actions of Libel and Slander(*r*). Section 5 of this Act provides, that in an action of slander for defamatory words spoken of any woman and imputing or meaning that such woman has committed or been guilty of adultery, fornication or concubinage, it shall not be necessary to allege in the plaintiff's statement of claim, or to prove at the trial, that any special damage resulted to the plaintiff from the utterance of such words, but the plaintiff may recover nominal damages without averment or proof of special damage(*s*).

Statement of claim to refer to section 5 (2) of the Act.

A plaintiff shall not under this section, or because or by reason of the provisions in this section contained, be entitled to recover a verdict in any such action, unless the statement of claim contains an allegation that the action is brought by the plaintiff under the provisions of this section(*t*).

The law in British Columbia.

The enactment in the British Columbia Law of Defamation Amendment Act(*u*) is the same as the English Act.

In Nova Scotia.

In Nova Scotia, under the rules of the Judicature Act(*v*), it is provided, that in any action for slanderous words spoken of any woman imputing to her any unchaste conduct, it shall not be necessary to allege in pleading, or prove at the trial, that any special damage resulted to her from the utterance of such words; but she shall recover such damages as may be assessed without such averment or proof of damage.

In the North-West Territories.

In the North-West Territories of Canada the enactment in Chapter 30 of the Consolidated Ordinances, 1898, provides that

(*q*) 52 Vict. c. 14.
(*r*) R.S.O. 1897, c. 68, s. 5.
(*s*) Sec. 5(1).
(*t*) *Ibid.* (2).
(*u*) R.S.B.C. 1897, c. 120, s. 5.
(*v*) R.S.N.S. 1900, c. 155, Ord. 19, R. 29.

in any action for slander founded on words spoken of the plaintiff imputing unchastity, adultery, or profligacy, to a female, whether married or unmarried, it shall not be necessary to allege or prove special damage, but such words shall be actionable *per se*.

In the Yukon Territory.

The same law, taken from this Ordinance, is contained in Chapter 28 of the Consolidated Ordinances, 1902, of the Yukon Territory. Section 2 of the Yukon Ordinance also enacts, that in any action of slander founded on false and malicious defamatory words, reflecting upon the character, reputation, honesty or actions of any person, or on false or malicious statements which might tend to bring into ridicule or contempt any person, it shall not be necessary to allege or prove any special damage, but such false and malicious defamatory words or statements shall be actionable *per se*. This enactment does not appear to include written or printed slander.

There has been as yet no legislation on the subject in any of the other Provinces. In those Provinces there is still existent "the unsatisfactory state of the law according to which the imputation by words however gross, on an occasion however public, upon the chastity of a modest matron or a pure virgin, is not actionable without proof that it has actually produced special temporal damage to her"(*w*). "Instead of the word 'unsatisfactory,'" said Lord Brougham in the same case(*x*), "I should substitute the word 'barbarous.'" It was in consequence of this sort of judicial criticism, much of it of a considerably later date, and of public opinion, as expressed by the English newspaper press, which condemned the former state of the law, that Parliament was constrained to pass remedial legislation on the subject.

"Adultery," "fornication," or "concubinage."

Although adultery is not indictable under the Criminal Code of Canada, it is a criminal offence in many of the United States. It is also, as we shall see, indictable in the Province of New Brunswick, under an unrepealed statute. Wherever in any of

(*w*) *Per* Lord Campbell, L.C., in Lynch v. Knight *et ux.* (1861) 9 H.L.C. 593; 8 Jur. N.S. 724; 5 L.T. 291.

(*x*) At p. 594.

the States it is made such an offence, without being defined, all the authorities hold that sexual intercourse between a married woman and a man other than her husband constitutes the crime. In some of the States this is held to be an exclusive definition, on the ground that the gist of the crime is the danger of introducing spurious heirs into the family. In other States it is held that the offence is committed by sexual connection between a man and a woman, one of whom is lawfully married to a third person, and that it makes no difference whether the married person is a man or woman(*y*). Adultery has been defined as the unlawful sexual intercourse, or open and unlawful living together, of a man and woman where one or both of them are married(*z*). In the cases just cited fornication is defined as the carnal and unlawful intercourse of an unmarried person with the opposite sex. Concubinage has been defined by the lexicographers as the act or practice of cohabiting as man and woman, in sexual commerce, without a legal marriage.

Rules of construction of the words used.

The rules of construction of the words used, and as to the certainty of the imputation, are the same both in Canada and the United States. It is not essential, under a statute making it slander to falsely charge a woman with adultery or fornication, that the charge should be made in direct terms. It is sufficient in law if the words used are such as impute adultery or fornication, and are so understood by those who hear them(*a*). As to the certainty of the imputation, the words will be actionable if they consist of a statement of matters which would naturally and presumably be understood by the hearers as a charge of the offence. There is no offence which can be conveyed in so many multiplied forms and figures as that of incontinence. The charge is seldom made, even by the most vulgar and obscene, in broad and coarse language. If the language used is such that, in its ordinary acceptation, a person of ordinary understanding could not doubt its signification, it will be *primâ*

(*y*) Newell on Defamation, 152; Rapalje & Lawrence, Law Dict. 32.

(*z*) Territory v. Whitcomb (1871) 1 Montana T. 359; Hood v. The State (1877) 56 Ind. 263.

(*a*) Buscher v. Scully (1886) 107 Ind. 246; 5 N.E. Rep. 738.

facie sufficient(*b*). But the words will not be actionable, even under the statutes permitting actions for imputations of unchastity or adultery to any female, where the words "are used merely as general terms of abuse; the words must be such as to convey to the hearers a definite imputation that the plaintiff has in fact been guilty of adultery or unchastity"(*c*). So, also, in an action for libel in which it is charged that the writing imputes unchastity to a woman or girl, the language must be such as to convey to the readers a definite imputation that the plaintiff has been guilty of unchastity(*d*).

The damages recoverable.

As to the damages recoverable for this species of slander, it will be noticed that, under the Ontario Act, the plaintiff may recover nominal damages without alleging or proving special damage, but that she is not entitled to recover anything, unless the statement of claim contains an allegation that the action is brought by the plaintiff under the provisions of section 5 of the Act relating to Libel and Slander(*e*). The character of the plaintiff is deemed to be vindicated by the award of nominal damages; and there is no inconsistency in a jury finding the defamation to be malicious and yet awarding only a nominal sum(*f*). This may, of course, be increased indefinitely by alleging and proving special damage. In Nova Scotia, the North-West Territories and the Yukon Territory, and also in British Columbia, there is no restriction as to the damages, which will be governed by the usual rules in actions for defamation. "The damages cannot be measured by any standard known to the law; they must be determined by a consideration of all the circumstances of the case viewed in the light of the law applicable to

(*b*) Woolnoth v. Meadows (1804) 5 East 463; Miller v. Parish (1829) 25 Mass. 384; Stroebel v. Whitney *et al.* (1884) 31 Minn. 384; 18 N.W. Rep. 98; Lewis v. Hudson (1872) 44 Ga. 568; Proctor v. Owens (1862) 18 Ind. 21; Walton v. Singleton (1821) 7 S. & R. (Penn.) 449.

(*c*) Odgers L. & S. 4th Ed. at p. 67.

(*d*) *Per* MacMahon, J., in Marsh v. McKay (1903) 2 O.W.R. 614, at p. 616, allowing appeal against order in Chambers refusing security for costs (2 O.W.R. 522). See note of this case in the chapter on Security for Costs in actions for libel against newspaper publishers.

(*e*) Sec. 5(2).

(*f*) Cooke v. Brogden & Co. (1885) 1 T.L.R. 497

them"(*g*). The jury have full discretion as to the quantum of damages, which shall be given subject to the power of the court to set aside the verdict should the amount be grossly inadequate or grossly excessive, and, in the latter case, to reduce the amount, with the consent of the plaintiff and without the consent of the defendant, instead of directing a new trial(*h*).

The plaintiff's costs.

In British Columbia, it will be observed, the costs recoverable by the plaintiff shall be no greater than the damages, unless the trial judge certifies that there was reasonable ground for bringing the action. There is no such restriction in any other part of Canada. In Ontario, where the action or issue is tried by a jury, the costs follow the event, unless the trial judge, in his discretion, otherwise orders(*i*).

The words must be distinctly stated in the pleadings.

In this as in every other species of defamation, verbal or written, the very words complained of must be set out by plaintiff(*j*). It is not sufficient to give the substance or purport of the libel or slander with innuendoes; the words must be set out verbatim(*k*). Where, therefore, in an action by husband and wife, the first and second counts of the declaration charged slander of the wife by imputing adultery and prostitution, and alleged special damage to the plaintiffs in their business as grocers, but the words constituting the slander were not set out, the counts which were demurred to on that ground were held to be clearly bad(*l*). For the same reason, an action will not lie where the words alleged as slanderous are set out in the declaration by way of narration instead of the actual words used(*m*). So, also, it has been held in the Province of Quebec, that a declaration which alleged that defendant, "at divers times and to various persons, uttered false and malicious statements with intent to

(*g*) *Per* Lord Herschell, L.C., in Bray v.Ford (1896) A.C. 44, at p. 53.
(*h*) Belt v. Lawes (1884) 12 Q.B.D. 356.
(*i*) R. 1130(3) O.J.A.
(*j*) Wright v. Clements (1820) 3 B. & Ald., at p. 506.
(*k*) *Per* Falconbridge, C.J., in Hay v. Bingham (1902) 1 O.W.R. 822; 5 O.L.R. (1903) 224, at p. 226.
(*l*) Breen *et ux.* v. McDonald (1872) 22 U.C.C.P. 298.
(*m*) Phillips v. Odell (1837) 5 U.C.R. (O.S.) 483.

injure the plaintiff in his character, credit and reputation, as being a person unworthy of confidence, unreliable and a perjurer," without setting forth the statements, or giving dates, is defective in substance and form, and that the action should be dismissed on exception to the form(*n*).

Imputation of unchastity without alleging a specific offence.

In an action by husband and wife for calling the wife a whore, it was held sufficient, under a New Brunswick Act(*o*), to aver in the declaration an intention to impute unchastity without alleging a specific offence, and without any further innuendo explanatory of the words, when, as in such a case, the words used indicate an offence punishable by the temporal courts. Upon a verdict for plaintiff, defendant moved in arrest of judgment on the grounds, that the words were not actionable in themselves; that the plaintiffs had not put such a construction on them in their declaration as would make them actionable; and that there was no allegation or proof of special damage. The Act 31 Geo. III. c. 5, which had been referred to at the trial in support of the action, applied, it was said, only to certain specific offences, viz.: incest, adultery and fornication. None of these, it was argued, was necessarily comprehended under the term unchastity, as that term would equally apply to the adultery of the heart, which was in the Scriptures considered as much a crime as the commission of the act itself. Unchastity might be imputed without any charge of the offences to which the Act referred; and the declaration, in order to sustain the action, ought to have charged a specific imputation of adultery or fornication. The court held, as above stated, that under the Act such a charge was clearly actionable in New Brunswick, if the words were such as to impute the offence thereby made punishable in the temporal courts. There was no ambiguity or doubt about the words in the declaration. Unchastity is a general term, like theft, which may include various particulars. To call a man a sheep-stealer, thereby meaning to impute theft, is an analogous case. There was nothing in the inducement, supposing it to be material, which could be taken to contract or abridge the natural and commonly received import of the words spoken(*p*).

(*n*) Deronin v. Archambault (1874) 19 L.C.J. (Court of Review) S.C.R. 157.

(*o*) 31 Geo. 3, c. 5.

(*p*) Martindale *et ux.* v. Murphy *et ux.* (1835) 2 N.B.R. (Berton) 161.

Right of action for words applicable to class of two.

In *Albrecht* v. *Burkholder*(*q*), there is a discussion of the question whether an action will lie when the words are applicable to a class of two, but it is uncertain which one of the two; and what, under such circumstances, is necessary for a plaintiff to prove in order to succeed in the action. The plaintiff, one of a family of four unmarried daughters of A., sued under the Ontario Law of Slander Amendment Act, 1889(*r*), for words imputing unchastity to her in her relations with one B. She and her sister L. were the only members of the family to whom the words could apply, as the other two were mere children. The words used did not in themselves ascertain plaintiff as being the person intended by defendant, and in order to identify her as being the particular person referred to, evidence of extraneous circumstances became necessary. The only person, however, who heard the slander uttered was not acquainted with the circumstances, and was for that reason unable to apply them to the defendant's words. No special damage was laid or proved, and, after all the evidence had been taken, counsel agreed that the trial judge (Street, J.) should dispose of the questions raised without a jury. The learned judge held, that the evidence shewed that the slanderous words were spoken under such circumstances as that the person to whom they were spoken did not know to which of the two sisters they were intended to be applied; that either of the two (who were two of a class) was entitled to sue, but it was necessary for her to prove that the words were untrue of the other, otherwise she could not recover, and that as the plaintiff had failed to do this, her action must be dismissed. In referring to the question, whether the innuendo making the words applicable to the plaintiff had been proved, he said: "The rule seems to be settled that the meaning naturally conveyed to the hearers of the words uttered, and not necessarily the meaning intended by the person who utters them, is the meaning which is to be attributed to them by the jury. So that if the person who hears them is not aware, when he hears them, of the circumstances which give to the words used the point and application alleged by the innuendo, it is as if those circum-

(*q*) (1889) 18 O.R. 287.
(*r*) 52 Vict. c. 14, *supra*.

stances did not exist: *Capital and Counties Bank* v. *Henty*(*rr*). I think, therefore, that the innuendo here has not been proved, and that the words must be read, for the purposes of this action, as if no innuendo at all had been alleged by which the words were made specially applicable to the plaintiff."

The plaintiff, however, contended that she was entitled to maintain the action without any innuendo of that nature; and that when the defendant imputed unchastity to one of two, without specifying the particular one to whom he alluded, either one of them might treat the words as aimed at herself, and bring an action. In dealing with this contention, and with the law generally, the learned judge said:—

The result of the cases.

"It appears to me, therefore, as the result of the cases and as being reasonable, that where the statement complained of is, that A. or B. committed an offence, adding expressions from which a jury may determine that the hearers of the words when uttered would understand them as applicable solely to either A. or B., then, the person to whom they appear so applicable may bring the action alleging himself to be the person intended; but that when nothing is added to make the expression applicable specially to either A. or B., then A. and B. may each bring an action, but each must allege in his action that the other did not commit the offence, and, of course, that the words were spoken falsely as to himself.

The limits of the principle.

"A difficulty in the way of the latter part of this principle is to say what are its limits. Its application, where one of two or three persons is referred to, is easy enough. For instance, to say that one of the doctors in A., where there are only two doctors, is an abortionist, might well be an injury to both; but to say that one of the doctors in B., where there are 100 doctors, is an abortionist, would not be an appreciable injury to all. The difficulty would, however, not be a practical one, for it would be controlled by the principle, laid down in the cases, which requires the guilt of all the other members of the class to be negatived before the plaintiff can recover even nominal damages"(*s*).

(*rr*) (1882) 7 App. Cas. 741.

(*s*) Albrecht v. Burkholder (1889) 18 O.R. 287.

Charges of incest and adultery.

A declaration by a married woman for words imputing that she had committed incest and adultery with her father, and alleging as grounds of special damage the loss of the *consortium* of her husband, and the loss of the society of friends, was held good on demurrer, although the second ground was clearly insufficient in not naming the friends. The words, said Osler, J., are not actionable *per se*, although they impute unchastity in its most detestable form, meaning, of course, according to the law as it stood at that time(*t*). Incest was afterwards made an indictable offence by the Criminal Code, 1892(*u*), which came into force on the first day of July, 1893. Adultery is not indictable under the Code, but conspiracy to induce any woman to commit adultery or fornication is indictable under section 218. Adultery is, however, indictable under an unrepealed statute of New Brunswick(*v*).

Imputation when privileged.

Words spoken to a constable who was attending an inquest on the body of a child, and imputing that an unmarried woman was the mother of the child which had been left to die of exposure, were held to be unprivileged(*w*). But words imputing unchastity to the plaintiff and spoken while the defendant in person was conducting a prosecution before a magistrate against the plaintiff for an assault, are absolutely privileged, the words having been used in the course of a trial(*x*).

Quebec decisions.

Where, in the Province of Quebec, the defendant had, some two years previously, in the privacy of the plaintiff's family, with whom he was intimate, called plaintiff, who was an unmarried woman of admittedly good character, *une putain* (a prostitute), and had subsequently repeated the expression to several persons, the words were held to be actionable, and judgment was given for $50 damages and costs in the Superior

(*t*) Palmer v. Solmes (1880) 45 U.C.Q.B. 15.

(*u*) Sec. 176.

(*v*) C.S.N.B. 1903, Appendix, p. 2397; R. v. Egre (1877) 1 N.B.R. (1 P. & B.) 189; R. v. Ellis (1883) 22 N.B.R. 440.

(*w*) Black v. Alcock (1861) 12 U.C.C.P. 19.

(*x*) Henderson v. Scott (1892) 24 N.S.R. 232.

Court(*y*). The courts of Quebec have also held that a father, whose infant daughter has been slandered by words imputing that she was guilty of fornication, has an action of defamation on his own behalf against the slanderer(*z*).

The law in the United States.

Throughout the United States, as a result of statutory enactments, and with, perhaps, the single exception of the State of Maryland, an imputation of a want of chastity to a female, married or unmarried, or of the commission of adultery or fornication, is actionable without proof of special damage. In Maryland the imputation of adultery to a married woman is not actionable, because, although adultery is a State offence, it is punishable only by fine(*a*).

(*y*) Denis v. Théorêt (1882) 5 L.N. 163; 27 L.C.J. (S.C.R.) 12.

(*z*) Antille v. Marcotte (1888) 11 L.N. (C.C.) 339.

(*a*) Griffin v. Moore (1875) 43 Maryland, 246; Shafer v. Ahalt (1877) 48 Maryland 171; 30 Amer. Rep. 456.

CHAPTER V.

Slander of a Person in his Office.

The rule as to this species of slander.

Slanderous words spoken of a person in relation to his office, profession, trade, or business, are actionable without proof of special damage on two conditions: first, that, at the time the words were spoken, he held such office or was following such profession, trade, or business(*a*); and second, that the words were prejudicial to him, or tended to his prejudice, therein(*b*). The plaintiff should establish both conditions, and, as to the second, it should plainly appear, as stated by Tindal, C.J.(*c*), that the words "touch the plaintiff in his office, profession, or trade," words falling short of this not being actionable in that connection. Where, therefore, the words, although false and malicious and probably occasioning some damage to the plaintiff under certain circumstances, were not in themselves defamatory, nor connected by averment or by implication with the plaintiff's trade, and the damage alleged was not the natural or reasonable consequence of speaking the words, the action could not be sustained(*d*).

Distinction between words actionable by holders of offices of honour or credit, and by holders of offices of profit.

"There is a distinction," also, as pointed out by Lord Herschell, L.C., in a case which came before the English Court of Appeal(*e*), "between that which is actionable in the case of offices of honour or credit as compared with the case of an office of profit. The ground upon which the action has been said to be

(*a*) *Per* De Gray, C.J., in Onslow v. Horne (1771) 3 Wils. 188; 2 W. Bl. 753; Bellamy v. Burch (1847) 16 M. & W. 590; Gallwey v. Marshall (1853) 9 Ex. 294; 23 L.J. Ex. 78; 7 Bac. Abr. 269, 271; Styles, 231; Poph. 207.

(*b*) Foulger v. Newcomb (1867) L.R. 2 Ex. at p. 330.

(*c*) In Doyley v. Roberts (1837) 3 Bing. N.C. 835, at p. 840. See, also, Com. Dig. Action for Defamation, D. 27.

(*d*) Miller v. David (1874) L.R. 9 C.P. 118; 43 L.J.C.P. 84; 30 L.T. 58; 22 W.R. 332.

(*e*) Alexander v. Jenkins (1892) (C.A.) 1 Q.B., at pp. 801, 802.

maintainable in the former case, certainly in some of the authorities, would seem to be this, that the language used has been such as, if true, would shew that the man ought to be deprived of his office, and, therefore, involves a risk of exclusion from that office. . . . All we have to deal with [*i.e.*, in the present case] is merely an imputation of unfitness for the office, and there is no case in which an action for 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. . . . I will put it shortly thus: That where the imputation is an imputation not of misconduct in an office, but of unfitness for an office, and the office for which the person is said to be unfit is not an office of profit, but one merely of what has been called honour or credit, the action will not lie, unless the conduct charged be such as would enable him to be removed from or deprived of that office."

In the case in which these observation occur the words complained of by the plaintiff, who had been elected to the office of town councillor for a borough, were: "He is never sober, and is not a fit man for the council. On the night of the election he was so drunk that he had to be carried home." No special damage was proved, and, in the absence of such damage, it was held, following *Onslow* v. *Horne*(*f*), that the words were not actionable, for the office of town councillor was not one of profit, and the charges affecting the plaintiff were such as, if true, afforded no ground for dismissing him from his office.

Distinction between words imputing want of ability and want of honesty (per Lord Herschell).

In another part of the same judgment, the Lord Chancellor, referring to the distinction, in those two kinds of offices, between words imputing want of ability in the office holder and words imputing want of honesty, says: "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 imputation of immoral or disgraceful conduct. As was said in *Lumby* v. *Allday*(*g*), by Bay-

(*f*) (1771) 2 W. Bl. 750.
(*g*) (1831) 1 C. & J. 301.

ley, B.: 'Every authority which I have been able to find either shews the want of some general requisite, as honesty, capacity, fidelity, etc., or connects the imputation with the plaintiff's office, trade, or business.' It must be either something said of him in his office or business which may damage him in that office or business, or it must relate to some quality which would shew that he is a man who, by reason of his want of ability or honesty, is unfit to hold the office. So much with regard to offices of profit; the reason being that in all those cases the court will presume, or perhaps I should rather say, the law presumes, such a probability of pecuniary loss from such imputation, in that office, or employment, or profession, that it will not require special damage to be shewn. It may be said to be an arbitrary rule. Be it so; but the rule is, at all events, laid down, and seems to me to rest on that basis. But when you come to offices that are not offices of profit, the loss of which, therefore, 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''(*h*).

Lindley, L.J., and Kay, L.J.

Lindley, L.J., and Kay, L.J., expressed similar opinions, Kay, L.J., making a reservation as to what the decision of the court would have been had there been an imputation of a disgraceful act done by the plaintiff in his office. Although it might be an act not sufficient to deprive him of the office, it might possibly be a sufficient slander to be actionable without proof of damage. And so, also, ''if this imputation had been made while he was a candidate for the office, and might possibly have prevented his candidature from succeeding, it seems to me a very strong argument might have arisen for holding the words actionable, although there was no proof of actual damage''(*i*).

(*h*) Alexander v. Jenkins, *supra*, pp. 800, 801.

(*i*) *Ibid.*, p. 805.

Words imputing misconduct in office although office not one of profit.

In giving judgment in this case the English Court of Appeal expressly reserved the question whether words imputing misconduct in office would be actionable without special damage. This question was subsequently decided by the court in a case in which the defendant, a councillor of a municipal borough, spoke at a public election meeting, concerning an alderman of the same borough, words importing a charge that plaintiff had used his office for the purpose of dishonestly procuring advantage to himself. The court held that the words were actionable without proof of special damage, and they laid down the rule that an action for slander will lie without special damage for words imputing dishonesty or malversation in a public office of trust, although the office is not one of profit, and whether there is a power of removal from the office for such misconduct or not(*j*).

Opinion of Lopes, L.J.

"In my judgment," said Lopes, L.J., "words imputing want of integrity, dishonesty, or a malversation, to any one holding a public office of confidence or trust, whether an office of profit or not, are actionable *per se*. On the other hand, when the words merely impute unsuitableness for the office, incompetency, or want of ability, without ascribing any misconduct touching the office, then, according to the decision in *Alexander* v. *Jenkins* (*supra*), no action lies, where the office is honorary, without proof of special damage"(*k*).

This view, as is pointed out, is quite consistent with the case last named, in which "Lord Herschel draws a marked distinction between an imputation of misconduct in an office and unfitness for it." Lopes, J., adds that he should hesitate long before he held "that words imputing gross misconduct in the discharge of the duties of a public office were not actionable *per se*, even where that office was an office of credit or honour." The power of amotion from a corporate office, incident to a corporation at common law, still existed unless it had been taken away by statute; and he could find nothing in any statute taking it away, nor anything in any statute inconsistent with its existence.

(*j*) Booth v. Arnold (1895) (C.A.) 1 Q.B. 571.
(*k*) *Ibid.*, p. 576.

Profession or vocation must be legal.

There is no restriction as to the office, profession, or vocation, in regard to which the action will lie, except that it be not illegal. "The rule as to words spoken of a man in his office or trade is not necessarily confined to offices and trades of the nature and duties of which the court can take judicial notice. The only limitation . . . is that it does not apply to illegal callings"(*l*).

Slander of a person holding an elective office not followed by special damage.

It has been doubted in an Ontario case whether defamatory words, spoken of a person holding an elective office, with respect to him in that capacity, and not followed by special damage, are actionable when they would not be so if spoken of the holder of the office in his private capacity. In *Blagden* v. *Bennett*(*m*), which was an action by a school trustee against a ratepayer for slander of plaintiff arising out of a matter in which the court held the communication to have been between parties mutually interested, and therefore privileged, Cameron, C.J., said: "I entertain very grave doubt as to whether defamatory words, spoken of the conduct of a person holding an elective office in regard to such office, not followed by special damage, can be made actionable, the office not making that actionable, which, spoken of the holder of the office as a private individual, would not be actionable; but, in the view I have taken of the question of privilege, it is not necessary to the decision of this case to determine whether this doubt should be solved in favour of the defendant."

Charge, in a mitigated sense, of public robbery.

Where the defendant had charged the plaintiff with being "a public robber," and it appeared by the plaintiff's declaration, that the defendant used the expression in a mitigated sense by the innuendo that "the plaintiff had defrauded the public in his dealings with them," it was held that it was not necessary for the plaintiff to aver that he was in any office, trade, or employ-

(*l*) Foulger v. Newcomb (1867) L.R. 2 Ex., at p. 330. See, also, Hunt v. Bell (1822) 1 Bing. 1; Yrissari v. Clement (1826) 3 Bing. 432.

(*m*) (1885) 9 O.R. 593.

ment, in which he could have defrauded the public. The words were actionable without the aid of a colloquium, or the averment of any particular trade(*n*), because they imported a felony, robbery being a proper term of legal signification describing an offence which was a felony.

Robinson, C.J.

"Surely," said Robinson, C.J., "a man may defraud the public in any individual transaction he may have without filling any particular trade or office, or having any common course of dealing which brings him in contact with the Government; if, in fact, the plaintiff never had such an office, or trade, or course of dealings, he could not have averred it because he could not have proved it, and yet the words would have been no less a slander, if they were false"(*o*).

Slander of officers of justice;

It is also actionable, without proof of special damage, to say of a judge that he gives corrupt sentences(*p*); or of an officer of a court of justice that he is an extortioner(*q*); or of a member of a Royal Commission that he takes bribes(*r*); or to make a similar charge against a justice of the peace(*s*);

of church wardens;

or to say of a church warden that he is a cheat and has cheated the parish(*t*); or to make a similar charge against a constable, or to say of him that he is not worthy of his office of constable(*u*);

(*n*) Surman v. Shelleto (1765) 3 Burr. 1688; Sweth v. Cary (1814) 3 Camp. 461.

(*o*) Taylor v. Carr (1847) 3 U.C.Q.B. 306.

(*p*) Caesar v. Carseny (1593) Cro. Eliz. 305.

(*q*) Stanley v. Boswell (1598) 1 Roll. Abr. 55.

(*r*) Moor v. Foster (1606) Cro. Jac. 65.

(*s*) Caesar v. Carseny, *supra;* Masham v. Bridges (1632) Cro. Car. 223.

(*t*) Strode v. Holmes (1651) Styles, 338; 1 Roll. Abr. 58; Jackson v. Adams (1835) 2 Bing. N.C. 402; 2 Scott, 599; 1 Hodges, 339.

(*u*) Taylor v. How (1601) Cro. Eliz. 861; 1 Vin. Abr. 464.

of parliamentary candidates.

or to charge a parliamentary candidate at a public meeting with atheism and blasphemy(*v*). But, unless special damage is provable, it is not actionable to impute insincerity to a member of parliament(*w*); or to use words of abuse of a justice of the peace which would not warrant his being deprived of his office(*x*).

(*v*) Pankhurst v. Thompson (1886) 3 T.L.R. 199.

(*w*) Onslow v. Horne (1771) 3 Wils. 177; 2 W. Bl. 750.

(*x*) Hilliard v. Constable, 1 Cro. Eliz. 306; Moore, 418; R. v. Farre, 1 Keb. 629; Hollis v. Briscow *et ux.* (1605) Cro. Jac. 58; Bill v. Neal (1662) 1 Lev. 52.

CHAPTER VI.

Slander of a Person in his Profession.

Slander of a person professionally.

An action of slander also lies, without proof of special damage, for words spoken of persons in relation to their professional offices or positions.

Clergymen and ministers of religion.

With respect to clergymen and ministers of the gospel any words concerning them which, if true, would be ground for degradation or deposition, or for deprivation of, or removal from, office, are actionable *per se*(*a*); but they are not so actionable, as the cases just cited shew, where the wrong-doing imputed does not tend to prove the party unfit to continue in his office.

Slander imputing incest to a minister of the gospel is actionable without shewing special damage, because tending to loss of his employment or office, and it is no objection to such an action that the slander was not spoken with reference to the office(*b*). So it is actionable, without proof of special damage, to say of a minister in office that he is an adulterer, and has had children by another man's wife(*c*); or to accuse a beneficed clergyman of immorality(*d*); or of misappropriation of the sacrament money(*e*); or of fraudulently obtaining a bill from defendant while stupefied with drugged wine(*f*); or of preaching false doctrine(*g*). But to say of a Congregational minister, who had

(*a*) Drake v. Drake (1652) 1 Roll. Abr. 58; Dod v. Robinson (1648) Aleyn 63; Pemberton v. Colls (1847) 10 Q.B. 461; 16 L.J.Q.B. 403; 11 Jur. 1011; Gallwey v. Marshall (1853) 9 Ex. 294, at p. 299; 23 L.J. Ex. 78.

(*b*) Starr v. Gardner (1843) 6 U.C.R. (O.S.) 512.

(*c*) Parret v. Carpenter (1560) 2 Cro. Eliz. 502.

(*d*) Dod v. Robinson, *supra;* Highmore v. Countess of Harrington (1857) 3 C.B.N.S. 142; Gallwey v. Marshall, *supra;* Evans v. Gwyn (1844) 5 Q.B. 844.

(*e*) Highmore v. Countess of Harrington, *supra.*

(*f*) Pemberton v. Colls, *supra.*

(*g*) Dod v. Robinson, *supra;* Dr. Sibthorpe's Case (1628) W. Jones 366; 1 Roll. Abr. 76.

been a linen draper, and with reference to his occupation as such, that he was a rogue and guilty of fraud and cheating, and that the defendant would so expose him that he should "not be able to hold up his head in the pulpit at T. nor in any other," is no slander of the plaintiff in his office as a minister(*h*). But to say of a minister of the gospel, that he has retained for his own use the whole or part of the collections made by him for foreign missions is actionable *per se*(*i*).

Imputation of profligacy against a Methodist minister.

Following *Hopwood* v. *Thorn* (*supra*), it has been held, in Ontario, that an imputation of incontinent or profligate conduct against a Methodist minister is not actionable without proof of special damage. The plaintiff alleged that, being a preacher of the Methodist Church and in receipt of emoluments as such, the defendant slandered him by saying: "He (plaintiff) kept company with a prostitute woman for a length of time, and I can prove it." The declaration was demurred to on the grounds that the words charged were not actionable without special damage; that none such was shewn; and on various other grounds. The demurrer was sustained on the authority of the decision above mentioned, that the declaration could not be supported, at all events, without an averment of special damage. Hagarty, J., who delivered the judgment of the court, also referred to *Cox* v. *Cooper*(*j*), where Blackburn, J., says in reference to the section in the Common Law Procedure Act: "The words must still bear, or be alleged in the declaration to bear, such a meaning as will shew a cause of action. . . There must now be a distinct averment that the words bear a meaning which is actionable"(*k*).

This decision is not in accord with the decisions, *supra* (*e.g.*, *Gallwey* v. *Marshall*), that verbal charges of immorality against clergymen are actionable without proof of special damage. Such a charge, if true, would be good ground for the deposition of a minister of the gospel, and so would come within the rule on

(*h*) Hopwood v. Thorn (1850) 8 C.B. 273; 19 L.J.C.P. 94; 14 Jur. 87. See remarks by Hagarty, J., *infra*, on this case. See, also, Harttey v. Herring (1799) 8 T.R. 130.

(*i*) McLeod v. McLeod (1888) 4 Mon. L. R. (S.C.) 343.

(*j*) (1863) 9 L.T. Rep. N.S. 329 Q.B.

(*k*) Breeze v. Sails (1863) 23 U.C.Q.B. 94.

that point laid down as to beneficed clergymen, who, in this country, are in no different position from salaried ministers of any religious denomination.

Charge of drunkenness against a clergyman.

It has been held, however, that in the absence of special damage, a charge of drunkenness against a clergyman is not actionable. The declaration charged the following words as being spoken of the plaintiff, a clergyman of the Church of England, in relation to his profession: "He will get drunk; I have seen him drunk." There was no averment of special damage. It was held on demurrer that the declaration was bad. In the judgment of Morrison, J., the cases of *Breeze* v. *Sails* (*supra*), *Hopwood* v. *Thorn* (*supra*), and the judgment of Wilde, C.J., therein, *Cox* v. *Cooper* (*supra*), and *Foulger* v. *Newcomb*(*m*), are referred to as being in favour of the defendant. The learned judge held that the words complained of were applicable as well to a person not a clergyman as to a clergyman, and could not be actionable as referable to the plaintiff's profession; and that they were not actionable in themselves(*n*). To say to a clergyman, "Thou are a drunkard," is not of itself actionable; but it is submitted that to impute to a clergyman habitual drunkenness, whilst engaged in the discharge of his official duties, would be actionable(*o*).

Slander of barristers, attorneys and solicitors.

Words touching a barrister, attorney, or solicitor, in his profession, and while he is in active practice, are actionable *per se*. To say of an attorney that he is "a common barreter," *i.e.*, a maintainer of quarrels(*p*); or to accuse him of champerty or maintenance(*q*); or to say of a solicitor that he is a cheating knave, and maintains himself by cheating(*r*); or that he cheats

(*m*) (1867) L.R. 2 Ex. 327.

(*n*) Tighe v. Wicks (1873) 33 U.C.Q.B. 479. See, also, Cucks v. Starre (1633) Cro. Car. 285.

(*o*) Odgers L. & S. 4th Ed. p. 56; Anon., 1 Ohio, 83*n*. See Dod v. Robinson, *supra;* McMillan v. Birch (1806) 1 Binn. 178.

(*p*) Taylor v. Starkey, Cro. Car. 192; Smith v. Andrews, 1 Roll. Abr. 54; Hob. 117.

(*q*) Boxe v. Barnaby, 1 Roll. Abr. 55; Hob. 117; Proud v. Hawes, Cro. Eliz. 171; Hob. 140.

(*r*) Anon. (1638) Cro. Jac. 516; Jenkins v. Smith (1621) Cro. Jac. 586.

his clients(*s*); or to use words imputing to him gross ignorance of the law(*t*); or that he is not a fully qualified practitioner(*u*); or that he will betray his clients' secrets(*v*); or that he misconducted himself professionally(*w*), are all actionable without proof of special damage. But words of general abuse are not actionable(*x*); nor are words alleging that he has defrauded his creditors where they were not spoken of him in his professional character, or in relation to his profession(*y*). But to say of a barrister that he is a "dunce"(*z*); that he is no lawyer and that those who come to him for law are fools(*a*); that he has deceived his client and revealed the secrets of his cause(*b*); that he will give vexatious and bad advice(*c*); or that he will stir up a law suit and fill his own pockets at his client's expense(*d*), is actionable without proof of special damage.

Justification restricted to mitigation of damages where solicitor slandered professionally.

The question whether slander of a solicitor professionally may be justified by facts which amount to a justification, although restricted, in effect, to mitigation of damages, has given rise to some conflict of opinion. Rose, J., held the plea good on demurrer(*e*), but his decision was disapproved of in another case(*f*), in which it is said that, as justification applies to the truth of the charge, if it is proved it is an absolute defence and the damages need not be considered; but, if it is not proved, it

(*s*) Alleston v. Moor, Hetl. 167.

(*t*) Day v. Buller (1770) 3 Wils. 59; Baker v. Morful (1668) Sid. 327; 2 Keb. 202.

(*u*) Hardwick v. Chandler (1740) 2 Str. 1138.

(*v*) Martyn v. Burlings (1597) Cro. Eliz. 589.

(*w*) Byrchley's Case (1585) 4 Rep. 16; Philips v. Jansen (1798) 2 Esp. 624.

(*x*) Alleston v. Moor, *supra*.

(*y*) Doyley v. Roberts (1837) 3 Bing. No. 6, 835; 5 Scott, 40; 3 Hodges, 154.

(*z*) Peard v. Jones (1635) Cro. Car. 382.

(*a*) Bankes v. Allen (1616) 1 Roll. Abr. 54.

(*b*) Snag v. Gray (1571) 1 Roll. Abr. 57.

(*c*) King v. Lake (1672) 2 Ventr. 28; Hardres, 470.

(*d*) *Ibid.*

(*e*) Wilson v. Woods (1885) 9 O.R. 687.

(*f*) Moore v. Mitchell (1886) 11 O.R. at p. 25.

cannot be used to reduce the damages, but is rather a reason for enhancing them.

Slander of members of the medical profession.

So also to say of a member of the medical profession that he caused the death of his patient through ignorance or culpable negligence(*g*); that he is "a quack," "an empiric," or "a mountebank"(*h*); that he is ignorant or unskillful in administering medicines(*i*), is actionable without proof of special damage.

Slander of a non-registered medical practitioner not actionable.

There can, however, be no slander of a medical practitioner professionally when he is not registered under a Provincial Medical Act. In an action for slander of a medical practitioner, the declaration alleged that the plaintiff was entitled to practise, and was in fact practising medicine, surgery and midwifery in the Province of Ontario, having been duly registered in the medical register of Great Britain, and being duly authorized to practice his profession there. The words complained of were, that the plaintiff was a quack and charlatan, and that the lives of the people were not to be entrusted to such a scoundrel, as he was an unqualified medical practitioner; that certain papers (meaning the plaintiff's diploma, granted by a duly incorporated medical school of the United Kingdom, and the medical register of Great Britain, containing the name of the plaintiff as duly registered) were fraudulent and were fraudulently obtained; and that the person called "Skirving," named in them, was not the plaintiff. The principal plea was that the plaintiff was not practising, and was not entitled to practise, medicine in the Province of Ontario. It was proved, by the production of the medical register of Great Britain, that the plaintiff was, in 1876, duly registered as a medical practitioner in Scotland, but was not, at the time when the words complained of were spoken by the defendant, entered in the medical register in Ontario, under the Provincial Medical Act, R.S.O.

(*g*) Southee v. Denny (1848) 1 Ex. 196; 17 L.J. Ex. 151.

(*h*) Allen v. Eaton (1630) 1 Roll. Abr. 54; Goddart v. Hoselfoot (1637) 1 Vin. Abr. (S.a.) pl. 12; 1 Roll. Abr. 54.

(*i*) Collier v. Simpson (1831) 5 C. & P. 73; Tutty v. Alewin (1770) 11 Mod. 221.

1877, c. 142, s. 21. A verdict was rendered for the plaintiff and $1 damages; but the court held that the action was not maintainable, on account of the plaintiff not being registered under the said Act, the case of *Collins* v. *Carnegie*(*j*), being referred to in support of the judgment directing a nonsuit(*k*).

In *Collins* v. *Carnegie* it was held, that it was no slander to say of a person who was unlawfully practising in England as a physician, that he was a quack, or an imposter, or an unqualified person, because it is only lawful employments which are protected. Neither is it actionable *per se* to accuse a physician of adultery unconnected with his professional conduct(*l*); although it would be if the adultery were alleged to have been with a patient, or that he had seduced a patient(*m*). To say of a surgeon that he poisoned a patient's wound, meaning that he had treated it improperly, would be actionable *per se;* but not if what was done was for a curative purpose(*n*). And where it was said of a surgeon and accoucheur that a female servant had a child by him, in consequence of which imputation he was not engaged as accoucheur in a certain case, it was held that he was entitled to damages(*nn*).

Other professions.

The same rule as to actionable words applies to the members of other professions. Where the words "touch" the parties professionally they are actionable *per se*. And, therefore, words affecting a person in any particular employment of a professional character by imputing a want of capacity, fitness, knowledge, or skill, are actionable without proof of special damage. This rule protects school masters(*o*); land surveyors(*oo*); architects(*p*); the holders of chaplaincies, lectureships, or reader-

(*j*) (1834) 1 A. & E. 695.

(*k*) Skirving v. Ross (1880) 31 U.C.C.P. 423.

(*l*) Ayre v. Craven (1834) 2 A. & E. 2; 4 N. & M. 220.

(*m*) *Ibid.*

(*n*) Suego's Case, Hetl. 175.

(*nn*) Dixon v. Smith (1860) 5 H. & N. 451; 29 L.J. Ex. 125.

(*o*) Watson v. Vanderlash, Hetl. 71; Hume v. Marshall (1878) 42 J.P. 136.

(*oo*) London v. Eastgate (1619) 2 Rolle's Rep. 72.

(*p*) Botteril *et al.* v. Whytehead (1879) 41 L.T. 588.

ships(*pp*); and veterinary surgeons(*q*). But an action against several defendants jointly, for words spoken of the plaintiff in his profession as a teacher of a common school, will not lie, not, however, as offending against the above rule, but on the ground that a joint action cannot be maintained for oral slander(*r*).

Occupations and employments generally.

The action lies however humble the occupation or employment, so long as it is not illegal, and the words relate to the employment and "touch" the plaintiff therein(*s*).

Words actionable per se.

So that words are actionable *per se* which impute improper conduct in her vocation and unfitness for her place to a female domestic servant(*t*); or which allege that she had had a miscarriage and had thereby lost her place(*u*). And where the slander was of a person in that employment in the Province of Quebec, it was held, that, although no special or material damage be proved, yet if the expressions complained of be false and slanderous, and in their nature calculated to injure plaintiff's character, and she thereby suffers damage and be wounded and injured in her feelings, the court will award damages. And *semble*, in the same case, that a statement made concerning a servant, by her late employer, to the keeper of a registry office through whom she had been engaged, and reflecting unjustly upon the character of such servant, cannot be considered a privileged communication(*v*). So, also, words which impute that a clerk or servant had cheated his master(*w*); or which charge a game keeper in a fox hunting district with miscon-

(*pp*) Payne v. Beunmorris (1669) 1 Lev. 248.

(*q*) Hirst v. Goodwin (1862) 3 F. & F. 257.

(*r*) Carrier v. Garrant *et al.* (1873) 23 U.C.C.P. 276.

(*s*) Seaman v. Bigg. (1638) Cro. Car. 480; Perry v. Hooper, 1 Lev. 115.

(*t*) Rumsey v. Webb *et ux.* (1842) 11 L.J.C.P. 129; Car. & M. 104.

(*u*) Connors v. Justice (1862) 13 Ir. C.L.R. 451.

(*v*) Fitzgibbons v. Woolsley (1887) 13 Q.L.R. 49 (Q.B.). For other cases of actionable slander in Quebec, see Soulières v. de Repentigny (1886) Mon. L.R. 2 S.C. 414; 10 L.N. 30; and Hus v. Lespérance (1886) Mon. L.R. 2 S.C. 127; 14 R.L. 319, S.C.; 9 L.N. 135.

(*w*) Seaman v. Bigg, *supra;* Reginald's Case (1640) Cro. Car. 480.

duct and breach of duty by trapping foxes(*x*); or which impute dishonesty and extortion to an auctioneer, and that he should not be trusted with an auctioneer's license(*y*); or to say of a tailor, "I heard you had run away"(*z*); or which allege of a farmer that he cannot pay his labourers(*a*); or of a pawnbroker that he is "a broken fellow"(*b*); or of a contractor that he "used the old materials," when his contract called for new materials(*c*), are actionable without proof of special damage.

Words not actionable per se.

But it is not actionable *per se* to impute immorality or adultery to a clerk to a gas company(*d*), or to a staymaker(*e*); or to say of a livery stable keeper that he is a regular prover under bankruptcies, and a regular bankrupt maker(*f*); or of a carpenter that he is "a rogue"(*g*); unless, as some other cases shew(*h*), the words can be taken to refer to his trade, in which case it would, of course, be actionable *per se*. The word "swindling," or "swindler," *per se*, is not actionable, as has been determined in *Savile* v. *Jardine*(*i*), and in other cases(*j*).

(*x*) Foulger v. Newcomb (1867) L.R. 2 Ex. 327; 36 L.J. Ex. 169; 16 L.T. 595; 15 W.R. 1181.

(*y*) Ramsdale v. Greenacre (1858) 1 F. & F. 61.

(*z*) Davis v. Lewis (1796) 7 T.R. 17.

(*a*) Barnes v. Holloway (1799) 8 T.R. 150.

(*b*) Holt, R., 652.

(*c*) Baboneau v. Farrell (1854) 15 C.B. 360; 24 L.J.C.P. 9; 1 Jur. N.S. 114; Sir R. Greenfield's Case, Mar. 82; 1 Vin. Abr. 465.

(*d*) Lumby v. Allday (1831) 1 C. & J. 301; 1 Tyrw. 217.

(*e*) Brayne v. Cooper (1839) 5 M. & W. 249.

(*f*) Angle v. Alexander (1830) 7 Bing. 119; 1 M. & P. 870; 1 Cr. & J. 143; 1 Tyrw. 9.

(*g*) Lancaster v. French (1727) 2 Str. 797.

(*h*) See Sloman v. Chisholm (1862) 22 U.C.Q.B. 20; noted *infra*.

(*i*) (1795) 2 H. Bl. 531.

(*j*) *Per* Robinson, C.J., in Fellowes v. Hunter (1861) 20 U.C.Q.B. 382.

CHAPTER VII.

Slander of a Person in his Trade or Business.

The basis of the action.

The right of action for slanderous words without proof of specific loss or damage, which is given merchants and traders and all persons engaged in legitimate business and lawful callings, is based on the present necessity of the case. "The peculiar nature and tendency of an injury to reputation renders it convenient, if not essential, that, in some instances at least, a remedy should be given in respect of calumnious imputations upon character, though no actual consequential damage can be proved. That is, it is desirable, if not necessary, under certain limits, to constitute the defamation a substantive and positive injury, independently of the proof of consequential damage. Were it otherwise, if actual loss were invariably essential to the remedy, the damage occasioned would frequently be irreparable. One of the peculiar and striking characteristics of the species of injury is the difficulty, or rather the impossibility, of estimating its noxious consequences, and adducing proof of actual mischief during its ruinous and destructive progress. If a physician, attorney, or merchant, could not obtain a remedy in respect of calumnious reflections upon his character or credit, until he could adduce specific instances of losses occasioned by such attacks, he might be effectively ruined before his proof was complete"(*a*). Where, therefore, the words are spoken in relation to plaintiff's business, they are actionable *per se*, and special damage need not be alleged or proved, but, if special damage is claimed, it should be alleged with certainty, so that defendant may be prepared to meet it(*b*).

Where the right of action is dependent upon the meaning of words as understood by bystanders.

In some cases the words are actionable or not according to the sense in which they were understood by bystanders not

(*a*) Stark. Com.

(*b*) Paint v. Maclean (1873) 9 N.S.R. (3 N.S.D.) 316.

acquainted with the matter to which they relate(*c*). The plaintiff, a weaver by trade, was employed by the defendant to weave thirty-five pounds of yarn for him, and the defendant delivered the yarn to the plaintiff for that purpose. Upon the yarn being woven, it was alleged that the defendant stated that five pounds of the yarn were deficient, and had been stolen by the plaintiff. All the witnesses, except one, understood the words to be spoken with reference to the state of facts set out in the inducement, namely, the charging the plaintiff with having embezzled, or fraudulently withheld, a portion of the quantity of yarn which defendant had placed in his possession as a weaver to be made into cloth—which was the case of a bailor charging his bailee with theft. One witness, however, stated that he heard the defendant, in the hearing of several persons, accuse plaintiff of having stolen five pounds of yarn, without explaining, and without the witness knowing, to what particular yarn he alluded, or that he alluded to any transaction of bailment as stated. Upon a motion against a verdict for the plaintiff it was held, that the words spoken in the presence of strangers, ignorant of the particular circumstances relating to the yarn, were actionable; and, in answer to the contention that the judgment should be arrested on the ground that plaintiff being a bailee could not be guilty of larceny, they held that the use of words imputing an indictable offence is actionable, or not, according to the sense in which the words may be fairly understood by bystanders not acquainted with the matter to which they relate(*d*).

Non-actionable slander of innkeeper in his business.

An accusation against an innkeeper, that he knows he has stolen goods in his house, does not relate to him in his business, and is not actionable on that ground. The words were: "You (plaintiff) have stolen goods in your house, and you know it"; meaning that the plaintiff had stolen goods in his inn, that he knew the said goods were in his house, and that they were stolen. It was held, on demurrer, that the words were not actionable, though spoken of an innkeeper; that they had no particular reference to his business as such; that there was nothing discreditable in an innkeeper having stolen goods in his house and knowing that they were stolen, "unless there had been

(*c*) Hankinson v. Bilby (1847) 16 M. & W. 442.
(*d*) Young v. Sloan (1852) 2 U.C.C.P. 284.

something legally or morally wrong in the manner of their coming into his possession or in the purpose for which he retained them. Goods that have been stolen are not to be destroyed, or thrown into the street. They are to be and must be kept somewhere, till an owner comes to claim them, or till they can be properly restored, or till the ends of justice have been satisfied." The words, "and you know it," implied something wrong; but what the imputation was which those words, added to the others, intended to convey, should have appeared in the declaration, and the meaning imputed to the words should have been such as to be evidently prejudicial to the character of an innkeeper. The meaning assigned by the plaintiff was "not injurious to the character of any man, unless when he received the goods into his house he knew them to be stolen, or unless, after he became aware of the fact, he either concealed the goods, or knowingly harboured them to serve some corrupt purpose of himself or others"(*e*).

Actionable slanders of innkeepers.

But it is actionable *per se* to say of an innkeeper that his house is infected with the pox and his wife laid of the pox, because, even in the case of smallpox, it is a discredit to the innkeeper and guests will not resort to his house(*f*). As was said by Kelly, C.B., in *Riding* v. *Smith*(*g*), if A. and B. are rival shopkeepers, and B. spreads a false and groundless report that A.'s shopman has the scarlet fever, intending thereby to prevent the public from going to A.'s shop, and succeeds in this malicious device, A. can sue B. It is also actionable to impute insolvency to an innkeeper whether he be within the bankruptcy laws or not(*h*).

Non-actionable words as to a trader in land and a money lender.

It should also clearly appear that there was a distinct business or trade in which the plaintiff was engaged at the time the words were spoken, and that they were spoken of him in reference to such business or trade, and not in regard to his actions

(*e*) Paterson v. Collins (1853) 11 U.C.Q.B. 63.

(*f*) Levet's Case (1592) Cro. Eliz. 289.

(*g*) (1876) 1 Ex. D. 96; 45 L.J. Ex. 281; 34 L.T. 500; 24 W.R. 487.

(*h*) Whittington v. Gladwin (1825) 5 B. & C. 180; 2 C. & P. 146; Southam v. Allen (1674) Sir T. Raym, 231.

or conduct in a matter not necessarily appertaining, and which might appertain, to any other trade or business. In an action for slander arising out of a sale of land, the first count of the declaration stated, in substance, that the plaintiff was a trader in the purchase and sale of land, and in the lending of money; that the defendant had purchased a lot of land for himself and the plaintiff, which they agreed to divide by lot, one to take the east half, the other the west half, the latter being of greater value; that in deciding in this way who should have the west half, two slips of paper were used, marked east half and west half respectively, and that these were put into a hat; and that defendant drew the east half, and thereupon conveyed to the plaintiff the west half. The count then charged that, in speaking to one L. of the plaintiff in reference to his said trade and business, and in reference to this transaction, defendant had asserted that the slips were prepared by the plaintiff, who asked the defendant to draw first, and that after he (defendant) had drawn a slip with E. ½ on it, he discovered the plaintiff altering the E. on the other slip into W.; that in fact both of the slips had originally been marked E. ½; and that defendant was thereby precluded from getting anything but the east half. Upon a demurrer to the declaration, the court held in favour of the demurrer, that no cause of action was shewn, for the words alleged could not be treated as spoken of the plaintiff in any trade or business, but in a private transaction.

Opinion of Robinson, C.J.

"We think," said Robinson, C.J., "we cannot call such a charge slandering of a man in a trade or calling. What was charged to have been done wrong by the plaintiff was in a single transaction, having no reference to any one trade more than another, nor to any trade, unless the drawing lots is called a trade, which it is surely not. It would be illegal, as a general rule, under the lottery Acts, but such a transaction as that in question would be an exception, being merely a mode of partition between those already holding a joint interest, which the statute against lotteries allows"(*i*).

(*i*) Fellowes v. Hunter (1861) 20 U.C.Q.B. 382, at pp. 386-7.

Imputation of dishonesty in a land transaction no slander of person in his business.

Where the defamatory words charged were a statement of the same trick or fraud as that just mentioned, and were alleged to have been spoken of plaintiff in his trade, and were demurred to on the same grounds, the court, in allowing the demurrer, said that the count only stated a private transaction between the parties, for acquiring, by the plaintiff, an interest in one hundred acres, and imputing to him a dishonest action for getting the best half, but could not be treated as slandering the plaintiff in any trade or business(*j*).

Charge of "swindling" and "cheating" against a land speculator.

And where, in addition to the defamatory words above mentioned, the defendant said: "It then struck me (*i.e.*, on discovering the plaintiff in the act of altering the letter on the slip) that I was swindled," the court, in giving effect to a like demurrer, held, that the addition of the words, "I was swindled," did not make the words actionable, if they would not be actionable without, "for the word "swindling," or "swindler," *per se,* is not actionable, as has been determined in *Savile* v. *Jardine*(*k*), and in other cases"(*l*). The same thing was held, with respect to the same transaction and contrivance, as to the words: "He cheated me out of one hundred acres of land"; and as to the words: "He cheated and swindled me out of the lot"; these words not being actionable unless spoken of a man in his trade or profession, and, the court being of opinion, as already stated, that there was no such allegation of a trade or business as could lay a claim to special damages(*m*).

The words "cheat," "rogue," "swindler."

The word "cheat" is not actionable in the absence of proof of special damage(*n*); nor are the words, "You cheat everybody, you cheated me, you cheated Mr. S.," unless they were

(*j*) *Ibid.* p. 387.

(*k*) (1795) 2 H. Bl. 531.

(*l*) *Ibid.* at p. 387. On the same point see Black v. Hunt (1878) 2 L.R. Ir. 10; Ward v. Weeks (1830) 7 Bing. 211; 4 M. & P. 796.

(*m*) Fellowes v. Hunter, *supra,* at p. 387.

(*n*) Savage v. Robery (1699) 2 Salk. 694; 5 Mod. 398.

spoken of the plaintiff in relation to his trade or profession(*o*); nor, for the same reason, are the words, "He is a rogue and a swindler; I know enough about him to hang him"(*p*); nor the words, "He is a rogue and has cheated his brother-in-law of upwards of £2,000"(*q*), except when plainly applicable to a person in his business or employment.

Words "thief" and "villain" not actionable per se where not indictable.

The following words were charged to have been spoken of the plaintiff as a trader in the purchase and sale of land and a money lender: "M., about the time of the election, made over his property by mortgage to F. (plaintiff) without a fraction of consideration. F. has since foreclosed upon him and taken the farm from him. The fact is, he is a villain and a thundering thief, a villainous thief, a thief." A demurrer on the same grounds as that to the first count in the same case (*supra*), and because the words "thief" and "villain" did not impute or charge any crime against the plaintiff, but were to be read in connection with the preceding words in the count, and were but an inference or conclusion from the transaction previously mentioned, was held to be good.

Opinion of Robinson, C.J.

"The words here charged," said Robinson, C.J., "cannot be held actionable, for they do not impute an indictable offence. It is not explained that the defendant was in any manner imposed upon when he gave the mortgage to the plaintiff, and there have been not a few cases in which a party has transferred or mortgaged his property to another for some purpose of his own, perhaps fraudulent, and has found difficulty in obtaining its restitution from the person whom he has trusted; but it cannot be assumed that in all such cases, if in any, the person receiving the voluntary conveyance is liable to be indicted because he does not restore the property. People sometimes in these cases fall into the pit which they have made for others"(*r*).

(*o*) Davis v. Miller *et ux.* (1742) 2 Str. 1169.

(*p*) Ward v. Weeks, *supra.*

(*q*) Hopwood v. Thorn (1850) 8 C.B. 293; 19 L.J.C.P. 94; 14 Jur. 87.

(*r*) Fellowes v. Hunter, *supra*, at pp. 387-8.

"Rascal," "rogue," "forsworn."

The word "villain," or "rascal," or "rogue," or words of similar import, are not actionable unless there be proof of special damage, because they are "words of heat"(*s*). Neither, according to the earlier cases, are the words, "You are forsworn," or "He has taken a false oath," as an accusation of perjury, in the absence of anything more definite to point the charge, as, *e.g.*, that it applied to plaintiff's sworn statements in a judicial proceeding(*t*). The later cases, however, shew that it is a question for the jury whether, under the circumstances, the words were really intended to impute wilful and corrupt perjury(*u*). Under the law of Canada(*v*) it is not necessary that the sworn statement, in whatever way it may be made, should be "material" in order to be indictable; and, therefore, a verbal imputation of perjury, based on such a statement, would be actionable *per se*.

The words "rogue," etc., as applied to a tradesman and merchant.

Although the word "rogue" and words of a like kind may not be actionable as mere terms of abuse, they become actionable, without proof of special damage, when spoken in relation to a person's business or trade. The plaintiff and defendant were tailors, the latter being also a seller of dry goods. The plaintiff went into the defendant's shop to buy cloth to make up a pair of trousers for A., who was with him. A. selected the cloth, and the plaintiff, having five dollars of A.'s money for the purpose of paying for it, demanded from the clerk in the shop a discount on the amount of the purchase, which the clerk declined to give. The plaintiff then went to the defendant, who was standing at a distance in the shop, and an altercation took place between them. The plaintiff and A. then left the shop, and as they were going out of the door, the defendant, who had asked A. to let him make the trousers, said to A.: "Don't you have anything to do with that man; that man will rob you; he is a rogue; you can see that by the way he was dealing with the

(*s*) Stanhope v. Blith (1585) 4 Rep. 15.

(*t*) *Ibid.* See, also, on the same point, Holt v. Scholefield (1796) 6 T.R. 691; Hall v. Weedon (1826) 8 D. & R. 140.

(*u*) See chapter on Slander imputing a Crime.

(*v*) C.C. s. 170(1).

clerk." It was objected, at the close of the plaintiff's case, that no special damage was laid or proved, and that the words were not actionable in themselves. The jury were directed that the words were actionable if spoken of the plaintiff in the way of his trade. The jury gave ten cents damages, and their verdict was held to be supported by the evidence. "The verdict," said Maclean, C.J., "is quite in keeping with the suit, and its being allowed to stand may have a salutary effect in teaching the defendant to put some restraint upon his language towards his fellow tradesman, and in teaching the plaintiff that it is not for every idle word spoken in passion that an action should be brought"(*w*).

As applied to a professional man.

As applied to members of the professions, also, the word "rogue," or "knave," or "cheat," or words of a like import, are not actionable as mere terms of general abuse, but where they impute misconduct generally in a person's profession, or in the performance of his professional duties, as *e.g.*, that an attorney supports his family by "cheating"(*x*); or that he "cheats" his clients(*y*), the words are actionable *per se*. In an action in Quebec by a pilot against the owner of a vessel, it was held, that a statement made by the defendant, that the plaintiff had been paid to run the vessel ashore and destroy her, was highly slanderous and injurious to the plaintiff in his occupation as a pilot(*z*).

Imputations of dishonesty against merchants and traders.

Any imputation of dishonesty or fraudulent dealing against a merchant or trader in his business, is actionable without proof of special damage, as, *e.g.*, a charge against a trader of adulteration of his goods(*a*); or against a butcher, of substituting infer-

(*w*) Sloman v. Chisholm (1862) 22 U.C.Q.B. 20. See cases cited *supra* as to calling a tradesman "a rogue," and Marsden v. Henderson, *infra*, as to a charge of "cheating" against a corn merchant.

(*x*) Anon. (1638) Cro. Car. 516; Jenkins v. Smith (1621) Cro. Jac. 586.

(*y*) Alleston v. Moor (1657) Hetl. 167; Bishop v. Latimer (1861) 4 L.T. 775.

(*z*) Morisette v. Jodoin (1862) 12 L.C.R. 333 (S.C.).

(*a*) Jesson v. Hayes (1636) Roll. Abr. 63.

ior for better meat actually sold to a customer(*b*); or against a merchant, that he keeps a false account book and is a cheating person(*c*).

Slander of a corn merchant in his business.

A corn merchant, who bought wheat on commission and otherwise, complained that the defendant spoke of him, in relation to his business, and the carrying on and conducting thereof by him, the words following: "I sold wheat to (plaintiff) and he cheated me out of two bushels of wheat, and, when I went to try the scales, he finger-rigged some screw about the scales and threw some weight on it at the same time, and I will not patronize him any more"; meaning that the plaintiff cheated, and was guilty of fraudulent practices in his business. No special damage was claimed. A verdict for plaintiff for small damages was moved against on the ground that no slander of the plaintiff in his business was proved; that the complaint that the defendant was cheated in a single transaction was no slander of plaintiff's business; that managing scales was no part of the business of a commission merchant; and that no special damage was shewn. The court (*per* Draper, C.J.) held, that the words complained of were clearly a slander of the plaintiff in his business, the two cases of *Griffiths* v. *Lewis*(*d*) being conclusive in his favour(*e*).

Repetition of a slander in answer to inquiries.

In *Griffiths* v. *Lewis*, the plaintiff, Mary Griffiths, was a butcher, whose son, Matthew, served in the shop. The words complained of, as spoken by the defendant, were: "Matthew uses two balls to his mother's steelyard"; meaning that plaintiff by Matthew, her agent and servant, used improper and fraudulent weights in her said trade and defrauded and cheated in her said trade. The words were held to be actionable.

Opinion of Lord Denman.

Referring to the defence of privilege in that case, in which, in answer to plaintiff's enquiry, the words were repeated in pre-

(*b*) Crisp v. Gill (1857) 29 L.T. (O.S.) 82.
(*c*) Crawfoot v. Dale (1675) 1 Vent. 263; 3 Salk. 327.
(*d*) (1846) the one in 7 Q.B. 61, and the other in 8 Q.B. 841.
(*e*) Marsden v. Henderson (1863) 22 U.C.Q.B. 585.

sence of a third party, the defendant at the same time asserting his belief in the statement and that he could prove it, Lord Denman said: "Injurious words having been uttered by the defendant respecting the plaintiff, the plaintiff was bound to make enquiry on the subject. When she did so, instead of any satisfaction from the defendant, she gets only a repetition of the slander. The real question comes to this, does the utterance of slander once give the privilege to the slanderer to utter it again whenever he is asked for an explanation? It is the constant course, when a person hears that he has been calumniated, to go with a witness to the party who, he is informed, has uttered the injurious words, and say, 'Do you mean, in the presence of witnesses, to persist in the charge you have made?' And it is never wise to bring an action for slander unless some such course has been taken. But it never has been supposed, that the persisting in and repeating the calumny in answer to such a question, which is an aggravation of the slander, can be a privileged communication; and in none of the cases cited has it ever been so decided"(*f*).

Where it was said of a cornfactor: "You are a rogue and a swindling rascal; you delivered me 100 bushels of oats, worse by 6s. a bushel than I bargained for," proof of special damage was held to be unnecessary(*g*). As to the actionable character, without such proof, of words imputing the use of false weights or measures, see besides *Griffiths* v. *Lewis* (*supra*), *Bray* v. *Ham*(*h*), *Stober* v. *Green*(*i*), *Prior* v. *Wilson*(*j*). Broadly stated, any words which impute to a man fraudulent conduct in the business whereby he gains his bread(*k*); or whatever hurts him in his business, is actionable(*l*) without proof of special damage.

(*f*) 14 L.J.Q.B. at p. 199. See, also, Richards v. Richards (1844) 2 Moo. & Rob. 557, and Force v. Warren (1864) 15 C.B. (N.S.) 806.

(*g*) Thomas v. Jackson (1825) 3 Bing. 104; 10 Moore 425.

(*h*) (1626) 1 B. & G. 4.

(*i*) (1615) *Ibid.* 5.

(*j*) (1856) 1 C.B.N.S. 95.

(*k*) *Per* Best, C.J., in Thomas v. Jackson, *supra*.

(*l*) *Per* Bayley, J., in Whittington v. Gladwin (1825) 2 C. & P. 146 at p. 148; 5 B. & C. 180.

Words impugning a trader's financial credit or standing.

In *Lott* v. *Drewry*(*m*), Hagarty, C.J., stated the law governing slanderous imputations against a trader's financial credit or standing. The defendant said of the plaintiff, a miller and grain buyer, that one of the big millers (naming plaintiff) had run away owing money to defendant and others; and that he (defendant) had come on to catch plaintiff, but that plaintiff had gone or "cleared out." It was proved that the plaintiff carried on business as a miller, grinding for farmers, and buying and selling grain; and that he had dealings with the defendant, who was pressing him for payment of a debt. A nonsuit was entered at the trial on the ground that the words complained of were not shewn to have been used with reference to the plaintiff's business, and that no special damage was proved; but the court held that the nonsuit was wrong, in that the words used cast an imputation upon the solvency and financial standing of the plaintiff, and it was for the jury to say whether they were spoken in reference to his business, and were calculated to injure him therein.

Opinion of Hagarty, C.J.

Hagarty, C.J., who delivered the judgment of the court, referred to a number of authorities, including *Jones* v. *Littler*(*n*), which he described "as nearest to the present case" and said: "It is necessary either to shew an imputation of the want of some general requisite, as honesty, capacity, fidelity, etc., or the words must connect the imputation with the plaintiff's office, trade or business: See *Lumby* v. *Allday*(*o*), where Bayley, J., so said down the rule. The latter clause of the rule, I think, clearly covers a case like that before us. See also *Davis* v. *Lewis*(*p*). . . We are of opinion that the case should have been left to the jury. The authorities shew that it is for them to say whether the words proved were spoken in reference to plaintiff's trade and business, and calculated to injure him therein. Of course a man may say of a trader that he has run away or cleared out, and

(*m*) (1882) 1 O.R. 577.

(*n*) (1841) 7 M. & W. 423.

(*o*) (1831) 1 C. & J. 301.

(*p*) (1796) 7 T.R. 17.

it may appear in evidence that they were not spoken in reference to his trade or his credit, but in reference to his leaving for some reason wholly unconnected therewith, *e.g.*, on some personal criminal charge. All this would be for the jury. It is not necessary that the words should disparage the plaintiff as to his unfitness for business, want of capacity, or unskilful conduct therein. It is sufficient to maintain an action to impute insolvency, or anything calculated to impugn his financial credit or standing. Special damage is not necessary to be proved"(*q*).

The English cases.

Of the cases referred to *supra*, it was said of a brewer, in *Jones* v. *Littler*, that he had been arrested for debt, and the words were held actionable without proof of special damage, because, although not specially relating to his trade when spoken, the words must necessarily affect his credit therein. In *Lumby* v. *Allday* the words spoken to a clerk to a gas company were: "You are a fellow, a disgrace to the town, unfit to hold your situation for your conduct with whores." The words were held to be not actionable *per se*, and not actionable of plaintiff in his office, because they were not spoken of him in reference to his character or conduct in such office, and did not impute any want of qualification, or any misconduct therein. In *Davis* v. *Lewis* the words spoken of a tailor were: "I heard you were run away," *i.e.*, from his creditors. As the words implied a want of credit, thereby affecting the plaintiff in his trade, they were held actionable without proof of special damage.

The rights of action by a partnership firm or company and its members individually.

It has been decided in an Ontario case, that when a firm or company composed of three persons is in business, an action will lie by the firm or company for imputing insolvency to two of its members in connection with the company's business, and by the two for damages to them individually, without proof of special damage. But where the action is for the imputation of insolvency to the two as members of another firm, and not as members of the company, an action by the two, suing in the name of the company, for damages to the other firm, or to themselves

(*q*) Lott v. Drewry (1882) 1 O.R. 577.

as members of the other firm, will not lie, unless there has been a proper amendment of the record at the trial. The following were the facts: The two plaintiffs were the members composing a firm of Bricker Bros., which firm had sold out the business to a company composed of the plaintiffs and another, the old firm continuing in existence for the purpose of being wound up. In an action for slander the following words were alleged to have been spoken by the defendant in relation to the business of plaintiffs as merchants: "If we were not careful with the cents we would not be careful with the dollars, and would have to compromise like Brickers"; and also the following words: "We pay one hundred cents on the dollar for our goods, and don't compromise at forty cents like the Brickers." It was uncertain, from the evidence at the trial, whether the words had been uttered in relation to the firm of Bricker Bros., whose business was being wound up, or whether they referred to the then going concern of the Bricker Hardware Co., represented by the three plaintiffs.

Opinion of Armour, C.J.

The charge of the trial judge (Armour, C.J.) was to the effect that, if the words were spoken in relation to the Bricker Hardware Company, and did not mean the old firm of Bricker Bros., or, if it was doubtful which it was, the plaintiffs must fail; that the cause of action as framed was for a slander upon the then existing members of the firm suing in the firm name of the Bricker Hardware Co., and if the slanders, or either of them, did not refer to that company, the plaintiffs could not succeed. The jury brought in a special verdict stating that the words, if used at all, referred exclusively to the firm of Bricker Bros., and in no way to the Bricker Hardware Co. Upon that finding judgment was directed to be entered for the defendant, dismissing the action. The plaintiffs moved to set aside the verdict for misdirection of the jury in telling them that, "unless the slanderous words complained of were spoken of the Hardware Company their verdict should be for the defendant"; and for non-direction in not telling the jury that, if the words in question were spoken of any one or more of the members composing the plaintiffs' firm, the plaintiffs were entitled to recover. The plaintiffs also asked leave to amend, if necessary, so as to enable them to recover such damages as they might be entitled

to in respect of the speaking of the said words of individual members of the firm, or to enable the plaintiffs, or some of them, to recover individually such damages as they individually might have suffered by reason of the speaking of the said words; and for a new trial upon such an amendment being made. The Divisional Court held that, on a record properly framed, the two plaintiffs might recover for any damages accruing either to them as individuals, or to the firm, without proof of special damage, and also as members of the company, for any special damage suffered by the company by reason of the slander of two members thereof, but on the record as framed the plaintiffs must fail; and, as no amendment was asked for at the trial, and no reason given for allowing an amendment on appeal to the Divisional Court, it was refused.

Opinion of MacMahon, J.

MacMahon, J., who referred to the then Consolidated Rules 300 and 345, O.J.A., and a number of other authorities, said that he considered "the fair result, from the consideration of the authorities, to be that where the libel is on a member of a firm in respect of his trade or business, the partner libelled can recover without proof of special damage, but the partners must sue jointly for any special damage sustained by the co-partnership"(*r*).

The English cases.

Of the cases referred to in the judgment of MacMahon, J., it was held, in *Harrison* v. *Bevington*(*s*), and in *Foster et al.* v. *Lawson*(*t*), that where insolvency is imputed to a member of a firm, the credit of the firm is also affected, and therefore he, or the firm, or both may sue for their own damages; in *Haythorne* v. *Lawson*(*u*), that where the firm is libelled as such they cannot jointly recover for any injury to an individual partner, but that the partner may, in the same action, recover for the damages to himself(*v*), and in *Robinson* v. *Marchant*(*w*), and *Solomons et*

(*r*) Bricker *et al.* v. Campbell (1891) 21 O.R. 204.
(*s*) (1838) 8 C. & P. 708.
(*t*) (1826) 3 Bing. 452.
(*u*) (1827) 3 C. & P. 196.
(*v*) See on the same points LeFanu v. Malcolmson (1848) 1 H.L.C. 637; 13 L.T. (O.S.) 61.
(*w*) (1845) 7 Q.B. 918.

al. v. *Medex*(*x*) that where a member of a firm is personally libelled he cannot recover for any special damage to the firm; and that all the members of the firm should sue for such jointly, which they might do in the same action(*y*).

Summary of the law on the subject.

The subject of slander of a person in his calling is summarized in a well digested article in the *American Law Review* for September, 1881, in which the law is reduced to a series of rules containing the essence of the illustrative cases. The rules, which are accompanied by a short commentary by the learned writer, are as follows:—

1. Words are actionable when spoken of persons touching their respective professions, trades, or business, and do or may probably tend to their damage.

2. If he act in the employment and derive emolument therefrom, his calling may be exalted or humble, his only means of livelihood or one of several, provided only that it is a legal one, and this it is presumed to be.

3. Though a party engaged in an illegal occupation cannot maintain any action for slanderous words directed against him in that occupation, yet if the words concern him as an individual, or in another and legal occupation, an action will lie.

4. The complainant must have carried on the occupation concerning which the slanderous words were spoken at the time they were spoken; but a person once shewn to have followed a certain calling is presumed to continue therein until the contrary is shewn, provided it be a trade or calling within the meaning of Rule 2.

5. The language, to be actionable, must affect him in his particular calling; it is not enough that his general reputation is affected thereby.

6. Where the words have such a relation to the party's occupation that they directly tend to injure him in respect to it, they are actionable, although not applied by the speaker to that occupation; but when they convey only a general imputa-

(*x*) (1816) 1 Stark. 191.

(*y*) See, also, Maitland *et al.* v. Goldney *et al.* (1802) 2 East 426; Cook *et al.* v. Batchellor (1802) 3 B. & P. 150.

tion upon his character, equally injurious to any one, they are not actionable, unless such application be made.

7. It is actionable to impute ignorance where learning and skill are requisite, or dishonesty where integrity is indispensable, or immorality where morality is absolutely required, or the absence of any other qualifications which are necessary to the prosecution of a particular profession or calling.

8. The language, to be actionable, must refer to some act or transaction which is a part of or incident to the person's occupation.

9. As the charge must be of something that affects generally the character of the party in his occupation, words imputing want of skill, or ignorance in a particular transaction, are not actionable *per se;* but *aliter* if that act is of so grave a nature as to necessarily injure his general reputation in that occupation.

These rules apply only to oral defamation, as distinguished from written or printed defamation, and in every instance given in the illustrations it is assumed that the charge was false(*z*).

(*z*) The Slander of a Person in his Calling, by John D. Lawson, American Law Review, September, 1881, p. 573. The writer is a Canadian by birth, and the author of a number of valuable works on different branches of the law.

CHAPTER VIII.

When Slander not Actionable.

The general rules as to the cause of action.

Except in the cases mentioned in the preceding chapters covering imputations (*a*) of crime, (*b*) of certain contagious diseases, (*c*) of unchastity to females (in some of the Provinces), and (*d*) "touching" a person in his office, profession, business or trade, an action for oral defamation either does not lie at all, or is not maintainable except on proof of special damage. In the cases mentioned, the words are actionable in themselves; in all other cases they become so when followed by some special damage, not too remote, which must be averred distinctly in the pleadings, and proved at the trial, as the natural and probable consequence of the words complained of(*a*).

When action for slander does not lie.

The cases in which an action for slander does not lie or is not maintainable, are set forth partially in the chapters referred to, and also in those dealing with the various defences to an action of defamation. With the exception of the statutory defence of apology, which is confined to actions for newspaper libel, similar defences are open to the defendant in both slander and libel. There are some other cases, however, which are dependent upon procedure, or upon the onus of proof, and in these the plaintiff will fail unless he makes out a *primâ facie* case.

When against defendants jointly.

An action for slander, *e.g.*, does not lie against two or more persons jointly; for, in legal consideration, verbal slander is an act which cannot be committed by several persons, and must be considered the separate tort of each person who spoke the words, and for which separate actions only can be brought(*b*). Where,

(*a*) Ludlow v. Batson (1903) 2 O.W.R. 41; Lynch v. Knight *et ux.* (1861) 9 H.L.C. at p. 600; Lumley v. Gye (1853) 2 E. & B. 216; 22 L.J. Q.B. 463; Bowen v. Hall (1881) 6 Q.B.D. 333.

(*b*) 1 Roll. Abr. 781; Cro. Jac. 647; 1 Bulstr. 15. *Per* Sherwood, J., in Brown v. Hirley *et al.* (1839) 5 O.S. 734.

therefore, a declaration against four defendants alleged that they spoke of the plaintiff, in relation to his office as a teacher of a common school, which he then exercised and carried on, the words following (setting out the defamatory words); whereby the plaintiff lost his situation and office of school teacher, and was prevented from obtaining any other similar, or any, employment, the declaration was demurred to and the demurrer sustained, on the ground that an action for oral slander will not lie against several defendants jointly. Most of the authorities on the point up to that time (1873) are referred to. Hagarty, C.J. (with whom Galt, J., concurred), concluded his judgment with the remark, that "all the authorities point to the same conclusion, and we think the action fails"(*c*).

It was argued for the plaintiff, in that case, that, when the words were spoken at one and the same time, the action would lie, and *Rex* v. *Benfield et al.*(*d*) was cited in support of the contention. Hagarty, C.J., however, points out that, in that case, a distinction was clearly made between "an indictment against several persons for singing an obscene and libellous song in the street at the house of the prosecutor, and an action for uttering the words, the offence arising from such a joint act as is criminal in itself without any regard to any particular personal default of the defendant peculiar to himself"(*e*).

When words not set out in plaintiff's pleading.

So also an action was held not to lie by husband and wife for imputations of adultery and prostitution against the wife, where the words constituting the slander were not set out in the declaration(*f*).

Actions by and against married women.

With respect to actions for slander by and against married women, the law generally, it may be observed, is governed by the provisions of the Married Woman's Property Acts in the different Provinces, the date of the marriage, in some cases, affecting the rights and liabilities of husband and wife both as plain-

(*c*) Carrier v. Garrant *et al.* (1873) 23 U.C.C.P. 276.

(*d*) (1760) 2 Burr. 980.

(*e*) *Ibid.* at p. 277.

(*f*) Breen *et ux.* v. McDonald (1872) 22 U.C.C.P. 298.

tiffs and defendants(*g*). It has been held in Ontario, that a married woman may sue for libel without joining her husband as co-plaintiff(*h*), and, of course, for slander also. Where the wife is the publisher of the slander, she may be sued either alone, or, as determined by the latest judicial decision, along with her husband, who is also liable for damages. The former view was entertained by Osler, J., who held, that in an action under R.S.O. 1877, c. 125(*i*), against a husband and wife for a slander uttered by the wife, the husband was not a proper party, and that the wife must be sued alone, her liability not being dependent on her possessing separate estate(*j*). On the other hand, in an action against the wife, married prior to 1884, for a tort of another character, Rose, J., held that the husband was properly joined as a defendant and was liable for her wrong-doing(*k*). This decision was approved by the Divisional Court in a later case(*l*), which, overruling *Amer* v. *Rogers et ux.* (*supra*), affirmed the judgment of Street, J., in favour of the plaintiff against a husband and wife for a slander uttered by the wife, that a husband married prior to July 1, 1884, may be joined as a defendant, and is not relieved from liability for the torts of his wife(*m*). In this latest Ontario case the court decided to follow the decision of the English Court of Appeal in *Earle* v. *Kingscote*(*n*), being unable to discover any such difference between the English statutes and our own as to justify the opposite conclusion. The ground upon which the English cases proceeded was, that the right conferred of suing the wife alone, in respect of torts committed by her during coverture, was an additional right given to the person wronged; that there was nothing in the English Acts to take away from him his common law right of suing the husband and wife jointly; and that there is nothing in the Ontario Acts, prior to 47 Vict. c. 19 (O.), to enable the court to say that the common law right

(*g*) See chapter on Husband and Wife.

(*h*) Spahr v. Bean (1889) 18 O.R. 70.

(*i*) Now R.S.O. 1897, c. 163.

(*j*) Amer v. Rogers *et ux.* (1880) 31 U.C.C.P. 195.

(*k*) Lee v. Hopkins (1890) 20 O.R. 666.

(*l*) Traviss v. Hales *et ux.*, 6 O.L.R. (1903) 574.

(*m*) See chapter on Husband and Wife for fuller notes of these cases.

(*n*) (1900) 2 Ch. 585.

is taken away, if it was not taken away under the provisions of the English Acts.

When uncertain as to the words and the person.

To make slander actionable—and the same rule applies to libel—there must be certainty (*a*) as to the words complained of, *i.e.*, they must be capable of the actionable meaning assigned; and (*b*) certainty as to the complainant being the person referred to, the onus being on the plaintiff as to both of these points. The first point is partially dealt with in the chapter on the Innuendo. The judge has to determine whether the words are capable of a defamatory meaning, and the jury, when the question is left to them, whether the words in fact bear such meaning(*o*).

When case may be withdrawn from jury.

If the words when construed in their ordinary and natural sense, which is the common rule of construction, are not defamatory; or if they are not defamatory when construed according to a particular meaning not apparent on their face, but which is alleged by the plaintiff to have been intended by the defendant and to have been understood by the persons to whom the words were published, the case may be withdrawn from the jury(*p*).

Lossing v. Wrigglesworth (1902).

In an action for libel and slander, in which there was a verdict for the plaintiff and $50 damages for words alleged to have imputed perjury, and that plaintiff had knowingly purchased stolen property, the Ontario Court of Appeal, in allowing an appeal against the judgment, and dismissing the action, held, that taken literally and in their primary and obvious meaning, the words were perfectly harmless, and that they could only be

(*o*) Capital and Countess Bank v. Henty (1882) 7 App. Cas. 741; 52 L.J.Q.B. 232; 47 L.T. 662; Australian Newspaper Co. v. Bennett (1894) 284, at p. 287; Russell v. Notcutt (1896) 12 T.L.R. 195; Nevill v. Fine Art & General Ins. Co. (1897) App. Cas. 68; Churchill v. Gedney (1889) 53 J.P. 471; Ritchie v. Sexton (1891) 64 L.T. 210; 55 J.P. 389; Hays v. Mather (1884) 15 Bradwell (Ill.) 30; Thompson v. Grimes (1854) 5 Ind. 385.

(*p*) Hunt v. Goodlake (1873) 43 L.J.C.P. 54; 29 L.T. 472; Mulligan v. Cole *et al.* (1875) L.R. 10 Q.B. 549; 44 L.J.Q.B. 153; 33 L.T. 12; Capital and Counties Bank v. Henty *et al. supra; per* Lindley and Lopes, JJ., in Ruel v. Tatnell (1881) 29 W.R. 172; 43 L.T.N.S. 507; Jacobs v. Schmaltz (1890) 62 L.T. 121; 6 T.L.R. 155; Russell v. Notcutt, *supra*.

actionable if shewn to have been spoken and written under circumstances which would fairly admit of their bearing a defamatory construction. Being in themselves harmless, and *primâ facie* not even spoken concerning the plaintiff, it was incumbent upon him to prove facts to shew that the words were capable of the meaning ascribed to them by the innuendo, which the plaintiff had failed to do. The duty of the trial judge in such a case, it was said, is laid down by Lord Selborne in *Capital and Counties Bank* v. *Henty*(*q*).

Words of low abuse whether oral or written.

The same principle is applied to words of low abuse whether oral or written, and whether the words be of obvious or doubtful meaning. In an action for libel the plaintiff claimed that the letters "S.B.," written on a post card and mailed to him by defendant, applied to him, and meant that plaintiff was "the son of a bitch."

Opinion of Britton, J.

Britton, J., in his judgment dismissing the action(*r*), which was affirmed by the Divisional Court(*s*), said: "I am unwilling to go any further than compelled by decided cases, in having an action of libel 'made easy' for a person who has not really suffered, either pecuniarily or in the estimation of others, by reason of what was written. I doubt very much if the words, even if written out at length, as in the plaintiff's innuendo, 'would appreciably injure the reputation of another,' or 'would make one think worse of him.' I doubt if these words would expose a person to 'hatred, contempt, ridicule, or obloquy,' or cause a person to be 'shunned, or avoided by his neighbours.' They are words of abuse, but are, as often used, absolutely meaningless. No one understands them to really impute anything against the character of the mother, and they cannot be understood to be a statement as a fact of something obviously untrue. A person using such language is guilty of low abuse. It may be, however, and I will so assume for the purposes of this trial, that the language, if written so as to mean what plaintiff

(*q*) (1882) 7 App. Cas. at p. 744; Lossing v. Wrigglesworth (1902) 1 O.W.R. 460.

(*r*) Major v. McGregor, 5 O.L.R. (1902) 81.

(*s*) 6 O.L.R. (1903) 528.

says this means, may be such as to set persons of whom written in a scurrilous or ignominious light. It is that kind of reflection that creates bad blood and provokes personal retaliation; it may be that such written abuse is fairly calculated to injure a person 'in the enjoyment of society, hold him up to scorn, or throw a contempt upon him which might affect his general fortune or comfort.' If so, these words written and published of a person would be libellous. But," he added in another part of his judgment, "these letters are innocent in their primary and natural sense, and such as would not be read by any reasonable person as conveying a libellous imputation on the plaintiff. See the *Capital and Counties Bank, Limited* v. *George Henty & Sons* (1888), 7 App. Cas. 741." He held, in effect, as did the Divisional Court, that there was no reasonable evidence to go to the jury that the letters, "S.B.," conveyed the meaning attributed to them by the plaintiff, and, therefore, that the plaintiff had failed to prove his innuendo.

The duty of the judge as to leaving the case to the jury.

It is however, as true of slander as of libel, that "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"(*t*). It is not right to say that a judge is to affect not to know what everybody else knows—the ordinary use of the English language(*u*). The question is not whether the letters are susceptible of an innocent interpretation, but whether no libellous construction can reasonably be put upon them; for, if such construction can reasonably be given to them, it is for the jury to say whether or no that is the true interpretation of them(*v*). In order to justify the judge in leaving the case to the jury, the words must be susceptible of a libellous meaning in this sense, that a reasonable man could construe them unfavourably in such a sense as to make some imputation upon the person complaining(*w*); and it is not enough to say that, by some person or another, the words might be understood in a

(*t*) *Per* Kelly, C.B., in Cox v. Lee (1869) L.R. 4 Ex. at p. 288.

(*u*) *Per* Brett, J., in Maccord v. Osborne (1876) 1 C.P.D. at p. 572.

(*v*) *Per* Lord Coleridge, C.J., in Hart v. Wall (1877) 2 C.P.D. 146.

(*w*) *Per* Lord Halsbury, L.C., in Nevill v. Fine Art and General Ins. Co., *supra*, at pp. 77-87.

defamatory sense(*x*). This is equally true of slander, in which, if the words are capable of being reasonably understood in a slanderous sense, it should be left to the jury to find whether or not they were so used(*xx*).

The rule in the United States as to the construction of defamatory language.

The rule as to the interpretation of defamatory language is the same in the United States. It is a general rule of construction in actions of slander, indictments for libel and other analogous cases, where an offence can be committed by the utterance of language, orally or in writing, that the language shall be construed and understood in the sense in which the writer or speaker intended it. If, therefore, obscure and ambiguous language is used, or language which is figurative or ironical, courts or juries will understand it according to its true meaning and import, and the sense in which it was intended to be gathered from the context, and from all the facts and circumstances under which it was used(*y*). In slander words are to be understood by courts and juries according to their plain and natural import—according to the ideas they are calculated to convey to those to whom they are addressed; and, where doubts arise, the jury are to decide whether the words are used maliciously and with a view to defame—this being a question of fact to be determined from all the concomitant circumstances. The court is to determine whether such words taken in the malicious sense imputed to them can alone, or by the aid of the circumstances stated upon the record, form the legal basis of an action(*z*). The rule is a sound one, that the law cannot shut its eyes to what all the rest of the world can see; and let the slanderer disguise his language and wrap up his meaning in ambiguous givings out as he will, it shall not avail him, because courts will understand language, in whatever form it is used, as all mankind understands it. This is a correct rule and must be regarded as a most sound and salutary one, to be acted upon

(*x*) *Ibid.* at p. 73.

(*xx*) Cameron v. Overend (1905) 15 M.L.R. 408.

(*y*) *Per* Shaw, C.J., in Commonwealth v. Kneeland (1838) 20 Pickering (37 Mass.) 216.

(*z*) Demorest v. Haring (1826) 6 Cowen (N.Y.) 76.

by the court, and to be fully explained and enforced upon the trial of the facts before the jury(*a*).

Slander communicated by gestures.

The general rule, as stated in other State cases, is, that the jury, and not the witnesses, are to determine the meaning and application of defamatory words. But where, as is often the case, the slanderous charge is not made in direct terms, but by equivocal expressions, insinuations, gestures, or even tones of the voice, which often have a patent meaning incapable of description, it is competent for witnesses who heard and saw them to state what they understood by them and to whom they understood them to apply(*b*).

Illustrations of certainty as to the words.

"I never set my premises on fire" was held a sufficient imputation of arson(*c*); so also, "C. burnt his barn to get the insurance money"(*d*); but not "You burnt your buildings"(*e*). "It has been ascertained beyond all doubt that Mr. A. and Mrs. H. are not brother and sister, but man and wife," was held sufficient to warrant a jury in finding an imputation of both bigamy and incest(*f*). Bigamy was also held to be sufficiently charged by the words: "He was married to a woman, J.S., and kept her till he got sick of her, and then sent her away, he having all the time two wives"(*g*). "He made a few hundreds in my service—God only knows whether honestly or otherwise," was held sufficient to charge embezzlement(*h*); so also the statement, that "A young man named F. M., employed as driver and collector by A. H. G., has disappeared with some of his

(*a*) *Per* Shaw, C.J., in Carter v. Andrews (1834) 16 Pickering (33 Mass.) 1.

(*b*) Leonard v. Allen (1853) 11 Cush. 241; Blakeman v. Blakeman (1884) 31 Minn. 396; 18 N.W. Rep. 103; Barton v. Holmes (1864) 16 Iowa 252; Smith v. Miles (1843) 15 Vt. 245.

(*c*) Cutler v. Cutler (1846) 10 J.P. 169.

(*d*) Case v. Buckley (1836) 15 Wend. (N.Y.) 324.

(*e*) Estes v. Estes (1883) 75 Me. 478. See, also, Frank v. Dunning (1875) 38 Wis. 270.

(*f*) Heming *et ux.* v. Power (1842) 10 M. & W. 564.

(*g*) Parker v. Meader (1859) 32 Vt. 300.

(*h*) Clegg v. Laffer (1833) 3 M. & S. 727; 10 Bing. 250.

employer's funds and the police have been notified"(*i*). "You forged my name," without stating to what instrument, imputes forgery(*j*); but not the words: "I never signed the note that was given to F. or saw the note, in God's world. I never signed a note with T. A. that was given to F. in God's world," spoken by a person called on to pay a note alleged to have been signed by him as a surety(*k*). Larceny or theft was held to be imputed by the words: "He is a pickpocket; he picked my pocket of my money"(*l*); "B. stole my box-wood, and I will prove it"(*m*); "Thou hast stolen our bees, and thou art a thief"(*n*); "You will steal and I can prove it"(*o*); or "You have been cropped for felony"(*p*); but not by the words: "You as good as stole the canoe"(*q*); nor the words: "A man that would do that would steal"(*r*). To say "They did not scruple to turn affidavit-men," was held to be a sufficient charge of perjury(*s*); but not the mere words: "You are forsworn"(*t*); nor words charging that one has falsely taken an oath prescribed by an Act of the Legislature that is unconstitutional and void(*u*). Where an imputation of perjury is alleged to be libellous, it is for the jury to say, upon a scrutiny of the whole publication, whether the word was used in a popular sense, or as charging the technical crime of perjury(*v*). Murder is not sufficiently imputed by the words: "He was the cause of the death of D.'s child," because a man, by accident or misfortune, might innocently cause

(*i*) Mallory v. Pioneer Press Co. (1886) 34 Minn. 521; 26 N.W. Rep. 904.

(*j*) Jones v. Herne (1759) 2 Wils. 87.

(*k*) Andrews v. Woodmansee (1836) 15 Wend. (N.Y.) 232.

(*l*) Baker v. Pierce (1704) 6 Mod. 23; Stebbing v. Warner (1710) 11 Mod. 255.

(*m*) Baker v. Pierce, *supra*.

(*n*) Tibbs v. Smith, 3 Salk. 325; Sir T. Raym. 33; Minors v. Leefard, Cro. Jac. 114.

(*o*) Cornelius v. Van Slyck (1839) 21 Wend. (N.Y.) 70.

(*p*) Wiley v. Campbell (1827) 5 Monroe (19 Ky.) 396.

(*q*) Stokes v. Arey, 8 Jones 46.

(*r*) Stees v. Kemble (1856) 27 Penn. St. 112.

(*s*) Roach v. Garvan, Re Read & Huggonson (1742) 2 Atk. 469; 2 Dick. 794.

(*t*) Holt v. Scholefield (1796) 6 T.R. 691; Hall v. Weedon (1826) 8 D. & R. 140.

(*u*) Burkett v. McCarty (1866) 10 Bush (Ky.) 758.

(*v*) Hawkins v. N. O. Printing Co. (1877) 29 La. Ann. 134.

the death of another(*w*); nor by the words: "Thou wouldst have killed me," because they only impute a murderous intention(*x*); nor by the words: "He killed her by his bad conduct, and I think he knows more about her being drowned than anybody else," because the words in their natural sense do not import a charge of criminal homicide(*y*). But the words: "He knows how she came to her death. He killed her. He is to blame for her death. There was foul play there," impute a crime to plaintiff(*z*); as do also the words: "She is slow poisoning her husband," because they are capable of being understood as charging the giving of poison with intent to kill(*a*).

Certainty as to the person defamed.

There must be certainty also as to the person defamed. It must appear that the plaintiff is that person, otherwise the action is not sustainable. There is the same rule in the case of libel. It is not necessary that the plaintiff should have been actually named in connection with the slander, either individually or as one of a class, so long as it can be shewn that he is the person aimed at. 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 would be done if his name and Christian name were ten times repeated(*b*).

Illustrations.

The plaintiff may be slandered or libelled by a fictitious name(*c*); or by the name of some other person(*d*); or by the first letter of his name(*e*); or by an asterisk instead of his name(*f*), as well as by his own proper name. "All the libellers

(*w*) Miller v. Buckdon, 2nd part, Buls., folio 12.

(*x*) Dr. Poe's Case, 1 Vin. Abr. 440, cited in 2 Buls. 206.

(*y*) Thomas v. Blasdale (1888) (Mass.) 18 N.E. Rep. 214.

(*z*) *Ibid.*

(*a*) Campbell v. Campbell (1882) 54 Wis. 90; 11 N.W. Rep. 456.

(*b*) *Per* Lord Campbell in LeFanu *et al.* v. Malcolmson *et al.* (1848) 1 H.L.C. 668.

(*c*) Rex v. Clerk (1728) 1 Barn. 304.

(*d*) Levi v. Milne (1872) 4 Bing. 195.

(*e*) O'Brien v. Clement (1846) 15 M. & W. 435; 15 L.J. Ex. 285.

(*f*) Bourke v. Warren (1826) 2 C. & P. 307.

of the Kingdom know now that printing initial letters will not serve the turn, for that objection has been long got over"(*g*). If the defendant said to a master: "One of thy servants hath robbed me," no one could sue, for, in the absence of special circumstances, it does not appear who is the person slandered(*h*). And so where a party litigant said to three persons who had given evidence against him: "One of you three is perjured," no action lies(*i*); but the case is different where the plaintiff can prove that he was the person spoken of(*j*). Suppose the words to be: "A murder was committed in A.'s house last night," no introduction can warrant the innuendo, meaning that B. committed the said murder; nor would it be helped by the finding of the jury for the plaintiff. For the court must see that the words do not and cannot mean it, and would arrest the judgment accordingly. *Id certum est, quod certum reddi potest*(*k*).

Where the words refer to plaintiff along with other persons.

The plaintiff may also be referred to along with a number of other persons. Where, *e.g.*, a suit was pending against the plaintiff and sixteen other parties, and, speaking of the suit, the defendant said: "These defendants helped to murder H. F.," it was held, that each of the seventeen had a separate action for slander(*l*). Though the words used may at first sight appear only to apply to a class of individuals, and not to be specially defamatory of any particular member of that class, still an action may be maintained by any one individual of that class who can satisfy the court that the words referred especially to himself, but the words must be capable of bearing such applica-

(*g*) *Per* Lord Hardwicke in Roach v. Garvan (1742) 2 Atk. 470; 2 Dick. 794.

(*h*) James v. Rutlech (1599) 4 Rep. 17.

(*i*) Bourn's Case, Cro. Eliz. 497.

(*j*) Aish v. Gerish, 1 Roll. Abr. 81; Coe v. Chambers, 1 Roll. Abr. 75; Vin. Abr. *c. b.* 4.

(*k*) Solomon v. Lawson (1846) 8 Q.B. 837; 15 L.J.Q.B. 257; 10 Jur. 796. See, also, Hearne v. Stowell (1840) 12 A. & E. 719; 6 Jur. 458; 4 P. & D. 696; *per* Willes, J., in Eastwood v. Holmes (1858) 1 F. & F. 349; Stockley v. Clement (1827) 4 Bing. 162; 12 Moore 376.

(*l*) Foxcraft v. Lacy, Hob. 89. See, also, Gidney v. Blake (1814) 11 Johns. (N.Y.) 54; Ellis v. Kimball (1834) 33 Mass. (Pick. 16) 132; Dwyer v. Fireman's Journal Co. (1882) 11 Daly (N.Y.) 248; Smart v. Blanchard. (1860) 42 N.H. 137.

tion. There must be an averment in the statement of claim that the words were spoken of the plaintiff, and the plaintiff may also aver extraneous facts, if any, shewing that he was the person expressly referred to(*m*). Where many individuals are specially included in the same attack, whether by the language of the satirist or the pencil of the caricaturist, the plaintiff is none the less entitled to redress because others are injured by the same act(*n*). Where a newspaper article stated that "In some of the Irish factories cruelties were practised upon the work-people"; meaning in the factory of the plaintiffs, who were manufacturers, the jury, being satisfied that the plaintiffs' factory was particularly referred to, found in favour of the plaintiffs. Their verdict was upheld by the House of Lord(*o*). Words of general contumely have been held, in many cases, not to be actionable. Abusive, insulting and unmannerly language, which affects not a man's liberty or estate, is of too indefinite and uncertain a character to be the subject of an action for pecuniary damages(*p*).

Publication to third person essential.

In every case, also, there must be publication of the slander, *i.e.*, the words must be communicated to a third person in a language which he understands; otherwise the plaintiff's reputation is not impaired and the action fails(*q*). It has been said with respect to libel, that, if the statement is sent straight to the person of whom it is written, there is no publication of it, for you cannot publish a libel of a man to himself. If a letter is not communicated to anyone but the person to whom it is written, there is no publication of it(*r*); except, it may be added, in the case of criminal libel. The sending of a libellous letter to the person defamed would be a sufficient publication for a criminal

(*m*) Dwyer v. Fireman's Journal Co., *supra*.

(*n*) *Per* Shaw, C.J., in Ellis v. Kimball, *supra*.

(*o*) Le Fanu *et al.* v. Malcolmson (1848) 1 H.L.C. c. 637; 13 L.T. (O.S.) 61; 8 Ir. L.R. 418. See, also, Williams v. Gardiner (1836) 1 M. & W. 245; 1 Tyr. & Gr. 578; 2 C.M. & R. 78; Hart v. Coy *et ux.* (1872) 40 Ind. 553; Ellsworth v. Hayes (1888) 71 Wis. 427; 37 N.W. Rep. 249; Wakley v. Healey (1848-9) 7 C.B. 591; 18 L.J.C.P. 241.

(*p*) Stark. Com. 6th ed. p. 17.

(*q*) Robbins v. Franks, Cro. Eliz. 857; Craft v. Boite (1681) 1 Saund. 242; Barrow v. Lewellin (1615) Hob. 62.

(*r*) Pullman v. Hill & Co. (1891) 1 Q.B. at p. 527.

prosecution(*s*). But, unlike libel, slander must be published to a third person. If slanderous words are used by the defendant in the presence of the plaintiff alone, no one else hearing them, an action of slander could not be maintained. There must be a publication. The publication of a libellous letter to the plaintiff alone, though it may be the subject of an indictment, is not such a publication as will maintain an action(*t*). Publication to a third person is necessary in order to sustain the action. So with reference to what was understood by the words. . . The maintaining of the suit depends upon what other persons understood them to mean, and not what the plaintiff himself understood them to mean(*u*). There may, however, be a simultaneous publication of both a slander and a libel, as when one reads to another a paper or writing which he knows contains a libel on a third person(*v*). But if, as has been said, "the uttering of a libel by a husband to his wife is no publication"(*w*), they being under the common law one person, the same would be true of the uttering by the husband to the wife, or the wife to the husband, of a verbal slander.

(*s*) C.C. s. 318.

(*t*) Phillips v. Jansen (1798) 2 Esp. 624; Starkie on Slander (Ed. 1876) p. 27.

(*u*) *Per* Wetmore, J., in Wood v. MacKay *et ux.* (1881) 21 N.B.R. 109.

(*v*) Forrester v. Tyrrell (1893) 9 T.L.R. 257 (C.A.).

(*w*) *Per* Huddleston, B., in Wennhak v. Morgan (1888) L.R. 20 Q.B.D. at p. 637.

CHAPTER IX.

Slander Actionable Only on Proof of Special Damage.

Rules as to words actionable only on proof of special damage.

Wherever oral defamation is not actionable *per se*, *i.e.*, wherever it is not presumed as necessarily following the utterance of the words, special damage must be distinctly averred in the pleadings as arising from the words, otherwise an action does not lie. And it does not lie even then, unless it be shewn that the damage claimed, which must be some temporal loss to the plaintiff, was not too remote, but was the natural and reasonable and probable consequence of the words complained of. This rule is applicable to all sorts of verbal imputations injuriously affecting plaintiff's reputation, which, made without lawful justification or excuse, are not of a criminal character, or are not included in the rules governing words actionable without proof of special damage. "Any words by which a party has a special damage" are actionable(*a*). "Undoubtedly all words are actionable, if a special damage follows"(*b*), provided they are in their nature defamatory(*c*). If we confine ourselves strictly to actions of defamation, and to words not actionable *per se*, it is correct to state the rule thus: "All words, if published without lawful occasion, are actionable, if it be proved by evidence of special damage not too remote, that they have in fact injured the plaintiff's reputation; and, in such cases, the action is called an action of defamation. And the converse of this rule will be equally correct: No words can be the subject of an action of defamation, however maliciously published, and although they have caused actual damage to the plaintiff, unless it is also proved that the plaintiff's reputation has in fact been thereby injured"(*d*).

(*a*) Comyn's Digest. Action upon the case for Defamation, D. 30.

(*b*) *Per* Heath, J., in Moore v. Meagher (1807) 1 Taunt. 39 at p. 44.

(*c*) Kelly v. Partington (1834) 5 B. & Ad. 645; Sheahan v. Ahearne (1875) Ir. R. 9 C.L. 412.

(*d*) Odgers L. & S. 2nd Ed. p. 89.

Illustrations of words or expressions actionable only on proof of special damage. Ludlow v. Batson (1903).

In an action for slander in which special damage was claimed, it appeared that O. B., whose parents had died when she was quite young, had lived with plaintiff and his wife, her aunt, for some years, plaintiff receiving an allowance for O. B.'s board from her father's executors. Defendant was a brother of O. B., and the allegation was, that the defendant said plaintiff sent in an account to one of the executors for certain named articles, the innuendo being that plaintiff made up a fictitious account, and, by false pretences, obtained payment thereof from the executor, and so was guilty of an indictable offence. The special damage claimed was, that plaintiff's wife left him, and that O. B. ceased to board with him because of these statements. The trial judge (Street, J.) dismissed the action on the ground that the words sworn to were not actionable, even if the special damage alleged were proved (a view of the law with which Britton, J., disagreed in the Divisional Court), and he rejected evidence of such damage. An appeal from his judgment was dismissed by the Divisional Court.

Opinion of Falconbridge, C.J.

Falconbridge, C.J., who referred to *Moore* v. *Meagher*(*e*); Odgers L. & S., 3rd Ed., 95, 96, 97; *Ratcliffe* v. *Evans*(*f*); and Mayne on Damages(*g*), said that the special damages claimed could not be considered the fair and natural result of the speaking of the words. If plaintiff's wife left him for that reason, she plainly acted without reasonable cause. She might as well have assumed to leave him because some other woman made uncomplimentary remarks about his personal appearance.

Opinion of Britton, J.

Britton, J., who discussed the law as laid down in *Lynch* v. *Knight et ux.*(*h*), said that such words, falsely spoken by friend or foe, could not be said to cause, as a natural or reasonable result, the separation of husband and wife, or the loss of a

(*e*) (In Error) (1807) 1 Taunt. at p. 44; (below) 3 Smith 135.

(*f*) (C.A.) (1892) 2 Q.B. 524, 527.

(*g*) 6th Ed. 47, 48, 63.

(*h*) (1861) 9 H.L.C. 577.

boarder; such consequences could not fairly and reasonably have been anticipated or even feared(*i*).

In *Moore* v. *Meagher* (*supra*), the loss of the gratuitous hospitality of friends was held to be sufficient special damage; in *Ratcliffe* v. *Evans*, a general loss of business as distinct from a loss of specific custom. In *Lynch* v. *Knight, et ux.*, it was held, that no action lay against the defendant for telling a married man that his wife was "a notorious liar," and "an infamous wretch," and had been all but seduced by a certain doctor before her marriage, in consequence of which statements the husband refused to live with her.

Imputations of unchastity.

In some of the Canadian Provinces, imputations of unchastity against women are, as they formerly were in England and in all the Canadian Provinces, actionable only on proof of special damage, or when spoken of them in an office or employment in which chastity is a necessary qualification, as, *e.g.*, a governess, or a domestic servant(*j*). But words imputing unchastity to a novice in a religious order were held not actionable in the absence of special damage(*k*).

"Swindling" and "swindler."

There must be special damage also for words imputing "swindling," unless they "touch" the plaintiff in his office, profession, trade, or business(*l*); but to print and publish of a person that he is a "swindler" is actionable whether touching him in his office or not(*m*).

(*i*) Ludlow v. Batson (1903) 2 O.W.R. 41; 5 O.L.R. (1903) 309.

(*j*) Connors v. Justice *et ux.* (1862) 13 Ir. C.L.R. 451; Gillett v. Bullivant (1846) 7 L.T. (O.S.) 490.

(*k*) Dwyer v. Meehan (1886) Ir. L.R. 18 C.P.D. 138.

(*l*) Black v. Hunt (1878) Ir. L.R. 2 Q.B.D. 10; Eislie v. Walther (1889) 4 N.Y. Supplt. 385; Savile v. Jardine (1795) 2 H. Bl. 531; Ward v. Weeks (1830) 7 Bing. 211; 4 M. & P. 796.

(*m*) I'Anson v. Stuart (1787) 1 T.R. 748. See, also, Brown v. Beatty (1862) 12 U.C.C.P. 107.

"Villain," "blackleg."

Special damage must also be shewn for calling a person a villain(*u*); a blackleg(*nn*), except in the sense of a cheating gambler punishable by the criminal law(*o*);

"Rogue," "black sheep," "cheat."

a rogue(*p*); a black sheep, except in the sense of cheating at cards(*q*); a cheat(*r*);

"Bogus peddler," "pickpocket," "liar."

a bogus peddler, except as implying a crime, *e.g.*, passing counterfeit money with intent to defraud(*s*); a pickpocket(*t*); a liar, or the words: "You swore to a lie and I can prove it"(*u*);

Imputing insanity, profligacy, criminal intention, etc.

for words imputing insanity (*v*); for words imputing that plaintiff had had the pox, without asserting present continuance of the disease(*w*); for the words: "You took my money and have it"(*x*); for words imputing immorality, profligacy,

(*u*) Stanhope v. Blith (1585) 4 Rep. 15.

(*nn*) *Per* Pollock, C.B., and Watson, B., in Barnett v. Allen (1858) 3 H. & N. 381; 27 L.J. Ex. 412.

(*o*) *Per* Martin and Bramwell, BB., in same case; O'Brien v. Clement (1846) 16 M. & W. 159; O'Brien v. Bryant (1846) in same vol. 168.

(*p*) Stanhope v. Blith, *supra;* Hopwood v. Thorn (1850) 8 C.B. 293; 19 L.J.C.P. 94; 14 Jur. 87.

(*q*) O'Brien v. Clement and O'Brien v. Bryant, *supra.*

(*r*) Savage v. Robury (1699) 2 Salk. 694; 5 Mod. 398; Davis v. Miller *et ux.* (1742) 2 Stra. 1169; Fellowes v. Hunter, *infra;* Lucas v. Flinn (1872) 35 Iowa 9; Weierbach v. Trone (1841) 2 Watts & Sergeant's R. (Pa.) 408.

(*s*) Pike v. Van Warmer (1850) 5 How. (N.Y.) Pr. 171; (1851) 6 *Ibid.* 99.

(*t*) Walls or Watts v. Rymes 3 Salk. 325; but *contra*, Stebbing v. Warner (1710) 11 Mod. 255; Baker v. Pierce (1704) 6 Mod. 23.

(*u*) Kimmis v. Stiles (1871) 44 Vt. 351.

(*v*) Weldon v. DeBathe (1884) 33 W.R. 328; Joannes v. Burt (1863) 88 Mass. (6 Allen) 236.

(*w*) Pike v. Van Warmer, *supra.*

(*x*) Christal v. Craig (1883) 80 Mo. 367.

etc., unless they "touch" plaintiff in his office, profession, etc.(*y*); for words imputing an offence against a statute punishable only by fine and forfeiture(*z*); for words imputing a criminal intention not yet acted upon(*a*);

Military offence, suspicion of crime, impossible crime, etc.

for words imputing a purely military offence cognizable by a court martial, as, *e.g.*, calling plaintiff a deserter(*b*); for words disclosing a suspicion of a crime having been committed(*c*); for words imputing a crime of which plaintiff could not be guilty(*d*); for the words: "He hath the falling sickness," except when "touching" plaintiff in his trade or profession(*e*); for the words: "He has been guilty of conduct unfit for publication," except when "touching" plaintiff in his office(*f*);

Drunkenness.

for saying of a clergyman that he will get drunk, or that he was drunk on a certain occasion (but not in church)(*g*); for saying of a land speculator: "He cheated me of 100 acres of land"(*h*); for saying of a livery stable keeper: "You are a regular prover under bankruptcies, a regular bankrupt maker"(*i*);

(*y*) Lumby v. Allday (1831) 1 Cr. & J. 301; Tyrw. 217; Ayre v. Craven (1834) 2 A. & E. 2; 4 N. & M. 220; Brayne v. Cooper (1839) 5 M. & W. 249, but see Riding v. Smith (1876) 1 Ex. D. 91; 45 L.J. Ex. 281; 34 L.T. 500; 24 W.R. 487.

(*z*) McCabe v. Foot (1866) 15 L.T. 115.

(*a*) Harrison v. Stratton (1803) 4 Esp. 218.

(*b*) Hollingsworth v. Shaw (1869) 19 Ohio 430.

(*c*) Simmons v. Mitchell (1880) L.R. 6 App. Cas. 156; 50 L.J.P.C. 11; 43 L.T. 710; 29 W.R. 401.

(*d*) Jackson v. Adams (1835) 2 Bing. N.C. 402; 2 Scott 599; 1 Hodges 339; Snag v. Gee (1597) 2 Coke's Rep. 300, referred to in Heming *et ux.* v. Power (1842) 10 M. & W. at p. 569.

(*e*) Taylor v. Perr (1607) 1 Roll. Abr. 44.

(*f*) James v. Brook (1846) 9 Q.B. 7; 16 L.J.Q.B. 17; 10 Jur. 541.

(*g*) Tighe v. Wicks (1873) 33 U.C.Q.B. 479.

(*h*) Fellowes v. Hunter (1861) 20 U.C.Q.B. 382.

(*i*) Angle v. Alexander (1830) 7 Bing. 119; 1 Tyrw. 9; 4 M. & P. 870.

Insincerity or mental weakness, etc.

for words imputing insincerity to a member of Parliament(*j*); or mental weakness to a candidate for Congress(*k*); or for calling him "a corrupt old tory"(*l*); for words of abuse of an attorney which does not "touch" him professionally(*m*);

"Imposter," "quack."

for saying of a physician or surgeon, not legally qualified, that he is an imposter or a quack(*n*); or that he poisoned the wound of his patient, except in the sense of treating it improperly(*o*); or, generally, and not in the technical sense, that he was guilty of malpractice(*p*); or for saying of a merchant or trader: "He owes me money," so long as there is no imputation of insolvency(*q*).

Oral defamation in the Province of Quebec.

In the Province of Quebec, under the *Code Civile*, the rules of decision with respect to oral defamation, influenced probably by the mischief resulting to the public peace from refusing legal redress to the party whose reputation has been defamed, have been less restricted than in the other Provinces. A consideration of the Provincial case law on the subject shews, that while the law is substantially the same as in other parts of the Dominion with respect to imputations that are actionable *per se*, greater latitude has been allowed in proceedings for abuse or defamatory language which, in the other Provinces, would require proof of special damage to make it actionable.

"Loafer."

It has been held, *e.g.*, that the use of the term "loafer" in reference to a person gives good ground for damages(*r*); and,

(*j*) Onslow v. Horne (1771) 3 Wils. 177; 2 W. Bl. 750.

(*k*) Mayrant v. Richardson (1818) 1 Nott. & M. 347.

(*l*) Hogg v. Darrah (1835) 2 Porter (Ala.) 212.

(*m*) Doyley v. Roberts (1837) 3 Bing. N.C. 835; 5 Scott 40; 3 Hodges 154; Alleston v. Moor (1632) Het. 167; Bishop v. Latimer (1861) 4 L.T. 775.

(*n*) Collins v. Carnegie (1834) 1 A. & E. 695; 3 N. & M. 703.

(*o*) Suegoe's Case (1632) Hetl. 175.

(*p*) Rodgers v. Kline (1879) 56 Miss. 808; 31 Amer. R. 389; which was an action for libel.

(*q*) *Per* Bramwell, B., in Reg. v. Coghlan (1865) 4 F. & F. 321, 322.

(*r*) Lighthall v. Walker (1866) 2 L.C.L.J. (S.C.) 43.

generally speaking, that an action will lie against a party who has used language, or made insinuations, which have had the effect of injuring the character of the plaintiff, who must prove that the imputations made against him are false(*s*). The truth of the imputation is not the issue, but the justice of the action, the honesty of the motive, and the *bonâ fides* of the utterance(*t*).

"Paye tes dettes."

The use of the words, "*paye tes dettes,*" by a creditor to his debtor on a public street, in the hearing of passers-by, gives ground for an action of damages(*u*). Where, in a similar case, the plaintiff sued for the following words alleged to have been spoken of him by the defendant: "*Roland, arrete donc, quand me payera-tu? Paye donc tes dettes avant de faire le monsieur, gredin que tu es,*" the evidence shewed that the defendant only cried out, "*Paye tes dettes, paye tes dettes.*" It was held, reversing the judgment of the court below, which dismissed the action as trivial, that the essential allegations of the declaration were proved, and that the expressions were such as to wound the sensibilities of plaintiff and to give him a right of action(*v*).

Slander of infant child.

In an action by the father for the slander of his infant daughter, it was held that, although a father cannot, without being named tutor of his infant child, recover damages suffered by her in consequence of the slander, he has nevertheless an action for the injury thereby occasioned to himself(*w*).

Privileged statements.

On the other hand, for words spoken *bonâ fide* and confidentially, an action for damages cannot be sustained(*x*). And where the words complained of were to the effect that plaintiff and the woman with whom he was living were not married, and it was proved that the plaintiff and the woman in question had lived together as man and wife for years without being married, but that they had been married about a month before the statement

(*s*) Belanger v. Papineau (1855) 6 L.C.R. (Q.B.) 415.
(*t*) Poitevin v. Morgan (1866) 10 L.C.J. 93; 1 L.C.L.J. (S.C.) 120.
(*u*) Rolland v. Jodoin (1866) 2 L.C.L.J. (Q.B.) 20.
(*v*) Lenoir v. Jodoin (1866) 16 L.C.J. (Q.B.) 387.
(*w*) Barrette v. Bourbonniere (1896) 12 Q.O.R. (S.C.) 271.
(*x*) Boucher v. Casgrain (1810) 1 Rev. de Leg. (K.B.) 381.

was made, it was held that the statement, having been made by defendant's wife in her own house to her nephew, in good faith and in an honest belief in its truth, which was justified by the circumstances, an action did not lie(*y*).

"Un homme dangereux."

So, also, where at a meeting of the *curé* and *marguilliers* of a parish, plaintiff pointed out to defendant, the *curé*, that he was acting irregularly, and told him he should refer to the statutes and not to the authority he was quoting, and the *curé* replied, "*Vous êtes un homme dangereux*," it was held that an action did not lie(*z*). And where the defendant denounced the conduct of the plaintiff who was whipping his son cruelly in an out-house, and thereby disturbing the whole neighbourhood, it was held, that the interference and language of the defendant were justifiable, and did not give rise to an action for damages(*a*).

Defamatory statements by ministers of religion.

The courts in Quebec have also had to determine questions of assumed ecclesiastical privilege, and the legal liabilities of ministers of religion, in the use of defamatory language in the pulpit and elsewhere. In an action against a *curé* of a French parish, it was held, reversing the judgment of the court below(*b*), that ministers of religion, in the Province of Quebec, are amenable to the courts of civil jurisdiction in the same manner and to the same extent as other persons, and that an action for slander will lie against a Roman Catholic priest for injurious expressions regarding private individuals uttered by him in his sermon(*c*). So, also, defamatory words spoken by a Roman Catholic *curé*, warning a parishioner not to employ a certain advocate in his professional capacity, are actionable(*d*). But an action brought by a village blacksmith claiming damages from the *curé* of the parish, for injurious and malicious expressions used by him in a sermon with respect to plaintiff, was dismissed by the

(*y*) Pearson v. Gratton *et al.* (1894) 6 Q.O.R. (S.C.) 359.

(*z*) Lafleur v. Guilmette (1879) 2 L.N. (S.C.R.) 261.

(*a*) Loranger v. Beauchamp (1894) 6 Q.O.R. (S.C.) 360.

(*b*) 5 R.L. 308.

(*c*) Derouin v. Archambault (1874) 19 L.C.J. (S.C.R.) 157; Vigneux v. Noiseux (1877) 21 L.C.J. (S.C.) 89.

(*d*) Brossoit v. Turcot (1875) 20 L.C.J. (Q.B.) 141.

Circuit Court. It was held on appeal that, while ministers of religion are amenable to the civil tribunals for slanderous expressions uttered by them from the pulpit or elsewhere, an action for damages for slander will not be sustained against a priest for admonishing his congregation, on the pain of their being deprived of the sacraments, not to go near the shop of certain people in the parish who were in the habit of scoffing at religion, where no injury is proved, and it does not appear that the words were spoken maliciously or with intent to injure any particular individual, though they were generally understood by the congregation to apply to the plaintiff(*e*).

(*e*) Blanchard v. Richer (1876) 20 L.C.J. (Q.B.) 146.

CHAPTER X.

Slander of Title.

Character of an action for slander of title.

An action for slander of title is not properly an action for words spoken, or for libel written and published, but an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title(*a*). When the slander is written and published it is indictable as well as actionable at common law(*b*).

Constituents of the action.

The character and constituents of such an action are concisely stated by Proudfoot, J., in a leading Ontario case. "To maintain the action," he says, "the statement must be false(*c*); and made *mala fide;* and the damage must result from it(*d*). This *mala fides* or malice may be either express or implied, and must go to defeat the plaintiff's title. If the allegations are made by a stranger who has no right to interfere, malice is presumed, and if he cannot shew the truth he is responsible in damages; if by a party interested and made *bonâ fide* to protect his own interest, the legal presumption of malice is rebutted, and the plaintiff must then shew that there was no reasonable or probable ground for the statement. In *Pater* v. *Baker*(*e*), Maule, J., says: "Slander of the title ordinarily means a statement of something *tending to cut down* the extent of the title, which is injurious only if it is false. It is essential to give a cause of action that the statement should be false, . . . that it should be malicious, not, as Lord Ellenborough observes, in *Pitt* v. *Donovan*(*f*), malicious in the worst sense, but with intent to injure the plaintiff. If the statement be true, if there really be the infirmity in the

(*a*) *Per* Tindal, C.J., in Malachy v. Soper (1836) 3 Bing. N.C. 371, at p. 384.

(*b*) Peacock v. Reynell, 2 Brownlow 151.

(*c*) Gutsole v. Mathers (1836) 1 M. & W. 495.

(*d*) Brook v. Rawl (1849) 4 Ex. 521.

(*e*) (1847) 3 C.B. 868.

(*f*) (1813) 1 M. & S. 639.

title that is suggested, no action will lie, however malicious the defendant's intention might be. The jury may infer malice from the absence of probable cause, but they are not bound to do so. The want of probable cause does not necessarily lead to an inference of malice; neither does the existence of probable cause afford any answer to the action''(*g*).

Cases in which action will lie.

An action for slander of title may be maintained by a corporation, whether the slander of the title be published by a stranger, or by one of their own members(*h*). There may also be slander of title to a copyright(*i*); but not to the right or title of property in the name of any house or residence, or landed estate(*j*); or in the name of a newspaper(*k*).

Difficulty of distinguishing slander of title from ordinary defamation.

Although in strictness slander of title is not defamation, is not either slander or libel of personal character or reputation, and although the rules of law applicable to the two kinds of wrongs are not the same, yet it is sometimes difficult to distinguish the one from the other.

Slander of plaintiff's manufactured goods and patent rights is not defamation.

An action, *e.g.*, for words written and published relating to articles of plaintiffs' manufacture, and the rights of plaintiffs under certain letters patent by virtue of which they claimed a monopoly of the manufacture and sale of the articles, was held (*per* Meredith, C.J.) not to be an action of defamation properly so called,

(*g*) The Ontario Industrial Loan and Investment Co. v. Lindsey *et al.* (1883) 4 O.R. 473, at p. 484. See fuller note of this case at close of this chapter.

(*h*) Metropolitan Saloon Omnibus Co. v. Hawkins (1859) 4 H. & N. 90; 28 L.J. Ex. 201.

(*i*) Hart v. Wall (1877) 2 C.P.D. 146; 46 L.J. 227; but see as to this 7 App. Cas. 777; Dicks v. Brooks (1880) 15 Ch. D. 39; or to letters-patent, Cousins v. Merrill, *infra;* Halsey v. Brotherhood (1880-1) 15 Ch. D. 514; 19 Ch. D. 386; Haddon v. Lott (1853) 24 L.J.C.P. 49; Wren *et al.* v. Weild (1869) 10 B. & S. 51.

(*j*) Day v. Brownrig (1878) 10 Ch. D. 294; 48 L.J. 173.

(*k*) Walter v. Emmott (1885) 54 L.J. Ch. 1059.

but an action on the case for maliciously acting in such a way as to inflict loss upon the plaintiffs(*kk*), and as not coming within section 109 of the Ontario Judicature Act, 1895(*l*), so as to be triable only by a jury, unless by consent(*ll*).

Libel of plaintiff personally and slander of title of his manufactured goods.

On the other hand, the publication may be both defamation of the plaintiff personally and a slander of title. The plaintiff complained of the following printed and published notice: "Caution: To all persons who may be entering into any arrangements with J. M. C. for his self-acting cattle and stock pump, who claims to have patented the same in April last, I wish by this notice to *caution* the public against having anything to do with C. or his pumps, *it being an infringement on my patent* which was obtained by me in 1858. *I intend to prosecute him immediately.* Beware of the fraud and save costs." Besides the general issue the defendant pleaded specially that the defendant, and not the plaintiff, was the first and true inventor of the pump in question; that the plaintiff's specifications embraced more than that of which the plaintiff was the first inventor; that the invention was covered by defendant's letters patent; and that the plaintiff, without defendant's consent, infringed the patent right of the defendant, whereupon the defendant published the words complained of in order to protect his own patent right and his interest thereunder, and to caution all persons against dealing with the plaintiff for the invention patented to defendant. The evidence shewed that the principle of the invention of both parties was "to raise water from wells for animals to drink by their own weight and act"; that this sufficiently conveyed the meaning which was intended; and that the principle of the invention, the application of the power, the general adjustment of the parts, and the purpose and objects of the article, were the same in both pumps. Upon a motion for a new trial, after a general verdict for the plaintiff, it was held, that the declaration set out a cause of action for slander of title based on defendant's published "caution" that plaintiff's pumps were an infringement on defendant's patent, for which defen-

(*kk*) Citing Odgers on Libel and Slander, 3rd Ed., p. 145.

(*l*) Now section 102.

(*ll*) Dickerson *et al.* v. Radcliffe *et al.* (1897) 17 O.P.R. 418.

dant intended to prosecute plaintiff immediately; and that it also disclosed a libel on plaintiff personally in the caution to all persons about to enter into arrangements with plaintiff for his pump against having anything to do with plaintiff or his pumps, and, in the words "beware of the fraud," in relation to the infringement of the patent. But it was also held that the slander was fully answered by the defendant, and that he was entitled to a verdict upon all the issues which related to that part of the publication, because it was true in fact. The verdict in that respect, therefore, was contrary to law and evidence, and, as it was general, it must be set aside, unless it could be confined to that portion of the publication which was a libel on the plaintiff personally, a verdict to be entered for the defendant on all the other issues. The terms not having been agreed to, the rule was made absolute for a new trial. Many authorities are referred to in the judgment of Adam Wilson, J.(*m*).

Trade puffing.

A tradesman's puffing of his own goods, by mere comparison of the same goods made or sold by others, is not slander of the other's goods. There must be actual disparagement of the other's goods(*n*).

Slander of conduct not slander of title. Russell et al. v. Webster (1874).

The same difficulty of distinction between ordinary defamation and slander of title, is noticed in some English newspaper cases. An article in the *Broad Arrow* newspaper charged the *Army and Navy Gazette* with publishing the advertisements of usurers for valuable consideration, and "other advertisements cheap (on a third of their scale, for instance) to induce respectable advertisers to appear in the usury and quack doctor page." In an action for libel by the proprietors of the *Gazette*, the jury found in their favour for a small amount of damages. The defendants, in moving against the verdict, contended that there was no libel of the plaintiffs, but merely slander of title for which no special damage had been proved. "The plaintiffs conduct an enterprise," said Bramwell, B., "and the defama-

(*m*) Cousins v. Merrill (1865) 16 U.C.C.P. 114.

(*n*) Evans v. Harlow, *supra;* Harman v. Delainy, 2 Str. 898.

tory words are published of them as the conductors of this enterprise; it is, therefore, a charge against them in their professional character, and consequently, it is not so much a case of slander of title as slander of conduct." The rule was refused(*o*).

Libel of a newspaper not necessarily libel of persons connected with it. Australian Newspaper Co. v. Bennett (1894).

So, also, where one paper described another as the "Evening Ananias," and the part proprietor, who was manager but not editor of the latter paper, sued the proprietors of the former and failed in his action—there being a majority verdict for the defendants—the Judicial Committee, in discharging a rule for a new trial, said (*per* Lord Halsbury, L.C.): "It is to be observed that the expression 'Ananias' is used in relation to the newspaper, and not to the plaintiff individually. No doubt offensive language applied to a newspaper may cast a reflection, and be understood as casting a reflection, upon persons connected with the newspaper. But it clearly cannot be maintained that every imputation upon a newspaper is a personal imputation upon everybody connected with the newspaper. Whether it is an imputation which would attach to any individual, and, if so, to whom, must depend in each case upon the language used, and upon the circumstances"(*p*).

Essentials of slander of title: It must be false.

Slander of title may be of a person's title to property real or personal, or of his estate or interest therein(*q*), and the plaintiff must shew that the statements complained of, whether oral or written or printed(*r*), are false, malicious, *i.e.*, with intent to injure the plaintiff, and that they have caused special damage. See remarks of Maule, J., in *Pater* v. *Baker* (*supra*), which are quoted in *Gordon et al.* v. *McGibbon*(*s*). "Unless he shews

(*o*) Russell *et al.* v. Webster (1874) 23 W.R. 59.

(*p*) Australian Newspaper Co. v. Bennett (1894) App. Cas. 284, at p. 288.

(*q*) Vaughan v. Ellis (1609) Cro. Jac. 213.

(*r*) Ratcliffe v. Evans (1892) 2 Q.B. at p. 532; Malachy v. Soper (1836) 3 Bing. N.C. at p. 386.

(*s*) (1875) 3 N.B.R. (Pugsley) 49.

falsehood and malice and an injury to himself, the plaintiff shews no case to go to the jury''(*t*).

It must be malicious, i.e., mala fide or from a wrong motive.

It is essential, also, that it should be malicious. See remarks by Maule, J., in *Pater* v. *Baker* (*supra*). See, also, *Stewart* v. *Young*(*u*), and *Gordon et al.* v. *McGibbon* (*infra*). In *Hargrave* v. *LeBreton*(*v*), Lord Mansfield says, that to maintain such an action as this, there must be malice, either express or implied, and the words spoken must go to defeat the plaintiff's title; it must be such a slander as goes directly to defeat the plaintiff's title. ''If a person makes a statement which is partly *bonâ fide* and partly *mala fide*, and it occasions injury to another, that other is not entitled to recover damages unless he can trace the injury to that part of the statement which is made *mala fide*''(*w*). So, also, if part be true and part false(*x*). It must have been made from a bad motive(*y*); of which a statement knowingly false would be evidence(*z*); although more recent cases shew that, with respect to slander of goods, express malice is not necessary, and that if the statement be made without reasonable and probable cause(*a*), without just occasion or excuse(*b*), or without lawful occasion(*c*), that will be sufficient. See remarks of Herschell, L.C., in *White* v. *Mellin*(*d*), as to the statements being malicious, and of Lindley, L.J., in *Halsey* v. *Brotherhood* (*supra*), at p. 392, as to their being dishonest. There are some cases, *e.g.*, a slander of goods contained in a news-

(*t*) *Per* Maule, J., in Pater v. Baker, *supra*, at p. 831. See, also, *per* Parke, B., in Brook v. Rawl (1849) 19 L.J. Ex. at p. 115; Anderson v. Liebig's Extract of Meat Co. (1882) 45 L.T. 757; White v. Mellin (1895) App. Cas. 154 (H.L.); Burnett v. Tak (1882) 45 L.T. 743, in which it was held that falsehood must be shewn on an application for an interim injunction.

(*u*) (1870) L.R. 5 C.P. 122.

(*v*) (1769) 4 Burr. 2425.

(*w*) *Per* Parke, B., in Brook v. Rawl (1849) 19 L.J. Ex. at p. 115.

(*x*) *Ibid.*

(*y*) *Ibid.*

(*z*) Waterer v. Freeman, Hob. 266.

(*a*) Halsey v. Brotherhood (1881) 19 Chy. D. at pp. 389, 390.

(*b*) Ratcliffe v. Evans (1892) 2 Q.B. at p. 527.

(*c*) Western Counties Manure Co. v. Lawes Chemical Manure Co. (1874) L.R. 9 Ex. at p. 222.

(*d*) (1895) App. Cas. 154 at pp. 158, 160.

paper advertisement, in which it would be very difficult to prove actual malice on the part of the newspaper publisher, or even to prove publication without the excuses or palliations above mentioned: See *Ravenhill* v. *Upcott* (*e*), in which, for the publication of an advertisement containing a slander of title that caused an estate to become unsaleable, the proprietor of the newspaper was found in damages, although the advertiser's name was given up, an apology published in the paper, and £60 paid into court in satisfaction of the claim.

Action not maintainable where alleged slander published in a bona fide assertion of right.

But there is no malice, and, therefore, no cause of action, where the alleged slander was published in a *bonâ fide* assertion of right. In an action for slander of title to certain goods and chattels, which plaintiffs ordered to be put up and exposed for sale by an auctioneer on their behalf, the slander was both written and oral. The written slander was in the form of a notice to the plaintiffs' auctioneer, in which it was alleged that the goods and chattels were defendant's property; that he forbade the selling of same; and that he would treat all persons as trespassers who would take down, remove, injure, or destroy, any of such chattels, a list of which was given in the notice. The oral slander was published upon the day the goods and chattels were to be sold, and before the sale, in the presence of a number of persons, in the following words addressed to the auctioneer: "I forbid you to sell them; they shall not be removed." It was also alleged that the defendant had wrongfully prevented plaintiffs from selling and disposing of the said goods and chattels. Special damages were claimed for these alleged wrongs. The goods and chattels in question were in a hotel, of which the plaintiffs were in possession for a certain term unexpired, and a special agreement was set up by the plaintiffs with the defendant under which the plaintiffs were to be at liberty to sell the whole of the said goods and chattels by public auction, and it was alleged that, in breach of this agreement, the defendant interrupted the sale in the manner described. There was a verdict for the plaintiffs, which was set aside for a non-suit.

(*e*) (1869) 33 J.P. 299.

Opinion of Maclean, J.

Maclean, J., who delivered the judgment of the court, said: "To entitle the plaintiffs to maintain the verdict on the first two counts, it appears to me that it must appear by the evidence, that the defendant was influenced by malicious motives in the publication of the alleged libel, or in making use of the words charged. If the statements were wholly untrue, and the title of the plaintiffs to the property undisputed before and since the sale of the goods, then malice might be inferred, and the action maintained; but when the evidence shews, as I think it does pretty clearly, that the claim of the defendant to the fixtures in dispute was put forth in good faith, and as to part, if not the whole, well founded, the presumption of malice, which is the foundation of this action on the first and second counts, wholly fails(*f*). . . The plaintiffs cannot recover in an action for a malicious libel or verbal slander of their title, when no malice appears"(*g*).

The alleged slander will be equally protected whether it be a *bonâ fide* assertion of the rights of others, real or supposed, or of one's own rights(*h*).

Special pecuniary damage must be alleged and proved.

It must also be alleged and proved that there was special, not general, damage, *i.e.*, some actual temporal loss(*i*) caused by the alleged slander.

Gordon et al. v. McGibbon (1875).

In *Gordon et al.* v. *McGibbon*(*j*), it was held on demurrer, by the Supreme Court of New Brunswick, that the words must be followed, as a natural and legal consequence, by some particular and pecuniary damage resulting to the plaintiff, which must be specially alleged and proved, and that mere words of caution are not sufficient. The complaint in that case was that

(*f*) P. 24.

(*g*) Boulton *et al.* v. Shields (1846) 3 U.C.Q.B. 21.

(*h*) Pitt v. Donovan (1813) 1 M.S. 639; Gutsole v. Mathers (1836) 1 M. & W. 495; 5 Dowl. 69; Baker *et al.* v. Piper (1886) 2 T.L.R. 733; Smith v. Spooner (1860) 3 Taunt. 246; Carr v. Duckett (1860) 5 H. & N. 783; 29 L.J. Ex. 468.

(*i*) Ratcliffe v. Evans (1892) 2 Q.B. at p. 532.

(*j*) (1875) 3 N.B.R. (Pugsley) 49.

plaintiffs were possessed of certain timber, which they could have disposed of but for defendant's wrongful conduct, in maliciously causing and procuring one W. S. to falsely assert and represent, in the presence and hearing of divers persons, that "there would be a lawsuit about it [*i.e.*, the timber], and they had better have nothing to do with it"; whereby persons who were about to become purchasers of the timber, and who might and otherwise would have purchased it, were deterred and prevented from purchasing, and thereafter wholly declined to purchase the same, and whereby plaintiffs were hindered and prevented from selling the timber, and were forced to pay out a large sum in expenses in offering it for sale.

Opinion of Ritchie, C.J.

"This is in the nature of an action for slander of title," said Ritchie, C.J., who delivered the judgment of the court. "To maintain an action of that character, the words must be followed, as a natural and legal consequence, by a pecuniary damage to the plaintiffs, which must be specially alleged and proved. In *Pater* v. *Baker*(*k*), Maule, J., says: "This is an action for slander of title, which is a sort of metaphorical expression. Slander of title may be of such a nature as to fall within the scope of ordinary slander. We do not think the words here complained of tended to cut down the extent of the plaintiff's title, or alleged any infirmity in the title. They may have amounted to words of caution calculated to induce inquiry on the part of the intending purchasers, but they were not words which must necessarily be followed, as a natural and legal consequence, by a pecuniary damage to the plaintiffs; nor is any such specially alleged, though there is a general allegation that they were so. Such general allegation in an action for slander of title, namely, that the plaintiff lost the sale of his lands, has been held too general, and, therefore, bad: See Com. Dig. 'Action on the case for defamation'(*l*). Accordingly it was held, in *Malachy* v. *Soper*(*m*), that without alleging special damage, no action for slander of title, whether written or oral, will lie, and that there must be an express allegation of some particular damage resulting to the plaintiff from such slander."

(*k*) (1847) 3 C.B. 868.
(*l*) G. 11.
(*m*) (1836) 3 Bing. N.C. 371.

See, also, *Ashford* v. *Choate* (*infra*)(*n*), where the same rule of law, laid down in the old cases(*o*), is followed in regard to slander of title to lands.

Rule as to special damage and particulars of same.

"The sensible and reasonable rule to be deduced from the authorities bearing upon cases of this kind is, that a person claiming damages for a slander of his title must shew some special damage reasonably resulting to him from the slander of which he complains; and that he must describe, with every reasonable particularity, the damage which he alleges he has sustained. Thus it has been held, in more than one case, that a tradesman may allege as special damage generally, that his trade has been diminished by reason of slanders uttered by the defendants because of the impossibility of his being able to shew the full extent of his damage in any other way: *Evans* v. *Harries*, 1 H. & N. 251; *Riding* v. *Smith* (1876), 1 Ex. D. 91; *Clarke* v. *Morgan*, 38 L.T.N.S. 354"(*p*).

Catton v. Gleason (1891).

In the case in which these observations were made, the plaintiff alleged that he was a tenant to the defendant; that he had advertised an auction sale of his goods; and that the defendant said to the persons assembled at the intended sale: "I warn you people not to buy any of these goods; I'll follow them and distrain on them as this man (the plaintiff) owes me twelve months' rent. Friends and neighbours, if you buy any of these goods, I will follow them for my rent." The special damage alleged was, that divers persons who were desirous of purchasing the goods, or some of them, and who would otherwise have bidden for the goods, or some of them, were deterred from bidding at the sale, and a large number of people withdrew from the premises altogether, and the plaintiff was thus unable to procure a fair and reasonable price for the goods, and the expenses incurred by the

(*n*) (1870) 20 U.C.C.P. 471.

(*o*) Law v. Harwood (1628) Cro. Car. at p. 141; Bliss v. Stafford (1588) Owen 37; Newman v. Zachary (1647) Aleyn 3; Milman v. Pratt (1824) 2 B. & C. 486.

(*p*) *Per* Street, J., in Catton v. Gleason (1891) 14 O.P.R. 222. See, also, Ratcliffe v. Evans (1892) 2 Q.B., at pp. 533, 534.

plaintiff preparing for the sale, and the sale itself, produced a disadvantageous result to the plaintiff. The defendant demanded particulars of this claim, and in reply the plaintiff furnished him with the names of a number of persons who had withdrawn from the sale, and with a list of the articles sold at the sale, and of the prices which they had brought. The defendant obtained an order in Chambers requiring the plaintiff to furnish the particulars of the names of any persons known to him, who withdrew from the sale, and, if none were known to him beyond those already named, to state that fact, and that he should state that the goods had sold for less than they would have brought but for the acts of the defendant. The plaintiff thereupon delivered particulars stating that the number of persons who withdrew was about sixty, and that their names were unknown to him; stating also the cost price of each article sold at the sale; the price at which it sold; and the sum for which the whole would have sold but for the conduct of the defendant. The defendant appealed against the order, and, upon this appeal, the plaintiff was ordered to furnish the names of the persons who would have given more for each of the specific articles as to which damage was claimed, but not the precise amount which each would have given; and that, unless such particulars were furnished within twenty-four hours of service of the order, the plaintiff should be precluded from adducing evidence at the trial in respect of any item of special damage other than those in respect of which such particulars should have been given. Upon an appeal against this order the Divisional Court held, that the plaintiff should not be required to give particulars of the names of the persons who would have given for each article, in respect of which damage was claimed, a larger price than was realized at the sale; and that all that he could reasonably be required to particularize was the amount of which his sale was damped.

Opinion of Street, J.

"Is it to be expected," said Street, J., "that he should know exactly who would have bid on each of the numerous articles sold? It seems to me that it is not, and that it would be unreasonble to hold him to so extreme a degree of particularity. He may reasonably be expected to know that his sale has been damped, and that it has produced less by an amount ascertain-

able within reasonable limits than under ordinary circumstances it would have produced, and his claim in this respect, it appears to me, . . . is all that he could reasonably have been required to particularize. The opinion of persons qualified to speak as to the selling value of goods offered at auction should be sufficient to satisfy a jury as to what these goods should have produced under ordinary circumstances, just as the opinion of competent judges of the value of land is necessarily accepted by courts and juries as a guide in many cases. Then if these goods have produced less than their value, judged by an auction standard, and no other reason is apparent why this has been the case, the jury may reasonably conclude that it has been caused by what the defendant said. I think we must treat the statement of claim as claiming damages for the general damping of the sale, whereby a certain loss happened to the plaintiff, and that the plaintiff must confine himself in his evidence to general evidence, and should not be allowed to go into evidence as to the price which particular persons would have given for the particular articles, for that would be to give evidence of a species of special damage which is not properly claimed in his statement of claim: *Ashley* v. *Harrison* (1793), 1 Esp. 48." The appeal was allowed(*q*).

Allegations and proofs of special damage in slander of title to lands.

In an Ontario case, which was decided on demurrer, the declaration alleged that the plaintiff, being the owner of certain lands (subject to mortgage) which had been conveyed to him by defendant, and having contracted with one M. for the sale of the lands to him at a certain price, defendant falsely and maliciously spoke and published of and concerning the plaintiff's title to the lands the words following: "J. A's. (plaintiff's) title to the said land is good for nothing. I held the land in trust for John and James A., and James's brothers are coming from California to claim their rights, and any money M. pays J. A. will be lost. The deed which I gave J. A. is good for nothing. J. A.'s brothers and sisters have as good a right to the land as he has, and my oath will give it to them." The claim for special damage was, that the said M. was prevented from carrying out

(*q*) Catton v. Gleason (1891) 14 O.P.R. 222.

and completing, and refused to carry out and complete, the contract for the purchase of the land from the plaintiff, and that the plaintiff lost the sale of the land and the use of the purchase money therefor, and was unable to sell and dispose of the land, and had incurred and been put to great loss and expense in and about the contract with M. and the enforcement thereof, and in and about quieting the title to the lands, and disproving the false and malicious statements of defendant. The court held, that the declaration should not only contain an allegation that the words complained of as conveying a slander are false and maliciously uttered, but also an express allegation of some special damage resulting from the slander actually sustained; that such special damage must appear upon the face of the declaration to be the mere natural and direct consequence of the words complained of(*r*); and that of the above averments of special damage, the following alone were sufficient, namely, "whereby M. was prevented from carrying out and completing, and refused to carry out and complete, the said contract for the purchase of the said land from the plaintiff, and the plaintiff has hitherto lost the sale of the said land and the use of the purchase money thereof, and has incurred and been put to great loss and expense in and about the said contract with M., and the enforcement thereof." The statement in the declaration that the plaintiff had been unable to sell and dispose of the lands, except to M., and had been put to great loss and expense in and about quieting the title of the lands, and disproving the false and malicious statements of the defendant, was insufficient to sustain the action. An averment of general inability to sell is insufficient: *Tasburgh* v. *Day*(*s*); and expense incurred in quieting the title to the lands cannot be said to be a damage which is the mere natural and direct consequence of the words complained of(*t*).

Opinion of Gwynne, J.

In answering an objection that the declaration was insufficient, upon the authority of *Vicars* v. *Wilcocks*(*u*), and *Morris* v.

(*r*) Referring to Malachy v. Soper (1836) 3 Bing. N.C. 385; Haddon v. Lott, 15 C.B. 421; Pitt v. Donovan (1813) 1 M. & S. 639; Stewart v. Young (1870) L.R. 5 C.P. 127.

(*s*) (1618) Cro. Jac. 484.

(*t*) Ashford v. Choate (1870) 20 U.C.C.P. 471, at p. 474.

(*u*) (1806) 8 East 1; 2 Sm. L.C. 11th Ed. 521; L.R. (1904) 1 K.B. 725.

Langdale(*v*), Gwynne, J., who delivered the judgment of the court, and reviewed these and other cases, said: "Now if it was considered that a case of slander of title was governed by *Vicars* v. *Wilcocks* and *Morris* v. *Langdale*, it is singular that neither Lord Ellenborough nor counsel ever referred to those cases in the course of the deliberate argument and judgment which *Pitt* v. *Donovan*(*w*) underwent. Their not being cited or alluded to leads, in my judgment, to the conclusion that there was no doubt ever entertained that it was an actionable wrong for a person falsely and maliciously to slander the title of the plaintiff to lands contracted by him to be sold, and so to impede or prevent the sale, or to expose the party to extra expenses, which otherwise would not have been incurred, in proceeding upon the breach of the contract, and that for such actionable wrong the plaintiff is entitled to recover such damages as he can shew have been sustained by him resulting from the wrong complained of. I am of opinion that a slanderer of title may be liable to indemnify the plaintiff for expenses which but for the slander would *not have been* incurred, and which were not recoverable in an action on the contract"(*x*).

Liabilities of parties to slander of title contained in a registered instrument. Ontario Industrial Loan and Investment Co. v. Lindsey et al. (1883).

There may also be a slander of title to lands by an instrument prejudicially affecting the title, prepared and executed without reasonable and probable cause, and illegally registered under the Provincial registry laws.

The courts of Ontario dealt with such a slander in the following case in which the liabilities of a party who claimed title to the lands by a declaration under seal, drawn and registered by his solicitor, and also the liabilities of the solicitor and the registrar, were severally determined: On June 7, 1882, S., acting on the advice and through C., his solicitor, presented to L., a city registrar, for registration, a document in the words and figures following: "Know all men by these presents that I, G. A. S., of the city of Toronto, Esquire, do hereby declare that I claim

(*v*) 2 Bos. & Pul. 284.
(*w*) (1813) 1 M. & S. 639.
(*x*) *Ibid.* pp. 485 *et seq.*

the lands and premises known and described as follows: (describing the lands) or some estate, right, title, or interest therein, and upon the decease of G. S., a lunatic, proceedings, if necessary, will be instituted to assert and establish my title and claim thereto, and all persons are hereby notified and cautioned against dealing with the said property or any part thereof, and any person or persons committing waste or damage to said lands and premises will be held responsible therefor, and damages claimed accordingly." The document was signed and sealed by the declarant named therein in presence of an attesting witness, and was registered by L. The plaintiffs, as owners of the property in question, subject to certain mortgages to persons who were not made parties to this action, thereupon brought action against S., C. and L. claiming cancellation of the said registered instrument, damages for registration thereof, and an injunction to restrain C. and S. from doing further acts of injury to or slander of their title. The evidence shewed that the document was registered for the purpose of preventing the plaintiffs dealing with the land, and of asserting supposed title to the property, and that it was done without reasonable or probable cause. The case was heard before Proudfoot, J., who gave a considered judgment holding that the instrument was not properly registrable within the Registry Act(*y*); that S., the declarant named in the instrument, and C., his solicitor, were alike liable in damages for registration of the same; that L., the registrar, was protected by R.S.O. 1877, c. 73, s. 1(*z*), inasmuch as it was not alleged that he had acted maliciously and without reasonable and probable cause, and because it is not to be expected that registrars should take advice, when any dubious instrument is presented to them for registration, as to whether it is such an instrument as is contemplated by the registry law; and that the solicitor C., was not, with respect to a third party like the plaintiffs, a solicitor, but merely a wrongdoer, a tort-feasor, to whom the principle of agency did not apply, each wrongdoer in such a case being a principal(*a*).

(*y*) R.S.O. 1877, c. 111, s. 2.

(*z*) "An Act to protect Justices of the Peace and other Officers from Vexatious Actions."

(*a*) Ontario Industrial Loan and Investment Co. v. Lindsey *et al.* (1883) 4 O.R. 473.

Opinion of Proudfoot, J.

In his judgment in this case Proudfoot, J., shews that the provision in the Registry Act(*b*) defining the instruments that may be registered, was not applicable to the document in question, and that it never could have been intended that the register was to contain a record of such claims.

Liability of the registrar.

He then proceeds to determine the legal liabilities of each of the three defendants. So far as the registrar was concerned his liability did not depend upon the fact whether such a paper should be recorded or not. The R.S.O. 1877, c. 73, s. 1 (*supra*), appeared to him to extend to registrars. It provided, as does the corresponding provision of the present Act, that every action brought against any officer or person fulfilling any public duty, for anything done by him in the performance of such public duty, shall be an action on the case as for a tort, and in the declaration it shall be expressly alleged that such act was done maliciously and without reasonable or probable cause. The declaration in the present case contained no such allegation. It only charged him with carelessly and negligently acting in permitting the paper to be registered. If he had acted entirely within the limit of his powers he would have required no protection. But the statute intended to protect him in the honest discharge of what he assumed to be his duty, though he might, in some respect, have mistaken it. If he maliciously, and without reasonable or probable cause, did any act under color of his office, he got no protection. The *bonâ fides* of the registrar was admitted, and he thought it was impossible to make him liable. But even without the protection of the Act, he did not think the facts would warrant a verdict against the registrar for carelessness and negligence. Although in his (the judge's) opinion the paper ought not to have been registered, it was a matter upon which different persons might arrive at another conclusion. Registrars are not in general professional men, and it is not to be expected that they are to take advice, when any dubious instrument is presented to them for registry, whether it is such as is contemplated by the registry law. Their position would be a hard one if they are in such a case to be responsible, either for

(*b*) R.S.O. 1877, c. 111, s. 2, ss. 1, corresponding with R.S.O. 1897, c. 136, s. 2, ss. 1.

not registering or for registering. He thought the registrar took a prudent course in registering it, and one that ought not to subject him to liability.

Liability of the declarant.

The case as to the defendant S. rested on different grounds, arising out of the nature of an action for slander of title and the rules of law which govern it. An order for absolute foreclosure had been made in a suit brought by the Trust and Loan Company against the lunatic and his committee, upon a certain mortgage made by the lunatic, by his committee, to the company; and it must be concluded that the lunatic had no longer any title to the land, and the implied assertion that he had was untrue, and made without reasonable or probable cause. The paper registered by the defendant S. tended to cut down and was a cloud on the title, and, therefore, the defendant S. was liable in damages for placing it, or causing it to be placed, on record.

Liability of the solicitor.

Then as to the solicitor. It was clear on the evidence that he advised the step that was taken, and prepared the paper and procured its registration. If a stranger who has no interest commits a wrong by which a person is injured, such as a slander of title, if the statement is untrue, malice is implied and he is answerable in damages. The rule being that an agent is personally liable to third parties for doing something which he ought not to have done (Evans' Law of Prin. and Agent, 328), it is quite immaterial to the third party whether the defenders are, as between themselves, client and solicitor, or occupy any other of the numerous characters to which the principle of agency applies. To the third party he is not a solicitor, he is merely a wrongdoer, a tort-feasor. And to torts the principle of agency does not apply; each wrongdoer is a principal. This has been expressed by saying that the law does not recognize the relation of principal and agent as existing among wrongdoers: *Sharland* v. *Mildon*, 5 Hare 469. Slander of title is a wrong. All persons procuring, commanding, aiding, or assisting, in the commission of a trespass, or any other wrongful act, are principals in the transaction: *Bates* v. *Pilling*, 6 B. & C. 38; *Stephens* v. *Elwall*, 4 M. & S. 261; *Perkins* v. *Smith*, 1 Wils. 328. A common instance is where an arrest has been made under process, which is after-

wards set aside for irregularity, both the attorney who sued out the process, and the client who set the attorney in motion, may be sued for the assault and false imprisonment: *Parsons* v. *Lloyd*, 2 W. Bl. 844. These authorities would justify treating the solicitor as a stranger doing a wrong to the plaintiffs without having any interest, but it was not of much importance in this case whether he (the judge) looked upon him in that character, or as in the same position as the defendant S., for, as there was not any reasonable or probable cause for the impeachment of the plaintiffs' title, he was equally liable as if the act were done with express malice(*c*).

Judgment of the Divisional Court.

Upon appeal from this judgment to the Queen's Bench Division, the judgment was substantially affirmed. The court held that the Registry Act did not authorize the registration of such an instrument; and (Cameron, J., *diss.*) that an action would lie for its removal; (*per* Hagarty, C.J., and Armour, J.) that the act of registration was a wrongful one, and all parties concerned in it were responsible to the plaintiffs, and the registrar was, therefore, a proper party; but (*per* Hagarty, C.J.) he was not a necessary party, and, there being no *mala fides*, that the damages should be nominal. Cameron, J., was of opinion that the instrument, being on its face one which did not affect the title, was not removable by the court, and that the action should be dismissed. He was also of opinion that neither the registrar nor the solicitor was a proper party to the action, the former because he had acted in good faith, and in the belief that he was acting within the scope of his duty; and the latter because, after consulting counsel, he had acted to the best of his judgment and ability in advising his client. The court varied the decree by ordering judgment against the defendants for nominal damages, without costs as against the registrar, and with costs against the other defendants(*d*).

The slander may be implied.

It is not essential, in order to constitute a slander of title, that there should be a positive and direct statement that the title

(*c*) Ontario Industrial Loan and Investment Co. v. Lindsey *et al.* (1883) 4 O.R. 473.

(*d*) Ontario Industrial Loan and Investment Co. v. Lindsey *et al.* (1883) 3 O.R. 66.

in question is defective. From the language used the slander may be implied. In his judgment in the case last mentioned, Proudfoot, J., points out that there was no direct statement in the registered paper that the plaintiffs' title was defective, but there was a necessary implication, because the paper was a warning to the purchasers that the lunatic named in the paper had a title, and that his heir might assert a title derived from him at some future time. "It was *something tending* to cut down the extent of title"(*e*).

The pleadings in actions for slander of title.

The Judicature Acts, it should be observed, have made no material change in the care and precision required under the former procedure in the framing of pleadings by both parties in actions of this character. The slanderous words must be precisely stated(*f*); and it must be alleged that there was an absence of reasonable and probable cause on defendant's part(*g*); that there was special damage, with a statement of such damage(*h*); and that such damage was caused by the slander in question(*i*). And where justification is alleged and pleaded, it must not be embarrassing, or of doubtful construction, or otherwise uncertain(*j*). Most of the cases under the former system, on these and other points in the pleadings, are still applicable. See, *e.g.*, *Mair* v. *Culy*(*k*), referred to in chapter on defendant's pleadings, as to the validity of certain pleas to a declaration for a slander of title to lands.

(*e*) *Ibid.* p. 484.
(*f*) Gutsole v. Mathers (1836) 1 M. & W. 495.
(*g*) Wren v. Weild, *supra.*
(*h*) Malachy v. Soper, and other cases, *supra.*
(*i*) Haddon v. Lott; Day v. Brownrigg, and other cases, *supra.*
(*j*) Carr v. Duckett (1860) 5 H. & N. 783; 29 L.J. Ex. 468.
(*k*) (1854) 12 U.C.Q.B. 71.

PART II. LIBEL.

CHAPTER XI.

LIBEL: WHAT IS, AND WHEN ACTIONABLE.

Difficulty of a logical definition of libel.

It is not easy to define libel in logical terms, because it is both a public offence and a private injury, and because, in the latter case, it embraces injury in a multiplicity of ways to character and reputation. In the former case, which covers libel as a crime, the Legislature has classified the offence, and, to a certain extent, defined it.

Defamatory libel defined by the Code.

"A defamatory libel is matter published without legal justification or excuse, likely to injure the reputation of any person by exposing him to hatred, contempt, or ridicule, or designed to insult the person of or concerning whom it is published(*a*).

Such matter may be expressed either in words legibly marked upon any substance whatever, or by any object signifying such matter otherwise than by words, and may be expressed either directly or by insinuation or irony"(*b*).

Seditious libel.

Libel on a foreign sovereign.

The Code also defines seditious libel as "a libel expressive of a seditious intention"(*c*); a libel on a foreign sovereign as "any libel tending to degrade, revile, or expose to hatred and contempt in the estimation of the people of any foreign state, any prince or person exercising sovereign authority over such state(*d*); and obscene libel—or what is to be regarded as such—in an article directed against the publication of obscene matter generally(*e*).

(*a*) C.C. s. 317 (1).
(*b*) *Ibid.*(2).
(*c*) *Ibid.* s. 132(2).
(*d*) *Ibid.* s. 135.
(*e*) *Ibid.* s. 207.

The difficulties of definition of libel are indicated in the "Report of the Select Committee of the House of Lords appointed to consider the law of defamation and libel, and to report thereon to the House"(*f*).

Lord Lyndhurst's opinion.

Lord Lyndhurst, in his statement to the committee, said, that he had never yet seen, nor been able himself to hit upon, anything like a definition of libel or even of sedition, which possessed the requisites of a logical definition; and he could not help thinking that the difficulty was not accidental, but essentially inherent in the nature of the subject matter.

Lord Campbell's opinion.

And Lord Campbell said, that he did not think that there could be any definition of private libel more specific than "a writing tending to injure and degrade the character of the person who is the object of it"; but he thought that, upon a review of the criminal law, there might be a classification and definition of public libels, as they tended to produce insurrection or resistance to the law, or to undermine the foundations of religion, or to corrupt manners.

Baron Parke's definition.

Baron Parke, afterwards Lord Wensleydale, defined libel as "a publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt or ridicule"(*g*). This definition has been very generally recognized and adopted by the English, United States and Canadian courts, and it has been embodied, as far as possible, in the definition (*supra*) of defamatory libel in the Criminal Code(*i*). We may, therefore, accept this definition as sufficient for our present purpose, and proceed to give illustrations, from the case law of the different Provinces, of libel as an actionable wrong, many other examples being furnished in the succeeding chapters.

(*f*) The report of this committee, in 1843, formed the basis of the Act, 6-7 Vict. c. 96, commonly known as Lord Campbell's Act, which in turn was the basis of colonial legislation on the same subject.

(*g*) 6 M. & W. 108.

(*i*) S. 317.

Any writing which tends to vilify and degrade a person is actionable, although no crime be imputed(*j*). A written paper charging the plaintiff with having wrongfully taken the defendant's logs, sawn them up and sold the lumber, is libellous without any averment or proof that larceny was thereby imputed(*k*).

"More like an assassin than an honest man."

But it is not libellous to write of a man that his outward appearance is more like an assassin than an honest man. In an amusing colloquy between the court and counsel for the plaintiff, who had failed in his action before the jury, Parker, J., said: "I will quote you an ancient authority: Plato said that the outside of Socrates was that of a satyr and a buffoon"(*l*). And Wilmot, J., added: "And what Caesar said of Cassius: 'Yon Cassius has a lean and hungry look; he thinks too much; such men are dangerous' "(*m*). "I have taken pains," said Parker, J., "to ascertain whether such words as these are libellous, and the only instance I can find is in the third volume of Lord Campbell's Lives of the Chief Justices, page 74, where it is said, a criminal information was granted against the printer of a newspaper for publishing the following paragraph about Lord Lonsdale: 'The painters are much perplexed about the likeness of the Devil. To obviate this difficulty concerning his Infernal Majesty, Peter Pindar has recommended to his friend Opie the countenance of Lord Lonsdale.' It is said that the other judges looked aghast at Lord Kenyon's ruling in that case, but remained silent. Lord Campbell cites it as one of Lord Kenyon's erroneous decisions"(*n*).

Libel on a solicitor.

It is libellous to charge an attorney with being governed entirely by a craving after his own gains, without regard to the interests of his clients, and reckless of bringing them to ruin(*o*);

(*j*) Connick v. Wilson (1845) 4 N.B.R. (2 Kerr) 617.

(*k*) Connick v. Wilson (1844) 4 N.B.R. (2 Kerr) 496.

(*l*) 2 Plutarch's Lives 501.

(*m*) Shakespeare's Julius Caesar, Act 1, Scene II.

(*n*) Lang v. Gilbert (1860) 9 N.B.R. (4 Allen) 445.

(*o*) Andrews v. Wilson (1845) 5 N.B.R. (3 Kerr) 86.

Imputation that plaintiff was the mother of an illegitimate child.

or to publish in a newspaper of the plaintiff, the mother of one E. J. B., the following: "Of the B.'s—that was the name of his reputed father; what was his mother's, I either never knew or have forgot, but I know it was not B."; meaning that the plaintiff was the mother of an illegitimate child. "These last words," said Robinson, C.J., "are very sufficient to intimate that, though the mother of E. J. B. may have been afterwards Mrs. B., she was not so till after this son had been born to her"(*p*).

"Caution to the public" that maker of promissory note has pleaded Statute of Limitations and refused payment.

It is also libellous to publish in a newspaper, under the heading "Caution to the Public," the copy of a promissory note made by plaintiff in favour of defendant, with the following words underwritten and signed by defendant: "The maker of the above note has availed himself of the Statute of Limitations and refused payment"; meaning that all persons should be cautious of having dealings with the plaintiff as he was a person who would avail himself of the law to avoid payment of a just debt. "What," said Bliss, J., "is the purport and meaning of this? The public are not put on their guard against the innocent actions of others, but such as we deem dangerous, wrong, and improper. The very word 'caution' carries with it an imputation, and when a particular act is attributed to another, and a 'caution' is given to the public in respect of it, this is not merely to announce the fact, but it is to put them on their guard against the individual as one from whom such conduct is to be expected, and of whom they are, therefore, to be wary in their dealings; and thus an imputation upon his general character lurks under such a publication. To speak of a person thus, to impute to him such conduct, is well calculated, it appears to me, to lessen him in the esteem and good opinion of others as an upright, just, and honourable man"(*q*).

Charges of "swindling."

To publish of a person in a newspaper that he "resorted to that style of financiering which in the vernacular is called

(*p*) Anderson v. Stewart (1851) 8 U.C.Q.B. 243.
(*q*) Roberts v. Patillo (1855) 2 N.S.R. (James) 367.

swindling," is libellous. "The term 'swindler' in Wharton's Law Lexicon," said Draper, C.J., "is defined as a cheat, one who lives by cheating, and in *Savile* v. *Jardine*, 2 H. Bl. 531, Eyre, C.J., and Buller, J., speak of the word 'swindler' as equivalent to cheat. I do not find it in Johnson, but in *l'Anson* v. *Stuart*, 1 T.R. 748, in answer to an objection that it was not a term of which the law could take notice, Buller, J., remarks that Mr. Justice Aston (who died in 1778) had formerly held otherwise, for he said that the word 'swindler' was in general use, and the court could not say they were ignorant of it. Though the plea [of justification] confesses that the innuendo correctly states the meaning of the words used: *McPherson* v. *Daniels* (1829), 10 B.C. 263; *Mountney* v. *Walton* (1831), 2 B. & Ad. 673, yet the innuendo does not in this case help to the interpretation. I think it is commonly used to designate a person who makes a practice of defrauding others by false representations or other deliberate artifice. It is held actionable in numerous cases without question. The defendant seems to have adopted some such meaning, by the frame of the plea of justification, in which he makes four distinct and particular statements of facts, each of which is pleaded as an instance of the plaintiff's 'resorting to that style of financiering, etc.' "(*r*).

"Left creditors in the lurch."

It is also libellous to publish of a person in a newspaper that he left a certain place "with his creditors in the lurch," and it justifies the innuendo that the plaintiff had absconded from the place named to avoid the payment of his debts, with the exception perhaps of the word "absconded" which is stronger than is warranted(*s*).

References to "a class" a libel on one of the "class."

General statements of a defamatory character, referring to "a class" of persons, may be understood to be defamatory of an individual, and so be actionable. The plaintiff, a corn merchant who bought wheat on commission and otherwise, used platform scales for weighing the wheat purchased by him, and, just before the publication of the libel complained of, purchased

(*r*) Brown v. Beatty (1862) 12 U.C.C.P. 107, at p. 114.

(*s*) *Per* Draper, C.J., in Brown v. Beatty (1862) 12 U.C.C.P. 107, at p. 113.

from the defendant a quantity of wheat for which he paid him according to the weight shewn by the plaintiff's scales. Under these circumstances the defendant published, in a letter in a newspaper, certain statements concerning "a class of men somewhat similar to Rob Roy, who call themselves commission merchants and wheat buyers, and make it their business to levy blackmail upon every man who sells them a load of wheat. This is done by a species of thimble-rigging performed on the platform scales by which from five to ten bushels are taken from every hundred bushels bought." These and some other statements in the same connection, in the letter as published, and referring to "a class," were alleged by plaintiff as intended to apply to himself, and to charge him with the dishonest practices referred to. The jury having found in favour of the plaintiff, it was held, on a subsequent motion for a nonsuit, upon the objection that the statements complained of shewed no libel (statements as to a class not being slanders of an individual, and, therefore, the part set out being no special slander of the individual plaintiff), that, though a class only was described, the plaintiff might be referred to, and that a verdict in his favour was justified by the evidence of witnesses who stated this to be their understanding and belief. The cases of *Le Fanu* v. *Malcolmson*(*t*); *Turner* v. *Merryweather*(*u*), and *Wakeley* v. *Healey* (in error)(*v*) are referred to in the judgment as authorities on this point(*w*).

Charge of having served a term as a convict, when conviction had been reversed.

An article in the Hamilton *Times* charged plaintiff and his family with being a set of robbers and swindlers, and warned the public against their imposition and extortion, referring especially to plaintiff as "old Sol, who was naturalized by serving a term in the penitentiary of New York State," meaning that plaintiff had served a term as a convict in that prison. The defendants pleaded in justification a conviction of the plaintiff of an indictable offence before a court in the State of New York, prior to the publication of the libel, his sentence to imprisonment in the

(*t*) (1848) 1 H.L. 637.
(*u*) 19 L.J.C.P. 10; 7 C.B. 251.
(*v*) (1848-9) 7 C.B. 591.
(*w*) Marsden v. Henderson (1863) 22 U.C.Q.B. 585.

state prison for a term of two years, and his subsequent committal to that prison and detention there for that period. Plaintiff replied that the conviction was reversed by the Supreme Court of the State, and the plaintiff released from custody upon the false and pretended charge. The replication was demurred to on the ground that the reversal of the conviction was no answer to the defendants' plea, as the imprisonment was admitted, and the alleged libel, which only charged that the plaintiff had been imprisoned, was thus admitted to be true. The court held the replication good, and gave judgment for the plaintiff on the demurrer. "If it is argued," said Richards, C.J., "that the serving out the whole term of imprisonment, to which he was condemned, is not a matter that can properly be deemed libellous, when it is substantially admitted that he was convicted of the offence and sentenced to the imprisonment, and did serve, under such conviction and sentence, a portion of the term, the answer seems to be, that there may be degrees of depravity in crime and degrees of turpitude attached to the periods of imprisonment, and when a man is charged with serving the term of imprisonment, and he did not so serve, it implies that he did not shew facts to modify his crime, so as to obtain a pardon or reverse the sentence to obtain his liberty." The learned Chief Justice referred to *Helsham* v. *Blackwood*(*x*), and to *O'Brien* v. *Clement*(*y*), and added: "Can there be any doubt it is injurious to a plaintiff to say that he served the term of imprisonment to which he was condemned for the crime of which he was convicted, when in truth he did not serve such term, but was discharged from such imprisonment during the term, because the conviction was declared to be illegal? . . . We think the libel charged more than the mere imprisonment; it charged imprisonment for the term for which he was sentenced to be imprisoned"(*z*).

Libels on a watchmaking firm in their trade or business.

In an action by a firm of English watchmakers against a Toronto watchmaker, for the publication in the name of "The American Watch Company," in a number of Ontario newspapers, of statements libelling plaintiffs in their trade and busi-

(*x*) (1851) 11 C.B. 111.
(*y*) (1846) 16 M. & W. 159.
(*z*) Davis v. Stewart *et al.* (1868) 18 U.C.C.P. 482.

ness, the first count of the declaration averred that the plaintiffs sold certain watches made for them in Switzerland, and other superior watches made in England, marking the former with the name only, namely: "Thomas Russell & Sons," and marking the latter with the firm name and the additional words "Chronometer Makers to the Queen," the last mentioned name and designation being used to mark and distinguish the watches so manufactured in England. The count proceeded to charge as libellous the statement, that "in every instance where tried, they [*i.e.*, the American Watch Company's watches] have been found infinitely superior to the uncertain, cheap Swiss or Coventry hand-made watches, with which the market has long been flooded, under fictitious names and reputations. In proof of this may be pointed out certain watches which are largely advertised throughout the Dominion under the attractive caption of 'Chronometer Makers to the Queen.' A large proportion of said advertised watches are merely Swiss anches imposed upon the public, by an appeal to their loyalty, as genuine London watches, at more than twice or thrice their value. By such means the public cannot be long deceived;" meaning that the plaintiffs imposed upon the public their watches, made and manufactured in Switzerland, as and for their watches made and manufactured in England, and thereby obtained for their Swiss watches twice or thrice their real value, and that the plaintiffs were deceiving the public.

In a second count the words complained of were: "Caution: The excellent reputation of the celebrated American Watch has induced certain unprincipled dealers, some of whom we could name, to place upon the Canadian market a worthless Swiss counterfeit of our watches, having our trade marks in whole or in part. All purchasers of the American watch should insist on our printed certificate of genuineness. Swiss anches, whether sold as the manufacture of "Chronometer Makers to the Queen," or as genuine American made watches at far more than their value, are a fraud upon the public, which deserves to be exposed"; meaning that the plaintiffs were unprincipled dealers, and that they sold worthless and counterfeit watches, and that, in selling their watches made and manufactured in Switzerland, they were committing a fraud upon the public, and that they sold watches which were a fraud upon the public. A demurrer to each of these counts to the declaration was disallowed. "The chief objection," said Hagarty, J., "seems to us to be, besides the general

one that no cause of action is shewn, that it is not shewn that the public are enabled in any way to distinguish, or that the plaintiffs have by their advertisements distinguished, between the different kinds of watches made by the plaintiffs as alleged, nor pointed out any way by which the public can distinguish that the watches marked 'Thomas Russell & Sons' were made in Switzerland and not in England. We think the defendant mistakes the gist of the alleged libel. In the first count it is that the plaintiffs impose inferior Swiss ancres on the public as genuine London watches. As we have had occasion to notice more fully in *Fitch* v. *Lemmon*(*a*), the plaintiffs undertake to satisfy the jury of the correctness of the meaning they put upon the alleged libel. In this view the defendant's objections fail as matters of pleading. Nor do we think that the objection can affect the second count for the like reasons. Both counts, with the innuendoes, seem to disclose a cause of action''(*b*).

Describing plaintiff as "ex-penitentiary bird" after his conviction had been reversed.

The plaintiff was described in an evening paper as ''an ex-penitentiary bird'' (meaning that the plaintiff had served a term in the penitentiary as a convict) from the State prison at Auburn, New York, at present a refugee from justice in the United States, and, to sum up his qualities in brief, undoubtedly the most notorious and unmitigated scoundrel extant''; and that ''he was sent to the Auburn State prison on conviction of obtaining a large sum of money by false pretences''; the defendant thereby meaning and intending to charge that the plaintiff was a scoundrel, and had practised villainous proceedings, and made a living by dishonest means. The defendant pleaded, as to the words without the meanings alleged, that the plaintiff, long before the publication of the libel, had been duly convicted of the offence mentioned, and imprisoned in the State prison at Auburn under sentence for said offence. To this the plaintiff replied that the alleged conviction was obtained without legal evidence, and afterwards, on appeal to the proper court, was reversed and annulled, as defendant well knew before publishing the libel. Upon a demurrer to this replication, and a demurrer

(*a*) (1868) 27 U.C.Q.B. 273.

(*b*) Russell *et al.* v. Wilkes (1868) 27 U.C.Q.B. 280.

also to the plea, the court held, that the replication was a good answer to the plea, and that the plea was good, although pleaded to the words without the innuendo. Wilson, J. (with whom Morrison, J., concurred), said: "After the reversal and annulment of the conviction, it is not true that the plaintiff was confined on the conviction for obtaining money by false pretences. The legal effect of the reversal was to render the sentence and imprisonment illegal, and not for a crime. Even if the conviction were never reversed, but a pardon was granted, it does not at all follow that any one may safely libel another as an ex-gaol or 'ex-penitentiary bird.' If the crime never were committed for which imprisonment had been awarded, and if the Crown were afterwards, upon the fullest inquiry, convinced of the innocence of the person convicted, and as the only mode of declaring his innocence, imperfect altogether as that mode may be, were to grant a pardon to him who had done no wrong, would it be justifiable to libel him as a gaol-bird? In my opinion it would not. The expression imports more than the circumstances will warrant to be inferred from them: *Roberts* v. *Brown* (1834), 10 Bing. 519. It is not every man who lies in gaol who is a gaol-bird, any more than that it is every man who is convicted that is guilty. . . The case between these parties, before cited, in 18 C.P. 482(*bb*), is a plain authority against this demurrer. The plea, according to the decision in *Watkins* v. *Hall*, L.R. 3 Q.B. 396, is rightly pleaded to the words without regard to the innuendo in the declaration, and it states the sense in which the publication was made, namely, in reference to the criminal trial, conviction and imprisonment in the State of New York. The plea is, I think, *primâ facie* sufficient in itself"(*c*).

A libellous petition.

The defendant was a municipal elector of the township of W., and the plaintiff, at the time of the occurrence of the facts complained of, was mayor of the village of P., and as such a member of the municipal council of the county of A., in the Province of Quebec, in which the township of W. was situated. The defendant, and some other electors of the same municipality, presented a petition to the county council, praying that a certain

(*bb*) See p. 134, *ante*.

(*c*) Davis v. Stewart (1869) 29 U.C.Q.B. 441.

by-law should be set aside, and among the reasons alleged in support of the petition were that certain members of the council, including the plaintiff, had, from selfish motives and for the sake of personal popularity, voted for the by-law contrary to their convictions, and in contempt of their oath of office. It was held by the Quebec courts, maintaining a verdict for damages, that these statements were defamatory and actionable, the allegations not being material, and there being no evidence that they were made without malice or for reasonable or probable cause(*d*).

Libellous telegraphic messages.

Telegraphic messages may also be libellous, and the company which transmits them may be made liable. The defendants, an electric telegraph company, transmitted over their wires from Halifax, N.S., to the *Daily Telegraph* newspaper, of St. John, N.B., the following message: "J. A. & Co. (plaintiffs) wholesale clothiers of Granville St. have failed, liabilities heavy." This was published in the newspaper, which was shewn to have a large circulation in the Maritime Provinces, and in Quebec and Ontario, and a limited circulation in England. The message was false, and was defamatory to such an extent that the plaintiffs failed in business. The jury awarded $7,000 damages, but the verdict was set aside and a new trial directed, by a majority of the Supreme Court of Canada, reversing the judgment of a majority of the Supreme Court of Nova Scotia(*e*), on the ground that the damages were excessive, and that evidence of special damage had been improperly admitted in the absence of any allegation of such damage in the pleadings. The majority in both courts, however, were agreed that the company were responsible for the publication of the message(*f*).

Libels on parliamentary candidates. Charge of being a "freemason."

The charge of being a "freemason," made against a parliamentary candidate, has been held to be libellous in the Province of Quebec, as it probably might be in other Roman Catholic sec-

(*d*) Lavergne v. Lainesse (1880) 6 Q.L.R. 241 (S.C.R.).

(*e*) (1881) 14 N.S.R. (2 R. & G.) 17.

(*f*) Silver *et al.* v. The Dominion Telegraph Company (1882) 10 S.C. R. 238. See, also, Whitfield v. South Eastern Railway Co., E.B. & E. 115; 27 L.J.Q.B. 229; 4 Jur. N.S. 688.

tions of Canada, at least on proof of special damage. The charge was published in a French newspaper against a French Roman Catholic advocate in Quebec, on the eve of an election for the House of Commons of Canada in which he was a candidate. The charge was false and was shewn to be injurious, and that it did in fact injure the plaintiff's candidature, his opponent being elected by a considerable majority. The action was tried at Montreal by Torrance, J., without a jury, and the plaintiff was awarded substantial damages(*g*).

Charge of non-payment of election bills.

So, also, it is libellous to publish in a newspaper of a candidate at a political election that he has not paid his election bills. And where the proprietor of a French newspaper, published in the district where an election was being held for the Legislative Assembly of Quebec, copied in his newspaper, during the electoral campaign, an article from another newspaper, in which it was falsely stated that plaintiff was not a candidate at P., because he had made so many enemies there by not paying his bills at the previous election, it was held that the statement was libellous and that the plaintiff was entitled to damages(*h*).

Charging corruption against a parliamentary candidate and challenging an action therefor.

The plaintiff and defendant were rival candidates at the election of a member to represent the county of L'Assomption, in the Province of Quebec, in the House of Commons of Canada. At a public meeting of the electors, at which both candidates were present, the defendant stated to the meeting that he had bribed the plaintiff, when he was presenting himself as a candidate on the occasion of a former election for the Provincial Legislature, to retire from the field for a sum of money which he had paid to him. The defendant afterwards caused this statement to be printed in a newspaper, and on a separate "dodger" or fly-sheet, which was circulated throughout the constituency, with a printed challenge to the plaintiff and others implicated to justify their innocence of the charges made by bringing an action for damages in case they were not guilty, and offering,

(*g*) Lareau v. La Compagnie D'Imprimerie de la Minerve (1883) 27 L.C.J. 337 (S.C.); 6 L.N. 156.

(*h*) Belleau v. Mercier (1882) 8 Q.L.R. 312 (S.C.).

at the same time, to make a deposit to cover the costs of suit. At the trial before the Supreme Court of the district of Montreal, where the defendant relied on his pleas of justification and privilege and publication in the public interest, the plaintiff was awarded $100 damages, with costs as of an action of that class. Upon an appeal by the defendant to the Court of Queen's Bench, this judgment was reversed, but without costs(*i*). Upon a further appeal by the plaintiff to the Supreme Court of Canada, it was held (Strong, C.J., *diss.*), that the appeal should be dismissed with costs(*j*).

Libel of plaintiff in relation to an office formerly held by him.

In an action for libels published in a Nova Scotia newspaper in which the plaintiff, a former Deputy Provincial Secretary, recovered damages against the defendants, one of the grounds for moving against the verdict was, that no defamatory matter was alleged to have been published concerning the plaintiff except such as related to him as the holder of an office which he did not fill at the time of the alleged publication. The court held, that although the defamatory matter was charged as having been published of the plaintiff in relation to his office, it was no objection to the verdict for plaintiff that the fact of plaintiff holding such office was not proved, as some of the words used were actionable *per se*, and the innuendo shewed that the object of the suit was to recover damages sustained by the plaintiff out of office by reason of charges made against him of improper conduct while in office. The case of *Goodburne* v. *Bowman et al.*(*k*), is referred to in the judgment of McDonald, J., as being "entirely in point." Reference is also made to Roscoe's N.P. Ev. 746, and *Lewis* v. *Walter*(*l*), It is also libellous to write and publish of an ex-mayor and justice of the peace of the borough, that, during his mayoralty, he displayed ignorance of his duties and was guilty of partiality and corruption—any

(*i*) (1897) Q.R. 6 Q.B. 520.

(*j*) Gauthier v. Jeannotte (1898) 28 S.C.R. 590. See, also, Harwood v. Astley, 1 B. & P.N.C. 47, 54; Pankhurst v. Hamilton, 3 T.L.R. 500,*per* Grove, J.; Bronson v. Bruce, 60 Amer. Rep. 307 (U.S.) 1886; Jones v. Townsend's Admix., 58 *ibid.* 676.

(*k*) 9 Bing. 692.

(*l*) 3 B. & C. 138; Crosskill v. Morning Herald Printing and Publishing Company (1883) 16 N.S.R. (4 R. & G.) 200.

imputation of unjust and corrupt motives being equally libellous of a person in relation to a public office as in his private capacity(*m*).

Libels caused by mistakes and published bona fide.

Defamatory matter, although published by mistake and *bonâ fide*, may nevertheless be libellous. A mercantile agency circular stated that plaintiff had given a chattel mortgage on his property, whereas, in fact, he had only assigned such an instrument held by him against another person. It appeared that the clerk of the county court had, by mistake, given the information to the clerk of the defendant who had published it *bonâ fide*. Wilson, C.J., said "that to write of another that he had made a chattel mortgage on his property, when he had only assigned a chattel mortgage which he held over the property of another, even although he had guaranteed to his assignee the payment of that mortgage, is or might be libellous." In *Shepheard* v. *Whitaker*(*n*), a somewhat similar case, the proprietor of a periodical publication circulating among book-sellers and stationers, inserted, by mistake, in the arrangement of the *London Gazette* announcements, the name of the plaintiff's stationery firm, under the head, "First meetings under Bankruptcy Act," instead of under "Dissolution of Partnerships." The blunder was explained by a circular sent to about four thousand of the trade; but it was held to be a libel. There it was the defendant's own mistake; here it was in consequence of the mistake of the clerk of the county court. In *Blake* v. *Stevens et al.*(*o*) the defendant, in a work on the Law of Attorneys, having referred to a case in which the plaintiff was said to have been struck off the roll, when, by the report of the case, he had been suspended for two years, defendant was held answerable for the libel. In *Tompson* v. *Dashwood*(*p*) the defendant wrote a letter containing defamatory statements of the plaintiff, and beginning "Dear Colonel Wood," which was a privileged communication to Colonel Wood. By mistake the defendant placed the letter in an envelope directed to another person, who received and read it. It was

(*m*) Parmiter v. Coupland, 6 M. & W. 105; 9 L.J. Ex. 202; 4 Jur. 701. See, also, Goodburne v. Bowman, *supra*.

(*n*) (1875) L.R. 10 C.P. 502.

(*o*) (1864) 4 F. & F. 232.

(*p*) (1883) 11 Q.B.D. 43.

held that, as the letter was privileged to Colonel Wood, the mistake in sending it to another was also privileged in the absence of malice. In another case(*q*) the party was led into making a mis-statement to the prejudice of the plaintiff by the mistake of another. In *Goldstein* v. *Foss*(*r*), a letter written to the members of a society that the plaintiff was an improper person to be admitted a member of the society, innuendo that he was a swindler, it was held, that the action would have been maintainable if the innuendo had been sufficiently connected with the introductory averment(*s*).

The epithet "black-leg."

The epithet "black-leg" has different meanings, and may be defamatory or not according to circumstances. In the vocabulary of the miners of British Columbia, and probably in other mining regions of Canada, the term "black-leg" has a local or trade meaning which may make it actionable when applied to a workman. It means that the person so called has taken the place and wages of some striker upon the same terms against which the striker has struck, whether the strike be for a raise, or against a reduction, of wages, or for shorter hours, or for whatever object the strikers seek to attain. In an action for libel against the publisher of the Nanaimo *Morning Courier* for the publication of a paragraph in which the plaintiff was styled a "black-leg," this, according to the evidence, was the meaning of the term. Bigbie, C.J., who tried the action without a jury, held, that the term was wholly inapplicable to the plaintiff or any workman in his circumstances, even according to the custom of miners; that it was a cruel libel published apparently to gratify a temporary majority of the workmen in the mine in which the plaintiff was employed; that there was no evidence of pecuniary loss; and that a judgment of $50 and costs would compensate the plaintiff for the pain and annoyance caused him by the publication(*t*). The epithet "black-leg" has, however, been held to be actionable when it signifies a person guilty of cheating, *e.g.*, cheating at cards(*u*).

(*q*) Brett v. Watson (1872) 20 W.R. 723.

(*r*) C.B. & C. 154.

(*s*) *Per* Wilson, C.J., in Lemay v. Chamberlain (1886) 10 O.R. 638.

(*t*) Hugo v. Todd (1889) 1 B.C.R. 369.

(*u*) O'Brien v. Clement (1846) 16 M. & W. 159; O'Brien v. Bryant (1846) 16 M. & W. 168.

In *Barnett* v. *Allen*(*v*) the words were, "I am surprised at R. allowing a black-leg in this room." Pollock, C.B., and Watson, B., thought that the term did not necessarily mean that the plaintiff was a cheating gambler, and that there must be proof of special damage in order to make the words actionable. But Martin and Bramwell, BB., were of opinion that it was a question for the jury whether the defendant meant that the plaintiff had been guilty of an offence for which he might be indicted under the statute against cheating; and that the jury having found that the words were used for the purpose of imputing that the plaintiff was a cheating gambler, and that the words would be reasonably understood in that sense, the action was maintainable.

Disparagement of trader's goods coupled with special damage.

Libel is also maintainable for disparagement of a trader's goods coupled with special damage. Where, therefore, a newspaper advertisement, published by the defendants, described their own goods as "the largest and best selected stock of silverware in Western Ontario; none but quadruple plate," etc., and added, referring to the plaintiffs' goods, "We do not keep acme or common plate"; it was held by Robertson, J., on defendants' demurrer, that the words were actionable. The learned judge referred to the opinion of Cockburn, C.J., in *Young* v. *Macrae*(*w*), and said that if the plaintiffs were able to prove the allegation of special damage, he thought, on the authority of *The Western Counties Manure Co.* v. *The Lawes Chemical Manure Co.*(*x*), the plaintiffs were entitled to judgment(*y*).

False statement of indebtedness in printed poster advertising account for sale.

A false statement of indebtedness contained in a poster advertising an account for sale is also libellous. Two of the defendants, who were merchants, placed for collection in the hands of the other defendant, a collector of debts, an account

(*v*) (1858) 3 H. & N. 381; 27 L.J. Ex. 412.

(*w*) 3 B. & S., at p. 269.

(*x*) (1874) L.R. 9 Ex. 218.

(*y*) Acme Silver Company v. The Stacey Hardware and Manufacturing Company (1891) 21 O.R. 261.

against a married woman, whose husband was joined as plaintiff, defendants well knowing the method of collection adopted. The collector, after a threatening letter to the female plaintiff, which did not evoke payment, caused to be posted up conspicuously, in several parts of the city where the plaintiffs lived, a yellow poster advertising a number of accounts for sale, including one against "Mrs. J. G. (the female plaintiff), Princess Street, drygoods bill, $59.35." The evidence shewed that she owed only $24.33. The trial judge (Rose, J.), who tried the action by consent without a jury, was of opinion that the statement in the advertisement was shewn to be substantially true, and he dismissed the action. His judgment was reversed by the Divisional Court who held that the publication was libellous, and could only be justified by shewing its truth, and, as the defendants had failed to prove that she was indebted in the sum mentioned in the poster, they were liable in damages. *Goodburne* v. *Bowman*(*z*), and *Alexander* v. *North Eastern R.W. Co.*(*a*), are referred to in the judgments of the court(*b*).

A placard (with accompanying circular) containing list of unpaid accounts and threatening to advertise same.

A placard (with an accompanying circular letter) containing a list of accounts alleged to be unpaid and threatening to advertise them for sale, unless paid in full, is libellous as implying dishonesty and insolvency. Defendant, a debt collector, had printed a large yellow placard containing the names of about thirty-eight well-known residents of Victoria, B.C., with alleged debts of small amounts set opposite their names, as due for "druggist's bill," "tailor's bill," "grocer's bill," etc., under the heading, in large letters: "Accounts for sale. The B.C. Mercantile Agency offer the following accounts for sale at their office," etc. This poster, which shewed the name of the plaintiff as debtor for a drug bill for $9.67, defendant sent to him, and to each of the persons on the list, together with a circular letter signed by "The B. C. Mercantile Agency" as follows: "Enclosed you will find sample poster. You may still have your name lifted by paying the amount on or before 27th July, after which date

(*z*) 9 Bing. 532.

(*a*) 6 B. & S. 340.

(*b*) Green *et ux.* v. Minnes *et al.* (1892) 22 O.R. 177.

the poster will positively be issued. The advertising of this and other claims for sale is, that in default of payment by the debtors of the amount due by them in full, the largest possible amount may be realized by their creditors from the claims, and for no other purpose." An interim injunction having been granted to restrain further publication, it was held (*per* Begbie, C.J.), on motion to continue the injunction till the hearing, that the poster was libellous, and that the innuendo implied was not merely that the plaintiff was justly indebted in the sum mentioned, but that he was dishonest and insolvent. A subsequent motion to dissolve the injunction was refused by the same judge, and, upon an appeal to the Divisional Court from the order dismissing the application, the court was equally divided. Crease, J., was of opinion that the poster was libellous; that it was in fact, in the eyes of the public, a black list, implying that all ordinary efforts to obtain payment had failed, and that the debtor was either dishonest or insolvent. Drake, J., expressed no opinion as to whether the poster was libellous, and thought that the exercise of the jurisdiction of the court in such cases should be very sparingly used, and, in practice, should be confined to trade libels(*c*).

Publication of copy of register of judgments privileged.

In connection with the two last mentioned cases reference may be made to the decision in *Searles* v. *Scarlett*(*d*), which deals with a cognate subject. In that case it was held by the English Court of Appeal(*dd*), adopting the principle laid down in *Fleming* v. *Newton*(*e*), that the publication of a mere copy of what is contained in a register of judgments, kept in pursuance of an Act of Parliament, and which by law the public are entitled

(*c*) Wolfenden v. Giles (1892) 2 B.C.R. 279.

(*d*) C.A. (1892) 2 Q.B. 56.

(*dd*) "That principle was enunciated by Lord Cottenham, L.C., not, it is true, in an action of libel, but, I think, as a principle which must govern a case of libel. It is, that where there is a register kept by virtue of an Act of Parliament for the purpose of giving information to the public, then, if a person makes a copy of it and publishes it, although he does so for the purpose of warning the public or tradesmen about to give credit, yet, if all he does is to publish a copy of the register, which is intended to be a public document, it is a privileged publication." *Per* Lord Esher, M.R., in Searles v. Scarlett, *supra*, at pp. 60-61.

(*e*) (1848) 1 H.L.C. 363.

to inspect, is privileged. The facts were, that an extract from the register of county court judgments was published in a trade protection society's journal, stating that judgments had been obtained in the county court against certain persons named, among whom was the plaintiff. A note was appended to the effect that the statement was taken from the register of the county court judgments, but that no distinction was made in the register between actions for debt or damages or properly disputed cases, neither was it known which of the judgments remained unpaid, but it was probable that a large proportion of them had been settled or paid. In an action for libel, the plaintiff alleged, by way of innuendo, that the statement meant that a judgment had been obtained against him, in the county court, which had remined unsatisfied, and that he was insolvent and a person to whom credit ought not to be given. The Court of Appeal held, that having regard to the note appended, the statement complained of was incapable of the meaning alleged by the innuendo, and that such statement being merely an extract from the register of the county court judgments, a document which by law was open to public inspection, the publication was privileged, and, in the absence of evidence of malice, the action could not be maintained.

Publication of record of unsatisfied judgments.

In the case of *Williams* v. *Smith et al.*(*f*), which is discussed in the above judgments, the plaintiff, a hatter, brought an action for libel against the proprietors of the *Hatters' Gazette*, a newspaper having a circulation among the members of the trade. The alleged libel consisted of a statement in the issue of the paper for December 1, 1887, in a column headed "The Gazette," with sub-headings "Bills of Sale," "County Court Judgments," and "The Bankruptcy Acts," under the sub-heading "County Court Judgments," as follows: "W. S., L. House, L. Street (the plaintiff's name and address) £27 1s. 0d., October 13, 1887"; the innuendo being, "that, on December 1, 1887, there was an unsatisfied judgment against the plaintiff in a county court for £27 1s. 0d., which had been obtained on October 13, 1887." A judgment for that amount had been at that date recovered against the plaintiff in a county court, and had been registered in a register of the county court judgments kept pursuant to

(*f*) (1888) 22 Q.B.D. 134.

section 18 of the County Courts Act, 1852. Prior to December 1, 1887, the plaintiff had satisfied the judgment, but he had not obtained a certificate of satisfaction, and on December 1, 1887, the judgment was still on the register. The defendants had, without searching the register, taken the particulars from another trade newspaper. The trial judge held that the words were capable of the alleged defamatory meaning, and left it to the jury to say whether they were libellous. The jury found a verdict for the plaintiff and substantial damages. Upon a motion to set aside the verdict it was held that the direction and the verdict were right. In his judgment in *Searles* v. *Scarlett* (*supra*), Lord Esher, M.R., "finds some difficulty" in dealing with this case. See his remarks at page 62 of the case as reported.

Action for defamation and not for disturbing plaintiff in his calling.

The courts have also had occasion to distinguish actions for defamation of a person in his trade or business, and actions on the case for disturbing a person in such trade or business, or in the exercise of a right in regard to it. The plaintiff, a tradesman, claimed damages for injury to his credit and business by reason of the defendant having sent certain hand-bills, issued by the plaintiff advertising his business, to various wholesale creditors of the plaintiff, and having written and published letters to such creditors falsely and maliciously charging that the plaintiff was advertising his business, and unduly forcing sales, with the view of selling and disposing of his goods to defeat and defraud his creditors. Upon an appeal by the defendant to a judge in Chambers (Meredith, C.J.), from an order of an official referee dismissing a motion by the defendant to strike out the statement of claim, or the first six paragraphs of it, as embarrassing, and for particulars of other paragraphs, it was held, that the action was for libel, and not in case for disturbing the plaintiff in his calling, and that the defendant was entitled to have the words of the alleged libel set out in the pleading. *Flood* v. *Jackson*(*g*), and *Riding* v. *Smith*(*h*), were specially referred to(*i*).

(*g*) (1895) 2 Q.B. 21.

(*h*) (1876) 1 Ex. D. 91.

(*i*) Robinson v. Sugarman (1897) 17 O.P.R. 419.

Words defamatory of manufactured goods and patent rights.

But an action for words written and published relating to articles of the plaintiffs' manufacture, and the rights of the plaintiffs under certain letters patent by virtue of which they claimed a monopoly of the manufacture and sale of the articles, is not an action of defamation properly so called, but an action on the case for maliciously acting in such a way as to inflict loss upon the plaintiffs(*j*).

Charges of "blackmail."

The question whether a charge of "blackmailing" is libellous, is discussed in some of the cases. In one of these(*k*) the trial judge (Meredith, J.), in his reserved judgment on a motion for a nonsuit, which he subsequently granted, said:—

Opinion of Meredith, J.

"There was no contention, nor any evidence whatever, that the word 'blackmailing' had any other than its proper meaning in this community, or among the readers of the newspaper; and that being so, and the word being an ordinary English word, the court will give to it its natural meaning. And everything really turns upon the meaning of the word. For the plaintiff it was very intelligibly put thus: the word imports a crime, and whatever may be said of the plaintiff's conduct, it cannot be said that he was guilty of any crime; and it was said to have been so ruled at *nisi prius* in another case of the same plaintiff against another newspaper in respect of the same, or like words. If it were so ruled, I could not agree in that ruling; but, if the decision were to me a known one, I would either follow it, or refer the question to a Divisional Court, as the statute provides; but I can not say it is a known one, and so am obliged to exercise my own judgment upon the question. . . But it is not needful to attempt to define its whole meaning: it is enough to say, as I must, that where a man, having no right, nor any pretence of right, to receive one farthing (except his proper law costs, if he succeed in the action), receives $4,500 to hush a complaint of, and to stifle his legal proceedings to prevent, a wrong which he charges is about to be perpetrated by means of audacious bribery

(*j*) Dickerson *et al.* v. Radcliffe *et al.* (1897) 17 O.P.R. 418.

(*k*) Macdonald v. Mail Printing Company (1900) 32 O.R. 163; 2 O.L.R. (1901) 278.

of public officers, his conduct may be "characterized as blackmailing" in the proper use and ordinary meaning of those words: indeed, it seems to me almost, if not quite, a typical case of blackmailing of the present day; and that is this case, except that this case is aggravated by a subsequent attempt to exact a larger sum."

Opinion of Boyd, C.

In the Divisional Court, where the nonsuit was set aside(*l*), Boyd, C., said, that it was not essential to determine whether the term "blackmail" *per se* imputed a crime. The better view was, that the colloquial use had broadened its meaning so that it may not necessarily have a criminal connotation. But when put in writing and published, it was manifestly defamatory. Here the innuendo, that it was a punishable crime, might be rejected, and a good cause of action remained. No innuendo was necessary as to these words: *Barrett* v. *Long* (1851), 3 H.L.C. 413, *per* Parke, B. He agreed with what was said in the latest American case he had found, that the term "blackmailing" was libellous *per se*: *Robertson* v. *Bennett* (1878) 44 N.Y. Sup. Ct. 66.

Opinion of Ferguson, J.

And Ferguson, J., said: "I cannot think there is room for doubt that an imputation or accusation, put into writing and published, of blackmailing, or stating in writing and publishing, that a person has been accused or suspected of blackmailing, would be defamatory, even though it should be conceded that the word 'blackmailing' at the present day does not necessarily mean a crime punishable by law."

Implied charge of forswearing.

A general charge of forswearing is also actionable; but, where the charge is to be found by implication from one or more writings, the case is different, and the writings referred to in the alleged libel should be produced, or their contents proved where their non-production is accounted for(*m*).

Hypothetical charge of perjury.

But a charge of perjury, made hypothetically, is not libellous. The defendant in a letter to A., regarding an affidavit

(*l*) 2 O.L.R. (1901) 278.

(*m*) Oakes v. Keating *et al.* (1883) 16 N.S.R. (4 R. & G.) 554.

made by the plaintiff about the service of a writ upon him (plaintiff) as A.'s agent, said that, "If L. (plaintiff) swears that I did not serve him with a copy of that writ on the 31st October last, he swears to a lie"; meaning that plaintiff had committed perjury. The defendant justified the truth of the charge, and the jury found—contrary to the evidence of the plaintiff—that the defendant had served him with the writ on the 31st October. It was held, that if the plaintiff had made an affidavit respecting the service of the writ, the jury having found it to be untrue, the justification was proved and the plaintiff could not recover; and, that if the plaintiff did not make the affidavit, the letter was not libellous, because it only stated the matter hypothetically(*n*).

Responsibility of trading corporation for libellous letters of its servants.

In *Freeborn* v. *The Singer Sewing Machine Company*(*o*) there is a discussion, in the light of a number of decided cases, of the question whether a corporation sued for libel can be guilty of express malice, "in the present state of the law." The plaintiff was in the service of the defendants, a foreign corporation, which had offices at Toronto and Winnipeg. About five weeks after his engagement, letters alleged to be libellous of the plaintiff were written by the assistant manager at Toronto to th manager at Winnipeg, and subsequently by the manager at Toronto to the manager at Winnipeg. It was admitted by plaintiff's counsel that the letters, being from one servant to another, respecting a subordinate servant, were *primâ facie* privileged communications; but it was contended that the language used evinced express malice, and that such excess was not privileged.

Opinion of Taylor, J.

In the judgment of Taylor, J., for the court, the cases are reviewed and it was held, that there was no evidence that the defendant corporation, its directors, or managing board, authorized or had any knowledge of, the letters in question being written, and that the defendants were not liable. "In the present state of the law," said the learned judge, "it would be, in my

(*n*) Lang v. Gilbert (1860) 9 N.B.R. (4 Allen) 445.

(*o*) (1885) 2 M.L.R. 253 (In appeal).

judgment, unsafe to hold, in the absence of any such evidence, that the defendants can be made liable for express malice. So the rule should be made absolute to enter a nonsuit."

Where words harmless per se, and no evidence of their defamatory character.

The defendant, a tax collector, having applied to the plaintiff for payment of certain taxes, was told by him that J. S. should pay them. He subsequently wrote and mailed to the plaintiff a post card containing these words: "I saw J. S. this morning; he said make the S. B. pay it." In an action for libel in which the plaintiff claimed that "S. B." applied to him, and meant "son of a bitch," it was held, affirming the judgment of the trial judge (Britton, J.) dismissing the action(*p*), that in its primary and obvious meaning the language of the post card was harmless; and that the letters, "S. B." not having acquired in the vernacular any meaning as a customary abbreviation of any particular phrase or expression, and the plaintiff having given no evidence that they conveyed the meaning attributed to them by him, he had failed to establish any cause of action(*q*).

Verdict subject to reserved questions of law.

At the trial of this action defendant's counsel moved for a nonsuit, which the learned judge was inclined to grant on the ground that there was no reasonable evidence to go to the jury of the innuendo as laid by the plaintiff, but, in order to save a second trial, he allowed the case to proceed subject to his reservation of the question of law, which was determined as above stated, after the jury had found for the plaintiff and $15 damages. This course was adopted, following *Macdonald* v. *Mail Publishing Company*(*r*).

Libel of a deputy acting postmaster in a letter to the Postmaster General.

An alleged libel consisted of detached parts of a letter written by defendant to the Postmaster General at Quebec, accusing the plaintiff, who was occasionally employed as deputy acting

(*p*) Major v. McGregor, 5 O.L.R. (1902) 81.
(*q*) Major v. McGregor, 6 O.L.R. (1903) 528.
(*r*) (1900) 32 O.R. 163; 2 O.L.R. (1901) 278.

postmaster, agent, or clerk, of the postmaster at B., of misconduct in the management of the post office at that place. The letter charged plaintiff with "not hesitating to violate a public trust for the mean gratification of personal revenge," with insolently discharging the duties of his office, and with destroying, overcharging, or otherwise injuring papers directed to any one, and then endeavouring "to screen himself in the mean, dirty subterfuge, that he is not accountable for his conduct, as he was acting for another." The trial judge charged the jury that they should consider whether the complaint, as stated in the letter, was a *bonâ fide* charge, for, if so, the action would not lie. The jury found for the plaintiff and £2 5s. damages. A rule *nisi* to set aside the verdict and enter a nonsuit was discharged. Powell, C.J., observed, that the authority cited from Ventris(*s*), which confined actions for libel to offices of a certain grade, was not sufficient to warrant a nonsuit(*t*).

Basis of the law of defamation in Quebec.

Defamation as an actionable wrong in the Province of Quebec is based on the following articles of the *Code Civile*:—

Article 1053. Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect, or want of skill.

Article 1054. He is responsible not only for the damage caused by his own fault, but also for that caused by persons under his control, and by things which he has under his care. The father, or, after his decease, the mother, is responsible for the damage caused by their minor children. Tutors are responsible in like manner for their pupils. Curators or others having the legal custody of insane persons, for the damage done by the latter. Schoolmasters and artisans, for the damage caused by their pupils, or apprentices, while under their care. The responsibility attaches in the above cases only when the person subject to it fails to establish that he was unable to prevent the act which has caused the damage. Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed.

(*s*) 1 Ventris 275.

(*t*) Jones v. Stewart (1827) 1 U.C.K.B. 626; Tay. Rep. 453.

Article 262. The following actions are prescribed by one year: (1) For slander or libel, reckoning from the day that it came to the knowledge of the party aggrieved.

Actions for defamatory statements in the pleadings in a cause.

The civil law of Quebec, unlike that of the other Provinces, does not give the protection of absolute privilege to defamatory statements in pleadings and proceedings in the courts, and so we have a number of decisions by the Quebec courts arising out of defamatory matter published in that way. It has been held, *e.g.*, that an action lies for libellous allegations contained in pleadings in an action(*u*); that a plaintiff in an action for libel, who is attacked by an additional libel in a plea to his action, may proceed by incidental demand in order to obtain judgment for this additional libel(*v*); that whoever defames a party to an action by writings of record in a suit, without sufficient cause, is liable in damages(*w*); that an action *d'injures* for libel set forth in proceedings in courts of justice is maintainable(*x*); and that libels in pleadings are actionable when the allegations complained of are false, or when they are made without probable cause(*y*)—a decision which was affirmed on appeal. The law infers malice from the nature and the falsity of such accusations(*z*). It was held in the same case, that an unproved plea of justification constitutes an aggravation of the libel; that executors are personally liable for libels published by them in their representative capacity; and that the mere fact of having taken the opinion of counsel, apart from any other circumstances, does not excuse a party making libellous allegations in the pleadings in an action(*a*). So, also, where the plaintiff sued for a charge of perjury, it was held, that the defendant should not have repeated the charge in his plea unless he could prove it(*b*). And where a defendant pleaded that the action was brought for the

(*u*) Laflamme v. Mail Printing Co. (1888) Mon. L.R. 4 Q.B. 84.
(*v*) *Ibid.*
(*w*) Pacaud v. Price (1871) 15 L.C.J. 281 (Q.B.).
(*x*) Tallee v. Munro (1816) 1 Rev. De Leg. 381 (K.B.).
(*y*) Rielle v. Bennings (1888) Mon. L.R. 4 S.C. 219.
(*z*) *Ibid.*
(*a*) See, also, Charlebois v. Bourassa (1888) Mon. L.R. 4 S.C. 424, and Manseau v. Manseau (1890) 19 R.L. 134 (S.C.).
(*b*) Belanger v. Carignan (1873) 5 R.L. 229 (S.C.).

purpose of extorting money, this was held to be an aggravation of the slander, and was visited with damages and costs(*c*). But statements in pleadings relating to the matters in litigation are libellous only if not proved, or if they go beyond what is necessary to the decision of the court(*d*); and where the action is founded on defamatory statements in a plea, it may be instituted before the termination of the suit in which the plea in question was filed(*e*).

When privileged.

Where such statements relate to a party to the action, they are privileged only when the allegations are pertinent to the issue, and are filed in good faith for the purpose of a legitimate defence(*f*).

But while a libel in a plea affords good ground for an action for damages, yet where a party merely makes an exception without appealing, and afterwards adopts proceedings to bring on the trial, regardless of any defect in the assignments, or who tries to avail himself of the assignments as they are, without any proceeding by the other side to compel him to proceed, he waives his right to except and cannot afterwards avail himself of it(*g*).

Defamation in pleadings in insurance cases.

The denial in a plea that a fire occurred accidentally and from cause unknown, does not imply or insinuate that the assured criminally set the fire. So, also, allegations in a plea by an insurance company, that the assured made false representations in his application for insurance, and false solemn declarations after the loss as to the value of his stock, with fraudulent intent, and that in swearing to false exaggerated statements, the assured did not tell the truth and rendered himself guilty of fraud and his policy null, when pertinent to the issue, and

(*c*) Lepage v. Wylie (1878) 1 L.N. 162 (S.C.).

(*d*) Hall v. LeMaire de Montreal (1883) 27 L.C.J. 129 (Q.B.).

(*e*) Hodgson v. La Banque d'Hochelaga (1884) 7 L.N. 353; 1 Mon. L.R. 15 (S.C.). See, also, Wilkins v. Major, *infra*.

(*f*) *Ibid.*

(*g*) Laflamme v. The Mail Printing Co. (1886) 30 L.C.J. 87 (S.C.R.). See, also, Landry v. Choquette (1887) 15 Q.L.R. 193 (S.C.R.).

pleaded in good faith and with probable cause, are not libellous or defamatory(*h*).

Charges of fraud.

A party who in pleading accuses another of fraud and collusion, will be held liable in damages, if the circumstances be not such as would produce on the mind of an ordinarily cautious and prudent man an honest conviction of the guilt of the party accused. Where, therefore, the defendant was cognizant of a loan made to his debtor by the plaintiff, and had himself received the greater part of it, a charge by him in the pleadings that the plaintiff, in taking security for the loan, by way of sale *à réméré*, of all the debtor's property, had acted collusively with such debtor in order to defraud the defendant, was held to be libellous and actionable(*i*). But an allegation of a fraud in a plea is not libellous, and will not support an action for libel, unless it be also alleged that the plea complained of was merely used to cover the libel, which was irrelevant to the issue(*j*). And where in an action for damages by one advocate against another, on the ground that the defendant had, in a factum in a previous case in which they had been engaged, accused the plaintiff of fraud, it was held, that without express proof of malice on the part of the defendant, the action must be dismissed, especially if both parties had been in fault, and each had acted wrongfully towards the other(*k*).

Unprofessional conduct.

But where the attorney for the plaintiff in a suit was charged, in the defendant's plea, with unprofessional conduct in having made an agreement with his client to assume the risk of the costs on condition that he should share in the amount which might be recovered in the action, and such charge was not justified by the evidence, the attorney was held entitled to recover damages therefor(*l*). A party who complains of a libel contained in a pleading is not bound to postpone his action for

(*h*) Morrison v. Western Assurance Company (1903) Q.R. 24 (S.C.) 111, Rochon, J.

(*i*) Matte v. Ratté (1893) Q.O.R. 3 (S.C.) 311.

(*j*) Fitzsimmons v. Byrne *et ux.* (1862) 12 L.C.R. 390 (S.C.).

(*k*) Barthe v. Boudreault (1878) 8 R.L. 489 (Q.B.).

(*l*) Gaudet v. Esplin (1895) Q.O.R. 9 (S.C.) 210.

damages for such libel until the case in which the pleading is filed is decided, and such action, if taken, will not be dismissed as premature(*m*).

The law generally in Quebec.

Apart from the law laid down in these various decisions making defamatory matter in the pleadings in a cause actionable, the law of libel in the Province of Quebec—at least as to what constitutes libel—is substantially the same as it is in the other Provinces. A distinction is made, as in the other Provinces, between what is defamatory and what is merely coarse without being actually defamatory(*n*). But it is libellous for a newspaper to publish of an alderman of a city, before ascertaining the fact, a statement falsely insinuating that the alderman has an interest in a certain contract with the corporation(*o*); or for a physician to publish, in an account for professional services sent to his attorney for collection, the nature of the maladies for which he treated his patient, when such publication is calculated to injure the patient's reputation(*p*); or for a newspaper to publish a report tending to cast ridicule upon an advocate(*q*); or to impute in a letter which is sent to a mayor of a city and others, that the plaintiff, a public accountant, has been guilty of fraud, negligence and incapacity, in the making of a certain balance sheet of an estate bequeathed for the purposes of a public library, and in the auditing of the books of the said estate(*r*). So, also, a public announcement of the termination of an agency concluding with the following expression: *Je tiens à en donner connaissance au public afin qu'il ne soit pas mis sous de fausses impressions*—is injurious and actionable(*s*).

(*m*) Wilkins v. Major (1901) 4 Q.P.R. 172, Davidson, J.

(*n*) See Ricard v. Jesmin (1889) 33 L.C.J. 112 (S.C.R.).

(*o*) Mullin v. Graham (1879) S.C. Unreported. See Quebec Digest.

(*p*) Hart v. Therien (1879) 5 Q.L.R. 267 (Q.B.).

(*q*) Desrosiers v. Lessard (1884) 7 L.N. 303 (S.C.).

(*r*) Evans v. Fraser (1881) 4 L.N. 51 (S.C.R.).

(*s*) Demers v. Chapleau (1888) (In Review) Mon. L.R. 4 S.C. 66. See, also, S. v. D. (1889) 18 R.L. (S.C.) 132; Duquette v. Major (1889) Mon. L.R. 5 S.C. 134; 17 R.L. (S.C.) 298; Laplante v. Paranteau (1889) 33 L.C.J. 124 (S.C.R.).

Burning a person in effigy.

Those who aid and abet, or who take part, in the hanging and burning of a person in effigy, with the object of bringing him into contempt, are jointly and severally liable in damages(*t*). And where the father of infant children was aware that his children were planning and abetting such a proceeding, and did not interfere to restrain, but on the contrary encouraged, them, he is responsible for their acts(*u*). It has also been held, that a child has an action for libel or slander of a deceased parent(*v*); and that an action will lie for conspiracy to libel on the part of members of a coroner's jury.

Conspiracy to libel by members of a coroner's jury.

In the action last mentioned, growing out of what was known as the Gavazzi riots, the plaintiff was one of the witnesses before the coroner's jury, summoned to inquire into the death of a person killed during the riot. The jury was composed of nineteen persons, who failed to agree on a verdict. Nine of the jurors, who differed from the other ten, read a paper calling the attention of the authorities to the depositions of some of the witnesses, among others the deposition of the plaintiff, which, they alleged, contained a wilful and corrupt perversion of the truth. The court held, reversing the judgment of the court below(*w*), that it was not competent for one or more jurors individually to prefer such a charge against any of the witnesses examined, and that it was sufficient for the plaintiff, after setting up the facts, to allege that the defendant with eight others did conspire to charge him falsely with wilful and corrupt perjury, etc.(*x*).

For an example of a libel of a public official, see *Graham* v. *Daoust*(*y*).

(*t*) Lortie v. Claude *et al.* (1892) Q.O.R. 2 (S.C.) 369.

(*u*) *Ibid.*

(*v*) Noiseux v. Huot (1892) Q.O.R. 2 (Q.B.) 521. See, also, Roy v. Turgeon (1886) 12 Q.L.R. 186 (S.C.).

(*w*) 4 L.C.R. 193.

(*x*) Simard v. Townsend (1856) 6 L.C.R. 315 Q.B.

(*y*) (1888) 32 L.C.J. 181 (Q.B.).

PART III. THE LAW CONCERNING SLANDER AND LIBEL.

CHAPTER XII.

PUBLICATION.

No action maintainable without publication.

No action is maintainable for either oral or written defamation unless the words be published, *i.e.*, communicated to some person other than the plaintiff. Therefore there is no publication in slander to the plaintiff himself(*a*); or, in libel, to some person who has not read the communication(*b*); or by a husband to his wife(*c*), unless they are living apart under a separation order, in which case publication of a libel to a third person by the husband against the wife would be actionable by the wife(*d*); or where the defendant, not being the printer or principal publisher, but only a subordinate disseminator, carried the libel in a parcel(*e*), or pamphlet(*f*), or newspaper(*g*), which he did not know, and had no reason to suppose, contained defamatory matter.

"Publishing a libel" defined by the Code.

"Publishing a libel," according to the Criminal Code, "is exhibiting it in public, or causing it to be read or seen, or shewing or delivering it, or causing it to be shewn or delivered, with a view to its being read or seen by the person defamed, or by any other person(*h*).

(*a*) Barrow v. Lewellin (1615) Hob. 62; *per* Lord Esher, M.R., in Pullman v. Hill & Co. (1891) 1 Q.B. at p. 527.

(*b*) *Per* Lord Herschell, L.C., in Browne v. Dunn (1893) 6 R., at p. 74.

(*c*) *Per* Huddleston, B., in Wennhak v. Morgan (1888) L.R. 20 Q.B.D. at p. 637.

(*d*) Robinson v. Robinson (1897) 13 T.L.R. 564.

(*e*) Day v. Bream (1837) 2 Moo. & R. 54.

(*f*) Martin *et ux.* v. The Trustees of the British Museum *et al.* (1894) 10 T.L.R. 338.

(*g*) Emmons v. Pottle (1885) 16 Q.B.D. 354; Mallon v. Smith (1893) 9 T.L.R. 621; *per* Lord Kenyon, C.J., in Rex v. Holt (1793) 5 T.R., at p. 444.

(*h*) C.C. s. 318.

This definition shews the distinction between publication in civil and criminal cases. No *action* will lie unless there be publication to some person other than the plaintiff. Shewing or reading only to the party defamed is not publication so as to entitle him to maintain an action for damages, but it is *punishable* because it tends to a breach of the peace(*i*).

Words not spoken in presence or hearing of third person.

Where the plaintiff proved that the words were spoken to him by the defendant, but not in the presence or hearing of a third person, Allen, C.J., who was presiding at the trial, directed the jury that, under these circumstances, the words were not actionable(*j*). So, also, in an action by a former clerk in a post office against the chief post office inspector for Canada, for charging plaintiff with abstracting missing money letters, it was held, that what passed at the private interview between plaintiff and defendant, when the charge was first made, was clearly no publication(*k*). In the Province of Quebec, when there is no publication of the libel, except by plaintiff himself, his action must fail, particularly if he has suffered no real damage, and defendant's conduct is not shewn to be such as should subject him to vindictive damages(*l*).

The sufficiency of proof of slanderous words.

As to the sufficiency of proof of the words in an action of slander, it is said in an early Upper Canada case, that "there are few points in our laws in which one finds it more difficult to come to a satisfactory conclusion upon the authorities. . . . The cases are very contradictory. The general principle as laid down is, that all the actionable words need not be proved; but that such as are proved must be proved as laid; that words merely equivalent will not do; and that whatever tends to qualify or explain the words relied upon must be omitted. Phillips,

(*i*) Barrow v. Lewellin (1615) Hob. 62; Rex v. Garrett, Hick's Case (1618) Hob. 215; Poph. 139. See, also, Clutterbuck v. Chaffers (1816) 1 Stark. 471; Rex v. Wegener (1817) 2 Stark. 245; Reg. v. Brooke (1856) 7 Cox C.C. 251; Pullman v. Hill & Co. (1891) 1 Q.B. at p. 527; Boxsius v. Goblet Frères (1894) 1 Q.B. 842.

(*j*) Gallant v. Calder (1883) 23 N.B.R. at p. 76.

(*k*) Waterbury v. Dewe (1878) 18 N.B.R. (2 P. & B.) 6; (1886) 6 S.C.R. 143. See, also, Wyatt v. Gore, Holt N.P. Cas. 299.

(*l*) Robitaille v. Porteous (1896) Q.R. 11 S.C. 181.

in his treatise on Evidence, thus states the law on this point: "The words must be proved as stated in the declaration; not that the whole of the words alleged in the record must be proved, but some material part of them, and damages may be given for such of the actionable words as are proved, precisely as in other actions the plaintiff recovers to the extent of his proof. But those words which are proved must be proved as laid, and it will not be sufficient to prove equivalent words of slander. Words to the same effect are not the same words. The rule is, that though the plaintiff need not prove all the words in the record, yet he must prove so much of them as will be sufficient to sustain his cause of action; and most clearly it is not enough for him to prove equivalent words of slander"(*m*). This is probably too strictly expressed, and it would seem to allow of no latitude, and to bind the plaintiff to the exact words: but the case referred to—*Maitland* v. *Goldney*(*n*)—goes far to support Mr. Phillips in the doctrine as he lays it down"(*o*).

In the case in which these observations were made, the variance between the words alleged and the words proved was held to be fatal. See, also, *Armitage* v. *Dunster*(*p*), and *Barnes* v. *Holloway*(*q*).

The exact words need not be proved.

The exact words need not be proved, but there is an embarrassing inconsistency in some of the decisions, even in modern times, as to the degree in which the proof can be allowed to vary from the words laid(*r*). Though it be not necessary to prove all the very words alleged, yet it is necessary to prove some material part of them; and it would not be sufficient to prove equivalent words of slander(*s*). In Quebec it has been held to be sufficient if the substance of the slanderous words as laid be

(*m*) Phillip's Ev. Def. 97.

(*n*) (1802) 2 East 426.

(*o*) *Per* Robinson, C.J., in McBean v. Williams (1838) 5 U.C.R. (O.S.) 689.

(*p*) (1785) 4 Doug. 291.

(*q*) (1799) 8 T.R. 150.

(*r*) *Per* Robinson, C.J., in Johnston v. Hedge (1849) 6 U.C.Q.B. 337, at p. 339.

(*s*) *Per* Lawrence, J., in Maitland v. Goldney (1802) 2 East 434.

proved(*t*). So, also, where an action for slander had been dismissed on the verdict of the jury, and also an appeal therefrom, it was held, reversing the judgment of the court below, that it is not necessary to prove the *ipsissima verba*, and that the substance of the charge, if proved, is sufficient to warrant a verdict for the plaintiff(*u*). In *Mallette* v. *Guay*(*v*), on the other hand, the evidence was considered insufficient to support the plaintiff's claim for slander. But where the words alleged as imputing theft were: "Go and get a search warrant and you will get your pork there," and the words proved were: "Go and get your warrant and you will get your pork," the count containing the words having been withdrawn from the jury, on the ground that the words as laid were not proved, a majority of the court held that they were sufficiently proved, and that they should have been left to the jury(*w*).

It will be sufficient, however, if practically the same meaning be conveyed by the words alleged and the words proved(*x*). But where the words charged were: "You robbed the mail," and the words proved were: "I am not like you running about the country with forged deeds and robbing the mail as you did," it was held that the variance between the two statements was fatal(*y*).

Insufficient proof of publication of a pamphlet.

In an action for libel by a clergyman of the Church of England, for the publication of defamatory matter contained in a printed pamphlet, of which it was not pretended that the defendant was either the author or printer, but which he was charged with publishing, it was held that the plaintiff was not entitled to have the alleged libellous matter read upon the production of evidence merely leading to the presumption that one or two pamphlets, seen in the defendant's hands, and delivered by him

(*t*) Hosser v. Arnold (1819) 1 R.L. 503 (K.B.).

(*u*) Beaudry v. Papin (1857) 1 L.C.J. 114 (Q.B.)

(*v*) (1879) 2 L.N. 325 (S.C.).

(*w*) Harris v. Clayton (1891) 21 N.B.R. (5 P. & B.) 237.

(*x*) Sydenham v. Man (1617) Cro. Jac. 407; Smith v. Knowelden, 2 M. & G. 561; Orpwood v. Barkes, 4 Bing. 261; Dancaster v. Hewson, 2 Man. & Ry. 176.

(*y*) McBean v. Williams (1838) 5 U.C.R. (O.S.) 689. See, also, McNaught v. Allen (1851) 8 U.C.Q.B. 30; Vankeuren v. Griffis (1846) 2 U.C.Q.B. 423; and the cases in the chapter on Variance.

to others at their request, but not produced at the trial, and which, for all that appeared, had never been read, were in all respects identical in their contents with the pamphlet which somebody else, not connected with the defendant, was proved to have published(*z*). The declaration in this case contained but one count, and the question having arisen whether the plaintiff, having already given evidence of the publication of a certain pamphlet as the cause of action, could be allowed to introduce evidence of another and distinct publication, the defendant being neither the author nor printer of the libel charged, Robinson, C.J., said: "The plaintiff, as I conceive, must be looked upon always as prosecuting for the injury arising from publishing some one certain libel, to which particular act of publication his cause of action is confined; and if he relied upon the giving a certain book to Silverthorn, as constituting that act of publication, he must produce that book, or prove it to be lost or destroyed, or call upon the defendant to produce that individual book, not any book having merely a similar title page, which book the defendant may never have published; and then, if he could have given evidence of its contents satisfactory to a jury, he could recover"(*a*). Where evidence was given that a copy of a pamphlet containing a libel was received by the witness from the defendant; that it was partially read by her and lent to others; and that a copy was afterwards returned to her which she had no reason to doubt was the copy which she first received, this was held sufficient evidence of publication to go to the jury(*b*).

An unpublished resolution.

But where the resolution of the directors of an incorporated Commercial Travellers' Association, strongly censuring an expelled member of the Association, who complained of the resolution as libellous, was entered on the minutes, but was not communicated by the defendants to any one, and was not affirmed, or in any way dealt with, at any general meeting of the Association, the resolution, as an act of the defendants, was not published(*c*).

(*z*) McGrath v. Cox (1847) 3 U.C.Q.B. 332.

(*a*) McGrath v. Cox (1847) 3 U.C.Q.B. 332.

(*b*) Gathercole v. Miall, 15 M. & W. 319; 10 Jur. 337; 15 L.J. Ex. 179.

(*c*) *Per* Patterson, J., in Cuthbert v. Commercial Travellers' Association (1876) 39 U.C.Q.B. 578.

Publication by signers of a petition.

In an action for alleged libels contained in a petition to a local board of license commissioners, it was contended that there was a separate publication by each subscriber to the petition when he delivered it back to the person who brought it to him. "That, we think, is not so," said Wilson, C.J. "The petition was an incomplete instrument until it was ready for delivery to the Board of License Commissioners, and, in place of each subscriber making a separate publication, he identified himself with, and became a joint participator with, the preceding signatories. The case of *Maitland* v. *Goldney* (1802), 2 East, 426, supports that view of the facts. There the two defendants, who were jointly sued for libel, joined in an affidavit, severally made by them, in which each one deposed for himself; and, in Starkie on Slander and Libel, 1 Ed. 354, 355, it is said, referring to this case: 'Where the wrongful act is the joint act of two or more, the plaintiff may proceed against them in one and the same action; as where the slander is contained in affidavits made by two, but so connected as to form one slanderous charge.' That is precisely the argument which might have been made for the plaintiff, if objection had been taken to his first action, when he joined three of the petitioners in that action"(*d*).

A claim of privilege as to questions concerning publication is insufficient proof thereof.

The defendant's claim of privilege as to questions concerning publication, taken in connection with other facts, is insufficient proof of publication. A newspaper correspondent was sued for the publication in a weekly paper, the *Star*, of the following paragraph reflecting on the plaintiff: "The rumour is current that a well-known auctioneer is actively engaged in the farm pupil business. We hope he will be content with fleecing, and not killing, any of the green Englishmen he is importing. We do not want any second edition of Burchell in this country." The office from which the *Star* was published was in S., but the type was set and the paper printed in T. Plaintiff alleged that defendant had been a correspondent of the newspaper at St. T., on different occasions, his communications being sent to S., and appearing under the head of "St. T. News." The alleged libel

(*d*) Willcocks v. Howell *et al.* (1885) 8 O.R. 576, at pp. 581-82.

was the last of several items in one of these communications. A copy of the newspaper containing the item was filed as an exhibit at the trial, but the manuscript was not produced or proved. In his examination for discovery, defendant, while admitting he was a correspondent of the newspaper at T., could not say whether he was the only one. He also said that he did not remember sending any of the items, but might possibly have sent some of them, but he did not think he had sent the one complained of; that since the publication he had had an interview with the editor with reference thereto, but he refused to answer whether he had discussed the item complained of, for fear, as he said, of incriminating himself. At the trial he stated that he had since ascertained that there were other correspondents at T., and on being pressed as to the item in question, he said, with some hesitation, that he did not furnish it. No other evidence was given connecting the defendant with the publication, and a nonsuit was moved for on the ground that there was no evidence of publication to go to the jury. The trial judge (Rose, J.) allowed the case to go to the jury, but reserved his decision on the motion for a nonsuit, intimating that, from the defendant's refusal to answer on his examination for discovery as to the publication on the ground that his answer might incriminate him, an inference might be raised as to what the true answer would have been, and the learned judge so charged the jury who found in favour of the plaintiff. In his judgment, subsequently delivered, he held that there was evidence upon which the jury were quite justified in finding as a fact, that the defendant was the author of the article in question and the cause of publication. Upon an appeal to the Divisional Court on the ground of misdirection, in telling the jury that they might, from the fact that the defendant refused for fear of self-crimination to answer a question put to him, draw an inference as to what the true answer would have been, it was held, that there was no evidence of publication to go to the jury, and that there had been misdirection on the ground stated, and that no inference adverse to the defendant should have been drawn from his refusal to answer(*e*).

Non-publication of a criminal charge contained in an unsealed envelope sent to an illiterate plaintiff.

The plaintiff had been a servant of the defendant, and, on leaving his service, asked for a statement of account, whereupon

(*e*) Nunn v. Brandon (1893) 24 O.R. 375.

the defendant made out an account, "Mr. Joseph Jackson to Wm. Stayley, Dr.," containing the following items: "Stole hay during winter, $4.00," and "Stole hatchet hammer, $1.50." In an action for libel, it appeared that the account was placed in an unsealed envelope and handed to M., the plaintiff's then employer, who took it to the plaintiff's house, and put it on the table between the plaintiff and his wife while they were at supper. The wife took the account from the envelope and read it to the plaintiff who could neither read nor write. There was no evidence to shew that the defendant knew that the plaintiff could not read, the only knowledge that defendant could have had on that point being that the wife had signed plaintiff's contract with defendant; but it did not appear that the defendant's attention was called to this fact, or that he knew that the signature was not the plaintiff's own handwriting; nor was there any evidence that M. read the account, or took it out of the envelope, and he was not called as a witness. Upon a motion to set aside a verdict for the plaintiff it was held, that there was no evidence of publication, and that, as the onus of proof was on the plaintiff, the action failed. "It is, of course, clear," said Rose, J., who delivered the judgment of the court, "that if the account had been enclosed in an envelope addressed to, and had been received by, the plaintiff's wife, and had contained libellous words, that would have been a publication: *Wenman* v. *Ash*, 13 C.B. 836. Or, if the defendant had known that the plaintiff could not read, and had sent it knowing, as in such case he must have known, the plaintiff must have some one else to read it for him: *Delacroix* v. *Thevenot*, 2 Stark. 63; but otherwise if it was addressed to the plaintiff and he shewed it to another, for the defendant would not be responsible for such publication by the plaintiff: *Barrow* v. *Lewellin*, Hob. R. 62. It does not seem that the fact of a letter being sent unsealed by the hands of a third party makes any difference, if the third party did not read it: *Clutterbuck* v. *Chaffers*, 1 Stark. 471. . . As, therefore, the defendant sent the account to the plaintiff in an envelope, though not sealed, and the wife obtained it under the circumstances detailed, there being no evidence that the defendant had any knowledge of the plaintiff's inability to read, and there being

no evidence that the third party (Murdock) read it, I am unable to find any evidence of publication; and, in my opinion, the plaintiff must fail"(*f*).

Publication by admissions of officer of defendant corporation.

Publication of a libel is not provable against a corporation by an admission of one of their officers, unless it was his duty, or he was authorized, to make such an admission. Where, therefore, in an action for the publication of a libellous circular by the defendant company, it was proved that copies of the circular had been received by several persons with whom the plaintiff was accustomed to deal, but the only proof of publication was an admission by one J., made in conversation with the plaintiff, who alleged that J. was the manager of defendants' business at W., that the circular had been issued by the defendants in reply to a circular issued by the plaintiff, a verdict for the plaintiff, which was upheld by the Divisional Court, was set aside by the Court of Appeal for Ontario. The court held, that no authority can be inferred on the part of a general manager or other officer of a bank, or trading corporation of any kind, to subject the corporation to actions for libels by his admissions to any person that he had published a libel on any person by their authority, and there was, therefore, no proof of publication. If J. had been called as a witness and had proved that he had been so authorized, and that it formed part of his duty to do the act complained of, then the libel would be the act of the corporation. *Tench* v. *Great Western Railway Co.*(*g*) was distinguished. "The shareholders or directors of the company cannot," said Hagarty, C.J.O., "without some sworn testimony, be held liable for a libellous publication by their manager. Such a matter would be wholly foreign to the subject of their employment of him as their officer or agent. . . . I think the principle deducible from the books is well stated in the last edition of Odgers, p. 416: 'A corporation will be liable to an action for libel published by its servants or agents, whenever such publication comes within the scope of the general duties of such servants or agents, or whenever the corporation has expressly authorized

(*f*) Jackson v. Staley (1885) 9 O.R. 334.

(*g*) (1872) 32 U.C.Q.B. 452; in Error and Appeal (1873) 33 U.C. Q.B. 8.

or directed such publication.' A curious case is cited at p. 413, *Harding* v. *Greening*, 8 Taunt. 42. The defendant authorized his daughter, a minor, to make out his bills, and write his general business letters. She chose to insert libellous matter in one of the letters. The father was held not liable for the wrongful act of the daughter in the absence of any direct instructions. If this verdict be upheld on the evidence merely of the manager's admission to others, it will, I think, carry the doctrine of a corporation's liability for a libel far beyond any case I have ever seen or been referred to. I think the learned judge should have dismissed the action as unsupported by any evidence of publication by defendants''(*h*).

Publication of libellous mercantile agency report.

In the case of a libellous mercantile agency report, there would appear to be publication of the report by transmitting it to the offices of the agency, or by communicating it to the office clerks. In an action for libel brought by a shopkeeper against a mercantile agency, in which it was charged that the defendants had issued to their customers a circular containing a statement which imputed perjury to the plaintiff, Osler, J.A., said in his judgment in the Court of Appeal for Ontario, which reversed the judgment for plaintiff: ''I am not entirely satisfied that there is not some evidence of publication of the libel by its transmissions to the defendants' Montreal office, or its communication even to his clerks here. This, however, was not relied upon, or a point made of it at the trial, and, therefore, it would be unsafe to act upon it at this stage. The defendant must not, however, assume that there is any privilege which will protect him against such a publication: *Boxsius* v. *Goblet Frères* (1894) 1 Q.B. 842''(*i*).

Publication by handing "copy" to newspaper editor.

So, also, there may be publication of libellous matter by handing it to the editor of a newspaper. The fact that the manuscript was returned to the party who brought it to the office, and that what appeared in the paper was taken from another copy of the writing so brought in, made the publication

(*h*) Carroll v. Penberthy Injector Company (1889) 16 O.A.R. 446.

(*i*) Robinson v. Dun *et al.* (1897) 24 O.A.R. 287.

to the editor none the less actionable. The plaintiff, a member of the Vancouver Branch of the Women's Christian Temperance Union, sued the female defendant for procuring the publication of the following in the Vancouver *World* of December 30, 1899: "At a meeting of the Women's Christian Temperance Union, held, etc., etc., the following resolution was adopted: 'Whereas it has been proved, by witnesses present, that (plaintiff) had been circulating false reports and defaming the character of members of this Union: Be it therefore resolved, that she is unworthy to be a member of the Women's Christian Temperance Union, and is hereby deposed from all offices and positions to which she has been elected, or appointed, and is hereby expelled from membership in the Women's Christian Temperance Union, in the city of Vancouver." The defendants denied publication. It appeared that the female defendant took a copy of the resolution to the editor of the *World*, who dictated it to his stenographer and handed defendant's copy back to her. Before the stenographer extended his notes, another copy of the resolution was found in the office, and from it the printer set up the type; but it was not shewn from whom this copy was received. The trial judge (Irving, J.) dismissed the action on the ground that it was not proved that the defendant procured the publication. Upon appeal his judgment was reversed and a new trial directed(*j*).

Compelling admission of publication.

If proof of publication be not otherwise available, the plaintiff may call the defendant for that purpose, and any admissions which he might make would, of course, be receivable in proof of the fact. But, under the law of all the Provinces, except Ontario(*k*), the defendant, or any other person, may claim privilege against admitting publication, or answering any question which forms one step towards doing so, on the ground that it would tend to criminate him. Any person, or any officer of a corporation, who is interrogated on that point, must, however,

(*j*) Mackenzie v. Cunningham *et al.* (1901) 8 B.C.R. 36; 21 C.L.T. Occ. N. 251.

(*k*) The Act 4 Edw. 7, c. 10, s. 21 (O.), repealed s. 5 of the Evidence Act, R.S.O. 1897, c. 73, and provides that no person shall be excused from answering any question tending to criminate, etc., assimilating the law in civil cases, in that respect, with the law in criminal cases. See Canada Evidence Act, R.S.C. 1906, c. 145, s. 5.

pledge his oath to his belief that such would or might be the effect of his answer, and it must appear that such belief is likely to be well founded(*l*).

Publication of libellous letters.

With respect to the publication of libellous letters or communications, the general rule is, that whenever the writer of such a communication deals with it in such a way that its contents become known to any person other than the person for whom the communication is intended, there is such a publication as will maintain an action. And, therefore, an action will lie for a libellous letter handed by the writer to his clerk to copy(*m*); or handed to a third party to read and which is read by him(*n*); or directed to a party whose clerk opened and read the letter, defendant knowing that the clerk was in the habit of doing this. It would be for the jury to say whether the defendant, in such a case, did not intend the letter to come into the hands of a third person(*o*). So where a letter libelling the plaintiff was directed to his clerk, but was opened by the plaintiff and handed to the clerk, this was held to be a publication by the writer(*p*). But a libel concerning plaintiff, in an unsealed letter, conveyed to him by a third party without having been read by any one, was held not to have been published(*q*).

Publication of libellous letter by posting to, or causing it to be received by, third party.

The defendant received a letter from the solicitor of the plaintiff's mother complaining of statements circulated by the defendant which had caused the mother and her family, and particularly her daughter, the plaintiff, annoyance, and

(*l*) D'Ivry v. World Newspaper Company of Toronto *et al.* (1897) 17 O.P.R. 387. See remarks on self-criminating evidence, and the authorities cited under that head, in the chapter on Evidence for Plaintiff.

(*m*) Puterbaugh v. The Gold Medal Furniture Manufacturing Co., 7 O.L.R. (1904) *infra*, and cases cited therein.

(*n*) Snyder v. Andrews, 6 Barbour (N.Y.) 43; McCombs v. Tuttle, 5 Blockford (Ind.) 431; Keene v. Ruff, 1 Clarke (Iowa) 482.

(*o*) Delacroix v. Thevenot (1817) 2 Stark. 63.

(*p*) Ahern v. Maguire, Arm. M. & O. 39.

(*q*) Clutterbuck v. Chaffers, 1 Stark. 471; Day v. Bream (1837) 2 Moo. & Rob. 54.

threatening to begin an action for slander unless a retraction were signed and costs paid. The letter was not answered by the defendant, but, the threatened action having been brought, the defendant wrote a letter to the plaintiff's mother, with the avowed purpose of preventing plaintiff from proceeding with her action. In this letter he said that he saw the plaintiff drive her father out of the house and pelt him with sticks of wood, and asked the mother if she thought it would add to her daughter's character to have this and much more published in court and in the newspapers. In an action for libel (based upon the letter) in which publication was denied, evidence was given by a woman who said that she saw the defendant's letter in the hands of the plaintiff's mother within twenty minutes after its receipt, and that she read it aloud in the presence of the plaintiff and her mother and several other persons. There was also evidence to shew that the letter had been posted and given out by the postmaster to the plaintiff's mother. The jury found in favour of the plaintiff and $350 damages. Upon an appeal to the Divisional Court on the ground, *inter alia*, that there was no evidence of publication, it was held, that had the evidence of the woman been offered in order to fix the defendant with liability for what was done, as a further publication of the letter, it would not have been admissible, but it was admissible in order to prove publication by the defendant, as it shewed that the letter was in the possession of the person to whom it was addressed shortly after it was posted by the defendant, and, therefore, was evidence of the receipt of it by her. It may not have been necessary to give the evidence, but the plaintiff had the right to do so(*r*).

Other cases of publication.

There is also publication if the writer of a defamatory letter gets any person to copy it for him(*s*); or if the defamatory matter is contained in a telegram(*t*), or a postcard(*u*); or if the

(*r*) Benner v. Edmonds (1899) 30 O.R. 676.

(*s*) Pullman v. Hill & Co., *supra;* Gordon v. Street (1899) 81 L.T. 237; 48 W.R. 158; 69 L.J.Q.B. 45. See, also, Boxsius v. Goblet Frères (1894) 1 Q.B. 842.

(*t*) Whitefield v. S. E. Ry. Co. (1858) E.B. & E. 115; Williamson v. Freer (1874) L.R. 9 C.P. 393.

(*u*) Robinson v. James (1879) 4 L.R. Ir. 391; Beamish v. Dairy Supply Co. (1897) 13 T.L.R. 484 (C.A.); Sadgrove v. Hole (1901) 2 K.B. 1; 17 T.L.R. 333 (C.A.).

defendant knew that his libellous letter would probably be opened by some other person than the plaintiff(*v*); or if the writing from which the libel has been printed is proved to be the defendant's writing(*w*).

Publication to a stenographer. Puterbaugh v. The Gold Medal Furniture Manufacturing Co. (1902, 1903, 1904).

The question whether liability attached to the dictation of a libellous letter by the acting manager of a department of a company's business to the office stenographer, who copied it on a typewriting machine, is fully discussed in a recent Ontario case. The plaintiff, an employee of the defendant company, was discharged by the defendant A., the acting manager for misbehaviour. Having been informed that plaintiff had taken away with him certain patterns belonging to the company, A. drafted a letter to the plaintiff demanding their return, pointing out that their removal was theft, and threatening prosecution if they were not returned. He gave the draft letter to a clerk, who wrote it out on a typewriter, and sent it to the plaintiff. This was the only publication of the letter. The company denied that the letter was written with their authority; and the defendant A. pleaded, in effect, that the occasion was privileged, that the letter was written without malice, and that the statements in it were true.

Opinion of Meredith, C.J.

The trial judge (Meredith, C.J.) felt bound by *Pullman* v. *Hill*(*x*) to hold that there was evidence of publication, and that the occasion of publication to the stenographer was not privileged. He should have preferred, had he been at liberty to do so, to hold otherwise, and to apply the principle of *Lawless* v. *Anglo-Egyptian Cotton and Oil Company*(*y*), and *Harper* v. *Hamilton Retail Grocers' Association*(*z*), but in the circum-

(*v*) Delacroix v. Thevenot (1817) 2 Stark. 63; Gomersall v. Davies (1898) 14 T.L.R. 430.

(*w*) Adams v. Kelly (1824) Ry. & M. 157; Tarpley v. Blabey (1836) 2 Bing N.C. 437; 7 C. & P. 395; Bond v. Douglas (1836) 7 C. & P. 626. 626.

(*x*) (1891) 1 Q.B. 524.

(*y*) (1869) L.R. 4 Q.B. 262.

(*z*) (1900) 32 O.R. 295.

stances of this case, according to the decision in the *Pullman case*, that principle was inapplicable(*a*).

Ruling of MacMahon, J.

The jury disagreed, and, upon a second trial of the action before MacMahon, J., and a jury, the ruling of the court as to publication and privilege was the same as at the previous trial, and a verdict was returned for the plaintiff for $300.

Judgment of Divisional Court granting new trial.

A new trial was directed by the Divisional Court, with leave to the company to plead privilege, which they had not done, and to permit that question to be properly dealt with. The court were of opinion that the plaintiff's case against the company was founded upon the assertion that they authorized A. to write the letter, and, the jury having so found, the privileged occasion pleaded by A. should be a protection to them. Street, J., and Britton, J., were both of opinion that the occasion was privileged, and refer to *Boxsius* v. *Goblet Frères*(*b*); *Lawless* v. *Anglo-Egyptian Cotton & Oil Co.* (*supra*); *Harper* v. *Hamilton Retail Grocers' Association* (*supra*); and *Nevill* v. *Fine Arts and General Insurance Co., Ltd.*(*c*), as weakening the authority of *Pullman* v. *Hill & Co.* on the question of privilege, and as shewing "that the publication by Abra to his type-writer, in the ordinary course of the correspondence of the company, did not take away the privilege, but was entirely consistent with its existence"(*d*).

Judgment of trial judge restored by Court of Appeal.

Upon appeal to the Court of Appeal this judgment was reversed, although with evident reluctance by at least two members of the court (Moss, C.J.O., and Maclaren, J.A.). It was held, on the authority of *Pullman* v. *Hill & Co.* (*supra*), that privilege was taken away by the publication to the stenographer, and that the defendant company was liable.

(*a*) Puterbaugh v. Gold Medal Co. (1902) 1 O.W.R. 250.

(*b*) (1894) 1 Q.B. 842.

(*c*) (1895) 2 Q.B. 156.

(*d*) Puterbaugh v. Gold Medal Furniture Manufacturing Co., 5 O.L.R. (1903) 680.

Opinion of Moss, C.J.O.

"The case," said Moss, C.J.O., "seems to be covered by decision"; but, he added, "it appears to me that, in view of recognized methods of conducting the business affairs of large commercial and manufacturing corporations in this country, it would not be unreasonable to hold, that where the manager, or other officer of such corporation, within the scope of whose duty falls that of dealing with any matter of concern to the business, dictates a letter on a business matter of the corporation to the stenographer in its employ, who thereupon transcribes it for signature in the ordinary course, such acts ought not to be treated as publication so as to render the corporation liable to an action for libel for the matter contained in the letter. The stenographer ought not to be regarded as a third person. The communication to him ought to be treated as privileged."

Opinion of Maclaren, J.A.

Maclaren, J..A, was unable to distinguish the case from *Pullman* v. *Hill & Co.*, which, so long as it was not overruled or overridden, the court was bound to follow in a case like the present, where the facts were identical, but he thought it enunciated doctrines which certainly ought not to be extended.

Opinion of Osler, J.A.

"On the questions of publication and privilege," said Osler, J.A., with whom Maclennan and Garrow, JJ.A., concurred, "the case cannot be distinguished, favourably to the defendants, from that of *Pullman* v. *Hill & Co.* (1891) 1 Q.B. 524. There, as here, the defendants were a trading company. Their managing director dictated the letter, which contained the alleged libel, to a shorthand clerk in their employment. The clerk transcribed it by a typewriting machine; the typewritten letter was then signed by the director, press-copied by the office boy, and mailed to the plaintiff. It was held by the Court of Appeal, that there had been a publication to the defendants' clerks and that the occasion was not privileged. The case was approved and distinguished by the same court in the later case of *Boxsius* v. *Goblet Frères* (1894) 1 Q.B. 842. That was an action against a solicitor for a libel contained in a letter sent to the plaintiff which had been dictated by the solicitor to a clerk in his office, and then press-copied into his letter book by another clerk. The court held

that there had been publication, but upon a privileged occasion. The communication, had it been made by the solicitor direct to the plaintiff, would have been privileged, and the publication to his clerks was necessary and usual in the discharge of his duty to his client, and was made in the interest of his client."

Replying to the question—"Was the occasion of doing so privileged?" the learned judge said: "It is argued that it was, inasmuch as the publication was fairly made in the conduct of the company's affairs, fairly warranted by a reasonable occasion or exigency, and done in accordance with usual business methods. The occasion is not one privileged by reason of the existence of any duty, legal or moral, on Abra's part to make the communication to Howitt [the clerk], or of any interest on Howitt's part to receive it. If privileged at all, it must be because Abra acted in a reasonably necessary and usual manner, and that such publication was not beyond 'the extent appropriate to the nature of the occasion.' *Pullman* v. *Hill & Co.* decides to the contrary of this, and if, with all respect, I may say so, I think the decision is entirely satisfactory. Typewriters, human and mechanical, may now perhaps be said to be reasonably necessary and useful for ordinary business purposes, but how in such a case as this can it be said that it was reasonably necessary to employ the typewriter in order to make a defamatory communication unconnected with the ordinary business of the firm? The act complained of by defendants was an isolated one. The only persons interested in sending or seeing the communication, and demanding a return of the company's property, were the company and Abra on the one hand and the plaintiff on the other. I do not agree that Howitt would have had any authority to make it, nor has it been argued that he was in a position to have made the company responsible, but, even if he alone had made it, there would have been no publication. It is said in the court below that Abra had the right to get the assistance of his fellow-servant in making a copy of the letter, but that assumes the question, which is, whether Abra had the right by doing so to publish it to his fellow servant. In my opinion he had not"(*e*).

The posting of a letter containing a libel has been held to be a publication in law of the libel(*f*); and the publication is suffi-

(*e*) Puterbaugh v. The Gold Medal Furniture Manufacturing Co., 7 O.L.R. (1904) at pp. 587-88.

(*f*) R. v. Burdett, 4 B. & Ald. 95.

cient where a letter libelling a trader is posted by the defendant to his correspondent in another country(*g*). There is a presumption amounting to *primâ facie* proof that a letter, properly addressed and posted, has been received in due course by the person to whom it was sent(*h*).

Publication by mistake.

A publication by mistake, *i.e.*, by the defamatory writing being sent to the wrong person, or to one for whom it was not intended, even though there was negligence on the part of the defendant, has been held to be not actionable in the absence of express malice(*i*). But this decision was questioned and commented upon unfavourably in a later case, in which it was held, that a libellous letter, which would have been privileged if sent by the writer to the person for whom it was intended, is actionable when sent by mistake to another person(*j*). But a mistake in a law list negligently published, as to the date of the admission of a solicitor, was held to be not actionable(*k*). Where, however, through mistake, the name of a stationery firm was published in a bankruptcy list, instead of a dissolution of partnerships list, in a periodical which was circulated among those engaged in the stationery business, the court refused to disturb a verdict against the proprietor of the periodical(*l*). And where a newspaper, by mistake, published the wrong address of a certain solicitor of the same name as another solicitor who had been ordered to be struck off the rolls, the mistake was held to be actionable(*m*). An infant is liable for publishing defamatory matter oral or written(*n*); and even a lunatic, it is said, may be sued or prosecuted for publishing a libel(*o*).

(*g*) Ward *et al.* v. Smith (1830) 6 Bing. 749.

(*h*) Warren v. Warren (1834) 1 C.M. & R. 250.

(*i*) Tompson v. Dashwood (1883) 11 Q.B.D. 43; 52 L.J. 425. See note *infra*.

(*j*) Hebditch v. McIlwaine *et al.* (1894) 2 Q.B. 54.

(*k*) Raven v. Stevens & Sons, 3 T.L.R. 67.

(*l*) Shepheard v. Whitaker (1875) L.R. 10 C.P. 502. See note *infra*.

(*m*) Tucker v. Lawson (1886) 2 T.L.R. 593.

(*n*) Woolnoth v. Meadows, 5 East 471; *per* Lord Kenyon in 8 T.R. 337.

(*o*) Hale, P.C. 14; 39 L.J. P. & M. 59, *per* Kelly, L.C.B.

The decisions in Tompson v. Dashwood and Shepheard v. Whitaker, *supra*, are discussed in an article in the English Law Magazine, Vol. 22, p.

Libellous telegrams.

A libellous telegram comes within the principle of some of these decisions. And where there was evidence of an agreement between an electric telegraph company and a newspaper publisher for the transmission over the wires of the company, by one of its agents, of news items for publication in the newspaper, and one of the items thus transmitted was libellous, the company were held to have published the telegram, and were made responsible in damages. This was so decided in a case in which a firm of merchants carrying on a wholesale and retail business at Halifax, N.S., sued the defendant company for transmitting over their wires from Halifax to St. John, and causing to be published in the St. John *Telegraph* and elsewhere, the following defamatory message: "John Silver & Co., wholesale clothiers of Granville St., have failed; liabilities heavy." The defendants denied publication and called no witnesses.

Secondary evidence received.

The original telegraphic message was not produced, but a copy of a newspaper containing it was received in evidence, the publisher of the newspaper stating that he never searched for the telegram; that it was of no use to do so; that he never had the custody of the telegram; and that such telegrams were generally destroyed the morning after they were received. The jury found in favour of the plaintiffs and $7,000 damages. One of the grounds for moving against the verdict was, that there was no proof of publication of the libellous telegram, but the Supreme Court of Nova Scotia (Weatherbe, J., *diss.*) held otherwise(*p*). Upon appeal to the Supreme Court of Canada it was

21, in connection with the unfavorable comments upon the former case in Hebditch v. McIlwaine, *supra*. The writer is of opinion that the two decisions are distinguishable, and that the case last named is not inconsistent with, and does not overrule, Tompson v. Dashwood, which is still an authority that defamatory matter must be intentionally published before the malice necessary to found liability can be presumed, and that negligent or inadvertent publication is not sufficient for this purpose. Tompson v. Dashwood and Shepheard v. Whitaker are also distinguished, in that in the one case the defendant, having a lawful publication to make, erroneously thought he was making that publication, while in the other the defendant made the publication he intended, erroneously thinking it to be lawful.

(*p*) Silver *et al.* v. Dominion Telegraph Company (1881) 14 N.S.R. (2 R. & G.) 17; 1 C.L.T. 284.

held that the evidence of publication was sufficient, and (Taschereau and Gwynne, JJ., *diss.*), that the appellant defendants were responsible for the publication of the libel in question. The two dissenting judges were of opinion that, assuming the agreement in question to be one within the scope of the purposes for which the defendants were incorporated, and that S. had sufficient authority to enter into it on behalf of the defendant company, the evidence established that the defendants collected, compiled and transmitted the news for the proprietor of the newspaper, as his confidential agents and at his request, and that they were not responsible for the publication, by the proprietor of the newspaper, of the item for which the damages were awarded. The appeal was, however, allowed on the ground of excessive damages, and for improper admission of evidence of special damages, Ritchie, C.J., doubting, and Henry, J., dissenting(*q*).

The joint and several liability of the telegraph and newspaper.

Referring to a suggestion that the transmission of news for publication in newspapers was not within the legitimate business for which telegraph companies were incorporated, Ritchie, C.J., said: "The law has not sanctioned, and I am full well assured never will sanction, such an idea. The legislature never meant, as said by Brett, J., in *Williamson* v. *Freer*, L.R. 9 C.P. 395, 'that the facilities for telegraphic communication should be used for the purpose of disseminating libels.' To exempt telegraph companies from liability, as now claimed, would be to clothe them with an irresponsible power for the perpetration of injustice and wrong wholly opposed to every principle of law or right. I am at a loss to understand how a newspaper proprietor can be liable for the publication of a libel, and the party who prepares the libel and delivers it at the office of the newspaper proprietor, and without whose acts no publication of the libellous matter could take place, can escape an equal liability with the printer or publisher of the paper. They are all engaged in one and the same transaction, viz.: collecting, transmitting and publishing matter collected, the aid and participation of all being necessary to the publication. . . . In the transmission of messages for

(*q*) Silver *et al.* v. Dominion Telegraph Company (1882) 10 S.C.R. 238.

publication, especially letters and news for the public newspapers, it would seem that telegraph companies assume a responsibility similar to that of the publishers. By this agency libellous matter would be necessarily brought to the knowledge of operators, who otherwise would not have cognizance of it.

Press despatches.

By their immediate and indispensable agency, "press despatches" and the like are brought before the public. In communications specially designed for the press, we see no reason why they should not stand on the same footing with publishers. But, in strictly private messages, the reason for so stringent a rule does not obtain, perhaps should not be applied at all. See *White* v. *Nicholls*, 3 How. U.S. 286(*r*).

Publication by railway companies, open post cards, etc.

There is also publication on the part of a railway company which sends over its wires, from one station to another, a message stating, in effect, that a certain bank had stopped payment(*s*). The sending of a defamatory communication in that way destroys the privilege which would attach to it if sent by letter, "because it is communicated through unprivileged persons"(*t*). For the same reason libellous matter sent through the mails on an open post card is actionable and unprivileged; and it is no defence that there was a mutual interest, in regard to the subject matter of the communication, between the writer and the receiver, and that what was written was *bonâ fide* and without malice(*u*).

The law in Quebec.

So, also, in the Province of Quebec, it has been held that a communication by a telegraph company of a despatch to its employees, who are engaged in receiving and transmitting such despatches, is a publication; but it was at the same time held, that the company is not obliged to transmit a despatch of a

(*r*) Silver *et al.* v. Dominion Telegraph Company (1882) 10 S.C.R. 238.

(*s*) Whitfield *et al.* v. S. E. Ry. Co. (1858) E. B. & E. 115.

(*t*) Williamson v. Freer (1874) L.R. 9 C.P. 393; 43 L.J.C.P. 161.

(*u*) Robinson v. Jones, Ir. L.R. 4 Ex. D. 391.

libellous nature, and is not entitled to plead its statutory obligations to transmit the despatches entrusted to it in answer to an action for the transmission of a libellous despatch(*v*).

As to other cases of alleged publication in Quebec, it has been held that a private letter containing defamatory matter, addressed to a person who does not make public the contents, is none the less a ground for an action for damages even if it has not been published(*w*). But where a person, without malice, sends his debtor a postal card on which he gives the latter notice of his intention to sue, unless the debt is paid, he is not liable in damages to the debtor even though third persons have seen the card(*x*). And where a false report, implicating an entirely innocent person in the commission of a serious crime, has been published in a newspaper, not maliciously, but without any effort to verify the statements contained therein, the fact that the newspaper was about to go to press at the time the information was obtained is not a valid excuse for failure to investigate the truth of the charge(*y*).

Proof of publication by proof of defendant's handwriting.

Where no other evidence of publication is available, it may be necessary to resort to evidence of defendant's handwriting, and, where this is in dispute, to the comparison of the disputed writing with that which is genuine, as provided by the statutes in both civil and criminal cases.

Vye v. Alexander (1889).

The case of *Vye* v. *Alexander*(*z*), which was an appeal from the judgment of the Supreme Court of New Brunswick refusing a nonsuit or new trial to the defendant in an action for libel, deals with the proof of publication where the manuscript was lost, and the party proving it spoke from recollection of the writer's handwriting as compared with subsequent correspondence with him. The libel was contained in an anonymous communication, signed "Facts that can be proved," alleged to have

(*v*) Archambault v. G.N.W. Telegraph Co. (1886) Mon. L.R. 4 Q.B. 122.

(*w*) Peters v. Tardivel (1899) 15 Q.R. S.C. 401.

(*x*) L'Hemeux v. Heroux (1904) Q.R. 25 S.C. 126.

(*y*) Auburn v. Berthiaume (1903) Q.R. 23 S.C. 476.

(*z*) (1889) 16 S.C.R. 501.

been written by the defendant and mailed by him to one M., the editor and publisher of the *Daily Transcript* newspaper, published at Moncton, N.B., accompanied by a request by the writer for its publication. The communication appeared in the issue of that paper of April 1, 1887. The plaintiff's name was not mentioned in the communication, but he had no difficulty in recognizing himself as the person referred to. He received the paper containing the article on April 2, 1887, at Campbellton, N.B.; and, some days afterwards, he went to Moncton to see the newspaper publisher who told him that the defendant was the author of the article. The plaintiff then said that, unless an apology was made by the writer, and published as publicly as the article itself, he would proceed against the publisher; to which the latter replied that he would publish the retraction if the writer would agree to it. No retraction having been made, the plaintiff brought two actions for damages, one against M., the newspaper publisher, and the other against the defendant. The action against the defendant was the only one tried, the other against M. having been withdrawn upon a verdict being rendered against the defendant. In the former action M. was the only witness called for the purpose of connecting the defendant with the article, and his testimony in substance was, that, upon March 31, or April 1, 1887, he received, by post, a paper having on it the Campbellton post mark. Upon opening it he found in manuscript, in six or seven sheets, the article in question, which he published in the *Transcript*. After the type was set, and he had read the proof, the manuscript as usual went into the waste basket, and, in the ordinary course of things, would go into the stove and be destroyed. He had a distinct recollection of throwing it into the waste basket, and he had never seen it since. Upon the last sheet there was a request that he should publish the article, and assuring him that the facts could be proved, under which was subscribed the name "A. E. Alexander." M. swore that he did not know the defendant; that he had never, to his knowledge, seen him until he saw him in court upon the trial of the present action; that he had never seen him write; and that he had never had any communication from him till the beginning of May, 1887, when he received from defendant a letter in answer to one written by himself in regard to the subject matter of his suit; and, except from that letter, he had no knowledge what-

ever of the defendant's handwriting. M.'s letter to the defendant was apparently written for the purpose of endeavouring to obtain from the defendant some admission of his having been the author of the article, so as to relieve himself of responsibility to the plaintiff. He had written a previous letter to the defendant in April, to which he had received no answer, and so, upon May 4, he wrote him again reminding him that he had had no reply to his request either to produce proof in support of the statements about plaintiff, contained in his letter to the paper, or to publish a disclaimer; and advising defendant that, if this were not done, he should be obliged to give his name and the manuscript of his published letter to the plaintiff, as he "did not intend standing in the gap of a libel suit." The defendant was then apparently aware that M. had already accused him of being the author of the article, and had given his name as such to the plaintiff, and, as the letter from M. threatened to give up the manuscript, of the destruction of which the defendant had no knowledge, he challenged M. to proof of his accusation. The defendant, who was called on his own behalf, denied that he had written the communication, or that he knew anything about it, and said that, if the writing in it looked like his, it was a forgery. The jury found in favour of the plaintiff and $400 damages. A motion before the Supreme Court of New Brunswick to set aside this verdict, and for a nonsuit, on the ground of the reception of M.'s evidence, and of some other documentary evidence to shew that the defendant had changed his usual signature after he learned that the present action was likely to be brought against him, was refused(*a*), and, upon an appeal to the Supreme Court of Canada, it was held (Gwynne, J., *diss.*) that the evidence of M. (*supra*) was proper to be left to the jury as sufficient proof of the publication of the alleged libel(*b*).

Opinion of Patterson, J.

"It seems to be true," said Patterson, J., "that in no reported case was the position precisely like this; but the principle on which the evidence is admissible is affirmed in many cases, including *Doe dem. Mudd* v. *Suckermore*, 5 A. & E. 730, on which the appellant has based a good deal of his argument. The principles there laid down by Coleridge, J., and Patterson,

(*a*) Vye v. Alexander (1888) 28 N.B.R. 89.
(*b*) Vye v. Alexander (1889) 16 S.C.R. 501.

J., and usually found stated in the text books in the words of the last named judge, as in the passage quoted by the appellant from Greenleaf on Evidence (section 576), make it proper to hold that such knowledge of the defendant's handwriting as the witness McConnel acquired from the correspondence he had with the defendant after the publication, and after the asserted destruction of the libellous communication, was legally sufficient to enable the witness to say that he knew the handwriting, although he had seen only one, or, at most, two specimens of it. That handwriting may be proved in the absence of the paper containing it is established by *Sayer* v. *Glossop*, 2 Ex. 409."

Opinion of Gwynne, J. (diss.).

Gwynne, J., who dissented, thought that it was of the very essence of the rule, and reason and justice required, that it should be confined to those cases for which it was established, and to which alone it had hitherto been applied, namely, the application of the witness's acquired knowledge of the handwriting of the party charged with having written a document produced before the court trying an issue joined in an action wherein the handwriting of such document was necessary to be proved. To extend the application of the rule to cases similar to the present one would result in opening a ready way to the greatest abuse, and in effectually closing the door to all responsible and intelligent inquiry into the truth of the matter in issue. . . . Without the production of the document in a case like the present, where the document was never seen by anyone but McConnell, who had no knowledge whatever of the defendant, nor had ever seen his handwriting until some five weeks after the receipt and destruction of the document by him, it was impossible that the issue joined between the parties could be intelligently tried, for no evidence whatever could be adduced to test the truth of McConnell's evidence or the accuracy of his opinion(*c*). Application was subsequently made for leave to appeal to the Privy Council, but leave was refused.

Consensus of opinion as to evidence of handwriting.

The case of *Doe dem. Mudd* v. *Suckermore*(*d*) (*supra*) contains the following consensus of opinion as to evidence of hand-

(*c*) Vye v. Alexander (1889) 16 S.C.R. 501.
(*d*) 5 A. & E. 730.

writing: "All evidence of handwriting, except where the witness sees the document written, is in its nature comparison. It is the belief which a witness entertains upon comparing the writing in question with an exemplar in his mind, derived from some previous knowledge. That knowledge may have been acquired either by seeing the party write, in which case it will be stronger or weaker according to the number of times and the periods, and under circumstances under which the witness has seen the party write; but it will be sufficient knowledge to admit the evidence of the witness (however little weight may be attached to it in such cases), even if he has seen him write but once, and then merely signing his surname(*e*); or the knowledge may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers, producing further correspondence, or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness, which, in the ordinary course of the transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party(*f*); evidence of the identity of the party being of course added *aliunde*, if the witness be not personally acquainted with him."

Proof of handwriting by comparison.

Where the handwriting of the alleged libel is in dispute, it may be compared with writings of the defendant which have been proved to the satisfaction of the judge to be genuine. This may be done in all the Provinces, except Quebec, under an enactment borrowed from the English Common Law Procedure Act, 1854(*g*), which provides that comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses, and such

(*e*) Lewis v. Sapio, M. & M. 39; Powell v. Ford, 2 Stark. N.P.C. 164; Garrells v. Alexander, 4 Esp. 37.

(*f*) Carey v. Pitt, Peake's Add. Ca. 130; Thorpe v. Gisburne, 2 C. & P. 21; Harrington v. Fry, Ry. & Moo. 90.

(*g*) 17-18 Vict. c. 125, s. 27.

writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute. This enactment applies to the procedure in civil cases, and section 8 of the Canada Evidence Act(*gg*), which is in the same words, makes it applicable to criminal cases all over the Dominion. The writing that is used for the purpose of comparison need not be relevant to the issue, but, before it can be so used, it must be proved to be the genuine writing of the defendant(*h*). The comparison may be made by witnesses familiar with the handwriting of the party, or by experts, or by jury or court (if there be no jury) without the aid of witnesses.

When publication inferred.

Publication of a libel may be inferred from its being in the defendant's handwriting(*i*), especially if the libel has been actually printed and published, although there is no evidence that the defendant directed publication(*j*). And where the libel appeared in a newspaper, and the supposed "copy," in the defendant's handwriting, was found at the house of the newspaper publisher, the "copy" was admitted in evidence against the defendant(*k*).

Uncommon expressions and style of composition as proof of publication.

In *Scott* v. *Crerar*(*l*) the Ontario courts had to determine whether evidence of the defendant being in the habit of using uncommon expressions, which occurred in the alleged libellous matter, and evidence of his style of composition, should be accepted in proof of publication. The statements complained of were contained in caligraphic circulars or anonymous letters written on a typewriter. These were sent to several members of the legal profession in the city of H., and imputed unprofessional conduct to the plaintiff. The evidence for the plaintiff,

(*gg*) R.S.C. 1906, c. 145.

(*h*) Birch v. Ridgway, 1 F. & F. 270; Cresswell v. Jackson, 2 F. & F. 24; Egan v. Cowan, 30 L.T. 223.

(*i*) Lamb's Case, 9 Rep. 59.

(*j*) Bond v. Douglas (1836) 7 C. & P. 626; R. v. Lovett, 9 C. & P. 462.

(*k*) Tarpley v. Blabey (1836) 2 Bing. N.C. 437.

(*l*) (1886) 11 O.R. 541; (1887) 14 O.A.R. 152.

which was wholly circumstantial, shewed that the circulars contained expressions similar to those used by defendant in speaking about plaintiff. The plaintiff also tendered evidence as to the defendant's style of composition, which was rejected. The trial judge (Galt, J.), who tried the action without a jury, was of opinion that there was no evidence in support of plaintiff's claim, and he directed a nonsuit. Upon a motion to set aside the nonsuit and for a new trial, the Divisional Court (Rose, J., *diss.*) held, affirming the judgment at the trial, that the evidence was not sufficient to be submitted to a jury, and that the evidence of the style of composition was properly rejected(*m*). Upon an appeal to the Court of Appeal it was held (reversing the judgment), that evidence of the defendant being in the habit of using certain uncommon expressions, which occurred in the alleged libellous letter, was improperly rejected; but *semble*, that the witness could not be asked his opinion as to the authorship of the letter; and (*per* Burton and Osler, JJ.A.) that evidence of literary style on which to found a comparison, if admissible at all, is not so otherwise than as expert evidence(*n*).

The effect, on proof of publication, of words used in a peculiar sense.

In a case in which a new trial was granted for the improper admission of evidence by the plaintiff of what he understood the slanderous words to mean, Wetmore, J., of the Supreme Court of New Brunswick, points out that, in any case, such evidence by the plaintiff is objectionable, because if the words used required a peculiar meaning to be given to them to make them actionable, other persons than the plaintiff must have understood them to have been used in the peculiar sense, or there would be no publication.

Opinion of Wetmore, J.

"The maintaining of the suit," said the learned judge, "depends upon what other persons understood them [*i.e.*, the words] to mean, and not what the plaintiff himself understood them to mean. If words are used which require a particular meaning to make them actionable, and all the hearers understood them

(*m*) Scott v. Crerar (1886) 11 O.R. 541.
(*n*) Scott v. Crerar (1887) 14 O.A.R. 152.

as conveying a meaning not actionable, except the plaintiff, I apprehend an action could not be maintained, as the words did not convey an actionable meaning to the hearers. There would, in such case, be no publication of actionable words. The plaintiff, understanding them as conveying an actionable meaning, would not help him, as there would be no publication of words conveying an actionable meaning to other persons. The plaintiff alone so understanding them would be no more a publication than the uttering of slanderous words to the plaintiff, which were not heard by any one else. In the one case, he only would hear the words; in the other, he only would understand them as conveying an actionable meaning; in either case there would be a lack of the publication of the slanderous words required to maintain the action. If the words required a particular meaning to be proved, I think the plaintiff was not the proper person to prove such meaning. The right to maintain the action would depend upon what other persons understood the words to mean, and not what the plaintiff understood by them. Upon both the views I have expressed, I think the evidence was improperly received. The rule in *Daines* v. *Hartley* (1848), 3 Ex. 200, must, I think, prevail, which is fatal to sustaining the present verdict''(*o*).

Distribution of libellous paper in ignorance, not actionable.

A person who distributes a libellous paper, or who gets another to distribute it for him, may be sued for its publication(*p*); but not where it appears—the onus being on him to prove it—that he was ignorant of the fact that the paper contained a libel(*q*). Ignorance, however, is no excuse in an action for damages in the case of a newspaper proprietor, or a bookseller, who sells, or whose servants or agents sell, a paper or book containing a libel, even where the sale takes place without his knowledge, consent, or authority. Such sale is a publication, and is actionable, and was formerly indictable(*r*). There is the same law in the United States(*s*).

(*o*) Wood v. MacKay *et ux.* (1881) 21 N.B.R. 109.

(*p*) Edwards v. Wooton, 12 Rep. 35. See, also, Rex v. Johnston (1805) 7 East 65.

(*q*) Day v. Bream (1837) 2 Moo. & Rob. 54; Emmens v. Pottle & Son (1885) 16 Q.B.D. 354; 55 L.J. 51.

(*r*) R. v. Walter, 3 Esp. 21.

(*s*) See Scripps v. Reilly, 38 Mich. 10; Storey v. Wallace, 11 Ill. 51.

Criminal responsibility for publication: when it arises and when not.

But publication in ignorance of the contents of a libellous paper entails criminal responsibility in Canada, only under exceptional circumstances. Every newspaper proprietor is presumed to be criminally responsible for defamatory matter inserted and published therein, but such presumption may be rebutted by proof that the particular defamatory matter was inserted in such newspaper without the proprietor's cognizance, and without negligence on his part(*t*). General authority given to the person actually inserting such defamatory matter to manage or conduct, as editor or otherwise, such newspaper, and to insert therein what he in his discretion thinks fit, shall not be negligence within this section, unless it be proved that the proprietor, when originally giving such general authority, meant that it should extend to inserting and publishing defamatory matter in any number or part of such newspaper(*u*). No one is guilty of an offence by selling any number or part of such a newspaper, unless he knew either that such number or part contained defamatory matter, or that defamatory matter was habitually contained in such newspaper(*v*).

Sale of defamatory matter in ignorance not criminal.

And no one commits an offence by selling any book, magazine, pamphlet, or other thing, whether forming part of any periodical or not, although the same contains defamatory matter, if, at the time of such sale, he did not know that such defamatory matter was contained in such book, magazine, pamphlet, or other thing(*w*). The sale by a servant of any book, magazine, pamphlet, or other thing, whether periodical or not, shall not make his employer criminally responsible in respect of defamatory matter contained therein, unless it be proved that such employer authorized such sale knowing that such book, magazine, pamphlet, or other thing, contained defamatory matter, or, in case of a number or part of a periodical, that defamatory matter was habitually contained in such periodical(*x*).

(*t*) C.C. s. 329.(1).
(*u*) *Ibid.* (2).
(*v*) *Ibid.* (3).
(*w*) *Ibid.* s. 330(1).
(*x*) *Ibid.* (2).

Each sale of book or paper a separate publication.

Each sale of a book or paper containing a libel is a separate publication, and, therefore, a separate and distinct cause of action, and a separate offence(*y*). In the *Duke of Brunswick's case*, just cited, the action was based on a libel published in a newspaper seventeen years previous to the plaintiff's agent purchasing a copy of the paper at the office of publication. The sale was held to be a fresh publication and actionable, and the action not barred by the Statute of Limitations. Under the prevailing law of the Provinces such an action would ordinarily be barred in two years from the date of the original publication, and, under the law of Ontario, in three months from the time when the plaintiff had notice of the publication of the statements complained of.

Identification of libellous paper directly, or by secondary evidence.

In a criminal prosecution for libel, the newspaper containing the defamatory matter should be identified, and should be filed with the affidavits on which a rule *nisi* for an information is granted(*z*). The rule as to identification of the paper also applies in a civil action for damages; but where the particular copy of the paper has been lost or destroyed, or where production is refused by the opposite party, or no copy of the paper is available for the purpose, secondary evidence may be given of the publication of the libel(*a*). Secondary evidence may also be given of a libellous letter(*b*). In two Nova Scotia cases(*c*), noted elsewhere, reference is made to *Johnson* v. *Hudson et al.*(*d*), in which another mode of proving publication of a newspaper is mentioned. It is there shewn that a copy of a libellous song produced corresponded with the manuscript of

(*y*) Duke of Brunswick v. Harmer (1849) 14 Q.B. 185; R. v. Carlisle 1 Chitty 453.

(*z*) R. v. Woolner *et al.*, 12 A. & E. 422. See, also, Reg. v. Stanger, L.R. 6 Q.B. 352; 40 L.J.Q.B. 96; 19 W.R. 640.

(*a*) Gathercole v. Miall (1846) 15 M. & W. 319; Fryer v. Gathercole, 4 Ex. 262; Le Merchant's Case, 2 T.R. 201; Layer's Case, 6 St. Tr. 229; Foster v. Pointer, 9 C. & P. 718.

(*b*) Boyle v. Wiseman, 10 Ex. 647; 24 L.J. Ex. 160.

(*c*) Wright v. Morning Herald Printing and Publishing Company (1881) 14 N.S.R. (2 R. & G.) 389, and Crosskill v. Morning Herald Printing and Publishing Company (1883) 16 N.S.R. (4 R. & G.) 200.

(*d*) (1836) 7 A. & E. 233(*n*); 1 H. & W. 680.

the song which had been destroyed, and that the song was printed by one of the defendants. Several hundred printed copies of the song had been sent by this defendant to the shop of his co-defendant, who gave several copies to a person who sang the words about the streets. This was considered sufficient evidence of publication by both defendants to be left to the jury. The printer of a newspaper(*e*), and the acting editor(*f*), have also been held liable for the publication of a libel. In the United States the printer and the proprietor of a newspaper are also held liable; but some of the cases shew that the editor may plead that the libel was published without his authority or consent(*g*), or without his knowing that any particular person was defamed by the article(*h*).

(*e*) R. v. Dover, 6 How. St. Tr. 547.

(*f*) Watts v. Fraser *et al.* (1835) 7 C. & P. 369; 7 Ad. & E. 223.

(*g*) The Commonwealth v. Kneeland, Thacher's C.C. 346.

(*h*) Smith v. Ashley (1846) 52 Mass. (11 Met.) 367.

CHAPTER XIII.

MALICE.

The relations of malice and privilege.

The question of malice, in actions of defamation, is thus referred to in an early case in the Upper Canada courts:

"To utter defamatory words of another, when there is no occasion to justify or call for it, is in itself malicious; the malice is implied from this unexplained injury; and the very uttering of the words gives the right of action. But when the words are shewn to have been spoken on an occasion when either a public duty, or a private interest, or a peculiar relation between the parties, renders necessary and allowable a free discussion of the character of the person complaining, then malice is no longer implied, but the contrary; because as the defendant, in such case, might have justifiably said all he did, whether true or untrue, provided he had no malicious motive and believed it, it follows that it will be presumed he exercised his privilege honestly, unless malice is proved against him. Upon any other principle, there would not be sufficient safety or freedom of conduct upon occasions when public policy, or the protection of private interests, in the ordinary occurrences of life, makes it necessary to speak openly what people know or believe. In some cases the party may speak from his own knowledge; in others upon the testimony of others which he cannot produce when called upon; in others he may have been led into impressions which he cannot satisfactorily account for. The only fair and proper security is that, when he had a justifiable occasion for speaking of the character of the individual, the jury must be made to say upon their oaths, after they have heard all the evidence, whether they are or are not convinced that he spoke the words maliciously in order to injure the plaintiff"(*a*).

(*a*) *Per* Robinson, C.J., in Richards v. Boulton (1835) 4 U.C.K.B. (O.S.) 95, at p. 97. See, also, his remarks in McNab v. McGrath (1837) 5 U.C.R. (O.S.) at p. 522; and the remarks of Macaulay, J., in Richards v. Boulton, *supra*, and in Stanton v. Andrews (1836) 5 U.C.R. (O.S.) at pp. 233-35.

Malice the gist of the action: its later signification.

The maxim that "malice is the gist of the action" for defamation has virtually lost its early signification, especially as, in the cases in which the maxim is so stated, it is not said in what sense the term malice is used, whether in the popular, or in the strictly legal, sense. It is also noticeable that the learned authors of the English Draft Code, upon which the Criminal Code of Canada is largely founded, discarded the use of the word malice, it being simpler and less confusing in its general application. In actions of defamation if the published matter be defamatory, malice in the legal sense is presumed, and it is only when the occasion of the communication is privileged that the maxim is really applicable. Malice, in the popular sense, then becomes the turning point of the action. The *tendency* of the publication, whether oral or written, is the main question in all suits for damages. If the tendency be injurious, the publication is malicious in the legal sense, whatever be the intention or motive of the speaker or writer, even though the publication be inadvertent or accidental(*b*). It is said, in some of the cases, that evidence of malice may be given, but is not essential, to increase the damages; and that there is no instance of a verdict for defendant for want of malice(*c*). These opinions refer to actions in which the occasion or the communication is unprivileged, and they mean not malice in fact, which is an act done from ill-will, but malice in law, or as an inference of law, which is a wrongful act, done intentionally, without just cause or excuse(*d*).

Bromage v. Prosser (1825).

"In an ordinary action for words, it is sufficient to charge that the defendant spoke them *falsely;* it is not necessary to state that they were spoken *maliciously.* This is so laid down in Styles (1652), 392, and was adjudged upon error in *Mercer* v. *Sparks* (1586), Owen. 51; Noy. 35. The objection there was, that the words were not charged to have been spoken maliciously, but the court answered, that the words were themselves malicious and

(*b*) See cases *post* in this chapter.

(*c*) Bromage *et al.* v. Prosser (1825) 4 B. & C. *per* Bayley, J., at p. 257; Hargrave v. Le Breton (1769) 4 Burr. 2425, *per* Mansfield, C.J.

(*d*) *Ibid.*

slanderous, and, therefore, the judgment was affirmed. Where the words 'unlawfully and maliciously' are used in a declaration, the omission of the word 'falsely' is immaterial"(*f*). "But in actions for such slander as is *primâ facie* excusable on account of the cause of speaking or writing it, as in the case of servants' characters, confidential advice, or communications to persons who ask it, or have a right to expect it, malice in fact must be proved by the plaintiff, and, in *Edmonson* v. *Stevenson*(*g*), Lord Mansfield makes this distinction between these and ordinary actions of slander"(*h*).

When publication protected.

These remarks apply equally to libel. In either case the publication will be privileged or protected, whenever it is shewn to be lawfully excused by the circumstances under which it took place. This rebuts the original presumption of malice in law and raises an issue of malice in fact, *i.e.*, personal malice, which must be proved by the plaintiff, otherwise his action fails(*i*). And it fails, also, if the evidence is equally consistent with the presence or absence of personal malice, because there is nothing to rebut the presumption which the privilege has created in favour of the defence(*j*).

The use of the words "falsely and maliciously" in pleading.

The observations of Bayley, J. (*supra*), as to the use of the word "maliciously," should not be misunderstood. It has always been the practice, in the courts of this country, to use the expression "falsely and maliciously," in either the declaration or the statement of claim, in actions for both slander and libel. This was the expression used in the form of pleading in the English Common Law Procedure Act, 1852, and it is prudent to follow that precedent especially when the defendant may plead privilege. A special reply is then unnecessary, because the averment of malice then really becomes an averment of malice in

(*f*) *Per* Lord Ellenborough in Rowe v. Roach (1813) 1 M. & S. 309.

(*g*) Bull. N.P. 8.

(*h*) Bromage *et al.* v. Prosser (1825) 4 B. & C., at pp. 255-56.

(*i*) Clark v. Molyneux (1877) L.R. 3 Q.B.D. 237.

(*j*) Cooke v. Wildes *et al.* (1855) 5 E. & B. 328; Somerville v. Hawkins (1851) 10 C.B. 583; Stace v. Griffith (1869) L.R. 2 P.C. 429; 6 Moore P.C.C. (N.S.) 18; Taylor v. Hawkins, 16 Q.B. 308.

fact. It should also be noticed that, under our Judicature Acts, there is a rule, that neither party need in any pleading allege any matter of fact which the law presumes in his favour, or as to which the burden of proof lies on the other side, unless the same has first been specially denied; and this would probably protect the pleading if the words referred to were omitted. Speaking of the judgment in *Bromage* v. *Prosser* (*supra*), Brett, L.J., says, that Bayley, J., there "treats of malice in law; and no doubt where the word 'maliciously' is used in a pleading, it means intentionally, wilfully. It has been decided that, if the word 'maliciously' is omitted in a declaration for libel and the word 'wrongfully' or 'falsely' substituted, it is sufficient, the reason being that 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"(*k*).

The evidence of malice, and when it should be given.

What is, and what is not, evidence of malice in fact, and when should such evidence be given? In the first place it should be observed, that it is never necessary or even permissible to set out the evidence by which malice is to be established at the trial. See *Glossop* v. *Spindler*, 29 Sol. J. 556; Odgers, 3rd Ed., p. 556(*l*).

The onus of proof where occasion or communication privileged.

Where the occasion is privileged, the jury should say whether the defendants used it for some indirect or wrong motive, and, in such a case, the whole onus of proving express malice is cast upon the plaintiff, and not on the defendant to disprove such malice(*m*). Where the libel complained of is clearly a privileged communication, the inference of malice cannot be raised upon the face of the libel itself, as in other cases it might be, but the plaintiff must give extrinsic evidence of actual, express malice; he must also prove the statement to be false as well as malicious; and the defendant may still make out a good defence by shewing

(*k*) Clark v. Molyneux (1877) 3 Q.B.D. 246, 247; 47 L.J.Q.B. 230; 37 L.T. 696, 697; 26 W.R. 104.

(*l*) *Per* Teetzel, J., in Hopewell v. Kennedy (1904) 4 O.W.R. at p. 437.

(*m*) *Per* Hagarty, C.J., in Wilcocks v. Howell *et al* (1884) 5 O.R. 360.

that he had a good ground to believe the statement true, and acted honestly under that persuasion(*n*).

Where occasion privileged express malice must be proved.

Where the occasion is privileged there must be evidence of express malice(*o*). And so where the only publication of a criminal charge is to the plaintiff, in the first instance, and thereafter in her presence to her parents, who came with plaintiff to defendant and asked for particulars, the occasion is privileged, and plaintiff must give evidence of express malice. Malice cannot be implied, in such a case, from the mere publication of the defamatory words(*p*). But where the occasion of speaking the words is not privileged, proof of express malice on the defendant's part is unnecessary, and the jury need not be told that, unless they find express malice, there should be a verdict for the defendant(*q*).

A mere plea of justification no evidence of malice where words spoken on privileged occasion.

So, also, where the alleged slander is uttered on a privileged occasion, a plea of justification is in itself no evidence of malice where no attempt is made to prove the plea. A milliner, who had been in the defendant's employment, sued him for an alleged slander to which, *inter alia*, he pleaded justification. A verdict in favour of the plaintiff was set aside by the Divisional Court on the ground that the occasion upon which the words were spoken was privileged, and that there was no evidence of malice. This judgment was affirmed by the Court of Appeal. It was held, that pleading justification in an action of slander, where no attempt is made to prove the plea, is not in itself evidence of malice entitling the plaintiff to have the case submitted to the jury, the words in question having been spoken on a privileged occasion. Osler, J., who delivered the judgment of the court, referred to *Caulfield* v. *Whitworth*(*r*), and *Wilson*

(*n*) McIntyre v. McBean *et al.* (1856) 13 U.C.Q.B. 534.

(*o*) Richards v. Boulton (1835) 4 U.C.K.B. (O.S.) 95.

(*p*) Johnston v. Kidston (1898) 31 N.S.R. 283.

(*q*) Clunis v. Sloan (1902) 1 O.W.R. 27.

(*r*) (1868) 16 W.R. 936; 18 L.T.N.S. 527.

v. *Robinson*(*rr*), and distinguished *Simpson* v. *Robinson*(*s*). "It is," he said, "altogether another question whether, when the defence of privilege has failed, it [*i.e.*, justification] may not be looked upon as some evidence of malice in aggravation of damages: *Wilson* v. *Robinson* (*supra*); *Warwick* v. *Foulkes*, 12 M. & W. 507; *Book* v. *Avrillon*, 21 W.R. 594"(*t*). Where, however, in an action for words imputing perjury, the defendant pleaded justification, but failed to prove the plea, and then abandoned it, it was held, that this was some evidence of malice, and an aggravation of the injury, and that the jury should have been told so(*u*).

A strong epithet not necessarily malicious.

Strong language, however, is not necessarily malicious when uttered on a privileged occasion. And so where the defendant spoke of the plaintiff as a "contemptible thief," but the evidence shewed that the words were spoken on a privileged occasion, the use of the qualifying adjective "contemptible" was held to be no evidence of actual malice. "They did not," said Armour, C.J., "add to the reproach contained in the word 'thief,' and the defendant stated no more than what he believed and what he might reasonably believe"(*v*).

Malice in words imputing theft in answer to inquiries.

But in an action for words imputing theft, in which the statements complained of were made in answer to inquiries by a relative of the plaintiff and by another person, it was held, that although the words were used on a privileged occasion, a statement by the defendant that he had "charges against him (plaintiff) that would send him to the penitentiary, and that he would do so if he would not clear out," altered the case.

Opinion of Draper, C.J.

"I think," said Draper, C.J., "this evidence brings the case within the two decisions of *Gilpin* v. *Fowler* (1854), 9 Ex. 615, and *Cooke* v. *Wildes* (1855), 5 E. & Bl. 328, that they afford

(*rr*) 7 Q.B. 68.
(*s*) (1848) 12 Q.B. 511.
(*t*) Corridan v. Wilkinson (1893) 20 O.A.R. 184.
(*u*) Faucitt v. Booth (1871) 31 U.C.Q.B. 263.
(*v*) Ross v. Bucke (1892) 21 O.R. 692.

occasion for the inference of malice, in advancing the charges made to the brother. These words in themselves would have afforded a ground of action, for nothing is shewn to make the speaking of them a privileged communication. The witness was not enquiring into the character of the plaintiff with a view of employing him, in which case it would have been the defendant's duty to have answered truly, and such duty would have repelled all presumption of malice. Slanderous words spoken before or after those charged in the declaration, whether spoken to the same person or to a stranger, and whether in themselves actionable or not, are admissible in evidence to prove malice. The cases of *Warwick* v. *Foulkes*, 12 M. & W. 507, and *Simpson* v. *Robinson* (1848), 12 Q.B. 511, are strong authorities illustrative of this doctrine"(*w*). But an accusation of theft by a master against his servant, in the presence of fellow servants, or even of casual bystanders, is not necessarily actionable. Such an accusation is *primâ facie* privileged, and, to destroy the qualified privilege, there must be some evidence of malice, such as want of belief in the accusation, intemperate language, seeking the opportunity to make the accusation publicly, or the like(*ww*).

Evidence of motive where occasion privileged.

It was held in a Nova Scotia case, that where the occasion was privileged, and evidence tendered by defendant to shew his motive in writing an alleged libellous letter was rejected, it was improperly rejected, and that the verdict for the plaintiff must be set aside(*x*). The action was tried a second time and a verdict rendered for the defendant. In his judgment on the motion against the verdict, Weatherbe, J., said that the learned trial judge erred in leaving the jury under the impression that defendant's evidence, as to the state of mind in which he wrote the letter complained of, was conclusive of that point. The jury should have been directed that the evidence as to the state of mind in which defendant wrote the letter was comparatively unimportant, or that it should be received with caution(*y*). It is

(*w*) Nolan v. Tipping (1858) 7 U.C.C.P. 524.

(*ww*) Gildner v. Busse, 22 C.L.T. Occ. N. 137; 3 O.L.R. (1902) 561; 1 O.W.R. 167.

(*x*) Miller v. Green (1899) 32 N.S.R. 129.

(*y*) Miller v. Green (1900) 33 N.S.R. 517, at p. 540.

the tendency of the publication, and not the intention of the publisher, which must be regarded(*z*). Defendant is not relieved by a finding that he had no malicious intent(*a*).

Statements knowingly false evidence of malice.

In the Nova Scotia case just mentioned, it was held by the Supreme Court of that Province, that the trial judge properly directed the jury that, if the defendant's statements in the letter in question, as to the reasons for dismissing the plaintiff from the company's service, were made by defendant knowing them to be false, this was malice beyond all doubt, and his privilege was wholly gone. Townshend, J., who concurred generally with Graham, E.J., was of opinion, that the direction as to malice should have been to the effect that, if the statements contained in the defendant's letter were false to defendant's knowledge, this would be evidence from which the jury might infer malice, and that the letter was written with the object of injuring the plaintiff, and was, therefore, an abuse of the occasion which would take away defendant's privilege(*aa*). The mere falsity of the words, however, is not in itself evidence of malice, but, as stated above, its known falsity to the defendant is evidence of malice(*b*). If a man is proved to have stated that which he knew to be false, no one need inquire further. Everybody assumes

(*z*) Haire v. Wilson, 9 B. & C. 643; 4 Man. & Ry. 605; Fisher v. Clement, 10 B. & C. 472; 5 Man. & Ry. 730.

(*a*) Huntley v. Ward (1859) 6 C.B. (N.S.) 514; 6 Jur. (N.S.) 18; 1 F. & F. 552; Blackburn v. Blackburn (1827) 4 Bing. 395; 3 C. & P. 146; 1 M. & P. 33, 63. See, also, Baylis v. Lawrence, 11 A. & E. 924; *per* Cresswell, J., in Hakewell v. Ingram, 2 C.L.R. 1854, p. 1402; Hooper v. Truscott (1836) 2 Scott 672; 2 Bing. N.C. 457; Godson v. Home (1819) 1 Br. & B. 7; 3 Moore 223.

(*aa*) Miller v. Green (1902) 35 N.S.R. 117. See statement of facts and decision of Supreme Court of Canada in this case, *post*, in which it was held, that where knowledge of the falsity of the words is the governing consideration, the person using them in any innocent sense is not chargeable with a knowing falsehood. The judgment in 35 N.S.R. 117 was subsequently reversed. See 33 S.C.R. (1903) 193, *infra*.

(*b*) Miller v. Green (1900) 33 N.S.R. 517; (1901) 31 S.C.R. 177; Clark v. Molyneux (1877) (C.A.) 3 Q.B.D. 237; 47 L.J.Q.B. 230; 26 W.R. 104; 37 L.T. 694; 14 Cox C.C. 10; Caulfield v. Whitworth (1868) 16 W.R. 936; 18 L.T. (N.S.) 527 C.P.; Fountain v. Boodle, 3 Q.B. 5; Blagg v. Sturt (1846) 10 Q.B. 899.

thenceforth that he was malicious, that he did do a wrong thing for some wrong motive(*c*).

Imputation of crime knowingly false.

The same rule applies to an imputation of crime knowing it to be false. A post office inspector, who was investigating complaints as to lost letters, made statements to the plaintiff's husband as postmaster and to his two sureties to the effect that plaintiff had taken money from certain post letters, and had given him a written confession of her guilt. The statements were held to be privileged on the ground of duty and interest, but the fact that the plaintiff at the trial denied the theft of the letters and the alleged confession, and that the inspector did not produce the confession, or in any way account for it, was held to be some evidence that he made the accusation knowing it to be untrue, and, therefore, maliciously, so as to displace the *primâ facie* case of privilege(*d*).

Failure to correct statements knowingly false.

A failure to correct a statement knowingly false is also evidence of malice. In an action for libel brought by an insurance inspector and adjuster, and, at the time of action brought, the liquidator of an insurance company, against a newspaper publisher, the plaintiff complained that an article in the paper charged him, in effect, with having been dishonest in adjusting insurance claims, and with accepting bribes from certain parties whose losses he had adjusted. The statement of defence admitted publication and set forth a subsequent article in the same paper correcting a statement in the article complained of, which might have conveyed a wrong impression of the plaintiff's conduct with respect to the matters referred to. Upon a demurrer to the paragraph in the statement of defence which admitted publication and contained this correction, it was held (*per* Rose, J.) overruling the demurrer, that the difference between the first and second articles as to the statement which had been corrected was material; for, if it was proved that the first article was in that particular false to the knowledge of the defendant, and that he made no correction, this would be evidence of malice,

(*c*) *Per* Brett, L.J., in Clark v. Molyneux, *supra*.
(*d*) Hanes v. Burnham (1896) 23 O.A.R. 90.

and would probably materially affect the damages; but, even if immaterial, the plaintiff was not prejudiced, as the correction was only offered in mitigation of damages(*e*).

Malice shewn in the language.

In a case in which a light-keeper sued a newspaper publisher for the publication of statements imputing inhumanity to him, on the occasion of a shipwreck, King, J. (subsequently a member of the Supreme Court of Canada), said: "As to proof of actual malice [this] may appear from the language of the alleged libel. The reference to the plaintiff's conduct on the occasion of the wreck some years before and prior to his becoming light-keeper, and the statement that he then refused to render assistance, would seem to have been quite unnecessary, if the sole object of the writer were to discuss the plaintiff's conduct in reference to the 'Arcana' "(*f*). When the evidence is left to the jury it is for them, considering the circumstances, to say, whether the language employed is within the privilege claimed, or whether it is in excess of what the occasion justified; and, if in excess, they can properly draw the inference of malice.

The means of knowledge as a test of malice.

In considering the question of malice the jury have also to consider the means of knowledge possessed by the defendant, and whether, with that means of knowledge, he must have been aware that the statements were not true; or that, with ordinary care, he could have satisfied himself that he was misstating the case against the plaintiff. For, under these circumstances, he loses his privilege, and the occasion does not justify the publication: *Turnbull* v. *Bird* (1861), 2 F. & F. 508, at pp. 524-5(*g*). But, as to whether the jury should always determine what is an excess of privilege, see *Tench* v. *Great Western Railway Company*(*h*), in which a different opinion is expressed.

(*e*) Livingston v. Trout (1885) 9 O.R. 488.

(*f*) Brown v. Elder (1888) 27 N.B.R. 465, at p. 489. See, also, Stanns v. Finlay, Ir. L.R. 8 C.L. 283, *per* Barry, J.; Huntley v. Ward (1859) 6 C.B.N.S. 514; Fryer v. Kinnersley (1863) 15 C.B.N.S. 422.

(*g*) *Per* MacMahon, J., in Colvin v. McKay (1889) 17 O.R. 212.

(*h*) (1873) (In Error and Appeal) 33 U.C.Q.B. 8.

The place and manner of publication as evidence of malice.

The place in which the slander was uttered, and the manner of uttering it, taken in connection with the defendant's untrue statements concerning the matter, may also be evidence of malice as against the claim of privilege or quasi-privilege. In an action which was tried twice, for words imputing theft, the defendant at both trials denied using the words, but said that the secretary of the company of which he (defendant) was president and of which the plaintiff had formerly been an employee, had received a letter stating that the plaintiff had committed the criminal acts with which defendant was said to have charged him. The letter when produced did not bear out these statements. The evidence for plaintiff shewed that the words complained of were spoken by defendant in a public place, in a loud, rough tone of voice, and within the hearing of other persons than the plaintiff's wife to whom, with a companion, it was alleged they were spoken. There was also some evidence of an admission by defendant that he did not believe plaintiff guilty of the criminal acts imputed at the time when, it was alleged, he had made the slanderous statements in question. The letter, the manner of defendant when he made the statements, and his admission, are referred to in the judgments, in both the Divisional Court and the Ontario Court of Appeal, as some evidence of express malice, to go to the jury as against the claim of privilege or quasi-privilege set up by the defendant(*i*).

A request to "spread" the slander.

So, also, a request by one defendant to another to "spread about the town at once" certain statements reflecting on the professional character of a clergyman, is evidence from which the jury might infer actual malice in authorizing a needlessly extensive publication of the libel complained of(*j*).

A repetition and excess of slanderous words.

A repetition and excess of slanderous words may also be evidence of actual malice. The defendant, while aiding, at the owner's request, in the search for stolen materials used in the

(*i*) Wells v. Lindop (1887) 13 O.R. 434; (1887) 14 O.R. 275; (1888) 15 O.A.R. 695.

(*j*) Fenton v. Macdonald, 1 O.L.R. (1901) 422.

manufacture of pianos, said, when what was supposed to be part of the property was found in the possession of a workman employed by the defendant, that the plaintiff had stolen it. This was held to be *primâ facie* privileged on the ground that the defendant had an interest in the search, and that it was his duty to tell his workman that the material did not belong to the person from whom he had received it. But defendant's repetition of the slander to one L., who had no interest and to whom he owed no such duty in the matter, and his over-statement, at the workman's house, that the plaintiff had stolen not merely the wood in the workman's possession, but also the material for five or six pianos, was held to be evidence of actual malice which could not be withdrawn from the jury, and that there must be a new trial(*k*).

Wherever it has been held that the defamatory words, unnecessary for the occasion that created the privilege, were not in themselves evidence of malice (except, perhaps, in some cases relating to the character of servants), there has been a state of facts either admitted or clearly proved, and remaining undisputed, to which the words can be referred, and in reference to which they may have been innocently uttered. In no case has it been held that a judge should do what is contended for here, viz., withdraw conflicting or contested evidence from the jury; find upon that evidence that certain facts were proved; and then test the animus of the defamatory words by their relation to those facts(*l*).

When express malice must be shewn against a corporation.

Where a foreign corporation was carrying on business in different Provinces in the Dominion, having their head office at T., in the Province of Ontario, and a branch office at W., in the Province of Manitoba, and, letters which might, under other circumstances, have constituted a libel on the plaintiff, were written and sent by the manager and assistant manager at T., to the manager at the branch office at W., it was held (the judgment of Taylor, J., containing a full review of the authorities), that express malice could not be imputed to the corporation in the absence of evidence that the corporation, its directors, or managing

(*k*) Bourgard v. Barthelmes (1897) 24 O.A.R. 431.

(*l*) *Per* Patterson, J.A., in Holliday v. The Ontario Farmers' Mutual Ins. Co. (1877) 1 O.A.R. 483, at p. 497.

board, authorized or had any knowledge of such letters, and, therefore, that the action was not maintainable(*m*).

It should be observed, however, that in an ordinary action for libel, *i.e.*, an action in which there is no privilege, express malice is not essential, and, therefore, an action will lie against a corporation. "Suppose," said Lord Bramwell(*n*), "that a corporation published a newspaper or printed books, and suppose that it was proved against them that a book so published had been read by an officer of the corporation in order to see whether it should be published or not, and that it contained a libel, an action lies there, because there is no question of actual malice, or ill-will, or motive."

Miller v. Green (1899, 1900, 1901, 1902, 1903).

The question of malice is discussed a good deal in *Miller* v. *Green* (*supra*), which came before the Supreme Court of Nova Scotia on several occasions, and also before the Supreme Court of Canada(*o*).

Where knowledge of the falsity of the words is the governing consideration, the person using them in any innocent sense is not chargeable with a knowing falsehood.

The action was brought by the local agent of a life insurance company, who was also a solicitor, against the general manager of the company for stating in a letter written by him to a policy-holder, a client of the plaintiff, that plaintiff had been "removed" from the agency, and that this was only done "because it was clearly necessary," and, adding, "I now find that he has collected money, which, up to the present time, we have been unable to get him to report." The verdict on the second trial was for the defendant, but the Supreme Court of Nova Scotia granted a new trial for non-direction on the question of malice. Upon an appeal to the Supreme Court of Canada(*p*) the judg-

(*m*) Freeborn v. The Singer Sewing Machine Company (1885) 2 M.L.R. 253 (In Appeal).

(*n*) In Abrath v. North Eastern Railway Co. (1886) 11 App. Cas. 254.

(*o*) Miller v. Green (1899) 32 N.S.R. 129; (1900) 33 N.S.R. 517; (1901) 31 S.C.R. 177; (1902) 35 N.S.R. 117; (1903) 33 S.C.R. 193. See decisions noted *ante* and *post*.

(*p*) Miller v. Green (1901) 31 S.C.R. 177.

ment of the court below was affirmed (Gwynne and Sedgewick, JJ., *diss.*). In the course of his judgment in the court below, Weatherbe, J., expressed the opinion, that the trial judge erred in directing the jury that it was not open to the plaintiff to put another construction upon the word "report" than the sense in which it would be understood by plaintiff and defendant themselves.

Opinion of King, J.

King, J., who delivered the judgment of the majority of the Supreme Court, in referring to this point, said that considerable argument had taken place respecting the statements in the letter as to the plaintiff's failure to report as to the moneys left for his collection. On the one hand it was said that the charge was that of a failure to inform his principal of the receipt of the money; on the other, that it merely meant a failure to make the form of report required of an insurance agent by the company. If the inquiry were as to the bare meaning of the words, as, for instance, whether the words were susceptible of a defamatory construction, he thought that the ordinary and natural sense would govern, as being the sense in which the words would be understood by the person receiving the letter; but, if the question upon the statement related to the question of malice or not, then, inasmuch as the knowledge of the defendant of the falsity of the facts alleged was the material fact, the sense in which the defendant may have used the word became the governing consideration; and, notwithstanding that the receiver might suppose that a grave charge was made, the person using the language could not be said to have knowingly stated a falsehood, if he honestly meant to use the word in any innocent sense.

In the same case, Weatherbe, J., had also expressed the opinion in the court below, that the trial judge erred, in his definition of "malice," in connecting it with the idea of "wreaking petty spite" upon the plaintiff, from which the jury were likely to understand that defendant was not liable unless there was evidence of spitefulness on his part; and that knowledge on the part of the defendant that plaintiff had used abusive language with respect to him in connection with their business relations, was a matter from which an inference of malice could be drawn. Remarking upon this opinion King, J., in the same judgment,

said that, as to the learned chief justice not charging more explicitly in reference to malice, evidenced by a pre-existing unfriendliness, if indeed there were evidence of such on defendant's part, or of any quarrel shared in by him, the charge would probably be inadequate.

Scintilla of evidence of malice insufficient for injury.

But looking at the facts, what was adduced was at most a scintilla of proof, consisting of hard things said by the plaintiff to and concerning the defendant, and by the defendant to and concerning the plaintiff. "It is too strained and refined to argue, because plaintiff's conduct towards defendant was improper and quarrelsome, therefore, the defendant must have shared the feeling"(*q*). The judge should stop the case if there be no more than a scintilla of evidence of malice to go to the jury. But it is difficult to say beforehand what will be deemed a mere scintilla, what more than a scintilla, in any given case. The same evidence may make different impressions on different minds. See *Adams* v. *Coleridge*(*r*).

In *Miller* v. *Green* (*supra*), it was shewn that the plaintiff had not been dismissed from the agency, but wanted larger commissions in continuing, which were refused, and that he was not a defaulter, but was dilatory in making his returns; and so, upon an appeal from the above judgment in 35 N.S.R. 117, it was held by the Supreme Court of Canada, that the evidence of the policy holder of her understanding of the letter as imputing to the plaintiff a wrongful retention of money, was improperly received, and that there was a miscarriage of justice by its admission. In the same case the judge charged the jury that "if the meaning of the first part of the letter is that he dismissed the plaintiff, and you decide that he did not dismiss the plaintiff, and it was not a correct statement, that is malice beyond a doubt. The protection which he gets from the privileged occasion is all gone. He loses it entirely. The same way with the second part. If it is not true, it is malicious, and his protection is taken away." It was held that this was misdirection on a vital point; that the question for the jury was not the truth or falsity of the statements, but whether or not, if false, the defendant hon-

(*q*) Miller v. Green (1901) 31 S.C.R. 177, at p. 185.
(*r*) 1 T.L.R. 87; Odgers L. & S., 2nd Ed., 273.

estly believed them to be true. The majority of the court were of opinion (Girouard and Davies, JJ., *contra*), that, as the defendant had asked for a new trial only in the court below, the Supreme Court could not order judgment to be entered for him, and they, therefore, directed a new trial, reversing the judgment in 35 N.S.R. 117(*rr*).

What is not evidence of malice.

A mistake through excusable inadvertence is not evidence of malice(*s*); nor is the fact that the defendant relied upon hearsay instead of primary evidence(*t*); nor are mere angry statements(*u*); nor strong statements where the plaintiff's conduct is equivocal(*v*); nor a statement voluntarily made in performance of what the defendant believed to be a duty(*w*). But evidence of what Brett, L.J., calls "a wrong feeling in a man's mind"(*x*) towards the plaintiff at the time of publication—and this may be shewn by his words and acts at that time—is evidence of malice in fact, although words and acts at other times, indicating or disclosing any ill-feeling towards the plaintiff when the publication took place, will also be admitted(*y*). In a word, all extrinsic facts and circumstances furnished by the actions, conduct, or disposition of the defendant, which shew personal ill-will, or hostility, or any improper motive, and all expressions, oral or written, to the same effect, on his part towards the plaintiff, and also all intrinsic facts and circumstances furnished by the character and style of the language used, which shew it to be unnecessarily defamatory, or more defamatory than the occasion calls for, may be evidence of actual malice to be submitted to the jury, and of which, when properly submitted, they are to be the sole judges.

(*rr*) Miller v. Green (1903) 33 S.C.R. 193.

(*s*) Harrison v. Bush (1855) 5 E. & B. 350; 25 L.J.Q.B. 25; 1 Jur. N.S. 846; Tompson v. Dashwood (1883) 11 Q.B.D. 43; 48 L.T. 943; 52 L.J. Q.B. 425; Brett v. Watson (1872) 20 W.R. 723; Potter v. Baker (1847) 13 C.B. 831.

(*t*) Lister v. Perryman, L.R. 4 H.L. 521, *per* Lord Westbury.

(*u*) Shipley v. Todhunter (1836) 7 C. & P. 690, *per* Tindal, C.J.

(*v*) Spill v. Maule (1869) L.R. 4 Ex. 232; 20 L.T. 675; 17 W.R. 805.

(*w*) Gardner v. Slade *et ux.* (1849) 13 Q.B. 798; 18 L.J.Q.B. 336.

(*x*) Clark v. Molyneux (1877) 13 Q.B.D. 247.

(*y*) Cooper v. Blackmore *et al.* (1886) 2 T.L.R. 746; R. v. Francis, L. R. 2 C.C.R. 128; Pearson v. Lemaitre (1843) 5 M. & G. 700; 7 Jur. 748; 12 L.J.Q.B. 253; Barrett v. Long (1851) 3 H.L.C. 395.

Plea that libel inserted without actual malice, etc.

Under the statutory law of all the Provinces, the defendant, in an action for libel contained in a newspaper, may plead that such libel was inserted in such newspaper without actual malice and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he apologized, or offered to apologize, in said newspaper, for the publication complained of(*z*).

Malice and the evidence of it under the Quebec law.

Malice in law has been held in Quebec to be not simply ill-will, but a wrongful act done intentionally with some other than a lawful object(*b*). And so where the plaintiff had been arrested for robbing defendant, and subsequently sued him for having said of plaintiff after the robbery: "I took him in the fact. It is not the first time he robbed me in that way. He robbed me since he was in my employ," and other words to the same effect, it was held that the slanderous words themselves were not the principal thing to be considered, but rather the motives and intention of the defendant, and the occasion of his utterance of the words(*c*).

It was not misdirection for the judge to charge the jury, that by law they should find the article to have been published falsely and maliciously; inasmuch as the defendants did not plead and prove the truth of it(*d*). For the purpose of establishing malice against the party slandered, the court will allow evidence of another accusation made by the defendant against the plaintiff more than five years previous to the speaking of the words complained of; but the defendant will be allowed, in such a case, to justify the former accusation by evidence of the time when, and the place and manner in which, it was made, and by establishing the truth of such accusation(*e*). The court will also take

(*z*) R.S.O. 1897, c. 68, s. 6(1); C.S.N.B. 1903, c. 136, s. 6; R.S.B.C. 1897, c. 120, s. 6; R.S.M. 1902, c. 97, s. 8; Statutes of P.E.I., 28 Vict., c. 25, s. 2. See "Retraction and Apology" in chapter on Defences to Actions of Defamation.

(*b*) Poitevin v. Morgan (1866) 10 L.C.J. 93; 1 L.C.L.J. 120 (S.C.).

(*c*) *Ibid.*

(*d*) Mail Printing and Publishing Co. v. Canada Shipping Co. (1887) Mon. L.R. 4 Q.B. 225.

(*e*) Hamel v. Amyot (1887) Q.L.R. 14 (S.C.) 56.

into consideration the length of time which has elapsed between the two occasions, so as to determine whether malice existed at the time the words complained of in the action were spoken(*f*).

Evidence to rebut malice.

In slander every fact that rebuts the inference of malice may be proved by the defendant upon the *defense en fait*(*g*). And in libel subsequent publications have been received for the same purpose. In a prosecution of the publishers of the *Daily Witness* at Montreal for a libellous article which appeared in that journal on February 17, 1874, the defence wished to prove and put in two copies of the *Witness*, one of the 19th and the other of the 20th February to rebut malice. It was objected, on the part of the Crown, that though parts of the same paper or book might be used, no subsequent acts of the defendants could avail them; that the absence of malice must be at the time of the offence. Counsel for the defence argued that, in a case of homicide, the acts of the party immediately after the death would be admitted to shew how the death happened, and that there was no malice, and consequently that there could be no murder. Ramsay, J., took time to consider, and, after conferring with Sanborn, J., said that the case was not without difficulty, but that they were both of opinion that, though not very strong evidence, it should go to the jury, it having been admitted in one case, *R.* v. *Hone*, mentioned in Starkie, 3rd Ed., p. 714(*h*).

(*f*) *Ibid.*

(*g*) Dupont v. St. Pierre (1819) 2 R.L. 334 (K.B.).

(*h*) Reg. v. Dougall (1874) 18 L.C.J. 85, at p. 89.

CHAPTER XIV.

The Law Concerning Corporations and Companies.

Corporations and companies, duly incorporated, may sue for a slander of their business or trade; and, when not engaged in business or trade, they may also sue for slander if they have sustained and can prove special damage. They may also sue for libels which have injured their joint property or their trade, or which have depreciated the value of their shares(*a*). A corporation is liable for the publication of a libel under circumstances implying malice(*b*); and a railway company for a libel published by its order(*c*). A joint stock company, limited, may also be sued for libel(*d*).

When slander actionable by and against a corporation.

With respect to slander there has been some diversity of opinion. In an action for wrongful dismissal and for slander brought against a railway corporation, in which the plaintiff complained that the slanderous words had been spoken of him by the defendants in relation to his business and calling as a roadmaster of the defendants, the trial judge (Rose, J.) ruled that slander would not lie against the corporation; and he dismissed the action as to this count. His judgment was affirmed by the Divisional Court. Reference is made in the judgment to Morawetz in Corporations, 2nd Ed., par. 727; Townshend on Slander, 4th Ed., sec. 265, at p. 474; Odgers, 3rd Ed., p. 435; *Gilbert* v. *Crystal Fountain Lodge*, 80 Ga. 284; 4 S.E.R. 905(*e*). In the case as reported the particulars of the publication are not mentioned.

(*a*) Metropolitan Saloon Omnibus Co. v. Hawkins (1859) 4 H. & N. 90; 28 L.J. Ex. 201; 5 Jur. N.S. 226; 7 W.R. 265; 32 L.T. (O.S.) 281.

(*b*) Whitfield v. South Eastern Ry. Co., E.B. & E. 115; 27 L.J.Q.B. 229.

(*c*) *Ibid.;* Tench v. Great Western Ry. Co., *infra*.

(*d*) Lawless v. The Anglo-Egyptian Cotton and Oil Co., Limited, 10 B. & S. 226; L.R. 4 Q.B. 262; 38 L.J.Q.B. 129.

(*e*) Marshall v. Central Ontario Railway Company (1897) 28 O.R. 241.

Action against an incorporated company for slander uttered by its servants or agents by company's orders.

But, in a subsequent action of the same character, Boyd, C., was of opinion that slander might lie against an incorporated company if the words were uttered by the company's orders. In that case the plaintiff claimed damages against an incorporated company for wrongful dismissal and for slander. The defendants moved before a local judge to strike out an amendment of the statement of claim adding the claim for slander on the ground, *inter alia*, that an action for slander does not lie against a corporation. Upon an appeal against the order striking out the amendment, Boyd, C., held that the pleading setting up slander should not be struck out summarily, but should be adjudicated on, and leave given to the defendants to have the question of law first determined. "An incorporated company," he said, "may be liable to an action of defamation if it expressly authorizes a libel to be published by its servants or agents: *Whitfield* v. *South Eastern R.W. Co.* (1858), E. B. & E. 115, and *Carroll* v. *Penberthy Injector Co.* (1889), 16 O.A.R. 446. And so, one would think, it may be liable if oral slander is spoken by its servants or agents in direct obedience to its orders. The difficulty would rest rather in the proof than in the pleading. See Odgers, 3rd Ed., p. 435, and Fraser, p. 69. At all events, the matter is not so clear that I should undertake to strike out summarily a pleading imputing slander to the corporation; rather let it be adjudicated on after being put on the record"(*f*).

May sue for slander of title.

Corporations and companies may sue for slander of title, whether the slander be uttered by one of their own members or by a stranger(*g*). A corporation is not liable for any slander uttered by an officer, even though he honestly believe that he is acting for the benefit of the company and within the scope of his duties, unless it can be proved that the corporation expressly ordered and directed the officer to say those very words(*h*). In

(*f*) Rodger v. Noxon Company (1900) 19 O.P.R. 327.

(*g*) Metropolitan Saloon Omnibus Co. v. Hawkins, *supra;* Trenton Insurance Co. v. Perrine, 3 Zab. (New Jersey) 402.

(*h*) Odgers Law of L. & S., 2nd Ed. 416.

Yarborough et al. v. *Bank of England*(*i*) Lord Ellenborough, C.J., said that wherever a corporation "can competently do or order any act to be done on their behalf, which as by their common seal they may do, they are liable to the consequences of such act, if it be of a tortious nature, and to the prejudice of others."

May be liable for publication of libel by their agents.

The question of the liability of a corporation for the publication of a libel by their agent, has been determined in a number of cases. The corporation will be liable whenever the publication in question comes within the scope of the general duties of the agent, or whenever the publication has been expressly authorized.

Tench v. Great Western Railway Co. (1872-73).

A leading case in the Ontario courts is *Tench* v. *The Great Western Railway Company*(*j*), in which the general manager of the defendants' railway had a hand-bill printed, addressed to the defendants' employees, stating in substance that the plaintiff, a conductor on the railroad, had been dismissed from defendants' service on account of dishonest conduct, an envelope having been found addressed by him to a conductor on the New York Central Railway containing tickets used but not cancelled. The placards describing the offence and stating the plaintiff's dismissal were posted up in the private offices of the company, in some of which they were seen by strangers, and in circular books of the conductors for the information and warning of some two thousand of the company's employees. A verdict for the plaintiff was moved against on various grounds, one of these being that the publication of the hand-bill was made by the manager without the order or resolution of the company, and that the act of the manager, in so doing, was not within the scope of his duty, so as to bind the company. It was held, however, both by the court in term(*k*), and by the Court of Error and Appeal, confirming the judgment below(*l*), that the defendants were liable

(*i*) (1812) 16 East 6.

(*j*) (1872) 32 U.C.Q.B. 452; and (in Error and Appeal) (1873) 33 U.C.Q.B. 8.

(*k*) (1872) 32 U.C.Q.B. 452.

(*l*) (1873) 33 U.C.Q.B. 8.

for the publication as being an act done by their general manager, in their interest and within the general scope of his duty, even although not specially authorized by the directors.

Opinion of Adam Wilson, J.

Wilson, J., in delivering the judgment of the court in term, said: "Then as to the publication: the evidence shews it was done by the general manager of the line in the ordinary performance of his duties. *Limpus* v. *The London General Omnibus Co.*, 1 H. & C. 526, *Green* v. *The same Co.*, 7 C.B.N.S. 290, and *Walker* v. *The Great Western R.W. Co.*, L.R. 2 Ex. 228, S.C. 21 L.T.N.S. 301, are authorities for that purpose. The question of ratification by the company does not arise, because the company were the principals. The libel, although indictable, is not a criminal matter properly, not more so than an assault is, which may also be the subject of an indictment. That forgery could not be ratified: *Brook* v. *Hook*, L.R. 6 Ex. 89; or that the agent went beyond the positive duty he had to perform, and so did not make the corporation liable: *Eggington* v. *Mayor, etc., of Lichfield and others*, 5 E. & B. 100; or because the clerk of the company did an act not binding on his employers: *Allen* v. *The London, etc., R.W. Co.*, L.R. 6 Q.B. 65, are not reasons why the defendants should not be liable for the libel if they authorized it to be published. And it is admitted that it is good law that a corporation may be sued for defamation"(*m*).

Opinion of Draper, C.J.

And, in the Court of Appeal, Draper, C.J., said: "It is, I think, satisfactorily shewn by the evidence of Mr. Swinyard and of three others of the directors that, as a Board, the directors did not authorize the publication of the placard; but the chairman of the Board gave evidence that the general manager could, as a matter of duty, have dismissed the respondent on his own responsibility. The Board of Directors have, at least tacitly, acquiesced in the dismissal. There could be no doubt in my opinion that the dismissal is proved to be an act of the defendants. If that be so, then I think that the notification of that dismissal to the two thousand employees of the appellants was an act done for their interest, and in their service; and, for any

(*m*) 32 U.C.Q.B. 460.

reason I can discover to the contrary, they must be responsible, if such notification was so given as to shew a wrongful act with a wrongful intent''(*n*).

Opinion of Bramwell, L.J.

Many authorities are referred to in the judgments in this case. In one of these, *Abrath* v. *North Eastern Ry. Co*(*o*), Lord Bramwell said that a corporation is liable for a libel published by its authority, even though the corporation, as distinct from its members, cannot be guilty of malice in the ordinary sense of the term. It has also been held that where a corporation, by its servant or agent, publishes a libel, it will be entitled to defend any action for libel brought against its servant or agent, and to use the corporate funds for that purpose, even when these funds have been subscribed for charitable purposes(*p*).

Municipal corporation liable in an action for libel.

In *McLay* v. *Corporation of the County of Bruce*(*q*) the question determined (on demurrer) was, whether an action for libel would lie against a municipal corporation. The statement of claim alleged that, from 1874 to 1883, the plaintiff was registrar of deeds of the county of Bruce; that, in 1880, on a petition of the defendants to the Lieutenant-Governor, a commissioner was appointed to enquire into the conduct of the plaintiff as registrar, and an inquiry held, when charges of a defamatory character were made against the plaintiff (setting them out); that the charges were not sustained in law or by the evidence, and were shewn to be, and were, untrue in fact, and made maliciously and with the design of injuring the plaintiff; that, before the commissioner had made any report on the charges, the defendants maliciously and without any reasonable or probable cause, and with the design or intention of injuring the plaintiff in his reputation, character and business, caused the accusations, charges, and defamatory statements, thereinbefore specially mentioned, and portions of the evidence adduced before the said commissioners, together with certain statements made by one R., who, during the investigation, acted as defendants' solicitor, to be

(*n*) 33 U.C.Q.B. 16.
(*o*) (1886) 11 App. Cas. 253; 55 L.J.Q.B. 460; 55 L.T. 44.
(*p*) Breay v. Royal British Nurses' Association (1897) 2 Chy. 272.
(*q*) (1887) 14 O.R. 398.

printed and published in pamphlets and in the minutes of the county council, and circulated throughout the county and elsewhere in the Province, greatly to the prejudice, detriment, damage, and injury of the plaintiff. The defendants demurred to the whole of the statement of claim, on the grounds that the facts alleged therein did not shew any cause of action; that the defendants, being a corporation, could not be guilty of malice; that a municipal corporation is not responsible in damages for malice; and that the defendants, being a municipal corporation only, were not liable to be sued for damages for libel. The demurrer was argued before Wilson, C.J., who held, as against the demurrer, that a good cause of action for libel was shewn, and that such an action lies against a municipal corporation. Most of the leading cases are reviewed in the judgment.

Whitfield v. South Eastern Ry. Co. (1858).

In one of the cases mentioned in this judgment(*r*), it was held, that a corporation aggregate is liable civilly and criminally, in its corporate capacity, for the publication of a libel under such circumstances as would imply malice; that a railway company, being such a corporation, may be sued for a libel published by order of the corporation; and that it is not necessary in such an action to prove either express malice or an intention to injure.

Opinion of Lord Campbell, C.J.

Lord Campbell, C.J., in the course of his judgment, says: "The ground on which it is contended that an action for a libel cannot possibly be maintained against a corporation aggregate fails. But, considering that an action of tort or of trespass will lie against a corporation aggregate, and that an indictment may be preferred against a corporation aggregate both for commission and omission, to be followed up by fine, although not by imprisonment, there may be great difficulty in saying that, under certain circumstances, express malice may not be imputed to and proved against a corporation. The authorities are collected and commented upon in *Reg.* v. *Great North of England Railway Co.*(*s*), in which it was held that a corporation aggregate may be indicted for cutting through and obstructing a pub-

(*r*) Whitfield v. South Eastern Ry. Co. (1858) E.B. & E. 115.
(*s*) 9 Q.B. 315.

lic highway"(*t*). In the same judgment Lord Campbell indicated an opinion that a privilege arising from the occasion of publication may be taken away by the malice of the corporation. Although a corporation cannot commit a crime in one sense, and so cannot be imprisoned, or hanged, or put to death, yet it may be sued and made to pay damages for libel, or may be indicted for libel and fined(*u*). It is true the corporation may not be imprisoned, but the fact that the same measure of punishment cannot be inflicted in this way cannot vitiate the indictment; the judgment is of the same character, that is, a fine and costs(*v*).

Telegraph and railway companies responsible for transmission of libellous messages.

Telegraph and railway companies may also be made responsible for the transmission of libellous messages. And where it appeared that there was an agreement between the telegraph company and a newspaper publisher for the collection and transmission, by the agent of the company, of news items for publication in the paper, and an item of a libellous character was sent by the agent and published in the paper, it was held by the Supreme Court of Nova Scotia that the company were liable(*w*). Upon appeal to the Supreme Court of Canada a majority of the court affirmed the judgment of the court below on the question of publication, but allowed the appeal on the grounds of excessive damages, and for improper admission of evidence of special damages(*x*). A railway company has also been held liable for transmitting a telegram to the effect that the plaintiffs' bank had stopped payment(*y*).

(*t*) (1900) 31 S.C.R. 81.

(*u*) *Per* Lord Blackburn in Pharmaceutical Society v. London and Provincial Supply Association, 5 App. Cas. 869, 870; 49 L.J.Q.B.D. 742; 28 W.R. 960; 43 L.T. 389. See special reference to this case in D'Ivry v. The World Newspaper Co. of Toronto *et al.* ((1897) 17 O.P.R. 387), in the Ontario Court of Appeal.

(*v*) The State v. Nashville Banner Publishing Co. (1879) 3 Lea. Tenn. 731.

(*w*) Silver *et al.* v. Dominion Telegraph Company (1881) 14 N.S.R. (2 R. & G.) 17.

(*x*) *Ibid.* (1882) 10 S.C.R. 238.

(*y*) Whitfield *et al.* v. South Eastern Ry. Co. (1858) E.B. & E. 115; 27 L.J.Q.B. 229; 4 Jur. N.S. 68.

Libel of companies in their business.

An advertisement published by the defendant contained the statement that the plaintiffs, who were manufacturers of lightning rods, were charging from 37 to 42½ cents per foot for their rods, whereas the defendant could furnish the same and even a better rod from 7 to 10 cents per foot, and that defendant, having a thorough knowledge of the lightning rod business, felt it to be an imposition practised by plaintiffs on the public in charging such exorbitant prices when the rods could be sold at the above low prices. The defendants pleaded, *inter alia*, that the matters so published by the defendants were published by way of reasonable caution to the public, and for the public good, and without malice, and were a fair and *bonâ fide* comment on the conduct of the plaintiffs; and that the alleged defamatory matter was true in substance and in fact. The advertisement was proved to be untrue, in that the prices charged by the plaintiffs included the cost of erecting the rod, while the prices named by the defendant only included the price of the rod, although the advertisement, as the jury found, was intended to convey the meaning that they included the cost of erecting the rod also. The jury found a verdict for the plaintiffs, and $4,000 damages. One of the grounds for moving against the verdict was that no actionable libel was alleged or shewn. The court held that the action was maintainable, but being of opinion that, under the circumstances, the damages were excessive, a new trial was directed unless the plaintiffs would consent to reduce the verdict to $1,000. "There is no allegation in the libel complained of," said Galt, J., who delivered the judgment of the court, "that the rod sold and manufactured by the plaintiffs is of an inferior description, so there is no slander of the article itself." He referred to the *Western Manures Co.* v. *Lawes Chemical Manure Co.*, L.R. 9 Ex. 218, which was an action for disparaging the goods of the plaintiff, and added that it was hardly possible to conceive a publication better calculated to injure the plaintiffs in their trade than the one in question(*z*).

(*z*) Ontario Copper Lightning Rod Company v. Hewitt (1879) 30 U.C. C.P. 172.

Libel of a corporation by impugning the validity of the election of its directors, and the legality of its business.

The defendant had been one of the promoters of a Building Society, incorporated under R.S.O. 1887, c. 169, and, for a long time, managing director, but had been removed from his position as manager. He thereupon caused to be published, in a local newspaper, as an advertisement, the following notice, which was signed by him as "Late Manager and Director, O. S. B. & S. Society": Notice: I hereby notify all whom it may concern that certain persons, representing themselves to be directors of the Owen Sound Building & Savings Society, are taking proceedings to sell the properties of borrowers who are somewhat in arrears in their payments to the society, and that such sales, or conveyances, or transfers of title, or transfers of shares of stock in the society, made or sanctioned by them will be irregular, the said persons assuming the position of directors being self-appointed, and, in consequence, all business transacted by them on behalf of the society, since and including the first Monday in August of the present year, is wholly and entirely contrary to the rules and regulations and law." This notice, it appeared, had been refused publication in certain other local newspapers. The defendant admitted the publication of the notice, but denied any defamatory meaning, and alleged that the notice was privileged, in that it was published in the discharge of a duty which he believed he owed to the shareholders and borrowers of the plaintiffs' society, a large proportion of whom had become shareholders and borrowers through his personal solicitations and representations. The jury found for the plaintiffs and $5 damages. Upon an appeal by the defendant to the Divisional Court it was held, that the statements complained of were capable of the meaning attributed to them, namely, that the business of the society was being illegally transacted, and, as such, were defamatory of the plaintiffs.

Opinion of Boyd, C.

"I agree," said Boyd, C., "with the construction placed upon the article by the trial judge, that it might well be read so as to reflect disastrously upon the credit and standing of the company. Indeed, it appears to me, that the obvious meaning of the words includes all the directorate as an usurping body,

for the words used do not limit reprobation to certain members of that board. Had the defendant named those alleged by him to be self-elected, it could be more cogently argued that the corporation was not defamed. But the very vagueness of the charge (assuming that only some were meant) would the more alarm the public; for who could tell what directors were acting illegally? Who could tell which director was to be avoided? Consequently, the only safe way was to avoid dealing with the whole concern."

Opinion of Ferguson, J.

Ferguson, J., was unable to see that the publication complained of was a mere slander of title as was contended, or that it was merely defamatory, if defamatory at all, of the persons called "certain persons representing themselves to be directors." "It seems to me to be quite capable of being read as a notification to the public, or to all whom it might concern, that all business that had been from the date mentioned, and was then being transacted on behalf of the society, was illegally transacted. Even if the publication had said or indicated that only some of the persons acting as directors had been and were self-appointed, stating the *consequence* as it did, I do not perceive that this would make a difference. It would, I think, yet be quite capable of being read as I have said"(*a*).

Where, also, an unincorporated joint stock insurance company is authorized by statute to sue in the name of its chairman, he may bring an action for a libellous attack on the company's mode of carrying on its business(*b*).

An incorporated trading company may sue for libel without claiming or proving special damages.

An action will lie by an incorporated publishing company to recover damages for the publication of defamatory matter calculated to injure their business reputation, without claiming or proving special damages. The publishers of the Ottawa *Evening Journal*, being such a company, sued for damages for statements defamatory of their business, written and published by

(*a*) Owen Sound Building and Savings Society v. Meir (1893) 24 O.R. 109.

(*b*) Williams v. Beaumont, 10 Bing. 260; 3 M. & Sc. 705.

the defendant in the Ottawa *Daily Citizen*. The statements were contained in an election address by the defendant as a candidate for the office of alderman, and were alleged to impute to the plaintiffs, in the conduct of their business as publishers of the *Journal*, depraved motives, fraudulent or dishonest practices, the corruption and prostitution of their newspaper for hire, gain or reward, etc. No claim for special damages was alleged or proved. The action was tried three times. At the first trial, before Falconbridge, J., the case was withdrawn from the jury and dismissed on the ground that an action for libel, at the suit of a corporation, could not be based upon a charge of corruption. This judgment was reversed by the Queen's Bench Division, and a new trial ordered, which resulted in a disagreement of the jury. The action came on a third time for trial before Boyd, C., and a jury, when a verdict was found for the plaintiffs and $200 damages. This verdict was moved against unsuccessfully both before the Divisional Court and the Court of Appeal. In their first judgment setting aside the nonsuit and directing a new trial, the Queen's Bench Divisional Court held, that a company incorporated for the purpose of publishing a newspaper can maintain an action for libel in respect of a charge of corruption in the conduct of their paper, without, as in this case, alleging special damage—following *South Hetton Coal Co.* v. *North Eastern News Association*(*c*), and distinguishing *Metropolitan Saloon Omnibus Co.* v. *Hawkins*(*d*).

Opinion of Armour, C.J.

"I do not think," said Armour, C.J., "that this case ought to have been withdrawn from the jury. . . . The allegations contained in these words [*i.e.*, the statements complained of and quoted in the judgment] that the plaintiff's newspaper reported favourably or adversely at ten cents a line, that it was corrupt and prostitute, might well be held by a jury to import the charge that the plaintiffs were in the habit of selling the advocacy of their newspaper, and it might well be held by a jury that such a charge tended to bring the plaintiffs into contempt, and to injure their business, and was, therefore, a libel. It was contended that such a charge made against the plaintiffs could not

(*c*) (1894) 1 Q.B. 133.
(*d*) (1859) 4 H. & N. 87.

be a libel, because the plaintiffs were a corporation and could not as such be guilty of such a charge.

Metropolitan Saloon Omnibus Co. v. Hawkins (1859) distinguished.

In *Metropolitan Saloon Omnibus Co.* v. *Hawkins*(*e*), Pollock, C.B., said (p. 90), that a corporation could not sue "in respect of a charge of corruption, for a corporation cannot be guilty of corruption, although the individuals composing it may;" but he said this by way of illustration, and, although no doubt true as to some corporations, it is too wide as to all corporations, and although applicable to a municipal corporation, it cannot be held applicable to a corporation such as the plaintiffs. Could a charge such as this, if made against the corporation, if such it is, that publishes the London *Times*, that it was in the habit of selling the advocacy of the *Times*, be said not to be a charge tending to bring that corporation into contempt, and not to be a charge tending to injure the business of that corporation, and not to be a libel? The test of the tendency of such a charge would be, what would be its effects on the business of that corporation if it were proved to be true, and could it be said that such effect would not be injurious? I think that the tendency of such a charge against that corporation could not fail to be injurious to its business, and I think that the charge here made might well be held to be injurious to the business of the plaintiffs.

South Hetton Coal Co. v. North-Eastern News Association (1894) followed.

The charge made in this case was clearly a charge in relation to the conduct of the plaintiffs of their business, and was a reflection upon such conduct, and was a libel upon the plaintiffs in the view taken of the law by Lord Esher in *South Hetton Coal Co.* v. *North-Eastern News Association* (1894), 1 Q.B. 133; and what is said by Lopes, L.J., in that case, is quite applicable to this case, 'with regard to the first point (will the action lie by the plaintiffs, who are a corporation?) I am of opinion that, although a corporation cannot maintain an action for libel in respect of anything reflecting upon them personally, yet they can maintain an action for a libel reflecting on the management

(*e*) (1859) 4 H. & N. 87.

of their trade or business, and this without alleging or proving special damage.' The injury likely to arise from such a charge as is here made would be a loss of subscribers for, and of purchasers of, the plaintiffs' newspaper, and a consequent loss of profits in their business. In my opinion, there must be a new trial, and the costs of the last trial and of this motion will be costs in the cause to the plaintiffs in any event of this suit''(*f*).

The case came up a second time before the Queen's Bench Divisional Court upon a motion by the defendant against the verdict and judgment recovered at the third trial. The motion was dismissed, and the defendant thereupon appealed to the Court of Appeal for Ontario, which affirmed the judgment in the court below, and laid down the broad rule that an action will lie at the suit of an incorporated trading company to recover damages for a libel calculated to injure their reputation in the way of their business. *South Hetton Coal Co.* v. *North Eastern News Association*(*g*), was again followed, and the first Divisional Court judgment in *Journal Printing Co.* v. *Maclean*(*h*) was approved.

Opinion of Osler, J.A.

Osler, J.A., who delivered the principal judgment of the court, after quoting from the opinion of Lord Esher in the *South Hetton Coal Co. case*, the judgment in which covered the present case, said that "statements as to the manner in which the proprietors of a newspaper conduct it, the purposes they serve by it, the principles they advocate in it, and the depraved or dishonest methods and motives which characterize it, are, or may well be, calculated to injure them in respect of their business. Again, there are corporations *and* corporations; as to some corporations such statements would have no more meaning or application than, *e.g.*, a statement of a municipal corporation that it was guilty of corrupt practices: *Mayor of Manchester* v. *Williams* (1891), 1 Q.B. 94; but the conditions which obtain as to the publishers of a newspaper, in the nature of the property, and the character of the paper, are peculiar. The reputation of

(*f*) The Journal Printing Company of Ottawa v. Maclean (1894) 25 O.R. 509.

(*g*) (1894) 1 Q.B. 133.

(*h*) (1894) 25 O.R. 509.

the newspaper is their own business reputation, and questions of motives and morals, and methods of dealing with matters of public interest, as manifested in the thing put forth by them to the public, must necessarily enter largely into the consideration of whether what is said of them in relation to their business as publishers of the paper is, or is not, libellous. A company illustrating, in the conduct of their newspaper, the principles and methods of the "Eatanswill Gazette," would probably thrive but meagrely in circulation and advertising in a respectable community. I agree with the judgment of the learned Chief Justice Armour on this branch of the case, as reported in 25 O.R. 509"(*i*).

Charge of bribery by one incorporated company against another.

An action for libel may also be brought by one corporation against another corporation(*j*). The publishers of the *World* newspaper, of Toronto, charged an incorporated company with attempting to bribe the aldermen of that city by issuing to them paid up stock in the plaintiff company. Meredith, C.J., before whom the matter came with respect to security for costs, said that *The Mayor, etc., of Manchester* v. *Williams*(*k*) was against the words being actionable "because a corporation could not be guilty of bribery and corruption." "It may be," he added, "that an action may lie by a trading corporation for words imputing to it acts such as those alleged in this case, because such charges may tend to injure the business of the corporation, though they amount in law, so far as they may be taken to charge the commission of a criminal offence, only to charges against the officers and agents of the corporation, in the conduct of its business. This seems to have been the principle upon which the court proceeded in the case of *Journal Printing Company* v. *Maclean*, recently decided by the Queen's Bench Divisional Court, 25 O.R. 509. See, also, *Owen Sound Building and Savings Society* v. *Meir*, 24 O.R. 109"(*l*).

(*i*) Journal Printing Co. v. Maclean (1896) 23 O.A.R. 324.

(*j*) L'Institut Canadien v. Le Nouveau Monde (1873) L.C.J. 296 (S.C.).

(*k*) (1891) 1 Q.B. 94.

(*l*) Georgian Bay Ship Canal and Power Aqueduct Company v. World Newspaper Company of Toronto (1894) 16 O.P.R. 320, at pp. 322-3.

The law in Quebec as to libellous trade circulars and reports by mercantile agencies.

The law in the Province of Quebec with respect to the publication, by mercantile agencies, of libellous trade circulars and reports, comes under articles 1053 and 1054 of the *Code Civile*, quoted by Ritchie, C.J., in *Cossette* v. *Dun et al.*(*m*), in the chapter on Privilege. It has been held in the Quebec courts, that persons carrying on a mercantile agency are responsible for the damages caused to a person in business by an incorrect and culpably negligent report concerning his standing, though the report be only communicated confidentially to a subscriber to the agency on his application for information(*n*). But where the report of a mercantile agency to its customers, concerning the standing of a person in business, is true, and no malice is proved, an action for damages for such publication cannot be maintained(*o*).

Libel by mercantile agency by the negligent circulation of an injurious trade report.

The appellants, a mercantile agency, sent a circular to their subscribers, with the words "call at the office" in reference to the respondent, a dry goods merchant of Montreal. Those who inquired at the appellants' office, including a newspaper correspondent who was not a subscriber, were informed by the appellants' employees that the respondent's firm had applied for an extension of time on a large indebtedness to their English creditors. This information was untrue, and was based on a report which the appellants had not verified. The circulation of the report by the appellants injured the respondent's credit, and embarrassed him in the management of his business, several orders for goods being cancelled, or suspended, until the report was shewn to be unfounded. It was held (affirming the decision of Loranger, J.,(*oo*), that the manager of a mercantile agency comes under the general rule in article 1053 of the *Code Civile*,

(*m*) (1890) 18 S.C.R. 222.

(*n*) Cossette v. Dun *et al.* (1887) Mon. L.R. 3 S.C. 345; affirmed (1890) 18 S.C.R. 222. See chapter on Privilege, and remarks therein by Burton, C.J.O., and Osler, J.A., on this case.

(*o*) Girard v. Bradstreet (1875) Mon. L.R. 3 Q.B. 69; 10 L.N. 236;

(*oo*) Mon. L.R. 2 S.C. 33; 14 R.L. 127.

which makes every person capable of discerning right from wrong responsible for damages caused by his fault to another, whether by positive act, imprudence, neglect, or want of skill, and that the appellants were guilty of negligence in circulating through their employees a report of an injurious nature without verifying it, and also in communicating it by a circular and verbally to persons who had no interest in being informed of the standing of respondent. It being proved that the circulation of the report was damaging to respondent, it was held that it was competent to the court below to estimate the amount of damages, and that the judgment should not be disturbed(*p*).

(*p*) Carsley v. Bradstreet Company (1887) Mon. L.R. 3 Q.B. 83; 10 L.N. 237. See chapter on Privilege.

CHAPTER XV.

The Law Concerning Husband and Wife.

Effect of Married Woman's Property Acts.

The law of defamation affecting husband and wife has to be considered in connection with the Provincial statutes relating to married women known as the Married Woman's Property Acts. These Acts, either alone or aided by the rules of procedure in the Provincial courts, have removed some of the technicalities which prevailed in this branch of the law. The rules of the Ontario Judicature Act, *e.g.*, provide that claims by or against husband and wife may be joined with claims by or against either of them separately(*a*). The date of the marriage, as will be seen(*b*), also affects the application of the statute.

The Ontario Act. Married woman may sue and be sued as feme sole.

Under the Ontario Married Woman's Act a married woman is capable of suing and being sued in tort as if she were a *feme sole*, and her husband need not be joined or be made a party with her as plaintiff or defendant; and any damages recovered by her shall be her separate property; and any damages or costs recovered against her shall be payable out of her separate property, and not otherwise(*c*).

This enactment enables a married woman to sue and be sued for defamation without her husband being joined, as he once had to be, as co-plaintiff or co-defendant(*d*). She and her husband might also formerly, as now, be jointly sued for a joint publication of a libel(*e*). The Act does not prevent them being joined in the action; on the contrary it expressly permits this

(*a*) See R. 234 O.J.A.

(*b*) Traviss v. Hales *et ux.*, *infra*.

(*c*) R.S.O. 1897, c. 163, s. 3(2).

(*d*) Vine v. Sanders, 4 Bing. N.C. 96.

(*e*) Catteral v. Kenyon, 3 Q.B. 310; Keyworth v. Hill, 3 B. & Ald. 685; s. 18, *infra*.

being done. The plaintiff may, at his option, sue both husband and wife, or the wife alone.

Continuance of the husband's common law liability.

The former liability of the husband is not taken away by the statute; and so it has been held that the husband may be sued along with the wife for a libel published by the wife during her coverture(*f*), as well as for a slander uttered by the wife during her coverture(*g*), and also for other torts of the wife, as, *e.g.*, the false arrest and malicious prosecution of the plaintiff at the wife's instance(*h*). This section of the Act also enables the wife to sue alone for a tort committed against her before the Act was passed(*i*).

Post-nuptial liabilities of the wife.

A married woman in Ontario also continues to be liable after her marriage, in respect of and to the extent of her separate property, for all wrongs committed by her before marriage; and she may be sued therefor; and all sums recovered against her in respect thereof, and any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be a contract between them to the contrary, her separate property shall be deemed to be primarily liable for all wrongs and for all damages and costs in respect thereof. But nothing in the Act shall operate to increase or diminish the liability of any woman, married before the commencement of the Act, for any such wrong(*j*).

This section restricts the common law liability of the husband, who was liable fully for the libels or slanders published by the wife before coverture. But the section, it will be noticed, does not apply to the wife's post-nuptial torts.

Limited liabilities of the husband.

The husband is also liable for the debts of his wife contracted before marriage, and for the wrongs committed by her

(*f*) Seroka v. Kattenburg *et ux.*, *infra.*

(*g*) Traviss v. Hales *et ux.* and Earle v. Kingscote, *infra.*

(*h*) Lee v. Hopkins *et ux.*, *infra.*

(*i*) Weldon v. Winslow, (C.A.) 13 Q.B.D. 784; 53 L.J.Q.B. 528; 51 L.T. 643; 33 W.R. 219.

(*j*) *Ibid.*, s. 16.

both before and after marriage, to the extent of all property belonging to her which he has acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him, in respect of such debts or wrongs, but not any further or otherwise; and the court has power to direct any inquiry or proceedings it may think proper for the purpose of ascertaining the nature, amount, or value of such property(*k*). But nothing in the Act shall operate to increase or diminish the liability of any husband married before July 1, 1884, for any such debt or liability(*l*).

When husband and wife may be sued jointly.

The Act also provides, that a husband and wife may be jointly sued in respect of any debt or liability for any wrong incurred by the wife, if the plaintiff seeks to establish his claim, either wholly or in part, against both of them; and if in such action it is not found that the husband is liable in respect of any property of the wife acquired by him, or to which he has become entitled, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any action against husband and wife jointly, if the husband is liable for the debt or damages, or any part thereof, the judgment, to the extent of the amount for which the husband is liable, shall be a joint judgment against the husband personally and against the wife as to her separate property; and, as to the residue of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only(*m*).

New Brunswick law the same as that of Ontario.

Under the New Brunswick Act all the property of a married woman shall be deemed to be her separate property with respect to all torts committed by her after the commencement of the Act, *i.e.*, after January 1, 1896(*n*). The other provisions of the

(*k*) See Collett v. Dickenson, 11 Ch. D. 687; 40 L.T. 394; Bursilo v. Tanner (1884) (C.A.) 16 Q.B.D. 1; 55 L.J.Q.B 53; 53 L.T. 445.

(*l*) *Ibid.*, s. 17.

(*m*) *Ibid.*, s. 18.

(*n*) C.S.N.B. 1903, c. 78, s. 4(3).

Act, relating to the torts of the wife and the liabilities therefor of herself and her husband, are the same as those contained in the Ontario Act(*o*). But nothing in the Act shall operate to increase or diminish the liability of any husband married before the commencement of the Act for any such liability(*p*).

The law in Nova Scotia and Prince Edward Island.

The Nova Scotia Act(*q*) is the same as the Ontario Act, except that the husband's liability is not extended to the wife's wrongs committed after marriage and to his being sued therefor. The Prince Edward Island Act, of 1903(*r*), is the same as the Nova Scotia Act(*s*).

The law in British Columbia.

The law in British Columbia(*t*) is the same as in Ontario, except that nothing in the Act shall operate to increase or diminish the liability of any husband married before April 7, 1887, in respect of any debt or liability of his wife(*u*).

The law in Manitoba.

The Manitoba law is the same as that of Ontario, except as to section 18 of the Ontario Act (*supra*), which is omitted in the Manitoba Act(*v*), and except also as to the liability of the husband for the wife's wrongs committed after marriage, and his liability to be sued therefor, the law on these points being the same as it is in Nova Scotia.

Effect of the want of uniformity in provincial legislation.

These Provincial enactments are important in view of the want of uniformity of the law of defamation affecting women. Imputations of unchastity, *e.g.*, in some of the Provinces are actionable *per se*, and in certain other Provinces are actionable only on proof of special damage(*w*). Where, in the case of a

(*o*) *Ibid.*, ss. 3(2), 14, 15, 16.
(*p*) *Ibid.*, s. 15.
(*q*) R.S.N.S. 1900, c. 112, ss. 13, 24, 25, 26.
(*r*) Statutes of P.E.I. 1903, 3 Edw. 7, c. 9, ss. 3(2), 12, 13, 14.
(*s*) See Gilbert v. Municipality of Yarmouth (1890) 23 N.S.R. 93.
(*t*) R.S.B.C. 1897, c. 130, ss. 5, 14, 31, 32.
(*u*) *Ibid.*, s. 31.
(*v*) R.S.M. 1902, c. 106, ss. 11, 15, 16.
(*w*) See chapter on Imputations of Unchastity.

married woman, the words are actionable *per se*, she may, under the Provincial statute, sue either alone or along with her husband, who is entitled in the same action to recover for any special damage which has thereby accrued to him. Where the words are not actionable *per se*, she must, in order to sustain her action, prove special damage to herself; and she will not be aided in her suit by the fact that the words have caused special damage to her husband, who alone can sue for such damage. Separate damages may, of course, be recovered by each in the same action, for which reason it is advisable for the wife to join her husband as co-plaintiff. It is also advisable for the plaintiff to join the husband as co-defendant, otherwise he will be released by the judgment recovered against the wife alone. Separate damages may also be recovered against both husband and wife where the wife is possessed of separate estate, although, in the latter case, it will be observed that the husband's liability for his wife's ante-nuptial debts, and for the wrongs committed by her before or after marriage, is limited, by certain sections of the statutes(*x*), to the extent of the property acquired by him by reason of the marriage. In the event of the death of the husband before judgment it has been held, that the action may be continued against his widow; but that it abates on the death of the wife during the husband's lifetime, whether the suit be for an ante-nuptial or a post-nuptial tort(*y*), unless the husband was a participant in the wrong. It has been held that a divorce releases the husband from liability(*z*), as does also a protection order still in force(*zz*), but not a voluntary separation under a deed for that purpose(*a*). The husband may also be sued by the wife for a libel upon her in her separate trade or business(*b*); but he cannot be prosecuted by her criminally for a defamatory

(*x*) See sections 17 and 18 in the Ontario Act, and the corresponding sections in the other Provincial statutes.

(*y*) Bell *et al.* v. Stocker, 10 Q.B.D. 129.

(*z*) Capel v. Powell *et al.*, 17 C.B.N.S. 743.

(*zz*) See s. 22.

(*a*) Head v. Briscoe *et ux.*, 5 C. & P. 485; 2 L.J.C.P. 101.

(*b*) *Per* Brett, J., in Summers v. The City Bank, L.R. 9 C.P. 583.

libel(*c*). She, however, may be prosecuted for the publication of such a libel(*d*).

Diversity of opinion under the Ontario Act as to joining husband in action against wife.

Some of the provisions of the Ontario statute have given rise to a diversity of opinion as to whether, in an action against a married woman for a tort committed by her during coverture, the husband is a proper party. In 1880, when the first reported decision was given, there was an enactment in the then Married Woman's Property Act(*e*), which is substantially the same, although differently expressed, in the present Act(*f*), that "any married woman may be sued or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts, or torts, as if she were unmarried." Under that state of the law the defendant, E. R., wife of G. R., who was also joined as a defendant, was sued for slanderous words imputing theft to the plaintiff. It does not appear from the report of the case when the defendants were married. The defendant, G. R., demurred to the declaration on the grounds that it did not allege or shew any cause of action against him, either jointly with his wife, or otherwise, and that he was improperly joined as a defendant in the action.

Opinion of Osler, J., that wife must be sued alone: Amer v. Rogers et ux. (1880).

Osler, J., held in favor of the demurrer that the husband was not a proper party; that the wife must be sued alone; and that her liability was not dependent on her possessing separate estate. The learned judge in his judgment reviews the provincial law on the subject as it stood at that time (June 8, 1880), with respect to the liability of a husband in an action for a tort committed by his wife during coverture, and refers to the cases which had been decided as to the effect of section 30 of the

(*c*) Reg. v. The Lord Mayor of London, 16 Q.B.D. 772; 55 L.J. M.C. 118.

(*d*) R. v. Mary Carlisle (1819) 3 B. & Ald. 167. See also R. v. Ingram, 1 Salk. 384; R. v. Cruse *et ux.*, 2 Moo. C.C. 53; 8 C. & P. 541.

(*e*) R.S.O. 1877, c. 125, s. 20.

(*f*) R.S.O. 1897, c. 163, s. 16.

statute upon the wife's power to contract, and to some other authorities touching the question raised by the demurrer. He also reviews the legislation affecting married women commencing with C. S. U. C. 1859, c. 73, and including the Act of 1872(*g*), which, with later amendments and chapter 73, had been consolidated in R.S.O. 1877, c. 125. He expressed the opinion that this legislation was in a great measure directed to relieving the husband from all personal liability for the wife's acts and contracts.

"The position of a married woman," he concluded, "as regards liability for her separate contracts and for her torts during coverture, is essentially different. She is bound by her civil torts just as if she was discovert, and whether she has separate property or not. But her contracts, though valid as against her property, cannot be sued upon at law or in equity, either during or after her coverture, so as to bind her person. As the statute has not enlarged her power to contract, so it has not interfered with her liability for her torts, but it has in plain language removed her disability to be sued alone. If this disability has been removed, and the husband has been deprived of the interest which he formerly had in his wife's property, what reason longer exists for making him a defendant? If he was only joined for conformity, not because of any liability, but merely because the wife could not be sued alone, on what ground is he to be made a defendant now that she may be sued alone? *Cessat ratione cessat lex.* It was urged that the 6th section of the Act shewed that the husband might still be properly joined as a defendant, his property being liable to execution after the wife's separate property has been exhausted. That section was taken from the Consol. Stat. of Upper Canada, c. 73, s. 3. It appears to me that full effect is given to it by applying it to those cases in which, at the time of passing the 35 Vict. c. 16, judgment had been obtained against husband and wife for the wife's tort. As the law then stood the wife's property was available to the creditor, and he had the additional advantage of being able to obtain a judgment against the husband as well as the wife. It could hardly have been the intention of the Legislature, in enacting that the wife might be sued alone for her tort, merely to give the plaintiff the option of taking a proceeding which

(*g*) 35 Vict. c. 16(O.).

would be less beneficial to him; and it would be needless, for the purpose of affecting the wife's separate property, to enact that she might be sued alone only when she had separate property, for such property was already liable to be taken in execution upon a joint judgment against herself and her husband. Looking at the cases in our own courts which have been referred to, it appears to me that I am at liberty to express my own opinion as to the effect of the Act, and, for the reasons I have already stated, I think that in such an action as this the husband is not a proper party, and that the wife must be sued alone. The defendant is, therefore, entitled to judgment on the demurrer"(*h*).

In this same judgment, Osler, J., also expressed the opinion, that, in actions by a married woman for a tort *suffered* by her, unconnected with her separate estate, her husband was, even after the Act of 1872(*i*), required to be a party plaintiff, because the Act did not enable her to maintain an action in her own name.

Husband may be sued along with the wife: Lee v. Hopkins (1890).

In *Lee* v. *Hopkins*(*j*), decided under 47 Vict. c. 19 (*O.*), which came into force July 1, 1884, the plaintiff sued a husband and wife for the false arrest and malicious prosecution of the plaintiff at the instance of the wife. The husband demurred on the ground that he was improperly joined as a defendant, as he could not be held liable for his wife's tort, it not being charged that he was in any way connected with the tort complained of.

Opinion of Rose, J.

The defendants were alleged to have been married before 1884, and it was held (*per* Rose, J.) that the husband was properly joined as a party. The learned judge summarizes the law governing the liability of husband and wife before and under the Act of 1859, C.S.U.C., c. 73, and then refers to the effect of

(*h*) Amer. v. Rogers *et ux.* (1880) 31 U.C.C.P. 195. See, also, Barker v. Westover (1882) 5 O.R. 120-22; *per* Hagarty, C.J., in Stone v. Knapp (1879) 29 U.C.C.P. at p. 609; *per* Spragge, C., in McFarlane v. Murphy, *infra;* and *per* Wilson, J., in Wagner v. Jefferson (1876) 37 U.C.Q.B. at pp. 577-8.

(*i*) 35 Vict. c. 16(O.).

(*j*) (1890) 20 O.R. 666.

the Act of 1884, which repealed (subsequent to the marriage of the defendants) chapter 125 of R.S.O. 1877, under which *Amer* v. *Rogers* (*supra*) was decided. He points out that, with this repeal, disappeared the section as to the liability of the wife's separate estate to satisfy an execution against her husband for her torts, with a proviso, however, "that such repeal shall not affect any right or liability of any husband or wife, married before the commencement of this Act, to sue or be sued under the provisions of the said repealed Act for or in respect of any debt, contract, money, or other matter or thing whatsoever for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act." He also observed that, by section 13 of the Act of 1884, the liability of a husband for wrongs committed by his wife, either before or after marriage, is limited to the extent of property belonging to his wife acquired by him, subject to certain deductions. This clause also contains a proviso, "that nothing in this Act contained shall operate to increase or diminish the liability of any husband, married before the commencement of this Act, for or in respect of any such debt or liability of his wife as aforesaid." And thus for the first time, in the history of the legislation, the liability of a husband for his wife's torts was limited in terms. "To decide the case before me," he says, "I do not see how I can uphold the demurrer, for, as I have suggested, for all that appears the marriage may have taken place prior to 1859, and the husband may have, prior to such date, obtained property of his wife, in which case I am clear he would be liable to an action for her torts. And, even if the marriage took place after 1872, it being prior to 1884, I am of the opinion that he is liable, because until 1884 there is no legislation expressly limiting his liability, and none, I think, limiting it by implication. Moreover, the legislature of 1884 recognizes his liability for his wife's torts and does not free him therefrom, but merely limits it. If the reason for exemption of the husband from liability for the wife's torts does not exist in cases where he had property belonging to his wife, then, unless one rule could exist for such cases, and another for cases where the husband takes nothing, the same liability exists in each case. As we have seen, the existence of the liability did not originally depend on the husband having any portion with his wife, as by law he took any property acquired by her during marriage."

Amer v. Rogers (1880), and Seroka v. Kattenburgh (1886), referred to.

Referring to the construction of section 3 in the Act of 1859 (corresponding to s. 8 in the Act of 1872) by Osler, J., in *Amer* v. *Rogers*, he said that, if the result he had arrived at was the correct one, force might be given to the section by holding that, while a party had the right of proceeding against both husband and wife, he had the option, where it would be more convenient, to proceed against the wife alone, as where the husband could not be conveniently served, or where he had no estate and the wife had the property, or where, for any other reason, there was no desire to add him as a party defendant. Referring, also to the case of *Seroka* v. *Kattenburgh et ux.*(*k*), in which it was decided that a person injured by the tort of a married woman might still sue the husband, he said that the provisions of the English Married Woman's Act of 1882, which had been construed in that case, were quite different from those of the Ontario Act prior to 1884, and seem to be rather more favourable to the defendant's argument than those of the Ontario statutes which he had been considering(*l*).

Traviss v. Hales et ux. (1903).

Traviss v. *Hales et ux.*(*m*) was an action against a husband and wife married in May, 1875, for a slander uttered by the wife in April, 1901. The Divisional Court held, affirming the judgment of Street, J., that the provisions of the Married Woman's Property Act, 1884(*n*), applicable to persons married before July, 1884, do not relieve the husband from liability for the torts of his wife, and that he is still liable, if the marriage took place before that date.

Opinion of Street, J.

Street, J., before whom the case was tried without a jury, thought the weight of authority seemed in favour of the view, that, at common law, the husband was liable for the torts of the wife as a matter of principle, and not by reason merely of the

(*k*) (1886) 17 Q.B.D. 177.
(*l*) Lee v. Hopkins (1890) 20 O.R. 666.
(*m*) 6 O.L.R. (1903) 574.
(*n*) 47 Vict. c. 19(O.).

fact that he was a necessary party to an action against her, citing Bacon Abr. Baron & Feme (L.); *Head* v. *Briscoe*(*o*); *Wainford* v. *Heyl*(*p*); *Seroka* v. *Kattenburgh* (*supra*); *Lee* v. *Hopkins* (*supra*); and *Amer* v. *Rogers* (*contra*). If there existed a direct liability at common law, he could not find in section 3 (2) of the Married Woman's Property Act, R.S.O. 1897, c. 163, anything sufficient to relieve the husband from it. He agreed that, if the husband's common law liability were one which did not exist because of a mere rule of procedure which required him to be joined as a party to an action against the wife, then his liability would cease with the abolition of the rule of procedure, as was held in *Amer* v. *Rogers*, but he thought that the liability of the husband was a necessary part of the common law principle of the identity of husband and wife. That identity had been gradually dissolved by the various stages of the Married Woman's Property Acts, but the liability to be sued along with his wife and to be made liable in such an action for her torts, was still maintained to a limited extent by section 17 of c. 163, R.S.O. 1897 (*supra*), and was by that section continued without any limitation down to the present time, so far as persons married before July 1, 1884, are concerned.

Affirmed by Divisional Court: Amer v. Rogers (1880) overruled.

Meredith, C.J., who delivered the judgment of the Divisional Court, notices the fact that, in many of the United States courts, in which the question had arisen on statutes making no greater changes than did our own Acts prior to 47 Vict. c. 19, in the rights of married women, the same view had been adopted as was taken by Osler, J., in *Amer* v. *Rogers*. His view had also been concurred in by T. Cyprian Williams, 16 Law Quarterly Review, p. 191; by Lush on Husband and Wife, 1st Ed., p. 256, and 2nd Ed., pp. 190-91. It had, however, been decided by the English Court of Appeal in *Earle* v. *Kingscote*(*q*), adopting and following the view of the Divisional Court in *Seroka* v. *Kattenburgh* (*supra*), that the effect of the English Acts is not to relieve the husband of his liability. He thought we ought to follow the decision of the Court of Appeal, unless there was such

(*o*) (1833) 5 C. & P. 484.
(*p*) (1875) L.R. 20 Eq. 321.
(*q*) (1900) 2 Chy. 585.

a difference, which he could not discover, between the English statutes and our own as to justify the court coming to the opposite conclusion. "The ground upon which the English cases proceeded was, that the right conferred of suing the wife alone, in respect of torts committed by her during coverture, was an additional right given to the person wronged, and that there was nothing in their Acts to take away from him his common law right of suing the husband and wife jointly, and there is, I think, nothing in our Acts, prior to 47 Vict. c. 19, to enable us to say that the common law right is taken away, if, upon the provisions of the English Acts, it was not."

Married woman may sue alone without joining husband. Revision of Married Woman's Property Act, 1884, R.S.O. 1887, c. 132, s. 3 (2).

In an action for libel brought by a married woman, the statement of claim was demurred to on the ground that the plaintiff could not sue without joining her husband as a co-plaintiff. The defendant's contention was, that the foundation of the right of married women at that time to bring an action of tort was 47 Vict. c. 19 (O.); that section 2 (2) of that statute gave her the right of suing, and being sued, without joining her husband "either in contract, or in tort, or otherwise"; that this section was consolidated in the revision of 1887, and the words "either in contract, or in tort, or otherwise" were omitted in R.S.O. 1887, c. 132, s. 3 (2); which left the law as it was before 47 Vict. c. 19 (O.), was passed, a married woman having then no right to bring an action of tort as a *fême sole*, and, therefore, in the present action, the husband should have been joined with the plaintiff. Boyd, C., held, that the omission of the words "either in contract, or in tort or otherwise," found in section 2 (2) in the then recent revision of the Married Woman's Property Act, 1884, from section 3 (2) R.S.O. 1887, c. 132, did not limit the legal effect and operation of that section, and that, in an action for libel by a married woman, her husband did not need to be joined as co-plaintiff—citing *Thynne* v. *Maur*(*r*), and *Weldon* v. *Winslow*(*s*); which latter case also shews that the

(*r*) 34 Ch. D. 466.

(*s*) 13 Q.B.D. 784.

proper mode of raising such objection is not by demurrer. Our statute, following the English Act, now says that a married woman can sue "in all respects as if she were a *fême sole*, and her husband need not be joined with her as a plaintiff"(*t*).

Special damage and grounds for arresting judgment.

Where an action was brought formally by the husband and wife, but in reality by the wife alone, for words imputing adultery to the wife, the loss of the hospitality of friends, with whom she was in the habit of associating, is a good ground for special damage, but it is doubtful whether the loss of the *consortium* of the husband would alone be sufficient(*u*). The fact that in such a case the declaration claimed the damages as the wife's, although when recovered they might belong to the husband, is no objection, and no ground for arresting the judgment; it is merely a matter of form and amendable(*v*). Nor will the judgment be arrested on the grounds that special damage could not be claimed by the wife for the loss of hospitality of friends; and that the damages claimed as the wife's might belong to the husband when recovered(*w*). So, also, in such an action for slander brought formally by the husband and wife, but in reality by the wife, the course adopted by the husband at the trial, with the defendant's concurrence, in conceding the action to be, in substance, that of the wife alone, in coming forward also as a witness for the defence in support of the plea of justification, and in allowing the case to be submitted to the jury on the question of the truth or falsity of the accusation, is sufficient to preclude the motion in arrest of judgment(*x*).

Judgments against the wife in crim. con. and alimony suits as defences to her action for slander.

Where, in such a case, it appeared by the evidence that the husband had sued the person accused of the adultery for charging which the action was brought, and had recovered judgment

(*t*) Spahr v. Bean (1889) 18 O.R. 70.
(*u*) Campbell *et ux.* v. Campbell (1875) 25 U.C.C.P. 368.
(*v*) *Ibid.*
(*w*) *Ibid.*
(*x*) *Ibid.*

against him in an action of *crim. con.*, and it also appeared that judgment had been given in another court against the wife on the ground of adultery, in a suit brought by her against the husband for alimony, it was held, that the verdict entered for the plaintiffs must be set aside; and that thereafter the male plaintiff, if so advised, might raise the question whether he was not *dominus litis*(*xx*).

Inadmissible evidence.

In an action against a husband and wife, for an alleged slander of the plaintiff by the wife, evidence of a statement by the wife made subsequent to the slander, that her husband compelled her to utter it, and of his object in doing so, was held to be inadmissible, as being against public policy and the statutory rule, that a wife shall not be compelled to disclose any communication made to her by her husband during marriage(*y*).

The law in Quebec as to the torts of the wife.

In the Province of Quebec a husband, generally speaking, is not responsible for the torts or quasi-torts committed by his wife, nor is the community responsible for them; and there is no exception to this rule, except when the husband has acted as his wife's accomplice, or has participated in the tort or quasi-tort by having aided, ordered, or authorized her. Where, therefore, the husband ordered his wife to be silent and to go into the house as soon as he understood what she was saying, there was no fault or complicity on his part, and no responsibility of the husband or of the community for the wrong committed by the wife(*z*).

Article 1294 of the Code Civile.

Under article 1294 of the *Code Civile*, it has been held that the husband is not responsible in damages for slanderous or insulting language used by his wife(*a*). And where in an action for slanderous words uttered by a married woman, the pleading also claims damages against the husband for the slander, the

(*xx*) *Ibid.*

(*y*) Wood v. Mackay *et ux.* (1881) 21 N.B.R. (5 P. & B.) 109.

(*z*) Fortier v. Demers (1902) Q.R. 21 S.C. 543.

(*a*) Bourassa v. Drolet (1892) Q.O.R. 1 (S.C.) 107.

husband cannot be jointly condemned unless he is alleged to have become in some way responsible for his wife's statements, and the conclusions against him personally will be struck out on demurrer(*b*).

The liability of the husband.

But a husband is liable for the consequences of acts done by his wife in the performance of an implied mandate to her, and, therefore, for damages caused by her in uttering defamatory expressions against another person, even if in an action against both, by the person defamed, there are no special conclusions against her(*c*).

Locus standi of the wife.

An action for damages for scandalous words spoken of a married woman cannot be released by her during coverture(*d*). Nor can a wife appear in judicial proceedings without her husband or his authorization, even if she be a public trader, or not common as to property. As soon as it appears to the court that she is acting without such authorization, or leave of the court, all proceedings in the case will be annulled and the parties ruled out of court. But a married woman has a right, when authorized by her husband, or, on his refusal, by the court or judge, to sue in her own name to vindicate her honour and to claim pecuniary compensation for personal wrongs, such as slander and assault(*e*). In the case of community of goods, however, the husband has the sole right of action for recovery of damages for slander of his wife; the wife cannot be joined with the husband in the institution of the action, even if the latter acts in his personal capacity and not solely to authorize her; and, upon demurrer, the claim of the wife will be dismissed(*f*). Where the principal suit, through error, was brought merely for the slander of the female appellant, while the incidental demand was for words uttered on the same occasion imputing misconduct to the male appellant at the instigation of his wife, it was held, that

(*b*) Camire v. Bergeron (1899) 3 Q.P.R. 281.
(*c*) Dubuc v. Trottier (1901) Q.R. 19 S.C. (Ct. of Rev.) 202.
(*d*) Fraser *et al.* v. Peltier (1816) 1 R.L. 381 (K.B.).
(*e*) Neron v. Breton (1898) Q.R. 15 S.C. 339.
(*f*) Caron v. Larivé (1903) 5 Q.P.R. 332.

the causes of action contained respectively in the two demands were identical, and that the two demands were properly joined. It was also held that the appellants, being common as to property, had both a cause of action in respect of the two demands, and, therefore, that the incidental demand was properly made by them under the provision contained in article 215, C.C.P.(*g*).

(*g*) Charest *et ux.* v. Tessier (1899) Q.O.R. 8 (S.C.) 500.

CHAPTER XVI.

Newspaper Libel—What is a Newspaper?

The statutory law of newspaper libel.

The statute books of all the Provinces contain enactments specially affecting newspapers. Most of these are based on English legislation, more particularly Lord Campbell's Act(*a*), which materially extended the benefits of Fox's Libel Act(*b*), the Newspaper Libel and Registration Act, 1881(*c*), and the Law of Libel Amendment Act, 1888(*d*). There are other enactments, *e.g.*, those concerning security for costs, which are in advance of the law in England. These were the outcome of an agitation in the newspaper press in regard to certain matters of procedure, which, it was said, hampered newspapers in the discharge of their functions, and exposed them to vexatious litigation. The Criminal Code, 1892(*e*), also contains a series of enactments specially relating to newspapers, some of which were passed at the instance of the associated journalists of Canada.

Summary of the enactments.

The statutory law of libel, which is made expressly applicable to newspapers in civil cases, comprises the definition of a "newspaper," *i.e.*, the meaning which is to be given to that term wherever it occurs in the particular statute; the registration of a newspaper with a view to fixing responsibility for its publication(*f*); the requirement of notice of the statements complained of as a condition precedent to an action; the privilege conferred on reports of public meetings as defined by the several Acts, and on reports of proceedings in courts of justice; provisions for

(*a*) 6-7 Vict. c. 96.

(*b*) 32 Geo. 3, c. 60.

(*c*) 44-45 Vict. c. 60 (Imp.).

(*d*) 51-52 Vict. c. 64 (Imp.).

(*e*) 55-56 Vict. c. 29(D.).

(*f*) This is under the Revised Statutes of Quebec, 1888, articles 2924-2938, and the Revised Statutes of Manitoba, 1902, c. 123. See, also, s. 14 of the Manitoba Libel Act.

obtaining security for costs; the restriction as to venue, *i.e.*, confining it to the place of residence of the plaintiff, or the place of publication of the newspaper; the permitting a defence of publication without actual malice and without gross negligence, coupled with a prompt and full apology; the admissibility of evidence formerly inadmissible in mitigation of damages, *i.e.*, of damages recovered in another action, or received by way of compromise; and the restrictions as to actual damages in certain cases, instead of the general damage ordinarily presumed. The provisions in some of the Libel Acts for the consolidation of actions by the same person against two or more defendants for substantially the same libel, and for the assessment of damages and the apportionment of costs in such cases, although not confined to defendants who are newspaper publishers, have proved a boon to the newspaper press. There are also provisions in the New Brunswick Act (*infra*) as to conspicuous publication in the paper of the name of the publisher, the enactments (*infra*) in the Libel Act and the Newspaper Act of Manitoba requiring registration of the newspaper under the last named Act, and similar enactments as to registration in the Quebec Act(*g*).

Objects and effects of legislation on the subject.

This statutory law, Provincial and Dominion, is presumably a recognition by the Local and Federal Legislatures of the exceptional position occupied by the newspaper press, the public, and, at times, perilous nature of its duties, and its public usefulness. It is "legislation [which] appears to be unique, and the intention is to protect newspapers reasonably well conducted with a view to the information of the public"(*h*). The effect of it has been to give a distinct legal status to the newspaper, and to create a law of newspaper libel, which, apart from the general law on the subject, has always to be considered in both civil and criminal proceedings.

Want of uniformity in procedure and practice.

There is, as might be expected, a good deal of diversity in the procedure and practice in civil actions for both libel and

(*g*) R.S.Q. 1888, articles 2924-2938.

(*h*) *Per* Boyd, C., in Bennett v. Empire Printing Company (1894) 16 O.P.R. 63, at p. 69.

slander in the Provincial courts. The Province of Prince Edward Island adheres, in the main, to the common law system. Ontario, Nova Scotia, British Columbia and (very recently) New Brunswick(*i*), have each adopted a Judicature Act based principally, but not exclusively, on the English Judicature Act. Manitoba has a system of her own, derived from the systems prevailing in the other Provinces; and this may also be said of the new Provinces of Alberta and Saskatchewan and of the North-West Territories. Quebec has a Code of Civil Procedure adapted to the substantive law contained in the *Code Civile*. The civil law and procedure being within the domain of civil rights, which are exclusively under the legislative jurisdiction of the several Provinces, there are no two Provinces in which the procedure and practice are uniform, although, as will be noticed in each of the Provincial statutes dealing with newspaper libel, there are a number of enactments which are almost identical. The case is different with respect to criminal law and procedure. These being exclusively within the legislative jurisdiction of the Federal Parliament are the same for the whole of Canada.

What is a "newspaper?" Definition in the Ontario Act.

The definition of a "newspaper" is substantially the same in all the Provincial Acts, except where it refers to the intervals of publication. In the Ontario Act "newspaper" means any paper containing public news, intelligence, or occurrences, or any remarks or observations thereon, printed for sale and published periodically, or in parts or numbers, at intervals not exceeding thirty-one days(*j*) between the publication of any two such papers, parts or numbers; or any paper printed in order to be dispersed and made public weekly or oftener, or at intervals not exceeding thirty-one days, and containing only, or principally, advertisements(*k*).

(*i*) An Act relating to the establishment of a Supreme Court of Judicature and to the practice and proceedings therein. Stat. of N.B., 6 Edw. 7, c. 37.

(*j*) Amended by 6 Edw. 7, c. 22, s. 1(O.).

(*k*) R.S.O. 1897, c. 68, s. 1, as amended.

In the British Columbia Act.

In the British Columbia Act(*l*), the expression used is "public newspaper or other periodical publication." The definition in other respects is the same as in the Ontario Act.

In the New Brunswick Act.

The same is true of the New Brunswick Act(*m*), in which "magazines" are expressly included. By section 11 no publisher of a newspaper is entitled to the benefit of the Act unless he publishes his name as publisher in a conspicuous place in the paper.

In the Nova Scotia Act.

In the Nova Scotia Act(*n*), which deals exclusively with the reports of the proceedings of public bodies, the definition is the same as in the Ontario Act, except that papers "containing only or principally advertisements" are excluded.

In the Manitoba Act.

In the Manitoba Act(*o*) the expression is "public newspaper or other periodical publication," and the intervals of publication twenty-six instead of thirty-one days. The benefits of all the provisions of the Act affecting newspapers are, by section 14 of the Act, and also by section 16 of the Newspaper Act of that Province(*p*), expressly subject to the last named Act, which requires registration of newspapers by their publishers with a view to proof of publication.

The Prince Edward Island Act.

The Libel Act of Prince Edward Island, passed prior to Confederation(*q*), dealt with libel both as a tort and a crime, the sections concerning libel as a crime being subsequently repealed by the Criminal Code, 1892(*r*), which applies to that Province

(*l*) R.S.B.C. 1897, c. 120, s. 2.

(*m*) C.S.N.B. 1903, c. 136, s. 2(1).

(*n*) R.S.N.S. 1900, c. 180, s. 1(a).

(*o*) R.S.M. 1902, c. 97, s. 2(a).

(*p*) R.S.M. 1902, c. 123.

(*q*) 52 Vict. c. 9, passed April 3, 1865.

(*r*) 55-56 Vict. c. 29(D,).

in common with the rest of the Dominion. The Act contains no express definition of a "newspaper," but the expressions "public newspaper or other periodical publication," and "printed newspaper, magazine, or other periodical publication," are used throughout the statute. The last expression is also used in the Provincial Evidence Act(*rr*).

The Quebec Act.

Quebec has no Libel Act, although endeavours have been made at different times to pass one, but the Revised Statutes, 1888, contain a series of articles, substantially the same as the sections in the Manitoba Newspaper Act, requiring registration of newspapers, and imposing penalties for non-registration(*s*).

The definition in the Criminal Code.

The Dominion Act of 1888, amending the criminal law of libel(*t*), contained a definition of a newspaper similar to that in the Manitoba Act. The definition in the Code is "any paper, magazine, or periodical," etc., published at intervals "not exceeding thirty-one days," and is otherwise the same as in the Acts above mentioned(*u*).

Origin of definition in Provincial Acts.

The definition of "newspaper" in these statutes is taken from the English Newspaper Libel and Registration Act, 1881(*v*), which in turn was taken from three separate clauses of Schedule A. to 6-7 Wm. IV. c. 76, each of which relates to a distinct class of publications. This Act was repealed by 33-34 Vict. c. 99 (Imp.), but the definition was subsequently revived in 44-45 Vict. c. 60 (Imp.), and thence found its way into our own law. The statute of William follows a series of Acts commencing with 10 Anne, c. 19, and ending with 60 Geo. III., and 1 Geo. IV. c. 9, which imposed stamp duties on certain publications designated as "newspapers," and affixed penalties for issuing them without stamps. Under the statute of Anne, for example, the *Spectator* was taxed as a pamphlet, and complaint is made of this by Addi-

(*rr*) 52 Vict. c. 9, s. 54.
(*s*) R.S.O. 1888, articles 2924-2938; R.S.M. 1902, c. 123.
(*t*) 51 Vict. c. 44, s. 1.
(*u*) See C.C. s. 2(22).
(*v*) 44-45 Vict. c. 60, s. 2.

son in one of the numbers. The schedule A. to 6-7 Wm. IV., taken in connection with the enacting part of the statute, was meant to be a legislative declaration of what should be deemed and taken to be "newspapers" within the stamp laws. The second and third clauses of the schedule, referring to publication "at intervals not exceeding twenty-six days," and the adoption of which in the Manitoba Act excludes monthly publications, first appeared in 60 Geo. III., and 1 Geo. IV. c. 9, s. 1, which was passed in 1819. That was "An Act to subject certain publications to the duties of stamps upon newspapers, and to make other regulations for restraining the abuses arising from the publication of blasphemous and seditious libels." The preamble to the Act shews that the interval of twenty-six days, between the publication of the parts or numbers, was adopted for the purpose of restraining the publication of papers "tending to excite hatred and contempt of the government and constitution of these realms as by law established, and also vilifying our holy religion." These papers, it is recited, were published in great numbers and at small prices, and it was "expedient that the same should be restrained" by the imposition of certain stamp duties from which theretofore they had been free and for which the Act provided. It thus plainly appears that the object of the statute, which first set limits to the time within which such papers should be published, was, firstly, to impose a duty upon a certain class of publications containing comments on current events of the day in church and state, and published within the prescribed intervals, but which had not been comprised in any prior enactment under the head of "newspapers"; and, secondly, the repression of such publications as being of a mischievous and dangerous character. None of these reasons are applicable to the monthly periodicals and trade papers which are excluded, by the definition of "newspaper," from the benefits of the Manitoba Libel Act above mentioned.

Attorney-General v. Bradbury & Evans (1851).

The *Attorney-General* v. *Bradbury & Evans*(*w*) is a decision touching the definition of a "newspaper" contained in 6-7 Wm. IV. c. 76, from which the definition in the Provincial Acts was originally taken. The defendants were charged, under the Act,

(*w*) (1851) 7 Ex. 96; 21 L.J. Ex. 12; 16 Jur. 130.

with having printed a newspaper on paper not duly stamped, and with liability for the penalty of £20 imposed by section 17 of the statute. The publication alleged to be a newspaper was entitled "The Historical Narrative of Current Events," from the 30th March to the 26th April, and related the proceedings in the Houses of Parliament and courts of law, and other events which had occurred during that period, but it was a part or number of a publication published periodically in parts or numbers at intervals "exceeding twenty-six days." The court (Pollock, C.B., Platt, B., Martin, B., Parke, B., *diss.*) held, that it was not a "newspaper" within the meaning of the Act, and so was not liable to the stamp duty.

Opinion of Pollock, C.B.

Pollock, C.B., said, that "a certain infrequency of publication gives to a periodical the character of a chronicle or history, and not that of a newspaper; and however it may afford useful information, as it is not likely successfully to compete with the daily or weekly papers, it has not been rendered liable to the stamp duty. An interval of more than twenty-six days is what, I think, the law has fixed as the criterion—if the interval be twenty-six days or less, it is a newspaper; if it be more, it is a chronicle—and the whole question turns on the distinction between news and history, which, I think, has been settled by the Legislature." Parke, B., who dissented, thought the defendants' publication contained all the elements of a "newspaper" within the meaning of the Act, and was liable to the duty imposed.

A daily sheet, issued by mercantile agency, a "newspaper" printed for sale within R.S.O. 1897, c. 68, s. 1.

The question what is a "newspaper" within the meaning of the Provincial Libel Acts, is discussed in an Ontario case in connection with an application for security for costs. The defendants, a mercantile agency, issued a daily printed sheet, called the *Daily Bulletin*, to persons who were subscribers to the agency, for the purpose of giving the information required by such subscribers. Having been sued for an alleged libel contained in one of the issues of the sheet, the defendants applied to a local judge for an order for security for costs, but the application was dismissed on the ground that the paper in question was not

a "newspaper" within the meaning of section 1 of the Libel Act defining a "newspaper." Upon appeal the order of the local judge was reversed, and the order for security allowed.

Opinion of Rose, J.

"I am of opinion," said Rose, J., who heard the appeal, "that the paper in question is a 'newspaper' within the meaning of section 1, of R.S.O. c. 68. I do not discuss this question at further length, for I think it is concluded by the judgment in *Attorney-General* v. *Bradbury* (1851), 7 Ex. 97. I refer especially to the judgment of Pollock, C.B., at p. 122, where he points out the distinction between news and history. Reference may also be made to *Hull* v. *King* (1888), 38 Minn. 349; *Kerr* v. *Hitt* (1874), 75 Ill. 51; *Railton* v. *Lauder* (1888), 26 Ill. App. 655; and other cases collected in the American and English Encyclopædia of Law, 1st ed., vol. 16, *sub tit.* 'newspaper.' I draw attention to that portion of section 1, of R.S.O. c. 68, which defines a newspaper as 'any paper printed in order to be dispersed and made public weekly or oftener, or at intervals not exceeding twenty-six days(*x*), and containing only, or principally, advertisements. This, I think, shews the intention of the Legislature to give a definition that is broad and comprehensive and not narrow. For some purposes the word 'newspaper' should be defined more strictly. By way of illustrating see *Beecher* v. *Stephens* (1878), 25 Minn. 146.

"But it remains to be considered whether this, being a newspaper, was 'printed for sale.' It appears from the evidence before me that the *Bulletin* is distributed in two ways: (1) by way of exchange with other newspapers; (2) by being sent to assignees, bailiffs and solicitors, in exchange for information supplied by such persons. It is not quite clear whether or not it is otherwise sold. The manager upon being examined said, in answer to a question: 'If I sell them I must get a contract, and let my bookkeeper know what is going on.' It is clear that the paper is not supplied gratis to subscribers. It may be that the contract, which is set out in the judgment of the Master, is one under which the company might, if it choose, supply information in a different way; but it is equally clear, as a matter of

(*x*) Thirty-one instead of twenty-six days was substituted by 6 Edw. 7, c. 22, s. 1(O.).

fact, that the contract refers by its heading to *The Daily Bulletin*, and I think it is a perfectly fair inference that it was the intention of both parties to the contract that the information supplied should be in the form of *The Daily Bulletin*. As long as the parties choose to supply and receive the information in this form, the sum paid by the subscriber to the company must be considered as the consideration for the supply of the paper. And, therefore, it was sold to the subscriber, and, being printed for the subscriber, was printed for him for sale.

Meaning of the words "printed for sale" to subscribers.

I see no distinction whatever between supplying the paper in consideration of a sum paid annually, and a sum paid for each number of the paper. I think the paper cannot be said to be less printed for sale, because it is printed for sale to a limited number. It has its own constituency to supply, in the same way as a religious newspaper, a political newspaper, a legal newspaper, a sporting newspaper, or the like. It seems to me, that the words 'printed for sale' are used in contradistinction to sheets that are printed for gratuitous circulation, as hand-bills, and even such as are within the definition 'newspaper' when they are of the class described by the words I have quoted, viz., 'papers printed containing only, or principally, advertisements' "(*y*).

This decision, which is applicable to all the Provincial legislation on the subject, has been accepted in the Ontario courts as a proper exposition of the law.

U.S. decisions. A journal containing general legal news and legal advertising, sale notices, etc., a "newspaper" in a limited sense.

The United States courts have also dealt with the matter in a variety of cases. In *Kellog* v. *Carrico et al.*(*z*) the question was, whether the St. Louis *County Legal Record and Advertiser*, a daily paper devoted to the dissemination of legal news, was a newspaper, and whether publication in it imported notice of a sale under a deed of trust. The Supreme Court of Mis-

(*y*) Slattery *et al.* v. R. G. Dun & Co. (1898) 18 O.P.R. 168.

(*z*) (1870) 47 Mo. 157.

souri held it was a newspaper, and that such notice was imparted by publication in its columns. "The paper," said Currier, J., who delivered the opinion of the court, "was devoted to the dissemination of general legal intelligence, and engaged extensively in legal advertising, including the publication of notices of sales under deeds of trust, and sales on execution, and all judicial sales. It was a law and advertising journal, and so, in a limited sense at least, a newspaper; for whether a newspaper or not is a question that cannot be determined by a consideration alone of the kind of intelligence it disseminated. It is not the particular kind of intelligence published that constitutes one publication a newspaper rather than another. Newspapers are devoted to the dissemination of intelligence on a great variety of subjects, such as politics, commerce, temperance, religion, and so on; and the law and legal topics and occurrences are not excluded from the range of newspaper enterprise. A paper devoted to the gathering up and dissemination of legal news among its readers is, or at least may be, a newspaper. I regard the *Legal Record* as a newspaper of that character."

A paper containing chiefly legal intelligence, but also items of general interest, is a "newspaper."

In *Kerr* v. *Hitt*(*a*) it was held, on appeal from the Superior Court of Cook County, Illinois, that the Chicago *Legal News* was a "newspaper" in which notices in legal proceedings might be published within the meaning of R.S. 1874, s. 5, referred to in *Railton* v. *Lauder* (*infra*). The *Legal News* was a weekly journal devoted principally to the dissemination of legal intelligence, but containing advertisements, references to passing events, brief notices of legislative bodies, and personal and political items of interest to the general reader as well as to the legal profession. "It comes," said Scott, J., "substantially at least within the definition given by lexicographers of a 'newspaper.' It is none the less a 'newspaper' because its chief object is the publication of legal news. Many newspapers published in this and other countries are devoted chiefly to special interests, such as religious and political newspapers, others devoted exclusively to literature, that contain advertisements, news items, personal and political, brief notices of matters of special public concern,

(*a*) (1874) 75 Ill. 51.

and reference to proceedings of legislative and other public bodies. So it is with this journal. Besides legal it contains other items of news, not only connected with the bench and bar, but others of a general interest." It further appears from the judgment of the court, that certain Acts of the state Legislature might "be regarded as a legislative construction and recognition of the fact [that] the Chicago *Legal News* is a newspaper in the sense that the term is used in the statute."

A paper specially devoted to the interests of the legal profession, but not adapted to the general reader, is not a "newspaper."

By general statute of the state of Minnesota, 1878, c. 65, s. 13, the publication of a summons issued by a justice of the peace is required to be "made in a newspaper." The *North-Western Reporter*, a weekly twelve-page publication, differing somewhat in size and shape from an ordinary newspaper, and purporting to be and in fact "devoted specially to the interests of the legal profession," the usual contents of which were the laws of the state of Minnesota, published shortly after their passage, the decisions of the Supreme Court of the state and of the Supreme Court of Wisconsin, and occasional decisions of other courts, a court directory, cards of attorneys, and counsellors-at-law, a list of transfers of real estate, . . . advertisements and notices of law books, and a page of miscellaneous business advertisements and legal anecdotes, was held by the Supreme Court of Minnesota not to be a "newspaper" within the meaning of the statute referred to, although it might properly enough be denominated a "legal newspaper." "Newspapers," said Berry, J., who delivered the judgment of the court, "are of so many varieties that it would be next to impossible to give any brief definition which would include and describe all kinds of newspapers. We are not called upon to incur the risk of giving any such definition at this time.

Usual meaning of "newspaper."

It will be sufficient, for all the purposes of this case, to say, that in the ordinary understanding of the word, a newspaper is a publication which usually contains, among other things, what is called the general news, the current news, or the news of the day; and nothing which does not usually contain such news,

and is intended for general circulation, is a newspaper, in the ordinary sense of the word. Such a newspaper is a publication adapted to the general reader. Now, in the absence of some controlling consideration to the contrary, the statute is to be taken to have used the word 'newspaper' in this its ordinary sense, or, as Gen. St. c. 4, s. 1, expresses it, 'according to the common and approved usage of the language'; and when the object of the publication of a summons is considered, the reasonableness of such a construction of the word 'newspaper' as requires the publication to be made where it will be likely to meet the eye of the general reader, is quite apparent''(*b*).

"A secular newspaper of general circulation."

A statute of the state of Illinois(*c*) provided, that "when any notice is required by law or contract to be published in a newspaper (unless otherwise expressly provided in the contract), it shall be intended to be in a secular newspaper of general circulation, published in the city, town, or county, or some paper specially authorized by law to publish legal notices, in the city, town, or county." The proof adduced in the court below shewed that the *Chicago Daily Law Bulletin* had been established and published in the city of Chicago for the period of about thirty years; that it was issued every secular day; that while its columns were largely devoted to legal matters and court notices, yet they contained various advertising matters, not being confined to such as related to any particular calling, and also news and information of a general and secular character, besides information of a legal character generally denominated legal news. It was also shewn that it had a general circulation throughout the city of Chicago and the county of Cook, among judges, lawyers and estate dealers, brokers, merchants and business men generally. It was held, on appeal from the circuit court of Cook county, Illinois, that the *Bulletin* was a secular newspaper of general circulation within the meaning of the statute; citing *Kerr* v. *Hitt* (*supra*); *Hermandez* v. *Drake*, 81 Ill. 34; *Kellog* v. *Carrico et al.* (*supra*)(*d*).

(*b*) Beecher v. Stephens (1878) 25 Minn. 146.

(*c*) R.S. 1874, s. 5.

(*d*) Railton v. Lauder (1888) 26 Ill. App. 655.

A denominational paper containing principally religious news, but also news of general interest, is a "newspaper."

The plaintiff sought to have a foreclosure by advertisement set aside, upon the ground that the notice of a sale was not published in a "newspaper," within the meaning of General Statute of the state of Minnesota, 1878, c. 81, s. 5. The notice of sale was published in the *Northwestern Presbyterian*, which, according to the finding of the trial judge, was a paper issued weekly, and containing principally religious news, and especially reading of interest to Presbyterians, but containing a column each week devoted to the general news of the day, embracing every sort of news of interest to the general public. The Supreme Court of Minnesota held the paper to be a "newspaper" within the meaning of the statute.

A general definition of the term.

"It would be unsafe," said Mitchell, J., who delivered the judgment of the court, "to attempt to give any definition of the term ['newspaper'] except the very general one that, according to the usage of the business world, and in ordinary understanding, a newspaper is a publication, usually in sheet form, intended for general circulation, and published regularly at short intervals, containing intelligence of current events and news of general interest (citing *Beecher* v. *Stephens* (1878), 25 Minn. 146; 4 Op. Atty. Gen. 10; Abb. Law. Dict. tit. 'newspaper'; and *Attorney-General* v. *Bradbury et al.* (1851), 7 Ex. 97, 103). But, if a publication contains the general and current news of the day, it is none the less a newspaper because it is chiefly devoted to the dissemination of intelligence of a particular kind, or to the advocacy of particular principles or views. Most newspapers are devoted largely to special interests, political, religious, financial, moral, social and the like, and each is naturally patronized mainly by those who are in accord with the views which it advocates, or who are most interested in the kind of intelligence to which it gives special prominence. But, if it gives the general current news of the day, it still comes within the definition of a newspaper: *Kerr* v. *Hitt* (*supra*); *Hernandez* v. *Drake*, 81

Ill. 34; *Kellog* v. *Carrico* (*supra*). . . . All that the statute requires is that the notice of foreclosure sale be published in a 'newspaper'; and, under the facts found by the court, we are of opinion that this publication is a 'newspaper,'' within the meaning of the statute''(*e*).

(*e*) Hull v. King (1888) 38 Minn. 349.

CHAPTER XVII.

NOTICE OF COMPLAINT BEFORE ACTION.

Notice of statements complained of in actions for newspaper libel.

In the Libel and Slander Acts of Ontario, New Brunswick and Manitoba, there are provisions protecting newspapers against actions for libel unless notice is first given of the statements complained of.

In Ontario.

Under the Ontario Act no such action shall lie unless and until the plaintiff has given to the defendant notice in writing, specifying the statements complained of, such notice to be served in the same manner as a plaintiff's statement of claim is served, or by delivering the notice to some grown up person at the place of business of the defendant(*a*).

In New Brunswick.

Under the New Brunswick Act(*b*) the notice must be five clear days in the case of a daily newspaper, and fourteen clear days in the case of a weekly or other newspaper, "in order to give the defendant an opportunity to publish a full apology for such libel." The notice may be served in the same manner as an ordinary summons.

In Manitoba.

Under the Manitoba Act(*c*) the notice must be three clear days in the case of a daily newspaper, and ten clear days in the case of a weekly newspaper, for the same purpose as under the New Brunswick statute; "and if the court or jury find that a full apology was published before the commencement of the action, the plaintiff shall not recover therein without proving special damage or actual malice."

(*a*) R.S.O. 1897, c. 68, s. 6(2).

(*b*) C.S.N.B. c. 136, s. 4.

(*c*) R.S.M. 1902, c. 97, s. 5.

The object of the notice and when to be given.

These provisions are confined to a "newspaper" as defined by the several Provincial Acts. The principal object of the notice is to enable the publisher to correct or retract the statements complained of, and, as expressly indicated in two of the statutes, to apologize for their publication. This, in most cases, will satisfy the complainant and prevent further proceedings. In Manitoba, as will be observed, a full apology before the writ is issued, is, if so found at the trial, a complete defence to the action unless the plaintiff proves either special damage, or actual, *i.e.*, express malice. The notice in every case must, of course, be given within the period during which an action may be brought under the Provincial law. In Ontario, as distinguished from the other Provinces, every action against the newspaper publisher must be commenced within three months "after the publication complained of has come to the notice or knowledge of the person defamed"(*d*), and must, of course, be preceded by notice of complaint under the statute. In no case, however, should the complainant sleep on his rights, or dilly-dally in asserting them. Where injured character or reputation is in question, the person aggrieved should be if anything more prompt than in other cases in formulating his grievance.

Form and contents of the notice.

Although little is said in the statute as to the form and contents of the notice beyond the statement of the defamatory matter complained of, the object and intention of the provision should be carefully observed, if only because the sufficiency of the notice is a condition precedent, and is indispensable to the bringing of the action. The notice should be either by the complainant himself, or by his solicitor expressly on his behalf; where it is signed by himself there can be no question about its validity in that respect. It will also be advisable to give the names, places of residence and additions, of both parties to the notice, *i.e.*, the prospective plaintiff and defendant, as well as the name of the newspaper, the date of the issue containing the defamatory matter, the heading of the article in which it appeared, and such further particulars as will plainly identify

(*d*) See comments on this section in the chapter on Defences to an Action of Defamation, under (9) Statute of Limitations.

it. The words or statements complained of should be fully and clearly set forth and defined(*e*), because they are the only words or statements which are actionable, and for which damages may be claimed(*f*). Where the language is either *primâ facie* innocent or ambiguous, it should be explained by an innuendo in order to make plain the real subject of grievance. It is important to remember that the meaning which the writer intended to convey is of less consequence than the sense in which the words are understood by the ordinary reader. The defamation and the damage consist, not in the secret intent of the writer, which may have been perfectly harmless, but in the apprehension of the reader.

Must comply strictly with the statute.

In other respects the notice of complaint and the service of it must be strictly in accordance with the statute. Where the newspaper is published by a company, and it is sought to hold the company liable, the notice should be addressed to the company, and not to the editor or the chairman of the board of directors(*g*). And where, under the Act, the alleged libel is against "any candidate for a public office," which means an elective office, the provisions of the statute governing his election, particularly as to the time when he actually becomes a "candidate," should be carefully examined, because it may affect the validity of the notice(*h*).

Notice essential as a matter of law and evidence.

As already observed, this statutory notice is indispensable in an action for a libel contained in a "newspaper." It is a condition precedent to the action, and if it is not properly given, the action will be premature, and, however malicious or injurious the libel may be, the plaintiff will "take nothing."

(*e*) See Bradlaugh *et al.* v. The Queen (1878) 3 Q.B.D. 607; Harris v. Warre (1879) 4 C.P.D. 125; Capital and Counties Bank v. Henty (1882) 7 App. Cas. 741; Solomon v. Lawson, 8 Q.B. 823, at p. 839.

(*f*) Obernier v. Robertson (1892) 14 O.P.R. 553.

(*g*) Burwell v. The London Free Press Printing Company (1895) 27 O.R. 6.

(*h*) See Conmee v. Weidman (1894) 16 O.P.R. 239.

The damages, how affected.

While, however, the cause of action and the damages claimed are limited to the defamatory matter stated in the notice, the plaintiff is not prevented from giving evidence which may enhance the damages. He may prove other libels against him by the defendant. These may be admitted in every case as evidence of malice(*i*). When so admitted the jury should be cautioned against awarding damages in respect of such other libels, because these may have formed, or may yet form, the subject of other proceedings, civil or criminal. The damages may also be aggravated by an unproved plea of justification. The defendant, on the other hand, is not confined in his defence to the statements set out in the notice. He may be able to mitigate their damaging character by having the whole article or paragraph containing the statements read and laid before the jury. The publication in its entirety will thus become evidence in the case, and may materially explain or qualify the language charged as defamatory, and possibly extract the sting altogether.

Conflict of opinion as to whether defamatory matter, not included in notice of complaint, can be struck out of plaintiff's pleading.

There has been some conflict of opinion as to whether defamatory matter contained in a statement of claim, but which was not included in the notice of complaint, can be struck out on a summary application.

Statement of claim must be confined to libels alleged in notice of complaint: Obernier v. Robertson (1892).

In *Obernier* v. *Robertson* (*infra*) the application was granted, but, in *Conmee* v. *Weidman* (*infra*), an order granting it by a local judge was rescinded on appeal. In the former action the publisher and proprietor of the *Evening Telegram* newspaper, of Toronto, was sued for defamatory statements contained in a report of a trial of a Division Court suit in which the plaintiff was defendant. It was alleged that the report was not a true, fair and accurate account of the trial, and of what took place thereat. Prior to bringing her action, the plaintiff served

(*i*) See cases cited in chapter on Malice.

the defendant with a statement in writing specifying the libellous matter complained of, which consisted of certain portions of the report in question, but not the whole of it. When the plaintiff delivered her statement of claim, she set forth therein the whole report of the trial as published by the defendant, and made this the basis of her claim for damages. The defendant then moved in Chambers to strike out of the statement of claim all those portions of the report which were not contained in the notice served prior to the action. The order asked for was refused on the strength of the decisions *infra*(*j*), which the learned Referee thought justified the insertion of the defamatory statements objected to by the defendant. Upon an appeal by the defendant to a judge in Chambers (Rose, J.) it was held, that the statement of claim must be confined to the statements complained of and specified in the notice served prior to the commencement of the action, and that the portions not so specified in the notice must be struck out.

Opinion of Rose, J.

"The statute," said Rose, J., "requires notice in writing specifying the statements complained of, and provides that, unless and until such notice shall be given, no action shall lie. It is manifest, therefore, that the plaintiff's claim must be confined to the statements complained of as specified in the notice in writing. The statement of claim in this case is not so confined. . . . The plaintiff must not throw upon the defendant the onus of going through a long article and determining whether or not he will be able, at the trial, to meet the claim as to the many paragraphs which appear in the article, and which are not set out in the notice. The defendant is called upon to meet the complaints made as set out in the notice, and no other . . . and is entitled to have the pleadings strictly follow the notice of action"(*k*).

This decision, it will be noticed, is based entirely on the words of the statute, and not, as in *Conmee* v. *Weidman* (*infra*), on

(*j*) Jones v. Bird, 5 B. & Ald. 837; Jones v. Nicholls, 13 M. & W. 361; Martins v. Upcher, 3 Q.B.D. 662; Smith v. West Derby Local Board, 3 C.P.D. 423; Union Steamship Company of New Zealand v. Melbourne Harbor Trust Comm., 9 App. Cas. 365.

(*k*) Obernier v. Robertson (1892) 14 O.P.R. 553.

the rule of pleading under the Judicature Act(*l*), which in the former case does not seem to have been considered.

Ontario Act not applicable to certain cases.

In *Conmee* v. *Weidman* the plaintiff had been a candidate for election to the Ontario Legislature. Under the Ontario Libel Act, the provisions of the section (6) as to notice, etc., shall not apply to the case of any libel against any candidate for a public office in the Province, unless the retraction of the charge is made editorially, in a conspicuous manner, at least five days before the election(*m*). By the Ontario Election Act(*n*), "candidate" means a person elected at an election to serve in the Legislative Assembly, and a person who is nominated as a candidate at such election, or is declared by himself or by others to be a candidate, on and after the day of the issue of the writ for such election, or after the dissolution or vacancy in consequence of which the writ has been issued.

Want of notice of complaint does not warrant summary dismissal of action, nor the striking out of paragraphs in statement of claim as to which no notice given.

The plaintiff was a candidate at the election held in June, 1894, for the purpose of returning a member to the Legislative Assembly of Ontario. The Assembly was dissolved, and the writ commanding the election to be held was issued on the 29th or 30th of May, 1894. The plaintiff brought this action in respect of several libels alleged to have been published by the defendant in his newspaper, some of them before the date of the writ for the election, and some after that date but before the election. No notice in writing under the corresponding section of R.S.O. 1897, c. 68, s. 6 (2) (3), was given by the plaintiff before action brought, and for this reason, upon an application by the defendant to the local judge, the libels alleged to have been published before the 29th May were ordered to be struck out, and the action dismissed as to those particular libels. Upon an appeal to a judge in Chambers (Ferguson, J.) this order was reversed.

(*l*) R. 387, now R. 261.

(*m*) R.S.O. 1897, c. 68, s. 6 (3).

(*n*) R.S.O. 1887, c. 9, s. 2(16), now R.S.O. 1897, c. 9, s. 2(8).

The learned judge held, that the plaintiff was not a candidate for a public office in Ontario, within the meaning of R.S.O. 1887, c. 57, s. 5 (2) (a)(*o*), before the date of the writ for the election; and that, as to the libels alleged to have been published before that date, a notice before action under the statute was necessary; but that the paragraphs of the statement of claim charging those libels could not (on the ground that the notice was not given), be struck out under Rule 387(*p*), nor the action as to them be summarily dismissed.

Opinion of Ferguson, J.

"Rule 387," said Ferguson, J., "authorizes a judge to order that a pleading be struck out on the ground that it discloses no reasonable cause of action or answer, and in such cases, or of the action being shewn by the pleadings to be frivolous or vexatious, the action may be stayed or dismissed. . . . The plaintiff was not, as I think, a candidate for a public office before the 29th or 30th day of May, and the giving of the notice is required by the Act, but it does not, in my opinion, follow that on its appearing that the notice was not given, the paragraphs could properly be struck out, or the action as to such paragraphs dismissed upon a motion—however inconvenient or fatal the failure to give the notice might be to the plaintiff at the trial. The fact of the giving of the notice, if it had been given, would not constitute any part of the pleading of the plaintiff. Such fact need not be stated in the pleading of the plaintiff at all, and each of these paragraphs discloses a reasonable cause of action. It does not appear by the pleadings, as I think, that any of such causes of action is frivolous or vexatious, and I am of the opinion that, in respect of these paragraphs, the order appealed from cannot be sustained"(*q*).

This decision conflicts, as already observed, with *Obernier* v. *Robertson* (*supra*), which is quite in accordance with the object of the statute, although Rose, J., seems to have regarded the pleading in that case as embarrassing apart from the statute. It also conflicts with *Gurney Foundry Co.* v. *Emmett et al.* (*qq*).

(*o*) Now R.S.O. 1897, c. 68, s. 6(3).
(*p*) Now rule 261.
(*q*) Conmee v. Weidman (1894) 16 O.P.R. 239.
(*qq*) (1904) 3 O.W.R. 382, 554.

Striking out matter in pleadings. Rule 298, O.J.A.

In this connection it may be noticed, that the court or a judge may, at any stage of the proceedings, order to be struck out or amended any matter in the pleadings, respectively, which may be scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action(*r*). A pleading tendering no issue, and containing unnecessary matter, may be struck out(*s*); or a defence alleging want of notice of action, where defendants were not entitled to notice of action(*t*); or, where there was a denial of the speaking of the words alleged, a paragraph admitting the speaking of other words (setting out the defendant's version of what he had said), and saying that they were true(*u*); or, in libel, a defence dividing the libel, and justifying as to part, leaving it doubtful which part was justified(*v*).

As a general rule a pleading should not be set aside on summary application unless plainly frivolous or indefensible(*w*). Formerly the party was left to demur, and, even though the pleading appeared to be demurrable, that was not a sufficient reason for striking it out(*x*). Now, however, that demurrers are abolished, it would seem to be proper to move, under Rule 261, O.J.A., in cases where that rule is applicable(*y*). It was held to be applicable, under the corresponding English Rule(*z*), in an action for libel against a solicitor respecting statements made by him in an affidavit made in an action on an interlocutory motion(*a*). Whatever may be said as to the rule being only applicable where the nature of the action or defence is disclosed by the pleadings, affidavits for that purpose have been admitted

(*r*) R. 298, O.J.A.

(*s*) Brock v. Tew (1897) 18 O.P.R. 30.

(*t*) McCarthy v. Vespra (1895) 16 O.P.R. 416.

(*u*) Rassam v. Budge (1893) 1 Q.B. 571; 68 L.T. 717.

(*v*) Fleming v. Dollar (1889) 23 Q.B.D. 388.

(*w*) Holmested & Langton's Ont. Jud. Act, 2nd Ed., p. 477.

(*x*) Glass v. Grant (1888) 12 O.P.R. 480; Stratford v. Gordon (1892) 14 O.P.R. 407; Daley v. Byrne (1892) 15 O.P.R. 4.

(*y*) *Ibid.*

(*z*) (1883) R. 288.

(*a*) Gompas v. White (1890) 6 T.L.R. 20; 54 J.P. 22.

in some cases(*b*); and there seems no good reason why affidavits should not be used and acted upon in cases similar to *Obernier* v. *Robertson* (*supra*).

Insufficient notice of complaint to newspaper company.

In the case of newspaper publishing companies, a notice by a complainant specifying the statements complained of, addressed to and served upon the editor of the paper, or a similar notice, addressed to and served upon the chairman of the board of directors, is insufficient. The notice must comply strictly with the words of the statute, and be a notice to and served upon the company in order to make the company liable in a subsequent action. In an action against a newspaper company, the notice complaining of the publication, given in pursuance of R.S.O. 1887, c. 57, s. 5 (2)(*c*), was addressed to the editor of the newspaper, and was served on the city editor at the company's office, and a similar notice, after the publication of substantially the same article in the evening edition of the paper, was addressed to and served on the chairman of the board of directors at the same office. The notice signed by the plaintiff's solicitors was as follows: "To the Editor of the London 'Free Press': Take notice that we are instructed by Beverly Burwell of this city, that he complains of the following article which appeared in the morning issue of the 'Free Press' on Monday, the 14th of January, 1895, on the ground that the same is untrue, and that this notice is given in pursuance of the R.S.O. c. 57, and amending Acts, and we hereby give notice of his complaint to the said article. The following is the article complained of": (quoting the article).

Opinion of Meredith, C.J.

Upon a special case stated, in which the question for decision was as to the sufficiency of this notice, Meredith, C.J., before whom the case was argued, said: "Is this a notice to the defendant such as is required by sub-section 2? I think not. The statute requires that the notice shall be given to *the defendant* in the action. The defendant is in this notice not referred to in any way, and, having regard to the fact that the editor to whom

(*b*) See Republic of Peru v. Peruvian Guano Co., 36 Ch. D. 489.

(*c*) Now R.S.O. 1897, c. 68, s. 6(2).

it is addressed might be personally liable to an action for the libel, and is equally with the publishers entitled to notice, under sub-section 2, before such an action could be maintained against him, I cannot, I think, treat the notice as one addressed to and intended for the defendant. It appears to me that it is such a notice as the editor himself would be entitled to receive if an action were intended to be brought against him. It may be urged that there is nothing substantial in the objection, as the notice must have come to the knowledge of the defendants, and that, had there been no address upon it, and had it been served upon the editor at the place of business of the defendant, it would have been a good notice(*d*); but I think that this does not help the plaintiff; the notice being addressed to the "editor" there was no duty cast upon him to bring it to the notice of the defendants. He may have dealt with it as a notice to himself personally, with which the defendants had no concern, and may not have brought it to the notice of the defendants. However that may be, the statute requires that notice in writing should be given to the defendant, and I have no right to substitute something else for that which the Legislature has made a condition precedent to the bringing of the action. It appears from the case that a similar notice, after publication of substantially the same article in a subsequent edition of the newspaper, was served upon the chairman of the board of directors of the defendant company, but this does not, I think, help the plaintiff, as the notice, being in the same form as the one I have been dealing with, is open to the same objection which I have held to be fatal to it; and besides this, there is nothing to shew that the action is brought for libel contained in the second publication, and the notice, not being in that case directed to the libel complained of in the action, is of no avail. The question for decision must, therefore, be answered in the negative. See *Hider* v. *Dorrell*, 1 Taunt, 383"(*e*).

The objection to the notices in this case, it will be observed, was to the *address* of the notices, *i.e.*, the parties to whom the notices were directed, and not to the *service*. Neither notice was addressed or given to the company, who were the parties really complained against, and whom, in the event of an action, the

(*d*) Archbold's Common Law Practice, 14th Ed., 210.

(*e*) Burwell v. London Free Press Printing Company (1895) 27 O.R. 6.

plaintiff would seek to make liable for damages. The service of the notices appears to have been in accordance with the statute, which permits "delivering the notice to some grown up person at the place of business of the defendant."

Omission to serve notice of complaint where action for libel and other wrongs.

Where the action is for a newspaper libel and other alleged wrongs, it should not be dismissed, on an interlocutary application, for an omission to serve the newspaper publishers with notice of complaint. The statement of claim alleged that the defendants, the publishers of the *Toiler* newspaper and members of certain labor unions, wrongly and maliciously published and circulated hand-bills, circulars and newspapers owned and controlled by them, describing the plaintiffs as unfair and their goods as unfair, and of inferior quality, and manufactured by apprentices and incompetent workmen, and requesting, persuading and advising the friends of labor and the public generally not to buy the plaintiffs' goods, and to break up their business, unless certain demands of the union were complied with. It was held by MacMahon, J., in Chambers, that the action being really one for libel, and no notice of complaint having been served on the newspaper publishers, the action would not lie, and he dismissed it, referring to *Burwell* v. *London Free Press Publishing Co.*, and *Obernier* v. *Robertson* (*supra*). Upon appeal to the Divisional Court it was held, that the order was improvident in striking out the whole claim against the defendants; that the claim for libel might alone have been struck out; but that it was better to leave the whole claim to be dealt with at the trial, with leave to plaintiffs to amend, and with leave to the newspaper publishers to plead the want of notice. The litigation could not be stopped by cutting off part of it(*f*).

(*f*) Gurney Foundry Co. v. Emmett *et al.* (1904) 3 O.W.R. 382, 554.

CHAPTER XVIII.

Publication in Newspapers.

Defects in mode of proving publication in newspapers.

Although there has been a good deal of legislation in the Provinces with respect to newspaper libel, proof of publication in a newspaper is not generally provided for. In Manitoba and Quebec there are registration Acts for the purpose. There are also enactments in the New Brunswick Act, and in the Prince Edward Island Evidence Act, which are designed to fix responsibility for publication; but there are none in the statutes of the other Provinces. This defect in the law has not escaped judicial notice. See the remarks suggesting amendments, by Burton, J.A., and Osler, J.A., in *D'Ivry* v. *World Newspaper Co.*(*a*).

Mode of proving publication under "The Newspaper Act" of Manitoba.

Under "The Newspaper Act" of Manitoba(*b*), the printers, proprietors and publishers of any newspaper, pamphlet, or other paper, are required to file in the public office named in the Act an affidavit containing particulars of their names, descriptions, and places of abode, etc., and of the shares or interest of the proprietors in such newspaper, etc.; also true descriptions of the building wherein the newspaper, etc., is to be printed, and the title of the newspaper, etc. A new affidavit is required when any changes take place which are covered by these particulars. A certified copy of this affidavit is made *primâ facie* evidence against the deponents and others of the contents of the affidavit, and the production of such copy dispenses with proof that the newspaper, etc., was purchased at the defendant's office. So that if a certified copy of an affidavit, made and filed in accordance with the provisions of this statute, be produced at the trial, it will be sufficient to prove publication of any defamatory matter contained in a newspaper published in the Province of Manitoba.

(*a*) (1897) 17 O.P.R. 387, at pp. 390, 393.
(*b*) R.S.M. 1902, c. 123.

Benefits of newspaper registration.

It should be noticed, however, that no persons or corporation, who have not complied with the provisions of "The Newspaper Act" of Manitoba, shall be entitled to the benefit of any of the provisions of the Libel Act of that Province(*c*). Failure to register a newspaper under the former of those two Acts would also deprive the general public of the benefits of that Act, under which proof of publication is greatly facilitated. The want of an easy method of proving who are responsible for the publication of newspapers, is one of the principal defects in the procedure for civil actions for libel in most of the Provinces. There is the same defect in the procedure in criminal prosecutions for libel, the Code having made no provision for that purpose.

Proof of publication under the Quebec Act.

The Quebec Act(*d*) is substantially the same, with respect to proof of publication, as the Manitoba Act.

Mode of proving publication in New Brunswick.

Under the Libel Act of New Brunswick, the publisher of a newspaper is not entitled to the benefit and protection of the Act, unless he publishes his name as such publisher in a conspicuous place in his newspaper, and a copy of the newspaper, with the name of the defendant so published, is sufficient evidence in all courts of publication of the newspaper by the defendant(*e*).

Proof of publication in Prince Edward Island.

The Prince Edward Island Evidence Act provides that evidence may be given of the printing or publishing of the libel by the production of the newspaper, magazine, or other publication containing it, and which shall be proved to have been published or printed by the defendant, or by his authority, express or implied, and it shall be *primâ facie* evidence of such printing and publishing to produce any printed document containing the libellous matter complained of, and which, among other printed matter contained therein, purports to be printed and

(*c*) R.S.M. 1902, c. 97, s. 14, and c. 123, s. 16.

(*d*) R.S.Q. Title VII., ss. 2924-2938.

(*e*) C.S.N.B. 1903, c. 136, s. 11.

published by the defendant, together with the testimony of any competent witness, who shall, on oath, state to the effect that he knows the defendant, and verily believes that the printed paper, so offered in evidence, has been printed or published by the authority, express or implied, of the defendant(*f*).

Usual mode of proving publication.

In the absence of any statutory directions for proving the publication of a newspaper, the mode of proof usually resorted to is the purchase of a copy of the paper at the office of publication and marking it for identification at the trial. The sale of the copy, under such circumstances, has been usually regarded as a publication of everything contained in the paper. The common law mode of proof is stricter than this, because it is said to require some substantial proof of publication by the party against whom the action is brought, or by his direction or authority; and such proof is not established by the mere production in court of a newspaper containing the libel, and bearing the names of the printers and publishers at the foot thereof, although supported by evidence that the witness believes such persons to be the printers and publishers, and that the copy produced was purchased by him at the office of publication(*g*). The mode of proof we have mentioned, however, has been accepted by the courts in England and this country, and there does not appear to be any other reported decision going the length of the case just mentioned(*h*).

Opinions have also been expressed, in some of the cases, that publication of defamatory matter in a newspaper is provable by evidence as to the type and make-up of the paper; the insertion and payment of advertisements therein; the identification of a printed copy produced at the trial; the admission of publication by the business manager of the paper; and the reading of the defamatory matter by subscribers in copies of the paper received by mail.

(*f*) Statutes of P.E.I. 1889, 52 Vict. c. 9, s. 54.

(*h*) Reg. v. Stanger, L.R. 6 Q.B. 352; 40 L.J.Q.B. 96; 19 W.R. 640.

(*h*) See Duke of Brunswick v. Harmer (1849) 14 Q.B. 185; Reg. v. Wilkinson (1877) 41 U.C.Q.B. 1; Crosskill v. Morning Herald Printing and Publishing Co. (1883) 16 N.S.R. (4 R. & G.) 200.

Publication provable by evidence as to the type and make-up of the newspaper.

In a case against the publishers of the Halifax *Morning Herald*, in which the defendants denied publication, a letter was put in evidence from plaintiff's solicitors to C., the business manager of the defendant company, referring to the statement as false, and demanding reparation. In answer to this letter the following letter was received in the hand-writing of the business manager, who had shewn the letter to the editor: "The editor of the *Herald*, referring to (the solicitors') letter, requests that they state what reference they wish to make to the matter in the *Herald*. If the statement as published is now denied by (plaintiff), the editor is willing to accord to him the benefit of such denial." C., who had been a practical printer, testified that he had knowledge of the make-up of the paper, and that there were advertisements in a copy of the paper tendered in evidence that were charged for by the defendants; but the trial judge declined to receive a question as to C.'s belief that the paper tendered was the one issued by the defendant. Upon a motion to set aside a voluntary nonsuit the court held, that the evidence of C., as to the make-up of the paper, should have gone to the jury (Ritchie, E.J., not concurring in, or at least doubting, this ruling) (*i*).

Publication provable by evidence that copy of paper tendered is genuine. Opinion of McDonald, J.

As to the copy of the paper tendered in evidence to prove publication, and rejected by the trial judge, McDonald, J., said: "It must not be forgotten that the defendant company is an incorporated body, having a statutory legal existence for the very purpose of printing and publishing the paper called the *Morning Herald*, the corporate name being 'The *Morning Herald* Printing and Publishing Company,' and, as we are obliged to take judicial notice of that statute, the difficulty which sometimes occurs in proving the proprietorship of newspapers, in cases of defamation, is very much obviated in this case. Therefore the question appears to me to be whether or not the *Herald*, which was tendered in evidence and rejected by the learned

(*i*) Wright v. Morning Herald Printing and Publishing Co. (1881) 14 N.S.R. (2 R. & G.) 398; 2 C.L.T. 106.

judge, was a genuine issue of the *Herald* for the publication of which the defendant company procured an act of incorporation. If it was a genuine copy—or rather a duplicate copy—the corporation is liable; if a spurious one the plaintiff must fail. Courts of justice in this Province have gone very far in requiring the most ample and strict proof of publication in actions for libels against newspaper proprietors, sometimes, as I think, further than the interests of justice demanded; and I do not think we should continue to go, in that direction, beyond the limit to which precedent and authority necessarily carry us. In *Johnston* v. *Hudson & Morgan*, reported in the American edition of the English Common Law Reports, No. 34, p. 139, and referred to in *Watts* v. *Fraser* (1835), 7 Ad. & El. 233, Coleridge, Justice, said: 'There is no rule respecting the proof of identity peculiar to the case of a printed paper; the evidence may depend upon correspondence in size, appearance, and other circumstances'; and Lord Denman, C.J., said: 'If we drop the recollection that this was a printed paper, and examine the question of its identity, as one would the identity of a bale of goods, it is clearly impossible to say that there is not some evidence.' Is there not some evidence here?'' The learned judge then referred to the fact that C., the business manager, testified uncontradicted, that he had been the business manager of the defendant company's paper for five years; that he was a practical printer; that he had knowledge of the type and of the make-up of the paper; and that, after so testifying, the court declined receiving a question as to the witness's belief that the paper tendered was the one issued by the defendants. ''I am of opinion,'' he said, ''that the evidence ought to have been received. True, it may not be the strongest kind of evidence, but as the witness was proved to be a practical tradesman, and, therefore, to a certain extent, an expert, in whom the defendant company placed sufficient confidence to employ him as the business manager of their paper, I think that his opinion ought to have been received for whatever it was worth and duly weighed: Taylor on Ev. 1226, 1227''(*j*).

(*j*) Wright v. Morning Herald Printing and Publishing Co. (1881) 14 N.S.R. (2 R. & G.) 398.

Advertisements as evidence of publication. Opinion of McDonald, J.

The business manager also testified, as a matter of fact within his knowledge, that there were advertisements in the copy of the paper shewn him which were charged for by the defendants, and he pointed out and identified the advertisements to which he referred. As to this McDonald, J., said: "That this was evidence of publication I think there can be no doubt. The witness was himself a party to the publication of both the libel and the advertisements in the paper produced. He identified them for the reasons which he gives, and I think that his evidence ought not to be ignored. It is true that, on the following day, he gave evidence somewhat conflicting with that just referred to, but whether he told the truth on the first day or the second, was, in my opinion, a question of fact to be decided, not by the judge, but by the jury"(*k*). Proof that the defendant accounted for the stamp duties of the paper in question has also been held to be proof of publication(*l*).

The evidence of subscribers in proof of publication.

In the case of *Wright* v. *Morning Herald* (*supra*) the trial judge expressed the opinion that the fact which could have been easily proved in every case, that subscribers to the papers sent to them by mail had read the libel in their several copies, he thought clearly insufficient. "Now I think," said McDonald, J., "that this is a correct view of the law, provided the paper which the subscriber received in due course and read was not produced, or its loss or destruction proved. The contention of the plaintiff's counsel, however, is that but for this expressed opinion of the learned judge, subscribers would have been produced as witnesses with the papers received by them, in due course, to be given in evidence, and that they were ready in court for that purpose."

In the same case the trial judge also said that, in the absence of a statute, he was inclined to think that it was necessary to shew a deliberate admission by the defendant, or a producing of the paper by purchase or delivery at the office of the news-

(*k*) *Ibid.*

(*l*) Cook v. Ward, 6 Bing. 408.

paper, or of an authorized agent, and producing the paper so admitted or procured. "In this view of the law," said McDonald, J., "the evidence of parties receiving by mail, in the ordinary course, a paper to which they were subscribers and for which they may have paid, together with the paper itself, so received, would have been entirely excluded, and, in the face of that clearly expressed opinion of the court, it would have been not only useless but rather disrespectful to the court to press for the reception of such evidence. It appears to me that, under the circumstances, the learned counsel for the plaintiff adopted the proper professional course in deferring to the opinion of the judge, who at once gave him a rule *nisi* to set the nonsuit aside"(*m*).

Other evidence of publication.

The publishers of the Halifax *Morning Herald* were also sued for the publication of an article "Concerning Martyrs" in which the plaintiff, the Deputy Provincial Secretary of Nova Scotia, was charged, among other things, with being a willing and active participator in an office which, for eleven years, was a sink of iniquity, wherein public robbery ran riot, and where political villainy of almost every species was concocted and perpetrated. He was also charged with lacking fidelity and honesty, and it was said that, if his name was to be placed on the roll of martyrs, it must be in the same list with the chief baker whom Pharaoh hanged. The verdict for the plaintiff for $3,000 damages was moved against on the ground that there was no proof of the publication of the alleged libel by the defendants. The Supreme Court of Nova Scotia held that the following evidence of publication was sufficient to go to the jury, namely, the production of a copy of the paper identical with the paper in question; the evidence of a vendor of defendants' papers; the evidence of a subscriber who read the libel in the copy of the paper produced, which he believed to be genuine; the production of a copy of the paper in question bought at the office of publication and marked; the evidence of practical printers as to the genuineness of a duplicate copy of the paper produced.

McDonald, J., said that he had already, for the purpose of shewing that there was no misdirection, referred to several cases

(*m*) *Ibid.*

of libel in which evidence, not so strong as this, was held fit to be submitted to juries, and in which their verdicts against the defendants were upheld, as would be seen by reference to *Regina* v. *Lovett*(*n*); *Fryer* v. *Gathercole*(*o*); *Chubb* v. *Flannigan*(*p*); and *Lewis* v. *Marshall*(*q*). But the case which seemed to him to be decisive was *Johnston* v. *Hudson & Morgan*(*r*), which is referred to in the judgment in *Wright* v. *Morning Herald Printing and Publishing Company* (*supra*)(*s*).

Admissions in defendant's letters as proof of publication.

In an action for libel against the publishers of the *Morning Herald* and the *Evening Mail* newspapers of Halifax, N.S., letters written by the defendants referring to articles which appeared in the *Herald* and *Halifax Herald* were relied on as admissions of publication by the defendants; but the papers tendered as containing the articles were rejected on the ground that the letters did not in terms name the *Morning Herald* in which the publication was alleged, and which was the title of the papers produced; and the case was withdrawn from the jury. It was held, that the evidence was admissible, there being evidence that the names used referred to one and the same paper, and that the question, whether the paper referred to in the admissions was identical with that in which the publication was alleged, was a question of fact that should have been left to the jury with proper instructions. *Crosskill* v. *Morning Herald Printing and Publishing Company* (*supra*) was referred to and approved(*t*).

Prima facie proof by newspaper employees.

A *primâ facie* case of publication of a newspaper was held to be established by a person who worked in the printing office of the defendants at the time the newspaper which contained the libel was printed, and who deposed that such paper was

(*n*) 9 C. & P. 462.

(*o*) 4 Ex. 262.

(*p*) 6 C. & P. 431.

(*q*) 7 M. & G. 744.

(*r*) (1836) 7 A. & E. 233.

(*s*) Crosskill v. Morning Herald Printing and Publishing Company (1883) 16 N.S.R. (4 R. & G.) 200.

(*t*) Handspiker v. Adams (1888) 21 N.S.R. (R. & G.) 147.

printed and circulated with the knowledge and by the desire of the defendants. The defendants, as stated in the judgment of the court, had a right to meet and explain this evidence by other testimony exculpatory of their conduct, but, as they did not do so, it must be presumed it was not in their power, and, therefore, the case made out by the plaintiff remained untouched(*u*).

A newspaper is "published" when and where it is offered to the public by the proprietor.

It has been held in England, that a newspaper is published when and where it is offered to the public by the proprietor. It may be published in more than one place, and where the proprietor has two offices in two different towns, at each of which he offers for sale or distribution copies of his paper, the paper is published at each office. In *McFarlane* v. *Hulton*(*v*), the plaintiff had purchased from the defendants *Bell's Life in London* under an agreement by which the defendants were not to print or publish any sporting paper within ten miles of 31 Bouverie street, London. He claimed an injunction to restrain the defendants from publishing three sporting papers at 68 Fleet street, to which, subsequent to the agreement in question, the defendants had removed their London business, and which was within the forbidden area. The principal office of the defendants was at Manchester where their sporting publications were printed. Parcels of these publications were sent from Manchester to a distributing agent in London, who delivered them to the various persons to whom they were addressed, and one of the parcels was delivered at the defendants' Fleet street office, where copies of the papers were sold, exchanged, etc. Two of the defendants' papers, the *Sporting Chronicle* and the *Athletic News*, formerly had an office in the same building as *Bell's Life* in Bouverie street. This was not called a publishing office. It was an office at which advertisements were received and other business done, but the business done by defendants at Bouverie street, when the agreement was made between the parties, was substantially of the same nature as that done subsequently, and at the time the action was brought, at 68 Fleet street. At this latter office the defendants had had painted up

(*u*) Brown v. Hirley *et al.* (1839) 5 U.C.R. (O.S.) 734.

(*v*) (1899) 1 Ch. D. 884; 68 L.J. Ch. 408; 80 L.T. 486.

a notice in these words: "Sporting Chronicle and Athletic News Advertising and Publishing Office"; but, after action brought, the words "Publishing Office" were painted out.

One of the questions at the trial was, whether the defendants were "publishing" their papers in Fleet street. Numerous witnesses were called as to the meaning of the word "publication," and it was argued for the defendants that their papers were not published in Fleet street, but in Manchester; that "publishing" a newspaper is bringing it into existence for the purposes of sale, the word "publishing" in that sense not being the same as when used in speaking of a libel; that the defendants' papers were the property of the distributing agent from the time the carriers received them, and that he was not defendants' agent; and that a newspaper is published once for all; it could not, at any rate as a rule, be published in more than one place.

Opinion of Cozens-Hardy, J.

Cozens-Hardy, J., who tried the action and granted the injunction as to two of the defendants' papers, but not as to the third, the *Athletic News*, as not being a sporting paper within the meaning of the agreement, said: "What is the meaning of 'publishing' a newspaper? It is plainly something different from printing it. I see no reason why a newspaper should not be published in more than one place. In fact, my attention has been called to two well-known newspapers which are expressly stated to be published in several towns. . . . It seems to me that a paper is published when and where it is offered to the public by the proprietor." He had endeavoured to ascertain the meaning of the word "publish," and had "come to the conclusion that, where a newspaper proprietor has two offices, one in Manchester and the other in London, at each of which he offers for sale or distribution copies of his paper, the paper is 'published' at each office. I cannot forget that the defendants themselves described their Fleet street office as a 'publishing office'; and although this circumstance would not suffice to make it a publishing office if it were clearly not so, I think, in a case of doubt, it is not unreasonable to hold that the defendants have rightly described what they do in Fleet street. It can make no difference that, since action brought, they have painted out the words 'publishing office'"(*w*).

(*w*) McFarlane v. Hulton (1899) 1 Ch. D. 884; 68 L.J. Ch. 408; 80 L.T. 486.

Publication in criminal cases.

Under the Criminal Code "publishing a libel is exhibiting it in public, or causing it to be read or seen, or shewing or delivering it, or causing it to be shewn or delivered, with a view to its being read or seen by the person defamed or by any other person"(*x*). The posting by the defendant of a libellous letter is publication, both in the place in which it is posted and in the place to which it is addressed(*xx*). If the person to whom the letter is sent is not at the address named on the envelope, and the letter is forwarded to him at another place, where he receives and reads it, there is publication in that place(*y*). Where a libel is dated at a certain place, the date is evidence that it was written there(*z*). The post mark on the envelope of a letter is *primâ facie* evidence that the letter was in the post office named on the date of the mark(*a*); but the post mark should be proved, and, if possible, proved by the person who made it(*b*). Where there is publication to a third person, most of these cases will apply in civil actions for damages.

Quebec cases.

The plaintiff, residing in Quebec, brought an action there against the defendants for a libel contained in their newspaper, which, although published in Montreal, where the defendants resided, was also circulated in Quebec. Declinatory exception was filed, on the ground that the publication of the libel, if any, was in Montreal only; but it was held, dismissing the exception, that a person who mails in Montreal libellous matter to be received and read by individuals and in a public reading room in Quebec, publishes that matter in Quebec(*c*). But where the

(*x*) C.C. s. 318.

(*xx*) R. v. Girdwood, 1 Leach, 169; East, P.C. 1116, 1120, 1125; R. v. Holmes, 12 Q.B.D. 23; R. v. Burdett, 4 B. & Ald. 95; R. v. Watson, 1 Camp. 215.

(*y*) R. v. Watson, *supra;* Warren v. Warren, 1 C. M. & R. 250.

(*z*) R. v. Burdett, *supra.*

(*a*) R. v. Plumer, Russ. & Ry. 264; R. v. Johnson, 7 East, 65; 29 How. St. Tr. 103; R. v. Canning, 19 St. Tr. 370; Stocken v. Collin, 7 M. & W. 515.

(*b*) Woodcock v. Houldsworth, 16 M. & W. 124; Abbey v. Lill, 5 Bing. 299.

(*c*) Irvine v. Duvernay *et al.* (1878) 1 L.N. (S.C.) 138; Q.L.R. 4 (S.C.) 85.

original printing and publishing was alleged to have taken place in the district of Terrebonne, and there was only a general allegation that the newspaper in which it appeared circulated in the district of Montreal, the court would not allow evidence of the publication of the special article in the district of Montreal(*d*). An action based upon a libel, and claiming damages incurred in a certain district other than that in which defendant has his domicil, and in which the newspaper containing the alleged libel is printed, may be begun in such district(*e*).

Criminal responsibility of proprietor of newspaper.

The Criminal Code contains several articles specially affecting the criminal responsibility for publication in newspapers, and for publication arising from the sale of defamatory matter either in newspapers, books, magazines, etc., or by an employer's servants. The fact that the proprietor of a newspaper was not aware of the insertion in his paper of the particular defamatory matter, although not a valid defence in civil actions, is recognized by the criminal law, and may excuse his responsibility. Every proprietor of any newspaper is presumed to be criminally responsible for defamatory matter inserted and published therein, but such presumption may be rebutted by proof that the particular defamatory matter was inserted in such newspaper without such proprietor's cognizance, and without negligence on his part(*f*).

The proof required of proprietor's negligence.

General authority given to the person actually inserting such defamatory matter to manage or conduct, as editor or otherwise, such newspaper, and to insert therein what he in his discretion thinks fit, shall not be negligence within this section unless it be proved that the proprietor, when originally giving such general authority, meant that it should extend to inserting and publishing defamatory matter in any number or part of such newspaper(*g*).

(*d*) Reg. v. Hickson (1880) 3 L.N. (Q.B.) 139.

(*e*) Gosselin v. Belley (1901) 4 Q.P.R. 233.

(*f*) C.C. s. 329(1).

(*g*) *Ibid.* (2).

Criminal responsibility of seller of libel in newspaper.

No one is guilty of an offence by selling any number or part of such a newspaper, unless he knew either that such number or part contained defamatory matter, or that defamatory matter was habitually contained in such newspaper(*h*).

Criminal responsibility of seller of libel in book, magazine, etc.

And as to selling libels generally it is enacted, that no one commits an offence by selling any book, magazine, pamphlet, or other thing, whether forming part of any periodical or not, although the same contains defamatory matter, if, at the time of such sale, he did not know that such defamatory matter was contained in such book, magazine, pamphlet, or other thing(*i*).

Criminal responsibility of employer where sale by servant.

The sale by a servant of any book, magazine, pamphlet, or other thing, whether periodical or not, shall not make his employer criminally responsible in respect of defamatory matter contained therein, unless it be proved that such employer authorized such sale knowing that such book, magazine, pamphlet, or other thing, contained defamatory matter, or, in case of a number or part of a periodical, that defamatory matter was habitually contained in such periodical(*j*).

Defendant must be proprietor or publisher at the date of the libel.

(Per Dorion, C.J.)

Evidence that the defendant in a criminal prosecution is, at the time of the trial, editor and proprietor of the journal in which the libel was printed, is insufficient. The defendant should be proved to have been proprietor or publisher at the date of publication. "This," said Dorion, C.J., who was trying the case, "is not a question for a jury. It is a question of law for the judge to decide whether there is evidence or no evidence. When there is evidence to go to the jury they have to decide whether it is sufficient or not, but it is a matter for the court to decide whether there is evidence or not. It is my duty, in this case, to say that there is no evidence to go to the jury of the defendant

(*h*) C.C. s. 329 (3).

(*i*) C.C. s. 330(1).

(*j*) *Ibid.* (2).

being the proprietor or publisher at the date of the libel, and it will be your duty to acquit the defendant for that reason"(*k*). See, also, *Macleod* v. *Wakley*(*l*), in which it was held, that defendant's admission that he was the editor of a periodical at a certain date was not sufficient to connect him with a libel published in the same periodical at a later date.

Insufficient proof of publication on account of newspapers not being filed or read at close of plaintiff's case.

Proof of publication has sometimes been defeated on what would now appear to be extremely technical grounds. In an action for a libel published in certain newspapers, copies of the papers in which the libel appeared were proved by the plaintiff at the trial, but they were not put in by him and filed or read when he closed his case. The defendant's counsel said he would not call witnesses. The plaintiff then desired to have the papers read. The defendant's counsel objected to this, as they had not been put in and read at the proper time. The trial judge was of opinion that the plaintiff could not, at that stage of the proceedings, as of right, put in and read the papers, but permitted him to do so, reserving leave to the defendant to move to enter a nonsuit if, according to the strict practice, the plaintiff had not pursued the proper course. The case then proceeded and a verdict was found for the plaintiff and $1.00 damages. Upon a motion to enter a nonsuit, it was held, that the evidence offered was not admissible, except in the discretion of the trial judge, who had not exercised it in the plaintiff's favour; and, therefore, the rule for a nonsuit should be made absolute(*m*).

This decision strikes one as exceedingly technical and not a proper exercise of judicial discretion. We doubt very much whether the courts of Ontario, under their present practice, would accept the decision as a precedent in any similar case. The reasons for the nonsuit, even though supported by authority, can hardly be regarded as satisfactory.

(*k*) Reg. v. Sellars (1883) 6 L.N. 197.

(*l*) (1828) 3 C.P. 311.

(*m*) Cross v. Richardson (1863) 13 U.C.C.P. 433.

Publication by insertion of a libel in newspaper at defendant's request.

The defendant caused to be published in a newspaper called the *Liverpool Transcript*, under the heading "Caution to the public," a copy of a promissory note made by plaintiff in favour of defendant with the following words underwritten: "The maker of the above note has availed himself of the Statute of Limitations and refused payment." This was signed by the defendant, and was alleged to impute dishonesty to the plaintiff in his business dealings. Upon the motion by defendant for a new trial it was argued that the proof of publication was insufficient, for, although the "Caution" was proved to have been inserted in the newspaper, there was no proof that the paper ever went out of the office. The court asked: "Was it not read by the publisher of the paper who proved its insertion?" Defendant's counsel said there was no evidence that anybody ever read it in the paper, and referred to American decisions.

Opinion of Haliburton, C.J.

Haliburton, C.J., said: "This is sufficient proof of publication under the decisions at Westminster Hall, which are binding on us. We respect highly the decisions of our American brethern, and with good reason, but we are not bound by them." And he added: "We are bound by a regular course of decisions in England, and must assume and receive them as law. Where a case stands isolated and is questioned there, we stand in regard to such a case as judges there do. It is *evidence* of law, but not law, and we can question it as they do." DesBarres, J., who tried the case, said, in his judgment refusing a new trial, that it was proved that the article complained of had been inserted at the defendant's request in the newspaper referred to, which had between six and eight hundred subscribers among whom it was circulated. This, he thought at the time, was sufficient evidence of publication(*n*).

Publication shewn in affidavit for writ of capias.

Upon an appeal from a judge in Chambers, who refused to set aside an order for the defendant's arrest made by a commissioner of the Supreme Court of the county of Halifax, it

(*n*) Roberts v. Patillo (1855) 2 N.S.R. (James) 367. See, also, Mackenzie v. Cunningham *et al.* (1901) 8 B.C.R. 36; 21 C.L.T. Occ. N. 251.

appeared that the order was made on an affidavit by the plaintiff who swore that the defendant was the publisher of a newspaper called *Progress*, purporting to be printed at St. John, N.B., containing certain libels against plaintiff which were set forth in the affidavit. It was held (*per* Macdonald, C.J.), that the publication was sufficiently shewn(*o*).

Insufficient evidence of publication by a newspaper correspondent.

The correspondent at S., of a certain newspaper, was sued for furnishing a libellous item reflecting on the plaintiff. In his examination for discovery the defendant admitted that he was a correspondent of the paper at S., but he could not say whether he was the only one; he did not remember sending any of the items; he might possibly have sent some of them, but he did not think he had sent the one complained of. He had had, since the the publication, an interview with the editor with reference to the matter, but he refused to answer whether he had discussed the item complained of, for fear, he said, of incriminating himself. At the trial he stated that he had since ascertained that there were other correspondents at S., and, on being pressed as to the item complained of, said, after some hesitation, that he did not furnish it. No other evidence was given connecting the defendant with the publication. It was held, that this did not constitute any evidence of publication to go to the jury(*p*).

(*o*) Spike v. Golding (1895) 27 N.S.R. (R. & G.) 370.

(*p*) Nunn v. Brandon (1893) 24 O.R. 375.

CHAPTER XIX.

Reports of Judicial Proceedings.

Reports of proceedings in Ontario courts privileged.

The only Provincial statutes conferring privilege on newspaper reports of proceedings in the courts of justice are contained in the statute books of Ontario, Manitoba and British Columbia. The provisions are not uniform. Under the Ontario Act, all reports of proceedings in any court of justice, published in a newspaper, shall be privileged, provided that they are fair and authentic and without comments, unless the defendant has refused or neglected to insert in the newspaper, in which the report complained of appeared, a reasonable letter or statement of explanation or contradiction, by or on behalf of the plaintiff(*a*).

The privilege in Manitoba.

The section in the Manitoba Act(*b*) is the same as the above, except that all the words following the word "comments" are omitted. This means that the defendant would not necessarily be deprived of the privilege, as he would be under the Ontario Act, by refusing or neglecting, on request, to publish a reasonable letter or statement of explanation or contradiction of the defamatory matter complained of in the report. His failure to do this, however, might be evidence of malice. But, as in the case of all other provisions in the Manitoba Libel Act affecting newspapers, the benefits of the enactment as to privilege are, by section 14 of the Act and by section 16 of the Newspaper Act of that Province(*c*), expressly subject to the last named Act, which requires registration of newspapers by their publishers.

The privilege in British Columbia.

The enactment in the British Columbia Act(*d*), as taken from the English Law of Libel Amendment Act, 1888(*e*), differs

(*a*) R.S.O. 1897, c. 68, s. 9.
(*b*) R.S.M. 1902, c. 97. s, 3.
(*c*) R.S.M. 1902, c. 123.
(*d*) R.S.B.C. 1897, c. 120, s. 3.
(*e*) 51-52 Vict. c. 64, s. 3.

materially from the enactments in the other Provinces. It provides that a fair and accurate report in any public newspaper, or other periodical publication, 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 authorize the publication of any blasphemous or indecent matter.

The enactment in the Code.

The enactment in the Criminal Code, as to reports of proceedings in the courts, is contained in the same section which privileges reports of parliamentary proceedings, and provides that no one commits an offence by publishing in good faith, for the information of the public, a fair report of . . . the public proceedings, preliminary or final, heard before any court exercising judicial authority, nor by publishing, in good faith, any fair comment upon any such proceedings(*f*).

The law prior to provincial legislation.

Fair reports in newspapers, or elsewhere than in newspapers, *e.g.*, in a pamphlet(*g*), of proceedings in the courts, were privileged in England and in Canada prior to any legislation on the subject, so long as their publication was not malicious, or not prohibited by the court(*h*), or the subject matter of the report was not blasphemous(*i*), seditious, or indecent(*j*). The qualified privilege so given, which was the same for a private individual as for a newspaper(*k*), and was not given specially to newspapers(*l*), might be rebutted by proving that the report was published maliciously. This protection was conferred for rea-

(*f*) C.C. s. 322.

(*g*) *Per* Esher, M.R., in Macdougal v. Knight & Son (1886) 17 Q.B.D. (C.A.) 636, at p. 640. See, also, Milissich v. Lloyds (1877) 46 L.J.C.P. 404; 36 L.T. 423, *per* Brett, L.J.

(*h*) Rex v. Clement (1821) 4 B. & Ald. 218; 11 Price 69.

(*i*) Rex v. Carlile (1819) 3 B. & Ald. 167.

(*j*) Steele v. Brannan (1872) L.R. 7 C.P. 261; 26 L.T. 509; 41 L.J. M.C. 85.

(*k*) *Per* Brett, L.J., in Milissich v. Lloyds (1877) 46 L.J.C.P. 405.

(*l*) *Per* Day. J., in Rumney v. Walter (1892) 8 T.L.R. at p. 262; *per* Hannen, J., in Salmon v. Isaac, 20 L.T., at p. 886. See, also, 3 T.L.R. 245, and *per* Bramwell, L.J., 5 Ex. D. 56.

sons of public policy, under a rule or principle which is expressed in a number of well-known decisions. The privilege still exists on the same conditions with respect to reports not covered by these statutes.

The development of the privilege. (Per Lord Cockburn, C.J.)

In *Wason* v. *Walter*(*m*), Lord Cockburn, C.J., said: "The recognition of the right to publish the proceedings of courts of justice has been of modern growth. Till a comparatively recent time the sanction of the judges was thought necessary even for the publication of the decisions of the courts upon points of law. Even in quite recent days, judges, in holding publication of the proceedings of courts of justice lawful, have thought it necessary to distinguish what are called *ex parte* proceedings as a probable exception from the operation of the rule. Yet *ex parte* proceedings before magistrates, and even before this court, as, for instance, on applications for criminal informations, are published every day, but such a thing as an action or an indictment founded on a report of such an *ex parte* proceeding is unheard of, and, if any such action or indictment should be brought, it would probably be held that the true criterion of the privilege is, not whether the report was or was not *ex parte*, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent of all intention to do injury to the reputation of the person affected."

Reports of ex parte proceedings privileged: Usill v. Hales (1878).

The privilege of reports of *ex parte* proceedings was upheld in England in two well-known cases, one of which was decided prior to the Libel Acts of 1881 and 1888, and the other soon after the last mentioned Act. In the earlier case, three men, who believed themselves to be aggrieved by the conduct of the plaintiff with respect to a supposed claim upon him for wages or salary, applied to a magistrate in open court for a summons under the English Master and Workman's Act. The magistrate declined to entertain the application, considering it a matter for a civil and not for a criminal court. The defendant afterwards published in a newspaper a report of what passed before the

(*m*) (1868) L.R. 4 Q.B. 73; 38 L.J.Q.B. 42, at pp. 93, 94.

magistrate. Cockburn, C.J., who tried the case, told the jury that the only question for their consideration was, whether or not the publication complained of was a fair and impartial report of what took place in the magistrate's court; and that, if they found that it was so, the publication was privileged. The jury found that it was a fair report, and returned a verdict for the defendant. A new trial was moved for on the ground that the publication being a report of an *ex parte* application to a functionary who had no jurisdiction to entertain it, and against one who had no means of answering the charges made against him, the privilege usually accorded to the publication of proceedings in a court of justice did not attach to it. The publication was held to be privileged, the decisions in *Curry* v. *Walter*(*n*), and *Lewis* v. *Levy*(*o*), being regarded by the court(*p*) as strong authorities in favour of the defendant(*q*).

Kimber v. The Press Association (1892).

The above decision was followed in *Kimber* v. *The Press Association*(*r*), in which it was held by the English Court of Appeal that the publication, without malice, in several London newspapers, of a fair and accurate report of proceedings in open court, before magistrates, upon an *ex parte* application for the issue of a summons for perjury, was privileged.

Opinion of Coleridge, C.J.

In his judgment in *Usill* v. *Hales*, Lord Coleridge, C.J., after quoting the passage (*supra*) from Lord Cockburn's judgment in *Wason* v. *Walter*, said (at p. 326) that "to the general line of argument in that passage, and to the accuracy of the statement in the last sentence I have read, I entirely adhere; and it is familiar that not only are unimportant cases and *ex parte* proceedings published, but a particular class of inquiries, which, in some of the earlier cases, I find actually by name excluded from the privilege—I mean inquiries before a coroner—are in cases which may be supposed to interest the public reported in

(*n*) (1796) 1 B. & P. 525.
(*o*) (1858) E.B. & E. 537; 27 L.J.Q.B. 282.
(*p*) Lord Coleridge, C.J., and Lopes, J.
(*q*) Usill v. Hales (1878) L.R. 3 C.P.D. 319.
(*r*) (1892) 8 T.L.R. 671; (1893) 1 Q.B.D. (C.A.) 65.

all the newspapers in the Kingdom, and yet no one ever heard, at least since I have known Westminster Hall, of an action being brought by a person injuriously affected by such publication, where the report is honest and *bonâ fide*, and published without intention to injure." And, in a previous part of the same judgment, he said, that "it has been laid down again and again in broad terms, that the publication of the proceedings in courts of justice is privileged if the report of such proceedings be fair and honest."

Opinions of Bowen, L.J., and Fry, L.J.

Commenting on the same passage in Lord Cockburn's judgment, Bowen, L.J., said (*s*) that "it shews that the ground on which immunity is extended to the publication of proceedings in courts of justice is, that the courts are meant to be public, and, therefore, an action will not lie for the publication of a true report of their proceedings, or a report published without malice and in good faith. It is important that the country should know what goes on in courts of justice, and there is also this consideration, that justice is often assisted by the publication of reports of proceedings." And Fry, L.J., in the same case, said that "the privilege exists on the ground that the more open the proceedings in a court of justice are the better."

Opinion of Armour, C.J.

The same views as to the benefits of publicity of the courts, and of the reports of their proceedings, have been frequently expressed by Canadian judges. In an action for an alleged libel contained in an Ottawa newspaper report of a police court case in which it was stated that the plaintiff, a second hand dealer, had purchased stolen goods, Armour, C.J. (afterwards Chief Justice of Ontario and a member of the Supreme Court of Canada), in charging the jury, said that "newspapers had a perfect and legitimate right to report the evidence of any case in police or other courts of law. The advantage derived by the public from these publications far more than made up for the inconvenience to parties concerned. The newspaper was one of the best preventives of crime,

(*s*) In Macdougall v Knight & Son (1886) L.R. 17 Q.B.D. (C.A.) 630, at pp. 641, 642.

as the publicity of offences served to put the public on their guard''(*t*).

"The true criterion."

The reported cases, decided before the legislature intervened to define this privilege, all shew that "the true criterion" of the privilege was, as stated by Lord Cockburn (*supra*), a fair and honest report, published simply for the information of the public, and innocent of intention to injure the reputation of the complainant. And in any case not within any Provincial statute, and as to any report not published in a newspaper, this no doubt would still be the criterion. The statutes which have since been passed in the Provinces give precision and certainty to the privilege in the case of newspapers, and, to that extent at least, have improved the position of newspaper publishers.

The ground of privilege. Opinion of Cockburn, L.C.J.

The reason for this species of privilege, as already indicated, is, that the general advantage to the community, in having these proceedings made public, more than counterbalances the inconvenience to private persons whose conduct may be the subject of such proceedings. "The immunity in respect of the proceedings of courts of justice rests upon a twofold ground. In the English law of libel malice is said to be the gist of an action for defamation. And though it is true that by malice, as necessary to give a cause of action in respect of a defamatory statement, legal and not actual malice is meant, while by legal malice, as explained by Bayley, J., in *Bromage* v. *Prosser*(*u*), is meant no more than the wrongful intention which the law always presumes as accompanying a wrongful act without proof of malice in fact, yet the assumption of law may be rebutted by the circumstances under which the defamatory matter has been uttered or published, and, if this should be the case, though the character of the party concerned may have suffered, no right of action will arise''(*v*).

(*t*) Mitrow v. Citizen Publishing Co., Mail and Empire, 11 January, 1899. See, also, remarks of Tindal, C.J., in Saunders v. Mills (1829) 6 Bing. 213.

(*u*) 1 B. & C. 255.

(*v*) *Per* Lord Cockburn, C.J., in Wason v. Walter (1868) L.R. 4 Q.B. 73; 38 L.J.Q.B. 34.

Opinion of Campbell, L.C.J.

"The rule," says Campbell, C.J.(*vv*), "is that the occasion is privileged, and the plaintiff must then, if he can, give evidence of malice. It is thus that in the case of reports of proceedings of courts of justice, though individuals may occasionally suffer from them, yet as they are published with reference to the individuals concerned, but solely to afford information to the public and for the benefit of society, the presumption of malice is rebutted, and such publications are held to be privileged. The broad principle on which this is an exception to the general law of libel is, that the advantage to the community from publicity being given to the proceedings of courts of justice is so great that the occasional inconvenience to individuals arising from it must yield to the general good." Opinions to the same effect were also expressed by Campbell, L.C.J., and by Wightman, J., in the earlier case of *Davison* v. *Duncan*(*w*).

Opinion of Lord Esher, M.R.

"The rule of the law," said Lord Esher, M.R.(*x*), "is, that where there are judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in open court, there the publication, without malice, of a fair and accurate report of what takes place before that tribunal is privileged. Under certain circumstances that publication may be very hard upon the person to whom it is made to apply, but public policy requires that some hardship should be suffered by individuals rather than that judicial proceedings should be held in secret. The common law, on the ground of public policy, recognizes that there may be greater danger to the public in allowing judicial proceedings to be held in secret, than in suffering persons for a time to rest under an unfounded charge or suggestion."

Nature and extent of the privilege.

The statutory privilege (*supra*) is confined to reports published in a "newspaper" as defined by the respective Provincial Acts, and is a conditional or qualified privilege.

(*vv*) In Taylor v. Hawkins, 16 Q.B. 308.

(*w*) (1857) 26 L.J.Q.B. 104; 28 L.T. (O.S.) 265; 7 E. & B. 229.

(*x*) In Kimber v. The Press Association (1893) 1 Q.B.D. (C.A.) 65, at p. 68.

"Court of justice."

The expression "proceedings in any court of justice," in the Ontario and Manitoba Acts, must be taken in the ordinary and popular sense. It will embrace proceedings in courts of every grade of jurisdiction, civil and criminal, of record or not of record(*y*), and whether *ex parte* or otherwise(*z*), including preliminary hearings before justices of the peace in regard to indictable offences, and proceedings in cases which they may hear and determine summarily(*a*). "It is well recognized that the phrase ['court or judge'] always includes a judge at Chambers, unless there is some express enactment limiting the meaning of the phrase"(*b*). Reports of proceedings before a judge at Chambers(*c*), or before a judge of the County Court in his private room to which the public have access(*d*), are in fact privileged.

Conditions of privilege in Ontario and Manitoba.

The conditions of privilege in Ontario and Manitoba are that the report shall be (1) fair; (2) authentic; (3) without comments; (to which may be added as being implied by the general law, although not expressed in the statute) (4) not prohibited by the court; and (5) not seditious, blasphemous, or indecent. And, in Ontario, the privilege on these conditions will be lost where the defendant has refused or neglected, on request, to insert a reasonable letter or statement of explanation or contradiction of the defamatory matter complained of in the report. There is no such proviso in the Manitoba Act, but, as already stated, the refusal of such a request might be regarded as evidence of malice.

Report must be "fair."

The report must be "fair," *i.e.*, correct and impartial. A report is said to be fair when it is substantially accurate, and

(*y*) Lewis v. Levy (1858) E.B. & E. 537; 27 L.J.Q.B. 282.

(*z*) Usill v. Hales (1878) 3 C.P.D. 319; 47 L.J.C.P. 323; 38 L.T. 65.

(*a*) R. v. Gray (1865) 10 Cox C.C. 184; Wason v. Walter (1868) L.R. 4 Q.B. 73; 38 L.J.Q.B. 34; Usill v. Hales, *supra*; followed in Kimber v. The Press Association, *supra*.

(*b*) *Per* Brett, M.R., in Dallow v. Garrold, 54 L.J.Q.B. 78; 14 Q.B.D. 543.

(*c*) Smith v. Scott (1847) 2 C. & K. 580.

(*d*) Myers v. Defries, Times, 23 July, 1877.

when it is either complete, or condensed in such a manner as to give a just impression of what took place(*f*). The report may be "fair" although it contains only the speeches of counsel and the summing up of the judge(*g*). "Fair" is equivalent to fairly correct; whether a person's mind is fair is involved in the question whether the publication is *bonâ fide*. The question as to fairness arises only when the report is not *literatim et verbatim;* if it is so, no such question can arise"(*h*).

A fair report of a judgment without the evidence privileged: Macdougall v. Knight & Son (1886).

In the case in which these remarks occur the question was, whether a fair report of a judgment in an action published *bonâ fide* and without malice, but unaccompanied by any report of the evidence at the trial, was privileged. Defendants published, in the form of a pamphlet, a report of the judgment delivered in a former action which plaintiff had brought against them. The pamphlet contained no separate report of the evidence given at the trial, and there were passages in the judgment reflecting on plaintiff's character. In an action for libel in respect of such publication the questions left to the jury were: (1) Was the pamphlet in fact a fair, accurate, and honest report of the judgment of Mr. Justice North? (2) Was the pamphlet published by the defendants *bonâ fide*, and with the honest intention of making known the true facts of the case, and in order to protect their reputation and in reasonable self defence? (3) Was there malice? The jury answered the first two questions in the affirmative and the third in the negative; and, on these findings, the verdict and judgment were entered for the defendants. A new trial on the ground of misdirection was refused by Day and Wills, JJ., and their judgment was affirmed by the Court of Appeal, who held that it was not necessary, as contended by the plaintiff, to ask the jury whether the pamphlet was a fair report of the trial, that the right questions had been left to the jury, and that defendants were entitled to judgment on the findings.

(*f*) Steph. Dig. Cr. Law, 3rd Ed., p. 206.

(*g*) Milissich v. Lloyds (1877) 46 L.J.C.P. 405; 36 L.T. 423.

(*h*) *Per* Esher, M.R., in Macdougall v. Knight & Son (1886) 17 Q.B.D. (C.A.) 636, at p. 640.

Opinion of Lord Esher, M.R.

Lord Esher, M.R., said: "It was decided by the Court of Queen's Bench in Lord Campbell's time, in *Lewis* v. *Levy*(*i*), that public policy justifies the publication of the proceedings in a court of justice, on the ground that the court is open to the public, but cannot hold all the people who may wish to be present, and it is for the public benefit that what takes place in court should be made known to all. Therefore it is not correct to say that what may be published is a fair report of the trial, for it is clear that a fair report of every proceeding in an open court of justice, whether it be a trial or not, may be published. If the trial lasts for several days, all the same people would not be in court on the different days, and in such a case, if a fair report of all that takes place on one day is published, the readers of that report are placed in the same position as if they had been in court on that day and had heard the proceedings. If a fair report of any one distinct part of a trial is published, the publication is justifiable, and, therefore, a fair report of the whole of one day's proceedings is privileged, even if the result is that the publication bears hardly on the character of an individual who may be in a position, at a later stage, to answer all that is brought forward against him. If a part of what takes place on a particular day is published as the whole of the day's proceedings, such a publication does not put people who have not been in the court in the same position as those who heard the case in court, and, therefore, is not a fair publication." Having given his opinion, as above quoted, of the meaning of the word "fair" in regard to the publication, the learned judge proceeds: "It has been decided, as I have observed, that a report of one day's proceedings may be published, and in the same way the judgment is quite a separate part of the proceedings. Suppose the judgment to be erroneous, still the people who were not in court, but who read the report, are put in the same position as those who were in court and heard the judgment delivered. The responsibility for the accuracy of the judgment rests on the judge who delivers it, not on the person who publishes the report of it. I am of opinion, therefore, that an accurate report of a judgment is not libellous"(*j*).

(*i*) E.B. & E. 537; 27 L.J.Q.B. 282.

(*j*) Macdougall v. Knight & Son (1886) 17 Q.B.D. (C.A.), pp. 639-40.

Opinion of Bowen, L.J.

Bowen, L.J., said that "it is not only true that no action will lie for the publication of a correct report of all that has passed, but the proposition must be extended so as to include the case of a fair summarized account. The difficulty arises with regard to fragmentary accounts of proceedings. Clearly there would be no protection if a report of a fragment were published as a report of the whole. It is true that a report of a fragment may be published, if it is a complete report of one particular part, as in *Lewis* v. *Levy*, the decision in which case shews that the proprietor of a newspaper cannot be held liable for publishing a report of the first day's proceedings before the case is concluded. I think, also, that a report of a portion of the case, if correctly given, is privileged, but if it is published maliciously, the privilege is destroyed. In the case of a newspaper the publication of proceedings from time to time, without malice, is undoubtedly privileged; yet it does not by any means follow that a person might publish a true report of a part of the proceedings, if he did so maliciously. I have come to the conclusion that a judgment is such a matter of public interest that a report of it may be published. It seems to me that public policy requires that the law should be as I have stated"(*k*).

Opinion of Fry, L.J.

And Fry, L.J., said: "We cannot shut our eyes to the fact that it is by no means an uncommon practice to publish a report of the judgment alone, which usually contains in itself a summary of the material facts of the case. In my opinion we are bound to have regard to the ordinary usages of society in this respect, and I entirely agree with the view expressed by Lord Campbell, in delivering the judgment of the court in *Lewis* v. *Levy*, where he said: 'The law upon such subjects must bend to the approved usages of society, though still acting upon the same principle, that what is hurtful and indicates malice should be punished, and that what is beneficial and *bonâ fide* should be protected.' "

(*k*) *Ibid.* p. 642.

The doubts of Halsbury, L.C., and Bramwell, L.J., in the House of Lords.

Upon an appeal to the House of Lords from this judgment the decision of the Court of Appeal was affirmed, but upon a different ground. Halsbury, L.C., and Bramwell, L.J., while not dissenting from the Court of Appeal as to reports of judgments being privileged, appeared to be of opinion that the fact that a report of the judgment was proved to be accurate, was not conclusive that it was a fair and accurate report of judicial proceedings so as to entitle it to protection(*l*). These doubts of the two learned Lords are referred to in the judgment of the Court of Appeal in a second action between the same parties for the publication of another portion of the same judgment(*m*). The court firmly upheld their former judgment (*supra*), which, Esher, M.R., said, was not overruled in the House of Lords; that their Lordships did not express any opinion on any point of law; "all that happened was, that two learned Lords intimated their desire that it should not be taken that they had expressed any opinion. To speak candidly, I cannot make up my mind what their doubt was." Fry, L.J., observed, that "such expressions, however weighty and however much entitled to respect, do not overrule the law as laid down in this court." "There is no decision in the House of Lords," said Lopes, L.J., "which impeaches the law as laid down in this court in the previous action between the present litigants. There are reservations of opinion by two of the learned Lords, but such reservations cannot be taken as in any sense decisions."

The rule of law on the subject (per Lord Esher, M.R.).

Stating his opinion of the rule of law on the whole matter, Lord Esher, M.R., said: "I take the law to be deduced from the holding of the court in *Lewis* v. *Levy*(*n*), with regard to the publication of legal proceedings in a court of law, to be that

(*l*) See observations of Halsbury, L.C., in Macdougall v. Knight (1889) 14 App. Cas., at pp. 200-1, and of Lord Bramwell, at p. 203.

(*m*) See Macdougall v. Knight (1890) 25 Q.B.D. (C.A.) 1. The action was dismissed as being frivolous and vexatious, and *res judicata*.

(*n*) (1858) E.B. & E. 537; 27 L.J.Q.B. 282.

the publication, without malice, of an accurate report of what has been said or done in a judicial proceeding in a court of justice is a privileged publication, although what was said or done would, but for the privilege, be libellous against an individual and actionable at his suit, and that this is true, although what is published purports to be, and is, a report not of the whole judicial proceeding, but only of a separate part of it, if the report of that part is an accurate report thereof and published without malice''(*o*).

The reiterated opinions of Fry, L.J., and of Bowen, L.J.

Fry, L.J., said, that ''nothing that had been urged, in the course of the argument in this second case between the parties, had raised any doubt in his mind as to the correctness of the decision in the former case. Bowen, L.J., put the point clearly and precisely, and I will read what he said as embodying my own view: 'I am satisfied myself that the judgment of a judge of the land is in itself an act of such a public and distinct character as to make it to the interest of the commonwealth that they should know it *in toto*, and provided it is either given verbatim correctly, or correctly summarized, it seems to me that the public policy requires that to be the law, and I have no hesitation in saying that I believe that to be the law at the present day'(*p*). In coming to that conclusion we are arriving at a decision in accordance with the ordinary practice of the public press, with the usages of society, and with the convenience of Her Majesty's subjects.'' And, referring to the responsibilities of journalists in such a case, he adds: ''It appears to me that it would be to put an undue fetter on the press to hold that the publication of a judgment is not privileged unless the judgment fairly summarizes the evidence. I cannot doubt that the judgments of courts must be presumed to be fair, accurate and adequate, and to make the person who reports such a judgment prove that it is so, would be to put on him a burden inconsistent with the interest of the commonwealth''(*q*).

(*o*) Macdougall v. Knight & Son (1890) 25 Q.B.D. (C.A.) 1, at p. 7.

(*p*) The reporter notes this extract as being taken from the printed judgments of the Court of Appeal in the appendix to the case in the House of Lords.

(*q*) Macdougall v. Knight & Son, *supra*, at p. 11.

Other requisites of a report.

An earlier case than the one just mentioned decided that the judgment or summing up of a judge might always be separately published; that it is a distinct part of the proceedings, complete in itself, and fairly severable from the rest; and that it is presumably a fair summary of the whole proceedings(*r*). A fair abstract will be sufficient(*s*). The report need not be verbatim, but should be a substantially fair account of what took place in court(*t*). But a report will not be privileged which gives the opening address of counsel as the real facts of the case, where the evidence does not fully support such a statement(*u*); or which synopsizes the addresses of counsel and omits all reference to the evidence(*v*); or which only refers to the evidence by the mere statement that the witnesses proved all that had been said by counsel for the prosecution(*w*); or that the evidence disclosed certain facts which it really did not disclose(*x*). Neither will a report be privileged which gives only a part of the judgment, and omits material portions of it(*y*); or which credits the reporter with having made "inquiries" as to the facts which he had not made, but, instead, had merely copied an affidavit not produced at a coroner's inquest the proceedings of which he had reported(*z*). A condensed report should fairly represent both sides of the case. If one side be given fully or lengthily, and the other side briefly, omitting material evidence, a jury may properly find the report to be unfair(*a*). The omission of

(*r*) Milissich v. Lloyds (1877) 46 L.J.C.P. 404; 36 L.T. 423; 13 Cox C.C. 575.

(*s*) *Ibid., per* Mellish, L.J.

(*t*) *Per* Lord Campbell, C.J., in Andrews v. Chapman (1853) 3 C. & K. 289.

(*u*) Woodgate v. Ridout (1865) 4 F. & F. 202.

(*v*) *Ibid.*

(*w*) Lewis v. Walter (1821) 4 B. & Ald. 605; Roberts v. Brown (1834) 10 Bing. 519; 6 C. & P. 757.

(*x*) Pinero v. Goodlake (1866) 15 L.T. 676; Ashmore v. Borthwick (1885) 49 J.P. 792; 2 T.L.R. 113, 209.

(*y*) Haywood & Co. v. Hayward & Sons (1886) 34 Ch. D. 198; 56 L.J. Ch. 287; Grimwade v. Dicks *et al.* (1886) 2 T.L.R. 627.

(*z*) Reg. v. Gray (1861) 26 J.P. 663.

(*a*) Duncan v. Thwaites (1824) 3 B. & C. 556.

material parts of the cross-examination of witnesses may also be regarded as partial and unfair(*b*).

Onus of fairness and accuracy on defendant.

The onus is on the defendant to shew fairness and accuracy. "I think," said Lord Esher, M.R.(*c*), "that it lies upon the defendant, who claims privilege in respect of a report of proceedings in a court of justice, to shew that the report was fair and accurate. The burden of proof lies upon him, but a person upon whom the burden of proof lies may always, in order to discharge himself of that burden, vouch what is proved for him by his opponent." See, also, remarks of Kay, L.J., in same case, at p. 76. And where it appears from the plaintiff's own evidence that he has suffered no wrong from the report of the proceedings complained of, the case may be withdrawn from the jury and the action dismissed.

Onus may be satisfied by plaintiff's own evidence: Booth v. Snell (1900).

In an Ontario case, *Booth* v. *Snell*, which was tried at the Hastings fall assizes, 1900, the plaintiffs, a husband and wife, sued the proprietor of the *Marmora Herald*, for the publication of an article stating that the plaintiffs were charged before a police magistrate with "witchcraft" and with aiding and abetting the same; and that they admitted the offence and were fined. The charge was laid under section 396 of the Code(*cc*), which was directed, *inter alia*, against unlawful pretensions to skill "in any occult science." The article stated that the female plaintiff, who claimed to be divinely gifted in such things, had looked into a magic crystal or mirror which she possessed, and described to a person, from whom some grain had been stolen, where it could be found. Upon the female plaintiff's evidence, the trial judge (Boyd, C.), held, that there was no offence by defendant in describing the proceedings in the police court, and giving the technical name to such an occult science. The section in the Code and the marginal note to it merely define what are the offences in that section under which the charge was laid, and no

(*b*) Lewis v. Levy (1858) E.B. & E. 551.

(*c*) In Kimber v. The Press Association (1893) 1 Q.B.D. (C.A.) 65, at p. 71.

(*cc*) Now s. 443.

legal wrong had been committed. This judgment was affirmed by the Divisional Court(*d*).

The law, however, is the same in both civil and criminal proceedings, whether the defence be that the statements complained of were published on a privileged occasion, or were fair and *bonâ fide* comments on a matter of public interest.

"Authentic."

The report under the Ontario and Manitoba Acts, besides being "fair," must be "authentic." That is, it must be trustworthy and reliable as narrating real facts, and not imaginative, fictitious, or unauthorized. The term "authentic" may also have reference to the source or authorship of the report, as having been prepared by a member of the newspaper staff, and not by one of the parties interested or his solicitor. In the latter case errors or omissions, which would be overlooked if made by the ordinary reporter, might be open to the imputation of bias or unfairness and also be considered malicious(*d*).

"Without comments."

The report must also be "without comments," *i.e.*, comments made by the reporter, or by persons not entitled to take part in the proceedings. Where, therefore, the defendant has published a report of proceedings for perjury against a party, and the report begins with an account of the proceedings out of which the charge of perjury arose, and observes that evidence was given by two persons named, which entirely negatived the alleged false statement of the accused, this observation is in the nature of comment and is properly no part of the report(*e*). So, also, where in a newspaper account of proceedings before a magistrate, the report contains a statement by the magistrate's clerk that the alleged conduct of the party charged was exceedingly improper under any circumstances, the statement is a comment in the nature of a statement of fact, which could not be justified as a part of the report properly speaking(*f*). The report to be

(*d*) The Printer and Publisher, Toronto, October, 1900, January, 1901.

(*dd*) See Stevens v. Sampson (1879) 5 Ex. D. 53 (C.A.); 49 L.J. Ex. 120; 28 W.R. 87; 41 L.T. 782; Dodson v. Owen (1885) 2 T.L.R. 111; and the remarks of Wood, V.C., in Coleman v. West Hartlepool Harbour and Railway Co., 2 L.T. 766; 8 W.R. 734.

(*e*) Lewis v. Levy (1858) E.B. & E. 539.

(*f*) Delegal v. Highley, 3 Bing. N.C. 960-61.

privileged should be confined to what actually took place, and there should be no defamatory comments by the reporter(*g*). If any comments are made, they should not be made as part of the report. The report should be confined to what takes place in court, and the two things, report and comment, should be kept separate(*h*). This remark of Lord Campbell can not, however, apply to reports of judicial proceedings under the Code (s. 322), because comments on such proceedings are privileged, so long as they are fair and published in good faith, and it can make no difference whether the comments are contained in the report or not.

The privilege of reports and comments in Quebec.

It has been held in Quebec, that a fair and honest report in a newspaper of proceedings before a court of justice, whether condensed or not, and even if injurious to persons referred to therein, is privileged(*i*). But though the reports of judicial proceedings, and even the comments thereon, are privileged, and do not afford ground for recourse in damages, still the immunity exists subject to the condition that the facts must be reported honestly, fairly and impartially, and the comments are subjected to the same rule, but in a more vigorous manner. Therefore, a comment on judicial proceedings which is not strictly accurate, and which gives to the facts discussed and commented upon a colouring less favourable to one of the parties than the truth would warrant, permits of proceedings for compensation (*en responsabilite*) against its author(*j*). The courts in Quebec have also held, that the privilege given to a report, published in good faith, of judicial proceedings, does not extend to the publications of declarations made by one of the counsel out of court and in private conversation, but such declarations, though not constituting a justification, may be pleaded to establish the good faith of the defendant, and to mitigate the damages to which he may be condemned(*k*).

(*g*) Cooper v. Lawson (1838) 8 A. & E. 746; 2 Jur. 919.

(*h*) *Per* Lord Campbell, C.J., in Andrews v. Chapman (1853) 3 C. &. K. 286.

(*i*) Downie v. Graham (1887) Mon. L.R. 3 S.C. 333.

(*j*) Dingwall v. Mason (1897) Q.R. 12 S.C. 333.

(*k*) Desjardins v. Berthiaume (1899) Q.R. 16 S.C. 506.

Conditions of privilege in British Columbia.

As already noticed, the British Columbia enactment is materially different from the enactments in the other Provinces. To be privileged in that Province the newspaper report must be (1) a report of proceedings publicly heard before any court exercising judicial authority; (2) it must be fair and accurate; (3) published contemporaneously with the proceedings; (4) not blasphemous or indecent; and (5) (impliedly) not prohibited by order of the court(*l*). The expression "proceedings publicly heard before any court exercising judicial authority," will embrace all courts of civil and criminal jurisdiction, superior and inferior, and all proceedings of a judicial nature conducted with open doors, and whether *ex parte*(*m*) or otherwise, and whether preliminary or final. It would also protect a fair report of a case heard by a judge in his private room, if the public had free access to the room during the hearing. But a report of the proceedings *in camera* will not be privileged(*n*). The words, "court exercising judicial authority," are wider than the expression "court of justice," in the other Provincial statutes, and will include arbitrations, and, if there could be any doubt on the point, commissions of inquiry where the evidence is taken under oath.

"Published contemporaneously."

But whatever may be the additional benefits thus conferred, they are a good deal neutralized by the restriction imposed by the expression "published contemporaneously," which, having regard to the means and possibilities of ordinary newspaper publication, is confusing. Taken literally these words would destroy the statutory privilege, because contemporaneous publication is not practicable; but it would not destroy privilege altogether, for, if the report were unprivileged under the statute, it would still have the qualified privilege of the common law, provided it were

(*l*) See cases at pp. 291-92 *ante*, as to (1) and (2).

(*m*) So decided as to *ex parte* proceedings in Usill v. Hales (1878) L.R. 3 C.P.D. 319; and in Kimber v. The Press Association (1893) 1 Q.B. (C.A.) 65.

(*n*) Smith v. Scott (1847) 2 C. & K. 580; Ryalls v. Leader (1865) L.R. 1 Ex. 296; 35 L.J. Ex. 185; Myers v. Defries, Times, 27 July, 1877; *per* Lord Halsbury, L.C., in Macdougall v. Knight (1889) 14 App. Cas. 200.

not malicious and satisfied the other common law conditions. The privilege would, of course, be lost by proof of malice in the publication(*o*).

It is not to be supposed, however, that the word "contemporaneously" is to be taken literally, but that it may rather have the meaning which is sometimes given to analogous terms like "forthwith" and "immediately" where time is concerned. "Words denoting time are not always literally construed. Thus the words "forthwith" and "immediately," though in strictness they imply "prompt, vigorous action without any delay"(*p*), have generally been considered to mean "within a reasonable time"(*q*). "Forthwith," in an Act of Parliament, has [in several cases] been construed to mean "in a reasonable time," as soon as the party who is to perform the act can reasonably perform it"(*r*). "The word 'forthwith' has sometimes received a free construction and sometimes a strict one, according to the circumstances under which it has been used. An act has sometimes been held to have been done 'forthwith' when done within a reasonable time, and an act has been sometimes held to have been done 'forthwith' only when done with the least possible delay"(*s*). Assuming, in the absence of any judicial interpretation of the expression, that publication of the proceedings "contemporaneously" may mean within a reasonable time, the publication of the report in the next edition of a daily paper and in the issues from day to day, if the proceedings reported were so extended, and in the next edition of a tri-weekly or a weekly paper, having regard, in both cases, to the opportunities for preparation of the report, and the time of going to press, would seem to be a compliance with the statute, and a consequent protection for the report, so far as that condition is concerned.

(*o*) Salmon v. Isaac (1869) 20 L.T. 885.

(*p*) R. v. Berkshire Justices, L.R. 4 Q.B.D. 469.

(*q*) Wilberforce on Statute Law, p. 132, citing Butler and Baker's Case, 3 Rep. 28*b*; Tennant v. Bell, 9 Q.B. 684.

(*r*) Hardcastle on Statute Law, 2nd Ed., p. 556, citing R. v. Price (1853) 8 Moore P.C. 213.

(*s*) *Per* Armour, C.J., in Maxwell v. Scarfe (1889) 18 O.R. 529, at p. 531.

Monthly publications privileged.

The definition of "newspaper" in the British Columbia Act covers monthly publications, so that reports of judicial proceedings in all such publications will be privileged under the Act, where the statutory conditions are satisfied.

CHAPTER XX.

Reports of Public Meetings.

Reports of public meetings, government documents, etc., privileged in Ontario.

The statutes of all the Provinces, except Quebec and Prince Edward Island, give a qualified privilege to the reports in a "newspaper," as defined by these statutes, of the proceedings of public meetings. The expression "a public meeting," as used in each statute, is also defined. Under the Ontario Act, a fair and accurate report published in any newspaper of any proceedings in the Parliament of Canada, or in any Legislative Assembly of any of the Provinces of the Dominion of Canada, or of any committee of said Parliament or of any of said Legislative Assemblies, or of a public meeting, or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a municipal council, school board, board of education, Provincial board of health, medical health board, or any other board or local authority formed or constituted under any of the provisions of any public Act of any Legislative Assembly of any of the Provinces of the Dominion of Canada or of the Parliament of Canada, or of any committee appointed by any of the abovementioned bodies, and the publication of the whole, or a portion, or a fair synopsis, of any report, bulletin, notice or other document, issued for the information of the public from any Government office or department, or by any Provincial board of health, medical health board, or medical health officer, or the publication, at the request of any Government or municipal official, commissioner of police, or chief constable, of any notice or report issued by him for the information of the public, shall be privileged, unless it shall be proved that such publication was made maliciously:

Provisos as to non-privilege.

Provided that nothing in this section shall authorize 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 proceeding, if the plain-

tiff can shew that the defendant has refused to insert in the newspaper making such publication a reasonable letter or statement of explanation or contradiction by or on behalf of the plaintiff: 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 or the publication of which is not for the public benefit(*a*).

Meaning of "a public meeting" in Ontario Act.

The words "a public meeting," in this section, shall extend to any lawful meeting to which the public are invited, and of which announcement has been made by printed or written notice thereof being posted up in at least six conspicuous places in the municipality where the meeting is held, or by advertisement in a newspaper published in such municipality, or, if there be none published therein, then in the one published nearest to the place of meeting(*b*).

Sub-section 1 of the above enactments was substituted by the Act, 6 Edw. VII. c. 22, s. 2(O.), for a sub-section which was the same as the corresponding enactment in the New Brunswick and Manitoba Act (*infra*). The first part of the section, as to reports of parliamentary proceedings, is unnecessary; it confers no greater privilege than existed previously. But the rest of the clause greatly enlarges the former privilege, extending it even beyond the corresponding section of the British Columbia Act (*infra*)(*c*), and of section 4 of the English Law of Libel Amendment Act, 1888(*d*), which was the original source of both Provincial enactments.

Coyle v. Globe Printing Co. (1906).

The enlarged privilege, thus conferred by the Ontario Act, was suggested by an action against a newspaper publishing company for an alleged libel, contained in a bulletin issued by the

(*a*) R.S.O. 1897, c. 68, s. 8(1) as enacted by 6 Edw. 7, c. 22, s. 2(O.). See Ponsford v. Financial Times, Ltd. (1900) 16 T.L.R. 248, and Kelly v. O'Malley *et al.* (1889) 6 T.L.R. 62, pp. 319-20, *post*, as to the meaning of the last proviso.

(*b*) R.S.O. 1897, c. 68, s. 8(2).

(*c*) R.S.B.C. 1897, c. 120, s. 4.

(*d*) 51-52 Vict. c. 64.

Dominion department of agriculture and published in the Ottawa correspondence of the newspaper, charging the plaintiff with a violation of The Fruit Marks Act, 1901(*e*), and, as stated in the innuendo, that he was "guilty of fraudulent, corrupt and dishonest practices" in the matter complained of. The defendants pleaded privilege, justification, and fair comment on a subject of public interest. The trial judge (Clute, J.) ruled "that it is not the law, in other words, it is not the right of a newspaper to publish an item of this kind, obtained in the manner in which this was obtained, and be entitled to privilege, whether it be false or not"; and that the defendants were bound to justify the defamatory statements. Ten of the jury found in favour of the defendants, and this being sufficient under the Ontario law the action was dismissed(*f*).

With respect to the privilege attaching to "a portion or a fair synopsis of any report," etc., under the Ontario Act, it should be observed, that documents in the official possession of the Provincial Government are privileged, if the head of a department claims privilege for them(*g*), in which event production of a document and disclosure of its contents could not be compelled. The publisher might thus be unable to shew the "fairness" of the publication, and so might fail in his defence. In any such case the only safety for the publisher would be to refrain from publishing the portion or synopsis of the report, etc., until he is satisfied that he could, if necessary, secure production of the report itself.

Privileged reports in British Columbia.

The following is the British Columbia enactment, which, although on the same lines, is more limited as to privilege than the Ontario enactment: A fair and accurate report published in any public newspaper, or other periodical publication, of the proceedings of a public meeting, or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a municipal council, school board, board of local authority

(*e*) 1 Edw. 7, c. 27(D.).

(*f*) Coyle v. Globe Printing Co., Daily Globe, Toronto, March 29-30, 1906.

(*g*) See s. 27 of the Act respecting Witnesses and Evidence, R.S.O. 1897, c. 73. This section was passed in consequence of the decision in Bradley v. McIntosh (1884) 5 O.R. 227.

formed or constituted under the provisions of any Act, or of any committee appointed by any of the above-mentioned bodies, or of any meeting of any commissioners authorized to act by letters patent, Act, or other lawful warrant or authority, or select committees of the Legislative Assembly, and the publication, at the request of any Government office or department or any public officer, of any notice or report issued 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 authorize 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 or other periodical publication, 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(*h*).

"Public meeting" defined.

The Ontario Act does not attempt to define "a public meeting," as the words are used in the first sub-section of the enactment, c. 68, s. 8, at page 298, *ante*, but it "extends" the words to "any lawful meeting" as defined in the second sub-section of the enactment. The British Columbia Act adopts the definition of "a public meeting" in the English Law of Libel Amendment Act, 1888(*i*), namely: "any meeting *bonâ fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of any matters of public concern, whether the admission thereto be general or restricted." The same definition of "a public meeting" appears in the New Brunswick Act(*j*). It

(*h*) R.S.B.C. 1897, c. 120, s. 4. See Ponsford v. Financial Times, Ltd. (1900) 16 T.L.R. 248, and Kelly v. O'Malley *et al.* (1889) 6 T.L.R. 62, pp. 319-20 *post*, as to the meaning of the last proviso.

(*i*) 51-52 Vict. c. 64, s. 4.

(*j*) C.S.N.B. 1903, c. 136, s. 2(*b*).

also appeared in the Ontario Act(*k*), as first introduced, and might well have been left in the statute as finally passed.

"Any meeting bona fide" held.

The phrase "*bonâ fide*" (*supra*) presumably relates to the origin of the meeting, and the intentions of those responsible for its being held. The equivalent of the phrase is "honestly," and its correct province is to qualify things or actions that have relation to the mind or motive of the individual(*l*). As to the number present, it has been said that one swallow does not make a summer, nor does the presence of one shareholder constitute a "meeting"(*m*). The word "meeting" implies a concurrence, or coming face to face, of at least two persons(*n*). There is accordingly, and speaking generally, no "meeting" of shareholders or other bodies if only one attends; though "no doubt in a particular statute the word might be used in a special sense, so that the attendance of one might satisfy it"(*o*). The meeting mentioned in the British Columbia Act must not be a sham, but a genuine "meeting," so to speak, called or brought about for honest reasons, in regard to a matter of public concern, and, where it is such, a report of the proceedings, which otherwise comes within the statutory privilege, will be protected. The phrase "public concern" has probably the same meaning as "public interest" in the expression, "fair comment on a matter of public interest." The "admission" may be either "general," in the sense of being open to every person who may choose to attend, or "restricted" by the requirement of a ticket, entrance fee, or some personal or specific qualification on the part of those seeking admission. In this latter sense a concert, lecture, or other entertainment, or the meeting of the creditors of an insolvent, or of the shareholders of a company, would be "public," and a report of the proceedings would be protected if the other conditions of privilege were complied with.

(*k*) 6 Edw. 7, c. 22, s. 2.

(*l*) Stroud's Jud. Dict. p. 82.

(*m*) *Re* Sanitary Carbon Co. W.N. (1877) 223.

(*n*) *Per* Coleridge, C.J., in Sharpe v. Dawes, 2 Q.B.D. 26; 46 L.J.Q.B. 104; 25 W.R. 66; 36 L.T. 188.

(*o*) *Per* Coleridge, C.J., in Sharpe v. Dawes, *supra*.

Defendant's proofs under the British Columbia Act.

To make good his claim of privilege, under the British Columbia Act, the defendant must prove (1) that the meeting was *bonâ fide;* (2) that it was lawfully held for a lawful purpose; (3) and for the furtherance or discussion of any matter of public concern; (4) that the report was fair and accurate; (5) that the matter complained of was neither blasphemous nor indecent; (6) that it was of public concern; and (7) that its publication was for the public benefit.

Under the Ontario Act.

Under the Ontario Act he must prove (4), (5), and either (6) *or* (7). There has been some difference of opinion, under the corresponding section of the English Act, whether the defendant must prove both of the two last mentioned conditions, or only one of them. The question, however, is for the jury(*p*), who, if they regarded the matter as one of public interest or concern, would probably approve of its publication as being for the public benefit. The defendant's proofs will not be sufficient if the plaintiff can shew (1) that the defamatory matter complained of in the report was published maliciously; or (2) that the defendant has refused or neglected, on request, to insert a reasonable letter or statement of explanation or contradiction of such matter. It will also be noticed that the section of the statute giving this conditional privilege does not limit or abridge any other privilege under the Provincial law; these are maintained intact.

Reports of meetings of municipal councils, school boards, etc.

The Ontario and British Columbia Acts also protect two classes of newspaper reports which are not covered by the statutes of the other Provinces. The first class comprises reports of meetings of municipal councils, school boards, boards of local authorities formed under any Act, etc. The "Act" referred to in the British Columbia statute may be either a Provincial or Dominion Act, as more fully stated in the Ontario statute. These reports are privileged on the same conditions as the reports of "public meetings," so long as the public or any newspaper reporter is

(*p*) Weldon v. Johnson (1884) 1 T.L.R. 168; Venables v. Fitt (1887) 5 T.L.R. 83; Pankhurst v. Sowler (1887) 3 T.L.R. 193; Kelly v. O'Malley *et al.* (1889) 6 T.L.R. 62.

admitted. The privilege may also be lost for the same reasons as in the other case. It should be observed, however, that the reports of any parliamentary committee, or of any commission acting in a judicial capacity and having judicial powers and authority(*pp*), although nominally within the British Columbia Act, would have an inherently independent and wider privilege apart from the statute. Reports, *e.g.*, containing the evidence and findings on private bills of the local Legislature, or of the Senate and House of Commons of Canada, or reports of the evidence under the recent Insurance Commission, or of the Commission appointed to inquire into the labour troubles in British Columbia, would be privileged whether or not the matter of the reports was of public concern, or its publication for the public benefit, and the defendant, in an action for libel, would not be required to prove the above conditions.

Reports published by request of a government office or department, or of a public official, etc.

The second class of reports protected by the Ontario and British Columbia Acts, and not included in the statutes of the other Provinces, comprises certain reports and notices, etc. (and, under the Ontario enactment, fair synopses of these), published for the information of the public, at the request of any government office or department, or of certain public officials. The conditions and deprivations of privilege are the same as in the other cases, and the same remarks apply as to the privilege of parliamentary reports and papers.

The privilege in the New Brunswick Act.

The enactment in the New Brunswick Act, which is taken from the English Newspaper Libel and Registration Act, 1881(*q*), is as follows: "A report published in a newspaper of the proceedings of a public meeting shall be privileged, if the meeting was lawfully convened for a lawful purpose, and if the report was fair and accurate and published without malice, and if the publication of the matter complained of was for the public benefit: Provided always, that the protection intended to be afforded by this section shall not be available as a defence

(*pp*) See Barratt v. Kearns (1905) 1 K.B. 504; 74 L.J.K.B. 318; 53 W.R. 354; 92 L.T. 255; 21 T.L.R. 212—(C.A.).

(*q*) 44-45 Vict. c. 60, s. 2.

in any proceeding if the plaintiff can shew that the defendant has refused to insert in a newspaper, in which the report containing the matter complained of appeared, a reasonable letter or statement of explanation or contradiction by or on behalf of the plaintiff''(*r*).

The privilege in Manitoba.

The first sub-section of the enactment in the Manitoba statute is substantially the same as the above, as is also the provision in the Criminal Code(*s*). The Manitoba Act also contains an enactment the same as sub-section 2, of section 8, of the Ontario statute (*supra*)(*t*).

When privilege not conferred in New Brunswick and Manitoba.

By section 11 of the New Brunswick Act, no publisher of a newspaper is entitled to the privilege unless he publishes his name as publisher in a conspicuous place in the paper. And by section 14 of the Libel Act of Manitoba, and section 16 of the Newspaper Act of that Province(*u*), the publisher is also deprived of the privilege if he has failed to register his paper under the last named Act. The New Brunswick Act gives the same meaning to the expression ''a public meeting'' as the British Columbia Act (*supra*).

The privilege in the Nova Scotia Act.

The only Nova Scotia Act relating to libel or slander is confined exclusively to newspaper reports of proceedings of public meetings, the courts and municipal councils. It defines ''a public meeting'' as ''any lawful meeting to which the public are invited, and of which public announcement has been made in some newspaper published in the vicinity, or by printed or written notice thereof''(*v*).

The Nova Scotia Act also provides that ''a report published in a newspaper of the proceedings of a public meeting, court

(*r*) C.S.N.B. 1903, c. 136, s. 3.

(*s*) See R.S.M. 1902, c. 97, s. 4(1), and C.C. s. 323. In the Manitoba Act the words, "and open to the public," follow the words "lawful purpose" (*supra*) in the New Brunswick Act.

(*t*) R.S.M. 1902, c. 97, s. 2(*b*).

(*u*) R.S.M. 1902, c. 123.

(*v*) R.S.N.S. 1900, c. 180, s. 1(b).

of justice, or municipal, city, or town council, shall be privileged, if the report was fair and accurate, and published without comment and without malice, and if the publication of the matter complained of was for the public benefit: Provided always, that the protection afforded by this section shall not be available as a defence in any proceedings,(a) if the defendant denies publication of the matter complained of; or (b) if the plaintiff can shew that the defendant has refused to insert in the newspaper, in which the report containing the matter complained of appeared, a reasonable letter or statement of explanation or contradiction, by or on behalf of the plaintiff''(*w*).

Restrictions of Nova Scotia Act.

These enactments restrict very considerably the meaning of "a public meeting," and the consequent benefits to the publisher of the reports of such meetings. The meeting must be "lawful," and the public must have been "invited" by announcement in some local paper, or by a printed or written notice. The report of no other meeting is protected. Nor will there be protection under the statute unless the defendant can prove (1) that the report was fair and accurate; (2) that it was published without comment; (3) and without malice; (4) that the publication of the matter complained of was for the public benefit; and (5) unless the defendant admits publication of such matter. (6) And having made these proofs and this admission—because the bar of a denial means an admission of publication—the defendant will lose the limited privilege conferred should it appear that he has refused, on request, to insert a reasonable letter or statement of explanation or contradiction. One of these conditions, namely, that which distinguishes report and comment, is applicable to the reports of all proceedings which are *primâ facie* privileged. The observations of Lord Campbell, C.J.(*x*), as to the reports of proceedings in the courts, are generally true: "If any comments are made, they should not be made as part of the report. The report should be confined to what takes place in court, and the two things, report and comment, should be kept separate."

(*w*) R.S.N.S. 1900, c. 180, s. 2.

(*x*) In Andrews v. Chapman (1853) 3 C. & K., at p. 288.

Reports of public meetings under the Code.

The enactment in the Criminal Code, as to reports of public meetings, provides, that no one commits an offence by publishing in good faith, in a newspaper, a fair report of the proceedings of any public meeting if the meeting is lawfully convened for a lawful purpose and open to the public, and if such report is fair and accurate, and if the publication of the matter complained of is for the public benefit, and if the defendant does not refuse to insert in a conspicuous place, in the newspaper in which the report appeared, a reasonable letter or document of explanation or contradition by or on behalf of the prosecutor(*y*).

Publication of parliamentary papers privileged by the Code.

The Code also privileges the publication of parliamentary papers and reports of the proceedings of Parliament by the following enactments, which may be quoted in this connection: No one commits an offence by publishing to either the Senate or House of Commons, or to any Legislative Council, Legislative Assembly or House of Assembly, defamatory matter contained in a petition to the Senate, or House of Commons, or to any such Council or Assembly, or by publishing by order or under the authority of the Senate or House of Commons, or of any such Council or Assembly, any paper containing defamatory matter, or by publishing, in good faith and without ill-will to the person defamed, any extract from or abstract of any such paper(*z*).

Reports of parliamentary proceedings under the Code.

No one commits an offence by publishing in good faith, for the information of the public, a fair report of the proceedings of the Senate or House of Commons, or any committee thereof, or of any Council or Assembly aforesaid [*i.e.*, the Council or Assembly mentioned in the previous section], or any committee thereof, . . . nor by publishing, in good faith, any fair comments upon any such proceedings(*a*).

(*y*) C.C. s. 323.

(*z*) C.C. s. 321.

(*a*) C.C. s. 322 in part. The omitted words relate to reports of proceedings of the courts.

Effect of the enactments as to reports of public meetings.

The enactments as to reports of public meetings, in these different statutes, have enlarged the number of privileged occasions upon which a newspaper, as defined by the Provincial Act, or by the Code, may publish defamatory matter. The Manitoba Act does not cover reports in monthly trade papers or other monthly publications(*b*), while none of the enactments, the Ontario enactment excepted, protect defamatory matter contained in a report of a public meeting which is published in a book, pamphlet, placard, or circular, or in an extract or reprint from a newspaper as defined. A defendant sued for any such publication would have to rely upon the law prior to the statute, unless indeed he could bring his case within the law as laid down in *Allbutt* v. *General Council of the Medical Education, etc.*, in which the publication, without malice, of a fair and accurate report of the minutes of the General Medical Council was held to be privileged. The Court of Appeal said: "It seems to us, having regard to the nature of the tribunal, the character of the report, the interest 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. . . . The public at large were interested in these proceedings, and their publication was information to which the public were entitled"(*c*).

Limitations of the statutory law.

Prior to these enactments the privilege thus given was not extended to any public meetings. Nor, as will be seen, is it extended now, in some of the Provinces, to reports of all public meetings, but only to those which are within the qualified protection of the Provincial Acts. This is particularly true of the newspaper reports in New Brunswick, Manitoba and Nova Scotia. The enactments in the Ontario and British Columbia Acts are wider and more comprehensive, and expressly extend the privilege to the reports of the proceedings, not technically public, of a number of representative bodies, and to certain official and other reports issued for the information of the public, which are not covered by the statutes of the other Provinces.

(*b*) A similar defect in the Ontario law was remedied by the recent amendment, 6 Edw. 7, c. 22, s. 1.

(*c*) (1889) 23 Q.B.D. 400, at pp. 410, 413.

The law prior to Provincial legislation.

Before these statutory changes in the Provincial laws, it was no defence to an action for a libel, contained in a report of a public meeting, to plead that the report was a true, correct and faithful report of the proceedings at such meeting.

Davison v. Duncan (1857).

In *Davison* v. *Duncan*(*d*), the facts were, that at a meeting of local improvement commissioners, one of the commissioners made some defamatory remarks on the conduct of the former secretary of the bishop of Durham in procuring from the bishop a license for the chaplain of the West Hartlepool cemetery. These remarks were reported in the local newspaper. In an action for libel against the newspaper proprietor, a plea alleging that the statements complained of were made at a public meeting of the commissioners, and were an impartial and accurate report of what took place at such meeting, was held bad on demurrer.

Opinion of Lord Campbell, C.J.

Lord Campbell said: "I am of opinion that, as the law now stands, the plea is bad. 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 the publicity. But it has never yet been contended that such a privilege extends to a report of what takes place at all public meetings. Even if confined to a report of what was relevant to the object of the meeting, it would extend the privilege to an alarming extent. If this plea is good, a fair account of what takes place may be published whatever harm the publication may do to private character, provided it takes place at a meeting of a public nature, a wide description embracing all kinds of meetings, from a county meeting to a parish meeting. At such meetings things may well be said very relevant to the subject in hand, yet very calumni-

(*d*) (1857) 7 E. & B. 229; 26 L.J.Q.B. 104; 28 L.T. (O.S.) 265.

ous. In what an unhappy situation the calumniated person would be if the calumny might be published, and yet he could not bring an action and challenge the publishers to prove its truth? The Legislature may think fit to extend the privilege of publication beyond the limits to which it now goes. If it does it can impose such restrictions on the extension as it thinks fit. We in a court of law can only say how the law now stands; and, according to that, it is clear the action lies and the plea is bad."

Purcell v. Sowler (1877).

In *Purcell* v. *Sowler* also(*e*), the English Court of Appeal decided that a fair and accurate report published in a local newspaper of the proceedings at a meeting of a board of guardians was not privileged, although the matter reported, which involved certain charges of neglect against the medical officer of a union workhouse, was held to be one of public interest, and although the report itself was admittedly correct and *bonâ fide*. It was the decision in this case which eventually led to the passage of the Newspaper Libel and Registration Act, 1881(*f*). *Hearne* v. *Stowell*(*g*) and *Popham* v. *Pickburn*(*h*) also illustrate the old law. See, also, *Pierce* v. *Ellis*(*i*) and *Charlton* v. *Walton*(*j*). In *Popham* v. *Pickburn* a vestry were required by an Act of Parliament to publish, sooner or later, a report made to them by their medical health officer; but, notwithstanding this, a newspaper proprietor was held liable for its publication. Such a case would be covered by the Ontario and British Columbia Acts, but certainly not by the Acts of the other Provinces.

Defendant's position under the Provincial statute.

This being the state of the law prior to any Provincial legislation on the subject, the defendant had then to rely upon the

(*e*) (1877) 2 C.P.D. (C.A.) 215; 46 L.J.C.P. 308; 25 W.R. 362; 36 L.T. 416.

(*f*) 44-45 Vict. c. 60.

(*g*) 12 A. & E. 719; 4 P. & D. 696; 6 Jur.

(*h*) (1862) 7 H. & N. 891; 31 L.J. Ex. 133; 10 W.R. 324; 5 L.T. 846; 8 Jur. N.S. 179.

(*i*) 6 Ir. C.L.R. 55.

(*j*) (1834) 6 C. & P. 385.

defamatory matter contained in the report being true, or upon its being a fair and *bonâ fide* comment upon a matter of public interest. And so he would still in regard to the published report of the proceedings of a public meeting which is not within any particular Act, *e.g.*, the Manitoba Act, as compared with the more comprehensive provisions of the Ontario and British Columbia Acts. In any case not within the statute in question, the defendant may, of course, avail himself of any defence open to him before the statute was passed. Where, therefore, by the decisions of the courts under the old law, such reports were privileged, they will be privileged still; and the defendant may plead the privilege as an answer to the action.

Defendant's proofs under the Manitoba and New Brunswick Acts.

In every case coming under these enactments as to privilege in the Provincial statutes, the onus is on the defendant to shew a compliance with the conditions of the privilege. Under the first clause of the enactment in the Manitoba Act, which is also contained in the New Brunswick Act, he must prove (1) that the meeting was a public meeting; (2) that it was lawfully convened; (3) for a lawful purpose; (4) and open to the public; (5) that the report was fair and accurate; (6) and published without malice; (7) and that the publication of the matter complained of was for the public benefit; (8) and, having proved these facts, the privilege will be lost should it appear that he has refused, on request, to insert in his paper a reasonable letter or statement of explanation or contradiction. These conditions, it may be remarked, appear to be no more than an equivalent for what would be granted at common law for the same sort of defamatory matter; the common law protection would seem to attach to a libellous report which complied with such conditions.

Defendant's proofs under the Ontario and Manitoba Acts.

The second clause of the enactment in the Ontario and Manitoba Acts, which is not in the British Columbia and New Brunswick Acts, also privileges the reports of a "public meeting" called by newspaper announcement, or by printed or written notice; but, instead of restricting the privilege to such reports, the clause expressly "extends" the privilege conferred by the preceding clause to the reports of such meetings as are announced in the manner described. Under this clause the defendant must

prove (1) a lawful meeting; (2) an invitation to the public; (3) an announcement (a) by notices, written or printed, posted in six conspicuous places where the meeting is held, or (b) by advertisement in a local newspaper as provided.

What is "a public meeting?"

The enactments in New Brunswick and Manitoba appear almost to imply that there may be public meetings which are not open to the public, and that meetings may be lawfully convened for unlawful purposes. This, of course, was never intended. Generally speaking, all meetings for the discussion of matters of common interest, and to which the public are freely admitted, are public meetings. What is "a public meeting," within the meaning of any of these enactments, has never been determined by any of the Provincial courts; in fact, there is no reported decision in England or in Canada on the words "a public meeting open to the public"(*jj*). In common parlance "a public meeting" means a meeting that is not of a private or secret character, but one at which the proceedings are open to the observation, hearing and knowledge of all who choose to attend.

"Open to the public."

The words "open to the public," which are omitted in the New Brunswick Act, imply at least the privilege of freedom of admission; and this may be either absolute, or conditional upon payment of a small fee. One criterion which has been suggested for determining what is, and what is not, a public meeting is this: Did persons at the meeting in question obtain admission simply as members of the public, or did they obtain it on account of some personal qualification?(*k*).

Municipal, political and religious meetings.

A meeting to which all the ratepayers of a municipality would be admitted, to consider and discuss a subject of common interest, would clearly be within those enactments. So would a meeting of the electors of any constituency to hear an address by their parliamentary representative. But a meeting to which only those belonging to one political party are invited, would appear not to be a public meeting within the enactments mentioned.

(*jj*) See Parke v. Hale (1903) 2 O.W.R. 1172.
(*k*) Fisher & Strahan's Law of the Press, 2nd Ed. 171.

A political meeting, *e.g.*, of Liberals, to which Conservatives were refused admission, would not be "a public meeting" "open to the public"; and the publication of defamatory statements made at such a meeting would not be privileged. The same may be said of any meeting of members of the same religious denomination, or holding the same religious opinions. The report, *e.g.*, of the proceedings of a meeting composed exclusively of Protestants, and which contained matter defamatory of individual Roman Catholics, would not be protected. It has been held in England, under the Law of Libel Amendment Act, 1888(*l*), which privileges newspaper reports of proceedings of public meetings in a broader sense than the Newspaper Libel and Registration Act, 1881(*m*), from which the enactments in New Brunswick and Manitoba are taken, that the meeting of a congregation for public worship is not a public meeting within the Act, and, therefore, that a report of the sermon preached during the service is not privileged(*n*).

Lectures and concerts.

There is a class of public meetings such as lectures and concerts that are also "open to the public," although usually on payment of an admission fee. How far these are within the enactments referred to must depend on the circumstances under which they are held. If they are free in the popular sense of the term, they are plainly within the law, and the payment of a small admission fee, not sufficient to exclude the general public, would appear to give reports of their proceedings the same protection. But a high-priced concert or lecture, or, in fact, any meeting, the conditions of admission to which, by reason of the charge or otherwise, would be to a large extent exclusive, could hardly be called a public meeting. In a case under the English Vagrant Act Amendment Act, 1873(*o*), the court held, that a railway carriage, while travelling on its journey, is within the definition in the Act of "an open and public place to which the public have or are permitted to have access"(*p*).

(*l*) 51-52 Vict. c. 64, s. 4.

(*m*) 44-45 Vict. c. 60, s. 2.

(*n*) Chaloner v. Lansdown & Sons (1894) 10 T.L.R. 290.

(*o*) 36-37 Vict. c. 38, s. 3.

(*p*) Langrish v. Archer, 10 Q.B.D. 44.

Municipal councils, school boards, etc.

The meetings of municipal councils, school boards, and other representative bodies of a like character, are apparently excluded from all the Provincial Acts except those of Ontario and British Columbia. Meetings of these bodies, although usually open to the public, and their proceedings as a rule reported in the press, are nevertheless within the control of their conveners. The public have not, strictly speaking, the right of admission; they have not the right to take part in the proceedings; and they may be excluded at any moment. Admission of people generally to such meetings is rather a privilege than a right, the exercise of which rests with those representative bodies themselves. If the public were freely admitted, there is scarcely a doubt that the meeting would be regarded as "a public meeting" "open to the public," and that defamatory matter in the published report of its proceedings would be protected, provided the other conditions of privilege were observed. If, however, the public on any occasion were excluded, the meeting would not be "open to the public"; and the publisher of defamatory matter in such a report would have to rely upon the law as it stood prior to the passing of the Act.

Pierce v. Ellis (1856).

In *Pierce* v. *Ellis*(*q*) privilege was claimed for a report of a meeting of a board of guardians, a representative local body. Reporters were admitted to the meeting, and the defendant handed one of them a correct report of his speech. The court were of opinion that it was not a fair report of the whole proceedings of the meeting; and Pigot, C.B., said that the public had not the right to be admitted to witness the proceedings, because the board had the power of deliberating with closed doors. In *Purcell* v. *Sowler* (*supra*), a fair and accurate report of a meeting of such a board, published *bonâ fide*, at which meeting reporters were present, was, as we have seen, held to be not privileged(*pp*).

Simpson v. Downs (1867).

The plaintiffs, contractors for a borough goal, were charged by the defendants, who were members of the town council, and,

(*pp*) See p. 310, *ante*.
(*q*) 6 Ir. L.R. (N.S.) 65, 66.

by reason of their business experience, competent judges of the contract work, with misconduct in the performance of their contract. The charges were published in a letter in a local newspaper. It was ruled that, although the charges would have been privileged if made to the town council, they were not privileged in the published letter(*r*).

Meetings of creditors and shareholders in public companies.

The meetings of creditors held under the authority of an Insolvent Act, or of any other Act for that purpose, and the meetings of shareholders or stockholders in banks, companies, and the like, are also in the unprivileged class under all the Provincial Acts, the Ontario and British Columbia Acts excepted. Meetings of that description are usually advertised, but the invitation to attend them is, as a rule, limited to those personally or immediately interested. Discussions arise there affecting individual character, reputation, or credit, and statements are made the publication of which would be most pernicious to the persons concerned. A shareholder in a railway company called a meeting of the shareholders, and invited newspaper reporters to attend. Upon the meeting being convened he made certain charges against one of the directors in his official capacity. These were held to be not privileged, because persons not shareholders were present(*s*). The manager and the directors of a joint stock company have a common interest in discussing the company's affairs; but that does not justify the manager in making personal charges of fraud against the directors in a public news room(*t*). In both of these cases there would be still less justification for the publication of the charges in a newspaper. *Ponsford* v. *Financial Times, Ltd., et al.*(*u*) (*infra*), is expressly in point as to the reports of public companies.

(*r*) Simpson *et al.* v. Downs *et al.*, 16 L.T. (N.S.) 391, *per* Montagu Smith, J. See, also, Harle v. Catherall, 14 L.T. 801; Jackson v. Sir Richard Mayne, 19 L.T. (N.S.) 399, *per* Keating, J.; Hopewell v. Kennedy [1904] 4 O.W.R. 433; 9 O.L.R. (1904) 43; Campeau v. Monette (1901) Q.R. 19 S.C. 429.

(*s*) Parsons v. Surgey (1864) 4 F. & F. 247.

(*t*) Waring v. McCaldin, 7 Ir. C.L.R. 282; Sewall v. Catlin, 3 Wendell (N.Y.) 292.

(*u*) (1900) 16 T.L.R. 248, *post*, p. 319.

"Lawfully convened for a lawful purpose."

The public meeting mentioned in some of these enactments must be "lawfully convened for a lawful purpose," *i.e.*, it must not be a meeting in violation of any Act of Parliament, or of any authority thereunder, and must be held under such circumstances as will not make it riotous, or a nuisance to people in the neighbourhood, and the object of the meeting must not be illegal. The Criminal Code(*v*) defines what is, and what is not, an unlawful assembly, and also what is a riot(*w*). The element of a disturbance of the peace tumultuously, *i.e.*, either the causing persons in the neighbourhood to reasonably fear such a disturbance, or the provoking persons, needlessly and without reasonable cause, to such a disturbance, or, in the case of a riot, the beginning of such a disturbance, is common to every such unlawful assembly, where there is an intent on the part of three or more persons who assemble to carry out a common purpose. A meeting will not be for "a lawful purpose" if it be seditious(*x*); or illegal, as, *e.g.*, persons meeting for a purpose which, although not carried out, would, if carried out, make them rioters(*y*); or if it be a meeting "to adopt preparatory measures for holding a national convention"(*z*); or if it be held under such circumstances as are likely to cause a breach of the peace(*a*). A report of such meetings would not be privileged; neither would the report of a meeting called for the purpose of defaming or vilifying any person, whether a private individual or a public man, more especially if it tended, by reason of violent opposition, to a breach of the peace. But no meeting, not otherwise unlawful, becomes unlawful because it will excite opposition which is itself unlawful, and thus indirectly lead to a breach of the

(*v*) Sec. 87.

(*w*) Sec. 88.

(*x*) Rex v. Hunt *et al.* (1819) 3 B. & Ald. 566; Redford v. Birley *et al.* (1822) 3 Stark, at p. 103.

(*y*) Rex v. Burt *et al.* (1834) 5 C. & P. 154.

(*z*) Rex v. Fursey (1835) 6 C. & P. 81.

(*a*) Rex v. Hunt *et al.* (1819) 3 B. & Ald. 566; Reg. v. Vincent (1838) 9 C. & P. 91, 109.

peace(*b*); except (1) where illegality in the conduct of the persons convening or addressing the meeting provokes a breach of the peace; or (2) where the object of the meeting and the conduct of those present are lawful, but peace can only be kept by dispersing it.

"Fair and accurate and published without malice."

The report must also be "fair and accurate and published without malice." That is, it must be substantially fair(*c*), and published without actual malice. It need not be a complete or verbatim report, and a few trivial errors will not destroy the privilege so long as the impression left on the reader does not differ materially from that conveyed by a perfectly correct report. The onus of proving fairness and accuracy is on the defendant; but where the plaintiff's witnesses admitted that the report complained of was fair and accurate, except as to two trifling errors, the court upheld the ruling of the trial judge, that there was no evidence of unfairness or inaccuracy to go to the jury(*d*). It is not to be expected that in discharging this duty a public journalist will always be infallible(*e*). The report as published, however, should not prejudice any individual by unfair omissions or incorrect insertions(*f*); nor by the place given it in a newspaper designed to serve certain trade interests(*g*). The heading of a report is no part of it, and must

(*b*) Beatty v. Gillbanks, 9 Q.B.D. 308, *per* Field, J., at p. 314. See, also, Beatty v. Glenister, W.N. 1884, p. 93, and Reg. v. Justices of Londonderry, 28 L.R. Ir. 440. But compare with these Wise v. Dunning (1902) 1 K.B. 167; Humphries v. Connor, 17 Ir. C.L.R. 1; Reg. v. McNaughton, 14 Cox C.C. 592; O'Kelly v. Harvey, 14 L.R. Ir. 105; 15 Cox C.C. 435.

(*c*) *Per* Lord Campbell, C.J., in Andrews v. Chapman (1853) 3 C. & K. 289.

(*d*) Kimber v. The Press Association (1892) 8 T.L.R. 671; (1893) 1 Q.B.D. (C.A.) 65.

(*e*) *Per* Cockburn, C.J., in Woodgate v. Ridout (1865) 4 F. & F. at p. 217.

(*f*) Street v. Licensed Victuallers' Society, 22 W.R. 553.

(*g*) Williams v. Smith (1888) L.R. 22 Q.B.D. 134, in which reference is made to the qualified privilege at common law of fair reports of proceedings in the courts.

be justified on other grounds than that of privilege(*h*). The question whether a report is fair and accurate is a question of fact for the jury(*i*). Although some of these citations do not refer to the fairness and accuracy of reports of public meetings, they are instructive, as are also the cases on fair reports of judicial and other proceedings in the chapters on those subjects under the Provincial statutes.

Publication "for the public benefit."

It should also appear that the publication of the matter complained of was "for the public benefit." That is, that the general advantage of the community in having the libel made public more than counterbalances the inconvenience to the individual whose conduct may be the subject of the libel(*j*). The meaning of the words, "matter for the public benefit," has raised some doubts, which were expressed by Lord Bramwell in *Ryalls* v. *Leander et al.*(*k*), in which it was held that proceedings in a gaol before a registrar in bankruptcy, under the Bankruptcy Act, 1861, upon the examination of a debtor in custody, were judicial and in a public court, and that a report of those proceedings was protected. If irrelevant evidence, which should have been excluded, be given in court and appear in the report, the reporter is not to blame(*l*). Reporters should not be expected to discriminate in such matters.

Pankhurst v. Sowler (1886).

Under the clause relating to reports in the English Newspaper Libel and Registration Act, 1881(*m*), it was held, that

(*h*) Clement v. Lewis *et al.* (1820) 3 B. & Ald. 702; 3 Br. & Bing. 297; 7 Moore 200; Bishop v. Latimer (1861) 4 L.T. 775; Boydell v. Jones (1838) 7 Dowl. 210; 4 M. & W. 446; Lewis v. Levy (1858) 27 L.J.Q.B. 282; E.B. & E. 537.

(*i*) Rumney v. Walter (1892) 8 T.L.R. 256.

(*j*) *Per* Lawrence, J., in Rex v. Wright (1799) 8 T.R. 298. See, also, the remarks of Lord Campbell, C.J., in Taylor v. Hawkins, *ante*, p. 284, where a similar reason is given for the privileged reports of judicial proceedings.

(*k*) (1865) L.R. 1 Ex. 296; 35 L.J. Ex. 185; 14 L.T. 563.

(*l*) *Ibid.*

(*m*) 44-45 Vict. c. 60, s. 2.

the question was, not whether the publication of the report was for the public benefit, but whether the actual words complained of were for the public benefit. In the case in which this rule was stated, the defendant was sued for the publication of a report of a speech which imputed atheism and blasphemy to the plaintiff. It was admitted that the public election meeting at which the words were spoken was for a lawful purpose, that the report was accurate, and that it was published without malice, but it was denied that the report was for the public benefit. The jury were asked to say, whether the publication of reports of election meetings was for the public benefit, and not whether the publication of the libel contained in the report of the speech was for the public benefit. On appeal it was held, that this was "not a proper and complete direction" under the rules of the Judicature Act, and the court directed a new trial(*n*).

In determining whether the publication of the matter complained of was for the public benefit the jury must look at all the facts and circumstances in connection with the meeting, its objects, the position of the parties litigant, the relevancy between the matter published and the purposes of the meeting, etc.(*o*). In the case in which this direction was given to the jury, they returned to court, after retiring, to inquire how the publication of a libel could possibly be for the public good.

Ponsford v. Financial Times, Limited, et al. (1900).

In a later case in which the cashier of a public company sued the defendants for the publication in their newspaper of a criminal charge contained in a verbatim report of the chairman's speech at a meeting of the company, Matthew, J., held, that the statement of this charge was not a matter of public concern, and that the defendants were not protected. The defendants relied on *Rickett* v. *Sharp*(*p*), and the last clause of section 4 of the Law of Libel Amendment Act, 1888(*q*), which has been adopted in the British Columbia enactment. The charge was admittedly unfounded, but the report was fair and published *bonâ fide*,

(*n*) Pankhurst v. Sowler (1886) 5 T.L.R. 193.

(*o*) *Per* Denman, J., in Venables v. Fitt (1888) 5 T.L.R. 83.

(*p*) 45 Ch. D. 286.

(*q*) 51-52 Vict. c. 64.

and the contention was, that the publication was privileged on the ground that the company was a public company, and the meeting a public meeting within the meaning of the statute.

Opinion of Matthew, J.

"It seems to me," said Matthew, J., "that the report of any statement made at the meeting in question, which was strictly confined to a discussion of the company's financial position, would have been privileged. But it does not follow that a report of all that was said in the course of a speech on the affairs of the company would be protected. This seems to be clearly the result of the proviso in section 4, which is in the following terms: "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"(*r*). The same proviso is contained in the Ontario and British Columbia Acts, the conjunction *or*, instead of *and*, being used in the last line of the proviso in the former Act.

Kelly v. O'Malley et al. (1889).

In another English case the question for the jury at the trial was, whether the publication of a lot of offensive personalities, interjected by persons in the crowd into a speech at a public meeting, and which was reported in the newspaper in that form, was for the public benefit. The report, which was accurate, was of a meeting of dock labourers for the purpose of discussing the sugar bounty question. The plaintiff attempted to speak at the meeting, and the report contained slanderous interruptions by persons present who were hostile to the speaker. The interruptions had no reference to the question before the meeting, and were alleged to charge the plaintiff with dishonesty. The defendant pleaded that it was a *bonâ fide* and accurate report of what had taken place at a public meeting, in regard to a matter of public importance, and that it was published for the public benefit without malice. Huddleston, B., left it to the jury to say, whether the report was fair and accurate, and whether "these miserable personalities had anything whatever to do with public interest and benefit. . . . He could not believe that a news-

(*r*) Ponsford v. Financial Times, Ltd., *et al.* (1900) 16 T.L.R. 248.

paper was justified in publishing slanderous matter, although actually uttered at a public meeting. Suppose that you have an enemy who goes to a public meeting, and there, to gratify his spite against you, says you are a thief or are insolvent, etc., and that is published by a newspaper. Is the paper to be allowed to publish such a matter and shield itself under the Act?" The jury found for the plaintiff and £5 damages(*s*).

The effect of the two last mentioned decisions is the same as that of *Purcell* v. *Sowler* (*ss*), which led to the amendment of the English Libel Act of 1881, and imposes upon the editor of a newspaper the somewhat onerous task of reading all the manuscript intended for publication, and of eliminating therefrom everything of a defamatory character which is not protected by the statute.

Newspaper charges of personal immorality not for "the public benefit."

In an Ontario case, the publishers of two evening papers, having been sued for publishing of the plaintiff that he had seduced and betrayed one B. P., and was a man unfit for the society of respectable people, etc., pleaded, *inter alia*, that the article was published *bonâ fide* and without malice, and for the public benefit, and in the usual course of the defendants' duty as public journalists; and was a correct, fair and honest report of proceedings of public interest and concern. This plea was demurred to as being no answer to the action, and the demurrer was upheld on the ground that the publication complained of was in no sense for the public benefit, nor published in the course of defendants' duty. "I have no kind of doubt," said Wilson, C.J., "that the seventh paragraph of the statement of defence in question is unsustainable. The defendants had no right to publish the article complained of. It was in no sense for the public benefit, nor in the course of the defendants' duty as journalists, to publish such matters." He gave judgment for the plaintiff on the demurrer with costs, with leave to the defendants to amend(*t*). This decision was given after the passage of the

(*s*) Kelly v. O'Malley *et al.* (1889) 6 T.L.R. 62.

(*ss*) (1877) 2 C.P.D. 218 (C.A.).

(*t*) Farmer v. Hamilton Tribune Printing and Publishing Co. *et al.* (1883) 3 O.R. 538.

Ontario Newspaper Libel Act, 1882(*u*), which was afterwards consolidated in the revised statute, and so remained till the substitution of the present wider enactment in R.S.O. 1897, c. 68, s. 8(1), *ante* pp. 298-99, which was substituted by 6 Edw. VII. c. 22, s. 2 (O.).

Refusal to insert a reasonable letter or statement by plaintiff.

The privilege conferred by the enactments in these Provincial statutes shall not be available as a defence, if the plaintiff can shew that the defendant has refused to insert in his paper a reasonable letter or statement of explanation or contradiction, of the defamatory matter in the report, by or on behalf of the plaintiff. This statutory condition applies to the reports of public meetings in all the Provinces except Quebec and Prince Edward Island. The refusal to publish an explanation or contradiction would be evidence of malice. In considering the reasonableness of the letter or statement, regard should be had to its matter and style and also to its length. There should be no reflections on persons not concerned in the matter in question, and, if the whole of the statement is not published, some good reason should be given for the omissions. In an action for libel (unreported) against the publishers of *Punch*, the well-known satirical paper, an explanatory letter by the female plaintiff, which would have filled more than two columns of the paper, was not regarded as "reasonable." The explanation or contradiction should be given equal prominence with the statements complained of, and what is said on that point in the chapter on Apology is more or less applicable to this condition as to privilege.

(*u*) 40 Vict. c. 9, s. 3(O.).

CHAPTER XXI.

Discussion of Matters of Public Interest.

The test of a subject of public interest.

It is difficult to lay down any precise test for a "subject of public interest"; but in practice, apart from the voluminous case law on the point, there is not much difficulty in determining whether any particular subject is of public or only of private interest.

Provision in the Code.

The enactment in the Code declares that no one commits an offence by publishing any defamatory matter which he, on reasonable grounds, believes to be true, and which is relevant to any subject of public interest, the public discussion of which is for the public benefit(*a*).

Groups of subjects of public interest.

Subjects of public interest may be grouped as follows:—

Affairs of State.

The Government, Federal or Provincial, and its policy; the Houses of Legislature, Dominion and Provincial, and their committees(*aa*); government appointments(*b*); petitions to the Legislatures and discussions thereon(*c*); Royal commissions(*d*); parliamentary elections(*e*); reforms in existing laws; bills before the Legislatures; the finances of the country; and all matters which similarly affect the public welfare.

(*a*) C.C. s. 324.

(*aa*) Hedley v. Barlow (1865) 4 F. & F. 224.

(*b*) Turnbull v. Bird (1861) 3 F. & F. 372.

(*c*) Wason v. Walter (1868) L.R. 4 Q.B. 73; 38 L.J.Q.B. 34; 8 B. & S. 671; 19 L.T. 409; 17 W.R. 169; Dunne v. Anderson (1825) 3 Bing. 88; 10 Moore 407; R. & M. 287.

(*d*) Mulkern v. Ward (1872) L.R. 13 Eq. 622; 41 L.J. Ch. 464.

(*e*) Wilson v. Reed *et al.* (1860) 2 F. & F. 149, 151, 152.

Administration of justice.

The administration of justice: The public conduct of judges and magistrates(*f*), and of members of the legal profession(*g*); the verdicts of juries(*h*); judicial decisions(*i*); the conduct of litigants and their witnesses, etc.(*j*).

Public institutions.

The administration of public institutions and local authorities: colleges, hospitals, asylums, municipal councils, school boards, vestries, boards of health, etc.(*k*).

Affairs ecclesiastical.

Ecclesiastical and church affairs: a bishop's government of his diocese; a clergyman's public conduct, and his management of his parish; the mode of conducting church services, etc.(*l*).

Literature and Art.

Literature and art: newspapers(*m*); books(*n*); pictures(*o*); pamphlets(*p*); posters or hand bills(*q*); advertisements(*r*); poems(*s*).

(*f*) Hibbins v. Lee (1864) 11 L.T. 541; 4 F. & F. 243.

(*g*) Seymour v. Butterworth, 3 F. & F. 372; Douglas v. Stephenson (1898) 29 O.R. 616.

(*h*) Woodgate v. Ridout (1865) 4 F. & F. 216.

(*i*) *Ibid.*

(*j*) Hedley v. Barlow (1865) 4 F. & F. 224.

(*k*) Harle v. Catheral *et al.* (1866) 14 L.T. 801; Purcell v. Sowler (1877) 2 C.P.D., at p. 218; Coe v. Fenney (1863) 4 F. & F. 13.

(*l*) Kelly v. Tinling (1865) L.R. 1 Q.B. 699; 35 L.J.Q.B. 231; 12 Jur. N.S. 940; 13 L.T. 255; 14 W.R. 51.

(*m*) Heriat v Stuart (1796) 1 Esp. 437; Stuart v. Lovell (1817) 2 Stark. 93; Campbell v. Spottiswoode (1863) 3 B. & S. 769; 32 L.J.Q.B. 185; 8 L.T. 201.

(*n*) Carr v. Hood (1809) 1 Camp. 355*n*; 10 R.R. 781*n*; Macleod v. Wakely (1828) 3 C.P. 311; Strauss v. Francis (1866) 15 L.T. (N.S.) 674; 4 F. & F. 939, 1107.

(*o*) Thompson v. Shackell (1828) 1 Moo. & Mal. 74.

(*p*) Hibbs v. Wilkinson (1859) 1 F. & F. 608; Koenig v. Ritchie (1862) 3 F. & F. 413; Odger v. Mortimer (1873) 23 L.T. 472; Morrison v. Belcher, 3 F. & F. 614.

(*q*) Eastwood v. Holmes (1858) 1 F. & F. 347; Paris v. Levy (1860) 30 L.J.C.P. 11; 3 L.T. 324; Jenner *et al.* v. A'Beckett (1871) L.R. 7 Q.B. 11; 41 L.J.Q.B. 14; 25 L.T. 464.

(*r*) Morrison *et al.* v. Harmer *et al.* (1837) 3 Bing. N.C. 759; Hunter v. Sharpe (1866) 15 L.T. 421; 4 F. & F. 938.

(*s*) Tabart v. Tipper (1808) 1 Camp. 350.

Public amusements.

Theatres or stage plays(*t*); concerts(*u*); floral exhibitions(*v*); and other places of public amusement or entertainment.

Other subjects of public interest.

What are subjects of public interest scarcely needs further illustration. It has been held, *e.g.*, that the testimony of witnesses given in public courts, on a subject of public interest, is itself a subject of public interest, and that an imputation that the evidence of a particular witness is unfounded, or incautious, will be privileged, if it comes within the rules as to honesty of criticism(*w*). So, also, the sanitary state of dwellings leased by workmen from mine owners(*x*); and a newspaper report of proceedings of the British Archæological Association, describing as attempts at extortion the sale by the plaintiff, as antiquities, of some leaden figures said to have been found in the Thames(*y*). In the case last named (*Eastwood* v. *Holmes*) Willis, J., held the action not maintainable because the alleged libel reflected only on a class of persons dealing in such articles, and because it did not appear that the paragraph specially referred to plaintiff. As to this last point see *Le Fanu* v. *Malcolmson*(*z*). So, also, the publications of a man who professes to be in possession of a specific to cure maladies are matters of public interest(*a*). The professional conduct of the solicitor for a municipal corporation, in the discharge of his duties as such, is also a matter of public interest, and a newspaper is justified in making fair comment upon the manner in which the duties are performed(*b*).

(*t*) Merivale v. Carson (1887) 20 Q.B.D. 275 (C.A.).

(*u*) Dibdin v. Swan *et al.* (1793) 1 Esp. 28.

(*v*) Green v. Chapman (1837) 4 Bing. N.C. 92; 5 Scott, 340.

(*w*) Hedley v. Barlow (1865) 4 F. & F. 224.

(*x*) South Hetton Coal Co. v. N. E. News Association (1894) 1 Q.B. 133 (C.A.).

(*y*) Eastwood v. Holmes (1858) 1 F. & F. 347.

(*z*) (1848) 1 H.L.C. 657; 13 L.T. (O.S.) 61; 8 Ir. L.R. 418.

(*a*) Hunter v. Sharpe (1866) 4 F. & F. 983; 15 L.T.N.S. 44.

(*b*) Douglas v. Stephenson (1898) 29 O.R. 616.

Matters not of public interest.

On the other hand, the circulation and position of a newspaper have been held not to be matters of public interest(*c*). So, too, the conduct of a trustee of a private corporation, as such trustee, is not a matter of public interest(*d*). Neither are the private actions and conduct of persons taking part in public affairs, except in so far as it affects their public relations(*e*); nor the private character of a journalist(*f*); or of an author(*g*); nor the conduct and management of a clergyman of a clothing charity in his parish(*h*).

The law the same in civil and criminal proceedings.

The law as to the protection given the public discussion of public matters is the same in both civil and criminal proceedings for libel. In one leading case(*i*) Cockburn, L.C.J., laid down the rule, that if a writer in the public press write that which turns out to be not founded upon the inferences which he draws, and is unable to justify the conclusion at which he has arrived, yet if he has acted in good faith in the discharge of his duties, bringing to it the amount of care, reason and judgment, which a man who takes upon himself to discuss public questions is bound to bring, so that the jury is of opinion that he has acted reasonably and properly, he will be privileged.

The privilege of public discussion of public affairs closely allied to fair comment.

The privilege here spoken of is closely connected with fair comment, which is discussed later on. This appears in a well-known case(*j*) in which the same eminent judge reviews several

(*c*) Latimer v. Western Morning News Co. (1871) 25 L.T.N.S. 44.

(*d*) Wilson v. Fitch, 41 Cal. 363.

(*e*) Pankhurst v. Hamilton (1887) 3 T.L.R. 500.

(*f*) Russell *et al.* v. Webster (1874) 23 W.R. 59; Heriot v. Stuart; Stewart v. Spottiswoode; Stuart v. Lovell; Strauss v. Francis, *supra.*

(*g*) Carr v. Hood (1808) 1 Camp. 355, *note.*

(*h*) Gathercole v. Miall (1846) 15 L.J. Ex. 179; 10 J.P. 582; 10 Jur. 337; 15 M. & W. 319.

(*i*) Risk Allah Bey v. Whitehouse (1868) 18 L.T.N.S. 615.

(*j*) Wason v. Walter (1868) L.R. 4 Q.B. 73; 38 L.J. Q.B. 34.

phases of the law of libel in a judgment that deserves careful study, and in which the rule as to privilege, in the discussion of public matters, is also considered. It was there decided that public comment on the conduct or motives of an individual is privileged, if it has been made with an honest belief in its justice, and the writer has brought to the task a reasonable degree of judgment and moderation, so that the result may be what a jury shall deem, under the circumstances of the case, a fair and legitimate criticism on the conduct and motives of the party who is the object of the criticism. But the defence of "fair comment" cannot be maintained, if, in criticizing the conduct of a man in relation to a matter of public interest, the writer imputes to him base and sordid motives without facts to warrant the imputation(*jj*).

Conflicting decisions.

The question as to what is a fair discussion of a matter of public interest has given rise to a conflict of decision in the English courts. In one case(*k*) it was held, that the fair and honest discussion of, or comments upon, a matter of public interest, is, in point of law, privileged, and is not the subject of an action, unless the plaintiff can establish malice. This decision, however, is not in accord with *Campbell* v. *Spottiswoode*(*l*), which was apparently not cited on the argument, and is not referred to in the judgments of the court; and it is expressly dissented from in *Merivale* v. *Carson*(*m*).

The publication of libellous matter in a newspaper cannot be justified on the ground that it was published "as a matter of public news"; or "in the *bonâ fide* belief that it is in the public interest that the matters referred to should be published"; or that it formed part of a statutory declaration unnecessary for the purpose for which the declaration was made(*n*).

(*jj*) Joynt v. Cycle Trade Publishing Co. (1904) 2 K.B. 292 (C.A.).

(*k*) Henwood v. Harrison (1872) L.R. 7 C.P. 606.

(*l*) (1863) 3 B. & S. 769; 32 L.J.Q.B. 185.

(*m*) (1887) 20 Q.B.D. 275 (C.A.).

(*n*) McDonald v. Sydney Post Publishing Co. (1906) 39 N.S.R. 81.

PART IV.

PLEADINGS AND PROCEDURE.

CHAPTER XXII.

THE PLEADINGS.

1. *The Plaintiff's Pleadings.*

The nature of the pleadings.

The want of uniformity of civil procedure in the different Provinces makes it inconvenient to deal fully with the pleadings and practice in actions of defamation; but the principal points of agreement may be indicated. With a few exceptions the pleadings and procedure are the same as in other actions of tort, except in actions for the like torts in the Province of Quebec. In Quebec the procedure has been framed to suit the substantive law contained in the *Code Civile*. The most notable changes in the system of pleading in the other Provinces, in actions of this nature, are those which were effected by the adoption of certain provisions in the English Common Law Procedure Act, 1852, and, latterly, by the rules of the Provincial Judicature Acts, which are also based on English legislation. Judicature Acts, or enactments designed to serve the same purpose, are in force in the Provinces of Ontario, Nova Scotia, British Columbia, Manitoba, and recently in New Brunswick. In Prince Edward Island the old common law system of pleading and practice still, in the main, prevails. In all the Provinces there have been changes, from time to time, in the rules of pleading generally, but practically none in the rules taken from the Common Law Procedure Act, nor in the rules established by the Judicature Acts, touching actions for slander and libel. Neither has there been any change in the law which gave rise to the old mode of pleading, nor in the evidence required at the trial under that system(*a*). The declaration, or statement of claim, as the case may be, must still disclose a cause of action(*b*), and, where the words are not

(*a*) See the observations of Burton, J.A., *infra*, in Todd v. Dun, Wiman & Co. (1888) 15 O.A.R. 85, at p. 88; and of King, J., *infra*, in Harris v. Clayton (1881) 21 N.B.R. (5 P. & B.) 237, at pp. 249-50.

(*b*) Kelly v. Partington, 5 B. & Adol. 649.

actionable *per se*, an actionable meaning must still be averred and proved, but without the circumlocution that was formerly necessary(*c*).

The venue.

First, as to the question of venue. Apart from the legislation affecting actions for libel against newspapers, and any special rule on the subject, as, *e.g.*, in Ontario, all actions for defamation are transitory. The plaintiff may lay his venue where he pleases, subject to the power of the court or a judge to order it to be changed. Under the rules of the Judicature Acts local venue is abolished, except in actions for, or including a claim for, the recovery of land, and except where the cause of action arose and the parties reside in the same county, in which cases the venue is local. The plaintiff, in his statement of claim, names the place in which he proposes that the action shall be tried, and the action shall be tried in the place so named, unless a judge otherwise orders, his order being subject to be discharged or varied by a Divisional Court(*d*).

Change of venue.

Except as to the statutory provision affecting newspapers, which limits the venue in libel actions in most of the Provinces, the rule in all the Provinces as to change of venue is the same. Either party may apply for an order for that purpose. If the plaintiff applies he should shew good ground for a change from the place which he has deliberately selected, and if the defendant applies, he should shew a distinct preponderance of convenience in favour of trying the action at the place proposed, instead of where the venue is laid, in order to oust the plaintiff's dominant right to fix the place of trial(*e*). The ordering of a change is in the discretion of the judge, to be exercised according to the balance of convenience and subject to appeal; and the order will be made if it appear that the interests of justice and a fair trial will be promoted thereby. The question where the defendant

(*c*) For a form of declaration, prior to the Common Law Procedure Act, averring a defamatory charge of perjury which was held to be technically sufficient under the then mode of pleading, see Milner v. Gilbert (1848) 6 N.B.R. (1 Allen) 51.

(*d*) This is the Rule(529) in Ontario.

(*e*) *Per* Quain, J., in 1 Charley, 119; 60 L.T. 103.

resides, or where the cause of action arose, has little to do with the matter. The defendant should be able to satisfy the judge that a trial at the place which he prefers will be less expensive and more convenient for the majority of witnesses on both sides. That it will be more convenient for his own witnesses is of itself an insufficient reason(*f*). But a defendant would be entitled to have the venue changed if he could shew that there was no probability of a fair trial at the place which the plaintiff has selected, *e.g.*, if a local newspaper of extensive circulation has published unfair attacks on the defendant with reference to the subject matter of the action(*g*). And, under the Provincial Libel Acts, a plaintiff would be equally entitled under the same circumstances, notwithstanding that, in an action against a newspaper publisher, he is restricted by some of the statutes to two places for the trial of his action. Where in an action for a libel in a newspaper, the plaintiff laid the venue in a county distant from that in which the paper was published and the parties resided, so that the trial might be free from local influences, an order to change the venue to the county in which the cause of action arose, merely because it would be more convenient and less expensive to try the case in the latter county, was refused. The obtaining of a fair trial must overbear every consideration of mere convenience(*h*). Where in an action for slander in Ontario, the plaintiff laid the venue at Goderich where she resided, the defendant, who lived at Windsor, and who pleaded justification, moved to change the venue to Sandwich. The Master in Chambers, in dismissing the motion, said he was unable to find "any such preponderance of convenience as is required by the cases to be shewn"(*i*). The character of the action (the charge being of something that happened twenty years previously) formed an important element in the decision, and he did not think that defendant could expect to be in any way facilitated, or that plaintiff should in any way be hampered in the attempt to vindicate her good name(*j*).

(*f*) Wheatcroft v. Mousley, 11 C.B. 677.

(*g*) Pybus v. Scudamore, Arnold's R. 464; Walker v. Brogden, 17 C.B. (N.S.) 571.

(*h*) Blackburn v. Cameron *et al.* (1871) 5 O.P.R. 341. See, also, Roche v. Patrick (1870) 5 O.P.R. 210, and Fernie Lumber Co. v. Crow's Nest Southern Ry. Co. *et al.* (1906) 12 B.C.R. 148.

(*i*) Campbell v. Doherty (1898) 18 O.P.R., at p. 243.

(*j*) Butt v. Butt (1903) 2 O.W.R. 423.

It was held in Quebec, that an action based on a libellous letter sent from the district of Three Rivers to the address of a person living in the district of Arthabasca, where it was received and read, might be brought in the latter district(*k*).

Venue in actions against newspapers.

In the statutory law of libel affecting newspapers in Ontario, New Brunswick, British Columbia and Manitoba, there are special provisions as to venue. In Ontario, every action for libel contained in a newspaper shall be tried in the county where the chief office of such newspaper is, or in the county wherein the plaintiff resides at the time the action is brought; but, upon the application of either party, the court or a judge may direct the issues to be tried, or the damages to be assessed, in any other county, if it be made to appear to be in the interests of justice, or that it will promote a fair trial, and may impose such terms, as to the payment of witness fees and otherwise, as may seem proper(*l*). Similar provisions are contained in the Acts of the other Provinces named(*m*).

The former part of this enactment, which was first passed in Ontario, was the outcome of protests by a number of leading journals against unfair methods in the conduct of libel actions against newspapers. It was alleged that, in a series of cases which were mentioned, the venue was laid so as to secure the trials before a judge who was supposed to have "a newspaper prejudice." But, whatever its origin, the provision is one of a number of instances, both in England and in this country, in which the newspaper press has been able to obtain the intervention of the legislature in its favour. The effect of the provision is to limit the former right of the plaintiff to lay the venue anywhere within the Province, and to confine his choice to one of two places, subject, however, to the right of either party to move to change the venue to some other judicial district.

The parties who may be joined as plaintiffs.

Secondly, as to the parties. According to the common law rule, all the plaintiffs had to be jointly entitled to sue, and all the

(*k*) Marcotte v. Therieu (1902) Q.O.R. 22 (S.C.) 315.

(*l*) R.S.O. 1897, c. 68, s. 11.

(*m*) See C.S.N.B. 1903, c. 136, s. 8; R.S.B.C. 1897, c. 120, s. 15; R.S.M. 1902, c. 97, s. 11.

defendants had to be jointly liable. In Ontario the Administration of Justice Act (*n*) introduced the procedure, which was adopted by the Judicature Acts and rules, under which all persons may be joined in an action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or occurrence, or series of transactions or occurrences, is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate actions any common question of law or fact would arise; but if, upon the application of a defendant, it appears that such joinder may embarrass or delay the trial of the action, the court or a judge may order separate trials, or make such other order as may be expedient; and, without any amendment, judgment may be given for such one or more of the plaintiffs as may be found entitled to relief, for such relief as he or they may be entitled to(*o*). So that under this rule an action of slander or libel may now be brought by two or more persons jointly, although they are not jointly interested either as co-partners or otherwise. Under the corresponding English Rule it was held, that co-proprietors of a newspaper could sue jointly for libellous reflections on their paper; that they need not prove special damage; and that the damages might be assessed generally(*p*). This would, of course, apply to co-owners of any business. And where eight persons, managing trustees of a charity, brought an action for libel, it was held that they might rightly join, though no joint injury was shewn, and although, before the Act, they would have had to bring eight actions(*q*). The fact that the damages were jointly assessed was held to be no objection.

Application of Rule 185, O.J.A., as to a "series" of statements.

The plaintiffs, a married man and an unmarried woman, sued for damages in respect of alleged statements by the defendant, on three different occasions, that the plaintiffs had been criminally intimate, one of the occasions complained of being by letter to the female plaintiff. A motion to require the plaintiffs

(*n*) R.S.O. 1877, c. 49, s. 5.

(*o*) R. 185, O.J.A.

(*p*) Russell *et al.* v. Webster, 23 W.R. 59.

(*q*) Booth *et al.* v. Briscoe, 2 Q.B.D. 496; 25 W.R. 838. See, also, Viscount Gart v. Rowney, 17 Q.B.D. 625.

to elect which would proceed with the action, and to strike out the claim in respect of the letter to the female plaintiff as shewing no cause of action, or as embarrissing, was refused, leave to amend being given to both parties. The plaintiffs thereupon amended by claiming for both damages in respect of another statement to the same effect on another occasion, for the male plaintiff special damage, and for the female plaintiff the benefit of section 5 of the Ontario Libel and Slander Act. It was held by the Divisional Court, that the plaintiffs were entitled to sue in one action for damages in respect of the statements made on three occasions, there being publication as to both, and these three being a series with a common question of law and fact, but that the joinder of the claim in respect of the letter to the female plaintiff, which gave rise at most to a cause of action in the male plaintiff, was improper, and that this claim, unless amended so as to be simply one in aggravation of damages, should be struck out as embarrassing(*r*). But the allegation that the defendants have been actuated by the same motive, in each of a number of similar transactions between them and distinct plaintiffs, is not sufficient to constitute the transactions a "series" within the meaning of Rule 185, O.J.A., so as to enable the plaintiffs to join in one action(*s*).

Substitution and addition of plaintiffs.

Where an action has been commenced in the name of a wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the court or a judge, if satisfied that it has been so commenced through a *bonâ fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, may, subject to clause (3) of Rule 206, order any other person to be substituted or added as plaintiff upon such terms as may seem just(*t*).

Consent in writing required.

Clause (3) of Rule 206, O.J.A., provides that no person shall be added or substituted as a plaintiff, or as the next friend of a plaintiff, without his own consent in writing thereto to be filed.

(*r*) Agar v. Escott, 8 O.L.R. (1904) 177.

(*s*) Mason v. Grand Trunk R.W. Co., 8 O.L.R. (1904) 28.

(*t*) R. 313, O.J.A.

Who may be joined as defendants.

All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative; and, without any amendment, judgment may be given against one or more of the defendants according to their respective liabilities(*u*). There is an exception to this rule in the case of slander.

Several defendants in cases of doubt.

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

Mis-joinder or non-joinder of parties.

In fact, under the rules of the Provincial Judicature Acts, no action shall be defeated by reason of the misjoinder of parties. And the court or judge may, at any stage of the proceedings, either upon or without the application of either party, order that the name of the plaintiff or defendant, improperly joined, be struck out; and that any person who ought to have been joined, or whose presence is necessary in order to enable the court, effectually and completely, to adjudicate upon the questions involved in the action, be added as plaintiff or defendant(*w*).

Joint and separate actions of slander.

Where, however, two persons speak the same slanderous words, the plaintiff must bring separate actions, for the acts are several in their nature, and the tort of the one is not the tort of the other(*x*). In an action in Ontario against two defendants jointly for the same slander, spoken by each of them at different times, the Master in Chambers held, following *Sadler* v. *Great Western Railway Co.*(*xx*), that, in an action for tort, there can be only one defendant unless defendants are sued as joint

(*u*) R. 186, O.J.A.
(*v*) R. 192, O.J.A.
(*w*) R. 206 (1)(2) O.J.A.
(*x*) Croke's R. 647.
(*xx*) (1896) A.C. 459.

tort-feasors, and he made an order requiring plaintiff within two weeks to discontinue the action against one or other of the defendants, and to make all necessary amendments, and staying proceedings in the meantime(*y*). And in an earlier case, before the Judicature Acts, a declaration in slander against several defendants jointly was held bad on demurrer(*z*).

Who may be joined in libel.

In the case of libel, the law permits the plaintiff to make all who participated either openly or by secret instigation, in publishing the libel, joint defendants in the action. It was remarked by the court in 5 Mod. 167: "If one reports and another writes a libel, and a third approves what is written, they are all makers of it; for all persons, who concur and shew their assent or approbation to do an unlawful act, are guilty." This doctrine was recognized afterwards in the case of *Rex* v. *Benfield et al.*(*a*), where the Court of King's Bench decided that an information would lie against several persons for a misdemeanour in jointly publishing a libellous song(*b*). It has been held in Quebec, that a person may have a distinct recourse against all the persons concerned in a libel against him, but he cannot claim but one compensation therefor(*c*).

When libel published in a newspaper.

So also the president and manager of a company formed for the publication of a newspaper, who signed the declaration required by articles 2924 *et seq.*, of the Revised Statutes of Quebec, may be held responsible for a libel published in such newspaper jointly and severally with the company(*cc*). In fact, all concerned in the printing and publishing of a libel in a news-

(*y*) McEvoy v. Wright *et al.* (1904) 3 O.W.R. 428. Reference was made to Desilia v. Schunk, W.N. 1880, p. 96; Smuthwaite v. Hanny (1893) 2 Q.B. 412; Odgers S. & L. 3rd Ed. 442; Hinds v. Town of Barrie, 6 O.L.R. (1903) 656; 2 O.W.R. 905; Langley v. Law Society of Upper Canada, 3 O.L.R. (1902) 245; and Andrews v. Forsythe (1904) 3 O.W.R. 307.

(*z*) Carrier v. Garrant *et al.* (1873) 23 U.C.C.P. 276.

(*a*) Burr. 980.

(*b*) *Per* Sherwood, J., in Brown v. Hirley *et al.* (1839) 5 U.C.R. (O.S.) 734.

(*c*) Gauthier v. Amyot (1871) 3 R.L. (S.C.) 446.

(*cc*) Migneron v. Compagnie de Publication de La Patrie (1902) 5 Q.P.R. 329.

paper may be sued—the proprietor, publisher, editor, printer, and also the author or contributor. And, under the rule above mentioned(*d*), they may be sued either jointly or severally, although in a suit against them jointly the damages should be claimed and assessed separately. Generally speaking the proprietor is the person sued, or the author, if his identity is known or is disclosed; but the proprietor of a newspaper will not as a rule disclose the name of any anonymous contributor, and he will certainly refuse to do so unless he be held harmless. "When," said Martin, B.(*e*), "a man went to an editor to ask for the name of an anonymous correspondent, no blame attached to the editor for refusing to give the name. Indeed, an editor would almost be mad to do so. He should blame no editor for so refusing."

There may, however, be circumstances which will justify the proprietor or editor of a newspaper in disclosing the identity of the writer of a defamatory communication which has been published in his paper, and which is being made the subject of an action. In any such case the law of Ontario gives the defendant the remedy which is stated in the following enactment:—

Joinder of writers of defamatory communications as party defendants.

In an action instituted for the publication in a newspaper of any defamatory matter which has been communicated in writing by any person to such newspaper with a view to its publication therein, the defendant may, at any stage of the proceedings, upon notice to such person and an affidavit verifying the facts, apply to a judge in Chambers for an order joining such person as a party defendant in the action, and such person may be joined on such terms as may appear to be just; and thereafter the defendant in the action, who is charged with the publication in the newspaper of the defamatory matter complained of, may claim in the action against the party so joined as aforesaid any remedy over or relief to which, under the circumstances, he may by law be entitled against such party(*f*). But this section shall

(*d*) R. 186, O.J.A.

(*e*) In Harle v. Catherall *et al.*, 14 L.T. 802.

(*f*) R.S.O. 1897, c. 68, s. 17(1).

not apply where the defamatory matter was known by the defendant to be untrue, or was contained in an anonymous communication(*g*).

This enactment is peculiar to the law of Ontario, and is intended to give a newspaper publisher a remedy against a person who has communicated to the paper defamatory matter which has been made the subject of an action. Prior to this amendment of the statute in 1894, the publisher had no redress against his libellous correspondent on the principle that there is no contribution between tort-feasors(*h*). And this is still the law in the other Provinces. In Quebec, *e.g.*, the proprietor of a newspaper, who publishes a libellous correspondence and is sued therefor, has no recourse *en garantie* against the writer of the correspondence(*i*). And even in Ontario, with the above amendment, the defendant has no recourse now, under the second subsection, (1) if he knew the statements contained in the communication to be false; or (2) if the communication be anonymous. But, in the absence of these conditions, the publisher, when sued, may claim in the same action, and at any stage of the action, any relief he is entitled to against his correspondent. He may state in an affidavit the facts and circumstances under which he was induced to publish the matter complained of, and, upon due notice to the correspondent, may apply to a judge in Chambers for an order joining the correspondent as a co-defendant in the action. If his claim for relief be well founded, for instance, if it appear that his publication of the matter in question was induced by deception or misrepresentation on the part of the writer, and he himself had acted *bonâ fide*, he would be fairly entitled to be indemnified by his co-defendant. In other respects the proceedings will be practically the same as in those cases in which third parties may be brought in as defendants. The provision as a whole is a new application of third party liability in the case of libel, the liability of a third party to the person defamed for causing a libel to be published having been long since established. Every one who re-

(*g*) R.S.O. 1897, c. 68, s. 17(2).

(*h*) Colburn v. Patmore, 1 C.M. & R. 73; 4 Tyr. 677; Moscati v. Lawson, 7 C. & P., at p. 35.

(*i*) Armstrong v. Barthe (1873) 5 R.L. (S.C.) 217.

quests, procures, or commands, another to publish a libel is as responsible as though he published it himself. *Qui facit per alium facit per se.* The request need not be express; it may be inferred from the person's conduct in sending his manuscript to the editor, or in making a statement to the reporter, of a newspaper, with the knowledge that they will publish it, and without any effort to prevent publication. The communication need not be inserted verbatim, so long as the sense and substance of it appear in print.

A "Judge in Chambers," in this section, means a judge of the High Court in Chambers at Toronto, Ottawa, or London, under the rule in that behalf.

The above enactment, it will be noticed, only covers defamatory matter "communicated in writing" to the newspaper. In the event of the writer being brought in, the plaintiff may, of course, claim damages against both defendants. The discrimination against anonymous communications, in sub-section 2 of this section (6), appears to be a needless restriction of the previous provisions. The publisher is always responsible, and he should not be deprived of recourse against the writer where the defamatory matter is published *bonâ fide*, or in an honest belief in its truth. The clause evinces prejudice against anonymity in the press, and stamps it with an odium which is undeserved. The great volume of newspaper writing is anonymous, and the proportion that is actionable and incapable of justification is comparatively small.

What is an "anonymous communication?"

The question, what is an "anonymous communication" within the meaning of the statute, has not yet been judicially determined. The first clause of the section giving the publisher a remedy for "any defamatory matter which has been communicated in writing by any person to such newspaper with a view to its publication therein," is modified by the conditions of the second clause. This clause was not in the original bill, but was added in committee. Without this addition the section was meant to be directed against defamatory matter in the form of letters and correspondence generally, and also against similar matter in editorials and news items contributed from outside sources. It was not intended to include editorial matter by members of the newspaper staff, which is invariably anonymous. The second clause is consistent with this construction. The

writer is aware of two cases in which the question of anonymity, and of a possible remedy by the publisher, has had to be considered. One of these was where a defamatory communication, signed with the name of a person known to the editor and purporting to be authentic, but which in reality was a forgery, was inserted in the belief that the name was genuine. The other was where an unsigned defamatory communication was inserted at the request of the writer contained in a private letter with a fictitious signature which was accepted as genuine. The question was, whether these communications were "anonymous" within the meaning of the statute, so as to afford a remedy to the publisher if the identity of the writers could be established? Cases of this nature are suggestive of the distinction made by lexicologists between the terms "anonymous" and "pseudonymous," and afford some reason for applying the term "anonymous" to every communication, exclusive of editorial matter proper, not signed by the author with his true name.

Consolidation of different actions for the same libel.

Where several actions are brought in respect of the same libel, whether published in a newspaper or not, the statutory law of some of the Provinces contains the following enactment as to the consolidation of the actions and the assessment of damages: It shall be competent for a judge of the High Court of Justice, upon an application by or on behalf of two or more defendants, in any two or more actions for 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 said actions, the defendants, in any new actions instituted in respect of 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 action already consolidated(*j*).

How damages assessed and costs apportioned in consolidated actions.

In the 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

(*j*) R.S.O. 1897, c. 68, s. 14(1).

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 last mentioned defendants; and the judge at the trial, in the event of the plaintiff being awarded 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(*k*).

The former procedure.

This is the Ontario enactment. There are provisions substantially the same, applicable to libel only and not to slander, in the Libel Acts of the other Provinces named. They are all taken from the English Law of Libel Amendment Act, 1888(*l*), which had its origin in an abuse of the former procedure permitting separate actions to be brought against different newspaper publishers for the same libel, and damages to be recoverable against each.

Tucker v. Lawson (1886).

In *Tucker* v. *Lawson*(*m*), for instance, which was an action for a libellous mistake in a newspaper report imputing misconduct to a solicitor, twenty-three newspapers were sued for the libel complained of, and enormous damages and costs recovered in the separate actions.

Creevy v. Carr (1835).

The actions were tried successfully at different times and places, but, on the authority of *Creevy* v. *Carr*(*n*), it was held that the fact that the plaintiff had already sued, or been compensated, for the libel by other newspaper proprietors, could not be given in evidence by any of the defendants.

Colledge v. Pike (1886).

Colledge v. *Pike*(*o*) was another action which hastened a change in the law. The libel sued for was contained in a Cen-

(*k*) R.S.O. 1897, c. 68, s. 14(2); C.S.N.B. 1903, c. 136, s. 10; R.S. B.C. 1897, c. 120, ss. 12, 13.

(*l*) 51-52 Vict. c. 64, s. 5.

(*m*) 2 T.L.R. 593.

(*n*) 7 C. & P. 64.

(*o*) (1886) 56 L.T.N.S. 124.

tral News telegram which was published in a number of London and provincial papers. Before bringing his action the plaintiff had recovered heavy damages in three actions for the same libel for the publication of which he subsequently sued the defendant Pike and sixteen other defendants separately. The Master in Chambers refused an order to stay proceedings in the sixteen actions until *Colledge* v. *Pike*, as the test action, could be tried. Pollock, B., confirmed this order, and the Queen's Bench Division refused an order to consolidate the actions on the ground that, although the libel was the same in each case, yet, the several publications and the circumstances attending each being different, the causes of action in the several cases were different. Huddleston, B., said that one paper might have insisted on the truth of the libel and made injurious comments on the plaintiff; another might have simply published the libel without remark; another might have inserted an apology; another might have refused to apologize; one paper might have a very large and wide circulation, and another a very limited one; and so on, each case being different from the others. The plaintiff could not, therefore, sue them all collectively, but must sue them individually. The court, however, made an order for the trial of one of the actions, and, if the plaintiff was dissatisfied with the result in that action, then for the trial of another, the proceedings being stayed in the remaining actions in which the plaintiff was to be at liberty to sign judgment for the maximum amount of damages found by the jury on the second trial.

The effect of consolidation.

The English Libel Act of 1888, and the Provincial Libel Acts containing the above enactment, amended the procedure under which such a multiplicity of suits was possible, and now, if a series of actions are brought by the same plaintiff against different defendants for the same or substantially the same libel, the defendants may have the actions consolidated and tried together. If, moreover, a plaintiff should try out one action successfully before commencing another, the second defendant will be able, under the Libel Acts of some of the Provinces, to prove in mitigation of damages, that the plaintiff has already received some compensation for the libel(*p*). And he may do this in every case

(*p*) See R.S.O. 1897, c. 68, s. 16; R.S.B.C. 1897, c. 120, s. 9.

where compensation for substantially the same libel has already been made, or agreed to be made, to the plaintiff by some person, although that person may have had no action brought against him.

When consolidation to be applied for.

These enactments as to consolidation do not state at what stage of the proceedings an application to consolidate may be made. Presumably, therefore, it may be made at any stage, although preferably after service of statement of claim in one of the actions, and before defence(*pp*). But where new actions are instituted after a consolidation order has been made, a prompt motion by all the defendants to be joined in a common action would appear to be advisable(*q*).

Eddison v. Dalziel (1893).

In Eddison v. *Dalziel*(*r*), the first reported decision under the corresponding section of the English Act, the action was brought by a factory worker, who had gone to New York, for a libellous news item telegraphed by Dalziel's News Agency. The item was copied into three newspapers whose publishers were sued separately. In one case the defendants pleaded an apology and paid two guineas into court, so that the only issue was as to the sufficiency of that sum as damages. In the other two cases the defendants pleaded justification, but they were not ready for trial, owing to the issue of a commission to the United States. An application on behalf of all the defendants to consolidate the actions was opposed on the ground that the enactment only applied to actions that were in the same position. For this reason no objection was offered to consolidating the two actions in which justification was pleaded, they being in the same plight; but, as to the action in which money was paid into court with an apology, it was objected that it was in a different position and that the statute did not apply. The plaintiff, it was said, was entitled and ready to go to trial on the question of larger damages, and he should not be deprived, by an order to consolidate, of his right

(*pp*) Stone v. Press Association (1897) 2 Q.B. 159.

(*q*) For comments on assessment of damages after consolidation, see chapter on Damages.

(*r*) (1893) 9 T.L.R. 334.

to try his action at the Leeds assizes which were then sitting. The court held that the application for consolidation was reasonable, and an order was made accordingly.

Beaton v. Globe Printing Company (1895).

This decision is referred to, and was followed, in *Beaton* v. *Globe Printing Co.* (1895), and a number of other actions by the same plaintiff against other newspaper publishers in the Province of Ontario. The defendants were sued separately for substantially the same libels contained in a United States associated press despatch. The actions were in progress before the passage of the Act, and an application to Robertson, J., in Chambers, for consolidation of a number of the actions, was granted. The plaintiff was ultimately defeated in her suits(*t*).

Suits by and against infants.

The ordinary rule as to parties is varied in certain cases of disability and of personal or business relationships. An infant may sue and be sued for defamation, either oral or written. As plaintiff his suit will be by his next friend, and, as defendant by his guardian, appointed for that purpose, or by the Official Guardian as the case may be(*u*). If he is a trader he may have an action for words which damage him in his trade(*v*). A plea that the defendant is an infant within the age of seventeen is not valid in a civil action(*w*).

The position of infants under the Code.

Whether an infant can be prosecuted criminally for libel depends on the Criminal Code, which, following the common law, provides that no person shall be convicted of any offence by reason of any act of such person when under the age of seven years(*x*). Nor shall a person be convicted of an offence when of the age of seven, but under the age of fourteen years, unless

(*t*) The decision is unreported. See, on the same point, Crossley v. Ferguson (1897) 33 C.L.J. 461, and Stone v. Press Association (1897) 2 Q.B. 159.

(*u*) R. 197, O.J.A.

(*v*) Wild v. Tomkinson, 5 L.J.Q.B. 265.

(*w*) *Per* Lawrence, J., in Woolnoth v. Meadows (1804) 5 East, 471. See, also, Lord Kenyon in 8 T.R. 337.

(*x*) C.C. s. 17.

he was competent to know the nature and consequences of his conduct, and to appreciate that it was wrong(*y*). If of the age of fourteen and upwards, he is presumed to have capacity to commit any crime until the contrary is proved(*z*).

A lunatic as a party to a civil action or criminal prosecution.

If a lunatic were to sue for defamation—although there is apparently no record of any such case—he would have to do so by his committee, or next friend(*a*). And were he made a defendant in such an action—and it has been said that he may be, and, further, that his lunacy is no defence(*b*)—his defence would be by his committee or guardian(*c*). It is also said that he may be prosecuted criminally for libel(*d*). But, if he were labouring under natural imbecility, or disease of the mind, to such an extent as to render him incapable of appreciating the nature and quality of his act, and of knowing that the act was wrong, he could not be convicted(*e*). If, on the other hand, he were labouring under a specific delusion, but was in other respects sane, he could not be acquitted on the ground of insanity, unless the delusion caused him to believe in the existence of some state of things which, if it existed, would justify or excuse his act(*f*). Every one is presumed to be sane at the time of doing an act until the contrary is proved(*g*); so that the onus of proving any of the defences indicated would be upon the defendant(*h*).

The rule, actio personalis cum persona moritur.

Slander and libel come within the common law rule, *actio personalis cum persona moritur;* the cause of action, therefore,

(*y*) C.C., s. 18.

(*z*) R. v. Owen, Warb. Lead. Cas. 19; R. v. Vamplew, 3 F. & F. 520.

(*a*) R. 217, O.J.A.

(*b*) *Per* Kelly, L.C.B., in Mordaunt v. Mordaunt, 39 L.J. Prob. & Mat. 59.

(*c*) R. 217, O.J.A.

(*d*) Mordaunt v. Mordaunt, *supra.*

(*e*) C.C. s. 19(1).

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

(*g*) *Ibid.*, (3).

(*h*) See R. v. Oxford, Warb. Lead. Cas. 21, and cases cited there; R. v. Davis, 14 Cox C.C. 563; R. v. Dubois (1890) 17 Q.L.R. 203; R. v. Dove, 3 Stephens Hist. C.L. 426.

does not survive the death of either party before verdict. But, under the rules of the Provincial Judicature Acts, there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but judgment may in such case be entered notwithstanding the death(*i*). The common law maxim (*supra*) does not, however, apply to slander of title, and where the plaintiff in an action of that nature dies before the trial, the cause of action survives to the executor(*j*). So also the executor or administrator of a deceased plaintiff may appear as a respondent to an appeal by a defendant against whom a final judgment in plaintiff's favour was entered prior to his death(*k*).

Foreigners.

Where the plaintiff is a foreigner resident beyond the jurisdiction of the Provincial court, he may sue a person within its jurisdiction for defamation, but he may be compelled to give security for the defendant's costs, unless he has property available for that purpose within the Province. A foreigner may also be sued for either a slander or libel published within the jurisdiction of the Canadian courts, and, in the case of libel, he may also be prosecuted criminally if he be within the jurisdiction.

Undischarged insolvents.

An undischarged insolvent may also be either plaintiff or defendant in an action for slander or libel, and the insolvency is no defence(*l*). In one case(*m*) Lord Ellenborough, C.J., ruled that a newspaper advertisement calling a meeting of the creditors of a bankrupt to consult as to their interests, and at the same time assailing the character of the bankrupt, was libellous, unless it could be shewn that an advertisement was the only mode of communicating the circumstances. It was, he said, the want of proper caution that made the publication in question actionable, as being published to the world at large. In the case of a

(*i*) R. 394, O.J.A.

(*j*) Hatchard v. Mège *et al.*, 18 Q.B.D. 771; 56 L.J. 397; 3 T.L.R. 546.

(*k*) Twycross v. Grant *et al.*, (C.A.) 4 C.P.D. 40; 39 L.T. 618; 27 W.R. 87; Sandford v. Bennett, 24 N.Y. 20.

(*l*) *Ex parte* Vine: *In re* Wilson, 8 Chy. D. 364; 38 L.T. 730; 26 W.R. 582; Dowling v. Browne (1854) 4 Ir. C.L.R. 265.

(*m*) Brown v. Croome, 2 Stark. R. 297.

brief to counsel, the publication as between attorney and counsel might not be libellous, and yet, if it were to be printed and published, there might be a libel in every line. This decision proceeds on the principle that the privilege attaching to a defamatory communication may be lost where the mode or extent of publication is in excess of the occasion. No one can sue or defend *in forma pauperis* for either slander or libel(*n*).

Changes in mode of pleading by C.L.P. Act, 1852.

The mode of pleading the defamatory words, whether spoken or written, was materially changed by a provision in the Common Law Procedure Act, 1852, which has become part of the law of the Provinces. Where, under the system of pleading prior to 1852, the words complained of were actionable only in connection with certain facts, there had to be prefatory averments of the facts, followed by a colloquium and innuendo shewing that the facts were applicable to the words, and that the words were capable of the defamatory meaning alleged in the declaration. Whenever, therefore, the words were alleged to have a different or wider sense than their ordinary meaning, the circumstances which gave them such a sense had to be set forth in the declaration, so that the court might determine whether the words, as explained by the circumstances, bore the particular meaning given them; otherwise the circumstances could not be looked at in plaintiff's favour. Where, *e.g.*, the declaration charged the publication "of and concerning the plaintiff" and set out the matter constituting the libel, which did not appear to relate to the plaintiff, who was not connected with it by the innuendo, the declaration was held to be bad(*o*). In *Goldstein* v. *Foss* (*supra*), the declaration contained introductory averments, the alleged libellous words and an innuendo that the plaintiff was "a swindler and a sharper," all which the court held would have constituted a good cause of action but for the fact that the libel was not properly connected with and explained by the introductory averments.

(*n*) Vin. Abr. tit. Pauper (B. 2); Clifford v. Mabey, 1 Addams, 124.

(*o*) O'Brien v. Clement (1846) 4 D. & L. 563; Bignell v. Buzzard, 3 H. & N. 217; 27 L.J. Ex. 355; Clement v. Fisher, 7 B. & C. 459; Goldstein v. Foss, 6 B. & C. 154.

When prefatory averments unnecessary.

But, even in that state of the law, prefatory averments were not necessary where the charge was apparent on the face of the paper without reference to extrinsic facts. In such cases it was sufficient if the libellous matter was connected with the plaintiff by an averment that it was written and published *of and concerning him.* The question after verdict is, whether enough appears on the record to sustain the action(*p*).

Inducements to support an innuendo.

In an action for libel before the Common Law Procedure Act, the plaintiff averred that she was the mother of one E. J. B., and then complained that the defendant, well knowing this, in order to defame her, published in his paper the following: "Of the B.'s—that was the name of his reputed father: what was his mother's, I either never knew or have forgot, but I know it was not B."; meaning that plaintiff was the mother of an illegitimate child. The defendant demurred to the declaration as not containing inducements sufficient to support such an innuendo. The declaration was held to be good, and judgment was given for the plaintiff on the demurrer(*q*).

Averments in plaintiff's pleadings.

The technical difficulties of this mode of pleading were removed by section 61 of the Common Law Procedure Act, 1852, which, as stated in the following enactment in the Ontario statute, represents the general law: In actions of libel and slander, the plaintiff may aver that the words or matter complained of were used in a defamatory sense, specifying the defamatory sense without any prefatory averment to shew how the words or matter were used in that sense, and the 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, shew a cause of action, the statement of claim shall be sufficient(*r*). The same rule prevails in criminal pleading in indictments for libel. A count for libel may charge that

(*p*) Connick v. Wilson (1845) 4 N.B.R. (2 Kerr) 617.

(*q*) Anderson v. Stewart (1851) 8 U.C.Q.B. 243.

(*r*) R.S.O. 1897, c. 68, s. 3; R.S.B.C. 1897, c. 120, s. 10; R.S.M. 1902, c. 97, s. 6.

the matter published was written in a sense which would make the publishing criminal, specifying that sense without any prefatory averment shewing how the matter was written in that sense. And on the trial it shall be sufficient to prove that the matter published was criminal either with or without such innuendo(*s*). These changes in the rule of pleading are fully explained by King, J., and Wetmore, J., in *Harris* v. *Clayton*(*t*), and by Blackburn, L.J., in *Cox* v. *Cooper*(*u*).

Words not libellous or slanderous *per se* are actionable when the innuendo discloses a defamatory meaning. The colloquium, which was essential under the system of procedure prior to the Common Law Procedure Act, is no longer necessary. The plaintiff's pleadings need not state a colloquium; all that they need do is to set out the words complained of and put any construction upon them that the pleader thinks fit. It is for the jury then to say whether the proper meaning has been assigned(*v*).

When innuendoes necessary.

Taken in connection with the enactment itself the inference from these various decisions is, that although prefatory averments are no longer requisite, innuendoes are still necessary wherever they were required previously. A cause of action must appear on the face of the pleading whether it be a declaration, or its equivalent a statement of claim.

Words not defamatory per se are actionable when innuendo discloses a defamatory meaning.

In an action for libel contained in a newspaper called the *Burning Bush*, and also for slander, the third count of the declaration alleged that the defendant falsely and maliciously printed and published of the plaintiff, in relation to his

(*s*) C.C. s. 861(2) (3).

(*t*) (1881) 21 N.B.R. (5 P. & B.) 237.

(*u*) (1863) 7 App. Cas. 782.

(*v*) Bowers v. Hutchinson (1865) 5 N.S.R. (1 Oldright) 679. See s. 61, C.L.P. Act, 1252, and Hemming v. Gasson, E.B. & E. 346; 27 L.J.Q.B. 252; and remarks thereon, and on this view of the statute, by Draper, C.J., in Black v. Alcock (1861) 12 U.C.C.P. 19. See, also, remarks by Burton, J.A., in Todd v. Dun, Wiman & Co. (1888) 15 O.A.R. 85, at p. 88, on another phase of the same rule.

calling as a minister of the gospel, the words following:—"Notice.—All persons who have at any time paid (plaintiff), formerly of the Lutheran Church in Nova Scotia, (meaning that the plaintiff, at the time of such publication, was falsely pretending to be a Lutheran minister in Nova Scotia) any money for funeral services, will confer a great favour upon the public generally by handing in their names to the editor of this paper as early as they possibly can, and before the close of the first week in October next." This count was demurred to as not in law amounting to a libel, because the words were not libellous *per se*, and because the innuendo gave the words a meaning which they did not bear; but the count was held good as containing proper averments and innuendoes(*c*). So, also, in an action for imputing the crime of perjury, it is not necessary for the plaintiff to allege in his pleadings that the sworn statements, charged as such, were taken in a judicial proceeding so long as the defamatory meaning of the words is set out in the innuendo(*d*).

When innuendoes unnecessary.

Words not intelligibly defamatory may be shewn to be capable of the defamatory meaning attributed to them in the plaintiff's pleadings when read in connection with the facts in evidence(*e*). Should the jury, however, negative the meaning assigned to the defamatory words, the plaintiff may rely on the natural meaning of the words. On this point Parke, B., said: "If the innuendo is more extensive than the words will bear, and therefore unwarranted by them, we are of opinion that it may be rejected as repugnant and void; and the words are libellous, and, therefore, actionable without its aid." That an innuendo which is bad, and on the face of it repugnant to the words, may be rejected, was decided in the cases of *Corbett* v. *Hill*(*f*), and *Smith* v. *Cooker*(*g*); and, if the words are sufficient without the innuendo, the action is maintainable(*h*). The same rule prevails where the

(*c*) Bowers v. Hutchinson (1865) 5 N.S.R. (1 Oldright) 679.

(*d*) McDonald v. Moore (1876) 26 U.C.C.P. 52.

(*e*) Harris v. Clayton (1891) 21 N.B.R. (5 P. & B.) 237.

(*f*) Cro. Eliz. 609.

(*g*) Cro. Car. 512.

(*h*) Roberts v. Camden, 9 East, 93, referred to by Parke, B., in Wakley v. Healy, 7 C.B. 604-5.

innuendo unnecessarily introduces new matter, as in *Harvey* v. *French*(*i*). The case would be different if the words are capable of two senses, and the innuendo ascribes one meaning to them, and is good on the face of it. *Williams* v. *Stott*(*j*) is an authority that in such a case it could not be rejected"(*k*). "Sometimes," as explained by Blackburn, J., in *Watkin* v. *Hall*(*l*), "it was not easy to frame a declaration to meet this state of the law, which was a trap for nonsuits; and, therefore, the Legislature enacted the provision in section 61 [of the Common Law Procedure Act]. The effect of the first clause is, that an innuendo cannot be rejected, as formerly, because not supported by the prefatory averments. And the last clause(*ll*) enacts, that instead of a declaration with many counts, with as many innuendoes, a count for libel or slander, with an innuendo that the words were used in a particular sense, may be read as two counts, one with the innuendo and the other without it; and proof of either is sufficient."

The double character of plaintiff's pleading.

In that case it was argued that, notwithstanding the 61st section of the Act, the plaintiff could not maintain his action if he failed to prove the innuendo, and, therefore, it was necessary to shew by the plea the real sense in which the words were used, and that the innuendo was untrue. But, said Lush, J., "to hold that, as it seems to me, would be entirely to neutralize section 61 of the Common Law Procedure Act, the object of that being to give to a declaration like this a kind of double character, and to give the plaintiff the benefit of an action, if the words themselves are actionable, whether the precise meaning which he ascribes to them by the innuendo is proved or not. It is not enough to say, that the plaintiff has failed in placing upon them

(*i*) 1 Cr. & M. 11.

(*j*) 1 C. & M. 675, 687.

(*k*) The opinion of the Judges to the House of Lords in Barrett v. Long, 3 H.L. Cas. 395, at p. 413.

(*l*) L.R. 3 Q.B. 396; 9 B. & S. 286; 18 L.T.N.S. 561; 37 L.J.Q.B. 125; 16 W.R. 857.

(*ll*) This clause reads: 'Where the words or matter set forth, with or without the alleged meaning, shew a cause of action, the declaration shall be sufficient.'

the meaning he intended by the innuendo, if the words which the defendant did use are capable of another meaning which renders them actionable."

Tench v. Swinyard (1869).

In *Tench* v. *Swinyard*(*m*) reference is made, in the judgment of the Ontario Court of Queen's Bench, to the difficulty which the corresponding section of the Provincial Act created as to the proper form of a plea in some cases justifying the truth of statements contained in a libel or slander charged in the declaration. In that case, in which the plaintiff complained of a printed notice imputing misconduct in his employment as a railway conductor, a demurrer to the defendant's plea justifying the libel with the meaning in the innuendo was overruled(*n*). Morrison, J., who delivered the judgment of the court, remarks that it did not appear to be settled what was the proper form of a plea of justification in such a case. He quotes the last clause of section 2 in the Provincial Act, which was the same as the last clause of section 61 in the English Act, and the observations of Blackburn, J., thereon in *Watkin* v. *Hall* (*supra*), in which he says that he can put no other meaning on that clause "than that the Legislature enacted, that a declaration containing one count for libel or slander, with an innuendo that the words were used in a particular meaning, shall be taken as if there were two counts, one with the innuendo and one without the innuendo; and, if the plaintiff prove either, it is sufficient. It follows then, that the defendant may plead a justification as to the words with the meaning in the innuendo, and also as to them without the meaning." Reference is also made by Morrison, J., to *Biggs* v. *Great Eastern Railway Company*(*o*), in which the facts were very similar to those in *Tench* v. *Swinyard*, and in which a demurrer to the plea, on the ground that it did not justify the words in the sense charged in the declaration, was disallowed by the court. See, also, *Alexander* v. *North Eastern Railway Company*(*p*), and *Gwyn* v. *South Eastern Railway Company*(*q*).

(*m*) (1869) 29 U.C.Q.B. 319.
(*n*) See Tench v. Swinyard, at p. 207, *ante*.
(*o*) (1868) 18 L.T.N.S. 482; 16 W.R. 908.
(*p*) (1865) 34 L.J.Q.B. 152; 6 B. & S. 340.
(*q*) (1868) 18 L.T.N.S. 738.

Form of pleadings under Judicature Acts.

Under the rules of the Judicature Acts, pleadings shall contain a concise statement of the material facts upon which the party pleading relies, but not the evidence by which they are to be proved(*r*). The "material facts" are not confined to facts which must be proved in order to establish the cause of action; any facts which may effect the damages, and which the plaintiff is entitled to prove at the trial, are properly pleadable in a statement of claim(*s*).

All the material defamatory words must be pleaded.

The precise words of the alleged slander or libel are "material facts," and must be set out in the statement of claim(*t*); the purport or substance of the words is not sufficient(*u*). By the fifth count of the declaration the plaintiff alleged that the defendant spoke of him the words following: "J. H. (plaintiff) in there"; meaning that the plaintiff had feloniously stolen pork. Some pork had been stolen from one B. According to the evidence of one of the plaintiff's witnesses, the defendant, during the forenoon of the day on which it was said these words had been used, said he knew where the pork was, stating where, and intimating that he knew who stole it. Being asked by the witness during the afternoon who he meant, he said: "J. H. in there." It was held that the count was bad in not setting out all the material words constituting the slander. Allen, C.J., said that if this was a good count under the Common Law Procedure Act, it had revolutionized the principles of pleading in actions of slander. Wetmore, J., said that the whole of the words must be stated; certainly such of them as will warrant the alleged defamatory sense(*v*). But amendments as to the words may be allowed, under the rules of the Judicature Acts, at practi-

(*r*) R. 268, O.J.A.

(*s*) Millington v. Loring, 6 Q.B.D. 190; Lumb v. Beaumont, 49 L.T. N.S. 772; Glosop v. Spindler, 2 Sol. Jour. 556.

(*t*) Harris v. Warre, 4 C.P.D. 215; 48 L.J. 310; Harris v. Clayton (1881) 21 N.B.R. (5 P. & B.) 237; Robinson v. Sugarman (1897) 17 O.P.R. 419; Hay v. Bingham, 5 O.L.R. (1902) 224.

(*u*) McPherson v. Daniels, 10 B. & C. 274; Solomon v. Lawson, 8 Q.B. 823; Wood v. Brown, 6 Taunt. 170; Wood v. Adam, 6 Bing. 481; R. v. Berry, 4 T.R. 217; Hay v. Bingham, *supra*.

(*v*) Harris v. Clayton (1881) 21 N.B.R. (5 P. & B.) 237.

cally any stage of the action(*w*). A letter containing a libel was allowed to be set out verbatim at the trial where only the substance of the libel was alleged in the declaration(*x*). In criminal prosecutions for libel, no count in the indictment shall be deemed insufficient for not setting out the words charged(*xx*).

Particulars as to time, place, etc., of slander.

In an action of slander it is not sufficient to allege that the defendant falsely and maliciously spoke and published the defamatory words complained of. The time and place, and the persons to whom, or in whose presence, they were spoken, must be stated with reasonable certainty(*y*). This is because the words may have been a privileged communication, or have been spoken in a privileged place, or on a privileged occasion. The rule applies to slander only. But it has been held in Quebec, that the omission by the plaintiff, in an action for slander, to set forth the names of the persons who were present when the slanders were alleged to have been uttered by the defendant, is not ground for a motion in the nature of an exception to the form(*z*). Particulars, however, as to those present, and as to the time, place, etc., of the uttering of the slander, may be ordered by the court or a judge. See cases *post* in the present chapter.

Slander or libel in foreign language.

Where the published words, whether spoken or written, are in a foreign language, they should be set out in the pleading in the same language with an English translation and an averment that the persons who heard or read the words understood them as applied to the plaintiff(*a*). In *Zenobio* v. *Axtell* (*supra*), in

(*w*) R. 298, O.J.A.

(*x*) Saunders v. Bate, 1 H. & N. 402. See as to other cases of amendments at the trial: Souther v. Denny, 1 Ex. 196; Ramsdale v. Greenacre, 1 F. & F. 61; Pater v. Baker, 3 C.B. 831; Smith v. Knowelden, 2 M. & G. 561; Foster v. Pointer, 9 C. & P. 718, 722; Huckle v. Reynolds, 7 C.B. (N.S.) 114.

(*xx*) C.C. s. 861.

(*y*) Thornton v. Capstock (1883) 9 O.P.R. 535.

(*z*) Lussier v. Martineau (1897) Q.O.R. 12 (S.C.) 437.

(*a*) Zenobio v. Axtell, 6 T.R. 162; 3 M. & S. 116; Jenkins v. Phillips, 9 C. & P. 766; R. v. Goldstein, 3 B. & B. 201.

which there was a translation merely, and not the original libellous French words, the judgment was arrested. In one of the earliest cases judgment was also arrested because it was not alleged in the pleading that the Welsh words were understood by the bystanders(*b*). In all such cases the translation should be proved at the trial. But in an action for slander in the Province of Quebec, in which the words were uttered in a foreign language, it was held (reversing the judgment below)(*c*), that it is not necessary to set out the words in the language in which they were spoken; that it is sufficient to state the words in the language of the declaration; to establish that they were uttered in the hearing of persons who understood their meaning; and that plaintiff suffered damage in consequence thereof(*d*).

The word "libel" unnecessary where the publication alleged to be false and malicious.

In an action of libel the word "libel" need not be used in the pleading where the publication is alleged to be false and malicious. Upon a motion to arrest a judgment for plaintiff on the ground that the publication was not in express terms called a libel, *Cooke* v. *Smith*(*e*) being cited in support of that view, Robinson, C.J., said it was clearly not necessary that the word "libel" should be used in complaining of a false and malicious publication. This had been expressly decided(*f*).

Where the contents of any document are material, it is sufficient in any pleadings to state the effect thereof without setting out the whole or any part, unless the precise words of the document, or any part thereof, are material(*i*). But this rule does not dispense with the necessity of setting out the precise defamatory words(*j*). For further discussion of the requisites of pleadings see chapter on Particulars.

(*b*) Jones v. Dovers (1597) Cro. Eliz. 496, 865.

(*c*) (1887) 11 L.N. 2 S.C. 2.

(*d*) McLeod v. McLeod (1888) (in Review) Mon. L.R. 4 (S.C.) 343.

(*e*) (1824) McL. 250.

(*f*) Smiley v. McDougall (1853) 10 U.C.Q.B. 113, at p. 115.

(*i*) R. 275, O.J.A.

(*j*) Harris v. Warre, 4 C.P.D. 215; 48 L.J. 310; The Queen v. Bradlaugh, 3 Q.B.D. 607; Davey v. Garrett, 7 Chy. D. 473.

Striking out or amending matter that is embarrassing, etc.

Under the rules of the Judicature Acts the court or a judge may, at any stage of the proceedings, order to be struck out or amended any matter in the pleadings which may be scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action(*k*).

The whole of an article containing the libels may be set out.

In an action for certain alleged libels which defendant caused to be published in the form of an interview in a local newspaper, and which were charged to impute a willingness on the part of plaintiff to be bribed at a political election, it was held (*per* Falconbridge, C.J.,) that while, generally speaking, it is not necessary to set out the whole of an article containing libellous passages, yet as the libel itself must be produced at the trial, and the defendant is entitled to have the whole of it read, the plaintiff was at liberty to set out the article complained of *in extenso*, and that his doing so did not offend against the above rule. In actions of defamation the very words complained of must be set out by plaintiff "in order that the court may judge whether they constitute a cause of action"(*l*); and it is not sufficient to give the substance or purport of the libel or slander with innuendoes; the words must be set out verbatim. But words not referring to plaintiff, and tendering an immaterial issue, which might be embarrassing, should be struck out. Odgers Law of S. & L., 3rd Ed., at pp. 553-554 and cases cited. *Deyo* v. *Brundage*, 13 Howard P.R. 221; *Millington* v. *Loring*, 6 Q.B.D. 190, at p. 194; and *Whitney* v. *Moignard*, 24 Q.B.D. 630, were referred to(*m*).

This action, it will be observed, was not against the newspaper publisher, but against the person who procured the publication of the libel. As against the newspaper publisher the pleading would have been objectionable, unless the whole article was complained of in the notice of complaint required to be served before action brought(*n*).

(*k*) R. 298, O.J.A.

(*l*) Wright v. Clements (1820) 3 B. & Ald. 503, at p. 506.

(*m*) Hay v. Bingham, 5 O.L.R. (1902) 224; 23 C.L.T. (Occ. N.) 112; 1 O.W.R. 822; 6 O.W.R. 447; 11 O.L.R. (1905) 148.

(*n*) See R.S.O. 1897, c. 68, s. 6(2); Obernier v. Robertson (1892) 14 O.P.R. 553, noted fully in chapter on Notice of Complaint before Action.

Other cases as to embarrassing pleadings.

Where, in an action for libel, one of the allegations in the statement of defence was, that "the defendant does not admit that he is the publisher and editor of said newspaper," when the fact of the defendant's being the editor and publisher had been established by affidavit, it was held that the paragraph could and should be struck out as false(*o*). Where the libel was contained in a petition to a municipal council for the removal of plaintiff from the office of poundkeeper for alleged misconduct, a motion to strike out separate paragraphs of the statement of defence denying the innuendo, justifying the alleged libels, etc., was dismissed. The statement of claim itself shewed, it was said, that the case was one of qualified privilege(*p*); and so, having regard to *Dryden* v. *Smith*(*q*), there was nothing objectionable in the statement of defence(*r*). The order was slightly varied on appeal(*s*).

Pleading over.

The third paragraph in a statement of claim for slander alleged, that "about the time plaintiff was leaving defendant's farm, defendant (much to the injury of the plaintiff's reputation) began circulating stories to the effect that plaintiff had taken and carried away from defendant's farm lumber and other material owned by defendant and had taken it over to plaintiff's farm." In the next two paragraphs the alleged slanderous words were set out with proper innuendoes, and allegations of the times when, and persons to whom, the words were spoken; and the sixth paragraph claimed general damage. Upon a motion by defendant to strike out, or for particulars of, the third paragraph (*supra*), it appeared that in a former statement of defence, some paragraphs of which had been struck out on plaintiff's application with leave to defendant to amend, the paragraph now objected to was pleaded to specifically, and no objection taken to the statement of claim. It was held by the Master in Chambers, that as the defendant at that time was not in any

(*o*) Lanos v. Landry (1901) 21 C.L.T. (Occ. N.) 312.

(*p*) Referring to Willcocks v. Howell (1884) 5 O.R. 360.

(*q*) (1897) 17 O.P.R. 505.

(*r*) Goodwin v. Graves (1904) 4 O.W.R. 449.

(*s*) *Ibid.* (1904) 4 O.W.R. 473. See p. 544, *post.*

default as to what case he had to meet, and had pleaded over, the present objection, even if tenable, came too late, and the motion must be dismissed. To hold otherwise would allow a defendant, who had been ordered to amend a second or third time, to object to a statement of claim to which he had already pleaded twice. At latest the objection should have been taken on the previous argument when it could have been disposed of without extra expense(*t*).

Matter of inducement.

In this same case it was argued that the expression "circulating stories," in the third paragraph (*supra*), was indefinite and embarrassing, because it did not state what the "stories" were, and that, under this paragraph, plaintiff might be allowed to recover, even if he failed in his proof of the other paragraphs. It was held, that, although in an action of defamation the very words complained of must be set out by plaintiff(*u*), and that, if the statement of claim had ended with the third paragraph, it would have disclosed no cause of action(*v*), yet that this paragraph was only matter of inducement and introductory to the other paragraphs, and on this ground, also, the motion to strike out failed as being unnecessary(*w*).

Where matter irrelevant, or of doubtful meaning.

In an action for libel by a member of a church against the minister, the alleged libel stated that the plaintiff had accepted a deficient certificate of membership in irregular form. One of the paragraphs of the defence set out at great length the facts and circumstances under which the defendant wrote the alleged libel, and concluded as follows: "The defendant's attention was called to the said article [*i.e.*, in another newspaper] by members of his congregation, and it was urged that the false impression thereby conveyed should be corrected, and the defendant thereupon wrote and forwarded to such papers as had a circulation in the said counties what he believed to be a fair and impartial statement of the result of such proceedings, which said statement

(*t*) Lawrie v. Maxwell (1904) 3 O.W.R. 38.

(*u*) Hay v. Bingham (1902) 1 O.W.R. 823.

(*v*) Odgers Law of L. & S., 3rd Ed. 553.

(*w*) Lawrie v. Maxwell (1904) 3 O.W.R. 38, at p. 39.

is the article or articles complained of." Upon an appeal by defendant from an order of a local judge striking out this paragraph and allowing defendant to amend, it was held that the discretion of the local judge should not be interfered with. The application, said Britton, J., was made under Rule 298, O.J.A., not under Rule 261, and the only question was, whether this paragraph embarrassed plaintiff, or was calculated to do so, on the trial of the real issue between the parties. An embarrassing plea is one in which matter is pleaded that the defendant is not entitled to make use of. No doubt a good deal of liberty is allowed in the case of libel, where defendant may set out all the facts relied on as shewing justification or privilege, or in mitigation of damages, but it was not clear what this paragraph was intended to be. It might mean that the impression created by the certificate of membership which the plaintiff had obtained was a false impression, and that the defendant was justified in an attempt to correct that impression in the mind of the public by publishing what was complained of. If that was the meaning it was embarrassing. If that was not its meaning, the latter part of the paragraph was embarrassing in not being so framed as to shew clearly what defendant intended to rely on(*x*).

Counterclaim for alleged slanders uttered at a meeting and reported in a newspaper.

In an action for libel published by the defendant of the plaintiff, in a letter in the Ottawa *Evening Journal*, the defendant, who was the contractor for the stone and mason work of the public library building in that city, alleged by way of counterclaim that the plaintiff, who was an alderman of the city and a member of the building committee of the library building, had, at a meeting of the committee, made several serious charges in respect of the unworkmanlike manner in which defendant was carrying out his contract; that plaintiff claimed to be specially qualified to make the charges by reason of being himself a public contractor; that the charges were duly reported in the public newspapers, and were matters of public interest; that the said letter was published in reply to the charges made by plaintiff in the *Journal*, and *bonâ fide* for the purpose of self-vindication, and to prevent plaintiff's charges from operating to his pre-

(*x*) Caldwell v. Buchanan (1902) 1 O.W.R. 682.

judice, and in reasonable and necessary self-defence and without malice, etc. A county judge, sitting at the Assizes, held, that the occasion on which plaintiff was charged with defaming defendant was *primâ facie* privileged, and that the counterclaim should have shewn in what respect plaintiff exceeded his privilege, and he ordered the counterclaim to be struck out. Upon appeal the Divisional Court held, that the reference in the counterclaim to the charges as set forth in the defence, and the further allegation that such charges were falsely and maliciously spoken by plaintiff, were quite sufficient to make the counterclaim a good pleading within Rule 268, O.J.A.(*y*). On the question of privilege the court held that the facts, as pleaded, did not constitute a privileged occasion, but many of them might be pleaded in mitigation of damages, referring to *Stirton* v. *Gammer*(*z*), and that defendant might amend for that purpose.

Laughton v. Bishop of Sodor and Man (1872).

Except in the case of *Laughton* v. *Bishop of Sodor and Man*(*a*), the court said they found no case in which such a defence had been allowed where the defamation complained of by defendant consisted of oral statements made by plaintiff at a public meeting in the presence of reporters, who, being expressly required to do so, published such statements in their newspapers; but they did not think the *Laughton* case an authority for the defence in the action, by reason of the special and extraordinary conditions involved in it.

In *Laughton* v. *Bishop of Sodor and Man*, here referred to, the plaintiff, a barrister, in his argument against a private bill before the House of Keys, imputed improper motives to the bishop, and wantonly impugned his conduct in his bestowal of church patronage. The bishop severely criticized the plaintiff's statements in a charge to his clergy, which he also published in the newspapers. The court held, that the circumstances warranted the bishop in thus publicly vindicating his character and conduct; that he was justified in sending his charge to the clergy and to the newspapers; and that the occasion was privileged in the absence of actual malice.

(*y*) Hopewell v. Kennedy, 9 O.L.R. (1904) 43; 4 O.W.R. 433; 25 C.L.T. (Occ. N.) 70.

(*z*) (1899) 31 O.R. 227.

(*a*) (1872) L.R. 4 P.C. 495.

In an action for slander the defendant may not plead facts tending to justify other words than those contained in the declaration, and, where he does so, objection should be taken by demurrer, and not by a motion to strike out the allegations(*b*). Where the action was for certain libels contained in an interview published by defendant in a local newspaper, a portion of the innuendo, set out in a separate paragraph in the statement of claim, and not referring to the plaintiff, was held (*per* Falconbridge, C.J.), to have been properly struck out by a local Master as being not fairly pleaded as innuendo, and as tendering an issue which was not material and might be embarrassing(*d*).

Amendment of defects or errors.

The court or a judge may also, at any time, amend any defect or error in any proceeding; and all such amendments may be made as are necessary for the advancement of justice, determining the real matter in dispute, and best calculated to secure the giving of judgment according to the very right and justice of the case(*e*).

Where action for libel and not on the case.

This rule may be invoked where the plaintiff has mistaken his cause of action. A statement of claim alleged that the plaintiff, a tradesman, claimed damages for injury to his credit and business by reason of the defendant having sent certain handbills, issued by the plaintiff, advertising his business, to various wholesale creditors of the plaintiff, and having written and published letters to such creditors falsely and maliciously charging that the plaintiff was advertising his business, and unduly forcing sales, with the view of selling and disposing of his goods to defeat and defraud his creditors. It was held (*per* Meredith, C.J.) that these allegations shewed that the action was for libel, and was not an action on the case for disturbing the plaintiff in his trade or calling, and that the statement of claim was embarrassing to the defendant in not setting out the libellous words(*f*).

(*b*) Phillips v. Laviolette (1902) 4 Q.P.R. 396.

(*d*) Hay v. Bingham, 5 O.L.R. (1902) 224.

(*e*) R. 312, O.J.A.

(*f*) Robinson v. Sugarman (1897) 17 O.P.R. 419.

Where action on the case and not for libel.

But an action for words written and published relating to articles of the plaintiffs' manufacture, and the right of the plaintiffs under certain letters patent by virtue of which they claimed a monopoly of the manufacture and sale of the articles, is not an action of defamation properly so called, but an action on the case for maliciously acting in such a way as to inflict loss upon the plaintiffs. Such an action, therefore, does not come within section 109 of the Ontario Judicature Act, 1895(*g*), so as to be triable only by a jury unless by consent(*h*).

Amendments in discretion of judge.

It must be left very much to the discretion of the presiding judge whether an amendment of the pleadings will be allowed or not. If it appears to him that the opposite party will be prejudiced by the amendment, he ought not to allow it(*i*). A statement of claim for wrongful dismissal may be amended after delivery of the statement of defence, by adding a paragraph setting up a cause of action for slander(*j*). A declaration charging sodomy, without an innuendo, may be amended, if amendment asked for, by explaining the criminal nature of the act(*k*).

Amendment by adding count for other slanders of same nature.

In an action for slander, the plaintiff, who had held the offices of trustee and secretary of the trustees in a school district, complained that the defendant, who had succeeded him in the office of secretary, and who was also the auditor of the trustees' accounts, had charged him at a meeting of the ratepayers of the district, at which the accounts of the district, while the plaintiff was a trustee, were discussed, with having stolen the school funds, the words being: "You have stolen over $140 from the district already." Upon a motion to amend at the trial by adding another count charging the defendant with speaking other slanderous words of the same character on another occasion, it was

(*g*) Now s. 102.

(*h*) Dickerson *et al.* v. Radcliffe *et al.* (1897) 17 O.P.R. 418.

(*i*) *Per* Allen, C.J., in Bolser v. Crossman (1886) 25 N.B.R. 556.

(*j*) Rodger v. Noxon Co. (1900) 19 O.P.R. 327.

(*k*) Anonymous (1869) 29 U.C.Q.B. 462.

objected that this stated a new cause of action, and that the defendant should have time to consider what answer he would give to it; that no time was stated when the words were alleged to have been spoken; and that the proposed new count was demurrable. There was no affidavit by the defendant, as in *Gallant* v. *Calder*(*l*), that he would be prejudiced in his defence by the amendment. The amendment was allowed conditionally, and upon a verdict for the plaintiff on the added count, it was held, that the amendment was properly made, the defence on the trial being a denial only of the speaking of the words charged, but that there must be a new trial unless the plaintiff consented to reduce the damages(*m*). An amendment may also be made after the trial, where the jury disagreed, by adding further innuendoes to the libel complained of(*mm*).

Amendment that occasion privileged.

In an action for words imputing theft, the defendant denied using the words and gave evidence to that effect at the trial. He also proposed to shew that, whatever the words used were, he honestly believed them to be true, and that the occasion was privileged, and he asked leave to amend by setting this up. The trial judge (O'Connor, J.) was of opinion that the occasion was not privileged, and refused the amendment; but the Divisional Court held that the occasion was privileged, and a new trial was granted to give the plaintiff an opportunity to prove express malice(*n*). But where an amendment of the defence by pleading that the slander complained of was a privileged communication was not applied for until after the evidence was concluded and the jury retired, its refusal was held to be a proper exercise of judicial discretion(*o*). In an action brought in the district of Montreal for a libel published in another district, and in which the defendant excepted to the jurisdiction, the plaintiff was not allowed to amend by alleging publication in the district of Montreal(*p*).

(*l*) (1883) 23 N.B.R. 73. See, also, Dewe v. Waterbury (1880-81) 6 S.C.R. 143.

(*m*) Bolser v. Crossman (1886) 25 N.B.R. 556.

(*mm*) Grant v. Grant (1904) 24 C.L.T. (Occ. N.) 95.

(*n*) Wells v. Lindop (1887) 13 O.R. 434.

(*o*) Shea v. O'Connor (1894) 26 N.S.R. 205.

(*p*) Senecal v. La Cie d'Imprimerie de Quebec (1881) 4 L.N. (Q.B.) 414.

Averment of words affecting plaintiff in his office or employment.

Where the words prejudicially affect the plaintiff in his office or employment, the averments in his pleadings should shew, in the case of slander, that he held such office, or was still in such employment, when the words were spoken, unless the words are actionable *per se*, or unless he can prove special damage; and it should also be alleged that the words were spoken of the plaintiff with reference to such office or employment(*q*); but this is not necessary in the case of libel. The gist of an action for slander of a person in his office is said to be the risk of his losing the office, hence the necessity for his holding the office when the slander was uttered(*r*).

When averment of office or employment immaterial.

But where the words alleged to have been published of plaintiff are in relation to an office and are actionable *per se*, averment and proof of the office are immaterial(*t*). So, also, averment in the declaration and proof of the particular employment are unnecessary, where the words are charged to impute dishonesty to a party in such employment or service, and, independently of that, are actionable *per se*(*u*). And where the defendant charged plaintiff with being "a public robber," and the declaration shewed that the defendant used the expression in a mitigated sense by an innuendo that "he (plaintiff) had defrauded the public in his dealings with them," it was held to be unnecessary for the plaintiff to aver that he was in any office, trade, or employment, in which he could have defrauded the public(*v*). So, also, words charging a person with violating a

(*q*) Gallwey v. Marshall, 23 L.J. Ex. 78; 9 Ex. 294; Bellamy v. Burch, 16 M. & W. 590; Yrisarri v. Clement, 2 C. & P. 223; 3 Bing. 432; Stanton v. Smith, 2 Ld. Raym. 1480; 2 Str. 762; Jones v. Littler, 7 M. & W. 423; 10 L.J. Ex. 171; Hall v. Weedon, 8 D. & R. 140; Foulger v. Newcombe, L.R. 2 Ex. 327; Miller v. David, L.R. 9 C.P. 118.

(*r*) *Per* DeGrey, C.J., in Onslow v. Horne, 3 Wils. 188; 2 W. Bl. 753.

(*t*) Crosskill v. Morning Herald Printing and Publishing Co. (1883) 16 N.S.R. (4 R.& G.) 200. See, also, Goodburne v. Bowman 9 Bing. 532; Warneau v. Hine, 1 Jur. 820; Parmiter v. Coupland, 6 M. & W. 108; Boydell v. Jones, 4 M. & W. 446.

(*u*) Hea v. McBeath (1843) 4 N.B.R. (2 Kerr) 301.

(*v*) Taylor v. Carr (1847) 3 U.C.Q.B. 306.

public trust for the purpose of revenge, being libellous *per se*, do not require to be connected with any particular office, although the mention of the office may be introduced as an explanatory circumstance(*w*). And where a paper contained matter which was grossly libellous *per se*, without reference to any particular situation or office, it was no objection to a verdict upon such libel that the office mentioned in the declaration was of an inferior grade; that it was not sufficiently proved that the plaintiff held such office; that there was no such office in fact; and that no proof had been adduced that the person mentioned in the declaration as principal in the office was so in fact(*x*).

Want of averment as to office no ground for arresting judgment.

Nor in libel is want of averment as to his office in plaintiff's pleadings any ground for arresting a judgment in his favour. Where, therefore, a verdict was obtained for a libel contained in a letter written by defendant to the Postmaster General at Quebec, charging the plaintiff, who was occasionally employed as deputy acting postmaster, agent, or clerk, of the postmaster, with misconduct in the management of the local post office, and a motion was made to arrest the judgment upon the grounds that there was no averment in the declaration that the libel was written of and concerning the plaintiff's office; that the cause of action, as set forth, was imperfect without such averment; and that charging the plaintiff with insolently discharging the duties of his office was not libelous without some explanation, the application was refused(*y*).

Defects in declaration cured by pleading over.

The defects of plaintiff's pleading may be cured by defendant pleading over. In an action for newspaper libel the declaration set out that the defendants falsely and maliciously published of the plaintiff, in relation to a certain office held by him as Deputy Provincial Secretary, in the defendants' newspaper, the *Morning Herald*, published at the city of H., and dated, etc., and which said article appeared in the editorial columns of the said newspaper, under the caption "Concerning Martyrs," etc., and is as

(*w*) Jones v. Stewart (1827) 1 U.C.K.B. 626; Tay. Rep. 453.
(*x*) *Ibid.*
(*y*) *Ibid.*

follows: (setting out the article at length). A rule to set aside the verdict for plaintiff on the ground, *inter alia*, that the declaration did not allege what defamatory matter was published of the plaintiff, and did not set up any cause of action against the defendants, was discharged for the reason, that, although no "article" had been mentioned in the count to which the words, "which said article" (*supra*) could refer, the defect was cured by pleading over, and particularly by a plea justifying the publication. Chitty on Pleadings, vol. 1, pp. 419, 703, 704, 711; Taylor on Evidence 8th Ed., 713; *Reg.* v. *Waters*, 2 C. & K. 866; and ss. 116, 121 and 123 of the then Practice Act of Nova Scotia, were cited in support of this view(*z*).

Plaintiff's pleadings objected to.

The term "rebel" not being actionable, unless used in a treasonable sense, the declaration must shew that the word was used in that sense, otherwise the judgment will be arrested(*a*); and where both husband and wife are sued for slanderous words spoken only by the wife, it must be distinctly alleged that the female defendant, being the wife, etc., spoke the words complained of, otherwise the action is not maintainable(*b*). A declaration in slander for words imputing incontinent or profligate conduct to a Methodist minister was held bad on demurrer(*c*); also counts in a declaration charging fraud against a money lender and trader in land in connection with a land sale, and in relation to his business, and for calling him a "swindler," "villain," "villainous thief" and "thundering thief"(*d*); also counts in a joint action by husband and wife for slander of the wife, where the words constituting the slander were not set out in the declaration(*e*). But a defendant will not be allowed, in an action of slander, to single out some of the words of a count and demur to them as not being actionable, while the

(*z*) Crosskill v. Morning Herald Printing and Publishing Co. (1883) 16 N.S.R. (4 R. & G.) 200.

(*a*) Beardsley v. Dibblee (1841) 3 N.B.R. (1 Kerr) 246.

(*b*) Wilson v. West (1861) 11 U.C.C.P. 127.

(*c*) Breeze v. Sails (1863) 23 U.C.Q.B. 94.

(*d*) Fellowes v. Hunter (1861) 20 U.C.Q.B. 382.

(*e*) Breen *et ux.* v. McDonald (1872) 22 U.C.C.P. 298.

same count contains other words, uttered in the same conversation, which are clearly actionable(*f*).

In an action on the case for slander, the words were alleged to impute incest with plaintiff's own daughter, who, at the time referred to, was under the age of twelve years. Plaintiff was nonsuited on the technical ground that there was no allegation in the declaration that plaintiff had a daughter under twelve years of age, and that the words charged made no allusion to her age. A motion to set aside the nonsuit was dismissed, the court being of opinion that the declaration should have averred that plaintiff had a daughter, either under the age of ten years, or above that age, and under twelve; and that the words spoken had reference to such daughter(*g*). But a declaration by a married woman for slander, imputing that she had committed incest and adultery with her father, and alleging as grounds of special damage the loss of the *consortium* of her husband, and the loss of society of friends, was held good on demurrer, although the second ground was clearly insufficient in not naming the friends(*h*). Where the declaration laid the words as accusing the plaintiff of cheating, and no special damage was proved, the declaration was held sufficient to sustain a verdict for the plaintiff, the words, in the opinion of the court, really amounting to a charge of forgery(*i*). And so, also, where the words in the declaration were: "It's my soul's opinion that nothing else kept that girl in the house last winter but taking medicine to banish the young baker," meaning that the plaintiff had been taking medicine to procure abortion, it was held that the declaration charged a good, substantial cause of action with sufficient certainty, and not a mere intention to commit a crime(*j*).

Partial demurrer to a multifarious plea of justification.

In an action for libels published in a newspaper, one of the statements complained of charged the plaintiff with resorting to "that style of financiering which in the vernacular is called swindling." The result of the pleading as a whole was a multi-

(*f*) Taylor v. Carr (1847) 3 U.C.Q.B. 306.

(*g*) Green v. Campbell (1856) 6 U.C.C.P. 50.

(*h*) Palmer v. Solmes (1880) 45 U.C.Q.B. 15.

(*i*) Hall v. Carty (1855) 2 N.S.R. (James) 379.

(*j*) Miller v. Houghton (1853) 10 U.C.Q.B. 348.

farious plea of justification partially demurred to, and no objection taken by the plaintiff to the multifariousness, nor by the defendant to the partial demurrer. For the mode of dealing with such a case, see *Brown* v. *Beatty*(*k*).

Where the plaintiff alleges that the words complained of bear a defamatory meaning he undertakes to prove it, and a demurrer which mistakes the gist of the words will be disallowed. The first count of the declaration set out that the plaintiffs were watchmakers, and sold certain watches made for them in Switzerland, and other superior watches made in England, marking the former with the name of their firm only, adding on the other the words, "Chronometer Makers to the Queen." The libel complained of charged, in substance, that a large proportion of the watches advertised by them were merely Swiss watches imposed upon the public as English, and at twice their true value. In the second count it was alleged that the libel charged the plaintiffs with selling their watches made in Switzerland as English, and thus defrauding the public. A demurrer to each of these counts was held bad. "We think," said Hagarty, J., "the defendant mistakes the gist of the alleged libel. In the first count it is that the plaintiffs impose inferior Swiss ancres on the public as genuine London watches. As we have had occasion to notice more fully in *Fitch* v. *Lemmon*(*l*), the plaintiffs undertake to satisfy the jury of the correctness of the meaning they put upon the alleged libel. In this view the defendant's objections fail as matters of pleading. Nor do we think that the objection can affect the second count, for the like reasons. Both counts, with the innuendoes, seem to disclose a cause of action"(*m*).

Allegations as to special damage.

Where the words are spoken in relation to plaintiff's business, special damage need not be alleged, but, if special damage is claimed, it should be alleged with certainty so that defendant may be prepared to meet it(*n*). In the absence of such an allegation, either in libel or in actions for defamatory words which

(*k*) (1862) 12 U.C.C.P. 107, at pp. 117-18.

(*l*) (1868) 27 U.C.Q.B. 273.

(*m*) Russell *et al.* v. Wilkes (1868) 27 U.C.Q.B. 280, at pp. 283-4.

(*n*) Paint v. Maclean (1873) 9 N.S.R. (3 N.S.D.) 316.

are actionable *per se*, evidence of special damage is not admissible. And this principle applies where the damage relied on is the act of a third party to the prejudice of the plaintiff, induced by the slander or libel complained of. In such a case evidence of the prejudicial act of the third person ought to be rejected if it is not pleaded in the declaration(*o*).

General allegation of loss of custom insufficient to prove a particular loss.

The established rule in all cases, whether in actions for words actionable *per se*, or actionable only when accompanied by special damage, is, that no evidence of particular damage can be given unless it is alleged in the declaration, and the general allegation of loss of customers is not sufficient to enable a plaintiff to shew a particular injury or the loss of a particular customer. This, also, is the law as laid down by the Supreme Court of the State of New York in *Tobias* v. *Horland*(*p*). Where, therefore, evidence of special damage was admitted, in the absence of any allegation in the pleadings of such damage, a new trial was directed(*q*).

Names of customers should be stated in the pleading.

The names of the customers must be given, otherwise evidence of the special damage is not admissible, and this rule is not confined to cases of verbal slander where the words are not actionable *per se*—cases in which special damage is a necessary ingredient in the cause of action(*r*).

Words not actionable per se, and claim for special damage insufficient.

The second count in the declaration, which also contained a count for slander of title to land, charged the following words as slanderous: "J. A. (plaintiff) is a great scoundrel. He has

(*o*) *Per* Strong, J., in Silver *et al.* v. Dominion Telegraph Co. (1882) 10 S.C.R. 238, at p. 263.

(*p*) 14 Wendell, 540. *Per* Gwynne, J., in Silver *et al.* v. Dominion Telegraph Co. (1882) 10 S.C.R. 238, at pp. 273-74.

(*q*) *Ibid.*

(*r*) *Per* Strong, J., in Ashdown v. Manitoba Free Press Co. (1891) 20 S.C.R. 43, at p. 50.

robbed me of $130''; meaning that plaintiff had, by fraudulent and dishonest means, deprived defendant of such sum, whereby plaintiff was much injured in his fair name, credit and reputation, and lost the friendship, assistance and hospitality of D. L., J. M. and T. H., and many others of his neighbours, divers of whom refused, and were unwilling as theretofore, to deal and transact business with plaintiff, and from whose friendship, hospitality and business dealings, plaintiff had derived profit and advantage, etc. This count was demurred to on the ground that the words were not actionable *per se*, and that no sufficient special damage was shewn. Gwynne, J., held, that the count was insufficient, and gave judgment on the demurrer for defendant(*s*).

Replication of reversal of conviction to plea of justification of criminal charge.

Where the words complained of implied that the plaintiff had been convicted of a crime and punished, a replication that the conviction was reversed is a good answer to a justification of the charge. The declaration was for a libel in the defendants' newspaper, in the following words: ''Old S., who was naturalized by serving a term in the penitentiary of New York state''; meaning that the plaintiff had served a term as a convict in said prison. The defendants justified by setting up a conviction of the plaintiff of an indictable offence before the Recorder's Court in Buffalo, prior to the publication of the libel, his sentence to imprisonment in the state prison of New York state for the term of two years, and his subsequent committal to that prison and detention there for that period. The plaintiff replied that, within three months from the time of the alleged conviction, and before he was imprisoned for the said term in said state prison, the conviction was reversed by the Supreme Court of the state of New York, and the plaintiff released from custody upon the charge against him. This replication was held good on demurrer(*t*).

(*s*) Ashford v. Choate (1870) 20 U.C.C.P. 471.

(*t*) Davis v. Stewart *et al.* (1868) 18 U.C.C.P. 482. See, also, Davis v. Stewart (1869) 29 U.C.Q.B. 441.

Replication of pardon; of having undergone sentence; of acquittal.

A replication to a justification of a charge of crime that the plaintiff, after the felony and before the uttering of the words, was pardoned(*u*); or that he had undergone his sentence, which was equivalent to a pardon(*v*), is also good; but not a replication of acquittal, by way of estoppel, to a plea justifying a charge of crime(*w*).

(*u*) Cuddington v. Wilkins, Hob. 81; 2 Hawk. P.C. c. 37, s. 48.

(*v*) Leyman v. Latimer *et al.* 3 Ex. D. 15, 352; 46 L.J. Ex. 765; 47 L.J. Ex. 470; 37 L.T. 360, 819; 25 W.R. 751; 26 W.R. 305; 14 Cox C.C. 51.

(*w*) Helsham v. Blackwood *et al.*, 11 C.B. 111; 20 L.J.C.P. 187.

CHAPTER XXIII.

The Innuendo.

The innuendo and its office.

The innuendo is the meaning ascribed by the plaintiff in his pleading to the words complained of, whether oral or written. It is the construction which he puts upon the words, and which he avers and undertakes to prove was put upon them by the hearer or reader, as the case may be, and which he will contend should be adopted by the jury at the trial. "It is admitted on all hands," said Bramwell, L.J., "that the common expression 'meaning' is incorrect and inadequate, for the question is not what the author of the alleged libel means, but what is the meaning of the words he has used; and more than that (for the words themselves may be harmless), if a libellous inference may be drawn from them, as a necessary or natural consequence, they are libellous"(*a*). The same remark is applicable to slander.

"The use of the innuendo is to explain the evil meaning of the defendant, when the words are apparently innocent and inoffensive or ambiguous, and the doctrine of taking words in the mildest sense is applied only when the words in their natural import are doubtful, and equally to be understood in one sense as in the other: *Somers* v. *House*, Holt, 39"(*b*).

When necessary.

In *Paladino* v. *Gustin*, an Ontario case(*c*), Ferguson, J., discusses the question of when an innuendo is necessary. The action was for slander brought by a married woman, who had been called "a blackguard," and "a bad woman," the innuendo being that the plaintiff was a common prostitute and a woman of evil character.

(*a*) *Per* Bramwell, L.J., in Capital and Counties Bank v. Henty (1882) 7 A.C. 772, at p. 790.

(*b*) *Per* Wilson, J., in Anonymous (1869) 29 U.C.Q.B., at p. 462.

(*c*) (1897) 17 O.P.R., at p. 560.

Opinion of Ferguson, J.

Ferguson, J., in his judgment in the Divisional Court, where security for costs was ordered on the ground that the defendant had shewn a good defence on the merits, said: "Whenever the words spoken are actionable only in some secondary sense, or by reason of some surrounding circumstances, an innuendo is necessary to the plaintiff's success. If, with their ordinary meaning, the words are perfectly good sense as they stand, facts must be given in evidence to shew that they may have conveyed a special meaning on the particular occasion on which they were spoken, and this being done, a bystander may be asked: 'What did you understand by the expression used?' It must be borne in mind that this is altogether different from attempting to explain away the meaning of plain words, for, where the words are well known and perfectly intelligible English, generally evidence cannot be given to explain their meaning. The plaintiff is allowed to give evidence of all the 'surrounding circumstances,' in order to place the jury, as far as possible, in the position of bystanders, that they may judge how the words would be understood on the particular occasion. The jury know what ordinary English means, and need no witness to inform them; but they are entitled to learn by evidence what were the 'surrounding circumstances,' to enable them to say how the words would be understood by a bystander"(*d*).

Rules governing the innuendo. Prefatory averments in its aid unnecessary.

There are certain well established rules with respect to the innuendo and its office, which are constantly acted upon in actions of defamation. In the first place prefatory averments are no longer necessary to support the innuendo. The case of *Johnson* v. *Hedge*(*e*) illustrates the old system of pleading under which such averments were necessary. The declaration contained three counts for slander, imputing the crime of sodomy by three different modes of expression. After a verdict for the plaintiff there was a motion in arrest of judg-

(*d*) See, also, Daines *et al.* v. Hartley (1848) 3 Ex. 200; 18 L.J. Ex. 81; 12 Jur. 1093; and *per* Wilson, C.J., in Huber v. Crookall (1886) 10 O.R. 475.

(*e*) (1849) 6 U.C.Q.B. 337.

ment on the ground, *inter alia*, that the words charged in the various counts did not of themselves import what was alleged as their meaning, and that there was no sufficient inducement, or statement of prefatory matter, to which the innuendo in the declaration could refer. The court (Robinson, C.J., *diss.*) held, that the declaration was defective on that ground, and the judgment was arrested.

Change effected by the C.L.P. Act.

Prefatory averments as an aid or support to the innuendo were dispensed with in all the Provinces by the adoption of section 61 of the Common Law Procedure Act, 1852. The words complained of, whether oral or written, are set out in the plaintiff's pleading followed, where necessary, by the innuendo, which simply states the defamatory sense of the words. The pleading in that form, as pointed out by Blackburn, J.(*f*), is to be regarded as two counts under the former system, one with the innuendo and one without, the plaintiff being entitled to recover if he can shew a good cause of action either with or without the alleged meaning. The rule is the same in criminal prosecutions for libel. A count for libel may charge that the matter published was written in a sense which would make the publishing criminal, specifying that sense without any prefatory averment shewing how the matter was written in that sense. And on the trial it shall be sufficient to prove that the matter published was criminal either with or without such innuendo(*ff*).

The defendant published of the plaintiff, in a newspaper called the *Liverpool Transcript*, under the heading "Caution to the Public," a copy of a promissory note, made by plaintiff in favour of defendant, with the following words underwritten and signed by defendant: "The maker of the above note has availed himself of the statute of limitations and refused payment." The innuendo was, that all persons should be cautious of having dealings with the plaintiff, as he was a person who would avail himself of the law to avoid payment of his just debts. Upon a motion before the Supreme Court of Nova Scotia to set aside a verdict for the plaintiff on the ground that there was no libel in the words *per se*, no prefatory averments to shew wherein they

(*f*) In Watkin v. Hall (1868) L.R. 3 Q.B. 402.
(*ff*) C.C. s. 861 (2) (3).

were libellous, and that the innuendoes were not justified by the words used, the court held, that it was sufficient to specify the defamatory sense of libellous words in the form of an innuendo without other averments; and that the innuendo in question was a proper one, the publication being capable of a libellous meaning. It was remarked in the judgment of the court, that the decisions in the United States courts, some of which were cited in favour of the defendant, although entitled to respect, are not binding on the courts of this country(*g*).

"The Practice Act, section 32,(*h*) has made it no longer necessary," said Bliss, J., "to set out those prefatory averments which were before required to support an innuendo, but the defamatory sense in which the libel is used may be at once averred. That sense, however, must, no doubt, be still supported by proof of other facts, wherever formerly the same would have been required. In some cases, though the words may be ambiguous, the real defamatory meaning, the injurious tendency of the expression, lies sufficiently on the surface to be collected without any extraneous proof, and then all that is necessary is the innuendo to point them out. Now here there is that averment. The only question, then, it appears to me, is whether that meaning can be supported, and whether the publication in that sense is libellous," which the learned judge held it was(*i*).

Words to be construed according to their ordinary sense.

In all actions of defamation the words or statements, whether oral or written, are subject to the same rules of construction. One rule is, that the words must be construed according to their ordinary and natural sense. "It would be strange to say, and more so to give out as the law of the land, that a man may be allowed to defame in one sense, and defend himself in another; such a doctrine would indeed be pregnant with the *nimia subtilitas* which my Lord Coke so justly reprobates"(*j*).

(*g*) See remarks by Meredith, J., in Macdonald v. Mail Printing Co. (1900) 32 O.R. 163, at p. 172, as to the caution required in the application of United States case law in actions of defamation.

(*h*) The section of the Nova Scotia Practice Act, above referred to, is the same as in the other Provincial Acts respecting Libel and Slander.

(*i*) Roberts v. Patillo (1855) 2 N.S.R. (James) 367.

(*j*) *Per* Lord Mansfield in Rex v. Horne, 2 Cowp. 672.

Words are actionable or not according to the sense in which they are understood.

In slander, therefore,—and the same remark applies to the reader's understanding of written or printed matter—words are actionable or not according to the sense in which they are understood by bystanders not acquainted with the matter to which the words relate(*k*). If the words are either defamatory *per se*, or might be so understood, the defendant cannot be heard to say that he did not use them with any such meaning; and the only question is, what would the ordinary bystander infer from the defendant's utterances(*l*)? Evidence is admissible to shew knowledge of the matter on the part of those who heard the words; and, if the words are actionable independently of such knowledge, the evidence is superfluous and harmless(*m*).

Rule as to construction of words (1) where meaning plain; (2) where meaning ambiguous.

"Unquestionably, the meaning of the defendant, when using the words complained of, is a question of fact to be decided by the jury, where the words are capable of bearing the construction put upon them; and where the words spoken, or the meaning of the terms employed, are ambiguous, and it is doubtful in what sense the speaker intended them, the question is in what sense the hearers understood them"—Folkard on Slander and Libel, 6th Ed., p. 466, where it is said, that "the ordinary meaning of the words used (whether written or spoken) is to be taken to be the meaning of the utterer, unless they are explained to import something different from their obvious meaning by previous occurrences, conversations, or other matters having been introduced"(*n*).

The same point is discussed more fully in an earlier Upper Canada case. "In *Fleetwood* v. *Curley*," said Robinson,

(*k*) Young v. Sloan (1852) 2 U.C.C.P. 284; Hankinson v. Bilby, 16 M. & W. 442. See chapters on slander of a person in his office, profession or business.

(*l*) Lawrie v. Maxwell (1904) 3 O.W.R., at p. 134.

(*m*) See Gates v. Lohnes *et al.* (1898) 31 N.S.R. 221.

(*n*) *Per* Smith, J., in Grant v. Simpson (1878) 12 N.S.R. (3 R. & G.) 141.

C.J., "where the words complained of had not obviously the application ascribed to them, the court remarked that, if the hearers did not so understand the words, they would not be actionable; 'but the slander and damages,' they say, 'consist in the apprehension of the hearers.' Hob. 268. So in a manuscript case reported in Vin. Abr. 507, it was laid down 'that the question is only what was understood by the hearers.' In Gilbert's Reports, 117, it was held that the words, 'I know Harrison will go off before this time twelve months,' being spoken of a tradesman, meant bankruptcy. It was objected that, for want of averment, the 'innuendo could not carry the words beyond their strict meaning'; but Parker, C.J., said 'the rule now is, that the words shall be taken in the sense the hearers understood, and not *in mitiori sensu* as formerly, and, therefore, no innuendo was necessary; but if it were, it was well laid on the plea.' Selwyn, N.P. 127 (9th ed.); 2 Stark. Ev. 629; Stark. on Libel, 92-3. So in *Penfold* v. *Wescote*, 2 New Rep. 335, the language of the court affirms the same principle, though to be sure, the words laid there were such as plainly conveyed a charge of theft, and the argument was that they were not used with such intent, but as words of mere general abuse. Sir James Mansfield said: 'The jury ought not to have found a verdict for the plaintiff, unless they understood the defendant to impute theft to the plaintiff. The manner in which the words were pronounced, and other various circumstances might explain the meaning of the word, and if the jury had thought that the word was only used by the defendant as a word of general abuse, they ought to have found a verdict for the defendant' "(*o*). "It is clear from modern decisions," said Des Barres, J., in *Roberts* v. *Patillo* (*supra*), "that the courts are not now to read the words of a libel *in mitiori sensu*, but to understand them in the same sense in which the rest of the world would read them, according to their plain and ordinary import."

Innuendo unnecessary when words prima facie defamatory.

Applying the rule already stated, that words must be understood in their ordinary and natural sense, it follows that words or statements which are *primâ facie* defamatory require no

(*o*) Johnson v. Hedge (1849) 6 U.C.Q.B. 337.

innuendo, because the language is plain and unmistakeable(*p*). Parol evidence by the plainitff is inadmissible to explain them. They explain themselves. And so it has been held that proof of the innuendo is in that case unnecessary(*q*). This rule applies to direct imputations of crime, and to all words and statements which are actionable *per se*. The word "sodomite," *e.g.*, applied to any person, is actionable *per se*, and does not require an innuendo(*r*). But in an action for slander for calling a person a "rebel," or for statements in which that term is used concerning the plaintiff, the plaintiff's pleadings must shew that the term was used in a treasonable sense, as it is not actionable *per se*(*s*). Where the action was for words calling a woman "a whore," it was held sufficient under a New Brunswick Act(*t*), to aver in the declaration an imputation of unchastity without further explanation, the word not being doubtful or ambiguous, and indicating an offence punishable by the temporal courts(*u*).

If words actionable without the precise innuendo, plaintiff may recover.

If the words themselves are actionable without the innuendo, the plaintiff may recover without the precise meaning given by the innuendo being proven: *Watkin* v. *Hall* (p. 373, *ante*)(*v*). The innuendo being unnecesary in such a case may be rejected and a good cause of action remains.

Innuendo unnecessary for a charge of "blackmailing."

In an action by the mayor of Toronto for words contained in a newspaper report of a speech at a public meeting in which the

(*p*) Harvey v. French, 1 Cr. & M. 11; 2 Tyrw. 585; 2 M. & S. 591; Slowman v. Dutton, 10 Bing. 402.

(*q*) Gates v. Lohnes *et al.* (1898) 31 N.S.R. 221; Homer v. Taunton, 5 H. & N. 661; 29 L.J. Ex. 318; 2 L.T. 512; 8 W.R. 499.

(*r*) Anonymous (1869) 29 U.C.Q.B. 462; Harvey v. French and Slowman v. Dutton, *supra*. See chapter on Slander Imputing Crime.

(*s*) Beardsley v. Dibblee (1841) 3 N.B.R. (1 Kerr) 246; Fountain v. Rogers (1601) Cro. Eliz. 878.

(*t*) 31 Geo. 3, c. 5.

(*u*) Martindale *et ux.* v. Murphy *et ux.* (1835) 2 N.B.R. (Berton) 161. The following cases illustrate the same principle: Webb v. Beavan (1883) 11 Q.B.D. 609; 49 L.T. 201; Francis v. Roose (1838) 3 M. & W. 191; 1 H. & H. 36; Kunahan v. McCullagh, Ir. R. 11 C.L. 1.

(*v*) Strachan v. Barton (1874) 34 U.C.Q.B. 374.

speaker characterized the plaintiff's behaviour in a certain matter as 'blackmailing,'' the innuendo was, that ''the plaintiff had committed a crime punishable by law,'' and ''was a man unworthy of any position of trust,'' and was a ''blackmailer.'' The defendants pleaded, *inter alia*, that the words did not bear the meaning alleged, or any defamatory meaning, and in the alternative, that the words, in their natural and ordinary signification, were true in substance and in fact. The jury found in favour of the plaintiff and $50 damages, subject to a motion for a nonsuit, which was subsequently granted by the trial judge (Meredith, J.) on the ground that there was no evidence of the falsity of the words, and that the uncontroverted evidence proved them to be true(*w*). Upon an appeal to the Divisional Court the judgment dismissing the action was reversed, and judgment directed to be entered for the amount of the verdict and costs.

Opinion of Boyd, C.

Boyd, C., said that it was not essential to determine whether the term ''blackmail'' *per se* imputed a crime. The better view was, that the colloquial use had broadened its meaning so that it may not necessarily have a criminal connotation. But when put in writing and published, it was manifestly defamatory. Here the innuendo, that it was a punishable crime, might be rejected, and a good cause of action remained. No innuendo was necessary as to these words: *Barrett* v. *Long* (1851) 3 H.L.C. 413, *per* Parke, B. He agreed with what was said in the latest American case he had found, that the term ''blackmailing'' was libellous *per se*: *Robertson* v. *Bennett* (1878), 44 N.Y. Sup. Ct. 66.

Opinion of Ferguson, J.

Ferguson, J., agreed that no innuendo was necessary. ''Let the innuendo,'' he said, ''be considered not proved and cast out. The plaintiff may then fall back upon the words actually published. This done, and the plaintiff can say to the defendant, 'You wrote and published of me that a speaker, at a public meeting, characterized my conduct upon a certain occasion as ''blackmailing,'' ' and this has not been proved''(*x*).

(*w*) Macdonald v. Mail Printing Co. (1900) 32 O.R. 163.

(*x*) *Ibid.*, 2 O.L.R. (1901) 278.

When words prima facie defamatory defendant may shew their innocence.

But notwithstanding the words are *primâ facie* defamatory, the defendant may set out in his pleadings, and may prove at the trial, facts and circumstances which shew that the words were not used in their ordinary signification, but in one that is innocent(*y*). This is allowable in order to place the jury who did not hear the words uttered, or, in case of an alleged libel, may never have seen or heard of the publication until it was produced at the trial, in the same position as the bystanders or the readers of the published matter, and thereby to enable them to judge fairly of the actual meaning. The same rule applies to the plaintiff where he alleges that the words had at the time a meaning different from their ordinary meaning(*z*). But it should appear that the facts and circumstances, pleaded and given in evidence, were known to those who heard or read the published words at the time of their publication, and that the words are capable of the innocent meaning alleged(*a*). The secret intent of the defendant, for example, in uttering in the presence of bystanders words imputing an indictable offence, is immaterial and is inadmissible in evidence(*b*). In the absence of such evidence, therefore, a witness will not be allowed to say that he did not understand the statements to convey any imputation against the plaintiff, because, as observed by Ferguson, J., "the jury know what ordinary English means." But when evidence has been given of facts which lead to the inference that the statements were made in the innocent sense alleged, a basis will have been laid for the question, "What did you understand by those statements?" Without such a foundation the question cannot be asked(*c*).

(*y*) Daines *et al.* v. Hartley (1848) 3 Ex. 200; 18 L.J. Ex. 81; *per* Wilson, C.J., in Huber v. Crookall (1886) 10 O.R. 475.

(*z*) *Per* Ferguson, J., in Paladino v. Gustin (1897) 10 O.P.R., at p. 560; and *per* Wilson, C.J., in Huber v. Crookall (1886) 10 O.R. 475.

(*a*) Hankinson v. Bilby, 16 M. & W. 445; 2 C. & K. 440.

(*b*) *Ibid.*

(*c*) Daines *et al.* v. Hartley (1848) 3 Ex. 200; 18 L.J. Ex. 81; 12 Jur. 1093; *per* Ferguson, J., in Paladino v. Gustin (1897) 17 O.P.R. 560; Simmons v. Mitchell (1880) 6 App. Cas. 156; 50 L.J.P.C.C. 11; Duke of Brunswick v. Harmer (1849) 3 C. & K. 10; *per* Pollock, C.B., and Watson, B., in Barnett v. Allen (1858) 3 H. & N. 376, 379, 380; 27 L.J. Ex. 415; *per* Byles, J., in Martin v. Loci, 2 F. & F. 654.

Words capable of a defamatory meaning should not be withdrawn from the jury.

Where the words are capable of a defamatory meaning, they should not be withdrawn from the jury, who should be permitted to say whether in fact the words bear the meaning alleged. It is probably better, in any case in which the sense of the words is not altogether clear, to leave the case to the jury, and, as in *Macdonald* v. *Mail Printing Co.*(*d*), to reserve the question of nonsuit, if such be raised, until after the verdict.

Innuendo as to defamatory words endorsed by bank manager on draft sent him for presentation.

A draft on the plaintiff having been presented for acceptance at his place of business by a clerk in a bank agency, answer was returned that "drawee (plaintiff) is away from home; he is in the Western States." The clerk noted this answer on the back of the draft. When the clerk took the draft back to the bank the defendant, the manager of the bank agency, added in his own hand-writing to what the clerk had written the words, "or San Francisco or the Rocky Mountains." The draft was then returned to the bank from which it had been sent for presentation, and by which, after its return, it was handed to the bankers of the drawers. The innuendo was, that the defendant, by the added words, meant to impute that the plaintiff had left for parts unknown, not intending to return to Ontario, and with intent to defraud his creditors. The defendant, besides pleading a general denial, alleged that the added words were privileged, because the statement endorsed on the draft was made in answer to a request to give the answer returned in case of refusal of acceptance; that San Francisco and the Rocky Mountains were in the Western States, and the added words meant only that the defendant did not know in what part of the Western States the plaintiff then was. At the trial the plaintiff was nonsuited on the ground that the words were not, in the opinion of the trial judge (Cameron, C.J.), libellous. Upon a motion to set aside the nonsuit the Divisional Court held, that the words were capable of the libellous meaning alleged, and a

(*d*) (1900) 32 O.R. 163.

new trial was directed in order to submit to the jury the question whether the words did in fact bear that meaning(*e*).

How witness should be examined where words not libellous in their natural sense.

In the same case the Divisional Court had also to determine whether there was evidence to go to the jury in support of the innuendo. At the trial the bank manager, to whom the draft was returned, was asked: "What do you understand by the words used by the defendant?" To this question objection was taken, and the trial judge ruled, that in the absence of evidence (which it was admitted could not be given) that, in the usage of bankers, the words complained of had a meaning other than that conveyed by them in their natural construction, the question could not be put. The court held, that the usage of bankers could not in any way be the rule by which the meaning of such words could be held to be governed, but (following *Daines* v. *Hartley*(*f*)) that nevertheless a proper foundation had not been laid for the question; that the witness should first have been asked if there were any circumstances which would lead him to understand the words in other than their natural sense, and that, upon proof of such circumstances, the question would have been allowable. As, however, the judge's ruling had precluded the plaintiff's counsel from laying such a foundation, a new trial was ordered.

Daines v. Hartley (1848).

In *Daines* v. *Hartley*, here referred to, it was held, that the proper course for a counsel to take, who purposes to get rid of the plain and obvious meaning of the words, is to ask the witness not, what did you understand by the words, but was there anything to prevent the words from conveying the meaning which ordinarily they would convey? Because if there was, evidence of that may be given, and then the question may be put what did you understand by them? Commenting on this decision, Wilson, C.J., said he considered there was a good deal of refinement in the mode of interrogation required. "It appears to me the witness may be properly asked: 'Did you read, or

(*e*) Huber v. Crookall (1886) 10 O.R. 475.

(*f*) (1848) 3 Ex. 200.

understand, those words in their natural sense?' And if the answer be, 'No,' he might then be asked: 'In what sense did you understand them?' But the decision referred to seems to require the question last mentioned should not be asked until the question is put and answered: 'Why did you not understand the words in their ordinary sense?' "(*g*).

The rule for the examination of a witness, laid down in *Daines et al.* v. *Hartley*, is commented on and approved by Smith, J., in *Grant* v. *Simpson*(*h*), in connection with the passage from the English text book which is there quoted in support of the rule. Evidence as to what a witness understood the words to mean, when the words in their natural sense are not defamatory, is specially objectionable in the case of a plaintiff who is a witness on his own behalf, because if the words used required a peculiar meaning to be given to them to make them actionable, other persons than the plaintiff must have understood them to have been used in the peculiar sense, or there would be no publication. And without publication the action would not lie(*i*).

Where ordinary meaning not libellous, the libellous meaning assigned must be proved.

Where there is no evidence that the words bore any other than their ordinary meaning, which is not libellous, the onus of proof of the innuendo which assigns a libellous meaning is not satisfied, and there should be a nonsuit. In an action by the mayor of Toronto, for an alleged libel published in the *Mail and Empire* newspaper during a municipal election, the words complained of were: "It can be readily understood what interests Mr. M., [a friend of plaintiff] has in the matter, and why he should make advances, hire committee rooms, and generally control the compaign, when $4,000,000, which he controls, will be made available if (plaintiff) can be elected mayor. In addition to this, Mr. M. has between $7,000 to $10,000 of claims against (plaintiff), which in proceedings it was shewn, under oath of Mr. M., that he hoped to be paid, should he succeed in qualifying (plaintiff) for mayor, and then electing him." The innu-

(*g*) Huber v. Crookall (1886) 10 O.R. 475.

(*h*) (1878) 12 N.S.R. (3 R. & G.) 141.

(*i*) Wood v. MacKay *et ux* (1881) 21 N.B.R. (5 P. & B.) 109.

endo was, that the defendants charged the plaintiff with having "entered into a corrupt arrangement" with M., "whereby the plaintiff should use the office of mayor, when elected, for private gain," and with having "unlawfully and corruptly influenced, or attempted to influence, the said M., to support him in the mayoralty campaign, both financially and otherwise," and with being "unlawfully and corruptly influenced" by said M., "to use the said office of mayor to improperly advance the pecuniary and private undertakings of said M." A nonsuit was moved for and judgment reserved, and the jury found in favour of the plaintiff and $50 damages. In his subsequent judgment the trial judge (Meredith, J.) held, that there being no evidence, apart from the newspaper article in which the statements appeared, to shew that they bore any other than their ordinary meaning, the onus of proof of the innuendo was not satisfied; there was no reasonable evidence to go to the jury that the words conveyed the defamatory meaning which the plaintiff attributed to them; and, therefore, as to that alleged libel, the motion for a nonsuit should prevail(*j*). This judgment was affirmed by the Divisional Court, Boyd, C., citing *O'Brien* v. *Marquis of Salisbury* (1889), 54 J.P. 215(*k*).

Where words not defamatory in their natural sense, and no evidence of their being defamatory, case should be withdrawn from the jury.

Major v. *McGregor* illustrates the same rule. That was an action for libel in which plaintiff claimed that the letters "S. B.," written on a post card and mailed to him by defendant, applied to him and meant that the plaintiff was the "son of a bitch." Britton, J., in his judgment dismissing the action(*l*), which was affirmed by the Divisional Court(*m*), said: "The question here is, can the plaintiff, relying upon the fact of publication, accept the post card, determine for himself what the letters mean, and, without evidence that any other person so understood them, have his case submitted to a jury? I do not think he can. . . . I

(*j*) Macdonald v. Mail Printing Co. (1900) 32 O.R. 163.

(*k*) *Ibid.*, 2 O.L.R. (1901) 278.

(*l*) Major v. McGregor, 5 O.L.R. (1902) 81.

(*m*) 6 O.L.R. (1903) 528.

do not think the letters on this postal card in their natural signification are actionable, and the plaintiff has failed to prove his innuendo. Even if the letters are reasonably capable of the meaning ascribed to them by the innuendo, and in that sense are actionable, I think it was necessary for the plaintiff to call evidence to shew that the words were in fact understood in that sense: Odgers, 3rd Ed. 596, 597"(*n*).

An innuendo necessary (1) for words prima facie innocent, but capable of defamatory meaning; and (2) for ambiguous or meaningless words.

On the other hand there are two classes of words in regard to which an innuendo is necessary. These are (1) words *primâ facie* innocent, but capable of a defamatory meaning; and (2) words ambiguous or of dubious import, or which are meaningless without explanation. In the case of the first mentioned class an innuendo is essential in order to disclose the latent injury which the words on their face do not bear. "A publication in the most innocent terms," said Wilson, C.J.(*o*), "may, with reference to certain circumstances and to persons knowing those circumstances, be shewn to convey a meaning very different from that which would be understood from the same words used under different circumstances. It is necessary the person or persons to whom the publication is made should understand the words complained of, if not libellous in themselves, are not to be understood in their natural meaning, but have a different, and that a libellous, meaning from their natural meaning." The words alleged in the declaration as imputing theft were: "Go and get a search warrant and you will get your pork there." The words proved were: "Go and get your warrant and you will get your pork." The count containing the words having been withdrawn from the jury on the ground that the words as laid were not proved, a majority of the court held that they were sufficiently proved, and that they were capable of the defamatory meaning alleged when taken in connection with the facts in evidence(*p*).

This explanation by facts and circumstances is open to both plaintiff and defendant, at different stages of the proceedings,

(*n*) Major v. McGregor, 5 O.L.R. (1902) 81. See, also, Frost v. London Joint Stock Bank, 22 T.L.R. 760.

(*o*) In Huber v. Crookall (1886) 10 O.R. 475, at p. 481.

(*p*) Harris v. Clayton (1891) 21 N.B.R. (5 P. & B.) 237.

for their respective purposes of attack and defence. It is open to the plaintiff in his pleadings, and subsequently at the trial, in order to shew that he has a cause of action founded on statements which appear to disclose no cause of action, or which are of doubtful import. It is open to a defendant in his pleadings, and afterwards at the trial, in order to shew that he has a defence to an action based on statements which seem to admit of no defence.

An innuendo in notice of complaint of newspaper libel.

There is one other proceeding in which it would seem to be necessary, or at least expedient, for the plaintiff to indicate the defamatory sense of statements which are *primâ facie* innocent. This is in the preliminary notice of complaint, which, under some of the Provincial Acts(*q*), is required to be served upon the defendant with respect to a libel contained in a newspaper. The primary object of such a notice is to inform the defendant of "the statements complained of" in the publication, and this the notice will not do if the statements specified, which are *primâ facie* harmless, are not shewn to be offensive. The injurious tendency of the publication can only be disclosed by an explanation, in the nature of an innuendo, defining the defamatory meaning put upon the statements by the complainant, shewing how they came to have that meaning, and shewing also how they relate to the complainant, whenever this is not clear upon their face.

Statements of dubious import, or meaningless without explanation.

The second class of statements in which an innuendo is necessary are those of ambiguous or doubtful import, or which are or may be meaningless without explanation. Where the words are ambiguous or doubtful in their meaning, the question is, in what sense the hearer or reader understood them. If the words have a doubtful meaning, the action will lie if the words were understood in an actionable sense; for the slander and damage consist in the apprehension of the hearers(*r*). But the alleged slander or libel may be in a foreign language. It may be

(*q*) See chapter on Notice of Complaint before Action.

(*r*) Fleetwood v. Curley (1619) Hob. 267; Cro. Jac. 557.

concealed in a foreign phrase or quotation in an English letter, or in an English newspaper, or it may be contained in a newspaper printed wholly in a foreign language. In such case a correct translation is indispensable, and, usually, an innuendo also. There are many foreign words that have various English meanings, and that are open, with perfect propriety and consistently with the sense of the foreign expression, to an interpretation that may or may not be defamatory. In any of these instances the notice of complaint, if it be for a newspaper libel, and in every case the innuendo, should leave no room for doubt as to the defamatory meaning ascribed to the language complained of. The plaintiff's pleadings should, of course, set out the foreign language with the translation added, and it should be proved at the trial that the translation is correct, and that the words bore the defamatory meaning imputed to them, *e.g.*, in the case of slander, that they were understood in that sense by those who heard them. Then again, some of the words or expressions used may be local, technical, provincial, or obsolete; they may be slang or cant terms; or they may be ordinary English words used in some figurative or peculiar sense, and not in their ordinary English signification. In all such cases the notice of complaint and the innuendo should explain the sense of the alleged injury, and thereby shew where the sting lies. At the trial evidence must be given to shew that the meaning thus assigned was the true meaning, and the one which was conveyed to the mind of the bystander or the reader at the time of publication. In *Barnett* v. *Allen*(*s*), Pollock, C.B., was of opinion that, where a witness is called to explain a slang term like "blackleg," the question should be, "What is the general meaning of the term among those who are in the habit of employing it?"(*t*). And, *per* Watson, B., "In what sense is the word commonly used and understood?" It should first be shewn that the word has acquired a peculiar sense, and then a witness may be asked whether he understood it in that sense(*u*). In the case in question both of these learned judges were of opinion that evidence as to the meaning of the word "blackleg" was not

(*s*) (1858) 27 L.J. Ex. 412.

(*t*) *Ibid.*, 3 H. & N. 379-380.

(*u*) *Ibid.*, 27 L.J. Ex. 415.

admissible. Martin and Bramwell, BB., were of opinion that the evidence was admissible(*v*).

Rule as to construction, after verdict, of words capable of double meaning.

Where words are capable of a double meaning, the court, after verdict, will always construe them in that sense which may support the verdict, and, under that rule, the judgment and findings of a judge are to be regarded the same as the verdict of a jury(*w*).

Words to be construed to support verdict.

"The court undeniably will, as a general rule, where words may be taken in a double sense, construe them, after verdict, in that sense which may support the verdict. This was urged upon us at the argument, but the authority cited by the plaintiff's counsel, Folkard, hereinbefore noticed page 571, also says, 'provided they are fairly susceptible of that meaning,' and he adds, 'If the court should afterwards be of opinion that the matter charged is not libellous, judgment will be arrested, whether on indictment, or a record in a civil suit' "(*x*)

In *Roberts* v. *Patillo*(*y*) Des Barres, J., in dealing with the defendant's objection that assuming the published matter to contain an imputation of some kind, it was not such as was set forth in the innuendo, said that "assuming it (*i.e.*, the innuendo) to be bad, that will not now affect the case, as it may, it seems, be rejected as surplusage. *Roberts* v. *Camden* (1897), 9 East, 93, is an authority in support of this position. The case of *Wakley* v. *Healy* (1848-9), 7 C.B. 591, is to the same effect. In that case an objection to a count in the declaration was made that the innuendo was bad. Parke, B., in delivering the opinion of the court, said: 'Supposing this objection to be well founded, the only consequence is, that the innuendo is to be rejected, and the question then is, whether the words themselves, without an

(*v*) *Ibid.*, 3 H. & N. 376.

(*w*) *Per* Meagher, J., in Gamble v. Hirschfield (1894) 26 N.S.R. 468. See, also, the remarks of Des Barres, J., in Roberts v. Patillo, *infra*.

(*x*) *Per* Smith, J., in Grant v. Simpson (1878) 12 N.S.R. (3 R. & G.) 141.

(*y*) (1855) 2 N.S.R. (James) 367.

innuendo, are actionable. After verdict it must be taken that the jury found that they have been published without lawful excuse, and are such as to be injurious to the plaintiff's character, as it has been the practice in modern time to leave the latter point to them. And if in their ordinary acceptation, and without the aid of extrinsic circumstances, the words may be reasonably understood as derogatory to the plaintiff's character, the judgment cannot be arrested.'" So, too, where a paragraph in a newspaper stated, that "It is reported that one S. (plaintiff), a recent arrival in L., who has failed to foist some hotel scheme on the city," etc., the Divisional Court held, that the words were capable of the defamatory meaning which the jury must have thought they actually bore, namely, that they imputed to plaintiff dishonourable or discreditable conduct; that he had thrust or forced, in a surreptitious way, or without warrant, or impertinently, dishonestly, or untruthfully, the hotel scheme upon the citizens of L.(*z*).

Innuendo must aver an actionable meaning.

The innuendo must also be specific; it must distinctly aver a meaning which shews that the words which it explains are capable of supporting the action. When the words are *primâ facie* innocent, but capable of a defamatory meaning, an innuendo that they were intended to create an unfavourable impression of the plaintiff would be insufficient(*a*). It should allege distinctly what was meant by the words, and should shew that, with such a meaning, the words are actionable. "Unless the words proved are in themselves defamatory, the plaintiff cannot recover damages in respect to their publication, without an innuendo which must be specific and distinctly aver a definite, actionable meaning"(*b*).

May not be changed.

Moreover, when an innuendo is given, the plaintiff is not allowed to change it in the course of the trial if he finds it untenable. He may reject it altogether, and fall back on the obvious meaning of the words, if these be actionable, but otherwise he

(*z*) Stone v. Jaffray (1905) 5 O.W.R. 725.

(*a*) Harrison v. Bevington (1838) 8 C. & P. 708.

(*b*) *Per* Ritchie, J., in Tobin v. Gannon (1901) 34 N.S.R. 9.

must take his stand on the innuendo as originally framed. He is not permitted to frame a new one(*c*). And where a verdict is claimed and rendered in plaintiff's favour upon a different construction of the words, a new trial may be granted on the ground of surprise(*d*).

Cannot introduce new matter, or enlarge the natural meaning of words.

An important rule relating to the innuendo is that, being used merely for the purpose of explanation, it cannot enlarge the natural meaning of, or add new facts or matter to, the words complained of. "Were it otherwise, there would be no sufficient and distinct averment of the existence of those facts which, in point of law, are essential to render the words actionable"(*e*). This was also the rule under the old style of pleading. It was then held that, although the innuendo might apply to precedent matter in the declaration, so as to attach a particular meaning to the words, it could not, without such precedent matter, add to, enlarge, or change, the natural sense and meaning of the words(*f*). The same rule is referred to by Robinson, C.J., in another case, in which it was objected that the counts in a declaration were clearly insufficient for want of any prefatory averment of facts previously known to the hearers, or reported or suspected by them, which might have led them to give such a sense to the words as the declaration ascribed to them, or of any statement of a colloquium respecting the odious crime referred to; and that without such statement of a colloquium, or of any prefatory matter, the innuendo was inadmissible, being an unwarrantable extension of the meaning for which no ground was shewn(*g*). And in the same case Draper, J., said, that the result of all the cases is, that an innuendo is bad

(*c*) Williams v. Scott, 1 Cr. & M. 675; Harvey v. French, 1 Cr. & M. 11; Simmons v. Mitchell (1880) 6 App. Cas. 156; Strachan v. Barton (1874) 34 U.C.Q.B. 374; Macdonald v. Mail Printing Co., 2 O.L.R. (1901) 278.

(*d*) Hunter v. Sharpe (1866) 4 F. & F. 983; 15 L.T. 421; Ruel v. Tatnell, 43 L.T. 507; 29 W.R. 172. See, also, Walkem v. Higgins (1889) 17 S.C.R. 225.

(*e*) Folkard's S. & L., 6th Ed., p. 403.

(*f*) Green v. Campbell (1856) 6 U.C.C.P. 50.

(*g*) Johnson v. Hedge (1849) 6 U.C.Q.B. 337, at p. 341.

and renders the declaration defective, if it introduce new matter, or alter or enlarge the sense of the words set out, without a special inducement and a colloquium concerning it to support such innuendo(*h*).

The rule as exemplified in Walkem v. Higgins (1889).

The same rule is also referred to in a much later case in which a judge of the Supreme Court of British Columbia sued the editor of the *British Colonist*, published at Victoria, B.C., for the publication of an article in which, as alleged in the first innuendo in the declaration, it was charged that the plaintiff had corruptly entered into a partnership with one McN., while holding offices of public trust, and had thereby unlawfully acquired large sums of money. The other innuendoes were (2) that he did so under cloak of his public position, and by fraudulently pretending that he acted in the interests of the government; (3) that he committed criminal offences punishable by law; and (4) that he continued to hold his interest in the contract after his elevation to the bench. In his charge to the jury the trial judge did not refer to the innuendoes set out in the declaration, although they were objected to at the close of the plaintiff's case; he simply directed the jury to find whether the publication was or was not a libel, and, if it was, whether it was true or untrue. The jury's verdict was: "We find that it is a libel, damages $2,500." The Supreme Court of British Columbia refused to set aside the verdict(*i*); but, upon appeal to the Supreme Court of Canada, it was held, that the article was susceptible of the first of the above innuendoes, but not of the others, which should have been, but were not, distinctly withdrawn from the consideration of the jury at the trial.

Opinion of Ritchie, C.J.

"It is clear," said Ritchie, C.J., who thought there had been a mistrial, "that an innuendo may not introduce new matter, or enlarge the natural meaning of the words. The innuendo in this case violates both of these principles, and the declaration is therefore objectionable. . . . The jury should have been told that they must disregard the innuendo, which should have been

(*h*) Johnson v. Hedge (1849) 6 U.C.Q.B. 337.

(*i*) Walkem v. Higgins, unreported in B. C. Reports.

specially withdrawn from their consideration, and more particularly so after it had been adjudged that the words might bear the meaning attributed to them in the objectionable innuendo." He also said that, if the matter contained in the innuendo had been distinctly withdrawn from the consideration of the jury, he should have had great difficulty in disturbing the verdict for $2,500 damages, which he thought "unnecessarily severe"(*j*).

Where the court approves of jury's finding that the words are libellous, it is unnecessary to pass upon the innuendo.

Where the whole question of libel or no libel has been fairly left to the jury, and they, in the opinion of the court, have properly found in the plaintiff's favour, it is unnecessary, upon a motion against the verdict, for the court to determine whether the innuendo setting forth a criminal charge was rightly ascribed or proved. The plaintiff, who was employed by a manufacturing company of which the defendant was president, brought an action for the seduction of his daughter against the superintendent of the company. Particulars of the alleged seduction having appeared in the public newspapers, a meeting of some of the members and servants of the company was held, at which the defendant presided, and a resolution was passed expressing confidence in the innocence of the superintendent. A letter was then, or immediately afterwards, drawn up and signed by a number of those present, including the defendant. This was handed to a reporter for publication, and was published in several newspapers, without any objection on the defendant's part. The letter was addressed to the superintendent, referred to the charges against him which had appeared in the newspapers, declared the belief of the signers in his innocence, and concluded: "We believe you are the victim of a conspiracy as base and ungrateful as was ever sprung on an innocent man," etc. In an action for libel based upon the publication of this letter, the innuendo was, that the plaintiff was guilty of the offence of conspiring and agreeing with his daughter to defame and slander, or otherwise injure, the reputation and character of the superintendent. The whole question of libel or no libel was left to the jury, who found for the plaintiff and $1,500 damages. Upon a motion for a new trial on the ground, *inter alia*, that the

(*j*) Walkem v. Higgins (1889) 17 S.C.R. 225.

letter in question was not a libel, or, at all events, not a libel on the plaintiff with the meaning alleged, the Divisional Court held, that it was not necessary to decide whether the letter could be construed as supporting the innuendo of a criminal conspiracy; the question really was, whether the defendant had libelled the plaintiff, and this question had been determined by the jury(*k*).

Where the meaning ascribed to specific charge is not considered by the jury.

The failure of the jury to consider the meaning ascribed to a specific charge may be ground for a new trial. In an action for a libel contained in a newspaper article respecting certain legislation, the innuendo alleged by the plaintiff, the Attorney-General of the Province where such legislation was enacted, was that the article charged him with personal dishonesty. The defendants pleaded "not guilty," and that the article was a fair comment on a public matter. Certain questions were put to the jury requiring them to find whether or not the words bore the construction claimed by the innuendo, or were fair comment on the subject matter of the article. The jury found generally for the defendants, and in answer to the trial judge, who asked if they found that the publication bore the meaning ascribed to it by the plaintiff, the foreman said: "We did not consider that at all." Upon a motion against the verdict, it was held by the court (Dubuc, J., *diss.*), that as from the answers given by the foreman, it was clear that the jury did not consider whether or not the words complained of had the meaning ascribed to them in the innuendo, there should be a new trial(*l*). An appeal from this judgment to the Supreme Court of Canada was dismissed. The court held that the general finding for the defendants was not sufficient, in view of the fact that the jury stated that they had not considered the material question, namely, the charge of personal dishonesty, and that for this among other reasons a new trial was properly granted(*ll*).

Evidence of rumours in proof of the innuendo.

Where the words are not actionable *per se*, evidence of rumours in the neighbourhood, which were unknown to the

(*k*) Taylor v. Massey (1891) 20 O.R. 429.
(*l*) Martin v. Manitoba Free Press Co. (1892) 21 S.C.R. 518.
(*ll*) *Ibid.*

defendant, is inadmissible in proof of the innuendo that the plaintiff had committed a crime. In an action for slander the innuendo as to words used in reference to the plaintiff was, that plaintiff had committed the crime of sodomy. The only evidence as to the sense in which the words were understood, was that of rumours in the neighbourhood that the plaintiff had committed such crime, but it was not shewn that these rumours were known to defendant. It was held, that the evidence had been improperly admitted, and that the verdict for the plaintiff must be set aside(*m*).

Evidence of witness's understanding of the words.

Where the meaning of words is unambiguous, evidence of what a witness understood by the words is inadmissible; but, if admitted, it is not a ground for setting aside a verdict for the plaintiff where the evidence is in accordance with the meaning ascribed to the words in the declaration. It is a question for the jury whether the words bore that meaning, and if they have found in the affirmative, the verdict should stand(*n*). Words which, without knowledge on the part of those who heard them of the matter to which they refer, can convey no defamatory meaning, are not actionable, but evidence is admissible to shew such knowledge. If actionable independently of such knowledge, such evidence is superfluous and harmless. Upon a motion to set aside a verdict for plaintiff in an action for slander imputing to him an unnatural offence, it appeared the words were not actionable *per se*, because without knowledge, on the part of those who heard them, of the matter to which they referred, they could convey no defamatory meaning to such persons. It was held, that evidence was properly received to shew that these persons must have understood that the defendant imputed such an offence; and that if the words were actionable, independently of the knowledge previously acquired by those persons of the matter to which they referred, such evidence was obviously superfluous and harmless. *The Capital and Counties Bank* v. *Henty et al.* (1882), 5 C.P.D. 519, 539; 7 App.

(*m*) Grant v. Simpson (1878) 12 N.S.R. (3 R. & G.) 141.

(*n*) Currie v. Stairs (1885) 25 N.B.R. 4.

Cas. 741, 771, 788; and *Ruel* v. *Tatnell*, 29 W.R. 172, were referred to(*o*).

The effect of evidence disclosing an actionable meaning different from that assigned.

Where the innuendo is not sustained by the evidence, which, however, discloses an actionable meaning in the words complained of, the variance is fatal, but there should be a new trial. The treasurer of a certain district complained of words imputing to him "the crime of perjury in a certain return which he made to the Inspector General of moneys collected in 1839, 1840, and 1841, for the erection of a lunatic asylum"; meaning that plaintiff, in performing the duties of his office as treasurer, had made a false return under oath, to the Government, of the amount of the assessments received by him. At the trial witnesses stated that they understood the words to mean that the plaintiff had sworn that he had paid over moneys which he had not paid over. After a verdict for the plaintiff, a new trial was directed on the ground that the innuendo in the declaration was negatived by the evidence. "Where an innuendo," said Robinson, C.J., "is used merely for the purpose of explaining what can only have one meaning obvious in itself without such explanation, there the innuendo is unnecessary and immaterial, and no proof need be given in support of it. So, also, if it tends merely to introduce new matter, not necessary to sustain the action, it need not be proved, but may be rejected as surplusage. *Roberts* v. *Camden*(*p*) is a case of this latter kind. But when the innuendo gives a specific character to the slander, it becomes part of the issue: *Williams* v. *Stott*(*q*); *Smyth* v. *Carey*(*r*). The defendant here, when he denies that he is guilty of the slander charged in these counts, denies that he spoke words imputing to the plaintiff the giving false accounts, under oath, of the money he has received; and it was not proved on the trial that he did impute that to the plaintiff; but that, while he did not question the correctness of his accounts so far as they stated the moneys received by him, he did charge the plaintiff with stating in his account that he had

(*o*) Gates v. Lohnes *et al.* (1898) 31 N.S.R. 221.
(*p*) (1807) 9 East, 93.
(*q*) 1 C. & M. 687.
(*r*) 3 Camp. 461.

made a payment or payments which in fact he had not made. The variance of the evidence in this respect from the cause of action, as laid, was fatal, and we are of opinion that there must be a new trial, without costs''(*s*).

Where the words proved different from those alleged, and no evidence as to the innuendoes.

Where the words proved are different from those charged, and there is no evidence of the innuendoes alleged, and of how the words used were understood, the court, in the absence of any amendment by the plaintiff, cannot frame an innuendo to conform to the evidence for the plaintiff; but they may, as was done in this case, suggest an innuendo which justifies the evidence for the defence. In an action by a solicitor claiming damages for slandering him professionally, the words proved were different from those set out in the statement of claim, and the innuendoes alleged were inapplicable to the words, and no evidence was given of the innuendoes alleged or of the meaning of the words proved. Leave was given to the plaintiff at the trial to amend, but no amendment was made. It was held, setting aside the verdict for plaintiff, that where the words are not actionable *per se*, the innuendoes must allege an actionable meaning; that here none of the innuendoes alleged were proved; and that, in the absence of evidence to shew how the words proved to have been used were understood, the court could not frame an innuendo to conform to the evidence, although they suggested an innuendo which was justified by the evidence for the defence(*t*).

Insufficient proofs of innuendoes.

Where the words imputed perjury, the inducement of some of the counts stated that the words were spoken of and concerning the plaintiff, and of and concerning a certain affidavit, etc. The defendant justified, setting out the affidavit, and alleging certain statements therein contained to be wilfully false. The affidavit referred to two papers which were annexed, but there was no positive proof that they were annexed when the affidavit was sworn to by the plaintiff. It was held, that there was sufficient *primâ facie* evidence to let in the whole affidavit; but that the

(*s*) Johnston v. Macdonald (1846) 2 U.C.Q.B. 209.

(*t*) Tobin v. Gannon (1901) 34 N.S.R. 9.

admission of part of the affidavit to be read, without the papers annexed, was improper, and that the innuendoes were not sufficiently proved(*u*).

Words spoken hypothetically.

A new trial has also been granted on the ground that it was doubtful whether the words, "You are a perjured man," were used in the unqualified sense alleged, or were spoken hypothetically, in which case they would have a different meaning, and convey a different impression(*v*).

Imputation of incontinence instead of criminal conduct.

In an action by an unmarried woman the first count of the declaration alleged that a coroner's inquest had been held on the body of an infant found on the defendant's premises, whose death the jury found was caused by desertion and exposure by persons to them unknown; and that defendant, speaking of the plaintiff, said to a constable attending the inquest: "Why did you not bring Miss B. (the plaintiff) down with you? She has had time to change her appearance. I could see the child looked like the mother, Miss B., because she has red hair and so had the child"; meaning that the plaintiff was the mother of the child, and had deserted it and exposed it, or caused and procured it to be exposed, on or near the defendant's premises, in consequence of which the child died. In a second count the defendant was charged with saying that the child was the very image of its mother, and with naming the plaintiff as its mother, in answer to a question as to who was the mother; the innuendo being the same as in the first count. Upon an appeal from a verdict for the plaintiff the court held, that as there was nothing to shew that the defendant was speaking of or alluding to the cause of the child's death, the innuendoes were not supported by the evidence; and as the evidence was not sufficient to establish that defendant meant to accuse plaintiff of causing the death of the child, there should be a new trial without costs. In the judgment of Draper, C.J., it is pointed out that the declaration was defectively framed, and that all that was stated might result

(*u*) Milner v. Gilbert (1847) 5 N.B.R. (3 Kerr) 617.

(*v*) Swan v. Clelland (1856) 13 U.C.Q.B. 335.

from an accusation of incontinence, which would not be actionable without averment and proof of special damage(*w*).

"Absconded" as applied to the words "left creditors in the lurch."

To publish of a person in a newspaper, that he left a certain place "with his creditors in the lurch," is libellous, and justifies the innuendo that the plaintiff had absconded from the place named to avoid the payment of his debts, although the word "absconded" is probably stronger than the words warrant(*x*).

Plea to words without the innuendo.

There may be a good plea to the words without the innuendo. It was so decided in an action for a libel in a newspaper describing plaintiff as an ex-penitentiary bird from the state prison at Auburn, in the state of New York (meaning that the plaintiff had served a term in the penitentiary as a convict) to which, it was alleged, he was sent on a conviction for obtaining money by false pretences. Defendant pleaded, as to the words without the meaning alleged, that the plaintiff, before the publication of the libel, had been duly convicted of the offence mentioned, and imprisoned at Auburn under sentence therefor. The plaintiff replied that the alleged conviction was obtained without legal evidence, and afterwards, on appeal to the proper court, was reversed and annulled, as the defendant well knew before publishing the libel. It was held on demurrer, that the replication was a good answer to the plea; and, also, that the plea was good, although pleaded to the words without the innuendo(*y*). When the words complained of are in relation to an office and are otherwise actionable *per se*, averment and proof of the office are immaterial, especially when the innuendoes shew a claim for damages out of office for imputations of misconduct in office(*z*).

How the jury should be directed as to the innuendo.

The judge should direct the jury as to whether the words are capable of the meaning assigned, this being part of his judicial

(*w*) Black v. Alcock (1861) 12 U.C.C.P. 19.

(*x*) *Per* Draper, C.J., in Brown v. Beatty (1862) 12 U.C.C.P. 107, at p. 113.

(*y*) Davis v. Stewart (1869) 29 U.C.Q.B. 441.

(*z*) Crosskill v. Morning Herald Printing and Publishing Co. (1883) 16 N.S.R. (4 R. & G.) 200.

duty, and then should leave it to them to say whether the meaning has been truly assigned, and, where this is not done, it may be ground for granting a new trial. The plaintiff claimed that he being *Custos Rotulorum* for the county and also a candidate for election in said county, as a member to serve in the House of Commons of Canada, the defendant published of him, by handbills and in the Halifax *Morning Herald* newspaper, a series of charges in connection with a loan for the purchase of the right of way of a certain railway, and the payments therefor. The alleged libellous matter was set out in a number of counts with an innuendo, which was in effect the same in each, that the defendant meant thereby that the plaintiff was a swindler, and had defrauded and obtained money from certain claimants under false pretences for his own use and benefit, whereby the electors were induced not to vote for plaintiff. The verdict for the defendant was set aside, and a new trial directed, for the non-direction of the trial judge in not telling the jury whether the words used were capable of the construction put upon them by the plaintiff, and in not leaving it to the jury whether the words were in fact used with such meaning. Reference was made by McDonald, J., to *Blagg* v. *Sturt* (1846), 10 Q.B. 899, 906; *Broome* v. *Gosden*, 1 C.B. 728; and *Hemmings* v. *Gasson*, E. B. & E. 346(*a*).

The relative functions of judge and jury as to the innuendo.

In *Blagg* v. *Sturt*, thus referred to, the relative functions of the judge and jury, in determining the meaning ascribed to a libel by the innuendo, are clearly defined. In that case in the Exchequer Chamber, on error from the Queen's Bench, Wilde, C.J., said (p. 908): 'Undoubtedly it is the duty of the judge to say whether a publication is capable of the meaning ascribed to it by an innuendo; but when the judge is satisfied of that, it must be left to the jury to say whether the publication has the meaning so ascribed to it.' All the other judges of the Exchequer Chamber concurred in this judgment''(*b*). The rule so laid down is now universally accepted and acted upon. It is for the court to say whether the innuendo is capable of bearing the meaning

(*a*) Ray v. Corbett (1883) 16 N.S.R. (4 R. & G.) 407.

(*b*) *Per* Young, C.J., in Bowers v. Hutchinson (1865) 5 N.S.R. (1 Oldright) 679, at p. 682.

assigned by it, and for the jury to say whether that meaning was intended and proved, citing *Blagg* v. *Sturt* (*supra*)(*c*). "It is always a question for the judge, or for the court, upon reading the innuendo, and after having heard the evidence upon it, to say whether the words are reasonably capable of bearing the meaning attributed to them"—citing *Hunt* v. *Goodlake*(*d*); *Goldstein* v. *Foss*(*e*); *Hearne* v. *Stowell*(*f*); *Capel* v. *Jones*(*g*); *Hunt* v. *Goodlake*(*h*); *Cox* v. *Cooper*(*i*); *Capital and Counties Bank* v. *Henty* (*j*)(*jj*). "It is settled law that it is for the judge to say whether the publication is capable of the meaning ascribed to it by the innuendo, and, if he is satisfied of that, it is then for the jury to say whether the publication has that meaning"(*k*). The meaning of the words is a question for the jury(*l*). But where the words are not capable of the meaning ascribed to them, there should be a nonsuit(*m*). It has been said of libel, and the remark is in the main true of slander also, that "the words must be susceptible of a libellous meaning in this sense, that a reasonable man could construe them unfavourably in such a sense as to make some imputation upon the person complaining"(*n*).

(*c*) *Per* Wilson, J., in Anonymous (1869) 29 U.C.Q.B., at p. 462.

(*d*) 42 L.J.C.P. 54.

(*e*) 6 B. & C. 154; S.C. 4 Bing, 489, in Ex. Ch.

(*f*) 12 A. & E. 719.

(*g*) 4 C.B. 259.

(*h*) 29 L.T.N.S. 472.

(*i*) (1863) 12 W.R. 75.

(*j*) (1882) 7 App. Cas. 741.

(*jj*) *Per* Wilson, C.J., in Huber v. Crookall (1886) 10 O.R. 475, at pp. 481-82.

(*k*) *Ibid.*, at p. 481.

(*l*) Ferguson v. Inman (1870) 8 N.S.R. 135; Archibald v. Cummings (1893) 25 N.S.R. 555.

(*m*) Hay v. Bingham, 11 O.L.R. (1905) 148.

(*n*) *Per* Lord Halsbury, L.C., in Nevill v. Fine Art and General Ins. Co. (1897) A.C. 68, at p. 76 (H.L.).

CHAPTER XXIV.

The Defendant's Pleadings.

The plea of not guilty.

The most radical change effected by the mode of pleading introduced by the rules of the Judicature Acts is the abolition of the comprehensive plea of not guilty, or the "general issue," as it is usually called. The plea of not guilty without statutory authority to plead it, is not admissible(*a*). This plea is, of course, still employed wherever the former procedure prevails, but the defences available under it are equally available, only in a distinct and separate form, under the later rules.

Plaintiff's proofs thereunder.

The ordinary plea of not guilty, as distinguished from a plea of "not guilty by statute," denies, and requires the plaintiff to prove, everything essential to his case. Publication, oral or written, even when contrived by the plaintiff for the purpose of a suit(*b*); malice, where the words are for any reason privileged; the defamatory sense of the words imputed by the plaintiff(*c*), or any other defamatory sense of which the words are capable, if the meaning alleged be rejected; and the special damages, if any such are claimed (not the general damages, which are presumed)—all these things are in issue, and must be proved by the plaintiff, as against a plea of not guilty.

Defendant's rights under not guilty.

The defendant, under such a plea, may not only disprove any or all of these matters, but may also establish the defences of privilege as to the person, place, or occasion, accord and satisfaction, or a release of the entire cause of action(*d*); but not an apology or payment of money into court. These must form

(*a*) Peterborough v. Midland Ry. Co. (1887) 12 O.P.R. 127.

(*b*) King v. Waring *et ux.*, 5 Esp. 13; Smith v. Wood, 3 Camp. 323; Weatherstone v. Hawkins, 1 T.R. 110.

(*c*) Forbes v. McClelland (1868) 4 O.P.R. 272.

(*d*) Lane v. Appelgate, 1 Stark. 97; Boosey v. Wood, 34 L.J. Ex. 65; 3 H. & C. 484.

the subjects of special pleas. In fact, a plea of not guilty cannot be pleaded with a plea of apology and payment into court.

The plea of not guilty not pleadable with plea of apology and payment into court.

And where in an action for libel prior to the Judicature Acts, the defendants pleaded not guilty, and a further plea, under the provisions of R.S.O. 1877, c. 56, s. 4(*e*), that they had inserted in a newspaper, in which the alleged libel appeared, a full apology therefor, and had paid into court one dollar by way of amends for the injury sustained by the plaintiff, the plea of not guilty was ordered to be struck out as being inconsistent with the plea of payment into court, *O'Brien* v. *Clement*(*f*), and *Thomas* v. *Jackson*(*g*), being referred to(*h*).

Justification and privilege.

So, also, a plea of justification alleging the truth of the defamatory words must be pleaded specially(*i*), and also a plea of the statute of limitations(*j*). There must also be a special plea of privilege, although the same defence may be raised under not guilty(*k*). Under the practice prior to the Judicature Acts, it was unnecessary to plead privilege specially; but, since that Act, privilege must be specially pleaded, and facts and circumstances must also be stated shewing why and how the occasion is privileged: Rule 298, O.J.A.; Odgers Law of S. & L., 3rd Ed., p. 563(*l*). For an example of statements assuming to set out in a plea of privilege, in a libel action, the circumstances constituting the privileged occasion, but which were held to have

(*e*) Now R.S.O. 1897, c. 68, ss. 6 and 7.

(*f*) (1846) 15 M. & W. 435.

(*g*) 8 Dowl. 591.

(*h*) Doyle v. Owen Sound Printing Co. (1879) 8 O.P.R. 69. But see Hawkesley v. Bradshaw, 5 Q. B. D. 22, 302.

(*i*) Belt v. Lawes (1882) 51 L.J.Q.B.D. 359.

(*j*) Hawkings v. Billhead (1636) Cro. Car. 404.

(*k*) Hoare v. Silverlock (1848) 9 C.B. 26; Lillie v. Price, 5 A. & E. 645.

(*l*) *Per* MacMahon, J., in Caldwell v. Buchanan (1903) 2 O.W.R., at p. 840.

been properly struck out as scandalous and irrelevant, and tending to embarrass the trial of the action, see *Caldwell* v. *Buchanan* (*supra*). As to a plea of alleged privileged occasion which the court held to be in mitigation of damages, see *Hopewell* v. *Kennedy*(*m*). See same case as to sufficiency of counterclaim, in action for libel, under Rule 268, O.J.A. Stated generally, the old system of pleading requires the parties to set forth the legal result of the facts, and not, as under the new system, the facts themselves. The rules of the Judicature Acts require the facts to be stated, and the court decides what is the result of the facts(*n*).

Defendant's pleadings under Rules of Judicature Acts.

As already noticed, the pleadings, under these rules, must contain a concise statement of the material facts upon which the party relies, but not the evidence by which they are to be proved(*o*). In an action of libel, for example, the defendant must set out all the facts upon which he relies as shewing justification or privilege(*p*); while in slander the plaintiff must allege the time and place, and the persons to whom, or in whose presence, the words were spoken, and not merely that the words were spoken falsely and maliciously(*q*). There is also a rule in Ontario, that each party in any pleading shall raise all matters which shew the action or counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, statute of limitations, release, etc.(*r*).

Admissions.

So, too, there are rules as to each party admitting such of the material allegations of the opposite party as are true; as to

(*m*) (1904) 4 O.W.R. 433.

(*n*) Hanmer v. Flight, 35 L.T.N.S. 127.

(*o*) R. 268, O.J.A.

(*p*) Belt v. Lawes (1882) 51 L.J.Q.B.D. 359.

(*q*) Thornton v. Capstock (1883) 9 O.P.R. 535.

(*r*) R. 271, O.J.A.

qualifying the admissions so as to protect the party's interests; and as to the silence of a pleading, with respect to any allegation, not being taken as an implied admission of its truth(*s*). But these rules as to admissions are practically permissive, and, in personal actions like slander and libel, are seldom acted upon. It is more usual to traverse, both generally and specifically, the several allegations of the statement of claim.

Not guilty by statute.

Nothing, however, contained in any of these rules, affects the right of a defendant to plead not guilty by statute, which as a defence has the same effect as heretofore(*t*). This plea puts in issue not only the defence which the statute gives, but also all the defences which were admissible under the general issue at common law(*u*).

Questions of law, how to be determined.

Questions of law may also be raised in the pleadings, but the mode of doing so is not uniform in the Provincial courts. Although still in use under the former system of pleading, demurrers, which were discouraged under these later rules as originally framed, are now, in some of the Provinces, abolished. In Ontario, for example, under the rules as amended, a party shall not be at liberty to demur, but shall be entitled to raise by his pleadings any point of law, and the point so raised shall be disposed of by the judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of a judge of the High Court on the application of either party, the same may be set down for hearing and disposed of at any time before the trial(*v*). If, in the opinion of the court, the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, counterclaim, or reply therein, the court may dismiss the action, or make such other order as may seem just(*w*).

(*s*) See Rules 269, 270, 272, O.J.A.

(*t*) R. 286, O.J.A.

(*u*) Ross v. Clifton, 11 A. & E. 631.

(*v*) R. 259, O.J.A.

(*w*) R. 260, O.J.A.

Striking out pleadings.

These two rules are in line with the English practice. So, too, a judge of the High Court may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shewn by the pleadings to be frivolous or vexatious, may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just(*x*).

Defendant's mode of pleading.

In his statement of defence the defendant may traverse generally the allegations of the statement of claim, and he may also traverse specifically the separate allegations of fact in the several paragraphs. He may first deny all the allegations in the plaintiff's pleadings; and he may then proceed to deny seriatim, that he spoke the words, or, in the case of libel, that he wrote and published the statements, complained of; that the words or statements referred to the plaintiff; that the words were spoken, or the statements published, with the meaning alleged, or with any other defamatory meaning; that the words were spoken, or the statements published, with reference to the plaintiff's business or employment; and that any damage was sustained by the plaintiff by reason of the speaking of the words, or the publication of the statements. The effect of these traverses is to put plaintiff to strict proof of all his allegations. The defendant may also set up a variety of defences under the following pleas, namely: (1) justification; (2) privilege, absolute or qualified; (3) fair comment; (4) payment into court; (5) apology; (6) in the case of a libel contained in a newspaper, apology and payment into court, and some other special defences; (7) statute of limitations; (8) accord and satisfaction; (9) release; (10) *res judicata*; (11) death of plaintiff before verdict; and, (12) in some cases, a counterclaim for damages for slander or libel published by the plaintiff against the defendant arising out of the same matter, or which, although not arising out of the same matter, may be conveniently tried in the same action. Some of these pleas or defences, and those available only by newspaper publishers, are conveniently dealt with in separate chapters.

(*x*) R. 261, O.J.A.

Proper mode of pleading matters relating to the same thing.

The matters of defence should be so pleaded that where they relate to the same thing, *e.g.*, privilege, fair comment, or matters in mitigation of damages, they may be found under those particular heads and may be intelligible in their scope and meaning. The plaintiff, who was Minister of Agriculture for the Province of Ontario, and a member of the Legislative Assembly, complained that the defendant, at a public meeting in plaintiff's constituency, spoke and published of him, in relation to those offices, words imputing that the plaintiff had sold the office of registrar of the county to the highest bidder; meaning that he had been guilty of corruption and malversation in his said offices.

Opinion of Moss, J.A.

It was objected that the defences to the action were so intermingled as to confuse the issues and embarrass the plaintiff at the trial, and upon an appeal from an official referee, who refused to strike out the defences, Moss, J.A., who heard the appeal, was of opinion that the plaintiff should not be driven to spell out the defences set up in an action. He is entitled to have them set forth in such a manner as will enable him, upon reading them, to form a fairly correct judgment as to their scope and meaning, and as to what is intended to be relied upon under them. And while the defendant, in an action of defamation, ought not to be shut out from setting up any matter which he may properly plead either in bar, or by way of mitigation of damages, he should so arrange the paragraphs of his statement of defence as to group the separate defences of privilege and fair comment, and the matters alleged in mitigation, under their appropriate heads. The learned judge made an order directing the defendant to amend by re-arranging the paragraphs or defences so as to group the different defences as stated, and by making such other amendments as might be necessary for that purpose(*y*).

(*y*) Dryden v. Smith (1897) 17 O.P.R. 505.

Plea of privilege by P.O. inspector.

A plea to a declaration of slander charging defendant with having falsely and maliciously published of plaintiff, a post office clerk, to the assistant postmaster in the same office, that he had feloniously abstracted and stolen letters out of the said office, alleged that the words were used by the defendant in the course of his duty and of an enquiry as chief post office inspector, etc. On demurrer it was held by the Supreme Court of New Brunswick (Weldon, J., *diss.*), that, if the plea had disclosed the defendant's authority to make the alleged enquiry, the case would come within the principle of the decision in *Dawkins* v. *Lord Rokeby*(*z*), and the words spoken would be absolutely privileged; but that the mere appointment of defendant as inspector would not of itself under 31 Vict. c. 10(*a*), give him such authority, and, therefore, that the plea was bad (*b*).

Opinion of Gwynne, J.

This decision was expressly dissented from by Gwynne, J., in his judgment on the defendant's appeal to the Supreme Court of Canada, which set aside the verdict for the plaintiff, on the ground that the words complained of were privileged, and that there was no evidence of actual malice(*c*). The court below relied for its judgment on *Brown* v. *Mallet*(*d*), which as stated by Allen, C.J., had decided that when duty is the legal result to be deduced from certain facts, the mere averment of duty, without the facts necessary to support it, is not sufficient—*Priestley* v. *Fowler*(*e*) being cited in support of the same proposition. "In applying that case (*i.e.*, *Brown* v. *Mallet*)," said Gwynne, J., "as the governing case upon the demurrer, the court, as it seems to me, misconceived the gist and substance of the plea, which does not profess to set up any duty as resulting in law from previously alleged facts, but which alleges as a matter of fact that the defendant was acting as an officer of the post office department (whether the name given to his office of "chief

(*z*) (1875) L.R. 7 H.L. 744.

(*a*) The Post Office Act, 1867.

(*b*) Waterbury v. Dewe (1876) 3 N.B.R. (Pugsley) 670.

(*c*) Waterbury v. Dewe (1881) 6 S.C.R. 143.

(*d*) 5 C.B. 599.

(*e*) 3 M. & W. 1.

inspector" was or not the proper name to be attached to it was wholly immaterial), and that, upon the occasion of speaking the words complained of, he was, as a matter of fact, acting and used the words in the *bonâ fide* discharge of what was, or what he believed to be, his duty—all this was matter of fact averred, not matter of law to be adjudicated upon as such by the court"(*f*).

Pleas objected to as embarrassing held to be pleas of privilege and in mitigation of damages.

In an action for words accusing the plaintiff of stealing the defendant's newspaper, the defendant pleaded that, if he "spoke the words complained of, which he does not admit, but denies, he says they were so spoken in good faith and without any malice whatever towards the plaintiff, under the following circumstances: (setting out the circumstances which led the defendant to believe that the plaintiff had stolen his newspaper, and to ask an explanation from him.)" Upon a motion to strike out the paragraph commencing with the words, "under the following circumstances," as being embarrassing and scandalous, the Master in Chambers held, distinguishing the cases *infra*(*g*), that this was substantially a plea of privilege; that words claiming privilege might be added; and, following *Beaton* v. *Intelligencer Printing and Publishing Co.*(*h*), that a subsequent paragraph of the defence setting up the same facts in mitigation of damages, and to which the same objections were taken, was properly pleaded(*i*).

Privilege, if relied upon, must be specially pleaded.

The decision in *Blagden* v. *Bennett*(*j*), that the omission to plead privilege as a defence does not preclude a defendant from setting it up at the trial, was questioned in *Wells* v. *Lindop*(*k*), where Boyd, C., said that, if *Blagden* v. *Bennett* is to be taken

(*f*) Waterbury v. Dewe (1881) 6 S.C.R., at p. 162.

(*g*) Switzer v. Laidman (1889) 18 O.R. 420, and the cases referred to therein, which were cited in support of the application.

(*h*) (1895) 22 O.A.R. 97.

(*i*) Vansycle v. Parish, 1 O.L.R. (1901) 13.

(*j*) (1885) 9 O.R. 593.

(*k*) (1887) 13 O.R., at pp. 440-41-42.

as laying down as a general proposition that the omission to plead privilege does not preclude a defendant from setting it up at the trial, without amending the record, he was not prepared to adopt that view of the law. "The whole conduct of the case and the burden of proof must be changed by the introduction of the element of the occasion being a privileged one, and it rests upon the defendant to state this as his defence if he wished to rely on it, even in cross-examination of the plaintiff's witnesses. . . . The English cases, since the Judicature Act, shew that privilege must be specially pleaded. It is said in Odgers' Law of Libel and Slander, p. 484, that such was the decision in the Exchequer Division in a case not reported, *Spackman* v. *Gibney*, and there is a similar decision in Ireland, *Simmonds* v. *Dunne*, Ir. R. 5 C.L. 358. Since the publication of this text book there is the case of *Belt* v. *Lawes*, 51 L.J.Q.B. 359, in the same direction. See also *Macdonell* v. *Robinson*, 8 O.R. 53, and, in appeal, 12 A.R. 270. It appears to be essential for the defendant to place this defence upon the record to entitle him in any manner to rely upon privilege at the trial."

The defences of privilege and fair comment distinguished.

The distinction between the defences of privilege and fair comment is remarked upon by Taylor, C.J,. in a Manitoba case. "If a defendant," he said, "charged with libel shewed the communication to be a privileged one, he can stop there, and need not go on to prove his belief in the truth of what was said. In such a case, malice must be proved to entitle the plaintiff to a verdict: *Jenour* v. *Delmege* (1891), A.C. 73. But where the defence is, as here, fair comment, then what is commented on must be facts admitted or proved to be true. A man has no right to publish defamatory matter, because he believes it to be true. If an alleged libel contains imputations on private character, it exceeds the limits of fair criticism"—quoting from the remarks of Lord Herschell, L.C., in *Davis & Sons* v. *Shepstone*(*l*). "And a newspaper editor or writer has no greater privilege than other people." It was so laid down in *Campbell* v. *Spottiswoode*(*m*), by Crompton, J., and Blackburn, J., the latter of whom said: "I take it to be certain that he has only the

(*l*) (1886) 11 App. Cas. 187.

(*m*) (1863) 3 B. & S. 769.

general right which belongs to the public to comment upon public matters." While in a case of privileged communication the truth of the fact asserted is not important, in a case of fair comment the truth or falsity is important. So, under a plea of fair comment, the truth of what is commented on may be proved: *Wills* v. *Carman* (1886), 17 O.R. 223"(*n*). The later decisions (*infra*) have to be considered in this connection.

Justification inadmissible under plea of fair comment.

The case of *Wills* v. *Carman*, here referred to, was an action for newspaper libel in which the principal defence was fair comment on matters of public and general interest respecting the conduct of the plaintiff as a public official. There was no plea of justification on the record, but, notwithstanding this, the defendant was permitted to give evidence of the truth of the matters commented on. The verdict in his favour was moved against on that ground, but the motion was dismissed, the court being of opinion that the evidence was admissible(*o*). In *Brown* v. *Moyer*(*oo*), however, the Ontario Court of Appeal were unanimous in holding that such evidence is inadmissible under a plea of fair comment where justification is not pleaded. The same rule was laid down by the Manitoba Court of Queen's Bench(*p*), whose judgment was affirmed on appeal by the Supreme Court of Canada(*q*).

The facts commented on should appear in the libel or in the pleadings.

Where fair comment is pleaded, the facts commented on, if not shewn on the face of the alleged libel, should appear on record either in the pleadings or the particulars. In an action for libel against the editor and proprietor of a newspaper in which the plaintiff complained of a personal attack upon him as a member of a municipal council, the principal plea was fair comment, and that the statements complained of were published by the defendant *bonâ fide*, for the public benefit, and without

(*n*) Martin v. Manitoba Free Press Co. (1892) 8 M.L.R. 50, *per* Taylor, C.J., and Bain, J.

(*o*) Wills v. Carman (1889) 17 O.R. 223.

(*oo*) (1893) 23 O.R. 222; 20 O.A.R. 509.

(*p*) Martin v. Manitoba Free Press Co. (1892) 8 M.L.R. 50.

(*q*) *Ibid.* (1892) 21 S.C.R. 518.

malice. The record did not disclose the matters commented upon nor any particulars. On the authority of *Wills* v. *Carman* (*supra*), the defendant was allowed to give evidence of the conduct of the plaintiff at a meeting of the committee of the council called to consider the question of the exemption of a local manufactory from taxation, on the ground that he could not otherwise establish his plea of fair comment. It was held by the Court of Appeal that a good deal of this evidence was really evidence in justification, and had, therefore, been improperly received. In the court below, Boyd, C., was of opinion that, under the present rules of pleading, the details of the conduct animadverted upon should properly have been spread upon the record either by pleading or by particulars(*r*).

Fair comment and not guilty may be pleaded together.

A plea of fair comment is not embarrassing when pleaded along with the general issue. This was so held in a Manitoba case in which a newspaper publishing company were sued for charging, as alleged in the innuendo, that the plaintiff, the Attorney-General of Manitoba, procured the Province to enter into a contract with a certain railway company for the purpose of raising a large sum of money for the company, "a portion of which," according to the innuendo, "was to be dishonestly and corruptly received by the plaintiff for his own use and benefit, to the great detriment of the Province." The defendants pleaded not guilty, and fair comment on matters of great public interest. Upon an appeal from an order of a referee striking out the plea of fair comment as embarrassing, and as setting up matter more proper to be pleaded under the general issue, Killam, J., said: "*The Earl of Lucan* v. *Smith*, 26 L.J. Ex. 94, shews that, under the old practice, leave would be given to plead that the alleged libel was a fair comment upon a matter of public interest along with the general issue, and much more should the court not interfere actively to prevent it being pleaded where no leave is required"(*s*).

Justification of the libel with the innuendo.

The defendant may justify the libel with the innuendo. This was so held in an action by a railway conductor who had been

(*r*) Brown v. Moyer (1893) 23 O.R. 222; 20 O.A.R. 509.

(*s*) Martin v. Manitoba Free Press Co. (1891) 7 M.L.R. 413.

dismissed from the service of the company of which defendant was manager, and who complained of the publication by the defendant of a hand-bill addressed to the employees of the company charging that the plaintiff had conducted himself fraudulently in his said employment, and had been dismissed therefor. The defendant pleaded the truth of the statements contained in the hand-bill in the same terms as in the declaration. This plea was demurred to on the ground that, being pleaded to the whole cause of action, it answered only part; that the declaration having attached a specific meaning to the libel, the defendant pleaded only the literal truth of the publication, which might or might not bear the meaning alleged; and that he thus admitted the innuendo without justifying it. The answer to this was, that under the new system of pleading in actions for defamation, which had been introduced by the English Common Law Procedure Act, section 61 of which had been adopted as section 2 in C.S.U.C. c. 103, the plea was sufficient, for the defendant undertook by it to justify the libel in the sense imputed to it by the plaintiff, or at all events in some actionable sense. The court so held, and that the plea was a good defence(*t*).

Mode of dealing with a multifarious plea of justification partially demurred to.

In an action for libel published in a newspaper, one of the statements complained of charged the plaintiff with resorting to "that style of financiering which in the vernacular is called swindling." The defendant pleaded not guilty and a plea of justification, in which certain specific money transactions between the plaintiff and three persons named were set forth in support of the plea. The plaintiff demurred to those portions of the plea setting forth the first two transactions, but did not demur to that portion of it setting forth the third transaction. The plaintiff also took issue on the pleas and the several matters and allegations therein contained. The result of the pleading as a whole was a multifarious plea of justification partially demurred to, and no objection taken on the one side to the multifariousness, nor on the other to the partial demurrer. For the mode of dealing with such a case, see *Brown* v. *Beatty*(*u*).

(*t*) Tench v. Swinyard (1869) 29 U.C.Q.B. 319.

(*u*) (1862) 12 U.C.C.P. 107, at pp. 117-18.

A plea and reply thereto where plaintiff described as "an ex-penitentiary bird."

Where in an action for a libel describing the plaintiff as an ex-penitentiary bird from the state prison at Auburn, in the state of New York (meaning that the plaintiff had served a term in the penitentiary as a convict), to which it was alleged that he was sent on a conviction for obtaining money by false pretences, the defendant pleaded, as to the words without the meaning alleged, that the plaintiff, before the publication of the libel, had been duly convicted of the offence mentioned, and imprisoned at Auburn under sentence therefor. The plaintiff replied that the alleged conviction was obtained without legal evidence, and afterwards, on appeal to the proper court, was reversed and annulled, as defendant well knew before publishing the libel. It was held, on demurrer, that the replication was a good answer to the plea; and also that the plea was good, although pleaded to the words without the innuendo(*v*).

Correction of a libellous report or article pleaded in mitigation of damages.

A plea alleging the correction of a libellous report or article may be pleaded in mitigation of damages. This was so held in an action by an insurance inspector and adjuster, and, at the time of action brought, the liquidator of an insurance company, against a newspaper publisher. It was alleged that the article in question charged plaintiff, in effect, with having been dishonest in adjusting insurance claims, and with accepting bribes from certain parties whose losses he had adjusted. The statement of defence contained a subsequent article in the same newspaper making a correction of a statement in the former article which might have conveyed a wrong impression of the plaintiff's conduct with respect to the matters referred to. Upon a demurrer to the paragraph containing the correction, it was held (*per* Rose, J.), overruling the demurrer, that the difference between the first and second articles as to the statement which had been corrected was material; for, if it was proved that the first article was in that particular false to the knowledge of the defendant, and he made no correction, this would be evidence of malice, and

(*v*) Davis v. Stewart (1869) 29 U.C.Q.B. 441. See, also, Davis v. Stewart *et al.* (1868) 18 U.C.C.P. 482.

would probably materially affect the damages; but, even if immaterial, the plaintiff was not prejudiced, as the correction was only offered as a defence in mitigation of damages(*w*).

Confession of crime only admissible under plea of justification, and not in mitigation of damages.

Where in an action for libel and slander imputing theft, the defendant pleaded, in mitigation of damages, that plaintiff had confessed to the defendant's mother that he had done the act charged against him, it was held that evidence of the alleged confession could only be given under a plea of justification, which was not on the record, and that it was not admissible in mitigation, unless the defendant admitted on the record that she had now good cause for discrediting the fact of such a confession, although she believed it when the words complained of were uttered(*x*). In libel the defendant must set out all the facts relied on in mitigation respecting plaintiff's general bad character, evidence of which is inadmissible unless referred to in the statement of defence(*xx*).

Plea amounting to justification, but restricted to mitigation of damages, disapproved of.

The question whether slander may be justified by facts which amount to a justification, although restricted in effect to mitigation of damages, has given rise to some conflict of opinion. In an action by a solicitor for words imputing to him theft and embezzlement in his business transactions with one of his clients, the defendant, besides a general denial, pleaded specially, in mitigation of damages, a number of facts which amounted to a justification. This plea, which was demurred to on the ground that it disclosed no defence, was held (*per* Rose, J.) to constitute a good defence(*y*). But the judgment overruling the demurrer was disapproved of by the Queen's Bench Divisional Court, where Wilson, C.J., said: "I do not agree with the particular decision of *Wilson* v. *Woods*, 9 O.R. 687, that a defendant, in slander,

(*w*) Livingston v. Trout (1885) 9 O.R. 488.

(*x*) Switzer v. Laidman (1889) 18 O.R. 420.

(*xx*) Scott v. Sampson, 8 Q.B.D. 491.

(*y*) Wilson v. Woods (1885) 9 O.R. 687.

may plead in justification the truth of the slander, and then be admitted to prove, under such a defence, the bad character of the plaintiff, because the defendant says he will use the facts printed in justification or reduction of damages. That appears to me to be objectionable. The justification applies to the truth of the charge—this particular charge. If it be proved, it is an absolute defence, and it is unnecessary to say anything as to the measure of damages. If it is not proved, it cannot be used to reduce the damages. It is, in such a case, a reason for enhancing the damages by persisting in the charge''(*z*).

For a plea justifying the slander of a solicitor in his professional capacity, see *Tobin* v. *Gannon*(*a*), and for a plea of justification which was upheld, although objected to as embarrassing, see *Fulford* v. *Wallace*(*b*).

Pleas objectionable as offering an immaterial issue.

But pleas offering immaterial issues are objectionable, and will be held to be bad. In an action for libel by a firm of watchmakers, carrying on business in London and Liverpool, against a Toronto watchmaker for the publication by the defendant, in a number of newspapers in Ontario, of statements defamatory of the plaintiffs in their trade and business, the first count of the declaration set out that the plaintiffs were watchmakers, and sold certain watches made for them in Switzerland, and other superior watches made in England, marking the former with the name of their firm only, adding on the other the words ''Chronometer Makers to the Queen.'' The libel complained of charged, in substance, that a large proportion of the watches advertised by them were merely Swiss watches imposed upon the public as English, and at twice their true value. In the second count the alleged libel charged the plaintiffs with selling their watches made in Switzerland as English, and thus defrauding the public. To each of these counts the defendant pleaded that the plaintiffs marked their Swiss watches with the names ''Thomas Russell & Sons, England & Liverpool,'' and not with the names ''Thomas Russell & Sons'' only, as alleged. These pleas were demurred to as offering no issuable traverse, and as immaterial, and no

(*z*) Moore v. Mitchell (1886) 11 O.R. 21, at p. 25.

(*a*) (1901) 34 N.S.R. 9.

(*b*) 1 O.L.R. (1901) 278.

answers to the action. Effect was given to these objections. "We do not understand the object of these pleas," said Hagarty, J. "There is no direct allegation, even if material in the counts, of which this could be a traverse. The averment in the first count is that the plaintiffs mark the Swiss watches with the name of their firm, saying nothing about its locality in London and Liverpool, and only put "Chronometer Makers to the Queen" on the English made watches. The finding of an issue on these pleas one way or the other would not, we think, affect the case, much less decide it, and it appears to be a wholly collateral and immaterial allegation. We think both pleas bad"(*c*).

Plea to words imputing a crime without the meaning alleged in declaration.

In an action for slander the declaration averred that plaintiff voted at a certain parliamentary election, and took the oath prescribed by the Election Law of 1868, and that, in reference to such oath, defendant said of the plaintiff: "He swore to what was false, and I can prove it"; meaning that the plaintiff was guilty of wilful and corrupt perjury. The defendant pleaded to so much of the declaration as related to the speaking of the words without the alleged meaning, that the plaintiff had sworn to what was false in swearing that he was a resident of a certain electoral division, and as such entitled to vote at the election for the election of members to serve for said division in the Legislative Assembly of the Province of Ontario. This plea was demurred to on the ground that it answered only a matter which was not the slander complained of, and that it was no answer to the declaration. The court held the plea to be bad, because, if it intended to specify perjury, it should have distinctly charged that offence, and, if not, the general issue should have been pleaded(*d*).

In the judgment of Richards, C.J., in this case, reference is made to *Forbes* v. *McClelland*(*e*), in which it was held (*per* Draper, C.J.) that, in an action for slander, the plea of not guilty puts in issue the defamatory sense imputed to the words

(*c*) Russell *et al.* v. Wilkes (1868) 27 U.C.Q.B. 280.

(*d*) Strachan v. Barton (1874) 34 U.C.Q.B. 374.

(*e*) (1868) 4 P.R. 272, 274.

alleged to have been spoken. A plea of justification seeking to justify the use of the words in a sense different to that imputed, was, therefore, disallowed, but defendant was permitted to justify generally.

Plea to words alleged to have been spoken, instead of to those actually complained of, embarrassing.

A plea to words alleged by the defendant to have been spoken by him, instead of to the words actually charged, is embarrassing and will be struck out. In an action by a merchant and member of the Senate of Canada for words imputing bribery, the purchase of his senatorship, the publication of misleading advertisements of his goods, etc., the defendant alleged, in paragraph 4 of his statement of defence, that, if he did speak the words, he did so not as stating a fact, but as stating a rumour, which was generally believed throughout Canada. The Master in Chambers held, that this paragraph was really in mitigation of damages, and should have been so pleaded, and so, following *Beaton* v. *Intelligencer Printing and Publishing Co.*(*f*), which decided that the defendant could plead to damages, and that it was not necessary to expressly plead such a defence as being to damages, he allowed the paragraph to stand. Upon appeal it was held (*per* Meredith, C.J.), that the paragraph was objectionable and should be struck out, because the defendant was not at liberty to allege by way of defence that the words actually spoken were different from those charged in the statement of claim to have been spoken, and to plead as to those other words something either by way of answer, or in mitigation of damages. Upon this point the learned Chief Justice followed *Rassam* v. *Budge* (1893), 1 Q.B. 571, and distinguished *Beaton* v. *Intelligencer Printing and Publishing Co.* (*supra*)(*g*).

In paragraph 2 of his defence, in the same case, the defendant pleaded that, if he had spoken the words, they, even with the innuendo, were not slanderous, and he denied the innuendo, and said that without it the words were not slanderous. An appeal by the defendant from the Master in Chambers, who held that the pleading did not follow the usual form

(*f*) (1894) 22 O.A.R. 97.

(*g*) Fulford v. Wallace, 1 O.L.R. (1901) 278.

in denying the meaning of the words spoken, but might be amended, was allowed by Meredith, C.J., who held, that the paragraph in question was not open to objection, and was not embarrassing(*h*).

Rassam v. *Budge* was also followed, and the pleas held to be embarrassing, in an action for words imputing the crime of arson, in which the defendant pleaded that, on a certain date, a barn belonging, as the defendant believed, to the plaintiff, was totally destroyed by fire, which also destroyed a large quantity of uninsured hay belonging to defendant's father; and that, if defendant ever spoke or used any language concerning plaintiff in reference to said fire, what he said was nothing more than a mere expression of belief or opinion made honestly and without malice. It was impossible, it was said, to say what these paragraphs meant. If the defendant wished to set up privilege, or to plead in mitigation of damages, he must do so plainly(*hh*).

Pleas to a hypothetical case embarrassing.

In *Fulford* v. *Wallace* (*supra*), the defendant pleaded a number of paragraphs which were held by the Master in Chambers to be pleaded to a hypothetical case that might never arise, and could arise only on an amended statement of claim, and which being embarrassing were ordered to be struck out. Upon appeal by the defendant, Meredith, C.J., held, affirming the order, that the paragraphs in question were open to the same objection which he had held to be well taken, on the authority of *Rassam* v. *Budge* (*supra*), to paragraph 4 of the same statement of defence(*i*).

Pleading matters of opinion or hearsay, derogatory to plaintiff, objectionable.

Allegations in the statement of defence which are merely matters of opinion or hearsay, and derogatory to the plaintiff, are objectionable and will be struck out. In an action for libel against the publishers of the Victoria (B.C.) *Times*, there was the following allegation in the statement of defence: "And the

(*h*) Fulford v. Wallace, 1 O.L.R. (1901) 278.

(*hh*) Grant v. McRae (1906), 8 O.W.R. 304.

(*i*) Fulford v. Wallace, *supra*.

defendants say that, if it shall be proved that the said words, set out in the fourth paragraph of the amended statement of claim, refer to the plaintiff and his wife, or either of them, the plaintiff has so conducted himself here during several months of his stay as to make the alleged libel seem very probable to the defendants." "This," said Begbie, C.J., "is merely putting on record a more extensive and more injurious libel than the other. The libel complained of may be rebutted if untrue; what is now proposed to be placed on record is matter of opinion still more derogatory than the principal libel to the plaintiff's character, incapable, as all opinions are, of refutation . . . and calculated to enable the defendants to present, under the protection of the court, and to press to the utmost, every act of folly or of vice to which the defendants may allege that they have heard it said, truly or untruly, that the plaintiff has given way." The allegation was ordered to be struck out(*j*).

A plea of the statute for the protection of public officers.

The question whether, in an action for slander against a public officer, the defendant can plead the "Act to protect Justices of the Peace and others from Vexatious Actions"(*k*), although raised in several cases, may now be regarded as settled. The medical superintendent of an asylum for the insane having been sued for words imputing theft to a servant in the asylum, one of the objections taken at the trial was, that no action lay against the defendant under that statute, the provisions of which were not complied with as to the slanders sued for which were alleged to have been spoken by the defendant in his official capacity. It became unnecessary to decide the question on account of the particular charge, to which the objection was taken, having been withdrawn from the jury as having been made on a privileged occasion. Falconbridge, J., in referring to the objection, said that "it might well be argued that, in what defendant did on that occasion, when he was investigating a matter brought under his notice in his official capacity, he was entitled to the protection of the statute, but it does not seem to me arguable that, in making the communication to Thompson, a man not in the service of the asylum, and after enquiry was over and sentence passed on the alleged culprit [*i.e.* the plain-

(*j*) Hoste v. Victoria Times Publishing Co. (1889) 1 B.C.R. 365.
(*k*) R.S.O. 1887, c. 73, now R.S.O. 1897, c. 88.

tiff] and the execution done, the defendant was doing anything in the execution of his office"(*l*). It was subsequently held that the statute is no defence(*m*).

Plea of the Manitoba Newspaper Act unnecessary.

It has been held in Manitoba, that, in an action for libel against a newspaper publisher, a plea of the Provincial Newspaper Act is unnecesary. The former Libel Act, 50 Viet. c. 22, s. 1, provided that, "Except in cases where special damages are claimed, the plaintiff, in all actions for libel in newspapers, shall be required to prove either actual malice or culpable negligence in the publication of the libel complained of." And the Act 50 Viet. c. 23, (M.)(*n*), provided that, "No person . . . who has . . . not complied with the provisions of this Act, shall be entitled to the benefit of any of the provisions of 50 Viet. c. 22." In an action for libel against a newspaper publishing company these statutes were not pleaded by the defendants, and upon the argument of a motion for a new trial, after a verdict for the plaintiff, it was contended by plaintiff's counsel that the Acts must be pleaded by such newspapers as propose to take advantage of them, as they are not of general application. If, it was said, the question is, whether a newspaper is entitled to the benefit of an Act, the pleadings must be looked at to see whether an issue on that point is raised; and, until defendant's case is reached, plaintiff does not know whether advantage will be taken of the statute unless it is pleaded. It would be too late then for plaintiff to prove actual malice. "I cannot see," said Taylor, C.J., "that it was necessary for the defendants to plead the statute. There is on the record a plea of not guilty, under which the defendants could raise the defence of privileged communication: *Lillie* v. *Price*, 5 A. & E. 645; and, if so, they should surely be at liberty to shew under the same plea that they have the protection of privilege, though not by the occasion or under the circumstances in which they published the alleged libel, yet by thus having complied with the provisions of a statute giving them protection"(*o*).

(*l*) Ross v. Bucke (1892) 21 O.R. 692, at p. 696.

(*m*) Hanes v. Burnham (1895) 26 O.R. 528; affirmed an appeal (1896) 23 O.A.R. 90; p. 489, *post*.

(*n*) Now R.S.M. 1902, c. 123, s. 16.

(*o*) Ashdown v. Manitoba Free Press Co. (1890) 6 M.L.R. 578 (In appeal).

Pleadings in actions of defamation in the Province of Quebec.

In actions of defamation in the Province of Quebec, the pleadings are regulated by the Code of Procedure. A plea to an action of slander which admits, but offers to retract, the slanderous words complained of, is bad and will be disallowed on demurrer(*p*); but the defendant may plead that what he said concerning the plaintiff was different from what is alleged in the plaintiff's declaration(*q*). Where one reproaches another with having been convicted of theft, it is no justification in law to plead the truth of the slander, but, on the contrary, an aggravation of the offence(*r*). And where in an action for slander, a plea of compensation for the injury and of provocation is put in, the defendant cannot plead that plaintiff was generally bad tempered and of a quarrelsome disposition(*s*); but he may plead that the plaintiff's reputation is bad, and set out the facts relied upon to prove such allegation(*t*). Rude and provoking words, but not reflecting upon the honour or credit of a person, do not justify or excuse defamatory accusations(*u*). And where, in an action for slander, there are grounds of defence arising from provocation and set-off of injuries, these should be pleaded as defences to the principal action, and the defendant cannot support a cross action for damages unless the injuries done by the plaintiff are more grave and damaging than those suffered by him(*v*). An insurance agent, sued for slander by the company which he formerly represented, was held entitled to plead, in addition to the truth of certain alleged facts, that he had used other expressions than those with which he was charged, and did so because the plaintiff company had been guilty of defamatory expressions injurious to him respecting the company which he now represented(*w*). A plea to an action for libel alleging facts which, if proved, tend to rebut the presumption of malice on the

(*p*) Noel *es qual.* v. Chabot (1858) 8 L.C.R. (S.C.) 211.

(*q*) Delisle v. Beaudry (1868) 12 L.C.J. (S.C.) 221.

(*r*) Petrin v. Larochelle (1872) 4 R.L. (S.C.) 286.

(*s*) Langlois v. Drapeau *et vir* (1897) Q.O.R. 12 (S.C.) 92.

(*t*) *Per* Larne, J., in Cotê v. Desrosiers (1903) 6 Q.P.R. 65.

(*u*) Cleveland v. Sherman (1901) Q.O.R. 19 (S.C.) 270.

(*v*) *Ibid.*

(*w*) Vallée v. Canada Life Assurance Co. (1899) 3 Q.P.R. (Q.B.) 272.

part of the defendant is not demurrable; nor is the insertion of a proposition in law ground for demurrer(*x*). So, also, a plea to an action for slander or libel, that the defendant had good reasons and probable cause to say or write what he did say or write, and specifying the reasons, is a good plea in law(*y*).

Exceptions to the form in an action for libel.

Where an action for libel was brought against three persons described as all of the city of New York, under the name, style and firm of R. G. Dun & Co., and exceptions to the form were filed by two of the defendants on the ground that the action should have been directed against the partners chargeable with the libel complained of, the court maintained the exceptions(*z*). In this same action, in which exceptions to the form were filed by two of the defendants on the ground that the cause of action was insufficiently stated, in that it was alleged that the defendants did fraudulently and maliciously write in a certain book kept in their office, a certain false, scandalous, and malicious libel to the effect that the plaintiff was not reliable, and was insolvent, or words to that effect, but that plaintiff was unable to state the exact words for the reason that the defendant had refused to let the plaintiff see the book, it was held that the exceptions were well founded, and that the action must be dismissed(*a*).

Untenable pleas in actions against French newspapers.

The libel complained of consisted of the following statement concerning plaintiff in a report in *L'Evenment* of an election nomination at Levis, at which scenes of violence had occurred: "*Il y avait encore un Monsieur R. P. Vallée et un M. Ely Déry, avocat, qui eux présidaient à la distribution des bouts de fer et des glaçons.*" The court held that it was no defence to allege that the defendant, being a newspaper proprietor, must give his readers all the information he could on public matters; or that what was said of the plaintiff formed part of a general report of the proceedings at a nomination; or that scenes of violence

(*x*) La Compagnie de Publication du Canada Revue v. Mgr. Fabre (1894) Q.O.R. 6 (S.C.) 436.

(*y*) Smith v. Hood *et al. es qual.* (1897) Q.O.R. 13 (S.C.) 341.

(*z*) McDonald v. Dun *et al.* (1862) 12 L.C.R. (S.C.) 345.

(*a*) *Ibid.*

took place at such nomination concerning which the public were desirous of being informed; or that the article had to be written in haste; or that the information obtained was from persons worthy of belief; or that the article was written with the sole object of giving information to the public in the manner usually adopted by newspapers generally; or that the plaintiff had not demanded from the defendant a correction of the statements in question(*b*). A plea, also, that the defendant does not admit that he is the editor and publisher of a certain newspaper, when the fact of his being editor and publisher has been established by affidavits, is false, and should be struck out(*bb*).

A newspaper article named the plaintiff and certain other persons as having assisted at a banquet given to a political personage, and added that among these persons were two of the authors of a libellous writing directed against the same party, and by reason of which a third party had been sent to prison. In an action based on this article it was held, that the defendants could not set up that, if the plaintiff felt that he was aimed at by the article, it was because he knew that he was guilty; that he had borne himself in public as a violent adversary of the person in question; that he had spoken and written against him not only the matters which the criminal court had punished by imprisonment, but other matters also; and that he had sympathized with the accused, and aided in his defence(*c*).

Justification must be under the public civil law of the province. Immunities on religious grounds inadmissible.

The defendant, who was sued for an alleged libel contained in a work written by him and published by his co-defendants, pleaded, *inter alia*, that he was a Roman Catholic priest, and a member of a religious society, among the objects of which were the defence and discipline and recognition of the rights and powers of the church; that among the powers that he wished to maintain was that of compelling the observance of the laws, decrees and ordinances of the church; that a certain other action,

(*b*) Dery v. Fabre (1878) 4 Q.L.R. (S.C.) 286; Prevost v Huard (1905) 7 Q.P.R. 406.

(*bb*) Lanos v. Landry (1901) 21 C.L.T. (Occ. N.) 312.

(*c*) Lemieux v. LeMonde Newspaper Co. (1899) Q.O.R. 16 (S.C.) 93

then pending against the archbishop, was intended to prevent the exercise of the ecclesiastical jurisdiction in the sense of the papal bull *Apostolicae Sedis*, etc. Upon a demurrer to this plea it was held, that the defendant having, as a voluntary act, written his book for public sale and circulation, and there being no pretence that it was written in the exercise of any ecclesiastical function or office (even assuming that this would alter the case), or on any privileged occasion, was bound to justify according to the public, civil law of the Province, and, therefore, those paragraphs of the plea, which asserted qualities in some sense creating for him special immunities, were irrelevant and must be disallowed(*cc*).

Defamatory matter in pleadings and judicial proceedings.

Defamatory matter contained or published in pleadings and judicial proceedings is not privileged in Quebec as it is in the other Provinces, although in some of the reported cases such matter would appear to be conditionally privileged. It has been held, *e.g.*, that an action for a libellous statement in a judicial proceeding raises matters concerning the relation of the subject to the administration of justice, and, as such, is governed by the law of England, under which no damages can be recovered for injurious words forming part of a judicial proceeding, pleaded in good faith, with probable cause and without malice, the words being relevant to the issue, although they may be subsequently shewn to be false and injurious(*d*). The complainant in such case is not bound to postpone his action therefor until the case in which the pleading was filed is decided, and such action, if taken, will not be dismissed as premature. Were he to delay proceedings his action might be prescribed(*e*).

Pleas not defamatory.

The denial in a plea that a fire occurred accidentally and from cause unknown, does not imply or insinuate that the assured criminally set the fire, and is not defamatory. So, also, allegations in a plea by an insurance company, that the assured made false representations in his application for insurance, and false

(*cc*) St. Louis v. Lacrosse *et al.* (1894) Q.O.R. 5 (S.C.) 247.

(*d*) Wilkins v. Major (1902) Q.O.R. 22 (S.C.) 264.

(*e*) *Ibid.* 4 Q.P.R. 172; Q.O.R. 22 (S.C.) 263.

solemn declarations after the loss as to the value of his stock, with fraudulent intent, and that in swearing to false, exaggerated statements, the assured did not swear to the truth and rendered himself guilty of fraud and his policy null, when pertinent to the issue, and pleaded in good faith and with probable cause, are not libellous or defamatory(*f*).

It is not legal to plead that the action is malicious and is the product of the hatred which the plaintiff bears to the defendant(*g*); nor to plead facts tending to justify other words than those mentioned in the declaration(*h*); nor to plead that an article published in a newspaper was simply published as an item taken from another newspaper(*i*). The elimination of allegations in a plea not amounting to justification should be sought by demurrer, and not by a motion to strike them out(*j*).

(*f*) *Per* Rochon, J., in Morrison v. Western Assurance Co. (1903) Q.O.R. 24 (S.C.) 111.

(*g*) Melançon v. Archambeault (1904) 6 Q.P.R. 460.

(*h*) Phillips v. Laviolette (1902) 4 Q.P.R. 396.

(*i*) Prevost v. Huard (1905) 7 Q.P.R. 406.

(*j*) Phillips v. Laviolette, *supra*.

CHAPTER XXV.

Variance in the Pleadings.

The rules as to variance under C.L.P. Act and Judicature Acts.

Although the rules which govern variance in the pleadings in actions of defamation have not been changed by the Common Law Procedure Act, as adopted in any of the Provinces, the whole question of variance has been materially affected, technically speaking, by the liberal powers of amendment conferred by the Rules of the Judicature Acts(*a*). In an action for slander in the Province of New Brunswick where the common law system of pleadings, as modified by the Common Law Procedure Act, has, until recently, prevailed, it was held, that the words are to be laid and proved according to the rules that governed the allegation and proof of them before the Act was passed(*b*).

Opinion of Wetmore, J.

In that case the words charged as slanderous were not actionable *per se*, and Wetmore, J., said: "It appears to me all the words must be set forth, and exactly set forth, to entitle the plaintiff to recover, where they are not actionable in themselves. The latter part of the section [*i.e.*, the section in the Common Law Procedure Act abolishing prefatory averments] is: "And where the words or matter set forth, with or without the alleged meaning, shew a cause of action, the declaration shall be sufficient." . . . Any variance in proof of the words used from those set forth in the declaration, and upon which he has put his defamatory sense, I think is fatal. The statute allows the plaintiff to put his words forward, and to put his defamatory sense upon the words so put forward, and that is all it allows. Failing to prove the words stated in the declaration, his defamatory sense must go with it. In case of variance no great incon-

(*a*) See the references to these rules in the chapter on Plaintiff's Pleadings.

(*b*) See observations by King, J., in Harris v. Clayton (1881) 21 N.B. R. (8 P. & B.) 237, on the changes in pleading effected by the Common Law Procedure Act.

venience would arise; application could be made to amend, and the judge would allow it upon reasonable terms''(*c*).

Plaintiff's pleading must state the actual words used, not words of narration.

The words charged must be the actual words spoken, and not the words by way of narration. Where, therefore, the words were laid, as relating in substance what the defendant said, thus: ''He (defendant) had no doubt the plaintiff did it,'' etc., instead of laying the words as it was proved the defendant uttered them, namely: ''I have no doubt he did it,'' etc., the court being of opinion that the words proved did not sustain the declaration, and that it was not permitted to the plaintiff to give, by way of narration, the effect of the words instead of the language used, the rule for a nonsuit was made absolute. *Cook* v. *Cox*(*d*), where a like objection prevailed in arrest of judgment, was referred to(*e*).

Proof of all the words not always necessary.

It is not necessary, however, in slander to prove all the words as laid in the declaration, provided such of them be proved as are material. Where, therefore, the words alleged were: ''You perjured yourself in the suit between T. and me before L.,'' and the words proved were: ''You perjured yourself in the suit between your brother T. and me,'' etc., this was held to be no variance(*f*). But where the words as laid in the declaration constitute a single charge, they must all be proved(*g*).

In *Handspiker* v. *Adams*(*h*), in which it was held that admissions, contained in defendant's letters referring to the newspaper articles in question, were admissible in evidence, and in which there was an alleged variance between the declaration and

(*c*) Harris v. Clayton (1881) 21 N.B.R. (5 P. & B.) 237.

(*d*) 3 M. & S. 110.

(*e*) Phillips v. Odell (1830) 5 U.C.R. (O.S.) 483.

(*f*) Vye v. Newman (1866) 11 N.B.R. (6 Allen) 388. See, also, Orpwood v. Barkes, 4 Bing. 261; 12 Moore 492; Rutherford v. Evans, 6 Bing. 451.

(*g*) Flower v. Pedley, 2 Esp. 491; Bell v. Byrne, 13 East, 554; Cartwright v. Wright, 5 B. & Ald. 615. See, also, Welch v. Smith, p. 432, *post*.

(*h*) (1888) 21 N.S.R. 147.

the evidence, reference is made in the judgment of McDonald, C.J. (at p. 154), to *Foster* v. *Pointer*(*i*), where it was held, that an allegation that the libel was published in a particular paper, specified in the declaration, was amendable by striking out the name of the paper. "We think," said the court, "that the declaration was amendable and ought to be amended. It is just one of the cases where there should be an amendment." See, also, *Rutherford* v. *Evans*(*j*).

Immaterial variance not affecting the meaning.

An immaterial variance between the libellous statements set out in the declaration, and those proved at the trial, was also held to exist in a certain newspaper paragraph, alleged to be libellous, by the omission of a few words in the declaration, which, the evidence shewed, should have been inserted, and which did not affect the meaning—*Cartwright* v. *Wright*(*k*), and *Tabart* v. *Tipper*(*l*), being cited by the court in favour of that view(*m*).

Where imputation the same either with or without variance.

The plaintiff, a corn merchant who bought wheat on commission and otherwise, used platform scales for weighing the wheat purchased by him, and just before the publication of the libel complained of, purchased from the defendant a quantity of wheat for which he paid him according to the weight shewn by the plaintiff's scales. Under these circumstances the defendant published, in a letter in a newspaper, the words following: "The farmers as a class of producers are the only ones, that I am aware of, who allow another class, the purchasers of their produce, the sole right to weigh their produce, and helplessly submit to their decision. (At this point, in the libel proved at the trial, but not set out in the declaration, the following sentence was contained: "This state of helpless dependency has been introduced with the platform scales which the farmer has not

(*i*) 9 C. & P. 718

(*j*) 6 Bing. 451.

(*k*) 5 B. & Ald. 616.

(*l*) (1808) 1 Camp. 350.

(*m*) Smiley v. McDougall (1853) 10 U.C.Q.B. 113, at pp. 115, 116.

yet learned to use, for, when the balance scale was in use, either party performed the operation of weighing, and fraud was soon detected.") This state of things has introduced a class of men somewhat similar to Rob Roy, who call themselves commission merchants and wheat buyers, and make it their business to levy blackmail upon every man who sells them a load of wheat. This is done by a species of thimble-rigging performed on the platform scales by which from five to ten bushels are taken from every hundred bushels bought." These statements, it was alleged, although referring to a class, were intended to charge the plaintiff with such practices. The jury found for the plaintiff on the whole declaration (which also contained a count for slander), and upon a motion to enter a nonsuit on account of the omission from the declaration of the sentence in brackets (*supra*), it was held that the variance was not substantial, for the same imputation appeared in the writing either with or without the part omitted—*Rutherford* v. *Evans*(*o*) being cited in support of the judgment(*p*).

Variance between "specific crime" alleged and "habit of crime" proved.

Where the words charged were: "You robbed the mail"; and the words proved were: "I am not like you, running about the country with forged deeds, and robbing the mail as you did," it was held that the variance was fatal. Robinson, C.J., who delivered the judgment of the court, said that the words as charged were specific, and might be taken to charge plaintiff deliberately with some act of robbery; but the words as proved imputed a habit of crime, which some might think a more serious charge than the one charged, and others less so, as tending more to vague and general crimination.

Equivalent words insufficient.

"We cannot say that they are, in our opinion, equivalent; and if they were, there is strong modern authority (2 East, 426)(*q*) for saying that that will not do. It is not possible, we think, to reconcile even all the modern cases on this point, but

(*o*) 6 Bing. 451.

(*p*) Marsden v. Henderson (1863) 22 U.C.Q.B. 585.

(*q*) Maitland v. Goldney (1802).

we have found none that seem to sustain the plaintiff's evidence in this case''(*r*).

Variance in charges of arson.

So where, in an action on the case, the words alleged in the declaration were: ''He (plaintiff) burnt my barn''; and at the trial the words proved were: ''There is the man that burnt my barn; if he was not guilty of it he would not carry pistols,'' it was held that the words did not support the declaration and the court directed a nonsuit(*s*).

Variance in charges of theft.

The plaintiff charged, in several counts, words imputing theft. The evidence did not precisely prove the words as laid in any count, the nearest proof being of the words charged in the third count, which were: ''He stole wheat last winter.'' Upon a motion for a new trial after a verdict for the plaintiff, it was held, that the words proved did not support the words charged.

Opinion of Robinson, C.J.

''In many cases,'' said Robinson, C.J., for the court, ''it has been held that the very words laid must be proved—not all of them, but as many as will support an action, and that it will not do to prove words that are equivalent, signifying the same thing in substance. There has been some relaxation from that rule, however, though it has been laid down by high authority and in modern times. Another rule laid down is, that when the words laid constitute but one charge, they must all be proved. This rule, however, must receive a reasonable application, and not be acted upon to the very letter. We cannot say that the words in this case were in our opinion sufficiently proved; to hold that they were, would require a greater latitude to be taken on the evidence than any authorities we can meet with would justify; and it is not a case in which a point should be strained to support the verdict''(*t*).

(*r*) McBean v. Williams (1838) 5 U.C.R. (O.S.) 689.

(*s*) Vankeuren v. Griffis (1846) 2 U.C.Q.B. 423.

(*t*) McNaught v. Allen (1851) 8 U.C.Q.B. 304. See Welch v. Smith, p. 432, *post*.

The omission of words explanatory of libel charged a fatal variance and not amendable.

In an action against a mercantile agency the alleged libel consisted of the publication, among the general body of the defendants' subscribers, of a notice or circular containing the words, after the plaintiff's name: "If interested inquire at office." It was charged that these words had a well-known meaning in the mercantile community and among such subscribers, and were intended to convey, and did in fact convey, to the persons receiving the same, notice that the defendants possessed information regarding the plaintiff which injuriously affected his business standing and reputation. The defendants, besides other defences, pleaded that the notice or circular in question contained, in addition to the words "if interested inquire at office," words explanatory thereof, which should be read in connection therewith, and which had not been set out in the statement of claim. The plaintiff joined issue upon this averment. At the trial it appeared that the notice or circular contained not only the expression alleged in the statement of claim, but also this further statement referring to and explanatory of it: "The words, 'if interested inquire at office,' do not imply that the information we have is unfavourable. On the contrary, it may not unfrequently happen that our last report is of a favourable character; but subscribers are referred to our office, because, in justice to them, the parties reported on, and to ourselves, the information can only be properly conveyed to those entitled to receive it by a full report as we have it on our records." The evidence at the trial was confined to the effect and meaning of the words set out in the statement of claim, notwithstanding the defendants' objection that they could not be severed from the rest of the circular. The plaintiff insisted that an amendment was unnecessary, and made no application to amend until the jury had retired. The defendants' counsel moved for a nonsuit on the ground of a variance, but this was refused by the trial judge whose ruling was affirmed by the Divisional Court(*u*). Upon appeal to the Court of Appeal it was held, that there was a variance between the libel alleged and that proved, and that, as the proposed amendment would have raised a new issue to which

(*u*) Todd v. Dun, Wiman & Co. (1886) 12 O.R. 791.

the evidence did not apply, the plaintiff should have been nonsuited.

Opinion of Osler, J.A.

Osler, J.A., said that the omitted paragraph was one which, in his opinion, must be read together with, and as explanatory of, the language complained of, "since it alters and qualifies the meaning which, standing by themselves, the words 'if interested inquire at office,' might be deemed capable of bearing. Indeed, it goes further and says that these words do not imply that the information the defendants have to give is of an unfavourable character. There is, therefore, a fatal variance between the words laid, and those proved. . . . It is . . . impossible at this stage of the case to permit an amendment, leaving the verdict to stand, as such an amendment would involve the presentation and trial of a case different in several material respects from that which has been dealt with by the jury. The only relief the plaintiff can have is a new trial, with leave to amend on payment of costs, or we should direct a nonsuit to be entered, with liberty to the plaintiff, if he desires it, to bring a new action"(*v*).

In an action for slander the words complained of by plaintiff, a street railway conductor, were: "Mr. T. (plaintiff) was rude and uncivil to Mrs. B. (defendant, a married woman, whose husband was joined in the action) yesterday on the cars." These words were alleged to have been spoken to the manager of the railway, who promptly dismissed plaintiff from the company's service. According to the manager's evidence the woman complained of plaintiff not by name but by giving his number, saying that he had frequently asked her where she wished to get off the car, and that he glared and smiled at her so as to cause her annoyance so late at night. The woman's account of her complaint was, that she told the manager that conductor No. 52 did not insult her by words but by actions and conduct, the nature of which she described. A motion for a nonsuit, on the ground of variance and the absence of malice, was reserved, and the case was left to the jury in a charge adverse to plaintiff who was awarded $50 damages. The trial judge (Falconbridge, C.J.,) held that the occasion of speaking the words was one of qualified

(*v*) Todd v. Dun, Wiman & Co. (1888) 15 O.A.R. 85.

privilege, and that there was a fatal variance between the words laid and the proof, and he entered a nonsuit dismissing the action with costs(*w*).

The words alleged must be substantially proved as laid; a slight variance, which means practically the same thing, will not affect the question, but it is one thing to call a man a thief and another to call him a robber, and in either case the question as to whether the words used are defamatory or not will depend upon the other words surrounding them(*x*).

In the case in which this was said it was held that the variance was fatal as to one imputation, and that there was no proof of publication as to another, the alleged slanderous words having been heard by no one but the plaintiff himself.

(*w*) Tapp v. Brenot (1904) 3 O.W.R. 80.

(*x*) *Per* Wetmore, J., in Welch v. Smith (1906) 4 W.L.R. 4, 6.

CHAPTER XXVI.

Security for Costs.

I. *In actions for libels in newspapers.*

Security for costs, when ordered.

In Ontario security for costs may be ordered where, by law or by the practice, a party has heretofore been entitled to obtain security for costs, and, without restricting the generality of this provision, also in the following cases: (*a*) Where the plaintiff resides out of Ontario; (*b*) where he is ordinarily resident out of Ontario, though he may be temporarily resident within Ontario; (*c*) where he has brought another action or proceeding for the same cause which is pending in Ontario, or in any other country; (*d*) where he, or any person through or under whom he claims, has had judgment or order passed against him, in another action or proceeding for the same cause in Ontario or in any other country, with costs, and such costs have not been paid(*a*). This rule does not limit the right to security for costs to the cases enumerated, but gives a specific right to security in those cases in addition to any others in which, according to law or other practice of the court, a party has been heretofore entitled to claim security for costs(*b*).

In actions for defamation.

In addition to the cases above mentioned, there are some special cases under Provincial statutes in which a defendant sued for defamation may obtain security. These are in actions brought in Ontario, Manitoba and British Columbia, for libels contained in newspapers, and in an action in Ontario for slander of a woman by the imputation of unchastity. Except as to the definition of a "newspaper," which determines the class of publications to which the provisions as to security for newspapers

(*a*) R. 1198, O.J.A.

(*b*) Holmsted & Langton's, O.J.A., 2nd Ed., 1320.

are applicable(*c*), the enactments in the Provinces named are substantially the same in cases in which a criminal charge is not imputed. In Ontario and British Columbia they are identical.

The law of Ontario as to security for costs in actions against newspapers.

Section 10 of the Ontario Libel and Slander Act(*d*) provides that, in an action brought for libel contained in a newspaper, the defendant may, at any time after the filing of the statement of claim, apply to the court or a judge for security for costs, upon notice and an affidavit by the defendant, or his agent, shewing the nature of the action and of the defence, and shewing that the plaintiff is not possessed of property sufficient to answer the costs of the action in case a verdict or judgment is given in favour of the defendant, and that the defendant has a good defence upon the merits, and that the statements complained of were published in good faith, or that the grounds of action are trivial or frivolous; and the court or judge may make an order that the plaintiff shall give security for the costs to be incurred in such action, and the security so ordered shall be given in accordance with the practice in cases where a plaintiff resides out of the Province, and the order shall be a stay of proceedings until the proper security is given as aforesaid.

(a) But where the alleged libel involves a criminal charge, the defendant shall not be entitled to security for costs under this Act, unless he satisfies the court or judge that the action is trivial or frivolous, or that the several circumstances which, under sub-section 2 of section 6 of this Act, entitle the defendant at the trial to have the damages restricted to actual damages, appear to exist, except the circumstance that the article complained of involves a criminal charge(*e*).

For the purposes of this section the plaintiff or the defendant,

(*c*) For the meaning of "newspaper" and decisions as to same, see chapter on Newspaper Libel—What is a Newspaper? In Slatterly *et al.* v. R. G. Dun & Co., noted therein, the judgment of a local judge, refusing security on the ground that the paper in question was not a "newspaper," was reversed, and security ordered.

(*d*) R.S.O. 1897, c. 68.

(*e*) *Ibid.* s. 10(1).

or their agents, may be examined upon oath at any time after the statement of claim has been filed(*f*).

Order of judge of High Court as to security final.

An order made under section 10 of the Ontario Act, by a judge of the High Court, granting or refusing security for costs in an action for libel contained in a newspaper, shall be final and shall not be subject to appeal, and where the order is made by a local judge, the same may be appealed from to a judge of the High Court sitting in Chambers, whose order shall be final, and shall not be subject to appeal(*g*).

The law of British Columbia.

Section 16 of the British Columbia "Law of Defamation Amendment Act"(*h*) is, except as to the meaning of the word "newspaper," precisely the same as section 10 (*supra*) of the Ontario statute.

The law of Manitoba.

The Libel Act of Manitoba(*i*) contains the following provision: In any action brought for libel contained in any public newspaper or periodical publication, the defendant may, at any time after the filing of the declaration, apply to the court in which such action is pending for security for costs, upon an affidavit made by the defendant applying, shewing to the court the nature of the action and of the defence, and that in the belief of the deponent the plaintiff is not possessed of property sufficient to answer the costs of the action in case a verdict or judgment be given in favour of the defendant, and that the defendant has a good defence upon the merits as he the deponent is advised and believes; and the court or a judge thereof, in his or their discretion, may make an order that the plaintiff in any such action shall give security for the costs to be incurred in such action in the same manner as, and in accordance with the practice, in cases where the plaintiff resides out of the Province, and such order

(*f*) R.S.O. 1897, s. 10(2); R.S.B.C. 1897, c. 120, s. 16; R.S.M. 1902, c. 97, s. 10.

(*g*) R.S.O. 1897, c. 68, s. 15.

(*h*) R.S.B.C. 1897, c. 120.

(*i*) R.S.M. 1902, c. 97, s. 10.

shall be a stay of proceedings in the case until the proper security be given as aforesaid: Provided always, that this section shall not apply to any action wherein the plaintiff shall sue *in forma pauperis*.

Similarity of the statutory provisions.

All these enactments are substantially the same as to the time when the application for security may be made, namely, any time after the filing of the plaintiff's statement of claim, or (in Manitoba) the declaration; as to disclosing the nature of the action and the defence, which may be done by the pleadings and the defendant's affidavits; as to shewing a good defence on the merits, and the inability of the plaintiff to pay the costs of a successful defence; and as to the mode of giving security. The Ontario and British Columbia statutes require additional particulars, not mentioned in the Manitoba Act, but some of these particulars are probably covered by the terms of the Act last named. The two former statutes distinguish between cases in which a criminal charge is involved, *i.e.*, a charge that the plaintiff has been guilty of a criminal offence(*j*), and cases in which there is no such charge. In both cases the defendant must shew (1) the nature of the action and the defence; and (2) the insufficiency of plaintiff's property to answer defendant's costs, *i.e.*, property that would be forthcoming and available in execution for that purpose(*k*).

Security where no criminal charge involved.

Where no criminal charge is involved, he must shew in addition, (3) that he has a good defence upon the merits; and (4) publication in good faith(*l*); *or* that the action is trivial or frivolous, *i.e.*, an action which must fail, if the facts found at

(*j*) Georgian Bay Ship Canal and Power Aqueduct Co. v. World Newspaper Co. of Toronto, p. 451, *post*.

(*k*) Bready v. Robertson (1890) 14 O.P.R. 7, at p. 10.

(*l*) See as to both points, Bennett v. Empire Printing Co., p. 453, *post*, and Lennox v. Star Printing Co., pp. 454-5, *post*; as to (3) Lancaster v. Ryckman; Swain v. Mail Printing Co.; Paladino v. Gustin; Feaster v. Cooney; and Bready v. Robertson *et al.*, p. 461, *post*, which also decide that the onus is on the defendant, and that the defence must be not only stated but disclosed; and as to (4) Georgian Bay Ship Canal and Power Aqueduct Co. v. World Newspaper Co. of Toronto, p. 451, *post*.

the trial are as stated in the defendant's affidavits(*m*). This alone is a good reason for granting the order.

Security where criminal charge involved.

Where a criminal charge is involved the defendant must shew in addition, (1) that the action is trivial or frivolous; (2) *or* that the general circumstances appear to exist which would entitle the defendant at the trial to have the damages restricted to "actual damages only," *i.e.*, actual specific loss, as, *e.g.*, the diminution of business suffered by the plaintiff in his trade or profession(*p*).

"Actual damages only."

"Actual damages only" shall be recovered, (1) where it appears, on the trial of the action, that the article was published in good faith, *i.e.*, with honesty of purpose; (2) that there was reasonable ground to believe that its publication was for the public benefit; (3) that it did not involve a criminal charge(*q*); (4) that the publication took place in mistake or misapprehension of the facts; (5) that a full and fair retraction of any statement alleged to be erroneous was published (in Ontario) in the next regular issue of the newspaper, or in any regular issue published within three days after the receipt of the notice specifying the statements complained of, or (in British Columbia) in the next regular issue, or in any regular issue, of the newspaper, published within three days after the service of the writ; (6) that the retraction was published as conspicuously, as to place and type, as the article complained of(*r*); and (7), where a candidate for a public office in Ontario or British Columbia is the complainant, that it was published, editorially and conspicuously, at least five days before the election(*s*). The provision as to

(*m*) *Per* Meredith, C.J., in Macdonald v .World Newspaper Co. (1894) 16 O.P.R. 324, at p. 327. See, also, Graeme v. Globe Printing Co., pp. 444-5, *post*.

(*p*) Ingram v. Lawson (1840) 6 Bing. N.C. 212; Ratcliffe v. Evans (1892) 2 Q.B. 524, at p. 533.

(*q*) Smyth v. Stephenson; Drumm v. O'Beirne; Macdonald v. World Newspaper Co., *post*, pp. 448-9, 449, and 447-8, respectively.

(*r*) R.S.O. 1897, c. 68, s. 6(2); R.S.B.C. 1897, c. 120, s. 6(1).

(*s*) R.S.O. 1897, c. 68, s. 6(3); R.S.B.C. 1897, c. 120, s. 6(1)(*a*); Conmee v. Weidman, pp. 456-7, *post*.

retraction would apply whether a criminal charge is involved or not.

Onus on the defendant.

As to all these matters, namely, the trivial or frivolous nature of the action for the criminal charge complained of; or, in the alternative, the existence of the several conditions restricting the plaintiff to actual damages; and, in the case of a candidate for an elective office, the statutory retraction, the onus, is on the defendant to satisfy the court or judge before an order for security will be granted.

"Good faith."

In determining the question of "good faith" the court will look at the circumstances as they presented themselves to the mind of the defendant at the time of the publication. He must not have wilfully shut his eyes to any source of information. If there were means at hand for ascertaining the facts, of which he neglected to avail himself, and he chose to remain in ignorance when he might have obtained full information, his honesty of purpose will be questionable.

"Publication for the public benefit."

The "publication for the public benefit," mentioned in the statute, is where the general advantage to the community in having the libel made public more than counterbalances the inconvenience to the person whose conduct may be the subject of the libel(*t*).

"Mistake or misapprehension of the facts."

The "mistake or misapprehension of the facts," on the defendant's part, which is also one of the circumstances to be shewn, means an honest mistake or misapprehension. When his conduct in regard to the publication is in question, and there is a *primâ facie* case against him, the defendant must establish the honesty of his error. Belief, however honest, in the truthfulness of the defamatory matter is not enough; in fact it is no defence in any

(*t*) *Per* Lawrence, J., in Rex v. Wright (1799) 8 T.R. 298. See, also, Pankhurst v. Sowler (1886) 3 T.L.R. 193, and remarks of Huddleston, B., in Kelly v. O'Malley (1889) 6 T.L.R. 62.

case(*u*). It should appear that his belief is honestly founded. A mistake innocently or inadvertently made, as to the facts, would affect the actual malice of the publication; it would not, at all events, be evidence of malice(*v*).

The Manitoba Act, it will be observed, does not apply to a plaintiff suing *in forma pauperis*, and permits the defendant to swear to a good defence on the merits "as he is advised and believes."

Practice as to giving security.

The practice as to giving security in cases where the plaintiff resides out of the Province, which is the practice to be followed in cases of newspaper libel, is well understood. A plaintiff in every suit, whether for libel or any other cause, who resides outside the Province, and is therefore beyond the jurisdiction of the court, and who has not sufficient property within the jurisdiction, may be compelled, on the application of the defendant, to give such security. It is usually given either by bond to the defendant, or by the payment into court of a certain sum of money sufficient to answer the defendant's costs(*w*).

Bready v. Robertson (1890).

In *Bready* v. *Robertson et al.*(*x*) Boyd, C., said: "I observe that the old practice of fixing $400 has been modified by the new rule 1248, which enables the party to pay into court not less than half the penalty of the bond required. That would seem to imply that ordinarily $200 would measure the costs of defence in average actions; this, I suspect, has been framed rather in ease of the person to give security than in accord with the actual results of litigation. But, however that may be, the rule affords

(*u*) Cooper v. Lawson (1838) 8 A. & E. 746; Campbell v. Spottiswoode (1863) 32 L.J.Q.B. 185; 8 L.T. 201; Harle v. Catherall *et al.* (1866) 14 L.T. 801; Botterill v. Whytehead (1879) 41 L.T., at p. 590; Bryce v. Rusden (1886) 2 T.L.R. 435; Brenon v. Ridgway (1887) 3 T.L.R. 592.

(*v*) Harrison v. Bush (1855) 5 E. & B. 350; 1 Jur. N.S. 846; 25 L.J. Q.B. 25; Kershaw v. Bailey (1848) 1 Ex. 743; 17 L.J. Ex. 129; Brett v. Watson (1872) 20 W.R. 723; Pater v. Baker (1847) 3 C.B. 831; 11 Jur. 370; 16 L.J.C.P. 124; Scarll v. Dixon (1864) 4 F. & F. 250.

(*w*) See Rules 1198, *et seq.*, O.J.A., as to the practice in Ontario.

(*x*) (1890) 14 O.P.R. 7, at p. 9.

additional reason for not bearing too hardly upon persons subject to this special legislation."

Increase or diminution of amount of security.

In Ontario the amount of security, whether given by an order issued on *præcipe* or otherwise, may be increased or diminished from time to time by the court or a judge(*y*). In an action for libel in which the plaintiff, a resident of Quebec, had given security under a *præcipe* order by paying $200 into court, but in which, as afterwards appeared, that sum was insufficient to answer the defendants' costs on account of the issue of a commission to Quebec, etc., an application for increased security was dismissed by an official referee, whose order was affirmed by Meredith, J., in Chambers, and by the Divisional Court, on appeal. The referee held, following *Trevelyan* v. *Myers*(*z*), that the defendants having elected to take a *præcipe* order for a definite amount of security, instead of making a special application, were bound by their election, and must abide by it. The court did not see fit to overrule the cases cited, and were of opinion that they always had power to increase or diminish the security in a proper case (*zz*). In *Trevelyan* v. *Myers* Boyd, C., thought the facts brought the case within the decision in *Bell* v. *Landon*(*a*). The defendant, he said, should have foreseen the necessity of a commission to England, and of the costs being larger than usual, and, instead of taking the ordinary *præcipe* order for security, should have made a special application for security in a larger sum. Not having done so, he must abide by his election. For this reason, and because of the delay in the application, he dismissed the appeal from the Master's order refusing the application. In *Bell* v. *Landon* it was not shewn that defendant might not at the outset have applied for a larger sum than the then usual amount, $400, and the order for increased security was refused where that sum was likely to be insufficient only by reason of an adjournment of the hearing, owing to the judge having to close

(*y*) See Rule 1208, O.J.A., which, according to D'Ivry v. The World, *infra*, is merely declaratory of the inherent power of the court.

(*z*) (1895) 31 C.L.J. 284; 15 C.L.T. 135.

(*zz*) D'Ivry v. World Newspaper Co. of Toronto (1897) 33 C.L.J. 202. See Moore v. Scott (1907) 16 M.L.R. 428.

(*a*) (1881) 9 O.P.R. 100.

the sittings in order to take another circuit(*b*). But where plaintiff moves for a new trial, an order may be made for additional security for the costs of the motion(*c*).

"Resides."

The term "resides" in these statutes presumably means a permanent, and not a temporary, residence beyond the boundaries of the Province(*d*).

The decisions of the courts, particularly in Ontario, under these statutes, and under the analogous enactments in actions by women for slander imputing unchastity(*e*), and in actions against justices of the peace and others fulfilling any public duty(*f*), have established a series of rules in regard to security for costs in actions for libel, and in actions for slander also where such security is permissible.

Obtaining of security confined to editor, publisher, or proprietor.

"In an action for libel contained in a newspaper" in Ontario, and, presumably, "in a newspaper or other periodical publication" in British Columbia and Manitoba, the order for security for costs is limited to the editor, publisher, or proprietor, and is not open to a correspondent, sued for the libel. This was held by the Ontario Common Pleas Division, on an appeal by the defendant from an order of Armour, J., reversing an order of the Master in Chambers, which required the plaintiff to give security for costs of an action for libel. The defendant was not the editor, publisher or proprietor, but a correspondent, of the newspaper, the libel charged being in a letter signed by the defendant and published in the newspaper, with which the defendant had no connection. Armour, J., was of opinion that the case was not one

(*b*) See, also, Simon v. La Banque Nationale (1878) 7 O.P.R. 422, in which it was held that the application should have been made at an earlier stage.

(*c*) Bentsen v. Taylor (1893) 2 Q.B. 193; 69 L.T. 333.

(*d*) Wilson v. Wilson (1874) 6 O.P.R. 152; Robertson v. Cowan (1885) 10 O.P.R. 568; Hately v. Merchants Despatch Transportation Co. (1883) 10 O.P.R. 253; Codd v. Delap *et al.* (1893) 15 O.P.R. 374. As to what constitutes "residence" abroad, see De Trench, 25 Ch. D. 500.

(*e*) R.S.O. 1897, c. 68, s. 5(3), p. 458, *post*.

(*f*) R.S.O. 1897, c. 89, s. 1, p. 462, *post*.

for security within the meaning of the Act. The court held, that although the alleged libel was literally "contained in a public newspaper or periodical," there were other expressions in the same section of the Act, *e.g.*, that which required the defendant to swear that "the statements complained of were published in good faith," which clearly shewed that the provisions as to security applied only to the proprietor, publisher, or editor, of a newspaper, who alone could take the benefit of it. The court were unanimous in dismissing the appeal(*g*). This decision has always been regarded in the Ontario courts as a proper interpretation of the statute.

Merits of action not to be tried on conflicting affidavits, and security to be allowed where prima facie case in favour of defendant.

The merits of the action are not to be tried on conflicting affidavits(*h*), and security is to be allowed if there is a *primâ facie* case in favour of the defendant(*i*). A married woman sued the publishers of the *Mail* newspaper, of Toronto, for the following statement contained in a published report of the proceedings of the city Police Court: "T. S. (husband of plaintiff), through his counsel, yesterday agreed in the Police Court to support his wife if she would forsake some improper associates to whom he objected. The magistrate thought this a fair proposal." The defendants moved before the Master in Chambers for security for costs upon two affidavits that the paragraph complained of was a fair and true report of a proceeding in the city Police Court, and was published in good faith, etc., and that the plaintiff was a person of no means, etc. The plaintiff filed four affidavits denying the correctness of the report, and stating that she had been greatly injured by it; but it was not denied that she was a person of no means. An appeal from the Master's order granting security was dismissed. "The judge," said Boyd, C., "is not to try the merits of the case, or to pass upon the disputed facts disclosed in conflicting affidavits

(*g*) Egan v. Miller (1887) 7 C.L.T. (Occ. N.) 443; followed in Neil v. Norman (1901) 21 C.L.T. (Occ. N.) 298. See, also, Powell v. Ruskin (1899) 35 C.L.J. 241.

(*h*) Bartram v. London Free Press, *infra*.

(*i*) Swain v. Mail Printing Co., *infra;* Lennox v. Star Printing Co., pp. 454-5, *post;* Southwick v. Hare, pp. 462-3, *post;* Bartram v. London Free Press, *infra*.

filed against the application. The materials under oath used by the applicant are to be weighed, and if from these it appears that there is a good defence on the merits—that is, a *primâ facie* case of justification or privilege—one which ought to succeed, if it is not answered or explained away at the trial, then the statute is satisfied and security should be ordered. Such is this case; the affidavits of the defendants shew a fair and accurate report of what occurred in the open court of the police magistrate; that is sufficient for the obtaining of security. Whether the defence will be substantiated, when tried before a jury, is another matter not now pertinent"(*j*). The opinion thus stated, that "the materials under oath used by the applicant are to be weighed," was adopted and followed by Rose, J., in *Lennox* v. *Star Printing Company*(*k*).

Contentious affidavits in answer not admissible.

Contentious affidavits in answer to the application will not be received. Upon an appeal from an order of a local judge requiring the plaintiff to give security for costs in an action for newspaper libel, the plaintiff desired to have the benefit of an affidavit made by himself contradicting the statements in the affidavit of the agent of the defendant on which the motion was based. The object, it was said, was not to try the facts on affidavits, but to shew that the defendants' agent did not have knowledge of the facts; that many of the statements made by him were untrue; and, therefore, that his affidavit was not such as is required by section 10 of the statute. The appeal was dismissed, Ferguson, J., holding that the plaintiff's affidavit, which had not been used by the local judge, could not be read or used upon the application. The cases referred to were *Southwick* v. *Hare*(*l*); *Paladino* v. *Gustin*(*m*); *Lancaster* v. *Ryckman*(*n*); and *Swain* v. *Mail Printing Co.*(*o*)(*p*).

(*j*) Swain v. Mail Printing Co. (1894) 16 O.P.R. 132.

(*k*) (1895) 16 O.P.R. 488, pp. 454-5, *post*.

(*l*) (1893) 15 O.P.R. 222.

(*m*) (1897) 17 O.P.R. 553.

(*n*) (1893) 15 O.P.R. 199.

(*o*) (1894) 16 O.P.R. 132.

(*p*) Bartram v. London Free Press Printing Co. (1897) 18 O.P.R. 11.

When action "frivolous."

Security will be ordered in a "frivolous" action. In an action for libel brought by one *Graeme* against the *Globe* Printing Company, the plaintiff complained of statements purporting to come from a correspondent at W., and published in the *Globe*, imputing a crime to one *Graham*. In this correspondence it was stated that one B., then a prisoner at W. under sentence of death for murder, had, in a conversation with the correspondent, stated that he had an accomplice, and that he had made it appear that this accomplice was a young Englishman named Graham; but the correspondent said that no one would believe that the charge against Graham was true. An article appeared in the *Globe*, a week after the commencement of the action, stating that the person referred to in the former article was not Graeme, the plaintiff, but one N. H. or W. H. Graham. There were other facts shewing that the plaintiff was not the person referred to. The Master in Chambers granted an order for security for costs on the ground that the action was "frivolous." This order was affirmed on appeal by MacMahon, J., and re-affirmed by the Divisional Court in a judgment (unreported) at the close of the argument.

Hunt v. Algar (1833).

In regard to the question whether the article, taken as a whole, and containing, as it did, a refutation by the writer and publishers of the antecedent part comprising the statement said to have been made by B., could be considered as libellous, MacMahon, J., referred to *Hunt* v. *Algar*(*q*), where one newspaper copied a libellous paragraph from another, adding the word "fudge" at the close. Lord Lyndhurst, in his charge, said, "that it was for the jury to say whether it was the object of the defendant to vindicate the character of the plaintiff by the addition of the word "fudge," or whether it was only introduced for the purpose of creating an argument in case proceedings should afterwards be taken." That is, where a story is being put in circulation which is libellous, and it is published with what is claimed to be a vindication of the character of the person against whom the accusation is made, it is for the jury to say whether that which has been set up as a vindication was

(*q*) (1833) 6 C. & P. 245.

honestly made, or was inserted with the design of shielding the defendant from the consequences of a publication of the libel(*r*).

Evoy v. Toronto Star (1903).

Security was also ordered, for similar reasons, in an action against the publishers of the *Star*, Toronto, for the publication of the following report of proceedings before the city Police Magistrate. "A year ago last August M. E. (plaintiff) was thought to have been a frequenter of a disorderly house, and a warrant was issued for his arrest. But he disappeared as mysteriously as though he had ascended to some other clime, and the warrant could not be executed. He was in court this morning, and affirmed that he had been in the city all the time and working. 'I think you have earned your discharge,' said his Worship." The inference might be that he was to be complimented for eluding the police so successfully." An affidavit filed by defendants stated that the plaintiff was not the man who had disappeared, and to whom the magistrate had made the remark quoted, but another man; that the defendants had published a correction; and that plaintiff had in fact been before the magistrate on some charge on the day in question, and had been confused with the other man by defendants' reporter. Plaintiff was admittedly not possessed of sufficient means to answer costs. The Master in Chambers said, that although privilege could not be claimed for the report under section 9 of the statute, on account of the report being a mistake and not "fair and authentic,"(*rr*) yet the defence that the report was published in good faith and without malice, and that a correction or apology was published, was a good defence, and, under the circumstances, the grounds of action were trivial or frivolous(*s*). An appeal from this decision was dismissed by Meredith, C.J.(*t*).

Action "frivolous" where words incapable of libellous meaning.

So, also, the action is "frivolous," and security will be ordered, where the words are incapable of a libellous meaning. Two para-

(*r*) Graeme v. Globe Printing Co. (1890) 14 O.P.R. 72.

(*rr*) Ashmore v. Borthwick, 2 T.L.R. 113, 209; McNally v. Oldham, 8 L.T.N.S. 604; Gwynn v. South Eastern Ry. Co., 18 L.T.N.S. 738; Shepheard v. Whitaker, L.R. 10 C.P. 502.

(*s*) Evoy v. Star Printing and Publishing Co. (1903) 2 O.W.R. 91.

(*t*) (1903) 2 O.W.R. 119.

graphs published in a local newspaper were alleged to impute fornication to an unmarried woman. It was argued that the sting of the alleged libel, which was contained in a correspondent's letter to the paper, consisted in the words, "Wonder if he is renewing old acquaintances?"—being put interrogatively instead of positively. Upon an appeal from the Master in Chambers, who had refused to order security on the ground that these words, taken in connection with the other language of the publication, were capable of the meaning alleged, and that the defendant had not shewn a good defence on the merits, it was held (*per* MacMahon, J.), that no innuendo could alter or extend the sense of the words so as to give them the meaning contended for; that the grounds of action were frivolous; and that the order appealed from must be set aside and the plaintiff ordered to give security. It had been said, in reference to the Act which permits an action to be brought for words spoken and published which impute unchastity or adultery to any woman or girl, that "the Act does not apply to any case in which gross epithets are used merely as general terms of abuse; the words must be such as to convey to the hearers a definite imputation that the plaintiff has in fact been guilty of adultery or unchastity"(*u*). So, also, in an action for libel in which it is charged that the writing imputes unchastity to a woman or girl, the language must be such as to convey to the readers a definite imputation that the plaintiff has been guilty of unchastity(*v*).

Security ordered where words contained in a fair and accurate report of a public meeting published in the public interest.

Security was also ordered when the alleged libel was contained in a newspaper report of the proceedings of a public meeting of a municipal council, and the defendant's affidavit stated that the plaintiff was not possessed of property sufficient to answer the costs of the action; that the report was fair and accurate; and that its publication was for the public interest. The Master in Chambers, who made the order, said that it had been argued that the defendants were not entitled to security because the meeting in question was not a public meeting within the

(*u*) Odgers Law of S. & L., 3rd Ed., at p. 90.

(*v*) Marsh v. McKay (1903) 2 O.W.R. 522, 614.

meaning of the Provincial Libel Act, as interpreted by the English Acts of 1887 and 1889. This point had never been decided in this Province, and he did not think he could decide it in face of the defendant's affidavit which disclosed a good defence, if it were proved. This, as the cases shewed, was all that could be determined on the present motion. The further argument that the statements made at the meeting, as reported, amounted to a criminal charge, under section 360 of the Code(*vv*), was, in his opinion, not well founded(*w*).

A second action for the same publication is "frivolous" and vexatious.

In *Macdougall* v. *Knight*(*x*) the defendant published, in the form of a pamphlet, a report of the judgment delivered in a former action which the plaintiff had brought against him. The pamphlet contained no report of the evidence given at the trial, and there were passages in the judgment reflecting on the plaintiff's conduct. In an action for libel in respect of such publication, the jury found that the pamphlet was a fair, accurate and honest report of the judgment, and was published without malice, and returned a verdict for the defendant. The plaintiff thereupon brought another action for libel in respect of the same publication, relying on other defamatory statements in the pamphlet than those set out in the statement of claim in the former action. On an application to dismiss this action as frivolous and vexatious, the English Court of Appeal held (reversing the judgment of the Queen's Bench Division), that the questions for the jury in the second action being identical with those decided in the first, a plea of *res judicata* must prevail, and that the action ought to be stayed as frivolous and vexatious. It was also held that, even if the plaintiff could rely in one action on one part of the pamphlet and in another action on another part, such a course was an abuse of the process of the court, and the second action should be stayed.

Action not "trivial or frivolous" merely because a good defence on the merits is alleged and not denied.

But an action for words involving a criminal charge cannot be considered "trivial or frivolous," merely because the exist-

(*vv*) Now s. 406.

(*w*) Parke v. Hale (1903) 2 O.W.R. 1172.

(*x*) (1890) 25 Q.B.D. (C.A.) 1.

ence of a good defence on the merits, *e.g.*, justification, is alleged by the defendant's affidavits, and is not contravened by an affidavit of the plaintiff; the action in such a case must be shewn to be "trivial or frivolous." It not being the practice, on an application for security for costs, to try the questions between the parties, the plaintiff may properly consider that a denial on oath of the truth of the charges against him is unnecessary. Where, therefore, a newspaper publishing company, who were sued for the publication of an article charging the plaintiff with attempted "blackmail," applied for security on affidavits alleging, what was not denied by the plaintiff, that the charge was true, and that the action was "trivial or frivolous," the application was refused by the Master in Chambers, and an appeal from his order was dismissed(*y*).

Security refused where the words may "involve a criminal charge" which jury must determine.

Where the words may "involve a criminal charge" which the jury must determine, security will be refused. The defendant, at the request of the plaintiff, published in his newspaper, the *Planet*, a statutory declaration made by one M., giving the particulars of a certain conversation between D. and T., in which the conduct of the plaintiff, as chairman of the board of works of the city council, was discussed. He also published the following words in a letter commenting upon this declaration: "There was not a man in sight while I (T.) talked with D., or rather while D. talked with me, for the inspector was brimming over with information, and gave it without stint. Mr. M.'s presence is a creature of (plaintiff's) fertile brain." The innuendo was, that the plaintiff had procured M. to sign the declaration untruly alleging that he was present at the conversation between D. and T. Upon an application for security for costs, the principal question was, whether the words above quoted "involved a criminal charge," within the meaning of the statute. The local judge having ordered security, it was held, upon appeal to a judge in Chambers (Meredith, C.J.), who allowed the appeal, that where a statement of claim in an action for libel contained in a newspaper is not so defective as to be demurrable, and the words are alleged by the plaintiff to have been used in a sense

(*y*) Macdonald v. World Newspaper Co. (1894) 16 O.P.R. 324.

which involves the making, by the person using them, of a criminal charge against the plaintiff, and may have that meaning, the case is brought within the exception contained in R.S.O. 1897, c. 68, s. 10 (1), clause (d), and the defendant is not entitled to security. That clause is applicable to cases where an innuendo is necessary to give the words complained of a defamatory sense; and, upon an application for security, there cannot be a trial of the action on the merits in order to determine whether the words used involve a criminal charge(*z*).

Security disallowed in similar case where plaintiff not named in newspaper article.

In *Drumm* v. *O'Beirne* (1897), which is merely noted in 17 O.P.R. at p. 376, Meredith, C.J., allowed an appeal from an order of a local judge requiring security for costs to be given by the plaintiff in an action for libel against a newspaper proprietor, the circumstances of which were similar to those in the preceding case, except that the plaintiff was not mentioned by name in the article complained of. As to that he was of opinion that, upon the statement of claim, it was impossible to say that the question whether the plaintiff was pointed at by the article could be withdrawn from the jury.

Words imputing a "Provincial crime."

In an action against the publishers and the editor of the *Essex County World* newspaper for the publication of certain statements imputing that plaintiff had corruptly and illegally received certain moneys, which he had converted to his own use, the Master in Chambers dismissed a motion for security of costs on the ground that the statements in question involved a criminal charge, if not within the Ontario Election Act(*a*), at least within the meaning of the Ontario Libel and Slander Act(*b*). He thought that the decision in *Regina* v. *Wason*(*c*) shewed that there is a "Provincial criminal law"; that this view was sup-

(*z*) Smyth v. Stephenson (1897) 17 O.P.R. 374. See, also, Macdonald v. The World, pp. 450-51, *post*, and Gordon v. Star Printing and Publishing Co. (1905) 6 O.W.R. 887.

(*a*) R.S.O. 1897, c. 9, ss. 159 and 188(7).

(*b*) R.S.O. 1897, c. 68, s. 10(a).

(*c*) (1890) 17 O.A.R. 221.

ported by the decision of the Supreme Court of Canada in *Attorney-General for Canada* v. *Attorney-General for Ontario*(*d*) on the question of the pardoning power; and that the enactments of the Legislature of Ontario (*supra*) must be held to be included in the exception as to a "criminal charge" in the above mentioned section(*e*) of the Libel and Slander Act; although, as appears, he did not base his decision on the provisions referred to in the Ontario Election Act, but on his view of the interpretation put upon the words complained of in the statement of claim. Reference is made to *Smyth* v. *Stephenson*, *supra*(*f*).

Security refused where newspaper charged attempted "blackmail."

Words accusing plaintiff of attempted "blackmail" were held to "involve a criminal charge" which the jury must determine, and security was refused. The publishers of the *World* newspaper of Toronto were sued for the following statements contained in an article in that newspaper: "What is the record of the 'trusted agent' (plaintiff) of the said aqueduct company in regard to another franchise, that of the street railway? Why, he tried to blackmail those who desired the franchise out of large sums of money, not in the interests of the city, but of himself. Is it not a fair inference that this same 'trusted agent' would compel the city to pay tribute to him or his company, should the city ever desire to go to Lake Simcoe for water?" The statement particularly complained of was that as to attempted "blackmail." The Master in Chambers, to whom an application was made for security for costs, after referring to *Edsall* v. *Brooks*(*g*), was of opinion that the plaintiff had been charged with words involving a criminal offence punishable under the Criminal Code, and refused the motion. Upon appeal Meredith, C.J., held, that the words might bear such a meaning as to charge the indictable offence defined by section 406 of the Criminal Code (*gg*), and that *Edsall* v. *Brooks* shewed that the

(*d*) (1893) 23 S.C.R. 458.
(*e*) s. 10(a).
(*f*) Harman v. Windsor World Co., *et al.* (1903) 2 O.W.R. 442.
(*g*) 17 Abb. P.R. (N.Y.), at p. 226.
(*gg*) Now s. 454.

meaning alleged might be attributed to them, but the question whether they did so when read with the context, was for the jury, and one which should not be determined upon this application; and the Master having held that they "involved a criminal charge," his decision should not be interfered with(*h*).

Security granted where a criminal charge not "involved," and publication in good faith.

Where no criminal charge is "involved" and there is publication in good faith, the defendant is entitled to security. The plaintiff corporation sued for the publication in a newspaper of an alleged libel to the effect that the plaintiffs had tried to bribe the aldermen of the city by issuing to them paid-up stock in the plaintiff company. Upon appeal from the order of the Master in Chambers dismissing an application for security, Meredith, C.J., held that the words complained of did not involve a criminal charge, as alleged by plaintiffs; for a corporation cannot be charged with an offence involving malice or the intention of the offender, following *Mayor, etc., of Manchester* v. *Williams*(*i*), and distinguishing *Journal Printing Company* v. *Maclean*(*j*). The words "involves a criminal charge" in the statute, he said, mean "involves a charge that the plaintiff has been guilty of the commission of a criminal offence." Where, as in this case, the defendants shewed publication in good faith, which was not displaced by the cross-examination of the deponent on his affidavit, and having regard to the object of the legislation as to security, and the principle upon which, according to *Bennett* v. *Empire Printing Company*(*k*), the application is to be dealt with, it was proper that there should be an order for security for costs(*l*).

(*h*) Macdonald v. World Newspaper Co. (1894) 16 O.P.R. 324; 2 O.L.R. 278. An accusation of "blackmailing" imputes an indictable offence: Marks v. Samuel (1904) 2 K.B. 287 (C.A.).

(*i*) (1891) 1 Q.B. 94.

(*j*) (1894) 25 O.R. 509.

(*k*) (1894) 16 O.P.R. 63. In this case Boyd, C., expressed the opinion that the legislation as to security is designed to protect newspapers reasonably well conducted, with a view to the information of the public.

(*l*) Georgian Bay Ship Canal and Power Aqueduct Co. v. World Newspaper Co. of Toronto (1894) 16 O.P.R. 320.

The malice "involved in a criminal charge."

The above decision, in so far as it assumes or determines that a corporation cannot be charged with an offence involving malice, is open to question. In *Mayor, etc., of Manchester* v. *Williams* (*supra*), the English Queen's Bench Division held, that inasmuch as a corporation, as distinguished from the individuals comprising it, cannot be guilty of bribery and corruption, the statement of claim, which alleged a charge of corrupt practices against the plaintiffs, disclosed no cause of action. Day, J., in his judgment, refers to a statement of Pollock, C.B.(*m*), that a corporation could not "sue in respect of a charge of corruption. For a corporation cannot be guilty of corruption, although the individuals comprising it may." But he (Day, J.) added, that "a corporation may sue for a libel affecting property, not for one merely affecting personal reputation"—which was the case before the court. Mr. Blake Odgers, the learned author of the well-known text-book, argued with much force for the plaintiffs that the libel complained of contained charges of "scandalous and abominable expenditure" by the corporate body, and not by the individual members of it, and that such charges could only refer to the corporation as a whole; and that if a corporation could be guilty of malice by its servants so as to render it liable to be sued for malicious prosecution, it must equally be capable of being guilty of corruption so as to entitle it to sue for an imputation of corruption. In *D'Ivry* v. *World Newspaper Company of Toronto*(*n*), in which the defendants claimed privilege against producing the file or number of the paper containing the libel in question, it was argued, for the plaintiff, that a corporation aggregate is incapable of malice, and, therefore, could not be found guilty of criminal libel. Burton, J.A., said the weight of authority strongly preponderated against that view, and the Ontario Court of Appeal, of which he was a member, were unanimous in holding that it would not be proper to compel the defendants to make production of documents on oath which might tend to subject them to a criminal prosecution, referring specially to the observations of Lord Blackburn in

(*m*) In Metropolitan Saloon Omnibus Co. v. Hawkins (1859) 4 H. & N., p. 90.

(*n*) (1897) 17 O.P.R. 387.

Pharmaceutical Society v. *London & Provincial Supply Association*(*o*) in support of their opinion(*p*).

Security ordered where good defence upon the merits, and publication in good faith.

So, also, where a good defence on the merits and publication in good faith were shewn, security was granted. In an action against the publishers of the *Empire* newspaper, of Toronto, the plaintiff claimed damages for alleged defamatory statements published in that newspaper in June and November, 1892, respectively, in which the plaintiff was referred to as an "unmitigated scoundrel," and in which it was stated that he had endeavoured to ruin his wife by inciting another person to commit adultery with her. The principal defence was justification. An official referee, sitting for the Master in Chambers, dismissed the application for security, whereupon the defendants appealed to a judge in Chambers (Ferguson, J.), who allowed the appeal and ordered security, which order was affirmed by the Divisional Court. The principal questions discussed on the different motions were, whether a good defence on the merits was shewn by the defendants, and whether the publication was in good faith.

Opinion of Boyd, C.

In the Divisional Court Boyd, C., said, that the judge in Chambers having, on appeal from the Master, exercised his discretion in favour of security being granted, he did not think that an appeal from that discretion should prevail. "The elements required by the statute in such cases exist here. . . . It is admitted that the plaintiff has no means, and it was hardly disputed that the defendants have a defence upon the merits. At all events, the manager has sworn to a belief in the substantial truth of what was published, and that, if proved at the trial, is a good defence in a civil proceeding for libel. It is also sworn that the publication was in good faith, and no reason appears to suggest that such is not the case, at all events as to the publication of the 2nd of June, 1892, for which the plaintiff sued, as well as for that of November, 1892. The return to the subject at

(*o*) 5 App. Cas. 857, at p. 870.

(*p*) See chapters on Malice and the Law Concerning Corporations and Companies.

the latter stage might perhaps render it more difficult to satisfy a jury that there was no malice, but at present, at this preliminary stage, I do not feel any such strength of opinion on the subject as to differ from the order in appeal: *Southwick* v. *Hare* (1893), 15 O.P.R. 222.

The legislation as to security designed to protect newspapers reasonably well conducted.

This legislation appears to be unique, and the intention is to protect newspapers reasonably well conducted, with a view to the information of the public. I would dismiss the appeal, and also the action, as the time has elapsed for giving the security, and it was agreed that this course should be taken if the court disallowed the appeal. I may add that I agree with my brother Ferguson that no criminal charge is involved in the matter published, within the meaning of section 9 (a)"(*q*)(*qq*).

Security refused where good defence on merits not shewn.

Security will be refused where a good defence on the merits is not shewn, *e.g.*, that the libels did not refer to the plaintiff and were published in good faith. A barrister and solicitor sued the publishers and the editor of the *Star* newspaper, of Toronto, for defamatory matter concerning him which had appeared in three issues of the newspaper. The plaintiff, acting as solicitor for one G., had written a letter to the defendants complaining of some statements in the newspapers concerning G., and the first of the articles objected to contained comments upon this letter. The defendants had apparently been irritated and provoked by actions of libel threatened and brought against them, and, in the criticism of the plaintiff's letter, the threatened action was classed among "vexatious suits," and it was stated that it was "proposed to lay the circumstances before the Provincial Government as evidence of the necessity for legislation to protect reputable newspapers from vexatious suits." The plaintiff and his letter were ridiculed, and the article then stated that "the *Star* knows nothing of the lawyers who are handling these three cases for the plaintiffs. The *Star's* solicitors are reputable gentlemen,

(*q*) Now R.S.O. 1897, c. 68, s. 10(1)(a).

(*qq*) Bennett v. Empire Printing Co. (1894) 16 O.P.R. 63.

standing well in the profession, and we hope the lawyers they are to meet in these cases bear equally good characters. But that has not been the experience in the past." Then followed an attack upon the lawyers who acted in the former suits, a warning to "the next shyster lawyer who undertakes to bulldoze this paper into buying him off," and a violent attack upon "fakir" lawyers, ending with the words: "These are the kind of lawyers the *Star* intends to get after." The plaintiff alleged that he was one of those referred to in these quotations from the *Star* article. The other publications complained of were a letter signed "A Sufferer," a second letter signed "Barrister," but written in the defendants' office, and some other items in a later issue of the paper. The defendants simply denied the charge, and alleged that the remarks made in the articles in question as to a class of "shyster" lawyers, etc., were not intended to refer, and did not in fact refer, to the plaintiff. The Master in Chambers being of opinion that the defendants, by their officers, had sworn to a good defence on the merits, and that it was otherwise a case for security, made the usual order. Upon appeal Rose, J., held, that the statements complained of, did, upon a fair reading refer to the plaintiff, that they did not appear to have been published in good faith, and, therefore, that defendants had not shewn a good defence on the merits. In allowing the appeal he referred to the different publications, and was of opinion that, if not true, they stated "a most hurtful libel"(*r*).

Swain v. Mail Printing Co. (1894).

Upon both motions in this case the defendants contended that *Swain* v. *Mail Printing Company*(*rr*) was in point as against any trial, at that stage, of the facts in controversy; but the learned judge was of opinion that the two decisions were not inconsistent. "I am, I think, not departing at all from the principle of the decision in *Swain* v. *Mail Printing Company* (1894), 16 O.P.R. 132, where the learned Chancellor says, the judge is not to try the merits of the case or to pass upon disputed facts; for he also says: 'The materials under oath used by the applicant are to be weighed, and if from these it appears that there is a good defence on the merits—that is, a *primâ facie* case of justification or privilege—one which ought to succeed if it

(*r*) Lennox v. Star Printing Co. (1895) 16 O.P.R. 488.
(*rr*) pp. 442-43, *ante*.

is not answered or explained away at the trial, then the statute is satisfied, and security should be ordered.' Here, as I understand it, neither justification nor privilege is set up, but simply a denial of the charge of defaming the plaintiff, and, as I read the article, such a defence is not made out. It is said that a jury may take a different view at the trial, but that possibility cannot assist the plaintiff now, for, according to my reading of the article, a verdict for the defendants on the defence raised would not be in accordance with the evidence''(*s*).

Security refused in an action by a candidate for a public office where no retraction by defendant.

Security will also be refused where a candidate for a public office has been libelled, and there has been no retraction in accordance with the statute. By the Ontario Election Act, R.S.O. 1887, c. 9, s. 2, ss. 16(*t*), ''candidate'' means ''a person elected at an election to serve in the Legislative Assembly, and a person who is nominated as a candidate at such election, or is declared by himself or by others to be a candidate, on or after the day of the issue of the writ for such election, or after the dissolution or vacancy in consequence of which the writ has been issued.'' The plaintiff was a candidate at the election held in June, 1894, of a member to the Legislative Assembly of Ontario for the west riding of the district of A. The Legislative Assembly was dissolved, and a writ commanding the election to be held was issued on the 29th or 30th of May, 1894. The plaintiff brought this action in respect of several libels alleged to have been published by the defendant in his newspaper, some of them before the date of the writ for the election, and some after that date but before the election. The Libel Act, R.S.O. 1887, c. 57, s. 5, ss. 2(a), enacted, as does section 6 (3) of the present revised Act, that ''the provisions of this Act(*u*) shall not apply to the case of any libel against any candidate for a public office in this Province, unless retraction of the charge is made editorially in a conspicuous manner at least five days before the election.'' No retraction was made by the

(*s*) Lennox v. Star Printing Co. (*supra*), at p. 492.

(*t*) R.S.O. 1897, c. 9, s. 2(8).

(*u*) In the present Act the word "section" instead of "Act" is used.

defendant. Upon an application by the defendant to a local judge, under R.S.O. 1887, c. 57, s. 9(*v*), the plaintiff was ordered to give security for the costs of the action as to the libels alleged to have been published *after* the 30th May. Upon an appeal from this order it was held (*per* Ferguson, J.), that as to the libels alleged to have been published *after* that date, and before the election, security for costs could not be ordered under the statute because the plaintiff was then a candidate for a public office within the meaning of the statute, and the statute did not apply, there having been no retraction(*w*).

Security refused under Manitoba Act where provisions of Newspaper Act not complied with.

Under the Manitoba law the defendant, in an action for a libel contained in a newspaper, must comply with the provisions of the Newspaper Act of that Province(*x*) before he can get the benefits of the Provincial Libel Act(*y*) as to security for costs. Where, therefore, in an action for libel based upon an article in a Manitoba newspaper, the defendants, at the date of the issue of the writ, had not complied with the requirements of the former Act as to the registration, etc., of their newspaper, although they did so comply after service of the writ, it was held, that such subsequent compliance did not entitle them to the benefits of the Libel Act, and their application for security was dismissed. "I have not been able," said Dubuc, J., "to find any authority exactly in point. I must, therefore, apply the principles which may be deduced from analogous cases. In *Hitchcock* v. *May*, 6 A. & E. 943, the court held, that an Act passed while an action is pending could not alter the position of the parties, unless it should clearly so express. Lord Denman, C.J., said: 'We are of opinion, in general, that the law as it existed when the action was commenced must decide the rights of the parties in the suit, unless the Legislature express a clear intention to vary the relations of the litigant parties to each other.' The same was held in *Chappell* v. *Purday*, 12 M. & W. 330. 'I think,' said Lord Abin-

(*v*) R.S.O. 1897, c. 68, s. 10.

(*w*) Conmee v. Weidman (1894) 16 O.P.R. 239.

(*x*) R.S.M. 1902, c. 123, s. 16.

(*y*) R.S.M. 1902, c. 97, s. 14.

ger, C.B., in that case, 'that the Legislature never intended, by an *ex post facto* law, to give one party to a suit, already commenced, a great advantage over his adversary.' In the present case the Act was passed before the action was brought, but the defendants neglected to put themselves in a position to claim the benefit of its provisions''(*a*).

II. *In actions of slander for imputing unchastity.*

Security for costs in actions for slander of women.

By R.S.O. 1897, c. 68, s. 5(3), in actions by women for slander imputing adultery, fornication, or concubinage, the defendant may, at any time after the filing of the statement of claim, apply to the court or a judge for security for costs, upon notice and an affidavit by the defendant shewing the nature of the action, and of the defence, and shewing that the plaintiff is not possessed of property sufficient to answer the costs of the action in case a verdict or judgment is given in favour of the defendant, and that the defendant has a good defence to the action on the merits, or that the grounds of action are trivial or frivolous; and the court or judge may make an order that the plaintiff shall give security for the costs to be incurred in such action.

There are the same provisions as to the mode of giving such security, and as to the examination of the parties, as in the case of newspaper libels.

Security refused where no defence "disclosed" on the merits.

In actions for slander under this statute, the defendant must shew, *i.e.*, "disclose"(*b*), a good defence on the merits, otherwise an order for security will be refused. In an action brought by a married woman, the words alleged to have been spoken were: "You are a blackguard; you are a bad woman"; and the innuendo was, that the plaintiff was a common prostitute and a woman of evil character. The defendant admitted having called the plaintiff "a bad, quarrelsome woman," but said that he did not recollect using, and he believed he had not used, the word "blackguard," and he denied that he used the words with

(*a*) Daly v. White (1887) 5 M.L.R. 55.

(*b*) See Lancaster v. Ryckman, pp. 461-62, *post*.

the meaning attributed to them by the plaintiff. The application for security was dismissed by a local judge, whose order was affirmed by MacMahon, J., and upon appeal by the Divisional Court (Meredith, J., *diss.*). MacMahon, J., in his judgment, refers to Odgers on Libel and Slander, 3rd Ed., p. 90, where, commenting on the corresponding section of the English Act(*c*), "it is submitted that it [*i.e.*, the Act] does not apply to any case in which gross epithets are used merely as general terms of abuse; the words must be such as to convey to the hearers a definite imputation that the plaintiff had in fact been guilty of adultery or unchastity." The epithet "blackguard," he thought, did not of itself help the plaintiff, and he was of opinion that, had it not been for the third section of the Provincial Libel and Slander Act, the order of the learned local judge could not have been sustained. But, as by it prefatory averments were not required in order to support the meaning attached to the words by the innuendo, the statement of claim must be considered sufficient as a pleading. That being the case, the affidavit of the defendant, merely stating that he had a good defence to the action on the merits, was not sufficient—citing *Lancaster* v. *Ryckman*(*d*), *Lennox* v. *Star Printing Company*(*e*) and *Swain* v. *Mail Printing Company*(*f*). In the Divisional Court Boyd, C., and Ferguson, J., were of opinion that the expressions used might be employed in such circumstances and surroundings that bystanders might think them a statement of want of chastity; while Meredith, J. (who dissented) was of opinion that, as it was shewn by the pleadings and affidavit of the defendant that there was a real and substantial question for the jury to pass upon, and upon which the action might fail, the defendant had shewn a good defence on the merits(*g*).

Onus on defendant as to shewing good defence on the merits, and insufficiency of plaintiff's means.

In all such applications the burden of proof is on the defendant, as to shewing a good defence upon the merits, and

(*c*) 54 & 55 Vict. c. 51.

(*d*) (1893) 15 O.P.R. 199.

(*e*) (1895) 16 O.P.R. 488.

(*f*) (1894) 16 O.P.R. 132.

(*g*) Paladino v. Gustin (1897) 17 O.P.R. 553.

that the plaintiff is not possesed of property sufficient to answer the costs of the action. In an action for words imputing unchastity to a married woman, an order for security for costs was made by the Master in Chambers on the ground that the plaintiff had not shewn herself to be possessed of sufficient means to answer the costs of the action as against the sworn statement of the defendant that she was not so possessed, referring to *Bready* v. *Robertson*(*h*), as to the property sufficient to answer such an application. Upon appeal Ferguson, J., held as above stated. He agreed with the learned Master that the defendant had shewn *primâ facie* a good defence upon the merits, but he was also of opinion that defendant had not shewn that the plaintiff was not possessed of property sufficient to answer the defendant's costs of the action. On this branch of the application he had conferred with the Master, who said "that he was of the opinion that it appeared that the plaintiff has property of her own of the value of at least $500, exclusive of all that could be claimed as exemptions (it not appearing that she owed any debts), and that he would have refused the order, or rather the application, but that he thought the case, *Bready* v. *Robertson* (1890), 14 O.P.R. 7, as he read and understood it, decided that it should appear that the plaintiff had property to the value of $800, otherwise the order should be granted.

Bready v. Robertson (1890).

"I agree with the Master as to its being made to appear that the plaintiff has property of the value of $500 at least; but I am also of opinion that it has not been shewn that she has not property amounting in value to a much larger sum, and the burden of shewing the negative was upon the defendant. Besides, as I understand the case, *Bready* v. *Robertson*(*i*) does not decide what the learned Master assumed that it does. In that case the plaintiff had sworn that, if all his debts were paid, he would have $800 to his credit, and this, as it appears to me, was the reason why the learned judge spoke of this sum of $800 as he did, and not with the view or intention of stating or deciding, as was assumed by the learned Master"(*j*).

(*h*) (1890) 14 O.P.R. 7.

(*i*) *Ibid.*

(*j*) Feaster v. Cooney (1893) 15 O.P.R. 290.

In *Bready* v. *Robertson et al.*, above referred to, the plaintiff, who had brought an action against a justice of the peace, was ordered by a local judge to give security for costs under 53 Vict. c. 23 (O.)(*k*), which is the same in its provisions respecting security as those in the Provincial Libel Act relating to newspaper libel where no criminal charge is involved. Upon an appeal to a judge in Chambers (Boyd, C.), the appeal was allowed without prejudice to a further application for security if the defendants were so advised. The learned judge was of opinion that, upon applications under the statute in question for security for costs in actions against justices of the peace, the rule should not be more, but rather less, onerous than in ordinary applications for security where the plaintiff is out of the country, and that the court should be less exacting as to the character of the property, where the person is a *bonâ fide* resident, than in the ordinary case of a stranger who seeks to justify upon property within the jurisdiction. The test is: is it such property as would be forthcoming and available in execution? And where, as in this case, the plaintiff had property, partly real and partly personal, to the value of $800 over and above debts, encumbrances and exemptions, security for costs should not have been ordered(*l*).

Defence must be "disclosed," but may be aided by defendant's cross-examination.

An application for security should "disclose" the defence, but the cross-examination upon the defendant's affidavit may be read in aid of the affidavit itself, and counter-affidavits should not be received. This was held in an action for words imputing a want of chastity brought by an unmarried female, and in which the defendant was cross-examined upon her affidavit filed upon the application. The local judge held, that the affidavit and cross-examination of the defendant might be read together, and that a *primâ facie* defence of privilege had been made out; and, it appearing that the plaintiff had no property, he made an order staying proceedings in the action until security for costs should be given. Upon appeal to a judge in Chambers (Street, J.) the order was affirmed so far as the claim for

(*k*) R.S.O. 1897, c. 89.

(*l*) Bready v. Robertson *et al.* (1890) 14 O.P.R. 7. See, also, Parke v. Hale (1903) 2 O.W.R. 1172, where the above decision is referred to.

slander was concerned, but not as to a claim for assault in the same action. It was held, that the affidavit was not sufficient, because a *primâ facie* defence must be "shewn"—citing *Whiley* v. *Whiley*, 4 C.B.N.S. 653; but that the cross-examination of the defendant upon her affidavit, which disclosed a *primâ facie* case of privilege, might be read in aid of the affidavit itself; and that counter-affidavits could not be received, because the case would not be tried upon a summary application of this kind—citing *Warrington* v. *Leake*, 11 Ex. 304(*m*).

In an action by husband and wife for libel and slander imputing unchastity to the wife, and alleging connivance by the husband, an order for the wife to give security was refused, it being impossible to distinguish between the causes of action of husband and wife, as was done in *Felgate* v. *Hegler* (1904), 4 O.W.R. 439; 9 O.L.R. (1904), 315(*mm*).

Decisions under R.S.O. 1897, c. 89, s. 1, allowing security to justices and others, are applicable.

The decisions under the Ontario Act allowing security for costs in actions against justices of the peace and other officers and persons fulfilling any public duty(*n*) are also in point. Section 1 of the Act contains the same provisions for the defendant obtaining security for costs as are found in the Provincial Libel and Slander Act permitting security to defendants in actions by women for slander imputing unchastity, and to defendants in actions for newspaper libel in which no criminal charge is involved.

Merits of action not to be determined on application for security.

Where, therefore, there was an appeal from an order of the Master in Chambers granting security to a justice on the ground that the plaintiff was penniless and his action trivial, it was held in Chambers by Robertson, J., who dismissed the appeal, and by the Divisional Court, where the order of Robertson, J., was affirmed, that it was not intended by the statute that the merits of the action should be determined upon an application for security. "I do not think," said Robertson, J., "the statute is to be construed into giving the Master jurisdiction to decide whether

(*m*) Lancaster v. Ryckman (1893) 15 O.P.R. 199.
(*mm*) Clark v. Cameron (1905) 6 O.W.R. 831.
(*n*) R.S.O. 1897, c. 89, s. 1.

the defence can be made out from a legal point of view or not; the subtleties, or nice legal technicalities which may be suggested by the ingenuity of counsel, or raised at the trial, or on pleadings, need not enter into his consideration, if the defendant shews: 1st, that the plaintiff has no means of paying the costs of the defence, should the action be dismissed; 2nd, that he has a good defence to the action on the merits; that is all that is necessary. . . . The defendant has sworn that he has [*i.e.*, a good defence on the merits], and the Master being satisfied, that is all that is necessary; if he was obliged to go further, he would be virtually deciding whether the plaintiff was entitled to recover or not; and, if he refused the order asked for, it would be tantamount to saying that the defendant had no defence. This was not the intention of the legislature."

The same point was discussed more fully by Meredith, J., in the Divisional Court. "I cannot think," he said, "it was ever intended that, upon an application of this character, any nice question of law, or any reasonable question of fact, in controversy between the parties, going to the root of the action in any respect, should be determined, or, indeed, that affidavits, controverting the good defence upon the merits disclosed by the defendant, should, generally, be received to displace the defence made known by the affidavits filed in support of the motion. It would be strange if the merits of the case were to be dealt with by the Master in Chambers, or a local officer, upon affidavit in such a summary mode, with an appeal, as here taken, to a judge in Chambers, and from him to this court, merely for the purpose of determining whether a defendant should have security for his costs, to be followed by the ordinary course of procedure to trial, where the parties would be bound by the judgment upon the Chambers motion, and, possibly, a motion against the verdict or judgment to the Divisional Court, which had already decided whether or not the defendant had a good defence upon the merits. . . . I, therefore, think that where a defendant brings himself within the provisions of the Act, he ought to be held entitled to the benefit of it, unless there be some special circumstances in the particular case, however slight, to justify an exercise of the discretion in a refusal of that particular application"(*o*).

(*o*) Southwick v. Hare *et al.* (1892-93) 15 O.P.R. 222. See, also, remarks of Boyd, C., in Swain v. Mail Printing Co. (1894) 16 O.P.R. 132, pp. 442-43, *ante*.

CHAPTER XXVII.

Defences to an Action of Defamation.

Defences to an action of defamation.

The same defences may be made to an action for either libel or slander, except where the libel is contained in a newspaper, in which case there are additional defences not available in an action for slander. Wherever the plea of not guilty is pleaded, as it may be under the former procedure, or wherever there is, under the Judicature Acts, a general denial of the allegations in the statement of claim, the onus is on the plaintiff to establish a *primâ facie* case. He must shew that the words or statements, whether verbal or written, are defamatory, that they refer to the plaintiff, and that they were actually published; and, in the case of a libel published in a newspaper in some of the Provinces, that proper notice in writing of the statements complained of was duly served on the defendant. The defendant may also specifically deny each of these things, failure to prove which, or any of them, would be fatal to the plaintiff's case. The special defences open to the defendant are: (1) Privilege, which may be either absolute or qualified; (2) Justification; (3) Fair comment; (4) Retraction and apology; (5) *Res judicata* or estoppel; (6) Accord and satisfaction; (7) Release; (8) Payment into court; (9) Statute of Limitations; (10) Death of party before verdict; (11) Counterclaim. The defences of privilege and fair comment are substantially the same in both civil and criminal proceedings. All these defences will be considered under their respective heads, the three first named being dealt with in separate chapters.

I. *Retraction and apology.*

Apology in mitigation of damages.

If the defendant has made or offered an apology for the slander or libel complained of, he may plead it in his defence; and, when not so pleaded, as where it was made or offered at a later stage in the action, evidence of the fact may be given at the trial in mitigation of damages. The sanction of a statute

is not needed for this purpose. Most of the Provincial Acts, however, relating to defamation provide for an apology both before and after action brought, and, in the case of libel, for an apology for a libel published either in a newspaper or in any other manner.

Statutory provision for an apology.

An apology, made or offered, may be evidence in mitigation of damages under the following statutory provision: In an action for defamation where the defendant has pleaded not guilty only, or has suffered judgment by default, or judgment has been given against him on demurrer, he may give in evidence, in mitigation of damages, that he* made or offered a written or printed apology to the plaintiff for such defamation before the commencement of the action; or, in case the action was commenced before there was an opportunity of making or offering such apology, that he did so as soon afterwards as he had an opportunity(*a*).

The New Brunswick Act.

This enactment relates to both slander and libel, and is found in the statutes of all the Provinces, with the additional words, in the New Brunswick Act, which are quoted in the foot note. These words, in view of the legal requisites and purpose of an apology, appear to be unnecessary. They are expressly applicable to a "newspaper" as defined by the Act(*b*), and are intended to permit evidence of a retraction of the statements complained of and an apology therefor, "in the same newspaper or publication in which the libel appeared." All this, however, may be done under any circumstances in the case of an action for a libel whether contained in a newspaper or not; it is evidence in mitigation which, as already stated, may always be given, and does not require the sanction of a statute. The section as

(*a*) R.S.O. 1897, c. 68, s. 4. See the corresponding enactments in C.S. N.B. 1903, c. 136, s. 5; R.S.B.C. 1897, c. 120, s. 8; R.S.M. 1902, c. 97, s. 7. The section in the New Brunswick Act has the following words inserted after the asterisk, *supra*, namely: "published a withdrawal of the libel, and a sufficient apology therefor, in a conspicuous place in the same newspaper or publication in which the libel appeared, or"

(*b*) C.S.N.B. 1903, c. 136, s. 2(a).

originally drawn, and as it appears in the Acts of the other Provinces, is intended to apply to libel generally as well as to slander, but the words interpolated in the New Brunswick statute are open to the construction of restricting the evidence in mitigation to newspaper libel only. In any event, the sufficiency of the apology is a question entirely for the jury. The plea of not guilty, it should be noticed, would not be applicable under the rules of the Judicature Acts, which require instead a concise statement of the "material facts" on behalf of the defendant. These rules also discourage demurrers.

Apology for libel in a newspaper.

The following enactment, which appears in the Ontario Act, is only applicable to an apology for a libel in a "newspaper" as defined by that Act: In an action for libel contained in a newspaper, the defendant may plead that the libel was inserted in the newspaper without actual malice and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in the newspaper a full apology for the libel; or, if the newspaper in which the libel appeared is one ordinarily published at intervals exceeding one week, that he offered to publish the apology in any newspaper to be selected by the plaintiff in the action(*c*). There is a similar enactment in the statutory law of some of the other Provinces(*d*).

The British Columbia Act also provides that, in an action for libel contained in a "newspaper" as defined by the Act, one clear day must elapse between the cause of action complained of and the issue of the writ thereon(*e*). This is for the purpose of retraction and tender of amends on the part of the newspaper publisher.

Payment into court.

The Ontario enactment further provides, that a defendant, upon filing the defence in the preceding section mentioned [*i.e.*, as to an apology], may pay into court a sum of money by way of

(*c*) R.S.O. 1897, c. 68, s. 6(1).

(*d*) See C.S.N.B. 1903, c. 136, s. 6; R.S.B.C. 1897, c. 120, s. 6; R.S.M. 1902, c. 97, s. 8.

(*e*) R.S.B.C. 1897, c. 120, s. 6.

amends for the injury sustained by the publication of the libel, and such payment shall be of the same effect, and available to the same extent and in the same manner, and be subject to the same rules and regulations as to costs, and the form of pleading (except so far as regards the additional facts hereinbefore required to be pleaded by the defendant) as payment of money into court in other cases; and to such defence the plaintiff may reply generally, denying the whole thereof(*f*). This provision, which formed part of Lord Campbell's Act(*g*), was, with the exception of the words at the end as to plaintiff's reply, subsequently repealed by 42-43 Vict. c. 59, Sched. Part 2 (Imp.), and 46-47 Vict. c. 49, s. 4 (Imp.). By the statute 8-9 Vict. c. 75, s. 2 (Imp.), every such plea so filed without payment of money into court is to be deemed a nullity. There is no such provision in any Canadian statute.

The words "the defence in the preceding section mentioned," refer, in the Ontario Act (*supra*), to sub-section 1 of section 6, and not to sub-section 2, which deals with the question of damages, and is strangely interposed between the enactment with respect to an apology and the concomitant provision as to payment of money into court. There is the same confusion in the arrangement of the sections of the British Columbia Act(*h*). These provisions in the Ontario and British Columbia Acts, touching an apology in a newspaper, do not, as will be seen, apply to a libel against a candidate for a public office except on certain conditions(*i*).

Publication "at the earliest opportunity."

"At the earliest opportunity" has been held to mean within a reasonable time, and of this the jury are the judges. In an action by a collector of customs for two libels published in the *Daily Leader*, of Toronto, the first publication appeared in the issue of the 29th October, 1862, and the second on the 5th November following. The action was commenced on the 15th Decem-

(*f*) R.S.O. 1897, c. 68, s. 7. See the corresponding enactments in C.S. N.B. 1903, c. 136, s. 7; R.S.B.C. 1897, c. 120, s. 7; R.S.M. 1902, c. 97, s. 9. As to payment out, after plaintiff's or defendant's death and before trial of action, of money paid in by defendant, see Maxwell v. Viscount Wolseley (1907) 1 K.B. 274 (C.A.), and Brown v. Feeney (1906) 1 K.B. 563 (C.A.).

(*g*) 6-7 Vict. c. 96, s. 2.

(*h*) R.S.B.C. 1897, c. 120, ss. 6. and 7.

(*i*) See p. 470, *post*.

ber, and the declaration was dated the 24th December, 1862. On the same day, before the declaration was filed or served, an apology was published in the paper, which the plaintiff's counsel, on the argument, admitted was sufficient, if published within a reasonable time under the statute. This point having been left by the trial judge to the jury, they found for the defendant. Upon motion for a new trial it was held, that the publication of the apology "at the earliest opportunity" is to be construed as meaning within a reasonable time, the circumstances of the case and the opportunities of the defendant to publish it being considered; and that the question of the publication of the apology within a reasonable time was properly left to the jury to decide. The court was inclined to the opinion that the finding by the jury that the apology was published within a reasonable time was erroneous, but being also of opinion that there was no proof of actual malice or gross negligence, they refused to grant a new trial on this issue. *Attwood* v. *Emery*(*j*), and *Hayward* v. *Parke*(*k*) are specially referred to in the judgment of Draper, C.J.(*l*). It has been held,, however, that it is not enough for the defendant to plead that he inserted the apology "at the earliest opportunity after" the commencement of the action, if he had an opportunity before action(*m*).

Payment into court not essential.

It is not necessary, under the Ontario enactment, that payment into court should accompany the apology. The apology alone may be relied upon. In an action for libel against the publisher of the *Belleville Ontario* newspaper, one of the pleas was the publication of "a full apology" in the manner provided by the revised statute of 1877(*n*), but no money was paid into court by way of amends with that defence. The defendant, said Osler, J.A., rightly relied upon the apology alone as a bar to the action; as we have no statute similar to the Imperial Act, 8 & 9 Vict. c. 75, s. 2, which makes such a plea a mere nullity unless accompanied by payment into court of a sum of money by way of

(*j*) 1 C.B. (N.S.) 110.
(*k*) 16 C.B. 295.
(*l*) Cotton v. Beatty (1863) 13 U.C.C.P. 243.
(*m*) *Per* Keating, J., in Ravenhill v. Upcott (1869) 33 J.P. 299.
(*n*) R.S.O. 1877, c. 56, s. 4, corresponding to R.S.O. 1897, c. 68, s. 6(1).

amends(*o*). A plea of not guilty, it has been held, cannot be pleaded with a plea of apology and payment into court, because it is inconsistent with apology and the tender of amends(*p*).

A mere willingness to apologize no defence.

A plea of a mere willingness to apologize and nothing more is no defence. In an action for libel against the publishers of the Victoria (B.C.) *Times*, the statement of defence alleged that the defendants were willing to publish an apology in such terms as the plaintiff could reasonably require. Upon an application by the plaintiff this allegation was ordered to be struck out as being clearly insufficient. "That is surely not sufficient," said Begbie, C.J. "It is not the offer, nor even the publication, of an apology at all, but an offer to offer an apology. And, even in terms, it seems to reserve to the defendant a right of judging whether the plaintiff is reasonable in demanding any particular form, *e.g.*, it offers to make such an apology as the defendant thinks fit"(*q*).

Requisites of an apology.

An apology should be prompt, unconditional and ample in its terms, and should be published as conspicuously as the words complained of. Its insertion in small type and among "notices to correspondents" will not be sufficient(*r*); and there should be no negligence or delay in its publication, otherwise the damages will be aggravated(*s*).

Opinion of Begbie, C.J.

In a case of newspaper libel which came before the courts of British Columbia prior to the passage of "The Law of Defamation Amendment Act"(*t*), Begbie, C.J., said: "You should not offer to make, but actually make and publish at once, and unconditionally, such an apology, expressing sorrow, withdrawing the imputation, rehabilitating the plaintiff's character, as

(*o*) Wills v. Carman (1888) 14 O.A.R. 656, at p. 680.

(*p*) Doyle v. Owen Sound Printing Co. (1879) 8 O.P.R. 69. But see Hawkesley v. Bradshaw, 5 Q.B.D. 22, 302.

(*q*) Hoste v. Victoria Times Publishing Co. (1889) 1 B.C.R. 365.

(*r*) Lafone v. Smith *et al.*, 3 H. & N. 735; 28 L.J. Ex. 33.

(*s*) Smith v. Harrison, 1 F. & F. 565.

(*t*) R.S.B.C. 1897, c. 120.

well as you can; not stipulating that the plaintiff is to accept it; not making any terms, but publishing it in the interests of truth, and because you are anxious to undo whatever harm may have accrued from a wrong which you find you have been the unconscious instrument of inflicting''(*u*).

Sufficiency of apology is for the jury.

Where an apology is pleaded, all the points relating to it—its sufficiency, the sufficiency of the payment into court where this occurs, and the questions of the absence of malice and negligence on the part of the defendant, are for the jury. Should they fail to find no actual malice and no gross negligence, and that the apology and payment into court, as the case may be, is sufficient, the defence is not established(*v*). A finding adverse to the defendant on any one of these points is fatal. In the case last mentioned, Cockburn, C.J., charged the jury that the questions to be decided were: First, was there an absence of malice? Secondly, was there an absence of negligence? And Thirdly, was the apology sufficient? If on any one point the plea failed, the plaintiff was entitled to recover; but if it was sustained on all, then the only question would be whether the action was not in substance answered. The jury found for the defendants. In another case the jury found negligence on the part of the defendant, but no malice, and that the apology was sufficient; and they gave damages equal to the sum paid into court. A judgment by the trial judge in plaintiff's favour, on the ground that the defendant had failed in his defence, was upheld by the Court of Appeal(*w*).

When provision for apology in a newspaper not applicable.

The sections (*supra*) in the Libel Acts of Ontario and British Columbia, which provide specially for an apology in a ''newspaper,'' do not apply to a libel against any candidate for a public office in the Province, unless a retraction of the charge is made editorially in a conspicuous manner at least five days before the election(*x*). The ''public office'' referred to is mani-

(*u*) Hoste v. Victoria Times Publishing Co. (1889) 1 B.C.R. 365.

(*v*) Risk Allah Bey v. Johnstone (1868) 18 L.T. (N.S.) 620.

(*w*) Oxley v. Willis (1898) 2 Q.B. 56.

(*x*) R.S.O. 1897, c. 68, s. 6(3); R.S.B.C. 1897, c. 120, s. 6(1)(a).

festly an elective office, and the provision as a whole is intended to discourage defamatory attacks on persons who are seeking the suffrages of the people. The Ontario Act is apparently wider than the British Columbia Act, which is restricted to candidates "at a parliamentary or a municipal election." It is doubtful whether either statute covers a candidature for vacancies in any body elected by popular suffrage, which has itself the power of filling such vacancies. But it is clear, under the law of both Provinces, that, unless the statements complained of are retracted five days before the election in a conspicuous place in the editorial columns of the defendant's newspaper, there is room for such an inference both of actual malice, *i.e.*, malice in fact, and gross negligence in the publication, as will deprive the defendant of the benefits of the enactment. The plaintiff, on the other hand, will lose the benefits of the section in the Ontario courts unless, before instituting proceedings, he serves the defendant with a notice of the statements complained of, this being a condition precedent to an action for a libel contained in a newspaper as defined by the Provincial Act(*y*). No such notice is required by the British Columbia Act.

By the Ontario Election Act(*z*) "candidate" means a person "elected at an election to serve in the Legislative Assembly, and a person who is nominated as a candidate at such election, or is declared by himself or by others to be a candidate, on and after the day of the issue of the writ for such election, or after the day of the issue of the writ for such election, or after the dissolution or vacancy in consequence of which the writ has been issued."

Conmee v. Weidman (1894).

In *Conmee* v. *Weidman*(*a*) plaintiff was a candidate at an election of a member of the Legislative Assembly of Ontario, and sued in respect of several libels published by the defendant in his newspaper, some of them before the date of the writ for the election, and some after that date but before the election. No notice in writing under the statute of the statements complained of was given by the plaintiff before action, nor was any retraction

(*y*) See s. 6(2).

(*z*) R.S.O. 1897, c. 9, s. 2(8).

(*a*) (1894) 16 O.P.R. 239.

made by the defendant. It was held (*per* Ferguson, J.), that the plaintiff was not a candidate for a public office in the Province within the meaning of the statute(*b*) before the date of the writ for the election, but that he was such a candidate after that date; that the notice under the statute was necessary as to the libels published before the date of the writ of election, but that the paragraphs in the statement of complaint charging these libels could not be struck out, nor the action as to them summarily dismissed, for failure to give such notice; and that security for costs could not be ordered as to the libels published after the date of the writ of election because plaintiff was then a candidate for a public office, and the statute did not apply(*c*), there having been no retraction.

Under the Ontario Act a notice is indispensable before commencing an action for a libel contained in a newspaper, and, therefore, it is just as necessary in the case of a candidate for a public office, who sues for damages for a libel published either before or after the election, as in the case of any other person. The Libel Acts of New Brunswick and Manitoba expressly state that the notice is for the purpose of giving the defendant an opportunity to publish a full apology for the libel complained of(*d*). And if, in Manitoba, the court or jury find that a full apology was published before the commencement of the action, the plaintiff shall not recover therein without proving special damage or actual malice(*e*). In British Columbia, as already stated, no notice is necessary, but, in an action for a libel contained in a newspaper, the statute requires that one clear day must elapse between the cause of action complained of and the issue of the writ(*f*).

Retraction and apology in the Province of Quebec.

In an action by a notary in the Province of Quebec for slanders uttered at the door of the parish church, at the close of

(*b*) R.S.O. 1887, c. 57, s. 5(2)(a), corresponding to R.S.O. 1897, c. 68, s. 6(3) and R.S.B.C. c. 120, s. 6(1)(a).

(*c*) Under R.S.O. 1897, c. 68, s. 6(3), and also under R.S.B.C. 1897, c. 120, s. 6(1)(a), it is the *section* and not the *statute* that does not apply. The provisions in both statutes as to security for costs are identical.

(*d*) C.S.N.B. 1903, c. 136, s. 4; R.S.M. 1902, c. 97, s. 5.

(*e*) *Ibid.*

(*f*) R.S.B.C. 1897, c. 120, s. 6.

mass as the people were issuing from the church, the words complained of were: "*Le notaire M. est accoutumé à faire des mauvaises pièces, et à forger des billets,*" the defendant adding that he had never signed a certain note in favour of one J. C., and that, if his name was on the note, it was the notary M. who put it there. It was held that the language used having been proved to be false, the fact that both parties were of good reputation and standing in the community, which, in the case of the defendant, only made his words more injurious from the greater credibility attached to them, his retraction and apology, made at the church door, was too late to prevent the injurious effects of the language and avoid damages. These were assessed by the trial judge at $250 and costs, the judgment to be published at the church door on two Sundays(*g*).

As to the effect of a retraction and apology tendered after action, see, also, *Lefebvre* v. *Monette*(*h*); *Pope* v. *Post Printing & Publishing Co.*(*i*); *Donovan* v. *Herald Co.*(*j*), and *Auburn* v. *Berthiaume*(*k*). As a defence it may be considered in mitigation of damages, but is an insufficient reparation for a wrong inflicted by a false accusation.

II. *Res judicata.*

Res judicata, when a defence.

The defence of *res judicata* arises where the plaintiff has previously sued defendant for the same cause of action, *i.e.*, the same words, whatever may have been the result of the former action; or where the questions for the jury in both actions are identical (*kk*); or where the plaintiff had sued a third party with whom the defendant was jointly concerned in the publication of such words. A judgment recovered against one joint publisher bars any action against others jointly liable with him for the publication(*l*). What is a joint publication has been considered in

(*g*) Mathieu v. Forget (1877) 7 R.L. (S.C.) 669.
(*h*) (1888) 32 L.C.J. (Q.B.) 195.
(*i*) (1888) 32 L.C.J. (S.C.) 50
(*j*) (1888) 32 L.C.J. (Q.B.) 11.
(*k*) (1903) Q.O.R. 23 (S.C.) 476.
(*kk*) Macdougall v. Knight (1890) 25 Q.B.D. (C.A.) 1, p. 447, *ante*.
(*l*) Brinsmead v. Harrison (1872) L.R. 7 C.P. 547.

Creevy v. *Carr*(*m*), and in *Frescoe* v. *May*(*n*), in which it was held that author and publisher are not jointly liable; also in *Martin* v. *Kennedy*(*o*), and *Banning* v. *Perry*(*p*), in which actions against the printer or publisher were held not to bar actions against the proprietor, and *vice versa*. But a judgment against one partner bars actions against the others as members of the firm(*q*).

Recovery of a verdict against several defendants an estoppel of a subsequent action by the same plaintiff for the same libel against others concerned in the publication.

The recovery, also, of a verdict against some of several parties concerned in the publication of a libel, and payment of the amount of the verdict and costs, without judgment being entered, is an estoppel to an action by the same plaintiff for the same libel against the other persons concerned in the publication. Defendants were sued for signing a petition to the local Board of License Commissioners in which it was said of the plaintiff and of his inn, that it was one of the worst drinking holes in the county, and was kept very disorderly; that there was no suitable accommodation for a good, respectable traveller; and that the landlord himself was much given to drinking. The plea upon which the decision turned was, that G. W. H., J. E. H. and D. R. C., were jointly concerned with the defendants in publishing the petition, and that the plaintiff theretofore sued the persons named for damages in respect of the same; that the plaintiff recovered a verdict for $300 damages against those persons, which damages, and $450 for costs, the parties named paid to the plaintiff; that the recovery of the damages was a recovery in reference to the same cause of action as that sued for by the same plaintiff in this action; and, therefore, that the plaintiff was estopped from bringing this action against the defendants. The plaintiff in reply said that the defendants separately and severally, and not jointly with the said G. W. H., J. E. H., and

(*m*) (1835) 7 C. & P. 64.

(*n*) (1860) 2 F. & F. 123.

(*o*) (1800) 2 Bos. & Pull. (O.S.) 69.

(*p*) *Ibid.*

(*q*) Munster v. Cox (1885) 1 T.L.R. 542.

D. R. C., committed the grievances complained of, and that the recovery of said damages from those parties was not a recovery in reference to the same cause of action, but for another and different cause of action than that complained of in the statement of claim. The verdict for plaintiff and $50 damages was moved against upon the ground, *inter alia*, that the cause of action was for the same wrong as that upon which the recovery was had in the former action of *Willcocks* v. *Howell et al.*(*r*), which recovery barred the plaintiff's right of recovery herein. The court held, that the recovery of a verdict in the former action against the several parties named therein as being concerned in the libel, and the payment of the amount of the verdict and all costs without judgment being entered, was a bar to the present action for the same libel. The authorities are fully reviewed by Wilson, C.J., who delivered the judgment of the court(*s*). It has been held in Quebec, that a person may have a distinct recourse against all the persons concerned in a libel against him, but he can claim only one compensation therefor(*t*).

Estoppel as to questions previously determined by the court.

There may also be an estoppel on account of certain questions arising on a previous trial of the action being *res judicata*, and so not proper to be reopened between the parties. In the *Journal Printing Co.* v. *Maclean*(*u*) Osler, J.A., expressed the opinion, in which the other members of the Court of Appeal concurred, that, if the judgment of a Divisional Court directing a new trial is not appealed against, the questions determined by it cannot be reopened upon an appeal from the judgment at any subsequent trial. In that case the plaintiffs, a newspaper publishing company, sued the defendant for statements defamatory of their business, contained in a municipal election address published by him in another newspaper in the same city. The action was tried three times. At the first trial the plaintiffs were nonsuited on the ground that an action could not lie by an incorporated company for statements charging them with corruption. This judg-

(*r*) Wilcocks v. Howell *et al.* (1884) 5 O.R. 360.

(*s*) *Ibid.* (1885) 8 O.R. 576.

(*t*) Gauthier v. Amyot (1871) 3 R.L. (S.C.) 446.

(*u*) (1896) 23 O.A.R. 324.

ment was reversed by the Queen's Bench Division and a new trial ordered(*v*). There was no appeal from this decision, and, at the second trial, the jury disagreed. At the third trial the jury found in favour of the plaintiffs and $200 damages. A motion against this verdict was dismissed by the Divisional Court whose judgment was affirmed by the Court of Appeal(*w*).

Opinion of Osler, J.A.

In referring to the question whether, under the circumstances, such an action would lie at the suit of a corporation, Osler, J.A., said: "It might be enough to say that, for the purpose of the present action, it was decided on the motion to set aside the nonsuit at the first trial. There was no appeal from that decision, and, as between these parties, it may be said that the question is *res judicata*: *Grand Trunk R.W. Co.* v. *McMillan*, 16 S.C.R. 543, at p. 566." The question, he added, was covered by the judgment of the Court of Appeal in the *South Hetton Coal Co.* v. *North Eastern News Association*(*x*), where it was held that an action will lie at the suit of an incorporated trading company (which these plaintiffs are) in respect of a libel calculated to injure their reputation in the way of their business.

Estoppel for failure to appeal against interlocutory order.

On the same principle an estoppel may arise on account of failure to appeal against an interlocutory order. The defendants pleaded justification of a libel, and added to their plea two clauses which the plaintiff applied to strike out. The application was refused on the ground that the defendants were entitled to plead the clauses in question as particulars of the defence of justification. There was no appeal from this order, and a subsequent application to strike out one of the clauses was refused by the Master in Chambers, and, on appeal, by a judge in Chambers. A further appeal to the Divisional Court was dismissed, because, among other reasons, the matter had already been decided on the previous Chambers application,

(*v*) 25 O.R. 509.

(*w*) 23 O.A.R. 324.

(*x*) (1894) 1 Q.B. 133.

which was not appealed against, and was *res judicata* on the second application as to the same matter(*y*).

Estoppel in action for slander of title to land.

Estoppel may also be pleaded in an action for slander of title to land. In an action on the case for publishing a printed notice denying plaintiff's title to certain land, of which the declaration alleged that he was seized in fee, and which he had advertised for sale, and stating that one C. J. had the title, and that a suit was pending in Chancery to establish her undoubted right, the fifth plea alleged that the plaintiff's only title was by virtue of an indenture of mortgage executed to him by one K., who was then seised in fee; that the said indenture was given to secure usurious interest; that the said K. died intestate, and his heir gave to the said C.J. full license to enter on and occupy the said land during her life; and that thereupon the defendant, as her agent, published the notice to protect her right and without malice. The plaintiff replied by way of estoppel, a verdict and judgment in an action of ejectment brought by him against the defendant and one E. Y., to recover possession of the said land, in which it was found by the jury that the said indenture was not illegal or usurious. The defendant demurred to this replication as shewing no estoppel. It was not necessary to determine the question raised by the demurrer on account of the plea being held bad; but the court indicated an opinion that the replication did shew an estoppel. "The plea, we think, is bad," said Robinson, C.J., "because it does not justify a very material part of the libel, namely, that a suit in Chancery was pending, which, for all that is stated in this plea, may have been a mere malicious invention, and as injurious a slander in its effects as anything that is charged"(*z*).

For some further references to this question of *res judicata*, see the comments on the Provincial enactments permitting evidence of previous actions for newspaper libel to be given in mitigation of damages.

(*y*) Bateman v. Mail Printing Co., 2 O.L.R. (1901) 416.

(*z*) Mair v. Culy (1854) 12 U.C.Q.B. 71.

III. *Accord and satisfaction.*

Accord and satisfaction.

A good plea of accord and satisfaction may be shewn in an action of libel, by an agreement between the parties to publish, and the actual publication thereafter, of mutual apologies in satisfaction and discharge of the causes of action(*a*); or by the acceptance by the plaintiff of satisfaction either by a third party on defendant's behalf(*b*); or by some one jointly liable with defendant(*c*). In any of these cases the plaintiff foregoes his right of action, and, upon proof of the agreement or satisfaction, a good defence is established.

Effect of misrepresentation by defendant.

If, however, the plaintiff has made the agreement, or accepted the satisfaction, through a misrepresentation of the facts on the part of the defendant, his right of action remains. Where the plaintiff accepted the publication in the defendant's newspaper of a letter by himself as satisfaction for certain reflections cast upon him in a report of a judge's charge published in the paper, and afterwards discovered that the statements complained of had not been made by the judge, his suit for damages prevailed as against a plea of accord and satisfaction based on the facts mentioned(*d*).

IV. *Release.*

Release.

A release of his cause of action by the plaintiff for a money or other valuable consideration also constitutes a good defence. Being under seal it is a more solemn mode of parting with his claim for damages and the right to sue therefor than accord and satisfaction, but it is no more binding than the other where, as in *Marks* v. *Conservative Newspaper Company* (*supra*), it has

(*a*) Boosey v. Wood (1865) 3 H. & C. 484; 34 L.J. Ex. 65; Marks v. Conservative Newspaper Co. (1886) 3 T.L.R. 244; Lane v. Applegate 1 Stark. 97.

(*b*) Jones *et al.* v. Broadhurst (1850) 9 C.B. 173.

(*c*) Thurman v. Wild *et al.* (1840) 11 A. & E. 453; Bainbridge v. Lax *et al.* (1846) 9 Q.B. 819; Hey v. Moorhouse, 6 Bing. N.C. 52.

(*d*) Marks v. Conservative Newspaper Co., *supra*.

been improperly obtained. A release must be specially pleaded, and where, in a New York case, it was pleaded in a joint action by a husband and wife for slander of the wife, who was living apart from her husband under an agreement permitting her to use his name in actions for injuries to her person and character, the release by the husband was held to be a good answer to the wife's cause of action(*e*).

V. *Payment into court.*

Payment into court.

Payment into court of a certain sum of money, in satisfaction of plaintiff's claim, may also be pleaded and proved in some of the Provinces as a defence to the action(*f*). Speaking generally, the rules of procedure under which this may be done, more particularly the rules under the Judicature Acts, enable the defendant to deny the plaintiff's cause of action, and at the same time pay into court, in actions of defamation(*g*), which are expressly excepted by the English Rule(*h*). Where the slanders or libels sued for are distinct and separable, the defendant may pay money into court in respect of one or more of them, and set up special defences, such as justification or privilege, as to the others(*i*). He may, in any case, deny the innuendoes assigned to a libel or slander in respect of which he pays money into court; and, after payment into court, may give evidence at the trial in mitigation of damages. The sufficiency of the payment into court is a question for the jury. Payment into court, with a defence denying liability, is not permissible in Nova Scotia in actions or counterclaims for libel or slander(*j*).

VI. *Statute of limitations.*

The statute of limitations.

An action of defamation may also be barred by the statute of limitations. Whether for libel or slander, the action, in the Pro-

(*e*) Beach *et ux.* v. Beach, 2 Hill N.Y. Repts. 260.

(*f*) Rules 419-429, O.J.A., relate to payment into court.

(*g*) Hawkesley v. Bradshaw, 5 Q.B.D. 22, 302.

(*h*) Fleming v. Dollar (1889) 23 Q.B.D. 388. See, also, Beaumont v. Kaye *et ux.* (1904) 1 K.B. 292 (C.A.).

(*i*) Fleming v. Dollar, *supra.*

(*j*) Ord. 22, R. 1, N.S.J.A. As to tender and payment into court in Quebec, see Prevost v. Huard, p. 490, *post.*

vince of Ontario, subject to the limitations hereafter mentioned, must be commenced within two years after the cause of action arose, *i.e.*, from the time of publication, unless the person entitled to the action is, at the time of publication, an infant or a lunatic, in which case the action must be commenced within two years from the time at which such disability is removed(*k*). A non-resident of the Province has no longer time to commence an action than if he were a resident when the cause of action accrued(*l*). A non-resident defendant may be sued within two years after his return to the Province(*ll*). The law in the other Provinces, except Quebec, is the same. In Quebec an action for slander or libel must be commenced within one year, reckoning from the day that the words, verbal or written, came to the knowledge of the party aggrieved(*m*).

Alleged bar of action against railway corporation under Railway Act.

The question was raised, in an Ontario case, whether an action for libel brought by a conductor of a railway company, who had been dismissed by the general manager of the company for alleged dishonesty, and a notification of whose dismissal had been published in printed placards in the company's private offices and in circular books of the conductors, was brought within the proper period. The defendants pleaded not guilty by 16 Vict. c. 99, s. 10, which provided that all suits for indemnity for any damages or injury sustained by any person or persons whomsoever, by reason of the said railway, should be instituted within six calendar months next after the time of such supposed damage sustained(*n*). The publication was made in April, 1869, and the action was not brought till August, 1871. The defendants alleged that, as the action had not been brought

(*k*) R.S.O. 1897, c. 72, s. 3.

(*l*) *Ibid.*, s. 4.

(*ll*) *Ibid.*, s. 5.

(*m*) Art. 2262.

(*n*) The same provision was contained in the then Railway Clauses Consolidated Act, C.S.C., c. 66, s. 83, upon which McCallum v. Grand Trunk Railway Company (1871) 31 U.C.Q.B. 527, was decided. See the present provision in the Consolidated Railway Act, C.S.C., 1906, c. 37, s. 306(1).

within the six months limited by the above enactment, the verdict obtained against them (which was afterwards set aside and a nonsuit entered) could not be sustained.

Opinion of Wilson, J.

"I do not say," said Wilson, J., "it is impossible that a libellous publication may not be made, and the limitation of the statute apply to the action, because the publication was by reason of the railway. But it is enough to say that, in this case, no such facts appear. The publication was certainly made by the company, because they were railway proprietors, and about a railway matter, because it related to their business, and that of the plaintiff, because he was in their railway service. Yet it was not a publication made by reason of the railway, but because they were exercising their ordinary civil rights in removing a person they considered to be an unjust servant from their employment, and in informing their numerous employees over their line that they had so removed him, and the cause of that removal. It is no more a matter which was done by reason of the railway, than the keeping of a banker's account is by reason of the railway. The plaintiff did not sustain his injury by reason of the railway, but by reason of the publication of the hand bill complained of. I may say I entertain no doubt on this point."

This judgment was affirmed by the Court of Error and Appeal for Upper Canada(*o*), who held that the action was not one within 16 Viet. c. 99, s. 10, and necessarily to be brought within six months(*p*).

A Quebec case.

The action of a teacher in Quebec, claiming damages from a school commissioner who had concurred in the adoption of a resolution terminating the engagement of the teacher for reasons alleged to be defamatory, was held to be prescribed, by the terms of article 2598, R.S.Q., which applied to school commissioners, as six months from the date of the adoption of the resolution, when the commissioner had acted in good faith(*q*).

(*o*) (1873) 33 U.C.Q.B. 8.

(*p*) Tench v. Great Western Railway Co. (1872) 32 U.C.Q.B. 452; and (In Error and Appeal) (1873) 33 U.C.Q.B. 8.

(*q*) Molleur v. Faubert (1898) Q.O.R. 16 (S.C.) 132.

The effect of a fresh publication on the statutory limitation.

There are, however, some modifications of the statutory rules which have the effect of extending the period of limitation. Every sale of a copy of a newspaper containing a libel has been held to be a fresh publication which gives the statute a new starting point, and enables an action to be brought against the publisher within two years thereafter, although, by reason of the lapse of time, no action would lie for the original publication. This is the result of the decision in *Duke of Brunswick* v. *Harmer*(*r*), in which the plaintiff's agent, at plaintiff's request, purchased at the office of the defendant, the proprietor of the newspaper, a copy of the issue published seventeen years previously which contained libellous matter concerning the plaintiff. In an action brought seven months after the purchase the defendant pleaded the statute of limitations; but it was held that the sale of the copy was a publication sufficient to take the case out of the statute, and that the statutory plea was of no avail. It was also held that the jury, who subsequently gave £500 damages, should not be directed by the trial judge to restrict the damages to those resulting from the later publication.

Limitation of time for bringing action for newspaper libel in Ontario.

The Libel Act of Ontario modifies still further the statutory rule of limitation. It enacts that every action for libel contained in a newspaper shall be commenced within three months after the publication complained of has come to the notice or knowledge of the person defamed; but, where an action is brought and is maintainable for any libel published within said period of three months, such action may include a claim or claims for any other libel published against the plaintiff by the defendant, in the same newspaper, within a period of one year prior to the commencement of the action(*s*).

This enactment is peculiar to Ontario; it does not appear in the statutes of any other Province. It is intended to ensure promptitude in asserting a claim for libel against a newspaper publisher, and to prevent an action being kept dangling over his

(*r*) (1849) 14 Q.B. 185; 19 L.J.Q.B. 20; 3 C. & K. 10; 14 Jur. 110.

(*s*) R.S.O. 1897, c. 68, s. 13.

head for an indefinite period, and perhaps stifling fair discussion of matters of public interest and importance. In every case the issue of a writ against the publisher brings the alleged libel *sub judice*, and may subject him to proceedings for contempt should he permit further comment in his newspaper. This clause does not prevent such proceedings, but it mitigates considerably the restraints of the old law by compelling the complainant to launch his action within three months after the statements complained of have come to his "notice or knowledge." So soon as this is done the parties are within the ordinary rules of procedure, which are usually sufficient to ensure diligence in the prosecution of the action.

The "notice or knowledge" necessary.

The "notice or knowledge" referred to may be acquired either by reading the libel, or by hearing it read, or by any information which will put the complainant upon inquiry, *e.g.*, any communication, verbal or written, advising him of the publication of the libel. Any "notice or knowledge" actual or constructive, direct or indirect, which will enable a person to understand that there has been a defamatory publication concerning him in the newspaper will be sufficient. Otherwise the complainant, by simply avoiding direct personal "notice or knowledge," might extend the period of limitation indefinitely. The time for bringing the action will commence to run from the time when the "notice or knowledge" was first received, and, should the statute be pleaded in bar of the action, the plaintiff should be prepared to prove when the defendant became aware of the fact, and that plaintiff's writ was issued within three months afterwards.

The claims for "other libels" which may be included in an action for a particular libel.

The second part of this section (13) restricts the benefits conferred by the first part where the defendant's newspaper has been defaming the complainant in its issues of the year immediately preceding the commencement of the action. The defendant may be compelled, under this clause, to answer "for any other libel" published in his paper concerning the plaintiff during such year. The claims for "other libels," which may be included in the same action, depend upon the conditions express or im-

plied in the statute. These are(1) that an action has been brought for some particular libel contained in the newspaper; (2) that such action has been commenced within three months after the plaintiff has had "notice or knowledge" of said libel; (3) that the action is "maintainable" by the plaintiff against the defendant for the particular libel sued on; (4) that the claim "for any other libel" is by the same plaintiff or plaintiffs against the same defendant; (5) that such other libel was published by the same defendant against the same plaintiff or plaintiffs; (6) that it was published in the same newspaper; (7) that it was so published within one year prior to the commencement of the action in which it is included. These conditions appear in section 13 (*supra*).

Notice of complaint to be given as to all the libels sued for.

Another condition is contained in section 6(2) of the Act, which requires notice of complaint of the particular libel which has provoked proceedings, and of the other libels referred to. This notice, which is to be served as directed by the statute, must specify the statements complained of, which are the only statements upon which a claim for damages can be based(*t*). The notice is a condition precedent; and if it has been omitted, the action is not "maintainable." Having regard to the purpose of section 6 (2) a similar notice is evidently necessary "for any other libel published against the plaintiff by the defendant in the same newspaper," and a claim for which, the statute says, may be included in the particular action. One object of the enactment respecting notice is to protect newspapers, to a certain extent at least, against libel actions. But the principal object is to apprise a publisher of the injustice and injury caused by the statements complained of, and to give him an opportunity of rectifying, by correction and apology, any wrong done by the publication. The effect of permitting claims to be made for libels of which no notice had been given would be virtually to set aside the enactment as to notice altogether. It would be manifestly unjust to proceed for damages "for any other libel" of

(*t*) Obernier v. Robertson (1892) 14 O.P.R. 553.

which no complaint had been made, and of which, perhaps, the publisher might be entirely ignorant, until the particular action, in which the claim for such "other libel" is included, had been instituted.

VII. *Death of party before verdict.*

Death of plaintiff or defendant.

An action for defamation being a personal action comes within the rule or maxim, *Actio personalis moritur cum personâ.* And, therefore, where a libel or slander has been published by or concerning any person, and such person dies before verdict, the cause of action is gone(*u*). There is no survival of the right of action for or against the executor or administrator of either party; and so the death of the plaintiff may be pleaded by the defendant, or by those who represent him, as a complete answer to the proceedings. But, where the death takes place after verdict, the case is different. For, as provided by the rule of the Judicature Acts, "there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but judgment may in such case be entered notwithstanding the death"(*v*). And where judgment has been entered in plaintiff's favour and he dies, his executors and administrators may appear as respondents on any appeal against the judgment(*w*). The law is the same in the United States(*x*). So, also, a judgment in plaintiff's favour may, on the death of the defendant, be enforced against the latter's representatives.

When the action survives.

The maxim, *Actio personalis moritur cum personâ,* does not apply to slander of title, nor to injury to property by either libel or slander. In such case the cause of action survives to plaintiff's representatives who may shew damage to plaintiff's estate(*y*).

(*u*) Hatchard v. Mège *et al.* (1887) 18 Q.B.D. 771; 56 L.J. 397.

(*v*) R. 394, O.J.A.

(*w*) Twycross v. Grant *et al.* (1878) (C.A.) 4 C.P.D. 40; 47 L.J.Q.B. 676; 39 L.T. 618.

(*x*) Sandford v. Bennett, 24 N.Y. 20.

(*y*) Hatchard v. Mège *et al., supra.*

VIII. *Counterclaim.*

Defence by way of counterclaim, when allowed and when disallowed.

There may also, under the Judicature Acts, be a defence by way of counterclaim to actions of defamation(*z*). The courts, however, have not favoured counterclaims for libel and slander against claims of a different character; but there seems to be no good reason why they should not be pleaded and be allowed to stand, as in fact they have been, against claims of the same character. The defendant in an action for slander, for example, has been permitted to counterclaim for damages for slander published by the plaintiff against the defendant on another occasion, and on account of another matter(*a*). And a defendant, in an action for libels contained in a letter published in a newspaper, has also been allowed to counterclaim for damages for slanders spoken by plaintiff at a meeting of a municipal committee and reported in the newspaper, and to which defendant replied in the letter in question(*aa*). Although it has been said(*b*) that the courts should give a liberal interpretation to these rules, which were passed with the intention of settling in one litigation all questions arising out of the subject matter of the dispute, the judges have been chary in giving effect to that view in actions of defamation. A defendant, who was sued by the director of a colliery company for the circulation among the company's shareholders of a libellous letter charging the directors with conspiracy and fraud, counterclaimed for losses sustained in respect of shares bought on false representations. The counterclaim was struck out by Lindley, J., who said: "This is one of those cases where it would be very difficult to keep the jury from mixing up the two claims." But the defendant was left at liberty to sue, and the plaintiff was put on terms not to issue execution on any judgment he might obtain without leave of the court or a judge(*c*). In an action for assault and

(*z*) Rules 251-254, O.J.A., relate to counterclaim.

(*a*) Quin v. Hession, L.R. (Ir.) 4 Ex. D. 35; 40 L.T. 70.

(*aa*) Hopewell v. Kennedy, 9 O.L.R. (1904) 43; 4 O.W.R. 433; 25 C.L.T. (Occ. N.) 70. See chapter on Plaintiff's Pleadings.

(*b*) *Per* Brett, L.J., in Turner v. Hednesford Gas Co., 3 Ex. D. 151.

(*c*) Nicholson v. Jackson, W.N. 1876, 38; 2 Charl. Ch. Ca. 37.

slander, a counterclaim for non-repair of a house was struck out(*d*). And in an action on a claim for rent, a counterclaim for libel and slander, not connected therewith, was not allowed to be set up(*e*).

Counterclaim for libel excluded in an action for damages for negligence.

So, also, in an action for damages for injuries sustained through the negligence of the defendants, a counterclaim for libel was excluded. It appeared that the plaintiff, after the commencement of the action, published an article in a Chicago newspaper reflecting upon the defendants, and the defendants thereupon counterclaimed for damages for libel. On the plaintiff's application, the Master in Chambers struck out the counterclaim under Rules 127(b) and 168, O.J.A.(*f*), but gave the defendants leave to bring an independent action. Upon an appeal to a judge in Chambers (O'Connor, J.), the appeal was dismissed. "I think," said the learned judge, "the provisions of the Judicature Act are wide enough to admit of two causes of action, both sounding in damages, and one as a counterclaim to the other, being tried together: *Gray* v. *Webb*, 21 Ch. D. 802; *McGowan* v. *Middleton*, 11 Q.B.D. 464; but I think it would be extremely inconvenient and inexpedient to try, in one suit, two causes of action in tort, each of which depends on nice distinctions of law and fact, and in one of which the judge controls the law and the jury the facts, while in the other the jury are judges of both the law and the fact. I think, besides, the order made by the Master in Chambers was a reasonable one"(*g*).

Counterclaim for libel and slander excluded in an action on a promissory note.

A counterclaim for libel and slander has also been struck out in an action on a promissory note. In that case the defendant L., the endorser of the note, pleaded that by an arrangement made

(*d*) Lee v. Collyer (1876) 1 Charl. Ch. Ca. 86; 20 Sol. Jour. 177; 60 L.T. Notes, 157.

(*e*) Rotheram v. Priest, 41 L.T. 558; 49 L.J.C.P. 105; 28 W.R. 277.

(*f*) See R. 254, O.J.A.

(*g*) McLean v. Hamilton Street Railway Co. (1885) 11 O.P.R. 193.

with the plaintiffs, who had discounted the note, it was to be renewed from time to time, and paid out of the proceeds of a certain agency business, in which the defendant O., the maker of the note, and the defendant L. were engaged as partners; that the defendant O. had absconded, and that afterwards the plaintiffs had, by libel and slander of the defendant L., prevented him from securing the continuance of the agency business for himself, whereby he was unable to carry out the arrangement; and he pleaded a counterclaim against the plaintiffs for the alleged libel and slander. The plaintiffs applied for an order to exclude the counterclaim on the ground that it was calculated to embarrass the plaintiffs, and to delay or hinder the trial of their action, by necessitating the obtaining of evidence under a commission in the United States. The application was refused, and, upon an appeal to a judge in Chambers (Armour, J.), the appeal was referred to the Divisional Court.

Opinion of Cameron, C.J.

"There is no doubt such a claim as this," said Cameron, C.J., (with whom Galt, J., concurred), "though sounding purely in damages, may be pleaded against an action on a money demand under Rule 127 of the Judicature Act. But it is equally clear that it is in the discretion of the court or a judge, under sub-section (b) of the said rule, on the application of the plaintiff, to refuse to allow the defendant to avail himself of the rule, if, in the opinion of the court or judge, the counterclaim cannot be conveniently disposed of in the pending action, and ought not to be allowed. In an action of slander or libel there is no precise measure of damages. The damages are wholly in the discretion of the jury, and in a case like the present, if a right to damages could be made out at all, the jury might be influenced in arriving at their verdict by the amount of the plaintiff's claim. It seems to me, in actions where malice is an essential element, and the damages are sentimental, without a legal rule to guide in their measurement, there is much more injury likely to arise to the cause of justice by allowing such a counterclaim than can possibly spring from the defendant being forced to bring an independent action for the redress of any wrong he may have suffered by the alleged libellous or slanderous matter. The discre-

tion of the court would seem to take a wide range under subsection (b), to Rule 127, and Rules 168 and 178''(*i*).

Rose, J., who dissented and thought the appeal should be dismissed, was much impressed with the argument that the charge of libel arose out of the circumstances giving rise to the claim and defence.

The appeal was allowed and the counterclaim struck out, without prejudice to the defendants bringing a fresh action; and, if a fresh action were brought, that judgment should not be signed in this action without the order of the court or a judge(*j*).

Counterclaim for slander of title excluded in mortgage suit.

This decision was followed by Robertson, J., in *Odell* v. *Bennett et al.*(*k*), upon an appeal by the defendants from an order of a local Master striking out the defendants' counterclaim for slander of title in an ordinary mortgage action. The plaintiff claimed payment and possession, and the defendants pleaded, *inter alia*, a counterclaim for damages by reason of false and depreciatory statements with regard to the value of the mortgaged premises. An order striking out the counterclaim under Rule 374(*l*) was affirmed, as well on the ground of inconvenience in trying the action and counterclaim together, as on the ground that the counterclaim was filed for delay.

Defence of want of notice of action.

The defence of not receiving notice of action, although open to a newspaper publisher in an action for libel, is not available to a public officer, as such, in an action for slander. A post office inspector, who was sued for damages in an action for slander, pleaded, *inter alia*, the want of notice of action to him as a public officer, but it was held by the Divisional Court(*m*), and affirmed by the Court of Appeal for Ontario(*n*), that he was not

(*i*) See Rules 251, 252, 253, O.J.A.

(*j*) Central Bank of Canada v. Osborne *et al.* (1887) 12 O.P.R. 160.

(*k*) (1889) 13 O.P.R. 10.

(*l*) Now R. 254, O.J.A.

(*m*) Hanes v. Burnham (1895) 26 O.R. 528.

(*n*) *Ibid.* (1896) 23 O.A.R. 90.

entitled to notice, statutes requiring such notice applying only to actions brought for acts done. Meredith, C.J., (with whom Rose, J., concurred), said that the decision of the Court of Appeal in *Royal Aquarium Society* v. *Parkinson*(*o*), was conclusive against the defendant. "It was there held that the provisions of a statute, similar in its terms to the Acts relied on in this case, did not entitle the defendant to notice in an action for slander; that the statute applied only to actions brought for acts done; that words spoken were not 'acts done'; and that all the expressions refer to some act done, or fact committed; and that there must be some positive act done." That decision was binding on the court, notwithstanding the previous decision in *Murray* v. *McSwiney*(*p*), which was plainly distinguishable. "Apart from authority, too, I should have been prepared to hold that the statutes relied on cannot be invoked by a defendant where the words spoken are defamatory, and have been uttered with express malice, for, in such a case, the defendant does not speak them in the *bonâ fide* and honest discharge of his duty, and the ground upon which his liability rests is, that he has not used the occasion honestly, but has abused it for an indirect and malicious purpose"(*q*).

Tender and payment into court in Quebec.

A defendant, who has tendered a certain sum in payment and thereafter deposited the money in court, is estopped from asking that the action should be dismissed absolutely; he can only pray for dismissal as to the excess of the demand over the amount tendered(*r*).

(*o*) (1892) 1 Q.B. 431.

(*p*) (1876) Ir. R. 9 C.L. 545.

(*q*) Hanes v. Burnham (1895) 26 O.R. 528.

(*r*) Prevost v. Huard (1905) 7 Q.P.R. 406.

CHAPTER XXVIII.

PRIVILEGE.

The defence of privilege.

One of the special defences sometimes available in an action of libel or slander is that the publication is privileged. There is no part of the law of defamation which involves finer distinctions of liability, the law as to qualified privilege especially. These distinctions affect in turn the rules of pleading and the rules of evidence.

Distinctions as to privileged communications.

With respect to privileged communications, *e.g.*, it has been said that they are not all equally and alike privileged. Some are cases of answers as to characters of servants; others are volunteer representations of a similar kind; others are spontaneous, confidential communications among friends, on whom a right or duty rests by reason of interest, or employment, or relationship, etc.; others are communications between individuals touching private matters. Some are from private persons to the King or his officers, respecting private grievances; others emanate from individuals but affect a party in some public office or duty, or are prompted by solicitude for the public good; others again are united representations from numbers of people touching the public conduct of public servants, addressed not to individuals, but to the head of the executive government or parliament; to which may be added proceedings in courts of justice, and the addresses of counsel to juries. Most of the cases of civil actions mentioned in the books have arisen out of communications between individuals, and distinctions seem to have been taken (1) between ordinary cases of slander and privileged communications; (2) of the latter, between communications solicited and volunteered; (3) between characters of servants and the like, and applications to public departments, which are spontaneous; (4) between cases of private applications respecting private claims; (5) private claims against an officer on his private account, or arising out of his public situation; (6) between representations for private relief, and a redress of public grievances; (7) between judicial

proceedings in a course of justice, through courts legal, equitable, or ecclesiastical, or parliament, and some privileged proceedings; (8) some being privileged *primâ facie* only, others absolutely. These and like points of difference should be borne in mind in applying cases to new facts(*a*).

Two kinds of privilege, absolute and qualified. Absolute privilege.

There are two kinds of privilege, absolute and qualified. The cases of absolute privilege are based on the principle that, although defamatory matter is published, its publication is so much in the public interest as to outweigh every other consideration. This species of privilege or protection is confined to cases where the public service, or the due administration of justice, requires complete immunity from legal proceedings, *e.g.*, the publication of defamatory matter contained in a petition to parliament(*b*), or of similar matter in an affidavit in a proceeding before any judicial tribunal(*c*). In such cases the presumption of privilege is altogether conclusive, and the law will not allow any evidence to be adduced to remove it, or at all to impeach it. The regular and established proceedings in parliament, and in courts of justice, are of this character, and no action can be supported upon any part of their contents. The reasons given for this absolute privilege are, First: that the safety and welfare of the community require that all such public proceedings shall be perfectly unrestrained and free, and only subject to the authority and discretion of the tribunals in which they take place; and Secondly: that such tribunals possess the power of expunging all defamatory matter, if irrelevant, from the proceedings, and of obliging the offending party to make satisfaction(*d*).

Qualified privilege.

The cases of qualified or conditional privilege, on the other hand, relate to less important matters in which the *primâ facie*

(*a*) *Per* Macaulay, J., in Stanton v. Andrews (1836) 5 U.C.R. (O.S.) 211.

(*b*) Lake v. King (1669) 1 Saund. 131; 1 Lev. 240; 1 Mod. 58.

(*c*) Astley v. Younge (1759) 2 Burr. 807; Gompas v. White (1890) 54 J.P. 22; Lilley v. Roney (1892) 8 T.L.R. 642.

(*d*) *Per* Sherwood, J., in Stanton v. Andrews, *supra*.

protection conferred by such privilege is rebutted by proof of actual malice. They proceed on the principle, that the person responsible for the publication of the defamatory matter should not be entirely free from responsibility, but that he should be protected in so far as he has acted in good faith and for the public good, *e.g.*, the publication of a fair report of a trial in a court of justice. In any case where this qualified privilege is set up as a defence, the plaintiff may rebut it by evidence of actual malice, that is, by evidence that the publication was not made *bonâ fide*, but from some improper motive, or as a cover for wilful and knowing defamation.

Privileged occasion and privileged communication distinguished.

There is also what is called a privileged occasion and a privileged communication, and the two are often confused. So far as the protection afforded is concerned, there is practically little or no difference between them. Usually a privileged communication arises or grows out of a privileged occasion. The question of a privileged occasion is for the judge; the question of a privileged communication is for the jury(*e*); whether the occasion gives the privilege is a question of law for the judge; whether the party has acted properly in using the privilege is a question of fact for the jury(*f*).

A privileged occasion. Why privileged.

A privileged occasion is an occasion upon which some person may do with impunity something which no other person can do(*g*). It is called privileged because the occasion, or, in other words, the circumstances under which the publication of the defamatory matter takes place, make it right that the defendant should freely publish what he honestly believes to be true, and that the publication should be excused for the sake of common convenience and in the interests of society at large. "In many relations of life the law deems it politic and necessary to protect the honest expression of opinion concerning the character

(*e*) *Per* Lopes, J., in Pullman v. Hill & Co. (1891) 1 Q.B., at p. 529.

(*f*) *Per* Lord Campbell, C.J., in Dickson v. Wilton (Earl of) (1859) 1 F. & F., at p. 419.

(*g*) Campbell v. Spottiswoode (1863) 3 B. & S. 769; 32 L.J.Q.B. 185; 18 L.T. 201; *per* Lord Esher, M.R., in Merivale v. Carson, *infra*.

and merits of persons, to the extent appropriate to the nature of the occasion. . . . Occasions of this kind are said to be privileged, and communications made in pursuance of the duty or right incident to them are said to be privileged by the occasion. The term 'qualified privilege' is often used to mark the requirements of good faith in such cases''(*h*).

This language, by a well-known text writer, is quoted by Osler, J.A.(*i*), as aptly paraphrasing the following from the judgment in the leading case of *Toogood* v. *Spyring*(*j*), which explains the principle of privilege: ''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 as to verbal slander), 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 unauthorized communications, and affords a qualified defence depending upon 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.''

When occasion not privileged.

In a legal sense, the term ''privileged occasion'' is used in reference to a case in which one or more members of the public are clothed with a greater immunity than the rest(*l*). But, in the case of a criticism on a published work, every person is entitled to do, and is forbidden to do, exactly the same things, and therefore the occasion is not privileged(*m*). Where the communication is of such a nature that it may be

(*h*) Pollock on Torts, 6th Ed., p. 259.

(*i*) In Puterbaugh v. Gold Medal Furniture Manufacturing Co., 7 O.L.R. (1904), at p. 586. As to this case, noted fully at pp. 168-171, *ante*, see Edmondson v. Birch & Co. *et al.* (1907) 1 K.B. 371 (C.A.).

(*j*) (1834) 1 Cr. M. & R. 181, at p. 193.

(*l*) *Per* Bowen, L.J., in Merivale v. Carson (1887) 20 Q.B.D. (C.A.). at p. 282.

(*m*) ***Per*** **Lord Esher, M.R., in Merivale v. Carson,** ***supra,*** **at p. 280.**

fairly said that those who made it had an interest in making it, and that those to whom it was made had a corresponding interest in having it made to them—when these two things co-exist, the occasion is a privileged one(*n*). But where the communication is made to a person who had no interest in the subject of the communication, or no duty in regard to it, then, even if the defendant had a *bonâ fide* and reasonable belief that such person had such an interest or duty, the occasion would not be privileged(*o*).

A privileged communication.

Privileged communications have also a protection imparted to them in the public interest. It is the same sort of protection as that afforded by a privileged occasion, namely, the right in a particular person to say or write a particular thing which no one else otherwise circumstanced has a right to say or write. Thus, in giving a character to a servant, the master has a particular privilege of saying what he believes to be true, whether true or not; that is a privilege(*p*). So, also, privilege attaches to, or is conferred upon, a person whenever he stands in such a relation to the facts of the case that he is justified in writing and publishing what would be libellous in another person to write and publish(*q*). The meaning, in law, of a privileged communication, said Burton, J.A., is a communication made on such an occasion as rebuts the *primâ facie* inference of malice arising from the publication of matter prejudicial to the character or credit of the plaintiff, and throws on the latter the onus of proving malice in fact, *i.e.*, that the defendant was actuated by motives of personal spite or ill will, or some other indirect or improper motive independent of the occasion on which the communication was made(*r*). Wilson, C.J., adopts the statement of Lord Camp-

(*n*) *Per* Lord Esher, M.R., in Hunt v. G.N. Ry. Co. (1891) 2 Q.B., at p. 191.

(*o*) Hebditch v. McIlwaine (1894) 2 Q.B. 54.

(*p*) *Per* Crompton, J., in Campbell v. Spottiswoode (1863) 32 L.J.Q.B. 195-6.

(*q*) *Per* Blackburn, J., in Campbell v. Spottiswoode (1863) 3 B. & S. 780.

(*r*) Todd v. Dun, Wiman & Co. & Chapman (1888) 15 O.A.R. 85, at pp. 91-2.

bell, C.J., in *Harrison* v. *Bush*(*s*), that "a communication made *bonâ fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it contain criminating matter which, without this privilege, would be slanderous and actionable"(*t*). In the conduct of affairs, says Osler, J.A., it often becomes necessary to make enquiries, and it must, therefore, be lawful to answer them. Such communications fall within the rule stated by Blackburn, J., in *Davies* v. *Snead*(*u*), that where a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts, then, if he *bonâ fide* and without malice does tell them, it is a privileged communication. This definition was approved by the Court of Appeal in *Waller* v. *Loch*(*v*)(*vv*).

Privilege really "a right."

Speaking of these expressions "privileged occasion" and "privileged communication," a writer on the law of the press says: "It is a misapprehension of the meaning of the words to call it a privilege. What is really meant is in no sense a privilege, but is a right, namely, the right to carry on one's business, or to take advantage of one's situation and circumstances, and this last is only another way of saying that each man is entitled to manage his affairs for his own advantage. The carrying on of business often involves the necessity of slandering or libelling some third party. The slander or libel in such circumstances is, however, only an incident to the lawful business so carried on, and being not invented, or used for the purpose of libel or slander, is in precisely the same position as a blow, or even a homicide, committed in self-defence, or under some proper justification"(*w*).

(*s*) (1855) 5 E. & B., at p. 348.

(*t*) Lemay v. Chamberlain (1886) 10 O.R. 638, at p. 645.

(*u*) (1870) L.R. 5 Q.B. 608, at p. 611.

(*v*) (1881) 3 Q.B.D. 619.

(*vv*) Todd v. Dun, Wiman & Co. (1888) 15 O.A.R. 85, at p. 89.

(*w*) Patterson on the Liberty of the Press, at p. 184.

The question whether occasion privileged is for the judge.

In actions for defamation the judge must determine whether the occasion of uttering the slanderous words, or publishing the libellous matter, is or is not privileged(*x*). The same rule holds where the facts are not in dispute, the question of privilege then being a question of law only for the judge and not for the jury(*y*). If privileged, there is, in the absence of evidence of malice, nothing to be left to the jury as to *bonâ fides* or otherwise(*z*). In deciding this preliminary inquiry as to privilege, the judge, to a certain extent, has to draw inferences of fact, the questions being compounded of both law and fact; but this is no more than he has to do in an action for malicious prosecution, where the question of want of probable cause is one for the judge, who, in this instance, as Lord Westbury points out in the case of *Lister* v. *Perryman*(*a*) supersedes the functions of the jury as sole judges of fact(*b*). In delivering the judgment of the court in *Shaver* v. *Linton*(*c*), Hagarty, J., said: "In several cases of late years it is discussed whether the judge should stop the case before reaching the jury on his own view of the question of privilege, or whether he should always leave it to them whether the privilege had been exceeded or not." After pointing out that the case of *Somerville* v. *Hawkins*(*d*) takes the former view, and that it is referred to by Lord Campbell, in *Harrison* v. *Bush*(*e*) as a leading case on privileged communications, the learned judge refers to the law on the point as stated in *Cooke et al.* v. *Wildes*(*f*); *George* v. *Goddard*(*g*); *Humph-*

(*x*) McIntee v. McCullough (1864) 2 U.C.E. & A. 390.

(*y*) *Per* Burton, J.A., in Hanes v. Burnham (1896) 23 O.A.R., at p. 91.

(*z*) McIntee v. McCullough, *supra*; Shaver v. Linton (1862) 22 U.C. Q.B. 177; Waterbury v. Dewe (1881) 6 S.C.R. 143.

(*a*) L.R. 4 H.L. 562.

(*b*) *Per* Strong, V.C., in Tench v. Great Western Railway Co. (1873); (In Error and Appeal) 33 U.C.Q.B. 8, at p. 42.

(*c*) (1862) 22 U.C.Q.B. 177.

(*d*) (1851) 10 C.B. 583.

(*e*) (1855) 5 E. & B. 358.

(*f*) *Ibid.* 340.

(*g*) (1861) 2 F. & F. 489.

reys v. *Stillwell*(*h*), and *Maitland* v. *Bramwell*(*i*), and adds: "We think we must assume the law to be as laid down by the courts *in banc*, after full argument, and that it is a question for the judge at the close of the plaintiff's case. As Lord Campbell suggests, in *Cooke* v. *Wildes*: 'In the case most frequently occurring, of an action for defamation on the occasion of giving the character of a servant, on evidence being given of declarations by defendant of spite and ill will towards the plaintiff, and a desire to injure him, the jury, as a matter of course, are asked if they believe these declarations and what effect is to be given them.' In the absence of such extrinsic and intrinsic evidence of malice to withdraw the immunity of privilege, we think the judge should not leave the case to the jury."

Rule as to malice where occasion or communication privileged.

Where the slanderous words are spoken on an occasion when, either from public duty, private interest, or the relation of the parties to each other, the character of the party complaining may be freely discussed, the jury must find express malice upon sufficient evidence before the defendant can be pronounced guilty(*j*). In a Nova Scotia case in which the occasion was admittedly privileged, and the only question for the jury was as to actual malice, Henry, J., said: "It would be superfluous, at this date, to define what the term malice in the present connection means. It is sufficient to say that it implies a state of mind in the person to whom it is imputed. This being so, its presence or absence is to be inquired into and determined in the same way as other states of mind are to be inquired into and determined—such, for instance, as fraudulent intent, intent to abscond, intent to deliver a deed as such, or any other intent, motive, or purpose, or other state of mind, which may be the subject of legal inquiry"(*k*).

The onus of proof, how satisfied.

The occasion having been held to be privileged the established rule is, that the onus lies upon the plaintiff to prove that the

(*h*) (1861) 2 F. & F. 590.

(*i*) *Ibid.* 628.

(*j*) Richards v. Boulton (1835) 4 U.C.Q.B. (O.S.) 95.

(*k*) Miller v. Green (1899) 32 N.S.R. 129, at p. 135.

defendant, in doing what is complained of, was actuated by an improper motive; that he acted, not from a sense of duty, but under the influence of malicious feelings; that in fact he cloaked his malice under the pretence of acting under a sense of duty; and, if there be no such evidence, there is nothing to submit to a jury(*l*). Where the libel complained of is clearly privileged, the inference of malice cannot be raised upon the face of the libel itself, as in other cases it might be, but the plaintiff must give extrinsic evidence of actual express malice; he must also prove the statement to be false as well as malicious; and the defendant may still make out a good defence by shewing that he had good ground to believe the statement true, and acted honestly under that persuasion(*m*).

Evidence of malice in cases of privilege.

Slanderous words spoken before or after those charged in the declaration, whether spoken to the same person or to a stranger, and whether in themselves actionable or not, are admissible in evidence to prove malice. The cases of *Warwick* v. *Foulkes*(*n*), and *Simpson* v. *Robinson*(*o*), are strong authorities illustrative of this doctrine(*p*).

Opinion of Burton, J.A.

"One of the modes," said Burton, J.A.(*q*), "frequently resorted to of renewing the presumption of malice, when once it has been held that the occasion is privileged and malice rebutted, is to shew that the libellous statement is false to the knowledge of the defendant. But the onus of shewing this is upon the plaintiff(*r*). It is quite true that the libel itself may contain expressions which may, in themselves, afford evidence of malice;

(*l*) *Per* Gwynne, J., in Waterbury v. Dewe (1881) 6 S.C.R. 143, at p. 164; Wilcox v. Stewart (1905) 38 N.S.R. (G. & R.) 409.

(*m*) McIntyre v. McBean *et al.* (1856) 13 U.C.Q.B. 534.

(*n*) 12 M. & W. 507.

(*o*) (1848) 12 Q.B. 511.

(*p*) *Per* Draper, C.J., in Nolan v. Tipping (1858) 7 U.C.C.P. 524, at p. 526.

(*q*) In Todd v. Dun, Wiman & Chapman (1888) 15 O.A.R. 85, at pp. 92-94.

(*r*) *Per* Lord Denman, in Fountain v. Boodle, 3 Q.B. 5.

but that would be a question for the jury, and not for the judge, whose functions are confined to the inquiry of whether the occasion was privileged. This is a matter of law. If, at the close of the plaintiff's case, there is no intrinsic or extrinsic evidence of malice, it is the duty of the judge to nonsuit. It is no doubt the duty of the judge to consider whether there is anything in the libel itself from which a jury might reasonably and properly infer malice(*s*). The rule is clearly laid down by the Court of Appeal in England, in *Clark* v. *Molyneux*(*t*), that the moment the judge rules that the occasion is privileged, the burden of shewing that the defendant did not act in respect of the reason of the privilege, but for some other and indirect reason, is thrown upon the plaintiff(*u*). 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''(*v*).

Evidence of defendant's motives.

The defendant may, however, shew his motives, and where the general agent of a life insurance company was sued for defamatory statements in a letter concerning plaintiff, a former local agent of the company who had been removed from his position by defendant, and tendered evidence (which was rejected) of his motive in writing the letter, it was held that, the occasion being privileged, the evidence was admissible, and that the verdict for plaintiff must be set aside(*w*).

Occasions absolutely privileged. Statements in the legislature.

The occasions of absolute privilege where no action lies, however false or malicious the statements may have been, comprise statements made in the course of parliamentary and judicial proceedings. Members of the Federal, Provincial and Territorial legislatures are not liable for anything they may say

(*s*) *Per* Parke, B., in Wright v. Woodgate (1835) 2 C.M. & R. 573; and *per* Lord Campbell in Cooke *et al.* v. Wildes (1855) 5 E. & B. 241, referring to Tuson v. Evans (1840) 12 A. & E. 733.

(*t*) (1877) 3 Q.B.D. 237.

(*u*) *Ibid.*, *per* Cotton, L.J., at pp. 249, 251.

(*v*) Spill v. Maule (1869) 4 Ex. 232.

(*w*) Miller v. Green (1899) 32 N.S.R. 129.

within the walls of those assemblies(*ww*), but the privilege does not extend to what is said outside(*x*). Petitions to those bodies(*y*), or to any of their committees(*z*), or statements of witnesses before such committees(*a*), are absolutely protected; but speeches published by members of the legislature to their own constituents have only a qualified privilege(*b*).

Judicial proceedings.

With respect to judicial proceedings, 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(*c*); that no action of libel or slander lies, whether against judges, counsel, witness, or parties, for words written or spoken in the course of any proceeding before any court recognized 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(*d*). This would include military courts of inquiry(*e*), and other judicial tribunals, *e.g.*, a commission appointed under statutory authority(*ee*). Absolute privilege also

(*ww*) Bill of Rights, 1 Wm. & M., St. 2, c. 2.

(*x*) Rex v. Abingdon (1794) 1 Esp. 226; Rex v. Creevey (1813) 1 M. & S. 273.

(*y*) Lake v. King (1680) 1 Saund. 131; 1 Lev. 240; 1 Mod. 58; C.C. s. 321.

(*z*) Kane v. Mulvany (1866) 2 Ir. C.L.R. 402; C.C. s. 320.

(*a*) Goffin v. Donnelly (1881) 6 Q.B.D. 307; 50 L.J.Q.B. 303.

(*b*) Davison v. Duncan (1857) 7 E. & B. 233; 26 L.J.Q.B. 104; Wason v. Walter (1868) L.R. 4 Q.B. 95; 38 L.J.Q.B. 42.

(*c*) *Per* Lord Mansfield, C.J., in Rex v. Skinner (1772) Lofft 55.

(*d*) Munster v. Lamb (1883) 11 Q.B.D. 588; Hodson v. Pare (1899) 1 Q.B. 455; Law v. Llewellyn (1906) 1 K.B. 487 (C.A.); *per* Lopes, L.J., in Royal Aquarium Society v. Parkinson (1892) 1 Q.B., at p. 451. See, also, Floyd v. Barker, 12 Rep. 24; Revis v. Smith, 18 C.B. 126; Seaman v. Netherclift (1876) 2 C.P.D. 53; C.C. s. 320; Watson v. McEwan and Watson v. Jones (1905) A.C. 480; 74 L.J.P.C. 151; 93 L.T. 489—H.L., which decides that statements by a witness to the client and solicitor, in preparing proof for trial, are protected.

(*e*) Dawkins v. Lord Rokeby (1875) L.R. 7 H.L. 744; 45 L.J.Q.B. 8; Horne v. Lord Bentinck, 2 Brod. & Bing. 130; Dawkins v. Prince Edward of Saxe-Weimar *et al.*, 1 Q.B.D. 499; 45 L.J. 567.

(*ee*) Barratt v. Kearns (1905) 1 K.B. 504; 74 L.J.K.B. 318; 53 W.R. 354; 92 L.T. 255; 21 T.L.R. 212—C.A.

attaches to pleadings(*f*), even when published in a newspaper and justifying a criminal charge(*ff*), affidavits(*g*), and objections filed to a bill of costs(*h*). The ground of the rule is public policy(*i*). Another reason for this privilege, stated in a Nova Scotia case, is, that by encouraging claimants to resort to the courts and protecting them there in all they desire to urge and establish, the courts prevent and discourage those unseemly and pernicious results which flow from the collision of contending parties(*j*).

The provision in the Code.

Under the Code, no one commits an offence by publishing any defamatory matter, in any proceeding held before or under the authority of any court exercising judicial authority, or in any inquiry made under the authority of any statute, or by order of His Majesty, or of any of the departments of government, Dominion or Provincial(*jj*).

The law in the Provinces.

The general law on the subject, save in Quebec, is the same in all the Provinces. In Quebec, with the exception of the "incidental demand" for increased damages for libel contained in the defendant's pleadings, which may be made under the law of that Province, and a few minor points relating to procedure, the law as to privilege in judicial proceedings is the same as in the other Provinces. An action against a party for a libellous statement in a judicial proceeding is a matter concerning the relation of the subject to the administration of justice, and as such is governed, in the Province of Quebec, by the law of England. Such an action, instituted before the determination of the suit in which the libellous statements are pleaded, is premature(*k*). A notice served on plaintiff by a third person for defendant,

(*f*) Lord Beauchamps v. Sir R. Croft (1569) Dyer 285*a*.

(*ff*) Shallow v. Gazette Printing Co. (1907) 3 E.L.R. 25.

(*g*) Astley v. Younge (1759) 2 Burr. 807; Gompas v. White (1890) 54 J.P. 22; Lilley v. Roney (1892) 8 T.L.R. 642.

(*h*) Pedley v. May (1892) 8 T.L.R. 2.

(*i*) *Per* Lord Esher, M.R., in Royal Aquarium Society v. Parkinson, *supra*, at p. 442.

(*j*) *Per* Weatherbe, J., in Lowther v. Baxter (1890) 22 N.S.R. 372.

(*jj*) C.C. s. 320.

(*k*) *Per* Archibald, J., in Wilkins v. Major (1902) Q.O.R. 22 (S.C.) 264.

under an Insolvent Act, requiring plaintiff to make an assignment for the benefit of his creditors, is privileged in the absence of express malice(*l*); but not the publication, in Quebec, of an extract from the declaration of a party in a suit entered before the return of the action(*m*); nor the entries in books kept by detectives referring to persons suspected of crime. These latter are not judicial proceedings, and no privilege protects their publication(*n*). It has also been held in Quebec, that no action will lie against an advocate for words spoken by him, in the discharge of his professional duty before the court, unless the words complained of are foreign to the case in which he is at the time engaged(*o*); and, in Ontario, that a party to a criminal proceeding before a magistrate, or his solicitor or counsel, would be privileged in objecting to the evidence of a witness for the prosecution on the ground that he had perjured himself on a former stated occasion; and, *semble*, also, even a stranger, when permitted by another to act for him with the magistrate's sanction(*p*); so, too, where the words imputed unchastity to the plaintiff, a married woman, while defendant was personally conducting a prosecution before a magistrate against plaintiff for an assault(*q*). But where the defendant, while the plaintiff was giving his evidence in court, interrupted him several times and called him a perjurer, it was held, reversing the judgment of the court below, that, although the court could not award exorbitant damages, the defendant must pay costs(*r*). With respect to witnesses the Quebec courts have held, in accordance with the law in all the other Provinces, that an action for slander will not lie against a person for relevant words or statements uttered by him in the course of his evidence as a witness in a court of justice(*s*); and that an action

(*l*) Strong v. Bank of British North America (1876) L.R. 1 App. Cas. 307; 34 C.L.T. 627. (Unreported below).

(*m*) Archambault v. Great North Western Telegraph Co. (1886) Mon. L.R. 4 Q.B. 122.

(*n*) Fullerton v. Berthiaume (1894) Q.O.R. 6 (S.C.) 342; affirmed on appeal (1895) Q.O.R. 7 (S.C.) 460.

(*o*) Gauthier v. St. Pierre (1884) 7 L.N. 44; 28 L.C.J. 16 (S.C.); *per* Curran, J., in Paille v. Demers (1897) 3 Rev. de Jur. 434.

(*p*) *Per* Cameron, C.J., in Cowan v. Landell (1886) 13 O.R. 13.

(*q*) Henderson v. Scott (1892) 24 N.S.R. 232.

(*r*) Gravelle v. Belanger (1867) 3 L.C.L.J. 69 (Q.B.).

(*s*) Rochon v. Fraser (1851) 3 L.C.R. 87 (S.C.); Hibbard v. Cullen (1893) Q.O.R. 3 (S.C.) 463; Renaud v. Guenette (1903) Q.O.R. 25 (S.C.) 310.

based on such statements, and which does not allege irrelevancy as to the case in which the defendant testified, or as to the circumstances connected with it, may be dismissed on exception to the form(*t*).

Relevancy of statement immaterial.

It has been said that this privilege of defamatory statements, made in the course of judicial proceedings and inquiries, is subject to the qualification as to parties, counsel and witnesses, that the statements must be relevant to the cause or subject matter of inquiry; that the rule as to relevancy runs through the decisions; and that the courts have treated it as essential in determining the question of privilege(*u*). The United States cases (*infra*) are also cited as supporting this rule(*v*). But the English Court of Appeal has decided that the relevancy of the matter is immaterial(*w*).

Communications privileged in libel on the ground of interest or duty.

In actions for libel a communication has been held to be privileged, in the qualified sense, on the ground of interest, or duty, or both, where it was a report made by a foreman, in the course of his duty and without malice, respecting men in his gang, which caused the men to be discharged(*x*); where it consisted of statements in a letter by the landlord of premises occupied by a joint stock company, to one of the principal stockholders in the company, representing plaintiff as an unfit and unsafe manager of the company, and otherwise reflecting upon him in terms clearly libellous(*y*); where the member of a collecting association transmitted a debtor's name to the association

(*t*) Hibbard v. Cullen, *supra*. See, also, as to the privilege of witnesses, Barnard v. Molson (1891) 19 R.L. 36 (S.C.); Thayer v. Kirby (1884) 29 L.C.J. 110.

(*u*) See Folkard's L. & S., 5th and 6th Ed., 215.

(*v*) Hoar v. Wood, 3 Met. Rep. 193; McLaughlin v. Cowley, 13 Lathrop's Rep. 316; Rice v. Coolidge, 121 Mass. 395.

(*w*) Munster v. Lamb (1883) 11 Q.B.D. 588; 52 L.J.Q.B. 726; 49 L.T. 252; 47 J.P. 805 (C.A.).

(*x*) Surprenant v. Gobeille (1884) 7 L.N. 195 (S.C.).

(*y*) Macfarlane v. Joyce (1887) 32 L.C.J. 25; Mon. L.R. 3 S.C. 326.

for publication in its monthly list, without expressing any opinion on his honesty or dishonesty, solvency or insolvency, the statement being true, without malice, and no special damage being proved(*z*); where, in the absence of express malice, members of a trades union caused to be printed, in a journal of their trade published in Washington, U.S., an injurious statement to the effect that a strike ordered by the union would not have occurred but for the treachery of the plaintiff, a fellow member(*a*); where the general manager of a life insurance company wrote *bonâ fide* to a policy holder that the plaintiff, the solicitor for the policy holder and a former local agent of the company, had been "removed" from the agency "because it was clearly necessary," and that he had collected money, "which up to the present they had been unable to get him to report," even though these statements were false and could not be justified(*b*); but (in the same case, subsequently) not where the statements of the reasons for plaintiff's dismissal were knowingly false(*c*); where an unincorporated retail grocers' association published to their stenographer, at the request of the secretary, a bulletin or report that plaintiff was "unworthy of credit"(*d*); where, in the absence of express malice, such a publication was also made to the members of the association(*e*); where, in such a case, the publication to the copyist is a reasonable means of conveying the information to those who, like the members of the association, have a common interest(*f*); where a municipal councillor made known truthfully to the council all the facts which could form grounds for refusing a contract for municipal work to a person seeking to obtain it(*g*); where a defendant, between whom and her co-defendant a confidential relationship existed, and at whose house and other

(*z*) Aubin v. Edmond (1892) Q.O.R. 1 (S.C.) 367.

(*a*) Beaulieu v. Cochrane (1898) 29 O.R. 151.

(*b*) Miller v. Green (1900) 33 N.S.R. 517.

(*c*) *Ibid.* (1902) 35 N.S.R. 117.

(*d*) Harper v. Hamilton Retail Grocers' Association *et al.* (1900) 32 O.R. 295; following Lawless v. Anglo-Egyptian Cotton and Oil Co. (1896) L.R. 4 Q.B. 262.

(*e*) *Ibid.*

(*f*) *Ibid.*

(*g*) Campeau v. Monette (1901) Q.O.R. 19 (S.C.) 429. See, also, Hopewell v. Kennedy, 9 O.L.R. (1904) 43, *infra*.

houses in the same place the plaintiff, a clergyman, visited, wrote to her co-defendant that plaintiff was "on our clerical black list," that he was "neither a desirable acquaintance, nor a reputable parson," that her friends should be told "to steer clear of him," and to "spread this about the town at once"(*h*). In this last case the Court of Appeal for Ontario held, that the communication was privileged on account of the moral and social duty existing between the defendants; and that, although the request to spread the statements about would be some evidence of malice, it should have been left to the jury to say whether that request had been in fact made. "I take moral or social duty to mean," says Lindley, L.J., "a duty recognized by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal"(*i*).

The provision in the Code.

On the question of interest in the defamatory matter communicated, the Criminal Code declares, that no one commits an offence by publishing [*i.e.*, in writing or printing] to another person defamatory matter for the purpose of giving information to that person with respect to some subject as to which he has, or is, on reasonable grounds, believed to have, such an interest in knowing the truth as to make the conduct of the person giving the information reasonable under the circumstances, if such defamatory matter is relevant to such subject, and is either true, or is made without ill-will to the person defamed, and in the belief, on reasonable grounds, that it is true(*j*).

Communications unprivileged in libel on the ground of interest or duty.

On the other hand, a communication has been held to be unprivileged in libel, where it contained a charge of dishonesty in a letter from the defendant to an intimate friend, a relative of the plaintiff, written for the purpose of securing the friend's good offices in the differences between plaintiff and defendant,

(*h*) Fenton v. Macdonald, 1 O.L.R. (1901) 422.

(*i*) Stuart v. Bell (1891) 2 Q.B., at p. 350.

(*j*) C.C. s. 328.

and to induce him to use his influence to stop certain actions by plaintiff against defendant. There was, said Chipman, C.J., no mutual interest in the letter between the defendant and his friend, as in the case of *Shipley* v. *Todhunter*(*k*), and no power in the person addressed to remedy the grievances complained of, as in the case of *Fairman* v. *Ives*(*l*). "The principle recognized in such cases by Lord Denman and the Court of Queen's Bench, in *Hearne* v. *Stowell*(*m*), is this: that the privilege under which a communication is protected is to result from something which gives the party a right to discuss the character of the plaintiff, not from any general honesty of intention"(*n*).

Where, also, in reply to statements made by plaintiff, a city alderman, at a public meeting, reflecting on the manner in which the defendant, a contractor, was performing his contract for work on a public building, defendant vindicated himself in a letter published in the local newspapers, and at the same time made a defamatory attack on the plaintiff, the letter was held to be unprivileged for want of mutuality of interest between the defendant and the public. It was also unprivileged, it is submitted, as being in excess of what the occasion required. The court were of opinion that the case came squarely within *Murphy* v. *Halpin*(*o*), in which it was held, that where the defendant, in answering a letter which the plaintiff had sent to the paper, does not confine himself to rebutting the plaintiff's assertions, but retorts by inquiring into plaintiff's antecedents, and indulging in other uncalled for personalties, the defendant will be held liable; for such imputations are neither a proper answer to, nor a fair comment on, the plaintiff's speech or letter. The language of Dowse, B., at page 138, was adopted by the court(*p*).

Charges of crime or misconduct privileged on the ground of duty or interest.

Privilege also attaches sometimes, both in libel and slander, to charges of crime and misconduct on the ground either of duty

(*k*) (1836) 7 C. & P. 680.

(*l*) (1822) 5 B. & Ald. 642.

(*m*) 11 L.J.Q.B. (N.S.) 25; 12 A. & E. 227.

(*n*) Connick v. Wilson (1844) 4 N.B.R. (2 Kerr) 496, at p. 506.

(*o*) Ir. R. 8 C.L.127.

(*p*) Hopewell v. Kennedy, 9 O.L.R. (1904) 43; 4 O.W.R. 433; 25 C.L.T. (Occ. N.) 70.

to society, or to individuals, or of mutual interest between the parties making and receiving the communications. In libel privilege has been held to attach, for some one or more of these reasons, to a letter containing a charge of criminal offences against an insolvent which was shewn to two of his creditors by a fellow creditor and inspector of his estate(*q*); to a petition to local license commissioners against granting a liquor license to the plaintiff and defamatory of his tavern, in the absence of express malice, or that the petitioners had used the occasion for some indirect or wrong motive(*r*); where the words, charged as imputing perjury to a candidate at a municipal election, were spoken to the returning officer, during the election, with reference to the plaintiff's qualifications, if spoken with sincerity and under the belief that what was said was true(*s*); where the words accusing plaintiff of criminal connection with a gang of burglars were, in the absence of malice, spoken in confidence by a government detective to plaintiff's business partner(*t*); where the words charging conviction of a crime, against a candidate for admission to a benefit society, were spoken by a member of the society at one of its meetings, or even five or six years after the conviction(*u*); where certain premises having been destroyed by fire, the agent of the company in which the property was insured made statements which were alleged to impute arson to the plaintiff(*v*); where, a church having been entered, and moneys and money boxes and certain books of no use to any one but the plaintiff, a collector of the pew rents, having been stolen, the defendant, the senior warden, in the presence of the plaintiff's surety (a vestryman), two other vestrymen, and the rector of the church, accused plaintiff of the crime, adding that he had not handed over the moneys collected, and had destroyed the books in order to conceal the deficiency(*w*); where words

(*q*) Howarth v. Kilgour (1880) 19 O.R. 640.

(*r*) Wilcocks v. Howell *et al.* (1884) 5 O.R. 360.

(*s*) Swan v. Clelland (1856) 13 U.C.Q.B. 335.

(*t*) Smith v. Armstrong (1866) 26 U.C.Q.B. 57; following Whiteley v. Adams (1863) 10 Jur. (N.S.) 470.

(*u*) Durette v. Cardinal (1872) 4 R.L. 232 (S.C.).

(*v*) Ronayne v. Wood (1874) 5 R.L. 301 (S.C.).

(*w*) Shepherd v. White (1876) 11 N.S.R. (2 R. & G.) 31; following Harrison v. Bush (1855) 5 E. & B. 344.

imputing theft of post letters were spoken by a post office inspector to a post office clerk in presence of the clerk's superior officer(*x*); where the defendant, suspecting his domestic servant of theft, spoke to her privately about it, and stated his suspicions to an employment agent from whom he had obtained her(*y*); where a municipal councillor had reasonable cause for speaking the following words concerning an officer of the municipality: "*M.B. boit trop cela l'empêche de l remplir bien ses devoirs de sécretaire trésorier; il a prélevé sur la municipalité des montants plus élevés que ceux que le conseil de la paroisse l' avait autorisé à prélever*(*z*); where the defendant honestly and justifiably believed that plaintiff had defrauded him, and uttered words involving charges of that character(*a*); where the words charging adultery, which might have been overheard by third persons (although there was no evidence of that fact), were spoken in presence of the accused persons(*b*); where the only publication of a criminal charge was to the plaintiff and her parents, who came with plaintiff to defendant and asked for particulars(*c*); where accusations of theft were made in good faith and without malice, by a master against his servant in presence of the latter's fellow servants, and even casual bystanders(*d*). It has been held in Quebec, that a qualified privilege exists when it was the duty of the person charged with slander to make the communication to another person who had an interest in the subject of the communication, or some duty in connection with it; or, secondly, when the defendant had an interest in the subject of the communication, and the person to whom the communication was made had a corresponding interest, or some duty in connection with the matter; and consequently, that a communication made by the chairman of school commissioners to his colleagues, respecting the character of the secretary-treasurer, if the statement were made to them alone, would be privileged. But

(*x*) Waterbury v. Dewe (1876) 3 N.B. R. (Pugsley) 670.

(*y*) McDonald v. Ryland (1882) 5 L.N. 291 (S.C.).

(*z*) Blackburn v. Cloutier (1882) 5 L.N. 420 (Q.B.).

(*a*) Stewart v. Sculthorp (1894) 25 O.R. 544.

(*b*) Gorman v. Urquhart (1897) 34 N.B.R. 322.

(*c*) Johnston v. Kidston (1898) 31 N.S.R. 283.

(*d*) Gildner v. Busse, 3 O.L.R. (1902) 561.

the privilege ceased when the communication was made at a public meeting of the parish at which many others, who were not interested, were present(*dd*).

Libel imputing crime or misconduct unprivileged.

On the other hand, statements alleged to be libellous were held to be unprivileged where an insurance company published the following notice in a newspaper concerning a former agent who had left them and become a successful canvasser for another company without advising policyholders of his change of agency: "Caution. N.B. Notwithstanding the false statements of (plaintiff) to the contrary, he is no longer an agent of this company"(*e*); where an inspector of licenses published a circular warning licensed victuallers against selling, etc., intoxicating liquors to plaintiffs, the defence of privilege being based on a resolution of the local license commissioners which was *ultra vires* of the Ontario Liquor License Act(*f*); where, even in such a case, there was an honest belief in the validity of the resolution, such belief only being material in an inquiry as to actual malice when the occasion is privileged(*g*); where a letter accusing plaintiff of taking defendant's money, and of cheating, was written to a justice of the peace having jurisdiction under a Provincial Act to adjudicate upon claims for debt, for the purpose of having a suit entered by defendant against plaintiff for the collection of the money and for damages(*h*); where an entry in the minute book of an incorporated benefit society contained injurious statements concerning a member of the executive committee who had resigned his position, such entry not being the record of any proper business of the society, but a condemnation of his reasons for resignation(*i*); where a letter containing a criminal charge

(*dd*) *Per* Archibald, J., in Herbert v. Jobin (1904) Q.O.R. 26 (S.C.) 193.

(*e*) Holliday v. Ontario Farmers' Mutual Ins. Co. (1873) 33 U.C. Q.B. 558; (1877) 1 O.A.R. 483.

(*f*) *Per* Osler, J., in Roberts v. Climie and Murphy v. Climie (1881) 46 U.C.Q.B. 264.

(*g*) *Ibid.*

(*h*) Lowther v. Baxter (1890) 22 N.S.R. 372.

(*i*) Phelan v. St. Gabriel Total Abstinence and Benefit Society (1894) Q.O.R. 5 (S.C.) 438.

was dictated by the acting manager of a company to his stenographer, who had it typewritten and copied in the company's letter book(*j*). See, however, as to this last case, noted fully at pp. 168-171, *ante*, *Edmondson* v. *Birch & Co. et al.* (1907), 1 K. B. 371 (C.A.),

Slander imputing crime or misconduct unprivileged.

Slander imputing crime or misconduct was held to be unprivileged where the words spoken by the treasurer of a municipal bridge committee, at a meeting of the committee for investigating the accounts, and imputing criminal appropriation by plaintiff of public moneys received by him as trustee for the construction of the bridge in question, were published on other occasions and for other purposes than the occasion referred to(*k*); but the words would have been privileged, if, at such meeting, the defendant, without going beyond what was necessary for the purpose, had stated in good faith any matter which he believed to be true, though false in fact, with the view of having an investigation and disclosing the truth(*l*). The words were also unprivileged where, on the occasion of the plaintiff interviewing defendant in presence of plaintiff's wife, daughters and son-in-law, as to an alleged theft by one of the plaintiff's daughters while in the defendant's service, defendant charged plaintiff with theft in a vehement and offensive manner, and said they were "all tarred with the same stick"(*m*); where, at an election of school commissioners, the words charged dishonesty, instead of a neglected formality often repeated before under official sanction, against a candidate for re-election as school commissioner(*n*); where the father of his infant son, who was charged with assault before a magistrate, imputed perjury to the plaintiff as a witness, it not being shewn that the father was acting for his son, with the son's consent, or that the son was a minor(*o*). Cameron, C.J., was of opinion that if the defendant

(*j*) Puterbaugh v. Gold Medal Furniture Mfg. Co. (1902) 1 O.W.R. 250; 2 O.W.R. 398; 3 O.W.R. 535; 5 O.L.R. (1903) 680; 7 O.L.R. (1904) 582; 23 C.L.T. (Occ. N.) 193; 24 C.L.T. (Occ. N.) 205.

(*k*) Decow v. Tait (1866) 25 U.C.Q.B. 188.

(*l*) *Ibid.*

(*m*) Miller v. Johnston (1874) 23 U.C.Q.B. 580.

(*n*) Powell v. Walkers (1878) 8 R.L. 656 (Q.B.).

(*o*) Cowan v. Landell (1886) 13 O.R. 13.

was acting in good faith and without malice, under the belief that it was his duty to inform the magistrate of the witness's bad character, he might have a qualified privilege, but the question of malice would be for the jury(*p*). The words were also unprivileged, where, on the occasion of a coroner's inquest on the body of an infant found on the defendant's premises, the defendant made imputations against the chastity of an unmarried woman to a constable attending on the inquest(*q*); where the words imputing to plaintiff an unnatural offence, of which defendant had heard from another person, were repeated in the presence of plaintiff and another party, coupled with a statement to the effect that plaintiff was guilty(*r*); and where defendant, in the presence of third parties, charged plaintiff, his tenant, who was packing up articles belonging to her preparatory to removal, with theft of some of his (defendant's) chattels, and, in answer to a question by plaintiff, reiterated the charge. The trial judge instructed the jury (who found in plaintiff's favour and $250 damages), that the occasion was privileged unless malice was shewn, but it was held that the occasion was not privileged, and that the directions to the jury on this point were erroneous; but, as defendant was evidently not prejudiced thereby, a new trial should not be granted(*rr*).

Slander privileged on the ground of duty, or mutuality of interest.

On the other hand, in actions for slander a communication has been held to be privileged, in the qualified sense, where the defendant was *de facto* and *de jure* in discharge of a public duty, and the words were spoken while in discharge of that duty and in reference thereto, to a subordinate officer having a corresponding duty(*s*); where the statement was by the honorary lady president of a benevolent institution to the managing committee respecting an employee of the institution(*t*); where the parties to the action were members of the same cheese making

(*p*) Cowan v. Landell (1886) 13 O.R. 13.

(*q*) Black v. Alcock (1861) 12 U.C.C.P. 19.

(*r*) Gates v. Lohnes *et al.* (1898) 31 N.S.R. 221.

(*rr*) McLean v. Campbell (1905) 38 N.S.R. (G. & R.) 416. See report of this case in 37 N.S.R. 356, for reasons for new trial.

(*s*) Waterbury v. Dewe (1881) 6 S.C.R. 143.

(*t*) Donoghue v. Hervey (1882) 5 L.N. 357 (S.C.).

association, and defendant said to the cheese maker of the association that plaintiff sent skimmed milk to the cheese factory(*u*); where a ratepayer in a school section made imputations of dishonesty to individual ratepayers, and at a public meeting of ratepayers, against a school trustee, with respect to the purchase and sale of cordwood for the use of the school, and stated that he could prove the charge. "Where the occasion is privileged," said Cameron, C.J., "in the absence of evidence of express malice, the defendant is in the same position though the charge is wholly untrue, as if it were true"(*v*). Where the ocasion is privileged in Quebec, the presumption of law is that the communication was made *bonâ fide*, and, if there be some doubt as to the defendant's motives, he is legally entitled to the benefit of the doubt.(*w*).

The communication alleged as slanderous was also privileged where the deputy head of a public office, before leaving for a vacation, handed the keys of the safe to a supernumerary instead of to the officer next after the deputy, and, in answer to an enquiry by his chief, said he did so because he had no confidence in that officer(*x*); where the defamatory words were first spoken to the defendant, and were afterwards repeated by him in terms different, but in effect the same(*y*); where the superintendent of an asylum, honestly believing on reasonable grounds in the truth of his statement, made a charge of theft against an unmarried woman, a servant in the asylum, to an ex-employee of the asylum engaged to be married to the servant, and in whom defendant felt a friendly interest(*z*); where the defendant, while aiding in the search for stolen property at the request of the owner, said, when what was supposed to be part of the property was found in the possession of the defendant's workman,

(*u*) Preston v. Thompson (1901) 21 C.L.T. (Occ. N.) 464.

(*v*) Blagden v. Bennett (1885) 9 O.R. 593.

(*w*) See Norman v. Farquhar (1888) 33 L.C.J. (S.C.) 129; Daoust v. Graham (1888) Mon. L.R. 4 S.C. 49; Donovan v. Herald Printing Co. (1888) Mon. L.R. 4 Q.B. 41; Tetu v. Duhaine (1889) 18 L.R. 374 (Q.B.).

(*x*) Hamel v. Amyot (1887) 14 Q.L.R. (S.C.) 56.

(*y*) Brown v. McCurdy (1888) 21 N.S.R. 201.

(*z*) Ross v. Bucke (1892) 21 O.R. 692, following Coxhead v. Richards (1846) 2 C.B. 569; Whiteley v. Adams (1863) 15 C.B. (N.S.) 392; and Stuart v. Bell (1891) 2 Q.B. 341.

that the plaintiff had stolen it, defendant having an interest in the search, and it being his duty to tell his workman that the material did not belong to the person from whom he had received it(*a*); where the statement was to the client of a solicitor in a pending case, the defendant having an interest in the subject matter of the communication(*b*); where the statements were made at a public meeting by an alderman of a city, in his capacity as a member of a public library committee, reflecting on the manner in which a contractor for the work on the library building was performing his contract(*c*); where the speaker, in such a case, knew that there were newspaper reporters present who published, or would publish, in their newspapers, reports of the proceedings including the speaker's statements(*d*); where a post office inspector, in investigating complaints as to lost letters, told the plaintiff's husband as postmaster and his sureties, that plaintiff had taken moneys from post letters; but not where he made the like statements to the business partner of one of the sureties(*e*); nor where the defendant honestly believed that a duty rested upon him, or that there was such a common interest, if such belief were unfounded(*f*). The existence of a moral or social duty, upon which the privilege rests, is a question for the judge and not for the jury(*g*); but there was no such duty on the part of the defendant, in this case, to publish to his mother and sister words imputing theft to his brother-in-law(*h*).

Privileged statements as to a medical practitioner.

In an action for slander and libel, by a physician and surgeon holding a Lower Canada diploma, the facts were, that the defendant, the clerk of the peace, in a conversation with the sheriff of the county as to the medical examination of a lunatic in jail, said he would not employ the plaintiff because he was

(*a*) Bourgard v. Barthelemes (1897) 24 O.A.R. 431.

(*b*) Tobin v. Gannon (1901) 34 N.S.R. 9.

(*c*) Hopewell v. Kennedy, 9 O.L.R. (1904) 43.

(*d*) *Ibid.*

(*e*) Hanes v. Burnham (1895) 26 O.R. 528; affirmed on appeal (1896) 23 O.A.R. 90.

(*f*) *Ibid.*

(*g*) Stuart v. Bell, *supra.*

(*h*) Clunis v. Sloan (1902) 1 O.W.R. 27.

not a qualified physician in Upper Canada, and could not legally practice here without the Governor's license, adding, that he thought the sheriff had more pluck than to ask him after what he (defendant) had written (referring to some article by the defendant in a medical journal). Upon being applied to, on plaintiff's behalf, for an apology, defendant repeated what he had previously said as to plaintiff not being a qualified physician in Upper Canada, and not having the Governor's license. Plaintiff also complained of a letter by the defendant in a Lower Canada newspaper in which the defendant stated that plaintiff "was simply unlicensed according to the laws of Upper Canada." In directing a new trial, after a verdict for plaintiff, the court held (1) that, as the law stood at that time, a medical practitioner, duly licensed in either section of the united provinces of Upper and Lower Canada, might practice in the other without further license, and, therefore, that the plaintiff, who had a Lower Canada diploma, was entitled to practice in the Upper Province, subject to any local laws affecting the profession there; (2) that, with respect to the slander counts, both conversations were privileged, and that, there being no intrinsic or extrinsic evidence of malice in either conversation, there was nothing to leave to the jury; (3) and with respect to the libel counts, that the trial judge might either have ruled the matter complained of to be privileged, or, at all events, have left it to the jury with a strong caution as to the usual liberty of discussion allowed in all matters of public interest, and with observations somewhat like those in the charge in *Turnbull* v. *Bird*, 2 F. & F. 508(*i*).

Confidential communications.

The defence of privilege also extends in many cases to confidential communications, either in answer to confidential inquiries(*j*), or not in answer to inquiries(*k*); and either from a duty based on a confidential relationship between the parties(*l*), or where no such relationship exists and the communication is

(*i*) Shaver v. Linton (1862) 22 U.C.Q.B. 177.

(*j*) *Per* Grove, J., in Robshaw v. Smith (1878) 38 L.T., at p. 423.

(*k*) *Per* Jessel, M.R., in Waller v. Loch (1881) 7 Q.B.D. 621.

(*l*) *Per* Pollock, C.B., in Beatson v. Skene (1860) 29 L.J. Ex., at p. 438.

volunteered(*m*). But privilege does not attach to words imputing crime, spoken confidentially to the attorney of a near relative of the speaker, where the latter had no interest in his relative's business(*n*); nor to a confidential letter aspersing an attorney, written, without any legal or moral duty, by the defendant to a friend who had no interest in the matter, for the purpose of obtaining his influence in settling certain law suits in which the attorney was acting against defendant.

Opinion of Chipman, J.

"It is material," said Chipman, J., who delivered the judgment of the court, "to distinguish between communications which are privileged in the eye of the law, and may, therefore, be made with impunity, unless there be express malice, and communications which are merely confidential. To hold that a communication, which the writer may intend to be confidential, may, for the reason that it is confidential, be made a vehicle for injuring the reputation of a third person, would be most mischievous. It would afford malicious persons the opportunity of conveying slander to the quarter where it would inflict the greatest injury upon the object of it, and at the same time shut him out from the power of vindicating himself"(*o*).

Quebec cases.

It has been held in Quebec, that the contents of a confidential letter are not subject to an action for damages(*p*); but it was otherwise where the defendant made the confidential communication, under a pledge of secrecy, to a person who intended to marry the plaintiff, and who inquired of the defendant as to her character, and it appeared that the defendant had previously made statements affecting plaintiff's character in the hearing of other persons, and thereby brought about the position which he invoked as excusing himself; the court being also of opinion that the evidence shewed the statements to be false(*q*). But a

(*m*) Waller v. Loch, *supra; per* Coltman, J., in Rumsey v. Webb *et ux.* (1842) Car. & M., at p. 105.

(*n*) Carvill v. McLeod (1859) 9 N.B.R. (4 Allen) 332.

(*o*) Andrews v. Wilson (1845) 5 N.B.R. (3 Kerr) 86.

(*p*) Smith v. Binet (1821) 1 Rev. de Leg. (K.B.) 504.

(*q*) Dille v. Belair v. Chaussé (1899) Q.O.R. 15 (S.C.) 512.

statement made by a person, in the course of a private and confidential conversation with his family physician, is privileged, particularly where there is no evidence of malice(*r*). And so, also, is a letter written to a private person privately without any chance of publicity. Damages for libel in such a case will not lie(*s*).

The privilege of mercantile agencies.

The privilege, in the legal sense, of confidential communications comprehends publications by mercantile agencies and their confidential agents, with respect to the standing and credit of business men. These have given rise to some apparently conflicting, although—having regard to the law of Quebec—not irreconcilable, decisions.

False information, based on unverified rumour, actionable under Code Civile. Carsley v. Bradstreet (1885).

The defendants, a mercantile agency, sent a circular to its subscribers with the words, "call at office," in reference to the plaintiffs, dry goods merchants of Montreal. Those who inquired at the office, including a newspaper correspondent who was not a subscriber, were informed that the plaintiffs had applied for an extension of time on a large indebtedness to their English creditors. This information was untrue, and was based upon a rumour which the defendants had not verified. The report injured the plaintiffs' credit and embarrassed them in their business. In an action for libel, tried without a jury, it was held, that the reports of a mercantile agency to its subscribers are not privileged communications, though made in good faith, and from information upon which it relies. Such agency comes under the general law of Quebec, stated in the *Code Civile*(*t*), which makes every person capable of discerning right from wrong responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect, or want of skill. The defendants having been guilty of gross neglect in circulating a report of an injurious nature concerning the plaintiffs, without verifying it, were liable for damages,

(*r*) Sinn v. Marcus (1893) Q.O.R. 6 (S.C.) 46.
(*s*) Burnstein v. Davis (1884) 7 L.N. 378; Mon. L.R. 1 S.C. 67.
(*t*) Arts. 1053 and 1054.

which were assessed at $2,000. This judgment was affirmed on appeal(*u*).

A libellous statement in mercantile agency circular, caused by mistake and published bona fide, not privileged. Lemay v. Chamberlain (1886).

A tradesman claimed damages for a statement, published in a mercantile agency circular called "The Legal Record, County Renfrew," that plaintiff had given a chattel mortgage on his property, whereas, in fact, he had only assigned such an instrument held by him against another person. The mistake was occasioned by the carelessness of the clerk of the county court who had given the information to the defendants, who had published it *bonâ fide*, but who corrected the mistake when discovered, and subsequently published the correction in the circular. The evidence shewed that the defendant was acting as a mercantile agency for the local business men, and furnished them fortnightly with information, obtained at the public office, as to writs issued, judgments entered, bills of sale, etc., filed or appearing there, for their confidential use. At the trial the jury were charged that the publication was privileged, but that they should assess damages in case the court should afterwards decide otherwise. The jury found that the plaintiff had sustained no damage. Upon a motion against the verdict the court held, that the statement complained of was libellous and was not privileged; but that the jury having found no damage the order *nisi* for a new trial must be discharged without costs. "Was he (defendant) privileged," said Wilson, C.J., "when the information was incorrect, and when he had no interest or duty but that arising from his own personal gain by making such publication, either in or to himself, or in or to his customers? I am of opinion he was not. A circular of this kind is not a confidential communication: *Getting* v. *Foss* (1827), 3 C. & P. 160. A communication which is a slander is not privileged by the speaker saying he speaks in confidence, when there is no interest or duty to speak: *Picton* v. *Jackman* (1830), 4 C. & P. 257; Folkard on Law of Libel and Slander, 289; Odgers on Law of Libel and Slander, 212. In *Bennett* v. *Deacon* (1846), 2 C.B. 628, the court was equally

(*u*) Carsley *et al.* v. Bradstreet Co. (1885) Mon. L.R. 2 S.C. 33; 9 L.N. 39.

divided whether a statement, voluntarily made by one to a tradesman not to trust another, was a privileged communication. Tindall, C.J., and Erle, J., were of opinion that it was, Coltman and Cresswell, JJ., that it was not. . . I am of the opinion that the communication to all the subscribers of the defendant's circular, on the facts stated, was not privileged''(*v*).

Confidential report privileged in absence of express malice. Variance fatal. Todd v. Dun Wiman Co. et al. (1888).

The plaintiff, a grain and general merchant, claimed damages for separate libels, one of which was published by D. W. & Co., proprietors of a mercantile agency, and the other by one C., who was employed by D. W. & Co. to obtain confidential information for them. In the printed circular issued by D. W. & Co. were the words, after the plaintiff's name: ''If interested, inquire at office.'' These were the words complained of as against the company, it being alleged that they had a well-known meaning in the mercantile community, and conveyed notice that the company possessed information regarding the plaintiff which injuriously affected his business standing, credit and reputation. The circular was published to the defendants' customers, some eight hundred in number, in Canada and the United States, not more than three or four of whom had any interest in the plaintiff's affairs. The circular also contained the following statement explanatory of the alleged libel, and which, the company pleaded, should be read in connection therewith, but which had not been set out in the statement of claim: ''The words, 'If interested inquire at office,' do not imply that the information we have is unfavourable. On the contrary, it may not unfrequently happen that our last report is of a favourable character; but subscribers are referred to our office, because, in justice to them, the parties reported on, and to ourselves, the information can only be properly conveyed to those entitled to receive it by a full report, as we have it on our records.'' The plaintiff took issue on the plea setting up this explanatory statement. At the trial it appeared that the circular contained both the particular words complained of and this explanatory statement referring to them, but the evidence was confined to the effect and meaning of the particular words, notwithstanding the company's objection

(*v*) Lemay v. Chamberlain (1886) 10 O.R. 638.

that they could not be severed from the rest of the circular. The plaintiff insisted that an amendment was unnecessary, and made no application to amend until the jury had retired. It was proved that the words, "If interested inquire at office," had the effect of injuring the plaintiff, and the jury gave damages against all the defendants. Upon appeal the Divisional Court held, that the words charged were clearly libellous, and that there was no privilege; for, as to the defendants D. W. & Co., the court was governed by *Lemay* v. *Chamberlain* (*supra*), where Wilson, C.J., after reviewing a number of authorities, says (at page 647): "The difference between such cases and the present one is, that the communication complained of in this action is to many persons between whom and the plaintiff there is no dealing or privity whatever, and the more numerous the defendants' customers are, the more is the plaintiff needlessly and mischievously harmed." Galt, J., who delivered the judgment of the court, said that this observation applied to the present case, the circular having been sent to all the subscribers, whether interested in the plaintiff's affairs or not; that the explanatory statement as to the words, "If interested inquire at office," did not affect the matter; and that, as to the defendant C., his failure to prove the truth of his statements, or his belief in their truth, deprived him of any privilege(*w*). Upon a further appeal to the Court of Appeal it was held, as to the company, that there was a variance between the libel alleged and that proved, and that, as the proposed amendment would have raised a new issue to which the evidence did not apply, the plaintiff should have been nonsuited; and, as to the defendant C., that the information having been procured for the purpose of being communicated to a person interested in making the inquiry, and there being nothing in the language in excess of what the defendant C. might fairly state, and no proof of express malice, the communication was privileged, and the plaintiff was not entitled to recover. It is the occasion, it was said, of publishing the alleged libel which constitutes the privilege; and, where privilege exists, implied malice is negatived(*x*), and the burden of shewing express malice is on the plaintiff. The mere untruth of the statement, unless coupled with proof that the defendant knew that what he

(*w*) Todd v. Dun, Wiman & Co. and Chapman (1886) 12 O.R. 791.

(*x*) Spill v. Maule (1869) L.R. 4 Ex. 232.

was stating was untrue, is not evidence of express malice(*xx*). Osler, J.A., said he preferred to rest the privilege on the special occasion, which, he thought, was *a priori* a privileged one. The information given was not volunteered, though that circumstance alone is not the test of the existence of the privilege, but was made in answer to a relevant inquiry. The appeal was allowed, following *Clark* v. *Molyneux* (1877), 3 Q.B.D. 235, and *McIntee* v. *McCullough* (1864), 2 U.C.E. & A. 390(*y*).

Commercial agency responsible for culpable negligence in supplying false information confidentially. Cossette v. Dun et al. (1890).

The plaintiff recovered judgment, in the Superior Court of the Province of Quebec, for $2,000 damages for libels contained in confidential reports, supplied by a commercial agency to one of their subscribers who applied to them for information as to the financial standing of the plaintiff, and particularly as to the charges upon his real estate. The information furnished was false, the falsehood being due to gross carelessness on the part of the persons employed by the defendants to obtain the information asked for. The defendants appealed from the judgment of the Superior Court to the Court of Queen's Bench at Montreal (in appeal), upon the ground that the communications complained of were privileged, and, although untrue in point of fact, were made in good faith and without actual malice. The court held that the communications were not privileged, and this judgment was affirmed by the Supreme Court of Canada. It was there held (Taschereau and Patterson, JJ., dissenting on the ground that there was no jurisdiction to entertain the appeal), that persons carrying on a mercantile agency are responsible for the damages caused to a person in business when, through culpable negligence, imprudence, or want of skill, false information is supplied concerning his standing, though the information be communicated confidentially to a subscriber to the agency on his application therefor. Ritchie, C.J., was of opinion that apart from general principles, or principles applicable to English law, the case clearly came within articles 1053 and 1054 of the *Code Civile* of Quebec, which provide as follows: 1053. Every person

(*xx*) Fountain v. Boodle, 3 Q.B. 5.

(*y*) Todd v. Dun, Wiman & Co. (1888) 15 O.A.R. 85.

capable of discerning right from wrong is responsible for the damages caused by his fault to another, whether by positive act, imprudence, neglect, or want of skill. 1054. He is responsible, not only for the damages caused by his own fault, but also for that caused by the fault of persons under his control, and by things which he has under his care.

Opinion of Gwynne, J.

Gwynne, J., gives the *raison d'être* of the decision where he says, that it was "clear that the defendants wholly voluntarily communicated to their client matter which was not only absolutely without foundation in point of fact, and gravely and injuriously affecting the character and solvency of the plaintiff, but was altogether outside of the matter they were asked to obtain information upon, which was simply as to the charges upon a particular piece of property belonging to the plaintiff, a piece of information which could have been obtained by a search upon the piece of land in the Registry Office, and which, by reason of the gross negligence of an agent employed by them, was not done"(*z*).

Libellous statements based on the mistaken report of the agent of a mercantile agency, privileged in the absence of malice. Robinson v. Dun et al. (1897).

In an action for libel brought by a shopkeeper against a mercantile agency, it appeared that the defendants had issued to a few subscribers, on their application for information regarding plaintiff, a statement that plaintiff, a short time previous, had been involved in an unsuccessful law suit over a promissory note; that he had lost something in the way of costs; and that he "is said to have a very easy way of swearing in court, and locally the fullest confidence is not felt in him"; meaning that he was guilty of perjury. The evidence shewed that the information on which the statement was founded related, not to the plaintiff, but to another trader of the same surname as the plaintiff. The jury gave a verdict for $25 damages. In a judgment reserved on the question of privilege, Boyd, C., who tried the action, held that although the publishing of the statement was a matter of qualified privilege, yet the want of reasonable care on the part of the

(*z*) Cossette v. Dun *et al.* (1890) 18 S.C.R. 222.

defendants, in collecting the information, was evidence of malice which destroyed the privilege. The learned judge accepted two rules of law as to mercantile agencies which were laid down in *Todd* v. *Dun et al.* (*supra*), namely, (1) that the publishing of any such information about a trader by such an agency, to subscribers specially interested therein, is a matter of qualified privilege; and (2) the opinion expressed by Osler, J.A., in the same case, that such agencies have no higher privilege for their business publications than other members of the community, and that a general publication of libellous matter to all their subscribers indiscriminately is not privileged(*a*).

Upon an appeal to the Court of Appeal for Ontario, this judgment was reversed, the court holding, in effect, that a mercantile agency is not liable in damages for false information as to a trader given in good faith to a subscriber making inquiries, the information having been obtained by the agency from a person apparently well qualified to give it, and there being nothing to make them in any way doubt its correctness(*b*).

Cossette v. Dun et al. (1890) not irreconcilable with Ontario law. Opinion of Burton, C.J.O.

In his judgment in the case Burton, C.J.O., refers to "some language" used by the Chief Justice of the Supreme Court of Canada, in *Cossette* v. *Dun et al.* (*supra*), as being rather opposed to the view taken by the Ontario Court of Appeal on the doctrine of qualified privilege. He remarks that "the law of libel and slander, under the civil law system of Quebec, derived from France, and our own, are essentially different; and that in the case in which that language was used, the same result would probably have been arrived at in our own courts, on the ground that the information was voluntarily given to persons who had not sought the information, and even in the case of their clients, who were entitled to seek the information, it was altogether outside of the matter they were asked to obtain information upon. I think we should have had no hesitation in holding, in the courts of this Province, that any communication of the libellous matter to those not interested in the information would be officious and unauthorized, and therefore not protected, though made in the belief of its truth, if false in fact."

(*a*) Robinson v. Dun *et al.* (1896) 28 O.R. 21.
(*b*) *Ibid.* (1897) 24 O.A.R. 287.

Opinion of Osler, J.A.

And, speaking of the same case, Osler, J.A., said, that it was a case which, if it did not turn wholly on French law, might be supported on the ground that some of the statements complained of were so wholly irrelevant and improper that no privilege could attach to them, or that there was abundant evidence of actual malice in the sense that the statements were recklessly or wrongfully made. He was unable, however, to apply, what (in the second clause of the head note) is said to have been determined in that case, to the defendant in the present case. "It seems," he added, "in every way reasonable that those who make a living by supplying, for reward, information which may be true or false about their neighbour's affairs, should be made to answer for defamatory statements negligently made, and should not be permitted to absolve themselves merely by shewing absence of malice or wrong motive"(*b*). Boyd, C., it should be observed, was of opinion that the "language" of the Chief Justice of the Supreme Court, referred to by Burton, C.J.O., (*supra*), was *obiter dicta*.

Unprivileged statements as to trading company.

Where in an action in British Columbia, it appeared that the plaintiffs, as second mortgagees in a foreclosure action, were joined as party defendants, and that a mercantile agency published, in a notice or circular distributed amongst its subscribers, that a writ had been issued against the plaintiffs claiming foreclosure of a mortgage, and indicating by means of the words "*et al.*" that there were other defendants, it was held (*per* Irving, J.), that the publication was libellous and not privileged(*d*).

Communications in answer to inquiries.

Communications in answer to inquiries are also frequently privileged. They may arise from a duty to society, to one's family, or to one's self, and they may comprise answers to inquiries which may or may not be confidential. As Grove, J., said in *Robshaw* v. *Smith*(*e*): "Every one owes it as a duty to his fellow men to state what he knows about a person, when

(*b*) Robinson v. Dun *et al.* (1897) 24 O.A.R. 287, at p. 295.

(*d*) Lion Brewery Co., Ltd. v. Bradstreet Co. (1903) 9 B.C.R. 435.

(*e*) 38 L.T.N.S. 423.

inquiry is made; otherwise no one would be able to discern honest men from dishonest men''(*f*). The answers of the slanderer to inquiries in the interests of the slandered are privileged communications, and, in this case, the answers should have been withdrawn from the jury(*g*). Where in an action for words imputing theft, the defendant, in answer to questions from a relative of the plaintiff as to why he had dismissed him, has, in good faith, without malice, and believing what he said to be true, made the statement complained of, it is privileged, and no action will lie(*h*). But where the same defendant was asked by another party why plaintiff had left his employment, and in reply said, ''I have charges against him that would send him to the penitentiary, and I will do so if he does not clear out,'' the case would be brought within the two decisions of *Gilpin* v. *Fowler*(*i*), and *Cooke et al.* v. *Wildes*(*ii*), as affording occasion for the inference of malice, in advancing the charges made to the relative. ''These words in themselves,'' said Draper, C.J., ''would have afforded a ground of action, for nothing is shewn to make the speaking of them a privileged communication. The witness was not inquiring into the character of the plaintiff with a view of employing him, in which case it would have been the defendant's duty to have answered truly, and such duty would have repelled all presumption of malice''(*j*). Where in an action for malicious prosecution and slander, which arose out of criminal proceedings by the defendant against the plaintiff, the words complained of were: ''I have had him (plaintiff) taken for obtaining money under false pretenses, and it will send him to the penitentiary. He obtained the money from me under false pretenses''; and it appeared that these words, or words in effect the same, were spoken of the plaintiff by the defendant in the presence of several persons, not voluntarily, but in answer to questions put by a third person to the defendant, after the latter had laid a criminal charge against the plaintiff before a magistrate,

(*f*) *Per* Osler, J.A., in Robinson v. Dun *et al.* (1897) 24 O.A.R., at p. 592.

(*g*) Poitevin v. Morgan (1866) 10 L.C.J. 93; 1 L.C.L.J. (S.C.) 120.

(*h*) Nolan v. Tipping (1858) 7 U.C.C.P. 524.

(*i*) (1854) 9 Ex. 615.

(*ii*) (1855) 5 E. & Bl. 328.

(*j*) Nolan v. Tipping, *supra*, at p. 525.

and with respect to such charge, it was held that the words were privileged and not sufficient to sustain an action of slander(*k*).

The rule as to communications in answer to inquiries is also discussed in that part of the present chapter (*supra*) relating to confidential communications, some of which may be confidential both as to question and answer, as in the case of communications to and from mercantile agencies.

The rule under the Code as to answers to inquiries.

The rule under the criminal law of libel is stated in the following section of the Code: No one commits an offence by publishing, in answer to inquiries made of him, defamatory matter relating to some subject as to which the person by whom, or on whose behalf, the inquiry is made, has, or on reasonable grounds is believed by the person publishing to have, an interest in knowing the truth, if such matter is published for the purpose, in good faith, of giving information in respect thereof to that person, and if such defamatory matter is believed to be true, and is relevant to the inquiries made, and also if such publishing does not in manner or extent exceed what is reasonably sufficient for the occasion(*l*).

Defamatory language provoked, or invited, may be privileged.

Defamatory language, whether verbal or written, may also be privileged as having been provoked or invited by the complainant. A member and vice-president of an incorporated Commercial Travellers' Association was charged with using abusive language towards the president and other members, and with improper conduct at a meeting of the directors.

Resolution of directors of Commercial Travellers' Association against expelled member.

The charge was investigated and sustained, and a resolution passed (which was afterwards rescinded) expelling the offender, who thereupon published a paper called *The Commercial Traveller*, purporting to be on behalf of the Association, in which he discussed the whole matter in an address couched in very offen-

(*k*) McCann v. Preneveau (1885) 10 O.R. 573.

(*l*) C.C. s. 327.

sive and violent language towards the president and other members. This was resented by a resolution of the directors repudiating the paper as emanating from the Association, and censuring the writer in strong language for its publication. The writer then sued the Association for damages for his expulsion, and for the alleged libel contained in the resolution, and was nonsuited. The trial judge (Patterson, J.) was of opinion that the resolution, if it could be deemed an act of the Association, was not published; that it was privileged; and that there was no evidence of express malice.

Opinion of Wilson, J.

In delivering the judgment of the court subsequently, refusing to set aside the nonsuit, Wilson, J., said that the whole proceeding was plainly a privileged matter. There was no reason to question that the defendant, and all who supported the resolution, acted in good faith; and the language in which it was expressed was not at all too strong. Such language was called for by the printed publication of the plaintiff. The defendants were not taking up the cause of another, or of the public generally. They were defending themselves against unworthy and opprobrious charges, against coarse and improper language which was likely to rouse the anger and feelings of persons so circumstanced. It was sufficient to dispose of the case upon that ground(*m*).

Libel of a solicitor privileged as being provoked and invited.

A barrister and solicitor sued the publisher of *The Week* newspaper, of Toronto, for the publication of a paragraph in which, according to the innuendo, it was charged that the plaintiff had been habitually guilty of unprofessional and improper conduct unbecoming a barrister, etc. The defence was that the alleged libel was published on a privileged occasion, being a fair and *bonâ fide* comment upon a matter of public and general interest, which had become such by means of the plaintiff's own appeal to the public through the medium of the press, inviting public attention to his professional character and position, and challenging public criticism upon his conduct in connection with all the matters referred to in the alleged libel, which was printed

(*m*) Cuthbert v. Commercial Travellers' Association (1876) 39 U.C.Q.B. 578.

and published by the defendant *bonâ fide*, for the public benefit, and without malice. The pleas setting up this defence were held good on demurrer (*per* Rose, J.)(*n*), and, upon appeal to the Ontario Court of Appeal, his judgment was affirmed, the cases of *Farmer* v. *Hamilton Tribune Co.*(*o*), and *Murphy* v. *Halpin*(*p*) being distinguished. Osler, J.A., said that the facts alleged in the pleading covered the whole of the alleged libel. It would be for the judge at the trial to determine, on the proof adduced in support of the pleading, whether all the matters it referred to had become of general interest in the manner and from the cause alleged, and the jury would then have to determine, as a question of fact, whether the defendant's comments had exceeded the limits of fair and reasonable discussion, or temperate criticism thereon(*q*).

Comments provoked by plaintiff's sworn evidence.

In an action for libel against a newspaper publishing company the facts were, that, in evidence given by plaintiff before a committee of the Senate of Canada, he was asked on cross-examination whether one J. R., his uncle and the father of J. E. R., deceased, had not, in an action tried several years previously, sworn that he would not believe plaintiff on oath. Plaintiff answered that J. E. R. had so sworn; that he believed his statements were due to a family feud, etc., and that J. E. R. had, on his death bed, sought forgiveness from plaintiff for the evidence which J. E. R. had given against him (plaintiff), and for which J. E. R. was threatened with a prosecution for perjury. In a letter by J. R., published in defendants' newspaper and containing the alleged libels, he denied these and some other sworn statements made by plaintiff before the Senate Committee, and characterized them as false. He described plaintiff as a "charlatan," and said J. E. R. invariably referred to plaintiff as a "polished scoundrel" and an "infamous rogue." The dedants pleaded justification, privilege and fair comment. The trial judge (Meredith, J.), in a charge not objected to, told the jury to lay the evidence given by plaintiff before the Senate

(*n*) Macdonell v. Robinson (1884) 8 O.R. 53.

(*o*) (1883) 3 O.R. 538.

(*p*) (1875) Ir. R. 8 C.L. 127.

(*q*) Macdonell v. Robinson (1885) 12 O.A.R. 270.

Committee and the published letter side by side, and to consider all the circumstances, and, if they were not able to say that the statements in the letter were true, then to consider whether they were a fair answer by J. R. in defence of J. E. R.'s memory; that, if they considered the letter was a fair answer to plaintiff's evidence before the committee, their verdict should be for defendants; but, if they found the libel proved, they should find for plaintiff. Upon a motion against the verdict for defendants, which was claimed to be perverse, the court held, that if the circumstances were not such as to raise the question of privilege, the plaintiff should not have allowed the case to go to the jury without objection to the judge's charge, which clearly treated the case as one of qualified privilege: *Wills* v. *Carman*(*r*); *Parsons* v. *Queen Insurance Co.*(*s*); *Macdonell* v. *Robinson*(*t*). It must be assumed, it was said, in favour of defendants, that the jury did as they were directed by the judge, and that they came to the conclusion that the letter was a fair answer in defence of J. E. R.'s memory to plaintiff's statements. The finding of the jury upon the point, which both parties appeared to have regarded as decisive of their rights, must be treated as final, there being no suggestion that the matter was unfairly submitted to them. The motion was dismissed(*u*).

The law in Quebec.

It has been held in Quebec, that gross and provoking remarks, not importing anything against the probity or credit of another, neither justify nor excuse defamatory accusations in recrimination; that, in an action for slander, grounds of defence, based on provocation and of reciprocal injuries, should be pleaded to the main action; and that the defendant can only maintain an "incidental demand" for damages if the abusive language addressed to him by the plaintiff is more serious and damaging than that which he addressed to the plaintiff(*v*). But any injury caused by the defendant, since the institution of an action for

(*r*) (1889) 17 O.R. 223.

(*s*) (1878) 43 U.C.Q.B. 271.

(*t*) (1885) 12 O.A.R. 270.

(*u*) Preston v. Journal Printing Co. (1903) 2 O.W.R. 923.

(*v*) Cleveland v. Sherman (1901) Q.O.R. 19 (S.C.) 270.

slander, cannot form the subject of an "incidental demand" in the same cause, but should be urged in a separate suit(*w*). So, also, a communication made in pursuance of some duty legal or moral, or with the fair and reasonable purpose of protecting the defendant's interests, is privileged, and beyond the legal implication of malice(*x*). Implied malice cannot co-exist with privileged communications, and, to support an action, actual affirmative malice must be alleged and proved(*y*).

Invited, challenged, or provoked publications under the Code.

Libellous publications which are invited, challenged, or provoked, form the subject of the following article in the Code: No one commits an offence by publishing defamatory matter on the invitation or challenge of the person defamed thereby, nor if it is necessary to publish defamatory matter in order to refute some other defamatory statement published by that person concerning the alleged offender, if such defamatory matter is believed to be true, and is relevant to the invitation, challenge, or required refutation, and the publishing does not in manner or extent exceed what is reasonably sufficient for the occasion(*z*).

Defamatory statements to protect defendant's interests.

At a meeting of the members and servants of a manufacturing company of which defendant was president, a resolution was passed expressing confidence in the innocence of the superintendent of the company, who had been sued, by an employee of the company, for the seduction of his daughter. A letter to the superintendent was at the same time drawn up and signed by a number of persons present, including the defendant, expressing their belief in the superintendent's innocence, and that he was "the victim of a conspiracy as base and ungrateful as was ever sprung on an innocent man." The letter was afterwards given to the press without objection on defendant's part. Upon a motion against a verdict for the plaintiff privilege was claimed for the letter, on the ground that its publication was necessary for the protection of the company, whose interests were or might be prejudiced by

(*w*) Lefebvre v. Godin (1902) 5 Q.P.R. 279.

(*x*) Poitevin v. Morgan (1866) 10 L.C.J. 93; 1 L.C.L.J. (S.C.) 120.

(*y*) *Ibid.*

(*z*) C.C. s. 319.

the action against the company's superintendent. This plea was rejected, Falconbridge, J., remarking that, "for a manufacturing concern to make such a claim, appeared to be the very climax of absurdity. There was no privilege qualified or unqualified"(*a*).

The communication was also held to go beyond what the occasion required, and as unnecessary to protect the defendant's interests, where, in order to prevent further proceedings against defendant for slanders which had caused the plaintiff's mother and her family annoyance, defendant wrote a letter to the mother defamatory of the plaintiff(*b*).

Defamatory statements against persons in official positions.

A qualified privilege also usually attaches to defamatory statements contained in petitions, letters, or documents, addressed or sent to the proper authorities, and sometimes even when sent by mistake to the wrong quarter, against public officials, or persons discharging public trusts, or when seeking a remedy or redress for a grievance(*bb*).

The privilege under the Code.

Under the libel sections of the Code, no one commits an offence by publishing defamatory matter for the purpose, in good faith, of seeking remedy or redress for any private or public wrong or grievance from a person who has, or is reasonably believed by the person publishing to have, the right or to be under obligation to remedy or redress such wrong or grievance, if the defamatory matter is believed by the person publishing the same to be true, and is relevant to the remedy or redress sought, and such publishing does not in manner or extent exceed what is reasonably sufficient for the occasion(*c*). But a letter charging a person with violating a public trust, and of a defamatory character otherwise, is not necessarily excused by the fact that it is a formal application to the head of a government department for the redress of grievances(*d*). Neither is a complaint respecting a public official whose conduct may be

(*a*) Taylor v. Massey (1891) 20 O.R. 429.

(*b*) Benner v. Edmonds (1899) 30 O.R. 676.

(*bb*) As to communication to wrong quarter, see p. 535, *post*.

(*c*) C.C. s. 326.

(*d*) Jones v. Stewart (1827) 1 U.C.K.B. 626; Tay. Rep. 453.

controlled by a public body, or by the government, necessarily privileged. The excuse or privilege depends on the complainant's motives(*dd*), or, in the case of a newspaper, on the publication being in the public interest(*e*).

Charges against a sheriff personally and officially.

In *Corbett* v. *Jackson* (*supra*), in which the defendant sent a paper to the mayor and council of a town corporation, and also to the Provincial Secretary, charging the plaintiff with using his influence, personally and as sheriff of the district, to threaten and intimidate voters at an election, and with subverting the freedom of election, the court refused to disturb a verdict for the plaintiff on the ground of the charge being privileged—the cases of *Robinson* v. *May*(*f*), and *Fairman* v. *Ives*(*g*), being cited as strongly in support of the action. It was said that the case having gone to the jury with proper directions, it must be inferred that the jury found the statements to have been made by defendant maliciously, without facts to warrant them, not *bonâ fide* in the exercise of his privilege, believing them to be true, and with a view to obtain redress, but in wilful abuse of that privilege, and with the view of unjustly defaming the plaintiff.

Opinion of Robinson, C.J.

"A great number of cases in modern times," said Robinson, C.J., "have established the principle, that a person is not to be allowed with impunity maliciously to defame any one, merely because he does it under the cover of an assumed necessity of preferring a complaint against a public officer, or other individual, in order to obtain redress. The motives of such a complaint may be brought in question before the jury; and the grounds of it, in point of fact, may also be called in question, as therein lie the motives. Of course, it does not follow that the effect of the complaint turning out to be groundless is to make the author of it liable in an action for libel. If the statements being true would have warranted the publication on the part of the defendant, then the sincere impression of their truth would protect the author of them, under the same circumstances, from the charge of malice, and so would protect him against an action."

(*dd*) Corbett v. Jackson (1844) 1 U.C.Q.B. 128; Des Barres v. Tremaint, p. 536, *post*.

(*e*) McDonald v. Sydney Post Publishing Co. (1906) 39 N.S.R. 81.

(*f*) 2 Smith, 3.

(*g*) (1822) 1 D. & R. 255.

Privileged charge of partiality and injustice against judicial officers.

In a case in which a petition, signed by two hundred persons and alleged to be libellous, was sent to the Lieutenant-Governor of the Province, charging the two commissioners of the local Court of Requests with the greatest partiality and injustice, with conniving at extortion on the part of the clerk of the court, and setting forth other grievances, and praying that these officials be superseded by more fit and competent persons, the court upheld a verdict for the defendant. They were of opinion that the petition was published *bonâ fide* and without malice, and was absolutely privileged, and that no action would lie upon it, although the defendant had circulated it, and had been the means of obtaining signatures to it of individuals who knew nothing of the facts stated in the petition, and some of whom supposed it to be a matter of a totally different character. Apart from the merits of the defence otherwise, Robinson, C.J., and Macaulay, J., were of opinion, as against Sherwood, J., that the declaration in the Bill of Rights(*gg*), " 'that it is the right of the subject to petition the King, and that all commitments and prosecutions for such petitions are illegal,'—was relied upon, not without reason, as a solemn recognition by the highest authority of a principle of the law which certainly applies to the case before us. The Governor, to be sure, is not like the King, and we cannot apply the principle literally and in terms, but in spirit it is applicable. This petition was addressed to him as acting for and in the name of the King, and it prayed him to exercise an authority for the redress of alleged grievances, which it was competent for him to exercise, because he was in this instance clothed with the authority of the Sovereign"(*h*).

Communication to the executive government with a view to obtaining redress.

So, also, in an action for an alleged libel, contained in a memorial sent by the defendant to the Governor-General, it was held, that such a communication having been made with a view to obtaining redress, the action could not be sustained, unless it

(*gg*) 1 Wm. & M. Stat. 2.

(*h*) Stanton v. Andrews (1836) 5 U.C.R. (O.S.) 211.

could be proved that the party making it had acted maliciously and without probable cause. The defendant, as it appeared, had for a long time been in peaceable possession of an enclosed piece of ground, and occupied it with his dwelling house. The plaintiff, a magistrate and militia officer, claiming that although there never had been a road in use over this enclosed land, yet that by law there ought to be, applied to the district council for a direction to have it thrown open, and the defendant's fences removed. From a regard to the defendant's long possession, and considering the travelled road sufficient, the council rejected the application. The plaintiff, relying upon the law being in his favour, thereupon proceeded, without the authority of the district council, and with an unusual number of persons, to pull down the enclosures and throw the land open. The defendant, believing that the plaintiff from his position would be amenable in some measure to the executive government, addressed the communication complained of to the Governor-General. A verdict for the plaintiff and £5 damages was set aside and a new trial directed without costs(*i*).

Charges against directors of a road company by an attorney professionally.

The communication was also held to be privileged where, differences having arisen between a road company and the municipal council of a township, the defendant, as attorney for and acting under the instructions of the council, examined the books of the company and thereafter wrote a letter, in the name of his firm, to a loan company with which the directors of the road company were negotiating a loan, stating objections to the loan, also that the directors were strongly suspected of "misappropriation" of the road company's funds, that the defendant's firm could get no account, from the directors, of the company's expenditure, etc., "all of which we can ourselves vouch for."

Opinion of Robinson, C.J.

A verdict for one of the directors was set aside and a new trial granted, and Robinson, C.J., in his judgment for the court, said: "There is the strongest necessity for freedom of action to every reasonable extent in conducting matters of business of

(*i*) Rogers v. Spalding (1844) 1 U.C.Q.B. 258.

this kind. The defendant does not appear to have been acting officiously in a matter which he had nothing to do with; he had a right to make known, at the request of the council, their sentiments and apprehensions and also his own as their agent, in regard to this important matter of public concern; and whatever he did honestly and in good faith to that end should not be treated as a malicious libel, otherwise people will be afraid to take such steps as may be necessary and proper for guarding the interests of the public, or their own"(*j*).

Charges by ratepayers of school section against public school teacher, addressed to local superintendent.

Privilege was also held to attach to a written paper, signed by a number of ratepayers of a school section and presented to the local superintendent of schools, containing charges against the habits and moral character of the public school teacher of the section, protesting against the payment of any school rates, and requesting the withholding of the government grant to the school section until the matters referred to were satisfactorily adjusted. The statements complained of, it was said, were made in the public interest with a view of obtaining redress, and would have been none the less privileged if made to the wrong quarter, so long as they were, or there was reason to believe they were, well founded, and that the signers of the paper acted in sincerity and good faith, and not maliciously without just cause or excuse(*k*).

Charges against P.L.S. sent to wrong quarter.

Privilege was also held to exist where a letter, written in good faith and without malice, and complaining of the conduct of, and making charges against, a provincial land surveyor, was sent to the Provincial Secretary instead of to the Commissioner of Crown Lands(*l*);

Charges against a sheriff.

where a letter containing complaints and charges against a sheriff officially, was written and sent to the Provincial Secre-

(*j*) Hanna v. De Blaquiere (1854) 11 U.C.Q.B. 310.

(*k*) McIntyre v. McBean *et al.* (1856) 13 U.C.Q.B. 534.

(*l*) Kerr v. Davison (1873) 9 N.S.R. (3 N.S.D.) 354.

tary, by a barrister, in the belief of the truth of the charges and without malice(*m*);

Defamatory statements in petition to a judge.

where, in Quebec, the defendants, for the purpose of obtaining the liberation of their brother, who was under arrest on a false charge of lunacy, presented a petition to the judge, supported by affidavits, containing statements reflecting on the plaintiff, which were relevant to the purpose of the petition and were substantially true, and had been generally known for two months previously, the defendants having acted in good faith and on a privileged occasion, and their allegations having been made with probable cause(*n*);

Criticism of chief of police.

and where a letter containing no false statements of fact was written, without malice, by a citizen to the chairman of the police committee of a municipality, criticising the conduct of the chief of police as a public officer(*o*). In the case of an action for an attack upon plaintiff's character contained in a communication by defendant to the Government, if the occasion be held privileged, the onus of proving plaintiff's character and conduct, and defendant's knowledge thereof, and his grounds and motives for making the imputation, is upon plaintiff, and he must shew actual malice in defendant in order to secure a condemnation(*p*).

Excess or abuse of privilege.

Although the occasion may be privileged, it is not every communication made on such occasion that is privileged. A communication which goes beyond what the occasion requires "exceeds the privilege," as it is called, and is no longer privileged(*q*). That is to say, when a defamatory writing has been published and the judge has decided that there is privilege, it must be for some reason, and the defendant is only entitled to

(*m*) Des Barres v. Tremaine (1883) 16 N.S.R. (4 R. & G.) 215.

(*n*) Legault v. Legault *et al.* (1892) Q.O.R. 1 (S.C.) 528.

(*o*) Hebert v. Lapointe (1895) Q.O.R. 12 (S.C.) 123.

(*p*) Robitaille v. Porteous (1896) Q.O.R. 11 (S.C.) 181.

(*q*) The same rule obtains under the criminal law of libel. See sections *supra*, of the Code.

the protection afforded by the privilege if he uses the occasion for the reason for which the privilege is given, but if he uses it for some indirect or wrong reason or motive of his own, then there is malice(*r*). A test of excess is the relevancy of the charge to the subject matter of discussion at the time(*rr*).

Tests of malice where privilege in question.

Other tests of malice in such cases are, where the defendant states what he knows at the time to be false(*s*); where from anger or any wrong motive he states as true what he does not know to be true, or is reckless whether it be true or false(*t*); where it appears that he was unreasonably prejudiced with respect to any particular person or thing(*u*); that he wrote or spoke the words with the intention of injuring the complainant(*v*); that there was present or past enmity or quarrels between the parties(*w*); that there was a grudge or resentment on the part of the defendant(*x*); that there was unnecessary violence or intemperance of language(*y*); that the publication was unnecessarily extensive(*z*); or that there was any wrong or improper motive(*a*). These tests have been repeatedly applied and approved of in our own and the English courts(*b*).

(*r*) *Per* Brett, L.J., in Clark v. Molyneux (1877) 14 Cox C.C. 10; 3 Q.B.D. 237; 47 L.J.Q.B. 230.

(*rr*) Crate v. McCallum (1905) 6 O.W.R. 825.

(*s*) *Per* Lord Esher, M.R., in the Royal Aquarium Society v. Parkinson (1892) 1 Q.B., at pp. 443-44.

(*t*) *Ibid.*

(*u*) *Ibid.*

(*v*) Peacock v. Reynal (1612) Part 2, B. & G. 151.

(*w*) Hooper v. Truscott (1836) 2 Bing. N.C. 457; 2 Scott, 672.

(*x*) Gilpin v. Fowler (1854) 9 Ex. 615; 23 L.J. Ex. 152; 88 Jur. 293; Dickson v. Wilton (Earl of) (1859) 1 F. & F. 419.

(*y*) *Per* Parke, B., in Wright v. Woodgate (1835) 2 C.M. & R., at p. 578; Fryer v. Kinnersley (1863) 15 C.B.N.S. 422; 33 L.J.C.P. 96.

(*z*) Gilpin v. Fowler, *supra*.

(*a*) Rogers v. Clifton (1803) 3 B. & P. 587; Jackson v. Hopperton (1864) 16 C.B.N.S. 829; 12 W.R. 913; 10 L.R. 529; Cooke *et al.* v. Wildes (1855) 5 E. & B. 328.

(*b*) See Hanes v. Burnham (1895) 26 O.R. 628; affirmed on appeal (1896) 23 O.A.R. 90; and the cases *infra;* Stuart v. Bell (1891) 2 Q.B. 341; 60 L.J.Q.B. 577; 39 W.R. 612; 64 L.T. 633; 7 T.L.R. 502 (C.A.); and the cases *supra.*

Spragge, C., on the general question.

Upon the general question of the excess of privilege it has been said, that those who are about to speak and write to others that which is defamatory, and who may have to rely upon privilege for their protection, should be especially careful to confine their subject or writing to the limit demanded by the occasion. If they are prepared to establish the truth of what they say or write, they can stand upon that; but when they are compelled to say, "this may be untrue, but, though untrue, is still privileged," the position of the utterer of the defamation, and of the person affected by it, is widely different. If the utterer would only consider beforehand that which he is obliged to say afterwards, and consider how cruel the wrong he may be inflicting, he would, of his own accord, unless positively malicious, do that which, in my opinion, the law requires of him, most carefully confine himself within the limits demanded by the occasion"(*c*).

No excess in publication by agent of corporation. Tench v. Great Western Ry. Co. (1872-1873).

The law as to excess in the mode of publication of privileged communications, by agents of corporations, is very fully discussed in the leading case of *Tench* v. *Great Western Railway Co.*(*d*). In that case, S., the general manager of the company, without the special instructions of the directors, dismissed the plaintiff, a conductor, from the company's service for alleged dishonesty. By the direction of S., printed placards describing the alleged offence, and stating the plaintiff's dismissal, were posted up in the company's private offices, in some of which they were seen by strangers, and in circular books of the conductors, for the information and warning of the company's employees, two thousand in number. Upon a motion against a verdict for the plaintiff, principally on the ground that the publication made by S. was without authority and was privileged, it was held in the first place by the Ontario Court of Queen's Bench, that the defendants were liable for the publication of the placards as being an act done by the defendants, their general manager, in

(*c*) *Per* Spragge, C., in Tench v. Great Western Railway Co. (1873) (In Error and Appeal) 33 U.C.Q.B. 8., at pp. 25-6.

(*d*) (1872) 32 U.C.Q.B. 452; (1873) (In Error and Appeal) 33 U.C. Q.B. 8.

the ordinary performance of his duties, although not specially authorized by the directors; that the placards would have been privileged if distributed only to the employees, or if put up in the private offices of the company where they alone had a right to be; but that the putting them up in defendants' offices and stations open to the public was not justified, and was evidence of malice. Upon appeal to the Ontario Court of Error and Appeal it was held, that the communication to the employees was made by a person having a duty or interest to persons having corresponding duties or interest. But, on the question of whether there was excess in the mode of publication, the court was divided, the majority (Draper, C.J. of Appeal, Hagarty, C.J. C.P., Gwynne, J., Galt, J., Strong, V.C., and Blake, V.C.) being of opinion that the evidence shewed a reasonable mode of publication, and no excess such as to take away the privilege or shew malice; and the minority (Richards, C.J., Q.B., Spragge, C., and Wilson, J.) being of opinion that there was excess in the mode of publication which was evidence of malice.

The principle of the authorities. Per Strong, V.C.

The principle of the authorities, said Strong, V.C., (afterwards Chief Justice of the Supreme Court of Canada), is that, if the communication is made in a reasonable manner, having regard to the circumstances in which the defendants are placed, it makes no difference that, in imparting the information to persons within the privilege, the alleged libellous or slanderous matter or words is also communicated to others not so included(*e*).

Holliday v. Ontario Farmers' Mutual Insurance Co. (1876-1877).

Holliday v. *Ontario Farmers' Mutual Insurance Company*(*f*) is another leading case with respect to excess of privilege, and the circumstances under which the jury may be required to find evidence of malice. The plaintiff, who had been a successful agent of the defendants, left their employment and entered the service of another company, for which he canvassed among defen-

(*e*) Tench v. Great Western Railway Co. (1873) (In Error and Appeal) 33 U.C.Q.B. 8, at p. 44, referring to Toogood v. Spyring (1834) 1 C.M. & R. 194, and Lawless v. Anglo-Egyptian Cotton and Oil Co. (1869) L.R. 4 Q.B. 262.

(*f*) (1876) 38 U.C.Q.B. 76; (1877) 1 O.A.R. 483.

dants' customers, asking those whose policies were about to expire whether they wished to be insured, or to insure again. There was also evidence that he asked several of defendants' customers to renew their policies, not telling them that he was acting for another company, and that these persons believed he was acting for defendants. Defendants' officers were informed of all this, and that plaintiff was representing himself as their agent. Under these circumstances defendants published in one or two local newspapers an advertisement headed "Caution," concluding with the words: "N.B. Notwithstanding the false statements of (plaintiff) to the contrary, he is no longer the agent of this company." In an action for libel there was no proof of malice in fact, and the question of privilege was left to be dealt with by the court *in banc* upon the evidence, neither party requiring any particular question to be left to the jury, who found a verdict for the plaintiff and $1,000 damages. Upon argument of the rule *nisi* it was held, that the occasion was privileged, and that neither the expression "false statements," nor the mode of publication, afforded sufficient evidence of malice. Upon appeal this judgment was reversed by the Court of Appeal. The court held (Spragge, C., *diss.*), that the statement was not privileged; (*Per* Patterson, J.A.) that the statement was not protected by the privilege, although made under proof of its truth, if it were, in point of fact, false; and that even if the occasion precluded the implication of malice, the privilege had been exceeded, both in the language and in the publication in the newspaper, so as to afford evidence of malice; and (*Per* Blake, V.C.) that the language would have been privileged if made to any one dealing with the company, but that the privilege had been forfeited by its publication in a newspaper. Moss, J.A., concurred with Patterson, J.A., and Blake, V.C.(*i*).

Excess of privilege in personal letters.

There was also excess of privilege, which destroyed the protection claimed for the communication, where the defendant wrote to the member of the Dominion Parliament for the county in which the parties resided, requesting him to have the plaintiff, a postmaster, removed from office, and charging plaintiff with

(*i*) Holliday v. Ontario Farmers' Mutual Life Insurance Co. (1877) 1 O.A.R. 483. See, also, Hamel v. Lauzière (1901) Q.O.R. 22 (S.C.) 194.

"roguery," with being "a scoundrel," with having "broken up seven or eight money letters and used the money for his own purposes," and with other kinds of actual or intended dishonesty in office(*j*); where, in order to prevent further proceedings against defendant for slanders which had caused the plaintiff's mother and her family annoyance, defendant wrote a letter to the mother defamatory of the plaintiff which did not come within the rule as to "statements necessary to protect the defendant's interest" so as to make the occasion privileged, and in which the excess of language destroyed the privilege(*k*);

Words spoken at a public meeting.

where the defendant said to the plaintiff, at a meeting of the ratepayers of the district at which the accounts of the school district, while plaintiff was a trustee, were discussed: "You have stolen over $140 from the district already," this language, which would otherwise have been privileged, being, according to the evidence, unnecessarily excessive and used in a manner not suited to the occasion(*l*);

Letters in newspapers.

where a series of letters containing libels of a very gross character were published in the *Irish Canadian newspaper*, of Toronto, reflecting on the warden of the Central Prison(*m*); where, after an investigation of plaintiff's accounts as township treasurer by a government commissioner, which shewed all the township moneys accounted for except a trifling sum, and which was followed by plaintiff's letter in a newspaper expressing his readiness to pay the township any moneys found to be owing, defendant replied in a letter to the same paper stating that plaintiff had made several thousand dollars out of the township, and could well afford to pay his shortage and still have some thousands to the good(*n*);

(*j*) Graham v. Crozier (1879) 44 U.C.Q.B. 378, following Fryer v. Kinnersley (1863) 15 C.B. (N.S.) 430.

(*k*) Benner v. Edmonds (1899) 30 O.R. 676.

(*l*) Bolser v. Crossman (1886) 25 N.B.R. 556.

(*m*) Massie v. Toronto Printing Co. (1886) 11 O.R. 362.

(*n*) Colvin v. McKay (1889) 17 O.R. 212.

Loud slanderous words publicly spoken.

where at two trials of an action for slander, which resulted in favour of the plaintiff, it appeared that the wife of the plaintiff, an employee of a mining company, on the occasion of making a demand on the president of the company for some of plaintiff's wages, was told that the company owed him nothing, and that he was guilty of stealing, and that the words were spoken in a public place, in a loud, rough tone of voice, and within the hearing of other persons than the plaintiff's wife. The court held, that as the jury had found that what was said by the defendant was not said in good faith in consequence of the application made by the plaintiff's wife, but was said in bad faith, the defendant not believing his words to be true; and that as the expressions must be considered as in excess of the requirements of the occasion and malicious, the defendant was not protected. Ferguson, J., said the law upon the subject was well stated by May, C.J., in *Jacob* v. *Lawrence*, 4 Ir. C.L.R., at p. 582(*o*). This judgment was affirmed by the Court of Appeal(*p*), where the case turned almost entirely on the question of misdirection.

Burton, J.A.

"When a person relies on privilege," said Burton, J.A., "he must shew that he acted on that privilege, and not in excess of it. The defendant might have contented himself with a mere refusal to pay the wages, and if the wife had gone on to ask his reasons, he would have been quite within his rights in stating them, if honestly believing in their truth, but the statement given was quite unnecessary in reply to the mere demand. And, in that respect, he may possibly be regarded as a volunteer"(*q*).

The law in Quebec.

It has been held in Quebec, that a plea of privilege is no defence to an action for slander, if it be shewn that the defendant acted without probable cause and with malice. The presumption of absence of malice, which might exist to relieve a defendant from responsibility for statements made on a privileged occasion, would be rebutted by proof of recklessness in making the

(*o*) Wells v. Lindop (1887) 13 O.R. 434; (1887) 14 O.R. 275.
(*p*) *Ibid.*, (1888) 15 O.A.R. 695.
(*q*) *Ibid.*, at p. 698.

statements, particularly when such proof is supported by defendant having made similar statements on other occasions(*r*). Even where the occasion is privileged, unnecessarily intemperate and extravagant language will not be protected(*s*). But no action will lie for statements made in the exercise of a right (*dans l'exercice d'un droit*) unless actual malice is proved; and it is for the court and not for the jury to say whether a statement is in the exercise of a right. Where, therefore, the jury found a statement so made caused damage to the plaintiff, but was made without actual malice, the court held the occasion privileged, and dismissed the action(*ss*).

Questions affecting privilege.

Allegations of a defamatory character in a defendant's pleadings are not necessarily privileged under the law of Quebec, but may be regarded as libellous and the subject of an "incidental demand" for increased damages(*t*).

Where in an action for slander for accusing plaintiff of stealing defendant's newspaper, the defendant pleaded, that "if he spoke the words complained of, which he does not admit but denies, they were spoken in good faith and without malice towards the plaintiff, under the following circumstances (setting out the circumstances), which led the defendant to believe that the plaintiff had stolen his newspaper," it was held, distinguishing *Switzer* v. *Laidman*(*u*), that this was substantially a plea of privilege; and leave was given to add words claiming privilege(*v*).

For an example of statements assuming to set out, in a plea of privilege in a libel action, the circumstances constituting the privileged occasion, but which were held to have been properly struck out as scandalous and irrelevant and tending to embarrass the trial of the action, see *Caldwell* v. *Buchanan*(*w*); for the

(*r*) Boydell v. Morrow (1898) Q.O.R. 15 (S.C.) 191.

(*s*) Phelan v. St. Gabriel Total Abstinence and Benefit Society (1894) Q.O.R. 5 (S.C.) 438.

(*ss*) Kavanagh v. Norwich Union Fire Ins. Co. (1905) Q.O.R. 28 (S.C.) 506.

(*t*) Laflamme v. Mail Printing Co. (1888) Mon. L.R. 4 Q.B. 84.

(*u*) (1889) 18 O.R. 420.

(*v*) Vansycle v. Parish, 1 O.L.R. (1901) 13; 21 C.L.T. (Occ. N.) 128.

(*w*) (1903) 3 O.W.R. 839.

proper mode of pleading privilege, fair comment and matters in mitigation of damages, when pleaded so as to be embarrassing, see *Dryden* v. *Smith*(*x*); and for a defence alleged to set up a privileged occasion, which the court held to be a defence in mitigation of damages, see *Hopewell* v. *Kennedy*(*y*).

In an action for slander, where the occasion of speaking the words was one of qualified privilege, and there was no evidence of malice and the jury disagreed, the action, on an application by defendant under Rule 780, O.J.A., was subsequently dismissed with costs(*z*). Where the defendant knows he is speaking for publication in a newspaper, and authorizes what he said to be published, the communication is not privileged(*a*). Neither is the publication in a newspaper of an item stating, in effect, that M. had made a statutory declaration before a justice of the peace accusing plaintiff, a Temperance Act inspector, of attempted bribery, the object being to bring the charge before a municipal council which had power to investigate the charge and to dismiss the official complained of; but (*semble*) a communication addressed and sent to the warden of the council might have been privileged(*b*).

The privilege of fair reports.

The defence of privilege, in the qualified sense, may also be made to actions for defamatory matter contained in fair reports of the proceedings of any court of justice, or of the legislature, or of public meetings. Defences arising in these various matters are fully dealt with in the chapters relating to those subjects.

(*x*) (1897) 17 O.P.R. 505.

(*y*) (1904) 4 O.W.R. 433; 25 C.L.T. (Occ. N.) 70; 9 O.L.R. (1905) 43.

(*z*) Latta v. Fargey (1906) 9 O.W.R. 231; affirmed on appeal, 9 O.W.R. 601.

(*a*) Hay v. Bingham, 11 O.L.R. (1905) 148.

(*b*) McDonald v. Sydney Post Publishing Co. (1906) 39 N.S.R. 81.

CHAPTER XXIX.

JUSTIFICATION.

The truth as a defence in civil actions.

The truth of a defamatory statement, whether verbal or written, is a complete answer, when pleaded and proved, to an action founded upon the statement; it constitutes the defence of justification. As was said in one case, "the truth is an answer to the action. . . . because it shews that the plaintiff is not entitled to recover damages; for the law will not permit a man to recover damages in respect of an injury to a character which he either does not or ought not to possess"(*a*). The truth is also a defence in a criminal prosecution for a defamatory libel, when the defamatory matter is true, and when its publication, in the manner and at the time it was published, was for the public benefit(*b*). The injury to the individual is the basis of the civil process, the injury to society of the criminal process. Theoretically, the question of libel or no libel is not affected by the truth or falsehood of published matter.

The defence of justification may be conveniently considered, First, with respect to the plea of justification; and, Secondly, with respect to the evidence in support of it.

1. *The Plea of Justification.*

The plea of justification.

Justification must be specially pleaded(*c*). Its usual form is simply an allegation that the words, or matters, or statements, as the case may be, are true in substance and in fact. And, except in the case of a charge of a particular specific act, the facts upon which this allegation is based should appear in the pleading itself, or in particulars filed and delivered with the pleading. "The pleading by the defendant of his justification

(*a*) *Per* Littledale, J., in McPherson v. Daniels (1829) 10 B. & C. 263; 5 M. & Rob. 251.

(*b*) C.C. ss. 331, 910, pp. 568-9, *post*.

(*c*) Belt v. Lawes (1882) 51 L.J.Q.B.D. 359.

consists of his general plea and his particulars''(*d*). But particulars, if demanded, will be refused where the plea amounts to fair comment and not to justification(*dd*).

Must not be general, but must allege the justifying facts, and cover the whole libel.

This requirement as to particularity is embodied in the rule that a plea of justification must not be general, but must allege the facts upon which it is founded, and must be co-extensive with the libel charged. In a letter inserted by the defendant in *The British Standard*, the plaintiff, who was the editor and publisher of *The Bytown Gazette*, was attacked for certain defamatory statements, originally published in the *Gazette* and copied into the *Standard*, in regard to the city council of O. These statements appeared in connection with a pamphlet in another paper, *The Union*, suggesting that plaintiff should be a candidate for the office of alderman at the coming municipal elections. The defendant's letter in the *Standard* referred to the attack on the city council of O., published in that paper and in the *Gazette*, and for which the plaintiff was primarily responsible, and stated that, in the writer's belief, ''the gross and ruffianly slanders'' on the council were published in entire ignorance of plaintiff's ''character and position in society.'' The letter also stated that plaintiff ''could not command votes enough in any ward of the city to be elected a common scavenger, although his fitness for such a position is undoubted''; that he had ''succeeded in earning for himself a bad, black notoriety''; that he was ''morally and socially an outcast,'' and ''a vagrant,'' ''and, through a series of long years, he has only lived to be an instrument of evil and mischief in that community whose contempt he repays by the unceasing exercise of a bad, malignant spirit.'' To the declaration setting out the letter in question, the defendant pleaded three special pleas that were intended to justify the statements complained of, designating in each plea the particular statements to which it was to apply. The plaintiff demurred to each of the pleas, and the demurrers were sustained to the second and third for the reasons given in *I'Anson* v. *Stuart*(*e*), that the pleas

(*d*) *Per* Lord Esher, M.R., in Zierenberg v. Labouchere (1893) 2 Q.B. 183 (C.A.), at p. 188.

(*dd*) Digby v. Financial News (1907) 1 K.B. 502 (C.A.).

(*e*) 1 T.R. 748.

were too general, and did not state the facts on which defendant formed his opinions, as given in the libel, of the plaintiff's respectability and influence; and to the fourth plea on the ground that the justification was not co-extensive with that part of the publication which it attempted to justify.

Opinion of Robinson, C.J.

Referring to the second and third pleas Robinson, C.J., said: "The defendant ought not to have written what he did of the plaintiff, merely to express his opinion of his want of respectability and influence, unless he had some particular facts to allege, on which he grounded his opinions, and, if there were such facts, he should have set them forth in his pleas, and averred that his statement of them was true." And as to the fourth plea he said, that, "if the truth of all that the defendant says was true in that plea was admitted, still it would not lead to the conclusion that the defendant was warranted in publishing what in that plea he attempts to justify"(*f*).

A charge of a specific act an exception.

The rule laid down in this decision and in the cases *infra*, that a plea of justification must not be general, is not violated where the defamatory words consist of a charge of a particular specific act which is justified by the general form of plea. If the words alleged a distinct charge of forgery, for example, it would be sufficient to plead in the general form that the words are true in substance and in fact, or that the plaintiff did commit the particular forgery imputed(*ff*). In case of doubt particulars may be demanded, and, if refused, may be obtained by a judge's order.

Plea must allege facts on which it is based.

The objection to generality of statements in pleading justification, and to not alleging facts on which the plea is based, was also upheld in a case in which an inspecting field officer of volunteers and militia complained of the publication by defendant of a newspaper article with reference to plaintiff in his official capacity. In this article, after referring to a recent inspection of a particular battalion, and stating that it was not

(*f*) Gibb v. Shaw (1859) 18 U.C.Q.B. 165.
(*ff*) Cumming v. Green *et al.* (1891) 7 T.L.R. 408.

often that "an example of swearing and drunkenness was set by the officers to their men," it was alleged that it was very little to the plaintiff's credit that "he appears before the volunteers as a transgressor, without apology, of those laws of discipline and good conduct, the observance of which he so strictly enjoins." In another part of the article it was said, that "we have been for some time aware that (plaintiff) was often incapable of attending to his duty here and elsewhere, and now that his evil habits appear to be entirely beyond his control, it is high time for the head of the department to deal with the case." The defendant pleaded that the statements were true in the sense in which they were alleged to have been used. This plea was successfully demurred to on the ground that the justification was too general, and did not set out any specific cases of misconduct on the plaintiff's part.

Opinion of Draper, C.J.

"If," said Draper, C.J., "swearing, drunkenness, and a continued perseverence in evil habits, were direct charges of specific acts, they might be met by a plea in the general form, that they were true in substance and in fact; so if the charge of drunkenness and swearing were limited to one particular occasion, say the inspection first spoken of; but incapacity 'here and elsewhere' is charged, and 'evil habits,' which 'now appear to be entirely beyond his control'; and these expressions assert a series of acts, repeated drunkenness and swearing when on duty—a course of conduct discreditable to the service. This plea asserts no fact or facts on which the general conclusion is based, and affords the court no opportunity of judging whether such facts in law justify the defendant in his general conclusion"(*g*).

A general statement of conduct similar to certain specific conduct, pleaded in justification, is insufficient.

A plea in justification of a charge of "swindling," published in a newspaper, set forth a series of money transactions between the plaintiff and W. R. B., E. W., and W. G. C., respectively, in support of the plea, and concluded with a general statement that the plaintiff had been, on divers occasions and with divers persons, guilty of similar conduct to that in the plea mentioned with the said W. R. B., E. W., and W. G. C., and, therefore,

(*g*) Baretto v. Pirie (1867) 26 U.C.Q.B. 468.

the charge was true. This portion of the plea was demurred to as being too general, the plaintiff being entitled, if the defendant knew of any other charges of a similar kind to those mentioned in support of the plea, to be informed of them, and of the names of the persons and the times and occasions, with convenient certainty, in order that he might be prepared to meet the charges. Draper, C.J., said that he had no doubt of the insufficiency of this portion of the plea, and that it was not supported during the argument of the demurrer to the other parts of the same plea(*h*).

Libel of a corporation not fully justified.

The rule is the same where a libel of a corporation is justified. The justification must cover every material part of the libel. A life assurance company sued the agent of another assurance company for the publication of a libel alleging, in substance, that the plaintiffs had lost heavily on debentures taken at par and nearly worthless, which they had nevertheless continued to value; that they were compelled by public opinion to call in an actuary, but prevented him from making a proper valuation; that their history was one of outrageous extravagance and dangerous debility; that for years they had trembled on the very verge of disaster; and that they were in an unsound and precarious condition, etc. These statements, contained in an extract from a letter to the New York *Spectator*, and in its editorial comments thereon, were circulated by the defendant. The defendant justified by a plea to the whole declaration which alleged, in substance, that defendants had for several years made untruthful annual statements; that they had lost large sums of money by investments; and that they paid larger bonuses and dividends and salaries than their true financial position would justify. This plea was demurred to on the ground that, whilst professing to answer the whole declaration, it afforded an answer only to a part. It was held that the plea did not justify all the material charges in the declaration, and that it was bad. Morrison, J., said: "As said by Maule, J., in *Helsham* v. *Blackwood*(*i*): 'When an action is brought for a libel, to make a good plea to the whole charge, the defendant must justify everything that the libel contains which is injuri-

(*h*) Brown v. Beatty (1862) 12 U.C.C.P. 107.
(*i*) (1851) 11 C.B. 129.

ous to the plaintiff. If the libel charges 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 the crime. If the crime is charged with circumstances of aggravation, as here, the plea is clearly bad if it omit to justify that.' Now in this case the several charges I have referred to, all of them injuriously affecting the credit and reputation of the company, are not met. It was argued that the substance of the libel was justified. I think otherwise. The plea falls short, and fails to meet the specific charges, and the substantial one of the imputation of insolvency, which are quite independent of the matters pleaded, and are not necessarily or inferentially included in the general allegations spread on the plea. The plaintiffs are entitled to judgment on the demurrer''(*j*).

The rule in actions for slander of title.

The same principle as to the generality of the justification, and the justification being as broad as the libel itself, applies in an action for slander of title. And so where the defendant published a printed notice denying the plaintiff's title to certain lands, a plea that the matters published were, at the said times when and still are, true in substance and effect, was held, on demurrer, to be clearly insufficient. As stated by Robinson, C.J., in his judgment, the plea, when it is intended as a justification of the alleged slander, must justify specially, setting out the particular facts which evince the truth of the imputation(*k*). ''It is a principle that pleas of justification must be particular and specific, not vague and general.'' In the same case it was held, that two of the other pleas were bad for omitting to justify a statement in the defendant's printed notice, that a suit was pending to establish the right of another person, C.J., to the title—this latter statement being part of the printed notice complained of, and a very material part of the libel(*l*).

(*j*) Canada Life Assurance Co. v. O'Loane (1872) 32 U.C.Q.B. 379. See, also, Edsall v. Russell (1843) 4 M. & G. 1090; Ingram v. Lawson (1840) 5 Bing. N.C. 66; 6 Scott, 775; Cooper v. Lawson (1838) 8 A. & E. 746; Smith v. Parker (1844) 13 M. & W. 459; 2 D. & L. 394; Walker v. Brogden (1865) 19 C.B. (N.S.) 65.

(*k*) 1 Saund. 130, note 1; Jones v. Stevens, 11 Price 283; 1 Ch. Pl. 522; Rowe v. Roach, 1 M. & S. 304.

(*l*) Mair v. Culy (1854) 12 U.C.Q.B. 71.

In line with the rule against a justification being general, and being required to cover every material part of the libel, is the rule that a general charge of misconduct, whether verbal or written, cannot be justified by a single act or instance of the misconduct imputed.

General charges against a lawyer of being a "pettifogger," etc., not justified by a single instance.

In an article in defendant's paper headed: "A pettifogger in print," and attacking plaintiff as a barrister and attorney, reference was made to the plaintiff's want of character, to an action in which damages had been recovered against him by one C., for maliciously making a false affidavit for an order for a *Ca. Sa.* against C., to the "affidavit-making propensities" of plaintiff, to "a method he had of manufacturing cases," and stated that defendant had no objection to become defendant in any action he might bring. In an action for libel based on these statements the defendant justified by setting out in his plea the particulars of one matter, viz., the alleged false affidavit by plaintiff for the order for the *Ca. Sa.* against C. This plea was demurred to and was held bad, on the ground that the charges against the plaintiff of being a "pettifogger," etc., could not be justified by the single instance mentioned in the plea(*m*).

That a general charge of misconduct, whether in an exaggerated form, or by a mere repetition of the charge or otherwise, cannot be justified by a single act or instance, but must specify particular acts or instances of the same nature as the general charge, is also shewn by the cases *infra*(*n*).

The instances, in either case, must be given either in the plea itself, or in particulars delivered therewith(*nn*). Three instances

(*m*) Fitch v. Lemmon (1868) 27 U.C.Q.B. 273, at pp. 279-80. See, also, Wakley v. Cooke, p. 554, *post*.

(*n*) In the case of libel: l'Anson v. Stuart, 1 T.R. 748; Behrens *et al.* v. Allen (1862) 8 Jur. (N.S.) 118; Clarkson v. Lawson (1829-30) 6 Bing. 266, 587; 4 M. & P. 356; Clarke v. Taylor (1836) 2 Bing. (N.C.) 654; Blake v. Stevens (1864) 11 L.T. 543; 4 F. & F. 232; Lane v. Howman, 1 Price, 76; Morris v. Langdale, 2 B. & P. 284; Newman v. Bailey, 2 Chit. Rep. 665; Holmes v. Catesby, 1 Taunt. 543; Hickinbotham v. Leach (1842) 10 M. & W. 361. And in the case of slander: Hickinbotham v. Leach, *supra;* Burgess v. Beaumont, 7 M. & G. 962; Jones v. Bewicke, L.R. 5 C.P. 32; Gourley v. Plimsoll (1873) 42 L.J.C.P. 121.

(*nn*) Zierenberg v. Labouchere (1893) 2 Q.B. 183; Foster v. Perryman (1891) 8 T.L.R. 115; Devereux v. Clarke (1891) 2 Q.B. 582. For other cases see chapter on Particulars.

were held sufficient in the case of a charge of disgraceful conduct against a solicitor(*o*). And, where L. B. & G. were charged with being a gang who lived by card-sharping, proof that they had cheated at cards on two occasions was held sufficient(*p*).

Discovery not allowed until plea sufficiently pleaded.

It has been held both in England and in this country, that, where the defendant justifies, the defence is not well pleaded until particulars are furnished with the plea, that the particulars should shew the facts relied on in support of the justification, and that discovery cannot be obtained until the plea is so pleaded. In an action for libel against a newspaper publisher in British Columbia, the defendant pleaded a general justification particulars of which he was ordered to give to the plaintiff. The defendant obtained an order for an extension of time for the delivery of the particulars, and also leave to proceed with the examination of the plaintiff for discovery before delivering same. Upon an appeal by the plaintiff from so much of the order as permitted the examination under such circumstances, it was held by the Supreme Court of British Columbia, that the defendant must furnish the plaintiff with the particulars of the facts relied on as justification before he could obtain discovery from the plaintiff.

Zierenberg v. Labouchere (1893).

"I think *Zierenberg* v. *Labouchere* (1893) 2 Q.B. 183 (C.A.)," said McCreight, J., "is a plain authority to the effect that the defendant is bound to give particulars of his justification before he is entitled to discovery, and that he must state in his particulars the facts on which he relies in support of his justification"(*q*). The same practice, on the same authority, has been repeatedly followed in the courts of Ontario.

Justification of libels of a newspaper editor by allegations as to the character of his editorials.

Where, in a case of newspaper libel, the statements complained of were made up of a series of charges culminating in or

(*o*) Moore v. Terrell *et al.* (1833) 4 B. & Ad. 870; 1 N. & M. 559.

(*p*) Reg. v. Labouchere (1880) 14 Cox C.C. 419.

(*q*) Bullen v. Templeman (1896) 5 B.C.R. 43.

summarized by a general charge, the instances in justification, consisting of a number of newspaper articles published by the plaintiff himself, were held to have been properly pleaded. The case was one in which the editor of the *Argus* sued the publisher of the *Daily News* (both local newspapers published at K.) for having inserted in the *News* a communication charging that the plaintiff had, "for the past twelve months, conducted his paper in such a manner as to call forth the strongest disapproval of a right feeling public, completely perverting the use of a public journal"; that he had "made his paper a receptacle for coarse abuse, scurrilous personalities, and, in some cases, gross slanders on private individuals who happened to come within the pale of his displeasure"; that he had "dragged into print, in the most offensive manner, the names of some of our most quiet, respected and philanthropic citizens, invaded the privacy of their personal relations, and held their peculiarities up to ridicule"; and had, "by heaping the most unmerited abuse on some of our most valued institutions, endeavoured to turn them into a by-word and a laughing stock." (*) The communication concluded with references to the plaintiff's "moral turpitude," and to his being "an oppressed hero" "who is suffering the merited consequences of a long course of deliberate, determined and reckless wickedness."

In a special plea of justification the defendant set out articles from the *Argus* which had appeared therein twelve months previous, and in which a number of persons, professors in Queen's College and others, were defamed, and alleged that these articles were false and malicious, and that the persons referred to and libelled therein were persons of good name and reputation, etc. To this plea the plaintiff demurred on the grounds that the defendant, having charged the plaintiff with moral turpitude, etc., was attempting to evade the charge by stating circumstances which formed no justification of the libel; that if the plea justified any part of the libel, it only justified down to the asterisk (*), whereas the plea was pleaded to the whole libel; that the plea did not disclose sufficient grounds for the libellous statements against the plaintiff; that, in the absence of an averment that the plaintiff published the matters alleged as justification for the libel, knowing them to be false, the plea did not justify the libel; that the averments in the plea were not co-extensive with the libel; that the plea was multifarious; and that it shewed

that plaintiff published the matters in his public capacity as an editor, and concerning certain individuals occupying public positions or performing public acts, but did not shew or aver that such matters were not within the privilege of public criticism. There was judgment for the defendant on the demurrer. The court held that, *primâ facie*, the articles set forth in the pleas afforded a justification for the alleged libel; that, by one of the grounds of objection, the plaintiff admitted that the defendant had justified down to the asterisk; that the plaintiff, having admitted to have done what was alleged, had no ground of complaint because others said that he possessed "moral turpitude," and that his course had been one of "deliberate, determined and reckless wickedness"; that the articles contained statements of a malicious, wanton and reckless character; and that if any series of attacks on individuals could justify the charge of "moral turpitude" and "deliberate, determined and reckless wickedness," these did; and, therefore, that the justification, as stated, was a sufficient answer to the charge. The court held further, in accordance with the decision in *Brown* v. *Beatty*(*r*), that the plea was not bad on the ground of multifariousness(*s*).

The charge of being "a libellous journalist" not sustained by a single instance.

Upon the argument of this case, *Wakley* v. *Cooke*(*ss*), which is referred to in the judgment, was cited by counsel in support of the demurrer, as shewing that where it was charged that plaintiff was a "libellous journalist," and the justification proved was that an action had been brought against him for libelling one R. C. in his profession, in which action £100 damages had been recovered, it was held that the plea justifying the words "libellous journalist" imputed moral misconduct, and that the production of the record referred to, without further evidence, did not prove the plea. He contended that, in this case, the imputation of moral misconduct was clear, and, therefore, that the demurrer ought to be sustained. The answer to this contention was, that *Wakley* v. *Cooke* was really in favour of the defendant (Rowlands) in the case

(*r*) (1862) 12 U.C.C.P. 107.

(*s*) Stewart v. Rowlands (1864) 14 U.C.C.P. 485.

(*ss*) (1849) 4 Ex. 511. See, also, Fitch v. Lemmon, p. 551, *ante*.

above mentioned; for the judges say, in speaking of the plea, that that it did not mean that the plaintiff had been guilty on one occasion only of having merely published a libel, but that he had been guilty of gross misconduct as a journalist by the *habit* of libelling others. The publication of a libel which may make a man civilly liable, does not necessarily lead to the conclusion that he has been guilty of any moral misconduct. The observations of the court in *Gibb* v. *Shaw*(*t*), and in *Fellowes* v. *Hunter*(*u*), were also cited in favour of the defendant. See, also, *Tighe* v. *Cooper*(*v*).

A charge of forgery against a whole community sufficiently justified.

A plea of justification may justify certain distinct parts of the defamatory matter leaving other parts unnoticed, and may justify in a special sense, which is understood and supported by the context. The plaintiff complained of the following statements contained in a letter addressed by defendant to the editor of a newspaper and published therein: "This man stands charged with instigating and aiding the commission of a crime, even the crime of forgery, and forgery committed not against one man, but against a whole community, and committed not in one solitary instance, and under strong temptations, but in many instances and without any other temptations than the lust of office, and a total disregard of all obligations of law and justice. Let them [*i.e.*, the public] reflect that, to screen this forgery, he subsequently suborned his accomplices in crime to commit, even on the floor of the Legislature, the most deliberate and palpable perjury, etc. Forgery, perjury, and deliberate, premeditated swindling must all be laid to his charge." The defendant justified by a plea setting out at length a fraud committed by the plaintiff and others, at a political election, by falsifying the poll books and inserting fictitious votes, as more fully stated in the report of the criminal proceedings against plaintiff in *Regina* v. *Fellowes*(*w*); averred that the plaintiff was convicted of and

(*t*) (1859) 18 U.C.Q.B. 165.

(*u*) (1861) 20 U.C.Q.B. 382.

(*v*) 7 E. & B. 639.

(*w*) (1860) 19 U.C.Q.B. 48.

sentenced for the said fraud; and that this was what was referred to in that part of the alleged libel, and was so understood to mean by all to whom it was published. To this plea the plaintiff demurred on the ground that the defendant admitted by it that he charged the plaintiff with the crime of forgery, but sought to qualify the charge by alleging that he intended, and was understood to intend, a different charge which was not forgery; that forgery is a distinct crime known to the law, and that it was no justification for defendant to allege that it was true he charged the plaintiff with forgery, but that he intended to make a charge of a different nature. The plea was held to be sufficient.

Opinion of Robinson, C.J.

"The libel, as the plaintiff has set it out," said Robinson, C.J., "fortifies the plea by shewing, as it seems to us to do very plainly, that the defendant did not mean to charge the plaintiff with forgery in any other sense than as a term which he thought it proper to apply to the conduct which he described; and then he submits to the court and jury that, if that was properly called by him forgery, then he published what was true, and, if it was not properly called 'forgery,' then the libel must be understood in that mitigated sense, that he meant only to charge that as 'forgery' which he described, and which he thus enabled the public to judge of and put their own construction upon. He says, in other words, "I imputed forgery to the plaintiff, so far as that would be forgery, and I was not and could not be understood by the public to mean anything more' "(x).

Justification where the imputations are separable.

So, also, where the imputations in a libel are separable, the defendant may justify some of these, and plead other defences, *e.g.*, privilege, or a denial of the speaking or publishing of the words, to the others(y); or he may plead both justification and privilege, which are not inconsistent, to the whole libel, or to any distinct and severable part of it, however imprudent it may

(x) Fellowes v. Hunter (1861) 20 U.C.Q.B. 382.

(y) Clarkson v. Lawson (1830) 6 Bing. 266, 587; Churchill v. Hunt (1819) 2 B. & Ald. 685; McGregor v. Gregory, 11 M. & W. 287; Roberts v. Brown (1834) 10 Bing. 519; Biddulph v. Chamberlayne, 17 Q.B. 351.

sometimes be to plead these defences together. He may also justify a distinct and severable part in mitigation of damages(*z*). But, where the justification is limited to part of a libellous statement, it must be clear that the part justified is severable from the remainder, and does not, as was held in *Fleming* v. *Dollar*(*a*), create doubt and embarrassment as to what is and what is not justified.

Justification of charges that an attorney had narrowly escaped indictment for perjury and had made a false affidavit.

An article in the defendant's newspaper stated that the plaintiff, a practising attorney, had been circulating lies and had narrowly escaped being indicted for perjury in a certain case at W. These statements the defendant justified, alleging that in a certain suit the plaintiff, as plaintiff's attorney therein, in an affidavit for a *Ca. Sa.*, had sworn falsely to certain specified statements made to him by one R., and that the defendant, in that suit, had recovered damages against the plaintiff for falsely and maliciously making such affidavit, and contemplated a prosecution of the plaintiff for perjury, but was dissuaded. In the second count the libel alleged was, in part, the publication of an affidavit made by R., in which he set out the action against the plaintiff, and the statements sworn by plaintiff to have been made to him by R., and averred that, on the trial of that action, he (R.) had sworn that these statements were false, as in fact they were. Defendant, in a plea to this part of the libel, averred that these statements made by R., repeating them, were true. These pleas were demurred to, but were held to be good. "It must be observed," said the court, referring to the justification of the statement in the first count, "that the justification is confined to the mere assertion of plaintiff's narrow escape, and does not apparently undertake to shew that perjury was actually committed. . . . We are not prepared to hold that the defendant may not be allowed to justify to this extent, and although it is not easy to reconcile all we find in the books as to the rule of such pleadings in libel and slander, we think this may be upheld. We know that a man may be indicted for perjury on a

(*z*) Vessey v. Pike, 3 C. & P. 512; Clarke v. Taylor (1836) 2 Bing. (N.C.) 664; 3 Scott, 95.

(*a*) (1889) 23 Q.B.D. 388; 61 L.T. 230; 58 L.J.Q.B. 548.

false charge, or on the trial the charge may break down on many grounds; the statement may not be material, or the contradiction not sufficiently clear, etc., still he was actually indicted for perjury, though he did not in the eye of the law commit the offence. It is easy to conceive a case in which a perfectly innocent man might very narrowly escape being indicted for perjury. If the plaintiff take issue on this justification, the defendant must, in order to succeed, prove it in substance as alleged, and satisfy the jury of its truth. If the plaintiff never was really in danger of so being indicted the justification would fail. It would hardly, we think, be proved by merely shewing that Campbell had threatened to indict, or talked of indicting, etc. The whole facts of the matter would have to be enquired into." As to the justification of the second count the court were of opinion that the justification covered all to which it was pleaded. Every statement in the paragraph was gone over and circumstantially averred to be true, and to have occurred as R. had sworn to them(*c*).

Justification of the libel and the innuendo.

In *Tench* v. *Swinyard*(*d*) the Upper Canada Court of Queen's Bench had to determine whether a certain plea was good as a justification of the libel with the meaning alleged in the innuendo, *i.e.*, whether the innuendo was justified as well as the libel, which imputed, as was alleged, that the plaintiff had conducted himself fraudulently in his employment as a conductor on the railway of which defendant was the manager, and had attempted to defraud the company, and had been dismissed therefor. To this it was pleaded that it was true, as stated in the alleged libel (setting out the words). This plea was demurred to on the ground that it was pleaded to the whole cause of action and answered only part. The court held, however, that under C.S.U.C., c. 103, s. 2(*e*), the plea was a good defence, for that the defendant undertook by it to justify the libel with the innuendo. Morrison, J., after quoting the above section of the statute, and remarking that it did not appear to be settled what was the proper form of such a plea in a case like the present, points out that the libel complained of imputed misconduct to

(*c*) Fitch v. Lemmon (1868) 27 U.C.Q.B. 273.

(*d*) (1869) 29 U.C.Q.B. 319.

(*e*) Now R.S.O. 1897, c. 68, s. 3.

the plaintiff in respect of his business or employment as a conductor, and consequently was actionable without any innuendo; "and if the plaintiff failed, as said by Lush, J., [in *Watkin* v. *Hall* (1868), L.R. 3 Q.B. 396], in placing upon the libel the meaning he intended by the innuendo, still the plaintiff would be entitled to recover without the innuendo; and, as said by Blackburn, J., [in the same case], the defendant's plea may be taken to be a justification of the libel without the innuendo; and in this respect the case of *Ruckley* v. *Kiernan*, 7 Ir. Com. Law R. 75, is applicable"(*f*). Where the meaning assigned to the words in the innuendo is adopted by the defendant, the words must be justified in that sense(*g*); but such meaning may be denied, and it may be alleged that the words, in their natural and ordinary signification, are true.

Justification of the repetition of defamatory statements.

Generally speaking, and subject to one or two exceptions in the case of slander, and to the statutory privilege in the case of libel, the same rules, as to the plea and proof of the truth of defamatory statements, apply to the repetition of such statements as to their original publication(*h*). A general plea, *e.g.*, that the defamatory words are true, will be insufficient where they were the words of a third party repeated by defendant. This would be merely alleging that the third party published the words, whereas the defendant must also prove that the words are true(*i*). As was said in one case, in which a charge of "blackmailing" was contained in the newspaper report of a speech at a public meeting, the justification is not affected by the fact that the defendants were only reporting, or purporting to report, the words of another. No one can escape the consequences of publishing a libel, or slander, because some other person is the author of it and that is at the same time stated. Nor can it make any difference, for this purpose, whether the repetition, or report, of the words is accurate or inaccurate (that question arises on a defence of fair and accurate report only). If the words used

(*f*) Tench v. Swinyard (1869) 29 U.C.Q.B. 319.

(*g*) White v. Tyrrell (2), 5 Ir. C.L.R. 498.

(*h*) De Crespigny v. Wellesley, McPherson v. Daniels, Watkin v. Hall, *infra*; Lewis v. Walter (1821) 4 B. & Ald. 605.

(*i*) See Duncan v. Thwaites, 3 B. & C. 556.

be true in substance and in fact, the plaintiff cannot recover. He sues for the injury his reputation has sustained by having his conduct falsely "characterized as blackmailing"; he can have no damages if it were truly so characterized(*j*).

That defendant was told and believed the slander charged, is no justification.

Justification by hearsay, *i.e.*, that the defendant had only repeated what he has heard from another, is no answer to the action(*k*), although it may, under certain circumstances, be evidence in mitigation of damages(*l*). A plea, therefore, that defendant was told and believed the slander which he published is no justification. In an action for words imputing murder, the defendant pleaded to so much of the second count of the declaration as charged the defendant with speaking the words, "I am told that you are the man that killed the pedler," that he was told that the plaintiff was the man who killed the pedler; and to so much of the third count as charged the defendant with speaking the words, "I am told that M. (plaintiff) was the man who killed the pedler, and I believe it," that he was told that plaintiff was the man who killed the pedler and he did believe it. The plaintiff demurred to each plea on the grounds that it amounted to a plea of not guilty; that the issue intended to be raised was wholly immaterial; and that the matters alleged therein could only be referred to, if at all, in mitigation of damages. It was held, on the authority of *Davis* v. *Lewis*(*m*), and *McPherson* v. *Daniels*(*n*), that both pleas were bad. Robinson, C.J., said that the allegation in the plea, "that he did believe it," was no justification. The defendant was, by that assertion, adding weight to the slander. But even without these faults the pleas would be bad, for it had been laid down in several cases, that it is not a justification to plead simply that the de-

(*j*) *Per* Meredith, J., in Macdonald v. Mail Printing Co. (1900) 32 O.R. 168.

(*k*) Lewis v. Walter (1821) 4 B. & Ald. 605.

(*l*) Watkin v. Hall (1868) L.R. 3 Q.B. 396; 37 L.J.Q.B. 125; Duncombe v. Daniell (1837) 8 C. & P. 222; 2 Jur. 32; 1 W.W. & H. 101; Davis v. Cutbush (1859) 1 F. & F. 487.

(*m*) 7 T.R. 17.

(*n*) (1829) 10 B. & C. 263.

fendant was told what he has said he was told, but he must in his plea mention who told him what he ventured to repeat, so as to give a right of action against his informant; and, moreover, it must appear that he spoke the words not maliciously or wantonly, but on some lawful occasion(*o*).

Repetition, when justifiable, and when not justifiable.

But there is no right of action against the original publisher of a slander for the repetition of the slander, unless its repetition was authorized by him, or was the natural and probable consequence of his publication(*p*). The fact that the defendant gave his authority for the slanderous or libellous words is no defence(*q*); or that he believed the words to be true(*r*), except when the occasion of publication was privileged(*s*). And it would be privileged where the defendant, having heard a slanderous report about a person, repeated it *bonâ fide* to such person for the purpose of enabling him to answer the slander, or redress the grievance(*t*); or where he repeated *bonâ fide* to one of two persons a slanderous report concerning both(*u*); or where he shewed an anonymous letter, defamatory of a person, to a *bonâ fide* inquirer as to such person's character(*v*); but not where the repetition consisted of the reassertion by the defendant of a defamatory report originally started by the defendant himself(*w*). The repetition of a slander uttered in answer to an inquiry as to same, and the assertion of a belief in plaintiff's guilt,

(*o*) Muma v. Harmer (1859) 17 U.C.Q.B. 293.

(*p*) Adams v. Kelly (1824) R. & M. 157; Ward v. Weeks (1830) 7 Bing. 211; 4 M. & P. 796; Parkins *et ux.* v. Scott *et ux.* (1862) 1 H. & C. 153; 31 L.J. Ex. 331; Riding v. Smith (1876) 1 Ex. D. 91; 45 L.J. Ex. 281; Ecklin v. Little (1890) 6 T.L.R. 366; Speight v. Gosney (1891) 60 L.J.Q.B. 231.

(*q*) DeCrespigny v. Wellesley (1829) 5 Bing. 392; 2 M. & P. 695; McPherson v. Daniels, *supra.*

(*r*) Campbell v. Spottiswoode (1863) 3 B. & S. 769.

(*s*) Tidman v. Ainslie, 10 Ex. 63. See, also, Maitland v. Goldney (1802) 2 East, 426; Bromage v. Prosser (1825) 4 B. & C. 247.

(*t*) Davies v. Snead (1870) L.R. 5 Q.B. 608; 23 L.T.N.S. 126 and 609; 39 L.J.Q.B. 202.

(*u*) *Ibid.;* Clark v. Molyneux (1877) 3 Q.B.D. 237; 47 L.J. 230; Waller v. Loch (1881) 7 Q.B.D. 619; 51 L.J. 274.

(*v*) Robshaw v. Smith (1878) 38 L.T.N.S. 423.

(*w*) Smith v. Mathews (1831) 1 Moo. & Rob. 151.

is an exaggeration of the slander, and is not privileged(*x*). But where the defamatory words, first uttered to the plaintiff herself, are thereafter repeated in her presence to her parents who came with her to defendant and asked for particulars, the occasion is privileged, and there must be evidence of express malice, which cannot be implied, under those circumstances, from the mere publication of the defamatory words(*y*).

Similar charges by other persons no excuse.

In an action for slander by a school teacher and organist in a Quebec parish, plaintiff alleged that defendant had publicly denounced her by several names implying that she was a woman of immoral character; that these reports had damaged her character so much that she was obliged to resign her offices of school teacher and organist; that teaching was her sole means of subsistence, etc. The defendant pleaded that the plaintiff had resigned her situation before he said anything; that injurious reports were in circulation respecting her; that the chairman of the school board called upon her for an explanation; and that she preferred to resign rather than attempt to justify herself. Some people were discussing these events, which had given rise to some excitement in the parish, and the defendant, who was present, joined in the conversation, taking the side of another person present who used strong language with reference to the plaintiff. The court were of opinion that the defendant could not excuse himself by saying that other people had made similar charges against the plaintiff; and as the injurious expressions used by the defendant were proved, the plaintiff had judgment for $100 damages, with costs of an action for that sum. But, the action having been brought for too large a sum, the plaintiff was adjudged to pay the difference of costs of contestation of the action as brought over those of an action for $100(*z*).

Plea justifying an imputation of a criminal offence.

Where the defendant wishes to justify words imputing a crime, he should do so distinctly and plainly. A plea to the words, without the meaning alleged in the declaration, is an

(*x*) Gates v. Lohnes *et al.* (1898) 31 N.S.R. 221.

(*y*) Johnston v. Kidston (1898) 31 N.S.R. 283.

(*z*) Gareau v. Montpellier (1882) S.C., 3 Stephens' Quebec Digest, p. 456.

answer to something not complained of; it is no answer to the declaration, and is bad in law(*a*). Neither is a plea setting forth a suspicion of crime any justification(*b*), nor a plea of an attempted crime founded on an unnecessary statutory declaration to the same effect(*bb*). The plea ought to state the charge with the same precision as in an indictment(*c*), and the charge ought to be proved with the same strictness.

Justification of a criminal charge where conviction reversed.

Where a libellous charge, that plaintiff had served a term as a convict in a state prison, was justified by a plea that, prior to the publication of the libel, he had been convicted of an indictable offence, sentenced to said prison for two years, and committed and detained there for that period, a replication that, within three months from the time of the alleged conviction, and before the plaintiff was imprisoned in the said prison for the said term, the conviction was reversed and the plaintiff released from custody, was held good on demurrer(*d*). But in case for a libel charging the plaintiff with being a "convicted felon," a plea that in a memorial to the Lieutenant-Governor he had confessed being guilty of bigamy, is bad, as an argumentative and insufficient way of pleading a justification(*dd*).

How damages affected by plea of justification.

Pleading justification, where no attempt is made to prove the plea, is not in itself evidence of malice entitling the plaintiff to have the case submitted to the jury, the words in question having been spoken on a privileged occasion(*e*). But, in the absence of privilege, it may aggravate the damages, where the

(*a*) See Strachan v. Barton (1874) 34 U.C.Q.B. 374; Forbes v. McClelland (1868) 4 O.P.R. 272, 274.

(*b*) Mountney v. Watton (1831) 2 B. & Ad. 673.

(*bb*) McDonald v. Sydney Post Publishing Co. (1906) 39 N.S.R. 81.

(*c*) *Per* Alderson, B., in Hickinbotham v. Leach (1842) 10 M. & W. 363; 2 Dowl. (N.S.) 270.

(*d*) Davis v. Stewart *et al.* (1868) 18 U.C.C.P. 482. See, on the same point, Davis v. Stewart (1869) 29 U.C.Q.B. 441. See, also, Cuddington v. Wilkins, Hob. 81; Leyman v. Latimer (1877-8) 3 Ex. D. 15, 352; 46 L.J. 765; 47 L.J. Ex. 470; Alexander v. N.E. Ry. Co. (1865) 34 L.J.Q.B. 152; Gwynn v. S. E. Ry. Co. (1868) 18 L.T. 738.

(*dd*) Longworth v. Hyndman (1844) 1 U.C.Q.B. 17.

(*e*) Corridan v. Wilkinson (1893) 20 O.A.R. 184.

plea is either abandoned at the trial, or is not proved, because it may then be considered as evidence of malice and an aggravation of the injury(*f*).

Justification of charge of purchasing a government appointment, etc.

A merchant and member of the Senate of Canada sued for words spoken to the effect that he had paid $50,000 to the Government for his senatorship, and was advertising in Europe that he was made a senator by the people of Canada because of the benefits conferred upon them by his discovery of a certain medicine; the innuendo being that he had corruptly bribed members of the Government and had purchased his senatorship, and was in the habit of publishing misleading advertisements boasting of his appointment to the said office, and falsely exaggerating the value of the medicines manufactured by him, etc. In one of the paragraphs of his defence the defendant justified the slander, and alleged, in addition, that the plaintiff did pay the Government, either directly or indirectly, or through some member thereof (to the defendant unknown), or to some person or persons (to the defendant unknown), the sum of $50,000 "in order that he (plaintiff) might be appointed a senator"; and did advertise as alleged; and that the particulars were well known to the plaintiff, but not to the defendant. Upon an application to the Master in Chambers to strike out the paragraph as embarrassing, it was held that the part objected to formed particulars of the justification, but, instead of being particulars of the words alleged to have been uttered, it assumed to justify different words, namely, "in order that he (plaintiff) might be appointed," and was for that reason improper, and must be struck out with liberty to amend as the defendant might be advised. Upon an appeal to a judge in Chambers it was held that the paragraph was unobjectionable. "I am unable to understand," said Meredith, C.J., "how this statement can be deemed embarrassing, or why it is open to objection. The defendant, in the part of the paragraph which is left to stand, has in proper form justified, and it seems to me somewhat hypercritical to say that it is not sufficient, in

(*f*) Simpson v. Robinson (1848) 12 Q.B. 511; 18 L.J.Q.B. 73; 13 Jur. 187; Caulfield v. Whitworth (1868) 18 L.T. 527; 16 W.R. 936; Warwick v. Foulkes, 12 M. & W. 508; Wilson v. Robinson, 7 Q.B. 68; 14 L.J.Q.B. 196; 9 Jur. 726.

giving his particulars of the justification, for the defendant to allege that the payment was made in order that the plaintiff might be appointed, the words charged being that the money was paid for the title. Most people would, I apprehend, conclude that one who had paid a sum of money in order to procure his appointment to an office, was not inaptly or unjustly said to have paid it for his title, using that word as meaning, as it is used in the plaintiff's pleading, the appointment to office''(*g*).

Adverse judgments in crim. con. and alimony in justification of words imputing adultery.

Judgments confirmatory of slanderous charges may also be pleaded in justification. In an action formally by husband and wife, but in reality by the wife, for words imputing adultery to the wife, it was held that the defendant might plead and prove in justification that a judgment had been recovered by the husband against a third party for criminal conversation with the wife, and that judgment had been given against the wife, on the ground of adultery, in a suit brought by her against the husband for alimony(*h*).

The law in Quebec.

In Quebec, as in the other Provinces, the defendant, in an action for slander, may plead that what he has said was true(*i*). But he may not plead facts tending to justify other words than those mentioned in the declaration; and where he has done so, or where the allegations do not amount to justification, the objection should be taken by demurrer, and not by motion to strike out the pleading(*ii*). Justification is also a good plea in a civil action for libel in Quebec(*j*); and may be pleaded, and is a good defence, in an action for libel by a public officer(*k*). A plea in the nature of a plea of justification will not be disallowed be-

(*g*) Fulford v. Wallace, 1 O.L.R. (1901) 278.

(*h*) Campbell *et ux.* v. Campbell (1875) 25 U.C.C.P. 368.

(*i*) Delisle v. Beaudry (1868) 12 L.C.J. (S.C.) 221.

(*ii*) Phillips v. Laviolette (1902) 4 Q.P.R. 396.

(*j*) Mousseau v. Dougall *et al.* (1874) 5 R.L. (S.C.) 442.

(*k*) Genest v. Normand (1873) 5 R.L. (C.C.) 161.

cause it does not contain an admission of the words attempted to be justified(*l*).

Defective plea justifying a charge of "leaving creditors in the lurch."

The facts stated in support of the plea must be consistent with the defamatory charge, otherwise the plea will be held to be bad. In an article published in the *Leader* newspaper at Toronto, it was stated that the plaintiff, a prominent journalist, had "left New York with his creditors in the lurch"; meaning that the plaintiff had absconded from New York to avoid the payment of his debts. In an action for libel based on these and other charges contained in the same article, the defendant pleaded, that before the alleged grievances, the plaintiff resided in New York, and became largely indebted to many persons there, and thereafter left that city and came to Canada permanently to reside, without having paid or satisfied his creditors in New York, and, therefore, the statement in question was true. This plea was demurred to and held bad on the ground, that for all that was stated in the plea, and supposing each allegation therein to be proved, yet the plaintiff might have left New York with the consent and approbation of his creditors.

Opinion of Draper, C.J.

"This expression [*i.e.*, leaving "his creditors in the lurch"] imports," said Draper, C.J., "that the plaintiff left New York either without the knowledge, or against the wish, of his creditors, contrary to fair dealing with them, or to what they had a right to expect in proper dealing, or to place them in a situation of difficulty or disadvantage in respect to their claims upon him, whereas every word in the plea may be true, and yet the plaintiff may have left New York upon a perfect understanding with his creditors, and even by their advice, upon a full communication of his plans and prospects, in which case it would be impossible to say with truth they were left in the lurch. I think, therefore, this plea is bad"(*m*).

(*l*) Gugy v. Ferguson (1861) 11 L.C.R. (Q.B.) 409.

(*m*) Brown v. Beatty (1862) 12 U.C.C.P. 107. See, also, O'Brien v. Bryant (1846) 16 M. & W. 168.

Defective plea justifying a charge of "swindling."

In the same article in the *Leader* it was also alleged that the plaintiff had "resorted to that style of financiering which in the vernacular is called 'swindling.'" This charge was justified by the averments, firstly, that the plaintiff obtained from one W. R. B. a certain promissory note, on the understanding that he, W. R. B., should, on the maturity thereof, pay the amount actually due between the plaintiff and himself, and that the plaintiff should retire the note; that W. R. B. did pay plaintiff the amount so due, but plaintiff did not retire the note and W. R. B. was sued thereon; and secondly, that plaintiff obtained from one W. a promissory note for $200, and, upon its maturity, a renewal for $100 and $100 in cash, upon the express understanding that he would retire the $200 note, which he did not, but used and appropriated the funds and new note for his own use. It was held, that the receipt and application of funds, as above stated, did not, in the first case, amount to swindling, but that the facts of the second case stated as a justification were sufficiently stated to entitle defendant to the decision of the jury thereon(*n*).

Mode of dealing with a multifarious plea of justification partially demurred to.

As the law of pleading stood in Ontario at the time this decision was given, the plea to which these objections were taken was multifarious, and only portions of it were demurred to. No exception was taken to the demurrer on that ground, but, as is pointed out in the judgment, the plight of the pleadings, when they came before the court for adjudication, was such as to create "an inconsistency in the court giving a judgment in favour of the plaintiff on a demurrer to one part of a plea, and for the defendant on another."

These peculiarities of the pleading are discussed by Draper, C.J., who concludes that, "on a judgment for plaintiff on an entire plea, the plaintiff is so far entitled to a judgment for damages and costs, the defendant on the other side to a judgment *quod eat sine die*, neither of which judgments could be entered here. I think we must either treat the pleading as before us, or that the demurrer is improper, and should not have been set

(*n*) Brown v. Beatty (1862) 12 U.C.C.P. 107.

down for argument. It appears to me that the former is the best course. It will create no new difficulty; the whole plea is in issue, and we decide, as matter of law, that it contains several good defences. The jury will determine whether any of them are good in fact." Judgment was given for the plaintiff on the demurrer to the first plea, and for the defendant on the demurrer to the second plea(*o*).

When defects in pleading cured.

A plea of justification may cure defects of pleading in the declaration. Such defects may also be cured by pleading over(*p*), *i.e.*, by the passing by a fault in the declaration without a demurrer (which latter admits the facts alleged in the declaration, but denies their sufficiency in law to sustain the plaintiff's case), and by delivering a plea which either traverses or confesses and avoids the allegations in the declaration.

When truth a defence under the Code.

The Code contains enactments providing for truth being a defence in a prosecution for libel, and for the manner of pleading it. It shall be a defence to an indictment or information for a defamatory libel that the publishing of the defamatory matter, in the manner in which it was published, was for the public benefit at the time when it was published, and that the matter itself was true(*q*).

The statutory plea of justification.

And, as to the mode of pleading such a defence, it is enacted, that every one accused of publishing a defamatory libel may plead that the defamatory matter published by him was true, and that it was for the public benefit that the matters charged should be published in the manner and at the time when they were published(*r*).

Such plea may justify the defamatory matter in the sense specified, if any, in the count, or in the sense which the defam-

(*o*) Brown v. Beatty (1862) 12 U.C.C.P. 107.

(*p*) Crosskill v. Morning Herald Printing and Publishing Co. (1883) 16 N.S.R. (4 R. & G.) 200.

(*q*) C.C. s. 331.

(*r*) *Ibid.*, s. 910(1).

atory matter bears without any such specification; or separate pleas justifying the defamatory matter in each sense may be pleaded separately to each as if two libels had been charged in separate counts(*s*).

Every such plea must be in writing, and must set forth the particular fact or facts by reason of which it was for the public good that such matters should be so published(*t*). The prosecutor may reply generally denying the truth thereof(*u*).

The truth of the matters charged in an alleged libel shall in no case be inquired into without the plea of justification aforesaid, unless the accused is put upon his trial upon any indictment or information charging him with publishing the libel knowing the same to be false, in which case evidence of the truth may be given in order to negative the allegation that the accused knew the libel to be false(*v*).

The accused may, in addition to such plea, plead not guilty, and such pleas shall be inquired of together(*w*).

If, when such plea of justification is pleaded, the accused is convicted, the court may, in pronouncing sentence, consider whether his guilt is aggravated or mitigated by the plea(*x*).

II. *Evidence of justification.*

Onus of proving truth on the defendant.

Where the words are defamatory, their falsehood is presumed in the plaintiff's favour, but the presumption may be displaced by pleading and proving that the words are true. It does not lie upon the plaintiff to prove the falsity of the charge; it is, for the purpose of the trial, presumed in his favour, and the onus is on the defendant to prove it to be true if he pleads justification: *Belt* v. *Lawes*(*y*). And where after a verdict for plaintiff, subject to a motion for a nonsuit, the action was dismissed on the

(*s*) C.C. s. 910(2).

(*t*) *Ibid.* (3).

(*u*) *Ibid.* (4).

(*v*) *Ibid.*, s. 911(1).

(*w*) *Ibid.* (2).

(*x*) *Ibid.* (3).

(*y*) (1882) 51 L.J.Q.B., at p. 361; *per* Boyd, C., in Macdonald v. Mail Printing Co. 2 O.L.R. (1901) 278.

ground that plaintiff had failed to prove the falsity of the charge, which, upon uncontroverted evidence, appeared to be true(*z*), the judgment was reversed by the Divisional Court on the ground that there was evidence to go to the jury, and that they having found in favour of the plaintiff on conflicting evidence, the judgment in his favour should be restored(*a*). So where the words complained of were: "He perjured himself in an affidavit in C.'s suit," without any inducement stating the words to have been spoken of and concerning the affidavit, and the defendant pleaded justification, it was held, that it was not necessary for the plaintiff to prove any affidavit, but that the onus was on the defendant, in support of his pleas of justification, to prove that the plaintiff had sworn wilfully false in an affidavit in C.'s suit(*b*).

Substantial justification of all the material statements.

In the case of libel the whole of the libellous statements which are material must be proved to be true; there must be a substantial justification. The defendant published as an advertisement, in a local newspaper, a notice stating that "certain persons, representing themselves to be directors" of a certain incorporated building society, had been "self-appointed by the most despicable, foul and fraudulent means, and in consequence all business transacted by them, since and including the first Monday in August of the present year, is wholly and entirely contrary to rules and regulations and law." The notice was signed by defendant as "late manager and director" of the society. The trial judge (Rose, J.) directed the jury that a plea of justification, which was added at the trial, was not proved. An appeal on this and other grounds from a verdict in the plaintiffs' favour was dismissed.

Opinion of Boyd, C.

Boyd, C., said that proof of the truth of certain preliminary statements printed did not go far enough to exonerate the defendant from his statement that all business transacted by the directors for the society was contrary to law, *i.e.*, null and void. "The public are cautioned against dealing with the com-

(*z*) Macdonald v. Mail Printing Co. (1900) 32 O.R. 163.

(*a*) Macdonald v. Mail Printing Co., 2 O.L.R. (1901) 278.

(*b*) Milner v. Gilbert (1847) 5 N.B.R. (3 Kerr) 617.

pany, because all business transacted since and including the first Monday in August, is wholly and entirely contrary to the rules and regulations and law. The fair meaning of that is, that it would be invalid, so that the persons would not be safe in buying and lending, or otherwise dealing with the company. This contention is not justified, and in this lies the sting of the whole advertisement. I agree, then, with the result of the learned judge's ruling, that the publication as a whole was not proved to be true. The judgment is, therefore, affirmed with costs." Ferguson, J., concurred in this view of the case(*c*).

The same rule in criminal cases.

In criminal cases, also, the whole of the libel must be covered by the plea of justification and the proof; otherwise there must be a verdict for the Crown(*d*). Libellous headings or titles must be proved to be true as well as the libellous statements which follow them(*e*). But every statement, expression, detail, or comment with respect to a charge need not be proved, so long as the substance of the charge is proved, and the failure to justify every expression produces no different effect on the reader(*f*).

Evidence justifying libellous comments without plea of justification inadmissible.

Evidence of the truth can only be given under a special plea for that purpose, and, when otherwise admitted, there is ground

(*c*) Owen Sound Building and Savings Society v. Meier (1893) 24 O.R. 109. See, also, Weaver v. Lloyd (1824) 1 C. & P. 295; 2 B. & C. 678; 4 D. & R. 230; Ingram v. Lawson (1840) 5 Bing. N.C. 66; 9 C. & P. 326; 7 Dowl. 125; 6 Scott 775; Clarke v. Taylor (1836) 2 Bing. N.C. 654; Helsham v. Blackwood *et al.* (1851) 11 C.B. 129; 20 L.J.C.P. 187.

(*d*) R. v. Newman, 1 E. & B. 268, 558; 22 L.J.Q.B. 156; Dears. C.C. 85; 17 Jur. 617; 3 C. & K. 252.

(*e*) Bishop v. Latimer (1861) 4 L.T. 775; Mountney v. Watton (1831) 2 B. & Ad. 673; Chalmers v. Shackell (1834) 6 C. & P. 475; Clement v. Lewis (1822) 7 Moore 200; 3 Br. & Bing. 297; 3 B. & Ald. 702.

(*f*) Alexander v. N.E. Ry. Co. (1865) 34 L.J.Q.B. 152; 6 B. & S. 340; 11 Jur. N.S. 619; 13 W.R. 651; Willmett v. Harmer *et al.* (1839) 8 C. & P. 695; Edwards v. Bell (1824) 1 Bing. 409; Lay v. Lawson (1836) 4 A. & E. 795; Reg. v. Labouchere (1880) 14 Cox C.C. 419; Morrison v. Harmer (1837) 3 Bing. N.C. 759; 4 Scott, 533; Weaver v. Lloyd, *supra;* Warman v. Hine (1837) 1 Jur. 820; Edsall v. Russell (1842) 12 L.J.C.P. 4; 6 Jur. 996; Behrens v. Allen (1862) 3 F. & F. 135; 8 Jur. N.S. 118; Cooper v. Lawson (1838) 8 A. & E. 753; 2 Jur. 919; 1 P. & D. 15.

for a new trial. In an action for libel against a newspaper publisher tried in Upper Canada prior to the passage of Lord Campbell's Act, the truth of a report of judicial proceedings, the comments upon which were complained of, was held to have been improperly admitted as evidence under the general issue in bar of the action, without a special plea of justification. It appeared that the plaintiff had sued one H. for defamation, and recovered damages. The defendant, who was editor and publisher of the *Colonial Advocate*, attended the trial at H.'s request, and prepared a report of the evidence and proceedings in the cause, which he afterwards published in the form of a circular accompanied by comments on the tendency and bearing of the evidence, and reflecting on the plaintiff. The report was contained in a part of the circular distinct from the comments complained of. The declaration set out the most objectionable of these comments, to which the defendant pleaded the general issue, and two special pleas stating, in substance, that the report of the trial between the plaintiff and H. was a true report, and warranted the comments. The plaintiff took issue on the first plea, and demurred to the two last, and the record was carried down to try the issue and assess contingent damages on the demurrer. At the trial defendant was allowed to give evidence in justification of his comments on the proceedings on the trial of plaintiff's action against H. The jury found for the defendant, but a new trial was granted on the ground that this evidence was inadmissible.

Opinion of Sherwood, J.

Sherwood, J., who had tried the action, and who delivered the judgment of the court (Robinson, C.J., and Macaulay, J., who had been concerned in plaintiff's suit against H., giving no opinion), having stated his reasons for admitting the evidence, said that it was not given in justification of the report of the judicial proceedings, but in justification of the defendant's comments on those proceedings. The remarks of the defendant and the report of the trial were distinct transactions, which essentially differed in their character and tendency. The correctness of the report might be proved in the way of justification under the general issue; but the truth of the comments must be specially pleaded when they cast an imputation on the character of an individual for which an action will lie: 3 B. & A. 702; 3 B. &

C. 24; 3 Bing. 88. The part of the evidence objected to by the plaintiff had been admitted in bar of the action, and for the purpose of leading to a verdict; but he now thought it was inadmissible for that purpose under the general issue, and that there should be a new trial(*g*).

Where justification not pleaded evidence of it inadmissible, but, if admitted, evidence in rebuttal also admissible.

Although under a plea of fair comment, where there is no plea of justification on the record, the defendant may prove that the facts commented on are true, he may not adduce evidence to shew that charges of specific misconduct or dishonesty, which he has made, are true. But, if such evidence be admitted, evidence in rebuttal should also be admitted. In an action for a libel contained in a newspaper article respecting certain legislation, the plaintiff, the Attorney-General of the Province where such legislation was enacted, alleged that the article charged him with personal dishonesty. The defendants pleaded not guilty, and that the article was a fair comment on a public matter. On the trial the defendants gave evidence in support of the charge of personal dishonesty, and evidence in rebuttal was tendered and rejected. Certain questions were put to the jury requiring them to find whether or not the words bore the construction claimed by the innuendo, or were fair comment on the subject matter of the article. The jury found generally for the defendants, and in answer to the trial judge, who asked if they found that the publication bore the meaning ascribed to it by the plaintiff, the foreman said: "We did not consider that at all."

Martin v. Manitoba Free Press Co. (1892).

Upon an appeal to the Supreme Court of Canada from an order for a new trial(*h*), it was held that the defendants not having pleaded the truth of the charge, the evidence given to establish it should not have been received, but, it having been received, evidence in rebuttal was improperly rejected; that the general finding for the defendants was not sufficient in view of the fact that the jury stated that they had not considered the material question, namely, the charge of personal dishonesty;

(*g*) Small v. Mackenzie (1830) Drap. Rep. 174.

(*h*) Martin v. Manitoba Free Press Co. (1892) 8 M.L.R. 50.

and that, for these reasons, a new trial was properly granted. The evidence for the defence, in direct support of the personal charge of corrupt dealing by the plaintiff, consisted chiefly of alleged admissions by the plaintiff that the object of a $500 per mile provision, in a certain contract between the Provincial Government and a certain railway company, was to provide money for the use, either personal or as members of a political party, by plaintiff and others. "It was evidence," said Patterson, J., who delivered the principal judgment of the court, "that would have been properly receivable upon a plea justifying the statement complained of as being true, and it was not properly receivable without such a plea"(*i*).

Justification of a criminal charge.

Where an imputation of crime is justified, there must be the same strictness of proof as on a trial for the crime imputed(*j*). It was said by Kenyon, C.J., that where a defendant justifies words which amount to a charge of felony, and proves his justification, the plaintiff may be put upon his trial by that verdict, without the intervention of a grand jury(*k*). But there is apparently no case on record in which that opinion was acted upon. The Criminal Code(*l*) enacts how an indictment may be preferred, and declares that, save as therein provided, no bill of indictment shall be preferred in any Province of Canada.

Character evidence inadmissible where justification pleaded.

Evidence of plaintiff's bad character or reputation is inadmissible when the truth is pleaded. Where words charging theft were justified, the defendant tendered evidence to shew that the plaintiff's character for honesty, and his general reputation in that respect, were bad; but the evidence was rejected on account of there being a plea of justification on the record. After a

(*i*) Martin v. Manitoba Free Press Co. (1892) 21 S.C.R. 518, at p. 527. See, also, Brown v. Moyer (1893) 20 O.A.R. 509.

(*j*) Willmet v. Harmer (1839) 8 C. & P., at p. 697; Smith v. Parker (1844) 13 M. & W. 459; 14 L.J. Ex. 52; 2 D. & L. 394; O'Brien v. Bryant (1846) 16 M. & W. 168; 16 L.J. Ex. 77; 4 D. & L. 341; Botterill *et al.* v. Whytehead (1879) 41 L.T. 588; Chalmers v. Shackell (1834) 6 C. & P., at p. 478.

(*k*) Cook v. Field (1788) 3 Esp., at p. 133.

(*l*) R.S.C. 1906, c. 146, ss. 870 *et seq.* and s. 873(4).

verdict for plaintiff a new trial was moved for on the ground of the rejection of this evidence; but the court held that it was properly rejected, and (*semble*) that it would have been inadmissible even without the justification(*m*). Evidence of plaintiff's bad character, in mitigation of damages, is also objectionable under a plea of justification. *Wilson* v. *Woods*(*n*), which held the contrary, was disapproved of in *Moore* v. *Mitchell*(*o*), which also held that a plea in mitigation of damages, based upon plaintiff's bad character, must either shew that the plaintiff is a man of bad general reputation or character, or that he has a bad character with regard to some specific act relating to the charge in the libel complained of.

Admissions and confessions in proof of the truth.

Admissions, or, in the case of an imputation of crime, a confession by the plaintiff, may be given in evidence in proof of the truth. And where the defamatory statement is based on a supposed confession which was not made, but which was honestly believed by the defendant, the facts may be specially pleaded and proved in mitigation of damages. The proprietor of a New Brunswick newspaper was sued for the publication in his paper of the following: "It ill becomes an Englishman like (plaintiff), who must have forsworn his allegiance to his country when he enlisted in the American army was required to take the oath of country a Yankee deserter, to prate about loyalty." The defendant pleaded justification. At the trial there was evidence that plaintiff was an Englishman born in England; that a person who enlisted in the American army was required to take an oath of allegiance to the United States; and that plaintiff had stated to several witnesses that he had enlisted in the army of the United States and had deserted from such service. Plaintiff himself swore that he had never taken the oath of allegiance to the United States, or been in the American army and deserted from it, and that he had never said so. If he had said so it was in jest. He also denied some other alleged admissions, and stated that he did not recollect others. The jury found in favour of defendant.

(*m*) Edgar v. Newell (1865) 24 U.C.Q.B. 215.

(*n*) (1885) 9 O.R. 687.

(*o*) (1886) 11 O.R. 21. There have been some different rulings in the Province of Quebec. See Laurent v. Doutre and Berthelot v. Trudel, p. 579, *post*.

Upon a motion for a new trial it was held, that as there was a conflict of testimony proper for the consideration of the jury alone, and distinctly left to them, the evidence of plaintiff's admission that he enlisted in the American army and deserted, might be taken as true, and, therefore, was evidence to prove the justification(*p*).

Confession only admissible in justification. When admissible in mitigation.

And where, in an action for libel and slander imputing theft, the defendant pleaded, in mitigation of damages, that plaintiff had confessed to the defendant's mother that he had done the act charged against him, it was held, that evidence of the alleged confession could only be given under a plea of justification, which was not on the record, and that it was not admissible in mitigation unless the defendant admitted on the record that she had now good cause for discrediting the fact of such a confession, although she believed it when the words complained of were uttered(*q*).

Justification of a slander of a solicitor professionally.

A solicitor claimed damages for the following words which were alleged to have injured him professionally: "He (plaintiff) cheated my brother Dan out of $10." "He trumped up a bill against my brother Dan's estate." "You (addressing a client of the plaintiff in the presence of others) will be treated in the same way as my brother." Other defamatory words charged were in a conversation of defendant with one L., when, it was alleged, defendant said to L.: "Why did you get (plaintiff) for your lawyer. He is not a decent lawyer. He will spoil your case (meaning an action by L., in the county court, against one D. C.), and he will soak you." The defendant pleaded, *inter alia*, that plaintiff had collected a sum of money for a firm and had wrongfully appropriated it to his own use; that judgment was obtained against plaintiff for the money which he refused to pay; and that "the person to whom the words were alleged to have been spoken being a friend and relative of defendant, he spoke and published the words complained of by way of advice to him,

(*p*) Hill v. Hogg (1858) 9 N.B.R. (4 Allen) 108.

(*q*) Switzer v. Laidman (1889) 18 O.R. 420.

and the words were so spoken and published without malice, the defendant believing the same to be true." At the trial the only evidence given on the part of the plaintiff, as to the words spoken, shewed that defendant, in conversation with L., in reference to a case pending, asked L. who his solicitor was, and, upon L. mentioning plaintiff, defendant said, that if he had an honourable man like M., he might win his case. L. said that he would not change until he found some fault—that plaintiff always did honourably with him, whereupon defendant said that plaintiff was "a dirty man." Leave was given to plaintiff at the trial to amend, but no amendment was made. Plaintiff, who was called by defendant as a witness, admitted that he had collected a sum of money for a client which he had failed to pay over, and that he had given a note for the amount collected which he had also failed to pay, and that a judgment had been obtained against him for the amount, which was unpaid at the time of the trial. Upon a motion to set aside a verdict for plaintiff it was held, that if the words spoken were spoken and understood in the sense that the plaintiff was not an honourable solicitor, defendant had substantiated a good defence, and that the evidence above mentioned shewed conduct which was dishonourable to plaintiff as a solicitor, and fully justified the language used by defendant. The verdict was set aside(*r*).

Withdrawal of evidence of justification, or misdirection as to same.

The withdrawal from the jury either of proper evidence of justification, or misdirection as to the same, is good ground for a new trial. The agent of a fire insurance company having left their service, the company published in a newspaper an advertisement headed "Caution," containing these words: "N.B. Notwithstanding the false statements of (plaintiff) to the contrary, he is no longer an agent of the company." In an action against the company the declaration alleged that this publication concerned plaintiff in his business as an insurance agent, the innuendo being that he had falsely, and for improper purposes, stated that he was still the agent of the company. In a second count to the same effect, the innuendo was, that the plaintiff had been dis-

(*r*) Tobin v. Gannon (1901) 34 N.S.R. 9. For justification of a libel by one physician upon another professionally, see Williams v. Morris (1906) 4 W.L.R. 99.

missed from defendants' employment for improper conduct as their agent. The defendants justified. At the trial it appeared that the plaintiff, after he had ceased to be defendants' agent, asked G., who had been insured in defendants' company, to insure. G. believed plaintiff was still acting for defendants, but, after signing the application, discovered that it was to another company, and the plaintiff then refused to allow him to withdraw. One M., who had previously been insured by the plaintiff in defendants' company, said the plaintiff called when the time to renew came, and, being asked if he came to renew the policy, said, "Yes," and expressed annoyance when he found she had already renewed it with defendants. The plaintiff denied these statements. Upon a verdict for the plaintiff a new trial was moved for on the ground of misdirection, in that the trial judge did not tell the jury that the defendants were not liable, and that he told the jury there was no evidence to sustain the plea of justification. It was held that the evidence just mentioned, if believed, was sufficient to prove a plea of justification; and it having been withdrawn from the jury, there should be a new trial for misdirection(*s*). An appeal to the Upper Canada Court of Error and Appeal was dismissed without a decision on the merits, there being a misunderstanding as to what took place at the trial(*t*).

Where a charge of perjury made hypothetically was justified, and the jury found, contrary to the evidence of the plaintiff, that the justification was proved, a new trial was refused(*u*). A court is not bound as of right to set aside a verdict that is against the weight of evidence, even though it be a verdict of which they cannot approve(*v*).

Evidence of justification in the Province of Quebec.

In an action for libel against the proprietor of the *Courier du Canada*, who pleaded justification, it was held, that a journal may publish libellous accusations against an individual when they are in the public interest and are true; but, if the truth of the charge is not proved, the plea is an aggravation of the

(*s*) Holliday v. Ontario Farmers' Mutual Fire Insurance Co. (1873) 33 U.C.Q.B. 558.

(*t*) *Ibid.* (1874) 33 U.C.Q.B. 568.

(*u*) Lang v. Gilbert (1860) 9 N.B.R. (4 Allen) 445.

(*v*) Edgar v. Newell (1865) 24 U.C.Q.B. 215.

offence(*w*). If, however, the defendant proves good faith and apologizes, this will serve in mitigation of damages(*x*). The defence of justification is also strengthened by evidence shewing that plaintiff's character was such that he suffered no damage by the publication(*y*). But a libel published in a newspaper on a private individual cannot be justified by shewing that it was an item taken from another newspaper(*yy*); or that the defendant merely reproduced the words of a candidate for election to the House of Commons, uttered at a public meeting held in the interests of his candidature, even though the jury found the words were published in good faith, without malice and in the public interest, the defendant having taken no steps to verify the speaker's statements(*z*). It has been held, on the other hand, that imputations, even the truest, are equally regarded in law as calumnies, and that the defendant in an action for defamation cannot be allowed, except in rare instances, to establish the truth of the imputations in order to excuse his act. In the case in question the defendant was not allowed to do so, especially as to fresh imputations made in his defence(*a*). A defendant, however, will not be cast in damages where the words complained of truly describe the conduct or act of the plaintiff. Thus a servant who has stolen wood from his master cannot have a verdict against the latter for saying, in a discussion relating to the theft: "You are a thief"(*b*).

For other Quebec decisions as to evidence of the truth of a libel, see cases *infra*(*c*).

(*w*) Langelier v. Brousseau (1880) Q.L.R. 6 (S.C.) 198. See, also, Laurent v. Doutre (1877) 9 R.L. (S.C.) 286.

(*x*) Langelier v. Brousseau, *supra*.

(*y*) *Ibid.* See, also, Berthelot v. Trudel (1889) 18 R.L. (C.C.) 114.

(*yy*) Prevost v. Huard (1905) 7 Q.P.R. 406.

(*z*) Graham v. Pelland (1896) Q.O.R. 5 (Q.B.) 196, affirming (S.C.) 348.

(*a*) Wineberg v. Wener (1901) 4 Q.P.R. (S.C.) 463.

(*b*) Baron v. Laroche (1901) 3 Q.P.R. 450.

(*c*) Mail Printing and Publishing Co. v. Canada Shipping Co. (1881) 15 R.L. (Q.B.) 234; Martineau v. Roy (1887) 16 R.L. (S.C.) 257; Garneau v. Robitaille (1887) 16 R.L. (Q.B.) 79; Black v. Giberton (1888) 16 R.L. (S.C.) 22; Graham v. Daoust (1888) Mon. L.R. 4 S.C. 49; 16 R.L. (Q.B.) 407; Trudel v. Beemer (1888) 19 R.L. (Q.B.) 600; Leduc v. Graham (1889) 33 L.C.J. (Q.B.) 184; Berthelot v. Trudel (1889) 33 L.C.J. (C.C.) 293.

CHAPTER XXX.

Fair Comment.

Fair and *bonâ fide* comment on a matter of public interest is also a good defence to an action for libel. The law is the same in both civil and criminal proceedings, except that, in the one case, the courts have defined or explained fair comment whenever it has been pleaded in an action, while in the other the Code has summarized, with a certain measure of precision, the matters in which fair comment is no offence. To be a good defence in either case the comment must be "fair," and of this the jury must be the judges.

Comments on men and things.

Although the protection afforded the discussion of any matter of public interest is closely allied to fair comment, the Code distinguishes the two, at least to the extent of stating the law in separate articles. In its statement of the privilege of fair comment it further distinguishes between comments upon the public conduct of persons who submit themselves, and comments upon things which are submitted by their authors or owners, to the criticism and judgment of the public. In either case the state of the defendant's mind when the comments were written will have an important bearing on the case. If his opinions, although severe, were expressed honestly and without ill-feeling, they should not be regarded as unfair; but, if there be evidence of dishonesty or of an intemperate and malicious spirit on the part of the writer, the jury will be justified in finding unfair comment. If it could be shewn, as is pointed out by Lord Esher, M.R., in *Merivale et ux.* v. *Carson*(*a*), that the defendant was not really criticising a published work, but was writing with an indirect and dishonest intention to injure the author, even though in some other case the alleged libel would not be beyond the limits of fair criticism, yet the dishonest motive would prevent the defence of fair and *bonâ fide* comment from being applicable. "And for this reason, that the comment would not then really be a criticism

(*a*) (1887) 20 Q.B.D. 275 (C.A.), at pp. 281-82.

of the work. The mind of the writer would not be that of a critic, but he would be actuated by an intention to injure the author."

The provisions in the Code.

No one, the Code declares, commits an offence by publishing fair comments upon the public conduct of a person who takes part in public affairs(*b*).

So, also, no one commits an offence by publishing fair comments on any published book or other literary production, or on any composition or work of art, or performance publicly exhibited, or on any other communication made to the public on any subject, if such comments are confined to criticism [*i.e.*, fair criticism] on such book or literary production, composition, work of art, performance, or communication(*c*).

Definition of fair comment. Per Stephen, J.

These two statements as to the criminal law of fair comment may be said to cover with sufficient completeness, for our present purpose, the law in civil cases. The first question is, what is fair comment? The answer, so far as it can be given, relates to the section in the Code as a whole. Mr. Justice Stephen says: "A fair comment is a comment which is either true, or which, if false, expresses the real opinion of its author (as to the existence of matter of fact or otherwise), such opinion having been formed with a reasonable degree of care and on reasonable grounds(*cc*)." By the "real opinion" of the author is evidently meant his honest opinion, however false, exaggerated, or wrong this may be. The authorities cited in support of this definition are *Hunter* v. *Sharpe*(*d*), and Folkard's Starkie(*e*).

Opinion of Cockburn, L.C.J., in Hunter v. Sharpe (1866).

Hunter v. *Sharpe* was an action by a medical practitioner, who had advertised that he was in possession of a specific remedy for a certain disease hitherto considered incurable, against the proprie-

(*b*) C.C. s. 325(1).

(*c*) *Ibid.* (2).

(*cc*) Steph. Dig. C.L. 4th Ed., 213.

(*d*) (1866) 4 F. & F. 983.

(*e*) 4th Ed., p. 232.

tor of the *Pall Mall Gazette* for an alleged libel in that journal. The writer in his comments represented the plaintiff, the author of the advertisements, as a quack, imposter, and also—by reason of his describing himself as an M.D., on account of a diploma obtained abroad—as like scoundrels who pass bad coin. There was evidence that his publications teemed with statements which were extravagant, exaggerated and alarming. In his charge to the jury, Cockburn, L.C.J., said that the matter commented on was of public interest, and a fair and proper subject for public comment; that if the plaintiff's publications were consciously of the character described in the *Gazette*, and if the plaintiff did not really believe them, the epithets applied by the newspaper were justifiable; but that, even if the publications were not so in fact, if the jury were satisfied that the writer of the article complained of really believed that they were so, and that he was writing honestly and with reasonable regard for moderation, he was excused and protected. A public writer, in commenting upon matters of public interest, is protected and excused, if, in writing honestly and with reasonable moderation and self-control, he makes, through mistaken inferences on the matters of fact involved, defamatory statements the truth of which he cannot substantiate. The plaintiff was awarded one farthing damages, and the verdict was not moved against(*f*) .

Morrison v. Belcher (1863).

Mr. Justice Stephen's references to Folkard occur in the chapter on communications on matters of public interest, and cover the above condensed rulings of Cockburn, L.C.J., and others to the same effect in the same case. They also include his rulings in *Morrison* v. *Belcher*(*g*), in which he said that it is not because a public writer may be unable to prove to the letter all he has stated that, therefore, he is liable; the jury must be of opinion that his observations and inferences are fair and legitimate under the circumstances; or that they are not so unfair as to be reckless, and thus, in law, malicious.

(*f*) See reporter's note on this latter point at p. 987.

(*g*) (1863) 3 F. & F. 614.

Opinion of Erle, C.J., in Turnbull v. Bird (1861).

Erle, C.J., is also referred to as stating(*h*) that it is a question for the jury whether, under the circumstances, misstatements contained in a commentary or criticism were made recklessly, and with a want of ordinary care and caution; and(*i*) that it is important that a line should be drawn between fair discussion for the promotion of the truth, and publications for the aspersion of personal character. The sixth or last edition of Folkard(*j*) contains all these references including the summarized remarks of Cockburn, L.C.J., in *Hunter* v. *Sharpe*. The authority of the rulings in that case, and also in *Turnbull* v. *Bird*—both of which are *nisi prius* decisions—in so far as they make *bonâ fides* and honest belief the test of freedom from liability, must be taken as superseded by the decision in *Campbell* v. *Spottiswoode*(*k*) and other cases, that mere honest belief in defamatory statements of fact is in itself no defence(*l*).

Modified opinion of Cockburn, C.J., in Campbell v. Spottiswoode (1863).

If, as Cockburn, L.C.J., says in *Campbell* v. *Spottiswoode* (at p. 200), the defendant "imputes to the person whom he is criticising base and sordid motives, which are not warranted by facts, I cannot think for a moment that because he *bonâ fide* believes that he is publishing what is true, that is any defence in point of law." The authority of *Campbell* v. *Spottiswoode* has never been questioned(*m*).

Opinion of Lord Tenterden, C.J., in Macleod v. Wakley (1828).

There are some other definitions of fair comment which may be cited. In *Macleod* v. *Wakley*(*n*), in which the editor of the

(*h*) In Turnbull v. Bird (1861) 2 F. & F. 526.

(*i*) In Hibbs v. Wilkinson (1859) 1 F. & F. 610.

(*j*) (1897) at p. 278.

(*k*) (1863) 3 B. & S. 769; 8 L.T.N.S. 201; 32 L.J.Q.B. 185.

(*l*) See the earlier case of Cooper v. Lawson (1838) 8 A. & E. 746; and also the later decisions of Harle v. Catherall *et al.* (1866) 14 L.T. 801; Bryce v. Rusden (1886) 2 T.L.R. 435; and Brenon v. Ridgway (1887) 3 T.L.R. 592.

(*m*) *Per* Bowen, L.J., in Merivale v. Carson (1887) 20 Q.B.D., at p. 283.

(*n*) (1828) 3 C. & P., at p. 313.

London Medical Physical Journal sued for aspersions on his private character by the editor of the London *Lancet*, Lord Tenterden, C.J., said: "Whatever is fair, and can be reasonably said of the works of authors or themselves, as connected with their works, is not actionable, unless it appear that, under pretext of criticising the works, the defendant takes an opportunity of attacking the character of the author; and then it will be libel."

Approved by Bowen, L.J., in Merivale v. Carson (1887).

This definition was quoted with approval by Bowen, L.J., in *Merivale* v. *Carson*(*o*), where he said, that "the criticism is to be 'fair,' that is, the expression of it is to be fair. The only limitation is upon the mode of expression. In this country a man has a right to hold any opinion he pleases, and to express his opinion, provided that he does not go beyond the limits which the law calls 'fair,' and although we cannot find in any decided case an exact and original definition of the word 'fair,' this is because the judges have always preferred to leave the question, what is 'fair'? to the jury." He then says that he thinks the nearest approach to an exact definition of the word "fair" is that by Tenterden, C.J., quoted *supra*, and adds: "It must be assumed that a man is entitled to entertain any opinion he pleases, however wrong, exaggerated or violent it may be; and it must be left to the jury to say whether the mode of expression exceeds the reasonable limits of fair criticism." "It is only when the writer goes beyond the limits of fair criticism, that his criticism passes into the region of libel at all"(*p*).

Hedley v. Barlow (1865).

In *Hedley* v. *Barlow*(*q*), Cockburn, L.C.J., in referring to the right of public discussion on matters of public interest, says that it requires for its beneficial exercise that it should be exercised fully and freely without being subject to too harsh or strict a limitation, and that so long as it is exercised fairly and honestly, it is protected or excused, even although it may incidentally involve the publication of defamatory matter. "But at the same time the comments must be fair, that is, conceived in a fair spirit

(*o*) (1887) 20 Q.B.D., at p. 283.

(*p*) *Ibid.*

(*q*) (1865) 4 F. & F., at p. 230.

—in the spirit of fair discussion—and not in a spirit of reckless or inconsiderate imputation. That which is recklessly defamatory can hardly be deemed fair."

Opinion of Lord Esher, M.R.

In *Merivale* v. *Carson*, in which the remarks of Bowen, L.J., (*supra*) occur, the plaintiff, who, with his wife, had written and produced a play called "The Whip Hand," sued the editor of a theatrical paper, the *Stage*, for an alleged libel therein imputing to the play an immoral tendency. Lord Esher, M.R., in answering the question—"What is the meaning of a 'fair comment?' "—says (at p. 280): "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 and 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." And again (at p. 281): "I think the right question was really left by Field, J., to the jury—'If it is no more than fair, honest, independent, bold, even exaggerated, criticism, then your verdict will be for the defendant.' He gives a very wide limit, and, I think, rightly. Even exaggeration, or even gross exaggeration, could not make the comment 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 jury must consider is this—could 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 which is criticised? If it goes beyond that, then you must find for the plaintiff; if you are not satisfied that it does, then it falls within the allowed limit; and there is no libel at all."

Opinion of Lopes, L.J., in South Hetton Coal Co. v. N.E. News Association (1894).

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

Opinion of Cockburn, L.C.J., in Wason v. Walter (1868).

In *Wason* v. *Walter*(*t*), which was an action for libel founded on an article in the *Times* commenting on a debate in the House of Lords, and the conduct of the plaintiff in preferring a petition which gave rise to it, Cockburn, L.C.J., in delivering the judgment of the court, said: "The jury were told that they must be satisfied that the article was an honest and fair comment on the facts, in other words, that, in the first place, they must be satisfied that the comments had been made with an honest belief in their justice, but that this was not enough, inasmuch as such belief might originate in the blindness of party zeal, or in personal or political aversion; that a person taking upon himself publicly to criticize and to condemn the conduct or motives of another, must bring to the task, not only an honest sense of justice, but also a reasonable degree of judgment and moderation, so that the result may be what a jury shall deem, under the circumstances of the case, a fair and legitimate criticism on the conduct and motives of the party who is the object of censure." These observations have also been frequently quoted or approved as a proper statement of fair comment.

(*s*) In South Hetton Coal Co. v. N.E. News Association (1894) 1 Q.B., at pp. 143-44.

(*t*) (1868) L.R. 4 Q.B., at p. 96.

Fair comments upon the public conduct of public men.

Fair comment upon the public conduct of a person who takes part in public affairs is not actionable, and is no offence(*tt*); in a word, fair comment in such a case is no libel(*u*). The law on this point is the same in both civil and criminal matters. It is because the public actions and conduct of a public man are matters of public interest that they come within this statutory rule as to fair comment. It was not disputed, as Cockburn, L.C.J., said in one case(*v*), that the public conduct of a public man might be discussed with the fullest freedom; it might be made the subject of hostile criticism and of hostile animadversion, provided the language of the writer was kept within the limits of honest intention to discharge a public duty, and was not made a means of promulgating slanderous and malicious observations.

Difference between criticism of public and private individuals. Opinion of Parke, B.

"There is a difference," said Parke, B., in another case(*w*), "between publications relating to public and private individuals. Every subject has a right to comment on those acts of public men which concern him as a subject of the realm, if he do not make his commentary a cloak for malice and slander; but any imputation of wicked or corrupt motives is unquestionably libellous."

Opinion of Alderson, B., in Parmiter v. Coupland, et al. (1840).

And in the same case, commenting on the greater latitude which is usually permitted to criticism on persons in public positions than on private individuals, Alderson, B., said, that "criticism may reasonably be applied to a public man in a public capacity which might not be applied to a private individual. The same thing might be no libel on one which might be a very grievous and injurious libel on another. But then, as pointed out

(*tt*) C.C. s. 325(1).

(*u*) *Per* Blackburn, J., in Campbell v. Spottiswoode (1863) 32 L.J. Q.B., at p. 202; and *per* Lopes, L.J., in South Hetton Coal Co. v. N.E. News Association (1894) 1 Q.B., at p. 143.

(*v*) Seymour v. Butterworth (1862) 3 F. & F., at p. 376.

(*w*) Parmiter v. Coupland *et al.* (1840) 6 M. & W. 108.

by Cockburn, L.C.J.(*x*), 'a line must be drawn between criticism upon public conduct and the imputation of motives by which that conduct may be supposed to be actuated; one man has no right to impute to another, whose conduct may be fairly open to ridicule or disapprobation, base, sordid and wicked motives, unless there is so much ground for the imputation that a jury shall find, not only that he had an honest belief in the truth of his statements, but that his belief was not without foundation. . . . It is said that it is for the interests of society that the public conduct of men should be criticised without any other limit than that the writer should have an honest belief that what he writes is true. But it seems to me that the public have an equal interest in the maintenance of the public character of public men; and public affairs could not be conducted by men of honour with a view to the welfare of the country, if we were to sanction attacks upon them destructive of their honour and character, and made without any foundation.' ''

The privilege of comment by newspaper writers.

The position of writers for the newspaper press, in the matter of public comment, is a good deal misunderstood. Their privileges are really no higher or greater than those of other members of the community; they are in the same plane, and, perhaps, by virtue of their wider influence, should be subject to a stricter accountability. Privilege, as declared in a Quebec case, justifies the publication of incriminatory matter which, under other circumstances, would be slanderous or libellous; but the fact that a person occupies a public position does not confer on his neighbour the privilege of making an injurious attack upon his character. Nor can it be contended that a writer in a newspaper stands on a more favourable footing than anyone else. The journalist is only a self-constituted critic, and the difference between him and other critics is, that he should be held to a greater degree of responsibility, because his opportunities to do injury are greater(*y*). ''It might be thought,'' as is stated in a well-known work on the subject, ''that the duty which the public expects from a writer for the press of watching and making generally known the acts of all public servants, and censuring them

(*x*) In Campbell v. Spottiswoode, 3 B. & S., at pp. 776-77; followed in Joynt v. Cycle Trade Publishing Co. (1904) 2 K.B. 292 (C.A.).

(*y*) Regina v. Tasse (1885) 8 L.N. 98 (Q.B.).

when deserving of censure, of commenting freely on all matters which touch the public welfare, of fearlessly exposing whatever is corrupt, oppressive, or otherwise deserving of reprobation, and of acting in general as a kind of censor of the morals of the time, would have given him immunity in all cases where he writes honestly and *bonâ fide* in the discharge of his public duty; and that actual malice alone should render an action against him sustainable. The newspaper writer, however, stands in this respect in no different position from any other member of the community, save so far as a jury may be inclined to deal more leniently with defamatory matter contained in his publications. The law with regard to him is the same as in the case of other men; he is in no way privileged, in the strict sense of the word privileged"(*z*).

The "privilege" of writers strictly speaking.

The same learned author, from whose work these observations are taken, also points out, what has been stated elsewhere in these pages, that "the case of *Campbell* v. *Spottiswoode* must be regarded as an express and distinct authority for the proposition that there is no *privilege*, in the strict sense of that term, in the case of comments by public writers on matters of public interest, and on persons occupying public positions, though the expression "privileged publication" has been frequently applied by eminent judges to such writings. For *privilege*, where it exists, excuses, in the absence of actual malice, every statement, however false in itself, or injurious to the person respecting whom it is made, . . . whereas the case of *Campbell* v. *Spottiswoode* has distinctly decided that neither the absence of actual malice, nor the *bonâ fide* belief of the public writer in the truth of the imputations which he makes, will justify him in making such imputations as there complained of, if they are not true in point of fact. In this strict sense, then, of the term *privileged*, the public writer, when dealing with matters and characters of public interest, is not privileged. He is, however, treated with more indulgence than a private individual who publishes defamatory matter of another, in that slight errors will in his case be excused, where he writes honestly in the interest of the public,

(*z*) Shortt's Law of Literature, 2nd Ed., p. 510.

and not with the malicious design of doing a personal injury"(*a*). The right to comment upon the public acts of public men is the right of every citizen, and is not the peculiar privilege of the press(*b*). But newspaper writers, though in strict law they stand in no better position than any other person, are generally allowed greater latitude by juries. For it is in some measure the duty of the press to watch narrowly the conduct of all government officials, and the working of all public institutions, to comment freely on all matters of general concern to the nation, and to fearlessly expose abuses(*c*).

Newspaper criticism of judicial judgments. Regina v. Wilkinson —Re Brown (1876).

The "privilege" of journalists, in the popular sense of that expression, and their right to comment on public men and public matters, is also discussed in an Ontario case, *Regina* v. *Wilkinson—Re Brown*(*d*). In that case an application for an attachment was made against the manager of the *Globe* newspaper, of Toronto, for a severe criticism, written and published by him in that journal, on a judgment of one of the judges of the Court of Queen's Bench on a motion for leave (which was granted) to file a criminal information against the defendant, Wilkinson. The article complained of was also alleged to be prejudicial to the fair trial of the defendant on the information. The manager of the *Globe* shewed cause in person, assisted by counsel. One of his main arguments was, that the article in question was written in discharge of his duty as a journalist, and as such was privileged, not in the strictly legal sense of privileged by the occasion, but as being a criticism which was not punishable. On this point he cited Morgan's "Law of Literature"(*e*), where it is said, that "the due administration of justice is a matter of the very highest possible concern to the public, and, in its interest, as we have seen in the chapter on contempt of court, the widest latitude will be accorded to the press and public in commenting there-

(*a*) Shortt's Law of Literature, 2nd Ed., pp. 515-6.

(*b*) Kane v. Mulvany (1866) Ir. R. 2 C.L. 402.

(*c*) Odgers L. & S., 4th Ed., p. 184. See, also, Brown v. Elder, p. 618, *post*.

(*d*) (1876) 41 U.C.Q.B. 47.

(*e*) Vol. 2, p. 423.

upon. It is only when such comments actually impair or impede such due administration of justice by the courts that they will be summarily dealt with." And also the following from the same work, at page 409: "The duty which the public expects from the press of watching and making generally known the acts of all public servants, and censuring them when deserving of censure, of commenting freely on all matters which touch the public welfare, of fearlessly exposing whatever is corrupt, oppressive, or otherwise deserving of reprobation, of being, as it should be and is, when rightly conducted, a censor of the public morals and a keeper of the public virtue, entitle it to a latitude and a leniency when its functions are exercised *bonâ fide* in that regard." He also quoted the following remarks by Cockburn, L.C.J., in *Wason* v. *Walter*(*f*): "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 very recent times been recognized. Comments on government, on ministers and officers of state, on members of both Houses of Parliament, on judges, and other public functionaries, are now made every day, which, half a century ago, would have been the subject of actions, or *ex officio* informations, and would have brought down fine and imprisonment on publishers and authors." He also referred to the language of Cockburn, L.C.J., in *Woodgate* v. *Ridout*(*g*), and of Parke, B., in *Toogood* v. *Spyring*(*h*), and to the following direction of Fitzgerald, J., to the jury in *Regina* v. *Sullivan*(*i*), as to a seditious libel: "The defendant had a right to discuss fairly and *bonâ fide* the administration of justice as evidenced in this trial. It is open to him to shew that error was committed on the part of the judge or jury; further, for myself I will say that the judges invite discussion of their acts in the administration of the law, and it is a relief to them to see error pointed out, if it is committed; yet while they invite the freest discussion, it is not open to a journalist to impute corruption." The defendant argued that the article in question did not tend to impair or impede the due

(*f*) (1868) L.R. 4 Q.B. 73, 93, 94.

(*g*) (1865) 4 F. & F. 202.

(*h*) (1834) 1 C.M. & R. 193.

(*i*) (1868) 11 Cox C.C. 57.

administration of justice; that it did not impute corrupt or improper motives to the learned judge whose judgment was criticised; that it was entirely confined to the injustice of his imputations against individuals; and was honestly written in the interest of the public, of suitors and of the court itself, and as such was privileged.

A criticism exceeding fair comment and not privileged. Opinion of Harrison, C.J.

Harrison, C.J., in his judgment, describes the article as one to which privilege could not possibly attach. It excluded "all idea of privilege." "The argument," he said, "is, that considering the notoriety of what is called the Big Push Letter, and the prominent position of the writer of it in one of the political parties of the country, that it was for the public interest that the articles in question should be written, although severely reflecting on one of the judges of a Superior Court of law in respect of a judgment delivered by him in court. But it is not for the public interest that any part of our judiciary, who, Mr. Brown admits, are worthy of the highest admiration, should be recklessly assailed in the public press. There is no privilege for any man in Canada, under the pretext of the public good, rashly to assail in the public press any of our judges for his conduct on the Bench, and to impute to the judge assailed conduct so wicked and corrupt as to render him wholly unfit to occupy the distinguished and responsible position of a seat on the Bench. The remedy for such a state of things, if ever it should unfortunately arise in our country, is wholly different."

In this case the court of two judges—Adam Wilson, J., the third member of the court, who was the subject of criticism in the articles in question, taking no part—differed as to making the rule absolute, Harrison, C.J., being in favour of the rule, and Morrison, J., *contra*. The court being equally divided, the rule dropped(*j*).

Opinion of Rose, J., in Blagden v. Bennett (1885).

In *Blagden* v. *Bennett*(*k*), which was an action for an alleged slander of a school trustee, Rose, J., said: "I quite agree that

(*j*) Regina v. Wilkinson: Re Brown (1876) 41 U.C.Q.B. 47.

(*k*) (1885) 9 O.R. 593.

persons holding positions of public trust are open to have their public acts criticised, as also their private conduct, if it be of such a character as would unfit them for the proper performance of the duties of their office. I do not, however, think it can be well contended that while those interested can criticise acts, they have the right to impute motives, or that an indiscretion on the part of an official will lay him open to the imputation of an entirely different offence. While it is in the interest of the public that there should be full and fair opportunity for criticism, it is also in the interest of the public that such criticism should be fair and just. The records of the past contain the names of many sensitive, honourable men who have been driven out of public life by unfair attacks upon their reputation, and many men of similar character are prevented from serving their country because they are unwilling to subject themselves and their families to such attacks. It is the honourable, sensitively honourable, men the public requires for officers of public trust and responsibility, and if the public, through the courts, protect them from unfair criticism, then they will be willing to accept the offices, and not leave them to men who are not sensitive to criticism, whether fair or unfair, and who thus cannot be kept in check from wrong-doing by the force of public opinion."

The limitations of newspaper comment on the public acts and conduct of public men. Per Bain, J., in Martin v. Manitoba Free Press Co. (1892).

In a Manitoba case Bain, J., said: "It is not now open to question that the publishers, editors and proprietors of newspapers, and indeed all other citizens, have the fullest and freest liberty to discuss and comment upon the public acts and conduct of a public man, and, if they see fit, not only to criticise his acts and conduct in the most hostile spirit and in the severest terms, but also to assail and denounce the man himself as unfit for his position for the want of such qualities as wisdom, judgment, discretion, or skill, and the like, as evidenced by his acts and conduct. One who undertakes to fill a public office offers himself to public attack and criticism; and it is now admitted and recognized that the public interest requires that a man's public conduct shall be open to the most searching criticism. . . .

For this reason it is, then, that now in the eye of English law, comment or criticism on a public man's public acts and conduct, whether such comment or criticism proceeds from a newspaper or from a private individual, is not libellous so long as a jury does not consider that the comment or criticism has been unfair. If the alleged defamatory matter be really comment or criticism, no matter how severe and violent, and even exaggerated, it may be, the only question is, is it 'fair?', and if, in the opinion of a jury, it is not unfair, under all the circumstances of the case, then it is not libellous: *Merivale* v. *Carson* (1887), 20 Q.B.D. 275. But this rule applies only to matter that can be regarded as comment or criticism; and when a newspaper writer, or any other person, passes beyond what can fairly be deemed comment or criticism, he put himself outside the rule. If the alleged defamatory matter is not comment at all, the question, is it fair comment? manifestly cannot be asked. And I take it to be settled by the cases of *Campbell* v. *Spottiswoode* (1863), 3 B. & S. 769; 32 L.J.Q.B. 185, and *Davis* v. *Shepstone* (1886), 11 App. Cas. 187, that an article or writing that unjustly and without foundation imputes to or charges a public man with actual dishonesty, or with having committed specific acts of personal misconduct, cannot be deemed to be merely comment or criticism.

Honest belief no defence for unfounded charges.

The above principles relating to pleas of fair comment must, I think, be taken to be subject to a very important qualification. It is perfectly clear from the two principal cases I have cited, that if a writer brings an unfounded charge of dishonesty or specific misconduct against a public man in connection with a matter of public interest, such charges are libellous, no matter how sincere and honest may be the belief of the writer that they are true. And it is further clear, I think, that it is not competent to a defendant, relying only on this plea, and without a plea of justification, to adduce evidence to shew that the charges of specific misconduct or dishonesty he has made are true. But evidence to prove the truth of charges of dishonesty and misconduct that one has made in commenting on matters of public interest, and evidence to prove the truth of these matters themselves, are two very different things, although, I think, plaintiff's counsel confounded them on the argument; and, in my

opinion, a defendant relying on this plea can always prove, if he can, that the matters or facts on which he commented are true, that is, that they are, or were, actual facts or occurrences, and not merely imaginings or inventions"(*l*).

Charges of corrupt motives or disgraceful conduct not fair comment.

Fair comment on a public official does not extend to a charge of corrupt motives or disgraceful conduct. The publisher of such a charge is an accuser, not a critic, and must justify or take the consequences. Defendant, a town councillor, published in a newspaper a letter commenting upon the conduct of plaintiff, the mayor of a town in Nova Scotia, and alleging that plaintiff took advantage of some of the employees of the town by withholding the money due them for their labour, and insisting upon their taking goods out of his shop in payment. The jury having found in favour of the defendant, in the absence of evidence of justification, it was held by the Supreme Court of Nova Scotia, setting aside the verdict with costs, and ordering a new trial, that the jury should have found for plaintiff; that the trial judge would have been warranted in withdrawing the case of attempted justification from the jury; and that the principle of fair comment or criticism should not be extended to cover or justify a charge of sordid or corrupt motives, or disgraceful conduct.

Opinion of Meagher, J., in Nova Scotia case.

"With respect to the question of fair criticism or comment," said Meagher, J., "it is sufficient to say that neither of these can be held to cover or justify a charge of sordid or corrupt motives, or disgraceful conduct. When a writer alleges that sordid, wicked, or corrupt motives actuated another in the performance of the duties of his office, he goes beyond the boundary of criticism or fair comment. Such a man is not a critic; he is an accuser, and he must see to it that his accusation is true, or abide the consequences. It is not criticism to say that a man is a thief, and no finding of a jury could make it so, nor is it fair comment. If one makes such a charge and prove its truth, he

(*l*) Martin v. Manitoba Free Press Co. (1892) 8 M.L.R. 50, at pp. 71 *et seq.*

needs no other defence, but if he is unable to do so, he cannot shelter himself under the plea of criticism. The line between criticism and accusation cannot, perhaps in all cases, be sharply drawn, but it clearly can be in this case, because the accusation is specific and distinct, not only as to the acts said to have been committed, but the motives which prompted them." The learned judge then proceeded to apply the language of Lord Herschell, L.C., in *Davis* v. *Shepstone*(*m*)(*mm*).

Opinion of Falconbridge, J.

In an action for libel by the Royal Templars against *The Economist*, a monthly newspaper published in Toronto, Falconbridge, J., in the course of his charge to the jury, said: "Newspapers have a right to comment freely upon matters of public concern, and have a right to criticise freely the conduct of public officials, Government officers, public institutions, and other matters of public concern. They must not in doing this, however, attack the private character of the individual, such as a member of the Government, but can criticise freely public acts. They may not suggest or invent facts, and then comment on these facts as if they were true, for comments should be upon facts that are facts. So you see that while newspapers have theoretically no higher rights or privileges in commenting than other people, yet they are or claim to be the guardians of public interests. And in their comments they are strictly within their domain so long as their comments are within facts and reasonably fair, for a newspaper, in commenting upon a public official or concern, should use fair and temperate language"(*n*).

Erle, C.J., in Turnbull v. Bird (1861).

In *Turnbull* v. *Bird*(*o*), which Hagarty, J., thought "much in point" in *Shaver* v. *Linton*(*p*), Erle, C.J., told the jury: "If you are of opinion that the defendant, in the comments that he made, was guilty of any wilful misrepresentation of fact, either

(*m*) (1886) 11 App. Cas. (P.C.) 190.

(*mm*) Munro v. Quigley (1898) 30 N.S.R. 360.

(*n*) Toronto "Star," 11 April, 1901.

(*o*) (1861) 2 F. & F. 508.

(*p*) (1862) 22 U.C.Q.B. 177.

by the exaggeration of what actually existed, or by the partial suppression of what actually existed, so as to give it another colour; or that he made comments with any misstatements of fact which he must have known to be a misstatement if he exercised ordinary care, then he loses his privilege, and the occasion does not justify the publication, which would be actionable."

The limits of newspaper criticism of a parliamentary candidate. Opinion of Street, J.

The question as to how far a newspaper is justified in criticising a candidate for election to Parliament, is dealt with by Street, J., in a case in which the plaintiff, who had been a member of the Ontario Legislature, was a candidate for re-election at the time of the publication of the alleged libels. In allowing an appeal by the plaintiff from an order of the Master in Chambers dismissing an application by plaintiff to strike out certain paragraphs of the statement of defence, the learned judge said: "Even a public man, engaged in a parliamentary election, has certain rights, and one of them is, that he may bring an action for libel in case statements are published asserting that he has been guilty of improper acts, unless those statements are true. All acts of his bearing upon his public position in any way, or as to his fitness or unfitness for it, are public property, and may be commented upon within the limits of what is known as fair comment; but there is a distinction between commenting upon acts which he has actually committed, and commenting upon acts which he is alleged, untruly, to have committed. To invent statements of fact, or to adopt as true the untrue statements of facts made by others, and then to comment upon them as being true, is not fair comment, and is not protected. The result is, that where an alleged libel upon a public man consists of statements of facts and comments upon them, it is not permissible to a defendant to plead as a blanket defence, covering all that he has alleged, that it is all fair comment. He must plead that the facts stated are true, and that the rest is fair comment. There is no such thing as a defence of privilege attaching to untrue statements with regard to the acts of a public man, even though the publisher believes his statements to be true, or has been, as he believes, credibly informed by others that they are true: *Davis* v. *Shepstone*, 11 App. Cas.

187; *Bryce* v. *Rusden*, 2 Times L.R. 435; *Crow's Nest Pass Coal Co.* v. *Bell*, 4 O.L.R. (1902) 660; 1 O.W.R. 679. In the present case defendants appear to have adopted and published, as true, statements of fact as to certain transactions in which plaintiff has been concerned, and to have introduced them in certain remarks upon a speech made by plaintiff to shew that parts of his speech were at variance with the truth. Defendants are not entitled to plead, as they are attempting to do, that these statements of alleged facts, as well as the comments they made upon them, are all fair comment. The paragraphs attached must be struck out, unless defendants elect to amend in the manner pointed out in the last case cited, by setting out the facts upon which they allege the article complained of was a fair comment, and alleging the truth thereof, and by setting up, as to the expressions of opinion, that they are fair comment upon such matters of fact"(*q*). An appeal from this judgment was dismissed by the Divisional Court(*r*).

The law in Quebec. Attacks based on unfounded rumours not fair comment.

The law of fair comment is the same in the Province of Quebec as it is in the other Provinces, and has been so stated in a variety of cases. In an action for newspaper libel which came before the Quebec courts, it was held that fair public criticism of a public servant is justifiable in the public interest, but that attacks based on unreliable rumours are pernicious and indefensible, and merit judicial reprobation. In the case in which the law was so laid down, $100 damages were awarded for the publication of a newspaper article reflecting on the conduct of the plaintiff as a public man, the article being founded upon certain alleged rumours which the evidence shewed to be unreliable and unfounded, and the truth of which the defendant took no means to test, though he might easily have done so—the defendant, however, appearing rather to have been misled by party zeal than actuated by personal malice, and the plaintiff declaring that he did not seek to derive pecuniary advantage from the suit(*s*). So, also,

(*q*) Conmee v. Lake Superior Printing Co. (1903) 2 O.W.R. 509, 543, 743.

(*r*) 2 O.W.R. 743.

(*s*) Pelletier v. Pacaud (1892) Q.O.R. 2 (S.C.) 140.

the public acts of a public officer may be criticised and censured even severely, and he is only entitled to the protection of the courts when the censure exceeds the limits of justice and a proper sense of duty(*t*).

Attacks based on suspicion of dishonesty.

In another Quebec case an unfounded newspaper statement to the effect that the plaintiff had sold his political influence, and had allowed himself, against his convictions, to be bought, was described by the court as a gross calumny. Attacks upon public men, it was said, made without any foundation, were destructive of their honour and were actionable; and a public writer was not justified in assailing the character of a public man as dishonest, because he fancied that his conduct was open to the suspicion of dishonesty(*u*).

Fair comment on an alderman seeking re-election is not libellous.

In a charge to a special jury in an action for an alleged libel, contained in a letter written by the defendant and published by him in a Montreal newspaper, representing the plaintiff as a "cipher" on the Board of Health of the city, Johnson, J., said: "The law has at all times drawn a wide distinction between libel and slander respecting private character, and criticisms, no matter how severe, so long as they are fair, upon men in their public capacity. In the one case, the law imposes a strong check. But the tendency of all modern cases has been that, where the intention of the writer is honest, where the criticism is intended to be and is fair, the writer is protected by the law, even if his opinion be mistaken. The rule seems to be that the private character is sacred. But as for public men and their conduct, if we could not discuss them freely we would become a nation of slaves. Such discussion, even if it does hit rather hard sometimes, or use strong expressions, is not a breach of the law. In this case, I have not heard a suggestion that there has been any private or malevolent purpose to serve. The defendant was an elector, and the plaintiff a public man seeking re-election as

(*t*) Curless v. Graham (1896) Q.O.R. 10 (S.C.) 175.

(*u*) Champagne v. Beauchamp (1888) 31 L.C.J. 144; 14 R.L. 175; Mon. L.R. 2 S.C. 484, S.C.R. 1886; 32 L.C.J. 237; 16 R.L. 506 (Q.B.). See, also Charlebois v. Bourassa (1889) 33 L.C.J. 234.

alderman. The defendant had the same right and the same duty as all of us, to see at that critical time that power should be held only by the safest and most competent men. If the defendant's motives were honourable and his object pure—if he sought the public good and nothing else, he is within the protection of the law. If you believe that he was acting for a public end, do not, because of the eloquence of the counsel for the plaintiff, say that he is a libeller, and a dishonest libeller. The law overlooks the mere severeity of such criticism, so long as it is not opprobrious, insulting, or indecent. As to the expression 'cipher,' it is perhaps exaggerated; but I see nothing indecent or insulting. It is true that the expression reduces the estimate of the plaintiff to the lowest point, but, even if not true, it is not necessarily punishable. If the motives were pure and the letter written for the public good, the defendant was within his right; and to say otherwise would be to make us a nation endowed with the forms of freedom but deprived of the means of using it. . . . The facts are entirely left with you, and my view need not necessarily be your view." The jury found in favour of the defendant(*v*).

Result of the cases.

Perhaps the result of the various *dicta* on this subject, taken along with the decision of the Court of Queen's Bench in *Campbell* v. *Spottiswoode*, might be expressed in the language of Pollock, C.B., in *Gathercole* v. *Miall*(*w*), that all *bonâ fide* and honest remarks upon persons occupying public positions may be freely made "without being questioned *too nicely* for either truth or justice." Or, perhaps the rule might be laid down thus: that *bonâ fide* comments *not in every respect* justifiable, and honest inferences *not altogether* correct as to conduct or motives, may be excused, provided the matter be one of public interest; that the circumstances of the case render comments and inferences of such a character not unnatural, and that there is no considerable margin of unsubstantial defamatory imputation; whilst, on the other hand, as expressly decided in *Campbell* v. *Spottiswoode*, unfounded imputations of base and sordid motives are unjustifiable, however honestly their truth may be believed in by the writer who publishes them(*x*).

(*v*) Tansey v. Graham (1886) 10 L.N. 139 (S.C.).

(*w*) (1846) 15 M. & W. 332.

(*x*) Shortt's Law of Literature, 2nd Ed., 516-17.

Fair comments on books or other literary productions, and on their authors. Opinion of Lord Ellenborough in Carr v. Hood (1808).

Fair comments on any published book or other literary production, or on their authors as such, are not actionable, but this privilege does not extend to attacks on the personal or private character of the authors. "Every man," says Lord Ellenborough(*y*), "who publishes a book commits himself to the judgment of the public, and any one may comment on his performance. If the commentator does not step aside from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right. . . . The critic does a great service to the public who writes down any vapid or useless publication, such as ought never to have appeared. He checks the dissemination of bad taste, and prevents people from wasting both their time and money upon trash. I speak of fair and candid criticism; and this every one has a right to publish, although the author may suffer a loss from it. Such a loss the law does not consider an injury; because it is a loss which the party ought to sustain: it is, in short, the loss of fame and profits to which he was never entitled. . . . We really must not cramp observations upon authors and their works. They should be liable to criticism, to exposure, and even to ridicule, if their compositions be ridiculous; otherwise the first who writes a book on any subject will maintain a monopoly of sentiment and opinion respecting it. This would tend to the perpetuity of error." But he added: "Reflection on personal character is another thing. Shew me an attack on the moral character of the plaintiff, or any attack upon his character unconnected with his authorship, and I shall be as ready as any judge who ever sat here to protect him; but I cannot hear of malice on account of turning his words into ridicule."

In the case in which these remarks were made, damages were claimed for a libellous caricature, but the learned Chief Justice observed that ridicule is often the fittest weapon that can be employed against a work that deserves criticism. If the reputation or pecuniary interests of the person ridiculed suffer, it is *damnum absque injuriâ*. Where is the liberty of the press if

(*y*) In Carr v. Hood (1808) 1 Camp. N.P. 355*n*; 10 R.R. 701*n*.

an action can be maintained on such principles? He further directed the jury that, if the writer of the publication complained of had not travelled out of the work he criticised for the purpose of slander, the action would not lie; but if they could discern in it anything personally slanderous against the plaintiff, unconnected with the works he had given to the public, in that case he had a good cause of action, and they would award him damages accordingly(*z*). The jury found for the defendants. This is a leading case, although, on one occasion(*a*), Best, C.J., said he did not think personal ridicule of the author was justifiable.

Opinion of Cockburn, L.C.J., in Strauss v. Francis (1886).

In *Strauss* v. *Francis*(*b*) the plaintiff sued the publishers of the *Athenaeum* for an alleged libellous critique on a novel published by plaintiff. The comments were severe on the character, tone and style of the book. Cockburn, L.C.J., said to the jury: "A man who publishes a book challenges criticism; he rejoices in it if it tends to his praise, and if it is likely to increase the circulation of his work; and, therefore, he must submit to it if it is adverse, so long as it is not prompted by malice, or characterized by such reckless disregard of fairness as indicates malice towards the author. You must say whether in this case you think the critique was the fair and genuine result of the judgment of the critic upon the work, or whether it was prompted by reckless disregard of the author's feelings, for the sake of displaying the writer's powers of denunciation. It was all very well for the plaintiff's counsel to contend that literature should be free and unfettered. Be it so. But then, if you give on the one hand the utmost latitude to literary composition, there ought to be at least the same latitude to literary criticism. Those who, in their capacity as literary critics, are, so to speak, prosecutors on behalf of the public, should be allowed to bring to the bar of public opinion those who are guilty of delinquencies against good taste, against morality, or against religion. The critic who sits in judgment upon the works of others is no doubt bound to be impartial; but, on the other hand, he cannot pretend to be infal-

(*z*) See, also, Stuart v. Lovell (1817) 2 Stark. 93; 19 R.R. 688.

(*a*) In Thompson v. Shackell (1828) 1 Moo. & Mal. 187; 31 R.R. 728.

(*b*) (1886) 15 L.T. 674; 4 F. & F. 939, 1107.

lible; and, even although you should be of opinion that the work did not wholly deserve the description given of it, still that is not the question. The plaintiff's counsel, in his reply, adroitly endeavoured to shew that there were parts of the critique which were not sustained. But the question is, whether as a whole it was fair, or prompted by motives of another character; and you must say whether, on the whole, you think this was a fair or a malicious piece of criticism"(*bb*).

In the case last mentioned the defendants consented to the withdrawal of a juror, and, in subsequent comments on the proceedings, explained that they did so because of the plaintiff's inability to pay the costs. In the second action for libel for these comments, Cockburn, L.C.J., told the jury that "it was urged by the plaintiff's counsel, truly enough, that in criticising a man's work, it is not proper to allude to his private circumstances. But, in this instance, the object was to explain how the defendants came to consent to waive a verdict, and to shew that they had substantially attained the same result; because, if they had got a verdict, in all probability they would not have obtained their costs. If you think that the allusion was brought in only to make an attack on the circumstances or character of the plaintiff, it would be malicious and objectionable; but if it was adverted to merely in order to explain and vindicate the course taken by the defendants, then you could probably think that it was not unfairly introduced." The jury found in favour of the defendants(*c*).

Per Tenterden, C.J., in Macleod v. Wakley (1828).

In another case(*d*) in which the editor of one medical journal sued the publisher of another medical journal, the *Lancet*, Tenterden, C.J., after defining fair comment, said to the jury: "That there is in this publication a great deal of ridicule must be admitted by every one; and I think that there appears also to be some rancour; still, if you think that what was said here was fairly called for by what the plaintiff had done as the editor of another publication, the defendant is entitled to a verdict; but if you think the remarks were not fairly called for, you will

(*bb*) See, as to evidence on malice, Thomas v. Bradbury, Agnew & Co. *et al.* (1906) 2 K.B. 627, p. 621, *post*.

(*c*) Strauss v. Francis (1886) 4 F. & F., at p. 1116.

(*d*) Macleod v. Wakley (1828) 3 C. & P. 311.

judge for the plaintiff." This is also applicable to defamatory statements not unfairly published in self-defence, or in vindication of defendant's own character. See, also, *Hibbs* v. *Wilkinson*(*e*).

Limits of literary criticism. Per Lord Ellenborough, C.J., in Tabart v. Tipper (1808).

In *Tabart* v. *Tipper*(*f*) Lord Ellenborough also stated his opinion as to the limits of literary criticism in these words: "Liberty of criticism must be allowed, or we should have neither purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication, therefore, I shall never consider a libel which has for its object, not to injure the reputation of any individual, but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality." But if a critic, in criticising a book, goes out of his way, and attacks the private character of the author, this cannot be justified, and the author may recover damages(*g*). And it is always to be left to a jury to say, whether the publication has gone beyond the limits of a fair comment on the subject matter discussed(*h*). This would apply to the case of a misdescription of a stage play by imputing that its authors have treated adultery lightly, and so have implied that the play was of an immoral tendency, when in fact there was no incident of adultery in the story. "There is," said Bowen, L.J., "another class of cases in which, as it seems to me, the writer would be travelling out of the region of fair criticism—I mean if he imputes to the author that he has written something which in fact he has not written. That would be a misdescription of the work. There is all the difference in the world between saying that you disapprove of the character of a work, and that you think it has an evil tendency, and saying that a work treats adultery cavalierly, when in fact there is no adultery at all in the story. A jury would have a right to consider the latter beyond

(*e*) (1859) 1 F. & F. 608.

(*f*) (1808) 1 Camp. N.P. 350; 10 R.R. 698.

(*g*) *Per* Lord Abinger, C.B., in Fraser v. Berkeley (1836) 7 C. & P. 625.

(*h*) *Per* Crompton, J., in Campbell v. Spottiswoode (1863) 3 B. & S. 778.

the limits of fair criticism"(*i*). But a comment which is the expression of honest opinion, not exceeding what may fairly be called criticism, is no libel, even though it be not such as a jury might think to be a just or reasonable appreciation of the work criticized(*ii*).

In *Morrison* v. *Belcher*(*j*) the plaintiff, the proprietor and editor of *Zadkiel's Almanac*, sued the writer of a letter in a newspaper in which it was stated that Zadkiel's mischievous propensities were "not solely involved in that foolish publication, *Zadkiel's Almanac*," but that he had "gulled" many of the nobility by means of a magic ball of crystal; that he pretended thereby to tell what was going on in the other world; and that he took money for "these profane acts, and made a good thing of it." Cockburn, L.C.J., told the jury that public writers would be privileged in denouncing the almanac and the use of the ball as an imposture, but not in unfounded statements that the plaintiff had made money by a conscious and fraudulent imposture by the use of the magic ball. If the system was mischievous, and calculated to delude the unwary and the credulous, it was no doubt fit subject for indignant denunciation. But it was another thing to say that because a man put forward such a publication or such a system, a public writer could go back into his past history and state facts which were not true and were calculated to do him injury. His system might be described as an imposture, but facts must not be invented or misstated as to his past life, with a view to destroy the credit of it.

Criticism by a political committee.

In directing the jury in an action against the committee of a Reform Union, who had published in a newspaper a report reflecting on the plaintiff as an offender in an election by trafficing in votes, etc., Hill, J., said: "I suggest to you that any self-constituted body which sets itself up for the reform of the public, whether in religious, commercial, or in political points of view, must be extremely cautious, in all their publications and writings concerning private individuals, not to reflect on private character. A man stands at fearful odds when he has to contend

(*i*) Merivale v. Carson (1887) 20 Q.B.D. (C.A.), at p. 284.

(*ii*) McQuire v. Western Morning News Co. (1903) 2 K.B. 100 (C.A.).

(*j*) (1863) 3 F. & F. 614.

with a public body. If they publish that which reflects on the private character of individuals, they should be very careful of the contents of what they put forth''(*k*).

Advertisements, circulars and handbills also subject to fair criticism.

Advertisements, circulars and handbills are in the same category as books, and are subject to fair criticism. ''I can see no distinction between a handbill, or a circular, or advertisement, which is published to all the world, and a book; both are literary productions and are addressed to the public, and both are subject to the same comment and criticism. The shape in which they are published makes no difference; many advertisements indeed are issued in the form of books. Two-thirds of the daily newspapers are usually taken up with advertisements of various sorts. It is plain, therefore, that the form in which the publication appears can make no difference''(*l*).

In the case in which these remarks occur, an alderman called the attention of a newspaper reporter to a handbill of a marine store dealer, and said that it offered great inducements to servants to rob their masters. The newspaper published what the aldermen said, and also a criticism on the handbill headed ''Encouraging servants to rob their masters.'' There were also some other defamatory statements in the article. The court refused to disturb a verdict for the defendant. Byles, J., said: ''The real question was, did the remarks exceed the fair license of criticism, and degenerate into reflections upon the private character of the plaintiff.'' Keating, J., said: ''I think my lord (Erle, C.J.) was perfectly right in telling the jury that there was no distinction as to fair comment and criticism between a handbill and a book or any other publication; as also in telling them that, if they thought that the language of the alleged libels was that of fair criticism, and free from personal imputation, the defendant was entitled to their verdict.''

Meaning of "literary production" in s. 325(2) of the Code.

The expression ''literary production,'' in section 325(2) of the Code, should receive a liberal interpretation so as to include

(*k*) Wilson v. Reed *et al.* (1860) 2 F. & F. 149, 151-2.

(*l*) *Per* Byles, J., in Paris v. Levy (1860-1) 30 L.J.C.P. 11; 9 C.B.N.S. 342; 3 L.T. 324; 9 W.R. 71. See, also, Hunter v. Sharpe (1866) 4 F. & F. 983; 15 L.T. 421; Jenner *et al.* v. A'Beckett (1871) L.R. 7 Q.B. 11; 41 L.J.Q.B. 14.

pamphlets, reviews and other brochures, and also newspapers; in fact, the collective body of such productions as embrace the results of knowledge, or learning, or fancy, which are preserved in writing, and which are either of a fugitive or more permanent character.

The case of sermons and of works for private circulation.

But it is doubtful whether comments on sermons preached in a church, and not otherwise published, would excuse the publication of matter injurious to the preacher(*m*). It has also been doubted by Pollock, C.B., in the case last referred to, whether the rules of criticism laid down by the courts, as applicable to published works which provoke or invite criticism, would apply to works privately circulated among friends of the authors. But fair criticism even of such works, or indeed of anything of a literary nature, would certainly seem to be protected.

Fair criticism of works of art, performances, entertainments, etc.

Protection is also afforded under the Code—and the same rule would apply in civil actions—to "fair criticism" of "any composition or work of art or performance publicly exhibited, or any other communication made to the public on any subject"(*n*). This includes a great variety of things, musical, dramatic or artistic—art in a wide sense of the term—and exhibitions or entertainments of a most versatile character; in fact, anything outside of a book or literary production, in regard to which the judgment of the public is provoked or invited. A paragraph in a newspaper stated, in effect, that the songs at a place of public entertainment were not, as they professed to be, of the plaintiff's composition; that the attendance was thin; and that the performances were of a very inferior kind, and were applauded only by persons hired for the purpose. Lord Kenyon, C.J., said: "The editor of a public newspaper may fairly and candidly comment on any place or species of public entertainment, but it must be done fairly and without malice or view to injure or prejudice the proprietor in the eyes of the public; that if so done, however severe the censure, the justice of it screens the editor

(*m*) Gathercole v. Miall (1846) 15 M. & W. 319.

(*n*) C.C. s. 325(2).

from legal animadversion; but if it can be proved that the comment is unjust, is malevolent, or exceeding the bounds of fair opinion, it is a libel, and therefore actionable''(*o*).

Merivale v. Carson (1887).

Merivale v. *Carson*(*oo*) is a leading case on this branch of the subject. The libel, consisting of comments on a play called ''The Whip Hand,'' appeared in a theatrical paper, the *Star*, and was partially in these words: '' 'The Whip Hand,' the joint production of Mr. and Mrs. Herman Merivale, gives us nothing but a hash-up of ingredients which have been used *ad nauseam*, until one rises in protestation against the loving, confiding, fatuous husband with the naughty wife and her double existence, the good male genius, the limp aristocrat, and the villainous foreigner''—meaning that the play had an immoral tendency. The verdict of one shilling damages was upheld by the Court of Appeal on the ground, that the jury found that ''naughty wife'' meant adulterous wife, which the court thought was a reasonable meaning of the expression. So where a society paper falsely said of a popular actor that his former profession was that of a waiter, it was held to be a libel(*p*).

Criticism of pictures.

A picture by an artist, which was publicly exhibited, was described in a criticism by defendant as a ''mere daub.'' ''If,'' said Best, C.J., to the jury, ''this be really an *honest* criticism and no more, the defendant is entitled to your verdict. If he has exceeded the limits of fair and honest criticism, then you will find for the plaintiff.'' They must say whether what was published was fair and temperate, or whether it was the vehicle of personal malignity towards the painter(*q*).

Architecture.

Soane v. *Knight*(*r*) enunciates a similar rule with respect to the works of an architect. The plaintiff in that case, who was a

(*o*) Dibdin v. Swan *et al.* (1793) 1 Esp. 28; 5 R.R. 717.

(*oo*) (1887) 20 Q.B.D. 275 (C.A.).

(*p*) Duplany v. Davis (1887) 3 T.L.R. 184.

(*q*) Thompson v. Shackell (1828) 1 M. & M. 187.

(*r*) (1827) 1 M. & M. 74; 31 R.R. 714.

professor of architecture in the Royal Academy, sued for a libel upon him professionally. The publication complained of described the plaintiff as "the Boeotian professor," who had invented a new order of architecture called the Boeotian order, at the same time ridiculing the rules of the order, and illustrating it by examples of buildings, the works of the plaintiff.

Opinion of Lord Tenterden, C.J., in Soane v. Knight (1827).

Lord Tenterden, C.J., thus directed the jury: "The publication professes in substance to be a criticism on the architectural works of the plaintiff. On such works, as well as on literary productions, any man has a right to express his opinion, and however mistaken in point of taste that opinion may be, or however unfavourable to the merits of the author or artist, the person entertaining it is not precluded by law from its fair, reasonable and temperate expression. It may be fairly and reasonably expressed, although through the medium of ridicule. In the present case the censure is certainly strong; nevertheless, if you think the criticism fair, reasonable and temperate, although it may not be correct, the defendant will be entitled to your verdict; if you think it unfair and intemperate, and written with the intention and for the purpose of injuring the plaintiff in his profession by imputing to him that he acts on absurd principles of art, you will find for the plaintiff." The imputation of ignorance or of want of experience to an architect, in work undertaken by him, is not fair criticism, and is a libel upon him professionally(*s*).

Criticism of a floral exhibition.

An exhibition of flowers at a horticultural exhibition was criticised in a periodical publication by the defendant as follows: "The name of G. is to be rendered famous in all sorts of dirty work; the tricks by which he and a few like him used to secure prizes seem to have been broken in upon by some judges more honest than usual. If G. be the same man who wrote an impudent letter to the Metropolitan Society, he is too worthless to notice; if he be not the same man, it is a pity two such beggarly

(*s*) Botterill *et al.* v. Whytehead (1879) 41 L.T. 588. See, also, Eastwood v. Holmes (1858) 1 F. & F. 347.

souls could not be crammed into the same carcass." It was held that this was not fair criticism on G.'s floral exhibition(*t*).

When private character may be criticized. Opinion of Cockburn, L.C.J.

The private character or conduct of a person which affects his public position, office, or employment, may, however, be the subject of fair comment, and the general rule should be qualified to that extent. The plaintiff, a Q.C. and a member of Parliament, had his private conduct investigated and censured by the Benchers of one of the Inns of Court. While the investigation was pending he was appointed a Recorder. In a subsequent address to his constituents he complained of the unfairness of the judgment passed upon him, whereupon the whole matter was commented upon in the *Law Review*. In directing the jury, Cockburn, L.C.J., said: "Mr. Seymour was not merely a member of the Bar; he was not only a member of Parliament; he was actually one of the judges of the land. . . . Mr. Seymour held a position in which integrity, honesty and honour were essential; and if in his private conduct he shewed himself destitute and devoid of those essential qualities, surely it could not be said that it was not a fair matter for public animadversion, so long as the writer keeps within the bounds of truth and the limits of just criticism"(*u*).

Published statements by R. C. bishops as to books and newspapers.

The courts in the Province of Quebec have had to pronounce upon the alleged defamatory character of comments or criticism contained in circulars, or other published statements, issued by the Roman Catholic archbishops or bishops in that Province, prohibiting the reading of books and newspapers of which they disapproved. In one of the cases, in which this question is discussed, it was held, that the laws or rules of the Roman Catholic Church, in the Province of Quebec, are known to the civil courts only in so far as they are proved before them, but it being proved that, under the laws of the Church, the archbishop or bishop of a diocese was vested with authority to prohibit the members of that

(*t*) Green v. Chapman (1837) 4 Bing. N.C. 92; 5 Scott, 340.

(*u*) Seymour v. Butterworth (1862) 3 F. & F. 372. See, also, Pankhurst v. Hamilton (1887) 3 T.L.R. 500.

Church from reading publications which he considered opposed to its teaching or discipline, the defendant, as archbishop of the diocese of Montreal, was in exercise of a right in issuing a circular prohibiting the members of the Church from reading plaintiff's newspaper under pain of deprivation of the sacraments; and although such prohibition did in fact prejudicially affect the plaintiff's interests, yet, in the absence of any evidence of unfairness or malice, it did not constitute an invasion of plaintiff's rights which could give rise to a claim for damages. It was also held, in the same case, that criticism or comment, however severe, upon a published work or newspaper, is not libellous and actionable, unless it be proved that the criticism is unfair or malicious, and it is for the party complaining of hostile criticism to establish such unfairness or malice(*v*).

Facts commented on should appear on the record.

Where fair comment is pleaded, the facts commented on, if not shewn on the face of the statements complained of, should appear on the record either by the pleading or particulars(*w*). And where in an action for alleged libel, contained in an article in the defendants' newspaper, the defendants pleaded fair comment, but did not attempt to set up the facts upon which it was alleged the article was fair comment, or allege that the statements of fact in the article complained of were true, it was held that the defence was bad, and should be struck out. It is clear upon the authorities that a man may not invent his facts and then comment on them, and succeed upon the ground that, the facts being assumed to be true, the comment is fair(*ww*).

Truth of libel inadmissible under plea of fair comment where justification not pleaded.

The question whether a libel can be justified under a plea of fair comment, is discussed in several cases. In an action for the publication, in defendant's newspaper, of an article reflecting on the conduct of the plaintiff as county treasurer, the defendant

(*v*) La Compagnie de Publication du "Canada Revue" v. Mgr. Fabre (1894) Q.O.R. 6 (S.C.) 436.

(*w*) *Per* Boyd, C., in Brown v. Moyer (1893) 23 O.R. 222, at pp. 226-7.

(*ww*) Crow's Nest Pass Coal Co. v. Bell (1902) 1 O.W.R. 679; 4 O.L.R. (1902) 660; 22 C.L.T. (Occ. N.) 407.

pleaded that the article was a fair and *bonâ fide* comment on matters of public and general interest respecting the conduct of a public officer, and was published *bonâ fide*, without malice and for the public benefit. The jury, at the second trial of the action(*x*), found in favour of the defendant. Upon a motion for a new trial principally on the ground that the trial judge (Rose, J.) had received evidence of the truth of the matters charged as libellous, justification not being pleaded, the Divisional Court held, that the defendant was entitled, under the plea of fair comment, to shew that the matters commented upon were true. *Lefroy* v. *Burnside*, 4 Ir. L.R. 556, *Davies & Sons* v. *Shepstone*, 11 App. Cas. 187, and *Riordan* v. *Willox*, 4 T.L.R. 475, were referred to(*y*).

In a subsequent case of *Brown* v. *Moyer*(*z*), the above decision is explained, and, in effect, overruled, by the Ontario Court of Appeal. The plaintiff, a manufacturer and member of the town council, sued the publisher of a local newspaper for the publication of an article assailing him personally for his public conduct as a councillor in opposing the application of a firm of local manufacturers for exemption from taxation. The principal defences were fair comment on a matter of public interest, and a fair and full retraction of the statements alleged to be erroneous. At the trial the defendant was allowed, on the authority of *Wills* v. *Carman* (*supra*), to give evidence that the matters commented on were true, as otherwise he could not establish his plea of fair comment. A verdict for the defendant was upheld by the Divisional Court(*a*), whose judgment was reversed by the Court of Appeal. The court held that, under the defence of fair comment, evidence of the existence of a certain state of facts, on which it is alleged the comment was fairly made, is admissible, but not evidence of the truth of the statements complained of as libellous. Hagarty, C.J.O., said he did not understand *Wills* v. *Carman* as in any way supporting the admission of the evidence objected to. "All we can find is, that, on a plea of fair comment on the conduct of a county treasurer,

(*x*) Directed by the Court of Appeal. See Wills v. Carman (1888) 14 O.A.R. 656.

(*y*) Wills v. Carman (1889) 17 O.R. 223.

(*z*) (1893) 23 O.R. 222; (1893) 20 O.A.R. 509.

(*a*) Brown v. Moyer (1893) 23 O.R. 222.

a report of the committee of the county council, appointed at the plaintiff's own request, was allowed to be put in evidence. The distinction seems well pointed out. It is not the truth of the facts, but the existence of a certain state of facts on which it is alleged the comment was fairly made. . . . The law is very clearly stated in such cases as *Lord Hindlip* v. *Mudford* (1890), 6 T.L.R. 367, and the distinction between the defence of justification and fair comment is well defined. See, also, *Kelly* v. *O'Malley* (1889), 6 T.L.R. 62." Burton, J.A., thought *Wills* v. *Carman* was somewhat misleading. "All that was intended to be decided in that case was, that it was necessary to shew the existence of a certain state of facts, in order to see whether the publication sought to be excused was a fair comment on them. These facts, it is true, must be actual facts, not facts existing only in the mind of the writer, and then commented on." Osler, J.A., did not read *Wills* v. *Carman* as laying down any such proposition as that, under a defence of fair comment, a defendant might prove the truth of the alleged libel, as if he had pleaded the defence of justification. The case of *Martin* v. *Manitoba Free Press Co.* (*infra*) was a clear authority to the contrary, if one were needed(*b*).

A charge of an indictable offence is not fair comment.

In a much earlier case, in which the defendant pleaded justification to a charge in his newspaper against the plaintiff, a newspaper editor, that he had headed a number of rowdies who assaulted a member of Parliament "in a most brutal manner," Draper, J., said: "As to the argument of the freedom of criticism to be allowed with regard to the conduct, etc., of public men, as applying to the plaintiff as editor of a public newspaper, and, therefore, proper to have been left to the jury to disprove malice, it appears to be sufficient to observe that the libel charges an indictable offence, and the plea justifies the charge by distinctly alleging that the plaintiff committed one, viz., an assault and battery. I have to learn how that can be considered as a fair comment on the plaintiff's conduct as editor of a public newspaper. I find nothing in *Parmiter* v. *Coupland et al.*(*c*) to warrant any such conclusion"(*d*).

(*b*) Brown v. Moyer (1893) 20 O.A.R. 509.
(*c*) (1840) 6 M. & W. 105; 9 L.J. Ex. 202; 4 Jur. 701.
(*d*) Smiley v. McDougall (1853) 10 U.C.Q.B. 113.

Fair comment not the proper defence to a specific charge of misconduct. Martin v. Manitoba Free Press Co. (1892).

The defence of fair comment does not apply to a specific charge of misconduct, which is an allegation of fact and can only be sustained by a plea of justification. Where, therefore, such a charge is complained of, and the meaning ascribed to the words as set forth in the innuendo and the charge is not justified, the failure of the jury to consider the meaning alleged by the innuendo, and a finding by them that the words are fair comment on a matter of public interest, are good grounds for setting aside a verdict for the defendant and for a new trial. "To state facts which are libellous is not comment or criticism on anything." In an action for a libel contained in the *Manitoba Free Press*, published at Winnipeg, plaintiff, the Attorney-General of the Province and a railway commissioner, complained that he was charged with personal dishonesty in connection with the framing of a contract for the construction of the Northern Pacific and Manitoba Railway. The defendants pleaded not guilty, and that the words complained of were fair comment on matters of public interest, and were published *bonâ fide*, for the public benefit, and without malice toward the plaintiff. At the trial the defendants put in evidence, plaintiff's counsel objecting, to prove the charge of personal dishonesty, and evidence in rebuttal was tendered by plaintiff and rejected. Certain questions were submitted to the jury requiring them to find whether or not the words bore the construction claimed by the innuendo, or were fair comment on the subject matter of the article. The jury found generally for the defendants, and in answer to the trial judge, who asked them if they found that the publication bore the meaning ascribed to it by the plaintiff, the foreman said: "We did not consider that at all. We found the article complained of was a fair comment on a matter of public interest, but the jury, while giving the verdict, desire to state that it would have been better if more temperate language had been used." On appeal the verdict was set aside and a new trial ordered, the court (Dubuc, J., *diss.*) being of opinion, following *Campbell* v. *Spottiswoode*(*dd*), and *Davies & Sons* v. *Shepstone*(*e*), that, if the publication charged the plaintiff with what

(*dd*) (1863) 3 B. & S. 769.
(*e*) (1886) 11 App. Cas. 187.

the innuendo alleged it did, namely, a specific act of misconduct, it could not be fair comment unless the jury found the charge to be true, and that the answer of the foreman meant that the jury had not considered the case as submitted(*f*). This judgment was affirmed by the Supreme Court of Canada where it was held, that defendants not having pleaded the truth of the charge in justification, evidence given to establish it should not have been received, but, it having been received, evidence in rebuttal was improperly rejected: that the general finding for the defendants was not sufficient in view of the fact that the jury stated that they had not considered the material question, namely, the charge of personal dishonesty; and that, for these reasons, a new trial was properly granted.

Opinion of Patterson, J.

"If," said Patterson, J., who delivered the principal judgment of the court, "the libel had in direct terms stated, as it did less directly, that the plaintiff had been guilty of a palpable attempt at jobbery by framing the contract so as to put money into his own pocket, the only effective plea to a declaration charging the publication of a libel in those terms would have been a plea that the asserted fact was true. A plea that the contract was a matter of public interest, and that the libel was a fair comment or criticism of it, would manifestly have fallen short of meeting the gravamen of the complaint. 'To state facts which are libellous is not comment or criticism on anything': *Per* Field, J., in *Reg.* v. *Flowers*, 44 J.P. 377. Such a plea ought to be met by a demurrer, as in the Irish case of *Lefroy* v. *Burnside* (1879), 4 L.R. Ir. 556"(*g*).

Opinion of Bain, J.

"The way the matter stands is this," said Bain, J., in the court below: "The jury found a verdict for the defendant because they say they thought the article was fair comment. But if the article charges the plaintiff with what the innuendo alleges it does, it could not be fair comment, unless the jury came to the conclusion that the charges it made were well founded. But as they say they did not consider whether or not the article means

(*f*) Martin v. Manitoba Free Press Co. (1892) 8 M.L.R .50.

(*g*) *Ibid.*, 21 S.C.R. 518.

what it is charged it does, and as they added they thought it would have been better that more temperate language had been used, it is quite evident, I think, that that was not the way the verdict was arrived at, and, therefore, I think the verdict should not stand"(*h*). And where an action has been brought for alleged libellous comments on judicial proceedings, evidence justifying the comments, which has been given under the general issue in bar of the action and without a special plea of justification, is improper, and is ground for a new trial(*i*).

Plea of fair comment may set up matter properly pleadable under general issue.

It is no objection to a plea of fair comment that a portion of the matter, set up in the plea by way of defence, should be more properly set up under the general issue; and an order of a Referee allowing an application to strike out the plea of fair comment as embarrassing on that ground was reversed on appeal. "Under the old practice," said Killam, J., who heard the appeal, "leave would be given to plead that the alleged libel was a fair comment upon a matter of public interest along with the general issue, and much more should the court not interfere actively to prevent its being pleaded where no leave is required"(*j*).

Unfair comments in letters adopted by newspaper editor.

In an action for libel the defamatory matter consisted of letters of a very gross character published in the defendants' newspaper, the *Irish Canadian*, reflecting on the plaintiff as warden of the Provincial Central Prison. The defendants refused to give the name of the writer of the letters, and assumed responsibility therefor. It was admitted by counsel for the plaintiff at the trial, that comments on the management of the prison, and the conduct of the plaintiff as warden, formed a matter of limited privilege; and the trial judge (Rose, J.) told the jury that "every one has a right to comment on matters of public interest and general concern, provided he does so fairly and with an honest purpose. . . . Such comments are not libellous,

(*h*) Martin v. Manitoba Free Press Co. (1892) 8 M.L.R. 50, at p. 78.

(*i*) Small v. Mackenzie (1830) Drap. Rep. 174.

(*j*) Martin v. Manitoba Free Press Co. (1891) 7 M.L.R. 413.

however severe in their terms, unless they are written intemperately and maliciously." The jury found for the plaintiff and $8,000 damages, which, however, the court (Rose, J., partially *diss.*) directed to be reduced with the consent of the plaintiff. The court held, that no exception could be taken to the judge's charge; that the libels were not privileged as fair comments or otherwise; and were not published on a privileged occasion. Cameron, C.J., said that it could not "be said that the libel was a fair comment upon a public matter in which the public had an interest. The language was entirely too strong and opprobrious to be sheltered and protected on this ground." Galt, J., who quoted in his judgment some of the statements complained of, said that, "after the perusal of the above statements, it would be a waste of time to say more than that there is no case to be found in the books that would even remotely tend to shew there could be any privilege, particularly on the part of a defendant who had no personal knowledge of their truth or falsehood." Referring to the observation of Galt, J., in his judgment (at p. 364), that, had the articles complained of been written by the editor himself, he would not have interfered, Rose, J., said: "I charged, and, it has been held, correctly charged the jury, that they must treat the defendants as if their editor had written the articles, he having refused to give the names of the writers. The defendants were then in the position of 'fathering' the articles, and urging they were 'fair comment,' while at the same time the editor was compelled to state that he had no knowledge whatever of the alleged facts which formed the text for such wild, cruel and unjustifiable accusations. . . . As I said to the jury, if we are to have men in public places of trust and responsibility who are persons of sensitive honour and who will be held in check by the force of public opinion, desiring to stand well in the opinion of those whose good opinion is worth having, we must protect them when attacked; and it seems to me we are affording them but little protection when we take upon ourselves to say that such persistent and malicious vilification, unapologized for, and attempted to be justified without the manly course of pleading that the charges were true, was of so little consequence that when a jury say that, in their opinion, the interests of the plain-

tiff and of the public demand a very strong mark of disapprobation, we can take upon ourselves to pronounce the amount, which evidences their judgment, so excessive that it would be contrary to good conscience to let it stand''(*k*).

Verdict for defendants on plea of fair comment set aside for non-direction.

In an action for publishing charges against a public official of swindling, fraud, and obtaining money under false pretences, the defendant justified the statements as fair comment on the conduct of the plaintiff in his public capacity. A verdict for the defendant was set aside for non-direction by the trial judge as to whether or not the occasion of the publication was privileged, and, if so, whether the defendant was actuated by malice in fact(*l*).

Misdirection to tell jury that comments must be believed on reasonable grounds to be true.

In *Douglas* v. *Stephenson*(*m*) the Court of Appeal for Ontario affirmed a judgment of a majority of the Common Pleas Division who held, that, in an action for libel by a barrister and solicitor against a newspaper publisher for defamatory statements concerning him as a city solicitor and county Crown attorney, the trial judge (Armour, C.J.) misdirected the jury, in telling them that the comments complained of in the newspaper on the conduct of the plaintiff must be based on the truth, or at least must be believed on reasonable grounds to be true. The case as reported shews that the charge on that point adopted the law of fair discussion and fair comment as laid down in the Criminal Code(*n*), and, therefore, the judgments in the Divisional Court and the Court of Appeal cannot be regarded as a satisfactory exposition of the law on the subject.

Brown v. Elder (1888).

It should be noticed, however, that *Douglas* v. *Stephenson* is supported by a New Brunswick case which was decided ten years

(*k*) Massie v. Toronto Printing Co. (1886) 11 O.R. 362, at pp. 363, 364, 367.

(*l*) Ray v. Corbett (1853) 16 N.S.R. (4 R. & G.) 407.

(*m*) (1898) 29 O.R. 616; (1899) 26 O.A.R. 26.

(*n*) C.C. ss. 324, 325(1).

previously. In that case the keeper of a lighthouse sued the publisher of the St. John *Daily Telegraph* for publishing a communication commenting on the plaintiff's conduct upon the occasion of a shipwreck, with loss of life, that took place in the vicinity of the lighthouse. The communication was headed: "The Loss of the 'Arcana.'" "A charge that no effort was made to save the crew." "The lighthouse keeper's conduct criticised." "A correspondent at St. Martin's sends us the following letter in regard to the wreck of the 'Arcana,' near that place a few days ago." Then followed the statements complained of which tended to shew that plaintiff had acted in an inhuman manner, and had not taken the proper means to save the lives of the crew. The trial judge, in charging the jury, told them, in effect, that if the writer of the letter honestly believed on reasonable grounds that it was true, it would not be exceeding the limits of fair comment and would not be a libel. There was a verdict for the defendant, which was set aside for misdirection. The law is fully reviewed in the judgments of the court(*o*).

Comments on a rejected advertisement published contemporaneously with its appearance in a rival newspaper.

Whether a newspaper is entitled to criticise an advertisement of a business firm which it had refused to publish, and which had not appeared in a rival newspaper when the criticism was written, but which was subsequently published in the rival paper contemporaneously with the publication of the criticism in the other paper, is one of the questions discussed in an Ontario case. The evidence shewed that the plaintiffs had arranged with the defendant for space in his paper for the insertion of a certain advertisement, and, in the issue of the week before, the defendant had notified his subscribers to look out for the advertisement. The advertisement was rejected by the defendant because he considered it contained reflections upon some of his other subscribers. The plaintiffs then intimated to the defendant that they would have it published in the rival local newspaper, and it duly appeared. In the issue of the defendant's paper of the

(*o*) Brown v. Elder (1888) 27 N.B.R. 465.

same date as that on which the advertisement appeared in the other paper, the article complained of as libellous also appeared. Plaintiffs charged that the meaning of the article was, that as traders and merchants they were unworthy of patronage, and had endeavoured to bribe the defendant to do some disgraceful act for their benefit; that they were maliciously endeavouring to injure other traders and merchants; that they conducted their business in a disreputable manner, etc. The principal defence was, that the article complained of was only a fair and reasonable statement of defendant's reasons for not publishing the advertisement, and was a fair comment thereon. The trial judge (MacMahon, J.) told the jury that, if the article was nothing more than a fair criticism of the advertisement, then, no matter whether it was injudicious or not for the defendant to have published it, it was not libellous. To this charge the objection was taken, that inasmuch as the advertisement had not been published before the article complained of, there was no right of criticism upon it at all; that nothing had been published for defendant to write about. It was also objected that plaintiffs were not obliged, as ruled by the trial judge, to produce, as part of their case, the written advertisement referred to by defendant in the articles complained of. The Divisional Court held, after a verdict for defendant, that the objection to the charge was not tenable; and that the ruling of the trial judge, which compelled the plaintiffs to put in the written advertisement, was wrong; but, as the only injury was the right of defendant's counsel to have the last word with the jury, plaintiffs were not entitled to a new trial(*p*).

Defendants published, on the first page of their newspaper, an article stating that some women from S. had been canvassing some time previous in Victoria, B.C., for subscriptions for a bogus foundling institution, and, on being questioned by the police, had left town. On the eighth page of the same issue there was an article stating that two ladies, for the past few days, had been selling tickets for a recital by one G., and that the tickets were being sold "in a manner similar to those for a recital by a gentle-

(*p*) Graham v. McKinnon (1890) 19 O.R. 475.

man of the same name nearly two years ago, which was ostensibly for the benefit of the orphanage, but which the promoters were obliged to abandon." The manner of selling the tickets was the same in both cases. It was held (*per* Irving, J.), that the article on the first page did not necessarily refer to the plaintiff, and that the article on the eighth page was a fair comment on a matter of public interest and was true(*q*).

Wherever the defence is fair comment upon a matter of public interest, evidence that the defendant was actuated by malice towards the plaintiff is admissible, upon the ground that comment which is actuated by malice cannot be deemed fair on the part of the person who makes it, and, therefore, proof of malice may take a criticism that is *prima facie* fair outside the limits of fair comment(*r*).

The defence to an action for libel in a newspaper article, that "in so far as the words consist of statements of fact, the same are in their natural and ordinary signification true in substance and in fact; in so far as they consist of comment, the same were fair and *bonâ fide* comment upon a matter of public interest," is a defence of fair comment and not a justification(*s*).

(*q*) Wiles v. Victoria Times (1904) 11 B.C.R. 143.

(*r*) Thomas v. Bradbury, Agnew & Co. *et al.* (1906) 2 K.B. 627.

(*s*) Digby v. Financial News (1907) 1 K.B. 502 (C.A.).

CHAPTER XXXI.

PARTICULARS.

The general rule as to particulars.

In actions of defamation particulars may be demanded, and, if refused, may be ordered by the court or a judge from each party to the action at the instance of the other. Each party is entitled to have the case against him presented in a fair and intelligible form, failing which particulars, or an amendment of the objectionable pleadings, may be required. Where, therefore, the defendant pleads in general terms that the words are true, the plaintiff is entitled to particulars of the matters relied upon in support of such plea(*a*) in order that he may know what case he will have to meet at the trial(*b*). Where the defendant justifies a general charge he must give specific instances either in his pleadings or particulars(*c*). No rules similar to those in force in England having been adopted, the practice in Ontario as to ordering particulars depends upon the inherent jurisdiction of the court to prevent injustice(*cc*). There is the same jurisdiction in the courts of the other Provinces.

Particulars of plea justifying charge of fraud.

In an action against a newspaper publisher, for the publication of an article charging plaintiff with having made false returns to the Government in his business as a distiller, the defendant was ordered to deliver full particulars in writing, with dates, of the several matters intended to be relied on in support of his plea of justification, or, in default, that the plea be struck out as embarrassing(*d*). Where the charge is not general, but

(*a*) Bullen v. Templeman (1896) 5 B.C.R. 43; Oakley-Hall v. Bryce (1890) 6 T.L.R. 344; Zierenberg v. Labouchere (1893) 2 Q.B. 183; Citizens Insurance Company v. Campbell (1883) 10 O.P.R. 129.

(*b*) Underwood v. Parkes (1744) Str. 1200.

(*c*) Zierenberg v. Labouchere, *supra*.

(*cc*) Queen Victoria Park Commissioners v. Howard (1889) 13 O.P.R. 14.

(*d*) Corcoran v. Robb (1879) 8 O.P.R. 49.

specific, *e.g.*, that, on certain occasions mentioned, the plaintiff cheated at cards, particulars are unnecessary(*e*).

Particulars of times when, places where, and persons to whom, or in whose presence, words spoken.

So, also, in an action for slander in charging the plaintiff with theft, particulars were ordered shewing the times, places, and persons, when, where and to whom, the words were spoken, or, if such persons were unknown, or, the words were spoken to the plaintiff, then the name of any person who was present and heard, or might have heard, the words spoken.

Opinion of Cameron, J.

"I am of opinion," said Cameron, J., in explaining the reasons for the order, "that it is essential that a statement of claim should disclose all facts necessary to shew a legal cause of action; that, in slander, the mere allegation that the defendant falsely spoke and published of the plaintiff certain defamatory words, setting them out, does not shew a cause of action, for the words might have been spoken to the plaintiff alone, to the wind, or on a privileged occasion, and the defendant would not be liable therefor. He is, therefore, entitled to know when, where, and to whom, the words were used, before being compelled to make his defence or answer to the plaintiff's case."

These reasons for the rule requiring particulars are reiterated in the comments in the same judgment on the plaintiff's contention that particulars, already furnished on two occasions, were sufficiently certain as to the time and place, and that he was not bound to furnish the names of the persons to whom the words were spoken, as that would be disclosing his witnesses, which he was not bound to do. As to this the learned judge says: "It would seem much more in accordance with the spirit of the [C. L. P.] Act to require the name or names of the person or persons to whom the words were spoken to be given, than to withhold them on the technical ground that, by the disclosure, the opposite party would be apprised of the names of those who would be the witnesses to support the allegation. There can be no real harm or prejudice, as far as I can see, in this, especially where it is essential to shew the facts constituting the cause of

(*e*) Cumming v. Green *et al.* (1891) 7 T.L.R. 409.

action or defence. To say of another person, not (*sic.*) in the presence of third persons, "you are a thief; you stole my money," or, speaking of such other, "he or she is a thief; he or she stole my money," is not necessarily actionable. The words may be used on a privileged occasion, as, for instance, if the defendant had reason to suspect the plaintiff, his servant, has stolen his money, and accused her of it with a view of ascertaining the truth of his suspicion immediately after discovering his loss, though another servant was present and heard the conversation, if the defendant acted in good faith or without malice, or if he was stating his case, his belief and suspicions, to a justice of the peace, or in giving evidence in a court of justice. . . . It seems to me, therefore, necessary for the plaintiff to shew in his narrative of facts, in an action for slander, that the words were spoken to some one, or in the presence of some one, before it can be seen whether he has a cause of action or not, and he cannot shelter himself under the rule that he is not bound to name his witness, and so withhold that which will enable the defendant and the court to judge whether there is a cause of action made out or not"(*f*).

In *Gould* v. *Beattie*(*g*) Boyd, C., expressed the opinion that the practice laid down in *Thornton* v. *Capstock* (*supra*) should be followed in preference to the practice stated in the English cases. See, on this point, *McMillan* v. *Colwell*(*h*). In a libel action in which an issue was raised on a plea of justification, particulars were ordered of matter material to the defendant's case, though involving disclosure of the names of persons intended to be called by the plaintiff as witnesses(*i*).

Particulars of persons present on different occasions.

Where in an action for slander, the statement of claim, after alleging that the slanders had been spoken and published to certain named persons, added, "and to others at present unknown

(*f*) Thornton v. Capstock (1883) 9 O.P.R. 535. See, also, Roselle v. Buchanan (1885) 16 Q.B.D. 656; Williams v. Ramsdale (1888) 36 W.R. 125; Bradbury v. Cooper (1883) 12 Q.B.D. 94; 32 W.R. 32; Moon v. Mathers (1896) 7 O.W.R. 422.

(*g*) (1886) 11 O.P.R. 329.

(*h*) (1887) 7 C.L.T. (Occ. N.) 141.

(*i*) Marriott v. Chamberlain (1886) 17 Q.B.D. 154 (C.A.); 54 L.T.N.S. 714; 34 W.R. 783. See, also, Humphries & Co. v. Taylor Drug Co. (1888) 39 Ch. D. 693.

to the plaintiff," this was held to be sufficient. But where it was also alleged that, during a period of five months, the defendant spoke and published various slanders, imputing a criminal offence, to certain named persons, and to "others not now known to the plaintiff," this was held to be insufficient, because it did not shew who of the persons mentioned were present when the different statements were made, nor at what times or places they were made. The Master in Chambers, to whom an application was made to strike out the paragraphs containing these allegations, or for particulars, was of opinion that the decisions in *Winnett* v. *Appelbe*(*j*), and *Müller* v. *Gerth*(*k*), were conclusive against the application. Street, J., who heard the appeal from the Master, was of opinion that the case came within *Robinson* v. *Sugarman*(*l*). He decided as above stated, and gave leave to the plaintiff to amend his statement of claim by adding such further charges of slander as might come to his knowledge before the trial of the action, upon alleging times and places within reasonable limits, and verifying the statements and the efforts made to obtain such information(*m*).

Defendant entitled to fullest particulars possible as to places, etc., customers lost, matters shewing malice, etc.

Particulars have also been ordered as to business customers alleged to have been lost by reason of the slanders charged, and of the matters shewing malice or in aggravation of damages, these being "material facts" which should have been pleaded; but in no case, it is said, should the particulars furnished be "shifty or uncertain."

In the action in which this rule was laid down, the statement of claim alleged three definite slanders in separate paragraphs, and the particulars ordered and furnished stated that these slanders were published at T., during July, August and September, to a specified person, "and others." Another paragraph alleged the publication of certain other similar slanders, without

(*j*) (1894) 16 O.P.R. 57.

(*k*) (1896) 17 O.P.R. 129.

(*l*) (1897) 17 O.P.R. 419.

(*m*) Townsend v. O'Keefe (1898) 18 O.P.R. 147.

giving the language or the names of the persons to whom such slanders were uttered, or the places where, or the times when, they were uttered. These slanders were stated to be pleaded merely as evidence of malice. Another paragraph alleged special damage by loss of customers, etc., and the particulars of it as furnished were, "among customers lost by the plaintiff," etc. The defendant on affidavit denied all knowledge of any of the slanders complained of, and swore that he was advised that it was unsafe for him to plead without better particulars. The plaintiff filed an affidavit in answer stating that he was unable to give the particulars sought. Upon an appeal to the Divisional Court from an order of the Master in Chambers requiring the plaintiff to deliver further particulars demanded by the defendant, it was held, that the defendant had a right to the fullest particulars the plaintiff could furnish as to the places where, the times when, and the persons to whom, the words alleged were uttered; to full particulars of the names of the persons who had ceased business dealings with the plaintiff on account of the slanders; and also to particulars of the slanderous statements alleged merely as matters shewing express malice or in aggravation of damages; and that shifty and uncertain particulars, such as are rendered meaningless and evasive by saying "among others," and "some of the persons," are to be discouraged. The plaintiff is bound to give definite information, so far as he can, and to stop there; if further information comes to his knowledge, he can obtain leave to amend. But where the plaintiff has sworn that he has given all the particulars in his power with regard to certain paragraphs, the defendant must be satisfied with what he has got so far as those paragraphs are concerned(*n*).

Particulars of publication of a libel.

Gourand v. *Fitzgerald et al.*(*o*), which was affirmed on appeal(*p*), is sometimes cited (questionably, it is submitted) as an authority against requiring plaintiff to give particulars of the publication of a libel. The action was by a director of a company against a committee of the company's shareholders for

(*n*) Müller v. Gerth (1896) 17 O.P.R. 129.

(*o*) (1889) 37 W.R. 55.

(*p*) *Ibid.*, 265.

a libel contained in a report which was published to other persons besides the shareholders. This, however, was not so alleged in the statement of claim, and it was held that the defendants were not entitled to particulars of the occasion of any publication to such other persons, under the then English rule of pleading(*q*). But, as the judgment shews, the application was refused on account of the defendants' delay in moving. It is questionable whether this decision would be followed in this country, nor yet the English decisions (*infra*) against granting particulars as to the names of persons alleged to have been passing by when the slanderous words in question were used, and as to the alleged damages(*s*). See *Thornton* v. *Capstock* and *Müller* v. *Gerth* (*supra*). Particulars were ordered in a libel action where the libel was justified, but where it was not clear whether the defence was that what was charged against plaintiff was true, or was truly reported(*t*); and they were refused where the defence was held to be fair comment and not a justification(*u*).

Examination of defendant in order to furnish particulars.

In *Robinson* v. *Sugarman*(*v*), the plaintiff, who was ordered to furnish particulars as to certain slanderous statements, was permitted to examine defendant in order to enable him to deliver the particulars. The action was for a series of slanders spoken and published of the plaintiff at the city of S., in the month of July, 1896, with the intention, it was alleged, of injuring plaintiff in his business, and causing his creditors to press for immediate payment. It was held, upon an appeal from an Official Referee, that the defendant was entitled to some particulars as to the times when, and the places where, the defamatory words were used, and as to some of the persons in whose hearing they were alleged to have been spoken; and that the plaintiff should have leave to examine the defendant before delivering such particulars, in order to enable him to furnish them. *Winnet* v.

(*q*) Ord. 19, r. 4.

(*s*) Restell v. Steward, 1 Charl. Ch. Ca. 87; W.N. 1875, 231; Wingard v. Cox, 2 Charl. Ch. Ca. 33; W.N. 1876, 106; 20 Sol. J., 341; 60 L.T. Notes, 304; Colonial Insurance Corporation v. Prosser, 2 Charl. Ch. Ca. 35; W.N. 1876, 55.

(*t*) Hennessy v. Wright (No. 1) (1888) 57 L.J.Q.B. 594; 36 W.R. 878; 24 Q.B.D. 445*n* (C.A.).

(*u*) Digby v. Financial News (1907) 1 K.B. 502 (C.A.).

(*v*) (1897) 17 O.P.R. 419.

Appelbe(*v*), which was relied upon by the Referee, was distinguished by Meredith, C.J., because it appeared that, in that case, the plaintiff was suing for words spoken to S.C. and "others," on a single occasion when S. C. and "others" whom he did not know were present, while in this case, for all that appeared, the plaintiff might be suing for words spoken on many occasions, and before many different persons, no single occasion and not one of the persons being mentioned in the pleading.

Striking out pleading for not giving proper particulars.

Where the statement of claim charged that, at divers times during the years 1888, 1889 and 1890, and to many people in and about the city of T., the defendant repeated the slanders sued for and words to the like effect, and spoke of the plaintiff words conveying the meaning that the said slanders and the said words conveyed, the Master in Chambers made an order striking out the paragraph containing these allegations on the ground that it was embarrassing. The plaintiff appealed to a judge in Chambers (Boyd, C.), alleging that he had not been able to ascertain the names of the persons to whom the slanders had been spoken and published; and that the striking out of the paragraph in question would prevent him from giving evidence of further slanders. It was held that the paragraph was embarrassing, and should be struck out, unless the plaintiff elected to amend by giving particulars upon payment of costs(*w*).

Insufficient particulars of justification should not be struck out.

But particulars justifying a libel should not be struck out as insufficient. If those delivered are too general, and the defendant swears he can give none better, the judge at the trial will exercise his discretion as to the admission of evidence thereunder. This rule was laid down by the Master in Chambers at Toronto, whose judgment was affirmed on appeal by Cameron, J. The action was for libel in publishing of an insurance company that "the management are greatly to blame for having established a branch in Great Britain, and also for their reckless under-writing in Canada." The defendant pleaded justification in general

(*v*) (1894) 16 O.P.R. 57.

(*w*) Paterson v. Dunn (1890) 14 O.P.R. 40.

terms, upon which an order was made for particulars, and a subsequent order for further particulars. Upon a motion to strike out the greater part of both sets of particulars as insufficient, the learned Master said: "But what must follow from this? I think there are particulars which sustain the plea, which, therefore, cannot be struck out. It is idle to make an order for further particulars, for the defendants allege that they cannot give them. An affidavit should be put in to this effect, and then, it seems to me, it must be left to the judge at the trial to deal with the case as he shall see fit. I never heard of an application to strike out particulars; but if a mere general statement, giving the plaintiff no real information, is inserted, the judge at the trial will probably exercise his discretion as to it, when the defendant attempts to give evidence of such general matters. . . . This is really a motion for further particulars, which, as to the general statements alluded to, are necessary"(*x*).

Particulars refused when already given on examination of party.

Where the information sought for had been given on an examination of the party from whom the particulars were demanded, particulars were refused and an order directing them to be furnished was rescinded. The action was for circulating certain vile, obscene and libellous papers, and for representing them to be copies of a letter written by the plaintiff, the slander being alleged to have been uttered, on several occasions, to certain persons named, and "others." Particulars were demanded of the names and residences of the persons referred to as "others," and also of the places where, and the times when, the alleged conversations took place with the persons named in the statement of claim, and "others." Upon an appeal by the plaintiff to a judge in Chambers (Boyd, C.) from an order of a local Master directing particulars of the names only of the said persons, the order was rescinded, because the examination of the plaintiff gave the defendant all the discovery he sought to obtain by the order for particulars. The learned judge expressed the opinion that, in an action for slander, the practice laid down in *Thornton* v. *Capstock*(*y*), as to particulars to be furnished, should be followed in preference to that prevailing in England. The cases

(*x*) Citizens Insurance Co. v. Campbell (1883) 10 P.R. 129.
(*y*) (1883) 9 O.P.R. 535, pp. 623-4, *ante*.

of *Bradbury* v. *Cooper*(*z*) and *Roselle* v. *Buchanan*(*a*) were mentioned as illustrating the English practice. *Smith* v. *Greey*(*b*) and *Early* v. *Smith*(*c*) were also referred to(*d*). Particulars have also been held to have been sufficiently obtained by examination for discovery in the case of other causes of action. See *Saunders* v. *Jones*(*e*), explained in *Benbow* v. *Low*(*f*); *Frost* v. *Brooke*(*g*); *Hill* v. *Wates*(*h*).

Particulars refused when useless and unnecessary.

Particulars were also refused where they were useless and unnecessary, all the information possible having been given, and it not being shewn that further information was essential for the defence. The action was for slander of the plaintiff in his profession as a barrister and solicitor. His solicitor, in answer to a demand for particulars, had written to the defendant's solicitor stating that plaintiff had given all the particulars he had, the names of the others to whom the words were spoken not being known to him. The plaintiff, when a motion for particulars was made, deposed on affidavit to the same facts. An order of the Master in Chambers requiring the plaintiff to furnish particulars of all the persons within his knowledge to whom, the places where, and the times when, the words were spoken, was affirmed by Meredith, C.J., in Chambers, but reversed by the Divisional Court on the ground that the plaintiff had given all the information in his possession, and that the defendant had not sworn she could not plead without further particulars, or that she was ignorant of what occasion was complained of, and, therefore, it was useless and unnecessary to order the particulars. *Thornton* v. *Capstock*(*i*) was approved, and the following cases were

(*z*) (1883) 12 Q.B.D. 94.
(*a*) (1886) 16 Q.B.D. 656.
(*b*) (1884) 10 O.P.R. 482; (1885) 11 O.P.R. 169.
(*c*) 12 Ir. C.L.R. Appendix 35.
(*d*) Gould v. Beattie (1886) 11 O.P.R. 329.
(*e*) 7 Ch. D. 435.
(*f*) 16 Ch. D. 97.
(*g*) 32 L.T.N.S. 312.
(*h*) L.R. 9 C.P. 688.
(*i*) (1883) 9 O.P.R. 535.

referred to by the court: *Gourand* v. *Fitzgerald*(*j*); *Citizens' Insurance Company* v. *Campbell*(*k*); *Dawson* v. *Rogan*(*l*); *Gould* v. *Beattie*(*m*); *Roselle* v. *Buchanan*(*n*)(*o*).

Particulars of immorality.

In an action against the publishers of *Saturday Night*, of Toronto, and against the managing editor of the paper, for charging the plaintiff, a candidate for a municipal office, with immorality, the defendants pleaded that the charge was true. The defendants, on plaintiff's demand, delivered particulars alleging various acts of immorality on plaintiff's part, whereupon plaintiff moved before Ferguson, J., to have the particulars struck out. The motion was dismissed, and the order for dismissal was affirmed by the Queen's Bench Division(*p*).

Particulars added to plea of justification.

The particulars of a plea of justification may be set out in the plea itself, and, where a clause added to such a plea may be interpreted or explained as an addition to the particulars, it will not be struck out. This was the course adopted as to the following alleged libel published in the *Mail and Empire*, Toronto: "Vancouver gets a rude shock. The genuineness of B.'s (plaintiff's) connections with various aristocratic people in England was known to many people here, so many refused to believe the stories of the peculiar character of B.'s card playing, and of his having been cashiered from the army for cheating at cards. To-day a rude shock was given society when solicitors served papers in a divorce suit filed in England by the Hon. B. B. against her husband Captain B. (plaintiff)." The defendants pleaded justification to the whole, and added two clauses to the same paragraph of their statement of defence, one of which related to the first charge and the other to the second. The first of these clauses was as follows: "The plaintiff was obliged to leave the army on

(*j*) (1889) 37 W.R. 55, 265.

(*k*) (1883) 10 O.P.R., at p. 130.

(*l*) (1890) 10 C.L.T. (Occ. N.) 300.

(*m*) (1886) 11 O.P.R. 329.

(*n*) (1886) 16 Q.B.D., at p. 657.

(*o*) Winnett v. Appelbe *et ux.* (1894) 16 O.P.R. 57.

(*p*) Macdonald v. Sheppard Publishing Co. *et al.* (1900) 19 O.P.R. 282.

the ground that he had cheated at cards, and stories of the peculiar character of the plaintiff's card-playing, and of his having been cashiered from the army for cheating at cards, were in circulation in the city of Vancouver." The second clause related to the divorce proceedings. The plaintiff applied for an order striking out both these added clauses, but the application was refused on the ground that the defendants were entitled to plead them as particulars of the defence of justification. There was no appeal from this order, but the plaintiff amended (by leave) by striking out so much of his complaint as related to the divorce proceedings, whereupon the defendants struck out of their defence the second clause relating to those proceedings. An application was then made to strike out the first clause as to the plaintiff being cashiered from the army, but this was refused by the Master and by a judge in Chambers (Boyd, C.), whose order was affirmed by the Divisional Court. Falconbridge, C.J., thought that the order appealed from was right, citing *Fulford* v. *Wallace*(*q*), and *Macdonald* v. *Mail Printing Co.*(*r*), and that the plaintiff could not be prejudiced by the clause in question, which was an addition to the plea of justification of a statement of facts as particulars. He approved of the ruling in *Dodge et al.* v. *Smith*(*s*), that a second appeal was not to be encouraged in a case of this kind. Street, J., thought the matter was *res judicata* by reason of the Master's order on the first application not having been appealed against(*t*).

In *Dodge et al.* v. *Smith*, thus referred to, it was held by the Master and by a judge in Chambers, following *Pullen* v. *Snelus*(*u*), that a defendant pleading the Real Property Limitation Act must set out in his statement of defence, or give particulars shewing, the section or sections on which he relies. Upon an appeal to the Divisional Court, it was held, that the defendant should have been content in such a matter with his appeal to the judge in Chambers, and should not have incurred useless costs by a further appeal.

(*q*) 1 O.L.R. (1901) 278.

(*r*) (1900) 32 O.R. 163.

(*s*) 1 O.L.R. (1901) 46.

(*t*) Bateman v. Mail Printing Co., 2 O.L.R. (1901) 416.

(*u*) (1879) 40 L.T.N.S. 363.

Where in an action for libel a defendant has pleaded a general justification, he must furnish the plaintiff with the particulars of the facts relied on as a justification before he can obtain discovery from the plaintiff(*v*).

Law as to particulars in Quebec.

These rulings as to particulars, which are substantially the same in all the so-called English Provinces, also prevail in the Province of Quebec. Although, in a few cases in Quebec, particulars have not been ordered of the names of the persons before whom the slanderous words were spoken(*w*), the rule generally acted upon in an action for slander is, that the plaintiff may be compelled to give particulars of the places where, the dates when, and the persons to whom and in whose presence, the words were spoken(*x*). Plaintiff's action may be dismissed should he fail to furnish particulars of the persons to whom the defamatory words were spoken as well as the dates(*y*). But the omission of the plaintiff to set forth the names of the persons who were present when the slanders were so uttered, is no ground for a motion in the nature of an exception to the form(*z*). Where the action is for injurious words spoken in the presence of two persons identified and named, and also before "a great number of other persons," plaintiff will be compelled to give the names of the latter, the dates of the injuries, and the places where the words were uttered(*a*). The plaintiff should also make it apparent that the remarks complained of were uttered with malice or with intent to injure; and where the allegation read as follows: "Which sum of $2,000 the said defendant has often acknowledged to be due and promised to pay," it was held, that the plaintiff should state in detail when and how the defendant acknowledged

(*v*) Bullen v. Templeman (1896) 5 B.C.R. 43.

(*w*) See Roy v. Powell (1899) 2 Q.P.R. 27, and Martineau v. Lussier (1898) Q.O.R. 7 (Q.B.) 473.

(*x*) Goudie v. Legendre (1820) 3 R.L. (K.B.) 39; Irvine v. McCrimmon (1898) Q.O.R. 13 (S.C.) 71; Coallier v. Filiatrault (1899) 2 Q.P.R. 33; Menard v. Pigeon (1902) 4 Q.P.R. (S.C.) 441; Roy v. Powell, *supra*, except as already stated.

(*y*) Coallier v. Filiatrault, *supra*.

(*z*) Lussier v. Martineau (1897) Q.O.R. 12 (S.C.) 437

(*a*) Lefebvre v. Lefebvre (1902) 4 Q.P.R. 366.

that she owed the said sum(*b*). Where the action is for libel and slander based upon several different counts, the plaintiff may be bound to give particulars of the amount claimed on each separate count(*c*).

The plaintiff in his declaration, after stating the injury resulting from one particular circumstance, added that defendant, before and since, had repeated the same and other injurious words, and especially had accused the plaintiff, a physician, of having, in collusion with their husbands, given false and erroneous certificates for the confinement of certain women in the asylum of St. Jean Dieu, and had even mentioned the name of one woman so confined. It was held, reversing Q.R. 12 S.C. 437, that the allegation that the defendant had published the same injurious words and others, before and since, was too vague and should be expunged, as in defamation the defendant has a right to demand that all the defamatory matters imputed should be particularized in the declaration(*d*). But it was not necessary, in the declaration, to give the names of the persons before whom the injurious words had been spoken, nor to mention the name of the woman whom the defendant had designated as having been confined on the false certificate of the plaintiff(*e*). Where the declaration mentions a person in whose presence the words complained of were spoken, the plaintiff is not obliged to give the first name of such person, unless it appears that confusion may arise without it; nor to give the names of the persons in whose presence the words were spoken, if the particulars given are precise enough to permit the opposite party to defend himself without knowing such names(*f*); nor to particularize the words "similar statements" where they follow the statement of the slanders sued for (*g*). And where in an action for libel the plaintiff claims damages generally, and makes no special allegation of real damages, the court should assume that the damages sought are vindictive, and should not order particulars(*h*).

(*b*) Menard v. Pigeon (1902) 4 Q.P.R. (S.C.) 441.

(*c*) Hogg v. Ross (1902) 5 Q.P.R. 339.

(*d*) Martineau v Lussier (1898) Q.O.R. 7 (Q.B.) 473.

(*e*) *Ibid.*

(*f*) Kennedy v. Shurtleff (1901) 3 Q.P.R. 514.

(*g*) *Ibid.*

(*h*) Gauvreau v. Chapais (1900) Q.O.R. 18 (S.C.) 135.

CHAPTER XXXII.

Discovery and Production and Inspection of Documents.

The practice as to discovery.

Although the procedure and practice in the different Provinces as to discovery by oral examination, interrogatories, and production and inspection of documents, are not as uniform as the substantive law, the general rules on the subject may be stated. The practice as to discovery originated in the equity courts where a defendant was required to answer on oath interrogatories contained in the bill, and a plaintiff to answer in the same way interrogatories in a cross-bill by the defendant. In Ontario, under the general orders of June, 1853, an oral examination of each party by the other took the place of interrogatories. The Consolidated Chancery Orders (138-148) continued this practice, which was adopted by the common law courts under the provisions of the Administration of Justice Act(*a*). The practice under the present rules of the Judicature Act, which has not changed the right to discovery by examination(*b*), has been derived from the Chancery Orders and the Common Law Procedure Act. Generally speaking, the procedure and practice in the other Provinces have been the same as in Ontario; and many of the cases decided under the old procedure are still applicable.

The right to discovery and the modes of obtaining it.

A party to an action has a right to examine for discovery, not only for the purpose of obtaining information from the opposite party as to material facts which are not within his own knowledge and are within the knowledge of the opposite party, but also for the purpose of obtaining from the opposite party admissions which will make it unnecessary for him to enter into

(*a*) R.S.O. 1877, c. 50, ss. 156 *et seq.*, as amended by 41 Vict. c. 8, ss. 8, 9, (O.). See Jones v. Gallon (1881) 9 O.P.R. 296, p. 650, *post*.

(*b*) Atty.-Genl. v. Gaskill, 20 Ch. D. 519; Hunning v. Williamson, 10 Q.B.D. 459.

evidence of the facts admitted(*c*). The two modes of obtaining discovery in actions of defamation are(1) by examination of the opposite party, and, in the case of a corporation, of certain of its officers; and (2) by the production under oath, for inspection, of the documents in the possession of the opposite party. As to these methods the right to discovery exists to the same extent in actions of slander, and, to a more limited extent, of libel also, as in other cases.

Discovery under Rule 485, O.J.A.

In Ontario, under the present Rule 485, O.J.A.(*d*), a much more extended right was at one time held to exist as to the time when, and the purposes for which, discovery might be had in such actions. Rule 485(*e*) provides that the court or a judge may, in any cause or matter where it appears necessary for the purposes of justice, make an order for the examination upon oath before an officer of the court, or any other person, and at any place, of any person, and may order any deposition so taken to be filed in the court, and may empower any party to the cause or matter to give such deposition in evidence therein on such terms as may seem just.

Examination of defendant before appearance.

In *Fisken* v. *Chamberlain et al.*(*f*), it was held (*per* Boyd, C.), that the above rule applied to examinations for discovery before trial; that the examination of a defendant might be had under it before defence filed; and, in fact, at any stage of the case, and though no motion was pending.

Examination of plaintiff for the purpose of framing statement of defence.

So, also, in an action for alleged libels contained in a newspaper report of the trial of the plaintiff on a charge of abduc-

(*c*) Colter v. McPherson (1888) 12 O.P.R. 630; Atty.-Genl. v. Gaskill, 20 Ch. D. 519; Hellier v. Ellis (1884) W.N. 9; Humphries v. Taylor Drug Co., 39 Ch. D. 693.

(*d*) Originally Rule 285, and subsequently Rule 566, as the Rules were amended or added to, from time to time.

(*e*) Referred to in the cases, *infra*, as Rule 285 and Rule 566, respectively.

(*f*) (1882) 9 O.P.R. 283.

tion, and in an editorial article commenting upon the conduct of the plaintiff, the defendants, in order to enable them to frame their statement of defence, were allowed, under an order in Chambers made under this rule, to examine the plaintiff as to his conduct with and towards the woman alleged to have been abducted, and as to the damages which he claimed to sustain from the publication(*g*).

Examination of defendant for the purpose of framing statement of claim.

And where it appeared that the plaintiff had a good cause of action for libel and slander against the defendant, and was unable to frame his statement of claim unless he could examine the defendant and his employer, who was not a party to the suit, it was held by the Divisional Court, that he was entitled to such discovery under this rule, and that an order for such examination made by a local judge of the High Court was properly made(*h*). So, also, in an action for slander, it was held by the Divisional Court, that when the court was satisfied, in such actions, of the *bonâ fides* of the plaintiff, and was convinced that he could not state fully and with sufficient particularity his various grounds of complaint, and when the knowledge required was within the possession and control of the defendant, an examination for discovery, before statement of claim, might be ordered under the same rule (566); but, in such case, a further examination after pleading would not be allowed except upon special grounds. *Fisken* v. *Chamberlain*(*i*), *Gordon* v. *Phillips*(*j*), and *McLean* v. *Barber*(*k*) were followed(*l*).

Production of documents on examination.

Production of documents might also be compelled for the purposes of the examination, even before defence filed. Upon a motion by the plaintiff to commit the defendant for refusal to

(*g*) Tate v. Globe Printing Co. (1886) 11 O.P.R. 253.

(*h*) Gordon v. Phillips (1886) 11 O.P.R. 540.

(*i*) (1882) 9 O.P.R. 283.

(*j*) (1886) 11 O.P.R. 540.

(*k*) (1890) 13 O.P.R. 500.

(*l*) Campbell v. Scott (1891) 14 O.P.R. 203.

produce, it was held (*per* Boyd, C.) that the powers of the special examiner, under the former general order in Chancery, 147, as to directing the production of documents, extended to examinations under this rule, and that upon an examination of a party under the rule, at a stage of the action earlier than an examination would be ordered as of course, only material documents should be produced, such as would be produced in the ordinary course at a later stage(*m*).

Examination of plaintiff before delivery of defence not applicable to examinations for discovery. Fisken v. Chamberlain (1882) and cases following it overruled.

All the above cases came under review in the leading case of *Beaton* v. *Globe Printing Company*(*n*), which was argued in all the courts, as to the right to examine plaintiff before delivery of defence under the same rule (566), and which, by overruling *Fisken* v. *Chamberlain* (*supra*), and the cases following it, settled the Ontario practice on that point. The action was against the publishers of the *Globe* newspaper, of Toronto, for statements contained in an article copied from the New York *World*, in which the plaintiff was charged with criminal offences. The defendants pleaded justification, but, before doing so, applied to the Master in Chambers for an order permitting them to examine the plaintiff before delivering their statement of defence. The Master in Chambers, after reviewing all the decisions bearing on the question up to that time (October 28, 1893), including *Zierenberg* v. *Labouchere*(*o*), which he distinguished from the present case, made the order asked for(*p*). The Master's order was affirmed by Galt, C.J.(*q*), whose judgment was in turn affirmed by the Divisional Court(*r*). The decisions up to this point were, in effect, that the rule in question should receive a large and liberal construction; that the granting of such an order was a matter of discretion; that where that discretion was exer-

(*m*) Orpen v. Kerr (1885) 11 O.P.R. 128.

(*n*) (1893) 15 O.P.R. 473; (1894) 16 O.P.R. 281.

(*o*) (1893) 2 Q.B. 183.

(*p*) 15 O.P.R. 473.

(*q*) *Ibid.*, 479.

(*r*) *Ibid.*, 480.

cised in Chambers it should not be lightly interferred with by the court; and that the question on the cases was one of *bonâ fides* and convenience. Upon an appeal by the plaintiff to the Court of Appeal for Ontario, it was held, reversing the decision of the Divisional Court, that the rule did not apply to examinations for discovery; and that, even if that rule were applicable, it was not "necessary for the purposes of justice," in the circumstances of this case, to make an order allowing the defendants to examine the plaintiff for discovery before delivering their statement of defence. The court overruled *Fisken* v. *Chamberlain* (*supra*), and the cases following it; referred specially to *Tate* v. *Globe Printing Company* (*supra*) and the cases following that decision; and followed *Gourley* v. *Plimsoll*(*u*), and *Zierenberg* v. *Labouchere*(*v*)(*w*).

Discovery compelled though injurious to third party.

The fact that the discovery sought for on any point may be an injury to a third person, not a party to the action, is no ground for refusing the information. The publishers of *Saturday Night*, a Toronto newspaper, and the managing editor of the paper, having, in two separate issues of their paper, charged a candidate for a municipal office with immorality, he sued them for libel, which the defendants justified. The plaintiff, on his examination for discovery, admitted certain of the charges which involved a third party, but denied the other particulars of immorality which had been delivered by the defendants. The plaintiff refused to give the third party's name, or the name she went by then, or where she was living at the time of the plaintiff's examination, on the ground that she was now a respectable married woman; that what took place was eighteen years previous; and that he thought she would be socially ostracized if her name were made public. Upon an appeal to the Divisional Court from an order of Ferguson, J., dismissing an appeal from the Master requiring the plaintiff to answer questions as to the name of the third party, it was held that the plain-

(*u*) (1873) L.R. 8 C.P. 362.

(*v*) (1893) 2 Q.B. 183.

(*w*) Beaton v. Globe Printing Co. (1894) 16 O.P.R. 281.

tiff was bound to disclose the name, although the disclosure might injure such third party(*x*).

Discovery as to damages claimed.

Plaintiff may also be examined as to the damages to his business by a trade libel, whether the damages claimed be general or special. A firm of undertakers averred in their statement of claim, that certain newspaper advertisements charged them with combining to extort from the public unjust profits; that they had formed an illegal combine to enhance the prices of funeral goods; and so were incapable of furnishing such goods to the public at reasonable prices. No special damage was alleged, but merely general damage to their business and commercial reputation. Upon an appeal by the plaintiffs from an order of a local judge requiring them to answer as to the damages alleged to have been sustained by the statements complained of, it was held (*per* MacMahon, J.), that no evidence of special damage would be admissible at the trial, but that the plaintiffs would have the right to place figures before the jury as to a general diminution of profits since the publication of the alleged libels; that if the plaintiffs proposed to give this class of evidence at the trial, the defendants were entitled, on examination for discovery, to know how such diminution was made out and the figures by which it was proposed to support it, but not to seek information as to the loss of any particular custom; but, if the plaintiffs did not propose to give such evidence, the defendants were not entitled to the discovery. It was, therefore, ordered that the plaintiffs should give particulars of any damage intended to be claimed for diminution of profits; and, if particulars given, that the examination should be continued and discovery afforded; but, if particulars not given, that evidence of diminution of profits should not be admitted at the trial(*y*).

Disclosure by defendant of source of information.

There have been differences of opinion as to whether a defendant, in an action for libel, is obliged to give the source of information on which the writing complained of as libellous was

(*x*) Macdonald v. Sheppard Publishing Co. *et al.* (1900) 19 O.P.R. 282.

(*y*) Blachford *et al.* v. Green *et al.* (1892) 14 O.P.R. 424.

based(*z*). There is a good deal of authority to shew that he is not, and that no distinction exists between a libel published in a newspaper and other libels(*a*). So that where the defendant, on his examination for discovery, in an action for libel, declined to give the name of the person who had told him of the alleged misconduct with which he charged plaintiff, it was held by the Master in Chambers, whose judgment was affirmed by Meredith, C.J., that the defendant should not be required to answer(*b*). Reference is made in the learned Master's judgment to *Williamson* v. *Merrill*(*c*), *Marriott* v. *Chamberlain*(*d*), *Gibson* v. *Evans*(*e*), and *Eade* v. *Jacobs*(*f*), but particularly to Lord Esher's judgment in the Court of Appeal (concurred in by Lindley and Lopes, L.JJ.) in *Hennessy* v. *Wright*(*g*), in which the court refused to allow interrogatories similar to the question in the present case. Lord Esher said that "the interrogatories in question cannot disclose anything which can fairly be said to be material to enable the plaintiff either to maintain his own case, or to destroy the case of his adversary." There being in the present case no plea other than privilege, he (the Master) could not see how the disclosure of the name of defendant's informant would enable the plaintiff "either to maintain his own case, or to destroy the case of his adversary"(*h*). On the other hand, however, in an action for damages alleged to have been sustained by reason of the sending out by defendants of a circular stating that they had been "advised that (plaintiffs) had decided to discontinue their separator business," the manager

(*z*) Schmuck v. McIntosh (1903) 2 O.W.R. 237, following Hennessy v. Wright (1888) 24 Q.B.D. 445, and Hope v. Brash, *infra;* Chambers v. Jaffray (1905) 6 O.W.R. 441. See cases in chapter on Interrogatories.

(*a*) Parnell v. Walter (1895) 24 Q.B.D. 441; 62 L.T. 75; Blanc v. Burrows, 12 T.L.R. 521; Ridgeway v. Smith, 6 T.L.R. 275; Hope v. Brash *et al.* (1897) 2 Q.B.D. 188.

(*b*) Sangster v. Aikenhead (1905) 5 O.W.R. 528.

(*c*) (1904) 4 O.W.R. 528.

(*d*) 17 Q.B.D. 154.

(*e*) 23 Q.B.D. 384.

(*f*) 3 Ex. D. 335.

(*g*) (No. 2) (1888) 24 Q.B.D. 445.

(*h*) Sangster v. Aikenhead (1905) 5 O.W.R. 438, 495.

was ordered to give, on his examination for discovery, the names of the persons to whom the circular had been sent, and the name of the person who had "advised" the defendants of the facts alleged, both items of information being relevant to the defence set up of qualified privilege, and discovery of the name being also important on the question of damages(*i*). "The distinction is drawn," said Britton, J., "between an action for a libel published in a newspaper, and other actions for libel and defamation. The decision now is, that a proprietor of a newspaper ought not, unless under special circumstances, to be forced to give the source of the information on which the libel was published, and that is so whether the defence raises the question of qualified privilege or of fair comment. The present case, as to the first point taken by appellants [*i.e.*, that defendants were not bound to disclose their sources of information], seems to be fully covered by *White* v. *Credit Reform Association and Credit Index, Limited* (1905), 1 K.B. 653. The last case is that of *Plymouth Mutual* v. *The Traders' Publishing Association* (1906), 22 T.L.R. 266, which follows *Hennessy* v. *Wright* (1888), 24 Q.B.D. 445."

A well-established newpaper, sued for libel, cannot be required to disclose the number of copies of the issue of the paper containing the libel(*j*). Questions as to the inquiries made as to the truth of the matters complained of before publishing them are proper(*k*); but not the names of the persons to whom the publication was shewn(*l*). Where, in libel, defendant has pleaded justification, and has given particulars in support of the plea, the issues to be tried are limited to the particulars, and discovery is also limited to those matters(*m*). Where publication is admitted, and apology and payment into court pleaded, production of the original MS. of the libellous matter will not be ordered(*n*).

(*i*) Massey-Harris Co. v. De Laval Separator Co., 7 O.W.R. 59, 682; 11 O.L.R. (1906) 227, 591.

(*j*) Whittaker v. Scarboro Post (1896) 2 Q.B. 148; 74 L.T. 753, overruling Parnell v. Walter, *supra*, on that point.

(*k*) White v. Credit Reform, etc., *supra*.

(*l*) *Ibid.*

(*m*) Yorkshire Provident, etc. v. Gilbert and Rivington (1895) 2 Q.B. 148.

(*n*) Hope v. Brash (1897) 2 Q.B.D. 188. See, also, Parnell v. Walter and Blanc v. Burrows, *supra*.

Discovery of information given by "others" to whom slanders published.

Where the alleged slanders(*o*) were said to have been uttered in presence of plaintiff's wife and son and one G. L. "and others," but, on his examination for discovery, plaintiff refused to answer questions as to the information given him by the "others" to whom the slanderous words were published, the Master in Chambers refused an order to compel plaintiff to attend for re-examination and answer the questions, which, he thought, would be equivalent to permitting defendant to see plaintiff's brief and have a rehearsal of his evidence. His refusal of the order was affirmed by Meredith, C.J., on terms(*p*). But the defendant may be asked whether he spoke the words complained of, or "words to that effect," and in whose presence he spoke them(*pp*); and also what information he had, and what inquiries he made, as to the truth of the words(*q*).

Name of newspaper correspondent.

A newspaper publisher, who is sued for a libel contained in correspondence in his paper, will not be compelled to disclose the name of his correspondent(*r*).

Discovery as to malice or malicious motive.

But the defendant cannot refuse to answer questions asked for the purpose of shewing malice, or malicious motive, in the publication. Where, therefore, in an action for newspaper libel, it was pleaded that the paragraph in question was a fair and accurate report of proceedings in a police court, and the defendants' manager refused to answer questions relating to a former action by the plaintiff against defendants, it was held (*per* Street, J.) that the manager was bound to answer(*s*). And where in an action for libel in which the defendant has pleaded qualified privilege, to which the plaintiff has replied malice, the defendant,

(*o*) As to the slanders charged and the pleadings, see Lawrie v. Maxwell, noted in chapter on Pleadings.

(*p*) Lawrie v. Maxwell (1904) 3 O.W.R. 38, 284.

(*pp*) Dalgleish v. Lowther (1899) 2 Q.B. 590; 81 L.T. 161.

(*q*) Saunderson v. Von Radick, 119 L.T. Jour. 33.

(*r*) Marsh v. McKay (1904) 2 O.W.R. 522, 614; 3 O.W.R. 48.

(*s*) Bateman v. Mail Printing Co. (1903) 2 O.W.R. 242.

although he has not pleaded justification, is not precluded, on examination of the plaintiff for discovery, from asking questions which are relevant to the issue of defendant's honest belief as tending to shew the absence of malice, although they may incidentally prove the truth of the libel(*t*). Where the words complained of were: "He swore false and could be made jump for perjuring himself. He perjured himself and stole money from the township," the plaintiff, on an examination for discovery, refused to answer questions as to whether he had applied for a certain reward offered by a township council. The questions asked, which related to the reward, were as to the fact of the reward, and whether plaintiff had been paid it, as to his presence at a meeting of the council and the statement which he made there, and as to the times and occasions when the words complained of were spoken. Upon appeal the Divisional Court held, that privilege having been pleaded, it was impossible to say that the questions were not relevant. It was unnecessary to consider whether, having regard to Rule 488, O.J.A., a defendant should plead the facts on which he intends to rely in mitigation of damages, assuming the question open since *Beaton* v. *Intelligencer Printing Co.*(*u*), or whether, if it be not necessary to so plead, it is proper to examine for discovery as to matters affecting damages only, unless and until the notice required under Rule 488 has been given(*v*).

Discovery as between husband and wife.

As between husband and wife, while neither the husband nor the wife can be compelled to disclose any communication made during marriage by the one to the other(*w*), that is a very different thing from saying that a husband or wife cannot be compelled to disclose any statement made by the witness to his or her partner. Where the whole alleged cause of action is founded on statements made by defendant to his wife, such a principle would be an absolute bar to the action(*x*). And so

(*t*) McKergow v. Comstock (1906) 7 O.W.R. 197, 273, 449, 558; 11 O.L.R. (1906) 637.

(*u*) (1895) 22 O.A.R. 97.

(*v*) McKenzie v. McLaughlin (1902) 1 O.W.R. 58.

(*w*) R.S.O. 1897, c. 73, s. 8, and corresponding sections in the Evidence Acts of the other Provinces.

(*x*) Williamson v. Merrill (1905) 5 O.W.R. 64.

where defendant, who was sued for libel, declined, on his examination for discovery, to answer what he had told his wife, who had been sued for libel and slander by the same plaintiff in another action, with respect to some matters in issue, it was held that, as the questions were relevant, they should be answered(*y*).

The rule as to disclosing names of witnesses on examinations for discovery.

The old rule as to non-disclosure of a party's witnesses has been somewhat modified by the later rule, which is to be gathered from the judgments of Lord Esher, M.R., and of Bowen, L.J., in *Marriott* v. *Chamberlain*(*z*). Under this later rule, although one party cannot compel the other to disclose the names of his witnesses as such, yet if the name of a person is a relevant fact in the case, the right that would otherwise exist as to information with regard to such fact is not displaced by the assertion that such information involves the disclosure of the name of a witness. And Lord Esher thought that it did not signify, in dealing with these questions, on whom it lies to prove the facts with regard to which the interrogatory is put. The other cases along the same line are *Storey* v. *Lord George Lennox*(*a*), *Humphries* v. *Taylor Drug Co.*(*b*), a case of infringement of trade mark, *Kuhliger* v. *Bailey*(*c*), *Dalgleish* v. *Lowther*(*d*), and *Attorney-General* v. *Gaskill*(*e*). *Eade* v. *Jacobs*(*f*) was distinguished in *Marriott* v. *Chamberlain*, and was also said by Cotton, L.J., who decided it(*g*), to have been "somewhat misunderstood"(*h*).

(*y*) Williamson v. Merrill (1905) 5 O.W.R. 64.

(*z*) 17 Q.B.D., at pp. 163, 164, 165.

(*a*) 1 Keen, 341.

(*b*) 39 Ch. D. 693.

(*c*) W.N. 1881, p. 165.

(*d*) (1899) 2 Q.B. 590.

(*e*) 20 Ch. D. 519.

(*f*) 3 Ex. D. 335.

(*g*) See Atty.-Genl. v. Gaskill, at p. 529.

(*h*) *Per* Falconbridge, C.J., in Williamson v. Merrill (1904) 4 O.W.R. 528.

Examination of the officers or agents of newspaper publishing companies.

The question as to who are officers or agents of newspaper publishing companies, and as such examinable for discovery, has been determined in a number of cases. In an action for libel against the publishers of the Toronto *Globe*, Osler, J., held that H., as the assistant or sub-editor of the defendants, was an officer of the company examinable for the purpose of discovery under 42 Vict. c. 15, s. 7 (O.) and the then Rule 227, O.J.A.; and (*semble*) that a person who has ceased to be an officer of a corportion could not be so examined, unless the matters in respect of which he was sought to be examined occurred while he was such officer(*i*).

There is no power under the Ontario Rule 439 (a), as substituted by Rule 1250 for the previous Rule 439 (1), to make an order for the examination for discovery of a former officer or servant of a corporation for discovery, *e.g.*, a reporter in the defendants' employment, at the time the action was brought, who wrote the article complained of(*j*).

A mere writer on a newspaper not examinable.

A writer on a newspaper, not in the position of a sub-editor, is not an officer of the company, and not examinable for discovery. Where, therefore, in an action against the publishers of the *Mail* newspaper, of Toronto, for an alleged libel contained in an article written by a member of the staff, who procured special information therefor under the supervision of the managing editor, and in which action the defendants pleaded justification, it was held on appeal by Boyd, C., that the writer was not in the position of a sub-editor, nor could he be called an officer of the company, and that he was not examinable for discovery; and that no sufficient foundation was laid for his examination, for it did not appear that he could give information of any facts, but merely that he could indicate where to procure evidence of the facts in dispute upon the plea of justification(*k*).

(*i*) Maitland v. Globe Printing Co. (1883) 9 O.P.R. 370.

(*j*) Cantin v. News Publishing Co., 8 O.L.R. (1904) 531.

(*k*) Murray *et al.* v. Mail Printing Co. (1892) 14 O.P.R. 405.

Under the present Ontario Rule 439(a) (1), the examination of an officer of a corporation shall not be used as evidence at the trial.

Rules as to privileged evidence in actions of defamation.

In actions of defamation, as in other cases, the rules as to privilege in evidence and the production and inspection of documents prevail. In libel more particularly these rules are of importance when discovery is sought as to publication, as to the authorship of defamatory articles and communications in newspapers, and as to the names of the proprietors, printers and publishers of such newspapers.

Self-criminating answers.

The publication of a libel being a crime the defendant may, except on a criminal prosecution for libel(*l*), and, in Ontario, in a civil action for damages(*m*), refuse to answer any question relating to the publication which may tend to criminate him(*n*). But this is no ground for striking out or disallowing interrogatories. These may be administered, but must be objected to in the sworn answers of the person interrogated as in the case of other objectionable questions(*o*).

Scope of the rule against self-incrimination.

The privilege as to incrimination covers questions indirectly as well as those directly incriminating. In an action for libel against a husband as the writer of libellous articles, and as editor of a newspaper in which they were printed, and against his wife as owner and publisher of the newspaper, the husband, on examination after issue joined, refused to answer questions as to the ownership of the newspaper on the ground that his answers

(*l*) The Canada Evidence Act, R.S.C. 1906, c. 145, s. 5.

(*m*) 4 Edw. 7, c. 10, s. 21(O.).

(*n*) Lamb v. Munster (1883) 10 Q.B.D. 110; 52 L.J.Q.B. 46; 47 L.T. 442; 31 W.R. 117; *per* Eldon, L.C., in Paxton v. Douglas (1812) 19 Ves. 225, at p. 227; Carter v. Leeds Daily News Co. *et al.* (1876) W.N. 11; 20 Sol. J. 218; 60 L.T. Notes, 196; 1 Charley, 101; Maloney v. Bartley (1812) 3 Camp. 210; D'Ivry v. World Newspaper Co. (1897) 17 O.P.R. 387; the Ontario cases *infra;* Power v. Ellis (1881) 6 S.C.R. 1.

(*o*) Fisher v. Owen (1878) 8 Ch. D. 645; 47 L.J. 681; Allhusen v. Labouchere (1878) 3 Q.B.D. 654; 47 L.J. Ch. D. 819, overruling, or at least disapproving, Atherley v. Harvey (1877) 2 Q.B.D. 524; 46 L.J. 518.

might tend to expose his wife to a criminal prosecution for publication of the libels, and the wife refused to answer questions as to the authorship of the newspaper articles in question, and as to the editing of the newspaper, on the like grounds as to her husband. It was held (*per* Galt, J.), on appeal from the Master in Chambers, who had decided that the privilege of the witness extended no further than a refusal to answer questions which might criminate one or the other, that the privilege was based not merely on the fact that answers so given might, in other proceedings, be used as admissions against the party giving them, but also on the danger of a criminal prosecution which the witness honestly and justifiably apprehended his answer might expose him to; and that it extended to cases where the danger so apprehended was the criminal prosecution of the wife or husband of the witness(*p*).

When claim of privilege may be made.

The claim of privilege may be made either on the examination for discovery, or at a later stage in the proceedings; and where a defendant, on his examination for discovery, refused, without assigning any reason, to answer as to the authorship of the libel, he was held entitled, on a motion to commit for not answering, to claim privilege on the ground that the answer might tend to criminate him(*q*).

Privilege not confined to answers directly criminating.

And as the privilege is not confined to answers directly criminating, the defendant may, at the outset or at any stage of his examination, refuse to give answers which might lead up to questions and answers of a criminating character. In an action of libel and slander the plaintiff alleged that the defendant had communicated to several persons the contents of a letter, received from another person, in which the plaintiff was accused of larceny, etc. Upon an examination for discovery the defendant refused to say whether he had received any letter from the person named, or to answer any question in relation to such letter or its contents, for the reason that it might criminate him to do

(*p*) Millette v. Little (1884) 10 O.P.R. 265. See, also, Fisher v. Owen (1878) 8 Ch. D. 645; Allhusen v. Labouchere (1878) 3 Q.B.D. 654 (C.A.); Alabaster v. Harness, 70 L.T. 375; Power v. Ellis (1881) 6 S.C.R. 1.

(*q*) Hall v. Gowanlock (1888) 12 O.P.R. 604.

so. Upon a motion to commit for refusing to answer these question, it was held (*per* Boyd, C.), that the reason given was sufficient to privilege the defendant from answering; and, although it was not the receipt of the letter, but the publication, that would make the offence, he was entitled to object to the line of enquiry at the outset(*r*).

Privilege in actions under the Canada Evidence Act (R.S.C. 1906, c. 145).

In another part of his judgment, in the above case, the learned Chancellor seemed to think that section 5 of the Canada Evidence Act, 1893(*s*), which had then been passed but was not in force, would, when it came into force, supersede the privilege then existing in cases of this kind. Section 5 of the Act, which became law July 1, 1893, enacted in part, that "no person shall be excused from answering any question on the ground that the answer may tend to criminate him." The defendant having been again ordered by the Master in Chambers, upon the application of the plaintiff, to attend for examination and answer the questions referred to, appealed against the order to the same judge (Boyd, C.) who allowed the appeal. He held, that the Ontario Evidence Act(*t*) limited the scope of all preliminary examinations for discovery or otherwise in civil actions, following *Jones* v. *Gallon*(*u*); that it had not been affected by section 5 of the Canada Evidence Act, which, by necessary constitutional limitations as well as by express declaration(*v*), applied only to proceedings respecting which the Parliament of Canada had jurisdiction; that the language used in the previous decision (*supra*) was too broadly expressed in the absence of concurrent Ontario legislation; and, therefore, that a defendant upon his examination for discovery, in an action for defamation, could not, even since the coming into force of the Canada Evidence Act, be compelled to answer questions which might tend to criminate him(*x*).

(*r*) Weiser v. Heintzman (No. 1) (1893) 15 O.P.R. 258.

(*s*) 56 Vict. c. 31 (D.), now R.S.C. 1906, c. 145, s. 5.

(*t*) R.S.O. 1887, c. 61, s. 5, now R.S.O. 1897, c. 73, s. 5.

(*u*) (1881) 9 O.P.R. 296.

(*v*) R.S.C. 1906, c. 145, s. 2.

(*x*) Weiser v. Heintzman (No. 2) (1893) 15 O.P.R. 407.

Jones v. Gallon (1881).

Jones v. *Gallon*(*y*), above referred to, was an action for breach of promise of marriage, in which it was held (*per* Osler, J.) that, as the law stood at that time, neither of the parties to an action for breach of promise of marriage could be called as a witness by the opposite party; that interrogatories could no longer be administered in such an action; and that discovery by means of an oral examination under R.S.O. 1877, c. 50, s. 156, *et seq.*, which was substituted for the old practice of administering interrogatories, must be limited to those cases in which the party to be examined was compellable to give evidence by or on behalf of the opposite party, and hence did not apply to actions for breach of promise of marriage(*z*).

The privilege of newspaper publishing companies and their officers.

The privilege as to self-crimination extends to newspaper publishing companies and their officers, and to affidavits of documents as well as examinations for discovery, but the privilege must be claimed under oath, and the belief of the party must appear to be well founded. In an action for libel against the *World* newspaper company of Toronto and its manager, the manager, in the affidavit on production of documents, objected to produce the file of the *World*, and all copies of the newspaper containing the statements complained of, on the ground that they were privileged, and, if produced, might subject the company, its manager, or some one or more of their officers or members, to a criminal prosecution. A motion for an order for a better affidavit, upon the ground that the documents referred to were not privileged and should be produced, was dismissed by an Official Referee, sitting for the Master in Chambers, and his order was affirmed by Meredith, J., in Chambers, by the Divisional Court, and by the Court of Appeal for Ontario. The last-named court held, in effect, that a person is protected against answering any question that has a direct tendency to criminate him, or that forms one step towards doing so; but any such per-

(*y*) (1881) 9 O.P.R. 296.

(*z*) The Act 45 Vict. c. 10(O.), which was assented to March 10, 1882, amended the law in this respect so as to make each party to an action for breach of promise competent and compellable to give evidence by or on behalf of the opposite party.

son or any officer of a corporation, who is interrogated on the point, must pledge his oath to his belief that such would or might be the effect of his answer, and it must appear that such belief is likely to be well founded; that the Ontario Evidence Act(*a*) embodied the existing law as to the protection of a witness against answering questions tending to criminate, and included the case of a party examined as a witness, or for the purpose of discovery; and that in regard to affidavits of documents, the same privilege existed as in regard to questions put to a witness or party. The proposition, that a corporation is not liable to an indictment for libel, was said to be so doubtful that it would not be proper to compel a newspaper publishing corporation to make production of documents on oath which might tend to subject them to a criminal prosecution—citing *The Pharmaceutical Society* v. *The London and Provincial Supply Association*, 5 App. Cas. 857(*b*).

4 Edw. VII., c. 10, s. 21 (O.), compelling answers to incriminating questions.

Until the passage of the Ontario enactment, 4 Edw. VII., c. 10, s. 21, the old common law principle against self-crimination, and the rules of evidence embodying it, prevailed in all the Provinces, as in fact they do still, except in Ontario, in civil actions for defamation, as well as in other cases. The Ontario Legislature, in 1904, created an exception by repealing section 5 of the Provincial Evidence Act(*d*), which was directed against questions tending to criminate witnesses, and by substituting the following: "No person shall be excused from answering any question upon the ground that the answer to such question may tend

(*a*) R.S.O. 1897, c. 73, s. 5.

(*b*) D'Ivry v. World Newspaper Co. of Toronto *et al.* (1897) 17 O.P.R. 387. Section 5 of the Ontario Evidence Act, R.S.O. 1897, c. 73, under which this decision was given, was subsequently amended by 59 Vict. c. 18, s. 6(O.), to read as follows:—"Subject to section 9 of this Act, nothing herein contained shall render any person compellable to answer any question tending to subject him to criminal proceedings, or to subject him to prosecution for any penalty." By 4 Edw. 7, c. 10, s. 21(O.), the whole section was repealed and a new section (*infra*) substituted, under which a person is not excused from answering questions tending to criminate.

(*d*) R.S.O. 1897, c. 73.

to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person: Provided, however, that if with respect to any question the witness objects to answer upon the ground that his answers may tend to criminate him, and if but for this section the witness would therefore have been excused from answering such question, then although the witness shall be compelled to answer, yet the answer so given shall not be used or receivable in evidence against him on the trial of any proceeding under any Act of the Legislature of Ontario"(*e*).

A similar rule under the Canada Evidence Act.

This enactment is, in effect, the same as section 5 of the Canada Evidence Act(*f*), which compels answers to incriminating questions to a witness in criminal proceedings, and in all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction(*g*), and also answers to incriminating questions in proceedings under the Act of any Provincial Legislature(*h*). The latter enactment(*hh*) applies to the whole of Canada, the former to the Province of Ontario alone. The effect of both enactments is to abolish the common law rule against self-crimination in the witness box, but to protect the witness, should he claim protection, against his answers to incriminating questions. These answers, under the Ontario Act, "shall not be used or receivable in evidence against him on the trial of any proceeding under any Act of the Legislature of Ontario"(*i*); and, under the Dominion Act, "in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence"(*j*). But, in both cases, the answers of the witness, if they be self-criminating, may afterwards be used against him should he fail to claim protection against them at the time he is interrogated.

(*e*) 4 Edw. 7, c. 10, s. 21(O.).
(*f*) R.S.C. 1906, c. 145.
(*g*) *Ibid.*, s. 2.
(*h*) *Ibid.*, s. 5(2).
(*hh*) *Ibid.*, s. 5.
(*i*) 4 Edw. 7, c. 10, s. 21(O.).
(*j*) R.S.C. 1906, c. 145, s. 5(2).

Chambers v. Jaffray (1906).

In an action for newspaper libel in which one of the defendant proprietors of the newspaper refused, on his examination for discovery, to answer certain questions on the ground that the answers might tend to criminate him, and that he could not be compelled to answer such questions, it was held (*per* Mulock, C.J.), that the effect of the statute above mentioned(*k*), is to protect a witness, who claims the statutory protection, from the liability otherwise accruing to him from his incriminating answer, and puts an end to the privilege which such a witness formerly enjoyed(*l*). A party on his examination for discovery, it was said, is, so far as the question under discussion is concerned, in the same position as he would be in if he were being examined as a witness at the trial, and he is, therefore, not excused from answering any question that is properly put to him, upon the ground that the answer may tend to criminate him, and, if he objects to answer on that ground, his answer is within the protection of section 5 of the Evidence Act as enacted by 4 Edw. VII., c. 10, s. 21 (O.) (*supra*)(*m*). *Regina* v. *Fox et al.*(*n*) is referred to as governing the case.

At first sight the concluding part of the Ontario enactment(*o*) may seem to prevent any admission by the defendant as to publication being used in favour of a plaintiff suing for libel, in which the procedure is regulated, to a certain extent, by the Provincial Libel Act. But manifestly this is not the effect of the enactment, nor is it what was intended, either with respect to libel or any other cause of action. Libel is a common law and not a statutory wrong; and the part of the section preceding the proviso makes it plain that the defendant, in such an action, is not excused from answering questions as to publication which might make him liable in "a civil proceeding at the instance of . . any person."

(*k*) 4 Edw. 7, c. 10, s. 21(O.).

(*l*) Chambers v. Jaffray *et al.* (1906) 7 O.W.R. 371; affirmed by the Divisional Court (1906) 8 O.W.R. 26.

(*m*) *Ibid.*

(*n*) (1898-99) 18 O.P.R. 343.

(*o*) 4 Edw. 7, c. 10, s. 21.

Some other enactments affecting incriminating questions.

There are some other provisions of the Canada Evidence Act(*p*) which may be noticed in this connection. Besides being applicable, as we have seen, to all criminal proceedings, and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction(*q*), it makes every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, a competent witness, whether the person so charged is charged solely or jointly with any other person(*r*). The laws of evidence of the Provinces make every person, with certain well-known exceptions, a compellable as well as a competent witness. Libel as a civil wrong being within the jurisdiction of the Provinces, the Canada Evidence Act has no application in actions for damages, which, with respect to the rules of evidence and procedure generally, are governed by the Provincial laws(*s*). Libel as an indictable offence, however, being within the jurisdiction of the Dominion, the Canada Evidence Act not only applies to the procedure on a criminal prosecution for the offence, but, in the following enactment, it also provides expressly for the application of the Provincial laws of evidence on such prosecutions wherever these are not excluded by the Act itself: "In all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the Province in which such proceedings are taken, including the laws of proof of service of any warrant, summons, subpœna, or other document, shall, subject to the provisions of this and other Acts of the Parliament of Canada, apply to such proceedings"(*t*).

When admissions of publication compelled.

Under this state of the law the publisher of a libel in every part of Canada, and every one concerned in its publication as

(*p*) R.S.C. 1906, c. 145.

(*q*) *Ibid.*, s. 2.

(*r*) *Ibid.*, s. 4.

(*s*) Weiser v. Heintzman (No. 2) (1893) 15 O.P.R. 407.

(*t*) Sec. 35. See Reg. v. Fox *et al.* (1898-99) 18 O.P.R. 343, which is discussed in Chambers v. Jaffray, *supra*, as to the meaning and construction of this section in an action in the High Court of Justice for Ontario for a penalty under the Alien Labour Act (R.S.C. 1906, c. 97).

defined by the Code(*u*), if he be a witness on his own behalf, or otherwise, on a prosecution for the offence, may be compelled to answer questions connecting him with the publication, and thereby obliged, unless he claims protection against self-incriminating answers, to disclose facts which may subject him to conviction. And if he be a defendant in a civil action for damages in the Province of Ontario, he may be obliged to go into the witness box as a witness on his adversary's behalf, and be there compelled to answer questions which may connect him with the publication, and thereby expose himself to an indictment, unless he objects to the questions and claims protection against the criminating character of his answers. He can no longer, as he once could, refuse to answer, and thereby escape criminal liability, so far as his own evidence is concerned, for the publication of the libel.

Privileged documents.

The general rules as to privilege in evidence are applicable to the protection from discovery of privileged documents(*v*); and, therefore, documents the production of which would tend to involve the party in a criminal charge are protected(*w*). But the grounds upon which the privilege is claimed must be properly stated. In an action for libel, the defendant, in his affidavit on production of documents, stated that he had in his possession the letter containing the alleged libel upon the plaintiff, but that he objected to produce it. "My ground for so doing," the affidavit continued, "is that the said letter is a privileged communication; and also that I am not bound to produce the same in view of the plaintiff's contention that it contains a libel, and therefore exposes me to a criminal charge." Upon a motion for a better affidavit and to compel production of the letter, the Master in Chambers, following *Webb* v. *East*(*x*), held, that the mere statement that the document was privileged was not sufficient; that the facts constituting the privilege should be set

(*u*) C.C. s. 318.

(*v*) Wadeer v. E. Indian Co., 2 Jur. N.S. 407; Clegg v. Edmonson, 22 Beav. 125; D'Ivry v. World Newspaper Co., p. 650, *ante*.

(*w*) *Sed quaere*, in Ontario, under s. 5 of Evidence Act as enacted by 4 Edw. 7, c. 10, s. 21(O.) *supra*. See, besides cases cited *supra*, Boyle v. Wiseman, 10 Ex. 647; Waters v. Earl of Shaftesbury, 14 W.R. 259.

(*x*) 5 Ex. D. 108.

out so that it might be seen whether or not it existed; that the document could not be protected by stating that the plaintiff contended it was libellous; and that the defendant would have to aver his belief that the production of the document would expose him to a criminal charge. An order was made for a better affidavit, and for production of the letter in question(*y*).

Communications between solicitor and client, etc.

So, also, all communications between a party and his solicitor, or other legal adviser or agent, made *ante* or *post litem motam*, or by or to the legal adviser in a professional capacity, are privileged(*z*); as well as all statements made by a person (who is afterwards a witness, or made for the purpose of being a witness) to a litigant and his solicitor in preparing his evidence(*zz*).

Rules governing inspection of documents.

The same rules that govern the production of documents are applicable where inspection is sought(*a*); and, where there is no right to discovery, there is no right to inspection of documents(*b*). Where the principal question is as to the handwriting of the libel, the defendant has been permitted, under a judge's order, to inspect the libel set out in the plaintiff's pleading and to take copies of it photographically or otherwise(*c*). Inspection of plaintiff's books was refused in support of justification of a libel imputing insolvency to a company(*d*); and inspection was also refused of accounts furnished by plaintiff of moneys received by him, etc., while in defendant's service, where a charge of dishonesty against plaintiff in such service was justified(*e*).

(*y*) Bromley v. Graham (1886) 11 O.P.R. 451. See, also, Gardner v. Irwin, 4 Ex. D. 49; Roberts v. Oppenheim, 26 Ch. D. 724.

(*z*) Minet v. Morgan, L.R. 8 Chy. 367; Greenough v. Gaskill, 1 Myl. & K. 98; Reid v. Langlois, 1 Mac. & G. 627; 19 L.J. Chy. 337; Proctor v. Smiles *et al.*, 55 L.J.Q.B.D. 467; 2 T.L.R. 474; *per* Jessel, M.R., in Anderson v. British Bank of Columbia, 2 Chy. D. 644; 45 L.J. 450; Lowdon v. Blakey, 23 Q.B.D. 332.

(*zz*) Watson v. McEwan and Watson v. Jones (1905) A.C. 480; 74 L.J.P.C. 151; 93 L.T. 489—H.L.

(*a*) Clegg v. Edmonson, 22 Beav. 125.

(*b*) Central News (Limited) v. Eastern Tel. Co., 28 Sol. Jour. 390.

(*c*) Davey v. Pemberton, 11 C.B. (N.S.) 628.

(*d*) Metropolitan Saloon Omnibus Co. v. Hawkins, 4 H. & N. 146.

(*e*) Collins v. Yates *et al.*, 27 L.J. Ex. 150.

CHAPTER XXXIII.

INTERROGATORIES.

Interrogatories displaced by oral examinations for discovery.

Under the rules of the Judicature Acts, and also under the former system of practice in some of the Provinces, oral examinations for discovery took the place of written interrogatories, except in the case of interrogatories under a commission. These latter are retained in Ontario and several of the other Provinces. It has been held, in Ontario, that it is not proper to apply to strike out interrogatories for impertinence. The proper course is for the witness to demur to the impertinent questions(*a*). And where interrogatories are administered under a foreign commission in the Master's office, the rules of evidence as to leading questions at a trial cannot be strictly applied(*b*).

The rule as to interrogatories.

In view of the general change of procedure, it will only be necessary to refer to interrogatories in so far as they affect particulars and examinations for discovery. The English decisions, with respect to delivering interrogatories, are useful in determining what particulars may be demanded. The rule, as laid down by Lord Esher, M.R.(*c*), is, that the interrogatory must be answered, if the answer will disclose anything which can be fairly said to be material to enable the party interrogating either to maintain his own case or to destroy the case of his adversary.

Interrogatories by plaintiff.

The interrogatories must, therefore, be relevant to the matters in issue; irrelevant questions need not be answered. The defendant must answer whether the words were intended to apply to the plaintiff, but not whether they were to apply to any other

(*a*) Williams v. Corby (1879) 8 O.P.R. 83; Lockwood v. Bew (1884) 10 O.P.R. 655. See, also, Swabey v. Dovey, 55 L.J. Chy. 631.

(*b*) Lockwood v. Bew, *supra*.

(*c*) In Hennessy v. Wright (1888) 24 Q.B.D., at p. 447.

person(*d*). If he denies that he wrote the libel he may be asked, for the purpose of comparing the handwriting, whether he wrote certain other writings produced(*e*); and, on an issue of privileged or not privileged, he may be interrogated for the purpose of proving or disproving malice(*f*); but not whether he has been indemnified against the consequences of the libel(*g*). Where he is the publisher or proprietor of a newspaper, it was once held that he might be asked as to the number of published copies of the issue containing the libel sued for(*h*); but this decision was overruled by the Court of Appeal in *Whittaker* v. *Scarborough Post Newspaper Co.*(*i*), in which it was held, that it was sufficient for the defendant to say that a considerable number of copies of the issue were published and circulated(*j*). Neither, in certain cases, may the defendant be asked whether he endeavoured to verify the libel before publishing it(*k*); nor, where he admits publication, need he answer as to the name of the author of the libel, unless the identity of the author is a fact material to an issue raised in the case(*l*); nor, in certain cases, as to the names of his informants(*m*); nor as to testing their information(*n*); nor (where the defence to an action for a libel contained in a newspaper report was that it was an accurate report of certain public proceedings and fair comment thereon) as to the names of persons on whose information the report was based(*o*); nor as to the possession or contents of the manuscript

(*d*) Wilton v. Brignall (1875) W.N. 239; 20 Sol. J. 121; 60 L.T. Notes, 104; 1 Charley, 105.

(*e*) Jones v. Richards (1885) 15 Q.B.D. 439. See, also, Wilson v. Thornbury (1874) 17 Eq. 517.

(*f*) Cooper v. Blackmore (1886) 2 T.L.R. 746; Martin *et ux.* v. Trustees of the British Museum and Thompson (1893) 10 L.T.R. 215. But see Davis v. Gray, 30 L.T. (N.S.) 418.

(*g*) Tupling v. Ward *et al.*, 30 L.J. Ex. 222.

(*h*) Parnell v. Walter (1890) 24 Q.B.D. 441, which was doubted in Rumney v. Wright (1890) 61 L.J.Q.B. 149.

(*i*) (1896) 2 Q.B. 148.

(*j*) See Massey-Harris Co. v. De Laval Separator Co., 11 O.L.R. (1906) 591, noted in chapter on Discovery, etc.

(*k*) Ridgway v. Smith (1890) 6 T.L.R. 275.

(*l*) Gibson v. Evans (1889) 23 Q.B.D. 384; Hennessy v. Wright (No. 2) (1888) 36 W.R., at p. 880.

(*m*) Tangyes v. Inman & Co. (1889) 88 L.T. Jour. 32; Parnell v. Walter, *supra*.

(*n*) Mackenzie v. Steinkopf (1890) 6 T.L.R. 141; Parnell v. Walter, *supra*.

(*o*) Hennessy v. Wright (No. 2) (1888) 36 W.R. 879.

of the libel(*p*); and, where he admits such possession, the court will not order inspection of the manuscript(*q*).

The later decisions of the courts have modified considerably the rules laid down, in some of the cases *supra*, as to a defendant's sources of information, and as to his verifying his statements before publication. In an action for libel against a trade protection society, in which privilege was pleaded, it was held (following *Elliott* v. *Garrett* (1902) 1 K.B. 870), that an interrogatory asking what inquiries defendants made as to the truth of the statements complained of, before publishing them, and from whom they obtained the information on which they relied in publishing the statements, was admissible; but not, in the same case, an oppressive interrogatory requiring defendants, by reference to their books, or otherwise, to give the names of the companies, firms and persons to whom a certain publication of the defendants, containing the statements complained of, had been supplied, or shewn, by or through the defendants or their agents(*a*). And where in an action for libel, in which the defence of privilege was set up, the plaintiff sought to administer to the defendants an interrogatory inquiring what information the defendants received which induced them to make the statements complained of, and from whom the information was derived, the court, being of opinion from correspondence which had passed between the parties that the interrogatory as framed was not put *bonâ fide* for the purposes of the pending action, but in order to enable the plaintiff to bring an action against the person or persons from whom the information was obtained, disallowed that part of the interrogatory(*b*). According to the general rule of practice in actions of libel against the publishers of newspapers, in respect of matter published therein, an interrogatory asking from whom the information was obtained on which the publishers relied for the expression of opinion in the article complained of is,

(*p*) Hennessy v. Wright (1888) 57 L.J.Q.B. 594; British and Foreign Contract Co. v. Wright (1884) 32 W.R. 413.

(*q*) Hope v. Brash (1897) 2 Q.B. 188.

(*a*) White & Co. v. Credit Reform Association and Credit Index (1895) 1 K.B. 653 (C.A.).

(*b*) Edmondson v. Birch & Co. (1905) 2 K.B. 523 (C.A.).

in the absence of special circumstances, inadmissible, and the defendants ought not to be compelled to answer it(*c*).

Interrogatories by defendant.

The plaintiff, on the other hand, may be interrogated as to matters referred to in particulars furnished him which are to be used as evidence in mitigation of damages(*r*); or as to any material fact upon the issue on a plea of justification(*s*); but not as to whether similar charges had not been made against him previously in a newspaper(*t*); or as to whether he had noticed or contradicted such charges(*u*).

"Fishing interrogatories."

What are described by Lord Esher, M.R., in *Hennessy* v. *Wright* (*v*), as "fishing interrogatories" are decidely objectionable, especially in support of a plea of justification(*w*). A "fishing" interrogatory is one put in the hope of finding out something of which the party interrogating has no present knowledge, *e.g.*, where the object of the question put to the plaintiff was to shew that, if he had not used the blasphemous words which he was charged with using, he had used language of much the same nature(*x*).

Interrogatories as to written documents.

Interrogatories are not permissible as to the contents of written documents not produced for the inspection of the party interrogated, unless he has admitted that such documents have been lost or destroyed(*y*); nor may such documents be contradicted

(*c*) Plymouth Mutual Co-operative and Industrial Society v. Traders Publishing Association (1906) 1 K.B. 403 (C.A.). See remarks of Britton, J., as to these cases, at p. 642, *ante*.

(*r*) Scaife v. Kemp (1892) 2 Q.B. 319.

(*s*) Marriott v. Chamberlain (1886) 17 Q.B.D. (C.A.) 154; 55 L.J.Q.B. 448; 54 L.T. 714; 34 W.R. 783.

(*t*) Pankhurst v. Hamilton (1886) 2 T.L.R. 682.

(*u*) *Ibid.*

(*v*) (1888) L.R. 24 Q.B.D., at p. 448.

(*w*) Gourley v. Plimsoll (1873) L.R. 8 C.P. 362; 42 L.J.C.P. 121; 28 L.T. 598; 21 W.R. 683; Buchanan v. Taylor (1876) W.N. 73; 20 Sol. J. 298; 60 L.T. Notes 268.

(*x*) Pankhurst v. Hamilton, *supra*.

(*y*) Dalrymple v. Leslie (1881) 8 Q.B.D. 5; Stein v. Tabor, 31 L.T. 444; Fitzgibbon v. Greer, 9 Ir. C.L.R. 294.

by interrogatories for that purpose(). "I do not think," said Bowen, L.J., "that any law or authority exists by which a person can be compelled to set out his imperfect recollection of a document not produced for his inspection, which is not suggested to be lost or beyond the jurisdiction of the court, or which, for anything that appears to the contrary, might even be in the possession of the interrogating party"(*a*).

Justification by interrogatories or evidence under plea of fair comment.

Where the defendants had not justified the libel complained of, but pleaded fair comment, and then administered interrogatories as to the truth of the libel, the interrogatories, which would have been admissible under a plea of justification, were ordered to be struck out(*b*). On the other hand, a defendant, who, without pleading justification, alleged that the libel in question was a fair comment on matters of public interest, was held entitled to shew that the matters commented upon were true(*c*); but this decision was not followed, and was otherwise explained, if actually dissented from, in *Brown* v. *Moyer*(*d*).

Interrogatories which might require incriminating answers.

Under the common law rule, which is part of the law of the Provinces, Ontario excepted(*e*), no person is obliged to answer questions which may tend to criminate him. But, as already stated, this does not prevent the administering of interrogatories which, if answered, might be incriminating. Nor is it any ground for striking out or disallowing such interrogatories. These may be properly objected to, in the sworn answers of the person interrogated, in the same way as other interrogatories which are open to objection. See authorities on these points in the paragraph on self-criminating answers in the chapter on Discovery and Production and Inspection of Documents.

(*z*) Moor v. Roberts, 3 C.B. (N.S.) 671; 26 L.J.C.P. 246.
(*a*) *Per* Bowen, L.J., in Dalrymple v. Leslie, *supra*.
(*b*) Hindlip v. Mudford (1890) 6 T.L.R. 367.
(*c*) Wills v. Carman (1889) 17 O.R. 223.
(*d*) (1893) 23 O.R. 222; (1893) 20 O.A.R. 509.
(*e*) See 4 Edw. 7, c. 10, s. 21(O.).

CHAPTER XXXIV.

The Trial: Duties of Judge and Jury.

Actions of defamation must be tried by a jury.

Actions of defamation shall be tried by a jury, unless the parties in person, or by their solicitors or counsel, waive such trial(*a*); and it shall be sufficient, in some of the Provinces, if ten of the jurors empanelled for the trial or assessment shall agree, instead of twelve(*b*). It is not necessary, therefore, to file and serve a jury notice in these cases(*c*); and the court cannot dispense with the jury, except by consent of both parties(*d*).

Exceptions to the rule.

An action for a trade libel does not come within the provision in the Judicature Acts as to jury trials, so as to be triable only by a jury, unless by consent(*e*). It is for the judge to say whether the words complained of as libellous are capable of being libellous, and, if they are not, he may withdraw the case from the jury and give judgment for the defendant(*f*). Should he leave the case to the jury, their verdict, either in slander or libel, must be a general one; they cannot be required to answer questions as in some other cases(*g*). Although upon a motion for a new

(*a*) O.J.A. s. 102; N.B.J.A., 6 Edw. 7, c. 37, s. 27; N.S.J.A., R. 42(1)(*a*); R.S.M. 1902; c. 40, s. 59. In British Columbia either party can give notice for trial by jury: S.C.R. 1890, O. 36, R. 329.

(*b*) O.J.A. s. 108.

(*c*) Puterbaugh v. Gold Medal Manufacturing Co., 3 O.L.R. (1902) 259.

(*d*) Adair v. Wade (1885) 9 O.R. 15, so decided with respect to the action of seduction, which, like libel and slander, comes within the class of actions to be tried only by a jury.

(*e*) Dickerson *et al.* v. Radcliffe *et al.* (1897) 17 O.P.R. 418.

(*f*) McQuire v. Western Morning News Co., (1903) 2 K.B. 100; 88 L.T. 757; Macdonald v. Mail Printing and Publishing Co., 2 O.L.R. (1901) 278.

(*g*) O.J.A. s. 112; N.B.J.A. 6 Edw. 7, c. 37, ss. 31, 32.

trial final judgment may, under certain circumstances, be given by the court(*h*), it has been held, that this rule does not apply where the question was, whether the report of a trial was a fair one or not—that this was for the jury and should not be withdrawn from them(*i*). Where, however, the action was for a libellous criticism of a play, it was held, that, if the alleged libel only amounted to a fair comment, it was the duty of the trial judge to withdraw the case from the jury(*j*).

Duties of judge and jury at the trial.

With respect to some questions the respective duties of a judge and jury, at the trial, are the same in both slander and libel, while in libel they are also subject to a series of statutory rules which have been adopted in all the Provinces.

In slander.

In slander the judge has to say whether the words are or are not actionable *per se*(*k*); whether they can bear the meaning assigned them in the innuendo(*l*); whether they are actionable without that meaning, or, are reasonably capable of any defamatory meaning(*m*); whether there is any evidence of the publication of the words, or that they referred to the plaintiff; whether, when pleaded, the statute of limitations applies; whether the matter complained of is capable of being reasonably inferred from certain antecedent facts(*n*); whether the occasion of publication is one of absolute or qualified privilege; and, in the latter case, whether there is any evidence of express malice to go to the

(*h*) Rule 615, O.J.A.

(*i*) Milissich v. Lloyds (C.A.) (1877) 46 L.J.C.P. 404; 36 L.T. 423; 13 Cox C.C. 575.

(*j*) McQuire v. Western Morning News Co., *supra*.

(*k*) *Per* Lord Abinger, C.B., in Reeves v. Templar, 2 Jur. 137.

(*l*) Holliday v. Ontario Farmers' Mutual Insurance Co., *infra.*; Kelly v. Journal Printing Co. (1905) 5 O.W.R., at pp. 84-85; Sturt v. Blagg 10 Q.B. 908, followed by McCully, J., in Kerr v. Davison (1873) 9 N.S.R. (3 N.S.D.) 354; Capital and Counties Bank v. Henty *et al.*, 7 App. Cas. 744, 782; 52 L.J.Q.B.D. 234, *per* Lord Selborne, L.C.; 52 L.J. 254, *per* Lord Blackburn.

(*m*) Hunt v. Goodlake, 43 L.J.C.P. 54; 29 L.T. 472; Mulligan v. Cole *et al.*, L.R. 10 Q.B. 549; 44 L.J.Q.B. 153; 33 L.T. 12.

(*n*) Lefroy v. Burnside (No. 2), L.R. Ir. 4 Ex. D. 566.

jury(*o*); whether any particular matter is of public interest(*p*); whether any special damage claimed is, or is not, too remote.

The jury have to say whether the words, when left to them, are in fact slanderous(*q*), or whether a slanderous meaning (held to be capable of being inferred) ought to be inferred from certain antecedent facts. When the facts relied upon for a qualified privilege are disputed, the jury must find the facts for the information of the judge, who must then determine the question of privilege(*r*). And in this connection they must find whether or not there was express malice. They must also decide as to the damages.

In libel.

In libel the duties of the judge and jury, respectively, are the same as in slander, in all the particulars mentioned; but besides these, the jury, in libel, must also decide as to the fairness of a report of the proceedings of a court of justice, or of a public meeting(*s*).

The statutory rules.

Both judge and jury are also subject to the statutory rules referred to, which, originally applied in England only in criminal prosecutions for libel, have been made applicable by legislation in Canada to libel in both civil and criminal cases. These are the rules contained in the following enactment, which, taken from the Ontario Act respecting actions of libel and slander, is the same in similar Acts in the other Provinces.

(*o*) Somerville v. Hawkins, 10 C.B. 583; 20 L.J.C.P. 131; 15 Jur. 450; Taylor v. Thompson, 16 Q.B. 308; 15 Jur. 746; 20 L.J.Q.B. 313; Harris v. Thompson, 13 C.B. 333; Beatson v. Skene, 5 H. & N. 838; 6 Jur. (N.S.) 780; 2 L.T. 378.

(*p*) Graham v. Pelland (1896) Q.O.R. 5 (Q.B.) 196, affirming 8 S.C. 348; *per* Lord Coleridge, C.J., in Weldon v. Johnson, Times, 27 May, 1884.

(*q*) Holliday v. Ontario Farmers' Mutual Insurance Co., *infra;* Kelly v. Journal Printing Co., *supra;* Sturt v. Blagg, *supra*, followed by McCully,J., in Kerr v. Davison, *supra.*

(*r*) Beatson v. Skene, *supra.*

(*s*) *Per* Cockburn, L.C.J., in Risk Allah Bey v. Whitehurst *et al.*, 18 L.T. (N.S.) 615; Street v. Licensed Victuallers Society, 22 W.R. 553; Milissich v. Lloyds, *supra.*

Jury may give a general verdict on the whole matter in issue; but shall not find defendant guilty on mere proof of publication.

On the trial of an action for the making or publishing a libel, on the defence of not guilty, the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue in the action, and shall not be required or directed by the court or judge, before whom the action is tried, to find the defendant guilty merely on the proof of publication by the defendant of the paper charged to be a libel, and of the sense ascribed to the same in the action;

Directions to jury who may find special verdict.

but the court or judge, before whom the trial is had, shall, according to the discretion of the court or judge, give the opinion and directions of the court or judge to the jury on the matter in issue, as in other cases;

Motion in arrest of judgment.

and the jury may on such issue find a special verdict, if they think fit so to do, and the defendant, if found guilty, may move in arrest of judgment on such ground and in such manner as he might have moved before the passing of this Act(*t*). The same procedure is provided for in section 956 of the Code.

Fox's Libel Act (32 Geo. III, c. 60 (1792)).

The original of these enactments, known as Fox's Libel Act(*u*), was passed to "remove doubts respecting the functions of juries in cases of libel" as a criminal offence. It became the practice in England, however, after the decisions in *Parmiter* v. *Coupland*(*v*) and *Baylis* v. *Lawrence*(*w*), for the court to define or explain the legal meaning of a libel, and then to leave it to the jury to say whether the defamatory matter in question was in fact libellous. Wherever in this country the English common law prevailed, the enactments in Fox's Act were made applicable by legislation to both civil and criminal cases, and the

(*t*) R.S.O. 1897, c. 68, s. 2. See the corresponding enactments in C.S. N.B. 1903, c. 136, s. 9; R.S.M. 1902, c. 97, s. 12; R.S.B.C. 1897, c. 120, s. 11.

(*u*) 32 Geo. 3, c. 60 (1792).

(*v*) 6 M. & W. 105.

(*w*) 11 A. & E. 920.

practice of the courts otherwise in leaving the case to the jury has been the same as the English practice. The judge simply defines a libel, and the jury are asked to find whether the matter charged comes within the definition.

Misconceptions in regard to the Act.

For some reason or other, probably from a perversion of the history and results of the celebrated contest over the right to return a general verdict, which ended in Fox's Act, this enactment has given rise to a misconception as to the relative functions of the court and jury, namely, that the jury are the sole judges of the law as well as of the facts in all libel cases, civil and criminal. This misconception is based on the confusion of the right to determine the law with the right to render a general verdict, the jury not being the judges of the law, except incidentally as involved in the mixed determination of the law and fact by a general verdict. Prior to the passage of Fox's Act the practice was for the court to leave only two questions to the jury: First, did the accused publish the alleged libel? Secondly, did it bear the meaning assigned in the indictment or information? If these points were found against the defendant, the court then determined whether the matter charged was libellous or not. This was an anomalous procedure, as compared with the procedure in trials for other criminal offences, in which the jury gave a general verdict of guilty or not guilty upon the whole matter in issue. The law was amended for the express purpose of removing this anomaly. The court or judge may now give their or his "opinion and directions" as in all other cases, but the jury are entitled to find a general verdict of guilty or not guilty. In so doing, they may, as in other cases, ignore the "opinion and directions" of the court, in which event their verdict may sometimes be set aside(x). The jury may also find a special verdict on the facts, leaving the application of the law to the court; while the defendant has still the right of moving to arrest the judgment on any ground on which he might have moved before the Act was passed. It is plain, therefore, that the real object of the Legislature was to place trials for libels on the same footing with trials for other wrongs, and was not, as is sometimes supposed, to give the jury any greater power over the law of the case in

(x) See chapter on New Trial.

libel than they possessed in regard to any other wrong. The enactment, it will be noticed, is directed to the exact point in controversy before the passage of Fox's Act, namely, the right of the jury to render a general verdict on the whole issue, and not merely on the former issues as to publication and the innuendoes. But the right of the court to pass upon the questions of law arising either during the trial, or afterwards, is not taken away; on the contrary, it is specially retained by the provision that the judge may give the jury his "opinion and directions," as in other cases, and, in order that the verdict shall not be conclusive of the law against a defendant, by the further provision that the defendant shall have the same right, as he had previously, as to a motion in arrest of judgment. The claim that the jury are to be the judges of the law, in any partial sense, is thus intentionally and carefully excluded.

The weight of judicial authority.

The weight of judicial authority in England and the United States is in favour of this view. The statute was not, as was said in one case, intended to confine the matter in issue exclusively to the jury, without hearing the opinion of the judge, but to declare that they should be at liberty to exercise their own judgment upon the whole matter in issue, after receiving thereupon the opinion and directions of the judge(*y*). Libel, said another member of the court, is a question of law, and the judge is the judge of the law in libel, as in all other cases; the jury having the power of acting agreeably to his statement of the law or not. All that the statute does is to prevent the question from being left to the jury in the narrow way in which it was left before that time. Judges are, in express terms, directed to lay down the law, as in other cases(*z*). And, in another case, Best, C.J., said, that he did not admit that, even in criminal cases, the jury are the judges of the law. Before the statute, their province was merely to find whether or not the innuendoes were proved, and then it was for the judge to say whether or not the publication was a libel. The statute does not transfer to the jury the authority of the judge, but it merely provides that they

(*y*) *Per* Abbott, L.C.J., in Rex v. Burdett, 4 B. & Ald., at p. 183.
(*z*) *Per* Best, J., in the same case, at p. 131.

may find a general verdict(*a*). There is abundance of authority in the United States to the same effect(*b*).

Subject to statutory rules, the functions of judge and jury in libel actions the same as in other actions.

The respective functions of a judge and jury, therefore, in an action for libel, are in no way different from such functions in other actions, except for the statutory provision (*supra*) in favour of a defendant. It is the duty of the court to consider whether there is any reasonable evidence to go to the jury in support of the plaintiff's claim, and, if not, to dismiss the action. See *Ryder* v. *Wombwell* (1868), L.R. 4 Ex. at pp. 35-9(*c*). This is the rule in all the Provinces in which legislation, similar to the above, has been passed.

Where the defence is privilege, and there is no evidence of malice in fact.

In an action for libel against a mutual insurance company, by a former agent of the company, for the publication of an advertisement in several newspapers cautioning the public against "the false statements" of the plaintiff, that he was still defendants' agent, the principal defence was privilege, and there was no proof of malice in fact.

Opinion of Wilson, J.

Wilson, J., who delivered the judgment of the court directing a nonsuit and reversing the verdict at the trial, said: "What should, and what should not, be left to the jury in such a case is not quite clear. I presume the general rule must apply in this as in every other case, that it is for the judge to decide whether the evidence offered is admissible or not, and, if received, whether it is of such a character that it should be submitted to the jury. But where there is evidence received, and it is proper to be left to them, they alone decide upon its weight and effect. It is said in Taylor on Evidence, 6th ed., s. 33: 'When a question arises as

(*a*) Levy v. Milne, 12 Moore, 421; 4 Bing., 195.

(*b*) See United States v. Battiste, 2 Sumner (N.S.) 243, *per* Story, J.; Duffy v. The People (1863) 26 N.J. 592, *per* Selden, J.; and United States v. Greathouse (1863) 4 Sawyer (N.S.) 464, *per* Field, J.

(*c*) *Per* Meredith, J., in Macdonald v. Mail Printing Co. (1900) 32 O.R. 163. See, also, the remarks of Patterson, J.A., in Wills v. Carman (1888) 14 O.A.R. 656, at pp. 679-80.

to whether a *communication was privileged* or not, . . . the respective duties of the judge and jury seem to be as follows: First, the jury must determine, as a question of fact, whether the communication was made *bonâ fide*, and then if the fact be found in the affirmative, as it must be if the evidence be not sufficient to raise a probability that the communication was colourably made, the judge must decide, as a question of law, whether the occasion of the publication was such as to rebut the inference of malice. If, however, any doubt should exist as to whether or not the defendant had in some respect exceeded the limits of his privilege, and had made comments which might be regarded as evidence of actual malice, the opinion of the jury must be taken upon the effect of such evidence.' It is the last proposition of the section which is not, in my opinion, so plainly settled as it is stated. It is a difficult matter to determine the line accurately when the judge may and should, and when he should not, take the decision into his own power and withdraw the case from the jury''(*d*).

Who should decide question of privilege.

In some cases the existence of privilege depends upon the question whether or not an article complained of as a libel is a fair commentary on a work given to the public. In that case it is plain that before the judge can be called upon to decide, as a point of law, the question of privilege or no privilege, the facts upon which that point of law depends, if not admitted, must be found by the jury. Upon these facts, however, if there be no contradiction, if the evidence be all one way, if there be nothing to warrant a doubt as to whether the facts upon which the point of law depends exist or do not, then there can be nothing to leave to the jury, and the judge should decide this point of law as upon undisputed or admitted facts(*e*). When the evidence is left to the jury it is for them to say, considering the circumstances, whether the language employed is within the privilege claimed, or whether it is in excess of what the occasion justified; and, if in excess, they can properly draw the inference of malice(*f*).

(*d*) Holliday v. Ontario Farmers' Mutual Insurance Co. (1876) 38 U.C.Q.B. 76.

(*e*) *Per* Gwynne, J., in Tench v. Great Western Railway Co. (In Error and Appeal) (1873) 33 U.C.Q.B., at pp. 87-8.

(*f*) *Per* MacMahon, J., in Colvin v. McKay (1889) 17 O.R. 212.

When the judge may decide as to excess of privilege.

If the opinion expressed in the case last mentioned, as to the privilege being exceeded by the language employed, means that it is always a question for the jury, it is apparently not in accord with the views entertained by the Ontario Court of Error and Appeal in *Tench* v. *Great Western Railway Co.* (*infra*).

Opinions of Ontario Court of Error and Appeal. Hagarty, C.J.

"We must be careful," said Hagarty, C.J., in that case, "not to leave the vitally important doctrine of privilege wholly at the mercy of a jury. In the language of the Privy Council case(*g*): '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 protection which the law throws over privileged communications.' . . . In the emphatic language of that most learned personage, the late Mr. Justice Willes, in *Henwood* v. *Harrison*(*h*): 'It would be abolishing the law of privileged discussion, and deserting the duty of the court to decide upon this as upon every other question of law, if we were to hand over the decision of privilege or no privilege to the jury.' . . . In actions of libel, as in other cases where questions of fact, when they arise, are to be decided by the jury, it is for the court first to determine whether there is any evidence upon which a rational verdict for the affirmant can be founded. I fear that evil consequences must follow from leaving such a thing always to a jury. The logical result must be that, in a matter of some legal nicety, the point cannot safely be trusted to the judge, but must be left to the acumen of a jury. As in the case of the existence or non-existence of probable cause, where there is no dispute as to facts, the judge must decide the point. In many cases, as in a case like the present, the question is one of degree. A little more or a little less may turn the scale. The judge holds, as a matter of law, there was reasonable cause. In the libel suit he holds there was or there was not excess over the admitted privilege"(*i*).

(*g*) Laughton v. Bishop of Sodor and Man (1872) 21 W.R. 204.

(*h*) (1872) L.R. 7 C.P. 628.

(*i*) Tench v. Great Western Railway Co. (In Error and Appeal) (1873) 33 U.C.Q.B. 8, at pp. 28-9.

Wilson, J.

In the same case in which the above observations occur, other members of the court expressed similar opinions. Wilson, J., said, that it was for the court alone to decide whether a case of privilege has or has not been proved, and upon which a rational verdict for the affirmant can be founded, referring to Willes, J., in *Henwood* v. *Harrison* (*supra*)(*j*).

Spragge, C.

Spragge, C., said, that he agreed that it was the province of the judge to say whether the paper in question is within the rule of privileged communications, and also whether there was excess in the exercise of the privilege. If there be any evidence of express malice, it would be different(*l*).

Gwynne, J.

Gwynne, J., said it was for the judge to determine, as matter of law, whether the occasion of the publication was or was not privileged. But, granting this, it is upon the existence of certain facts that the question of law arises and depends. What these facts are, Willes, J., states in *Henwood* v. *Harrison*, quoting Parke, B., in *Toogood* v. *Spyring*(*m*): "Communications fairly warranted by any reasonable occasion or exigency, and honestly made, are protected for the common protection and welfare of society, and the law has not restricted the right to make them within any narrow limits." So that, as the learned judge points out, it must be assumed, admitted, or established, that the protection was *honestly* made before the question of privilege or no privilege can be decided by the judge, as is the case often where a question as to the existence of reasonable or probable cause arises.

Strong, V.C.

Strong, V.C., in the same case, said that the question whether what is proved to have been really done constitutes a privileged communication, is a question entirely for the judge at the trial

(*j*) *Ibid.*, at p. 33.
(*l*) *Ibid.*, at p. 27.
(*m*) 1 C. M. & R. 181.

to decide. And he quotes Erle, C.J., in *Whiteley* v. *Adams*(*n*), where he says: "Judges who have had, from time to time, to deal with questions as to whether the occasion justified the speaking or the writing of defamatory matter, have all felt great difficulty in defining what kind of social or moral duty, or what amount of interest, will afford a justification; but all are clear that it is a question for the judge to decide."

Blake, V.C.

Blake, V.C., who was a member of the court, said that the authorities seemed to lead clearly to the conclusion, that it is for the judge to say whether the communication complained of is privileged; and if the judge finds this point in favour of the defendant, it is his duty further to find whether the expressions are so far beyond what the occasion calls for as to raise a presumption of actual malice, and to say whether the privilege has been exercised within the limits afforded by the occasion; or, in other words, whether there has been any excess beyond the privilege in the mode of dealing with the communication. The learned Vice-Chancellor quotes the law as stated in *Whiteley* v. *Adams*, and also the rule as laid down in *Henwood* v. *Harrison*, at page 628, and referred to by Hagarty, C.J., *supra*, and adds: "The court will not infer malice: *Harrison* v. *Bush*, 5 E. & B. 344; and, where privilege exists, the burden of proof of actual malice rests upon the person who complains. If there is no evidence of such malice, it is the duty of the judge to direct a verdict for the defendant: *Somerville* v. *Hawkins*, 10 C.B. 583; *Spill* v. *Maule*, L.R. 4 Ex. 232; *McIntee* v. *McCullough* (1864) 2 Grant, E. & A. 390"(*o*).

When question of publication to be left to the jury.

The question as to when publication should be left to the jury, is discussed in *Crosskill* v. *Morning Herald Printing and Publishing Co.*(*p*), in which a new trial was moved for and refused on the ground that the trial judge had left that question to the jury.

Opinion of McDonald, J.

McDonald, J., who delivered the judgment of the court,

(*n*) 15 C.B.N.S. 418.

(*o*) See Tench v. Great Western Railway Co. (1873) 33 U.C.Q.B. 8, where the various opinions above referred to are expounded.

(*p*) (1883) 16 N.S.R. (4 R. & G.) 200.

cites many authorities in support of the trial judge's direction to the jury on that point, and as to the respective duties of judge and jury generally. "Even when a question of law," he says, "which is to be decided by the judge who tries a cause, depends upon doubtful or contradictory evidence, the question of fact ought to be submitted to the jury, and the legal decision should be the result of their finding upon the facts submitted: *Cooke et al.* v. *Wildes*, 5 El. & Bl. 328; Taylor on Evidence, 37 to 40; *Panter* v. *Williams*, 2 Q.B. 169; *Turner* v. *Ambler*, 10 Q.B. 252. Whether there is any evidence, is a question for the judge: *Hodges v. Ancrum*, 11 Ex. 216; but whether the evidence is sufficient is a question for the jury: *Carpenter's Company* v. *Hayward*, 1 Dougl. 375; Broom's Legal Maxims, 7th Am. Ed. 107." The learned judge also referred to *Johnson* v. *Hudson & Morgan*, 7 A. & E. 233; *Delacroix* v. *Thevenot*, 2 Stark. 63; *Reg.* v. *Lovett*, 9 C. & P. 462; *Fryer* v. *Gathercole*, 4 Ex. 262; *Chubb* v. *Flannagan*, 6 C. & P. 431.

The rule as stated in the above judgment, that when a question of law, which is to be decided by the trial judge, depends upon doubtful or contradictory evidence, the question of fact should be submitted to the jury and the judge's decision should follow their finding upon the facts, had been previously stated, on the same authorities, by the Supreme Court of Nova Scotia, in *Wright* v. *Morning Herald Printing and Publishing Co.*(*q*).

Publication of apology within a reasonable time.

Where in an action for libel published in a newspaper, an apology under the Provincial statute is pleaded, it is a question for the jury, and not for the judge, whether the publication of the apology took place within a reasonable time, the circumstances of the case, and the opportunities of the defendant to publish it, being considered(*r*).

Quebec cases.

In an action for defamation in the Province of Quebec, the

(*q*) (1881) 14 N.S.R. (2 R. & G.) 398.

(*r*) Cotton v. Beatty (1863) 13 U.C.C.P. 243. See remarks of Draper, C.J., in that case.

question whether the words spoken or written were spoken or written maliciously, is a question for the jury(*s*). But the question whether the occasion is such as to rebut the inference of malice, if the words were spoken in good faith, is one of law for the court, and the question whether *bonâ fides* existed is one of fact for the jury, and should be so submitted(*t*).

(*s*) Burns v. Goudie (1818) 1 R.L. (K.B.) 503.

(*t*) Poitivin v. Morgan (1866) L.C.J. 93, at p. 99; 1 L.C.L.J. (S.C.) 120.

CHAPTER XXXV.

The Evidence for Plaintiff.

The plaintiff's proofs.

In actions of defamation the evidence for the plaintiff includes the following matters of proof: (1) The plaintiff's special character officially, professionally, etc., as a suitor, whenever that is necessary, and that the words apply to him in that character, where they are not actionable otherwise. (2) Publication, namely, the speaking of the slanderous words, or the publishing of the libel, to some third person; and, in the case of libel, production and proof of the libel itself. (3) The application of the defamatory words to the plaintiff, and proof of the innuendoes. (4) Malice in fact of the defendant whenever that is necessary. (5) Damage when specially alleged. Some of these matters are fully dealt with in the chapters relating to Publication, the Innuendo, Malice and Damages.

Evidence of official character, profession, etc.

Evidence of the plaintiff's special character or office is not always necessary. It may be admitted by the words themselves, or on the pleadings, and, in either case, evidence of it need not be given(*a*). But there will not be an admission by the words where they include some particular statement which is denied by the defendant(*b*). Where the words are actionable only because published of the plaintiff in his special character or office, profession, etc., such special character may be proved if denied on the pleadings; but, if not denied, the silence of the defendant's pleading on the point is not to be taken as an admission of its truth(*c*). The plaintiff must also prove that the words were spoken of him in his official, professional, or trade capacity, and that he was acting at the time in that capacity.

(*a*) Yrisarri v. Clement, 3 Bing. 432; 2 C. & P. 223; 11 Moore 308; Berryman v. Wise, 4 T.R. 366. See, also, Smith v. Taylor, 1 B. & P.N.R. 204.

(*b*) Wakley v. Healey *et al.* (1849) 4 Ex. 53; 18 L.J. Ex. (N.S.) 426.

(*c*) R. 272, O.J.A.

When averment and proof of office immaterial.

But where the words alleged to have been published of plaintiff are in relation to an office, and are actionable *per se*, averment and proof of the office are immaterial, especially when the innuendoes shew a claim for damages out of office for imputations of misconduct in office(*d*). So, also, where the words are charged to impute dishonesty to a party in his employment or service, but, independently of that, are actionable *per se*, averment in the declaration and proof of the particular employment are unnecessary(*e*).

Where slander in relation to plaintiff's trade or business.

Where the words are charged to injuriously affect a person in his trade or business, there must be evidence shewing an imputation of a want of some general requisite, as honesty, capacity, fidelity, etc., in connection with such trade or business; and it is for the jury to say whether the words were spoken in reference thereto, and were calculated to injure plaintiff therein. It is not necessary for the words to disparage him with respect to his unfitness for business, his want of capacity, or his unskilful conduct therein; it is sufficient if they impute insolvency, or anything calculated to impugn his financial credit or standing. And it is not necessary in such a case to prove special damage(*f*). Where the action was for defaming plaintiff in his business as a druggist, evidence that he kept a drug store, and that several persons practising physic had purchased medicines from him, was considered sufficient proof of his being engaged in that business(*g*).

General evidence as to official character usually sufficient.

But general evidence is, as a rule, all that is necessary with

(*d*) Crosskill v. Morning Herald Printing and Publishing Co. (1883) 16 N.S.R. (4 R. & G.) 200; Crate v. McCallum (1905) 6 O.W.R. 825.

(*e*) Hea v. McBeath (1843) 4 N.B.R. (2 Kerr) 301.

(*f*) Lott v. Drewry (1882) 1 O.R. 577; Jones v. Littler, 7 M. & W. 423; 10 L.J. Ex. 171; Whittington v. Gladwin (1825) 5 B. & C. 180; 2 C. & P. 146; Harrison v. Bevington (1838) 8 C. & P. 708; Brown v. Smith (1853) 13 C.B. 596; Davis v. Lewis, 7 T.R. 17; Hall v. Smith, 1 M. & S. 287; Barnes v. Holloway (1799) 8 T. & R. 150.

(*g*) Terry v. Starkweather (1823) 1 U.C.K.B. 68; Tay. Rep. 57.

respect to a plaintiff's special character or office, etc., and where a person holds a particular office or situation, or is engaged in a particular profession, trade or business, and complains of having been defamed therein, general evidence of having acted in the office, etc., will be sufficient. The presumption is, that he has been acting legally, and strict proof, *i.e.*, of his appointment, or of his introduction to the position, is not required(*h*); unless his title to the place, or his qualification, is called in question, in which event strict proof will be necessary. The Acts of the several Provinces regulating the practice of law and medicine, provide for proof of the title and qualifications of members of those professions(*i*).

Proof of defamatory language.

Proof of the defamatory language, which in slander is included in proof of publication, naturally follows such proof in actions of libel. In an action for a libel published in a newspaper, *e.g.*, proof of publication must precede proof of the libel itself, which may thereupon be shewn or read to the jury, who have a right to see it, or to have it read to them(*j*). The defendant has also a right to have read the whole of the published matter, *e.g.*, the whole of a newspaper article in which the words or passages complained of occur(*k*), for the reason that the context may correct, or materially qualify or mitigate, the actionable character of the language. He may, for the same reason, require the whole of the conversation, in which the slanderous words were uttered, to be given in evidence. And where documents relating to the matter are connected, they are admissible(*l*), and, in some cases, may be required by the defendant to be put in as part of the plaintiff's case(*m*), but not where the documents, *e.g.*, distinct paragraphs in an issue of a news-

(*h*) Berryman v. Wise, 4 T.R. 366; Cannell v. Curtis, 2 Bing. N.C. 228; R. v. Shelly and Gordon's Case, Leach 581; Rutherford v. Evans, 6 Bing. 451; Smith v. Taylor, *supra*, 196, 204.

(*i*) See R.S.O. 1897, c. 1, s. 8(23).

(*j*) Wright v. Woodgate (1835) 2 C.M. & R. 573; Gilpin v. Fowler (1854) 23 L.J. Ex. 156; 9 Ex. 615.

(*k*) Cooke v. Hughes (1824) 1 R. & M. 112.

(*l*) Weaver v. Lloyd (1824) 3 C. & P. 296.

(*m*) Thornton v. Stephen, 2 M. & Rob. 45; Hedley v. Barlow *et al.* (1865) 4 F. & F. 227.

paper, have no reference to each other(*n*). The original libel should, if possible, be produced, and, in any event, should be accounted for(*o*). If not produced, and the proceedings are otherwise irregular and a verdict is found for the plaintiff, the judgment will be arrested(*p*). Copies of newspapers, or of any printed or other paper which is multiplied by printing or other process, are counterpart originals, and any single copy is evidence of what is contained in the other copies(*q*).

When secondary evidence admissible.

Secondary evidence is admissible where the original libel is lost or destroyed(*r*); where its production is highly inconvenient, as in the case of a libel published on a wall(*s*); where the original is in defendant's possession, and is not produced after due notice to produce duly served(*t*); where it is admitted by the defendant to be non-existent(*u*); where it is in possession of a third party who is out of the jurisdiction of the court, and who refuses to produce it(*v*); where the original manuscript is lost, and the witness proving it speaks from recollection of the writer's handwriting as compared with a letter subsequently received from him(*w*).

(*n*) Darby v. Ouseley (1856) 1 H. & N. 1; 25 L.J. Ex. 227; 2 Jur. N.S. 497.

(*o*) R. v. Rosenstein, 2 C. & P. 414; Adams v. Kelly (1824) 1 R. & M. 157; Fryer v. Gathercole, 4 Ex. 262; 18 L.J. Ex. 389.

(*p*) Stace v. Griffith (1869) 6 Moo. P.C.C. (N.S.) 18; L.R. 2 P.C.A.C. 420; 20 L.T. 197.

(*q*) Johnson v. Hudson *et al.* (1836) 7 A. & E. 233*n*, approved of in Wright v. Morning Herald Printing and Publishing Co. (1881) 14 N.S.R. (2 R. & G.) 398, and in Crosskill v. Morning Herald Printing and Publishing Co. (1883) 16 N.S.R. (4 R. & G.) 200; R. v. Watson, 2 Stark. 129.

(*r*) McGrath v. Cox (1847) 3 U.C.Q.B. 332; Rainy v. Bravo, L.R. 4 P.C. 287; 20 W.R. 873; Gathercole v. Miall (1846) 15 M. & W. 319.

(*s*) Mortimer v. McCallan, 6 M. & W., at p. 68; Bruce v. Nicolopulo, 11 Ex., at p. 133; 24 L.J. Ex., at p. 324.

(*t*) R. v. Boucher, 1 F. & F. 486; Le Merchant's Case, 2 T.R. 201; Layer's Case, 6 St. Tr. 229.

(*u*) Foster v. Pointer, 9 C. & P. 718.

(*v*) Boyle v. Wiseman, 10 Ex. 647; 24 L.J. Ex. 160; Newton v. Chaplin (1850) 10 C.B. 356; R. v. Aickles, 1 Leach 330; R. v. Llanfaethly, 2 E. & B. 940; 23 L.J.M.C. 33.

(*w*) Vye v. Alexander (1889) 16 S.C.R. 501. See full note of this decision in chapter on Publication, which also deals with proof by comparison of disputed handwriting.

When secondary evidence inadmissible.

Before secondary evidence of the publication of a libellous pamphlet can be received, it must be shewn that notice to produce the identical pamphlet has been served; or that the pamphlet has been either lost or destroyed(*x*). The same evidence would be required for admitting secondary proof of any other document or paper.

Opinion of Weatherbe, J.

In a Nova Scotia case in which the plaintiff sued four defendants jointly for charging him with perjury, Weatherbe, J., said: "A general charge of forswearing is sufficient to maintain an action of libel, but where the charge is to be found by implication from one or more writings the case is different, and I have an impression, though it is not necessary to offer a decided opinion on this point, that the writing referred to in the alleged libel should have been produced, or its contents proved, where its non-production was accounted for"(*y*). Where the imputation of perjury has been verbal, instead of written, it is unnecessary to prove the existence of a suit or proceeding in which the oath was taken(*z*). It is a question for the jury whether the meaning assigned to the words was truly assigned, or was intended to be conveyed(*zz*). As to what is a judicial proceeding, see section 171(2) of the Code.

Where libellous paper in possession of government department.

Secondary evidence will also be inadmissible where the original libellous writing, paper, or document, is in possession of a government department, and its production would be against public policy. The same public policy would apply to the secondary as well as to the primary evidence(*a*). It is for the head of the department, and not for the trial judge, to decide whether the writing is privileged from production. An anonymous letter, written by the defendant to the Ontario Government,

(*x*) McGrath v. Cox (1847) 3 U.C.Q.B. 332.

(*y*) Oakes v. Keating *et al.* (1883) 16 N.S.R. (4 R. & G.) 544, at p. 558.

(*zz*) *Ibid.*

(*a*) Stace v. Griffith (1869) L.R. 2 P.C.C. 428; 6 Moore P.C.C. (N.S.) 18; 20 L.T. 197; Home v. Bentinck, 2 Brod. & B. 130; Anderson v. Hamilton (1816) 2 Brod. & B. 156*n*; Dawkins v. Rokeby (Lord) (1875) (Ex. Ch.) L.R. 8 Q.B. 255.

relating to the licensing of the plaintiff's hotel, and the production of which at the trial was objected to by the departmental officer having the letter in charge, on the ground that its production would be injurious to the public service, was admitted as evidence of malice on the part of the defendant. It was held, that the question whether the production of such a document was injurious to the public service, must be determined, not by the judge, but by the head of the department having the custody of the paper, and that the production of the document ought not to have been compelled. The verdict against the defendant was set aside and a new trial granted without costs(*b*). The same rule was laid down in England in *Beatson* v. *Skene*(*c*), which was followed in *Swann* v. *Vines*(*d*). The rule is stated by Grove, J., in *Kain* v. *Farrer*(*e*), where it is said, that "the court is entitled to have the pledge and security of the head officer of State" for the non-production of the document.

Application of the words to the plaintiff.

No action of defamation can be maintained unless it appears that the statements complained of applied to the plaintiff. This may be shewn either by the defamatory matter itself, or, when that is not plain, by extrinsic evidence on the part of the plaintiff explaining the meaning of the matter and pointing the allusion. In some cases this may require evidence of a variety of facts and circumstances(*h*). These must support the allegation that the plaintiff is the person aimed at(*i*), and must shew that the words are actionable in the sense imputed(*j*); otherwise there should

(*b*) Bradley v. McIntosh (1884) 5 O.R. 227, which led to the amendment of the Ontario Evidence Act contained in R.S.O. 1897, c. 73, s. 27.

(*c*) (1860) 5 H. & N. 838; 6 Jur. N.S. 780; 2 L.T. 378; 29 L.J. Ex. 430.

(*d*) (1877) 37 L.T. 469.

(*e*) 37 L.T. 470.

(*h*) See Taylor v. Massey (1891) 20 O.R. 429, pp. 682-3, *post*.

(*i*) Le Fanu v. Malcolmson (1848) 1 H.L. Cas. 637, 664; Clement v. Fisher, 7 B. & C. 459; Mulligan v. Cole *et al.* (1875) L.R. 10 Q.B. 549; 44 L.J.Q.B. 153.

(*j*) Macdonald v. Mail Printing Co. (1900) 32 O.R. 163; 2 O.L.R. (1901) 278; *per* Lindley and Lopes, JJ., in Ruel v. Tatnell, 43 L.T.N.S. 507; 29 W.R. 172.

be a nonsuit, or the jury should be directed that proof of the imputation has failed(*k*).

Where onus as to innuendo not satisfied.

In an action for libel against a newspaper publishing company, where there was no evidence, apart from the newspaper article in which the libel appeared, to shew that the words bore any other than their ordinary meaning, which was not libellous, it was held that the onus of proof of the innuendo, which assigned a libellous meaning, was not satisfied; there was no reasonable evidence to go to the jury that the words conveyed the defamatory meaning alleged, and the trial judge directed a nonsuit(*l*). But where the libel is ambiguous or covertly expressed, or the plaintiff is not named in it, the testimony of persons who read it, and who, being acquainted with the plaintiff and the circumstances of the case, state that he is the person referred to, will be sufficient(*m*), and will sustain the verdict(*n*); but may not be satisfactory to the court, in criminal proceedings, when met by evidence distinctly contradictory(*o*).

Evidence of opinion as to whom libel aimed at.

It is proper to ask witnesses in a libel action who, in their opinion, is aimed at by the libel in question. In an action by a newspaper publishing company for libellous statements affecting their business reputation, contained in a municipal election address published by the defendant in the Ottawa *Citizen*, one of the witnesses for the plaintiffs, at the second trial of the action, was asked if he had formed any opinion as to who was aimed at in the publication complained of. The question was objected to but was admitted by the trial judge (Boyd, C.). The witness replied that he judged, when he read the statements in question,

(*k*) *Ibid.*

(*l*) Macdonald v. Mail Printing Co. (1900) 32 O.R. 163, which was affirmed by the Divisional Court, 2 O.L.R. (1901) 278, at pp. 280-81.

(*m*) Taylor v. Massey, p. 682, *post;* Journal Printing Co. v. Maclean (1894) 25 O.R. 509; (1896) 23 O.A.R. 324, *post;* Kirkpatrick v. Mills (1898) 30 N.S.R. 426, *post;* Bourke v. Warren (1826) 2 C. & P. 307; Broome v. Gosden, 1 C.B. 728; IAnson v. Stuart, 1 T.R. 748; 2 Sm. L.C. 6th Ed., p. 57.

(*n*) See the Canadian cases already cited and noted *post;* also LeFanu v. Malcolmson, *supra;* Wakley v. Healey (1848-9) 7 C.B. 705; Stockley v. Clement, 4 Bing. 162; 12 Moore 376; Pinnock v. Chapman & Hall, The Times, Dec. 9 and 10, 1891.

(*o*) R. v. Barnard, *ex parte* Lord R. Gower, 43 J.P. 127.

that they were aimed at the plaintiffs, adding that he formed his opinion from his knowledge of municipal affairs; from the reference in the publication to the plaintiffs' newspaper; and from the fact that that newspaper was the only one which had opposed the defendant as a candidate in the election campaign. The ruling as to this evidence was upheld by the Court of Appeal(*p*).

Evidence of opinion, as to whom the libel was aimed at, was also held to have been properly admitted in a Nova Scotia case, in which a merchant claimed damages from the proprietor of the *Times-Guardian* newspaper, for the publication of the following paragraph: "The Telephone Company is talking of removing the telephone toll office (meaning the toll office in plaintiff's store) to a new and favourable location. Complaints of ill-treatment and profanity, on the part of the attendants (meaning the plaintiff), is the principal reason for the change." One of the grounds of a motion for a new trial, after a verdict for the plaintiff, was, that witnesses who had read the paper containing the libel were allowed to state to whom they thought the libel referred. It was held that the evidence was admissible(*q*).

Occurrences at a meeting, and surrounding circumstances, as evidence of person aimed at.

Where a libellous letter, in which the plaintiff was not named, was published at a public meeting and in the newspapers, evidence of occurrences at the meeting and of surrounding circumstances was admitted to prove that the plaintiff was the person aimed at. At a meeting of some of the members and servants of a manufacturing company of which defendant was president, a resolution was passed expressing confidence in the innocence of the superintendent of the company who had been sued by the plaintiff, an employee of the company, for the seduction of the plaintiff's daughter. A letter to the superintendent was at the same time drawn up and signed by a number of persons present, including the defendant, declaring the belief of the signers in the superintendent's innocence of the charges against him which had previously appeared in the newspapers. The letter, in which

(*p*) Journal Printing Co. v. Maclean (1894) 25 O.R. 509; (1896) 23 O.A.R. 324.

(*q*) Kirkpatrick v. Mills (1898) 30 N.S.R. 426. See, also, Journal Printing Co. v. Maclean, p. 695, *post*, as to opinion evidence in proof of damages.

plaintiff was not named, concluded thus: "We believe you are the victim of a conspiracy as base and ungrateful as was ever sprung on an innocent man," etc. The letter was afterwards published in several newspapers, without any objection on defendant's part, and plaintiff thereupon sued defendant for libel. The jury found in the plaintiff's favour and $1,500 damages. Upon a motion for a new trial on the ground, *inter alia*, that the letter was not a libel, or, at all events, not a libel on the plaintiff, or with the meaning alleged in the statement of claim, namely, that plaintiff had conspired with his daughter to defame the superintendent, the Divisional Court held, that it was not necessary to decide whether the letter could be construed as supporting the innuendo of a criminal conspiracy. The question really was, whether the defendant had libelled the plaintiff; and this question had been determined by the jury. They had a right to consider the evidence, which was properly admitted, of the surrounding circumstances in connection with the libel in order to decide who was the person aimed at by the letter, and it was sufficient that this evidence pointed, in the opinion of the jury, to the plaintiff as the person intended(*r*).

Plaintiffs' identity proved by the fact that no other persons of same name interested.

That the plaintiffs were the persons aimed at may be shewn by the fact that no other persons of the same name were concerned in the libel. The plaintiffs, merchants carrying on a wholesale and retail business at Halifax, N.S., sued an electric telegraph company for transmitting over their wires from Halifax to St. John, N.B., and causing to be published in the *Daily Telegraph* of the city last named, and elsewhere, the following message: "John Silver & Co., wholesale clothiers of Granville St., have failed, liabilities heavy." No evidence was offered to shew that the alleged libel, or the words "John Silver & Co.," referred to the plaintiffs, or either of them, but the plaintiffs described themselves in the writ and pleading as wholesale and retail merchants in Halifax, doing business under the name of John Silver & Co., and there was no evidence of any firm doing business in Granville St., of the name of John Silver & Co., other than plaintiffs.

(*r*) Taylor v. Massey (1891) 20 O.R. 429.

The jury found in favour of the plaintiffs and $7,000 damages. One of the grounds urged against the verdict before the Supreme Court of Nova Scotia was, that there was no evidence that plaintiffs were the persons referred to in the libel complained of. DesBarres, J., who delivered the judgment of the court (Weatherbe, J., *diss.*), and who referred to the evidence *supra*, said that the jury were well warranted in coming to the conclusion that the libel complained of unmistakeably pointed and referred to the plaintiffs. The objection was not taken at the trial, and it ought not to have been taken on the argument(*s*). The decision on this point was not questioned by the Supreme Court of Canada in the subsequent appeal to that court from the judgment of the court below. But the appeal was allowed and a new trial granted for excessive damages, and for inadmissible evidence of special damage not alleged in the pleadings(*t*). So, also, where plaintiff was ridiculed in a libel published in a newspaper, evidence that he was subsequently jeered at in a public meeting was received as identifying him with the subject of the libel(*u*). And the remarks or opinions of persons looking at a libellous picture were also held admissible for the same purpose(*v*).

Opinion evidence, when admissible.

As has already appeared, there are, in actions of defamation, exceptions to the general rule that opinion evidence is inadmissible in proof of material facts. Witnesses may state their judgment and opinion as to the application of the slander or libel to the plaintiff, and also, under certain circumstances, as to the meaning of the words used by the defendant. The same rule applies in criminal prosecutions for libel. The opinions of witnesses may be given to identify the prosecutor as the person calumniated, where, *e.g.*, the initial letters only of a person's name, or fictitious names, etc., are used(*w*). It should be noticed,

(*s*) Silver *et al.* v. Dominion Telegraph Co. (1881) 14 N.S.R. (2 R. & G.) 17; 1 C.L.T. 284.

(*t*) Silver *et al.* v. Dominion Telegraph Co. (1882) 10 S.C.R. 238.

(*u*) Cook v. Ward (1830) 4 M. & P. 99; 6 Bing. 412.

(*v*) DuBost v. Beresford (1811) 2 Camp. 511.

(*w*) The Queen v. Hurt (1711) T.T. 12 Ann.; Digest Law of Libel 7; Roach v. Garvan (1742) 2 Atk. 469; DuBost v. Beresford, *supra;* Cook v. Ward, *supra.*

however, that opinion evidence has been held to be inadmissible as to the probable effect or tendency of the libel to injure the plaintiffs' business, which is a question for the jury, and also, when tendered to prove the defendant's style of composition, which is a question for experts, if the evidence is admissible at all(*x*).

Proof of innuendo, when unnecessary. Opinion of Henry, J.

Proof of the innuendo is only necessary in some cases. It is unnecessary where the meaning of the words is plain and unmistakable. Upon a motion to set aside a verdict for words accusing plaintiff of the commission of an unnatural offence, Henry J., who delivered the judgment of the court, said: "It was contended that the innuendo must be proved, and that it was not proved. It is not necessary, in every case, that evidence should be given to prove the innuendo, and it is clearly not so where the words used are perfectly intelligible English words, and their meaning is obvious and unmistakeable"—citing *Brunswick (Duke of)* v. *Harmer*(*y*), *Barnett* v. *Allen*(*z*), *Hughes* v. *Rees* (*a*), and *Blagg* v. *Sturt*(*b*)(*bb*). So, also, where the whole question of libel or no libel has been left to the jury, and they, in the opinion of the court, had properly found in the plaintiff's favour, it is unnecessary, upon a motion against the verdict, for the court to determine whether the innuendo setting forth a criminal charge was rightly assigned or proved. The question really is, whether the defendant has libelled the plaintiff, and this question was determined by the jury(*c*).

Words not intelligibly defamatory may be shewn to be defamatory.

Words, which of themselves are not intelligibly defamatory, may be shewn to be defamatory by the facts in evidence. In the first count of a declaration for slander it was alleged that the defendant spoke the following words concerning the plain-

(*x*) See Journal Printing Co. v. Maclean (1896) 23 O.A.R. 324, and Scott v. Crerar (1887) 14 O.A.R. 152, on these two points, respectively.

(*y*) (1849) 3 C. & K. 10.

(*z*) (1858) 27 L.J. Ex. 412; 3 H. & N. 376, 379, 380.

(*a*) 4 M. & N. 204, 210.

(*b*) (1846) 10 Q.B. 904.

(*bb*) Gates v. Lohnes *et al.* (1898) 31 N.S.R. 221.

(*c*) Taylor v. Massey (1891) 20 O.R. 429.

tiff: "Go and get a search warrant and you will get your pork there"; meaning that the plaintiff had feloniously stolen pork. The words proved were: "Go and get your warrant and you will get your pork." These words were spoken by the defendant in the course of a conversation with one B., who stated that his pork had been stolen, and that he thought of taking out a search warrant to search the plaintiff's premises. The judge directed the jury that the words as laid were not proved, and withdrew that count from their consideration. It was held by the court (Weldon and Wetmore, JJ., *diss.*), that the words as laid were sufficiently proved, and were capable of the defamatory meaning attributed to them when read in connection with the facts in evidence, and that the count should have been left to the jury(*d*).

Proof of knowledge of matter to which words refer.

Where the words, without knowledge on the part of those who heard them of the matter to which they refer, can convey no defamatory meaning, they are not actionable, but evidence is admissible to shew such knowledge. If actionable independently of such knowledge, the evidence is superfluous and harmless(*e*).

Failure to prove innuendo of words imputing perjury.

Where the words charged the plaintiff with perjury, the inducement of some of the counts stated that the words were spoken of and concerning the plaintiff, and of and concerning a certain affidavit, etc. The defendant justified, setting out the affidavit and alleging certain statements therein to be wilfully false. The affidavit referred to two papers which were annexed when the affidavit was sworn to by the plaintiff. It was held, that there was sufficient *primâ facie* evidence to let in the whole affidavit, and that the admission of part of the affidavit to be read without the papers annexed was improper, and that the innuendoes were not sufficiently proved. But, the verdict being for plaintiff, *quære*, whether it was a sufficient ground for a new trial that the statement alleged by the defendant to be false, and on which he founded his charge of perjury, was contained

(*d*) Harris v. Clayton (1891) 21 N.B.R. (5 P. & B.) 237.
(*e*) Gates v. Lohnes *et al.* (1898) 31 N.S.R. 221.

in the part of the affidavit which was read, and that the defendant was obliged to make use of it to support his pleas(*f*)?

Where no innuendo to meet the evidence.

Where the words proved are different from those alleged, and there is no evidence of the innuendoes alleged and of how the words used were understood, the court, in the absence of any amendment by the plaintiff, cannot frame an innuendo to conform to the evidence for the plaintiff; but they may, as appears in this case, suggest an innuendo which justifies the evidence for the defence(*g*).

Where a different innuendo indicated.

And where the innuendo was not sustained by the evidence, which indicated another actionable meaning, the variance from the cause of action was held to be fatal, but that there should be a new trial(*h*).

For other authorities as to evidence of the innuendo, and as to its office generally, the reader is referred to the chapter on that subject.

Evidence of malice in cases of privilege.

In *Robinson* v. *Dun et al.*(*i*) there is a discussion of the question of evidence of malice in connection with privileged statements. In that case a trader had been libelled by mistaken information supplied by a mercantile agency to some of their subscribers. The mistake was innocently made, through excusable inadvertance, and it was held that this was not evidence of malice. See the observations of Burton, C.J.O., at pp. 289-90.

Where occasion privileged express malice must be proved.

The appellant acted for some time as agent of an insurance company at his own offices. After some correspondence as to a change of terms upon which the parties could not agree, the company's secretary sent to persons who insured through the appellant a circular stating that the agency of the appellant at his offices had "been closed by the directors." The appellant

(*f*) Milner v. Gilbert (1847) 5 N.B.R. (3 Kerr) 617.
(*g*) Tobin v. Gannon (1901) 34 N.S.R. 9.
(*h*) Johnston v. Macdonald (1846) 2 U.C.Q.B. 209.
(*i*) (1897) 24 O.A.R. 287.

having brought an action for libel against the company, the trial judge ruled that the statement was capable of a defamatory meaning, but that the occasion was privileged. The jury found a verdict for the plaintiff, that the statement was a libel, that it was untrue, and that the defendants had exceeded the privilege, but did not find actual malice. It was held by the House of Lords (affirming the decision of the Court of Appeal (1895) 2 Q.B. 156), that judgment must be for the company, on the grounds that the statement was not capable of a defamatory meaning, that it was true, that the occasion was privileged, that the finding of the jury as to excess of privilege was insufficient, and that there was no evidence of malice for the jury(*ii*).

So, also, where the occasion is privileged by reason of the only publication being to the plaintiff herself in the first instance, and thereafter in her presence to her parents, who came to defendant and asked for particulars, there must be evidence of express malice. Malice cannot be implied, in such a case, from the mere publication of the defamatory words(*j*).

Malice on the face of the libel itself.

And where there is a fair occasion for making the statement complained of, it is not to be taken to be malicious, though it may turn out to have been unfounded; in other words (although, as we shall see, this is open to question) the inference of malice cannot be raised upon the face of the libel itself, as in other cases it might be, but there must be proof given by the plaintiff of actual express malice, independently of the evidence of such a feeling which the paper itself would seem to supply. And the plaintiff, even in such a case, cannot sustain his action upon this proof of malice alone, but he must also shew the statement to be false as well as malicious; and, when he has done this, the defendant may yet make out a good defence, if he can prove that he had good ground for believing the statement to be true, and acted honestly under that persuasion(*k*). In the case in which this principle is asserted, a representation by the assessed inhabitants of a school section as to the character of a teacher, made with a view of obtaining redress, was held to be a privileged

(*ii*) Nevill v. Fine Art and General Ins. Co. (1896) A.C. 68 (H.L.).
(*j*) Johnston v. Kidston (1898) 31 N.S.R. 283.
(*k*) McIntyre v. McBean *et al.* (1856) 13 U.C.Q.B. 534.

communication, which it was of importance to the public to protect, and that such a statement would not be the less privileged if made by mistake to the wrong quarter.

This decision, in so far as it holds that it is incompetent for the plaintiff to rely upon the language of the defamatory words themselves for the purpose of shewing malice on the part of the defendant, is expressly dissented from in *Crate* v. *McCallum*(*kk*). It was there held, following *Laughton* v. *Bishop of Sodor and Man*(*l*), that malice may be inferred from the defamatory words themselves. The whole current of authority, it is said, since *McIntyre* v. *McBean*, is directly opposed to the view taken in that case, and is in accord with the law as laid down in *Laughton* v. *Bishop of Sodor and Man*, where it is held, that "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."

When proof of express malice required against a corporation.

Express malice must also, in some cases, be established against a corporation. Where a foreign corporation was carrying on business in Canada, having their head office at T., in the Province of Ontario, and a branch office at W., in the Province of Manitoba, and letters, which might under other circumstances have constituted a libel on the plaintiff, were written and sent, by the manager and assistant manager at T., to the manager of the branch office at W., it was held, that express malice could not be imputed to the corporation in the absence of evidence that the corporation, its directors, or managing board, authorized, or had knowledge of, such letters, and, therefore, that an action of libel was not maintainable(*ll*).

But a corporation cannot be held to be incapable of malice so as to be relieved of liability for malicious libel when published by its servant acting in the course of his employment, although the servant may have had no actual authority, express or implied, to write the libel complained of containing statements which he knew to be untrue; if he did so in the

(*kk*) 11 O.L.R. (1906) 81.

(*l*) (1872) L.R. 4 P.C. 495.

(*ll*) Freeborn v. Singer Sewing Machine Co. (1885) 2 M.L.R. 253 (In appeal).

course of an employment which is authorized, the corporation is liable(*m*).

Proof of actual malice or culpable negligence formerly necessary under Manitoba Libel Act.

By the Manitoba Libel Act, 1887,(*mm*) it was provided, that "except in cases where special damages are claimed, the plaintiff, in all actions for libel in newspapers, shall be required to prove either actual malice or culpable negligence in the publication complained of." In an action against the publishers of the Manitoba *Free Press* for the publication of a libel in relation to the plaintiff and his business as a hardware merchant, the plaintiff's pleadings contained no allegation of special damage and none was proved, and the jury gave a general verdict for the plaintiff for $500, but did not answer three out of the five questions left to them by the judge. Two of the three questions on which the jury could not agree were as to whether the defendants were guilty of actual malice, or culpable negligence, in the publication of the article. A new trial was directed by the Manitoba Court of Queen's Bench on the ground that the jury had really disagreed(*n*), and this judgment was affirmed by the Supreme Court of Canada and the appeal dismissed. The court held, that under the above section of the Libel Act, actual malice or culpable negligence had to be established to the satisfaction of the jury, unless special damages were claimed, and that if there was a disagreement as to these issues, the verdict could not stand(*o*).

The onus where justification pleaded.

Where justification is pleaded the onus is on the defendant to establish his plea. The words complained of were: "He perjured himself in an affidavit in C.'s suit," without any inducement stating the words to have been spoken of and concerning the affidavit. The defendant justified. It was held that it was not necessary for the plaintiff to prove any affidavit, but that the

(*m*) Brown v. Citizens' Life Assurance Co. (1904) A.C. 423, following or affirming Barwick v. English Joint Stock Bank (1867) L.R. 2 Ex. 259.

(*mm*) 50 Vict. c. 22, s. 11, which is omitted in the present Act, R.S.M. 1902, c. 97.

(*n*) 6 M.L.R. 578.

(*o*) Ashdown v. Manitoba Free Press Co. (1891) 20 S.C.R. 43.

onus was on the defendant, in support of his pleas of justification, to prove that the plaintiff had sworn wilfully false in the affidavit referred to(*p*). The plaintiff, where justification is pleaded, is not required to prove the falsity of the charge; the legal presumption, for the purpose of the trial, is in his favour, and the onus is on the defendant to prove the charge to be true: *Belt* v. *Lawes* (1882), 51 L.J.Q.B., at p. 361(*q*).

Evidence of falsity of words imputing crime inadmissible where no justification pleaded.

And where no justification was pleaded of words imputing theft, it was held that evidence by the plaintiff of the falsity of the charge was inadmissible. "Unless where justification is pleaded, the truth or falsity of the charge is not in issue, and is not relevant. The law presumes the plaintiff's innocence"(*r*). But where, after a verdict for plaintiff subject to a motion for a nonsuit, the action was dismissed on the ground that plaintiff had failed to prove the falsity of the charge, which upon uncontroverted evidence appeared to be true(*s*), the judgment was reversed by the Divisional Court on the ground that there was evidence to go to the jury, and that they having found in favour of the plaintiff on conflicting evidence, the judgment in his favour should be restored(*t*).

Order of plaintiff's evidence when justification or fair comment pleaded.

"Where," said Taylor, C.J., in a Manitoba case, "a plea of justification is on the record, the plaintiff may, if he chooses, in the first instance meet the justification, or he may leave such proof until the reply. He cannot, however, divide his proof, calling some evidence to meet the justification in the first instance, and more afterwards in reply: *Browne* v. *Murray*, Ry. & M. 254; *Harvey* v. *Canadian Pacific Railway*, 3 M.R. 266. Is there any difference when the plea is fair comment? I cannot see that there should be any. Under a plea of justification, the onus is on the

(*p*) Milner v. Gilbert (1847) 5 N.B.R. (3 Kerr) 617.
(*q*) Macdonald v. Mail Printing Co., 2 O.L.R. (1901) 278.
(*r*) *Per* Falconbridge, J., in Ross v. Bucke (1892) 21 O.R. 692.
(*s*) Macdonald v. Mail Printing Co. (1900) 32 O.R. 163.
(*t*) Macdonald v. Mail Printing Co., 2 O.L.R. (1901) 278.

defendant to shew that the alleged libel is true; in fair comment, the onus is on him to shew that the facts commented on are acknowledged to exist, or are true. In such a case it seems to me all the plaintiff need do, in the first instance, is to prove the publication, to give such evidence as will shew that he is the person referred to in the libel, and that the words complained of were published about him. Then, if the defendant brings evidence to prove the facts commented upon to be true, or acknowledged to exist, the plaintiff should be entitled to produce evidence that they are neither acknowledged nor true. Of course he cannot divide his proof, bringing forward part of his evidence in the first instance and more in reply."(*u*).

When allegation and evidence of special damage unnecessary.

Evidence of special damage is unnecessary in some cases. In an action for words imputing a misdemeanour under the old Consolidated Statute of Canada, c. 92, s. 51, relating to the misappropriation of moneys by a trustee, a new trial was refused on the ground that some of the counts in the declaration did not allege an actionable slander with special damage, and that no special damage was shewn, the court being of opinion that the words were actionable without any such allegation or evidence(*v*).

Where slander in relation to plaintiff's business.

So, also, where the words are spoken in relation to plaintiff's business, special damage need not be alleged or proved, because the words are actionable *per se*, but, if special damage is claimed, it should be alleged with certainty, so that defendant may be prepared to meet it(*w*).

When evidence of special damage inadmissible.

Nor is evidence of special damage always admissible. If the plaintiff, either in libel or in actions for defamatory words action-

(*u*) Martin v. Manitoba Free Press Co. (1892) 8 M.L.R. 50, at p. 61. As to the time for giving evidence to rebut justification, see, also, Sylvester v. Hall, Ry. & Moo. 255*n*; Spooner v. Gardiner, *ibid.*, 86; Pierpoint v. Shapland, 1 C. & P. 447; Delauney v. Mitchell, 1 Stark. C. 439; Rees v. Smith, 2 Stark. C. 31.

(*v*) Decow v. Tait (1866) 25 U.C.Q.B. 188.

(*w*) Paint v. Maclean (1873) 9 N.S.R. (3 N.S.D.) 316; Lott v. Drewry (1882) 1 O.R. 577. See, also, *per* Strong, J., in Silver *et al.* v. Dominion Telegraph Co. (1882) 10 S.C.R., at p. 263, and *per* Gwynne, J., in same case, at pp. 271-72.

able *per se*, seeks to prove any such damage, it must be alleged in the declaration, and, in the absence of such an allegation, evidence of it is not admissible. And this principle applies where the damage relied on is the act of a third party to the prejudice of the plaintiff, induced by the slander or libel complained of. In such a case evidence of the prejudicial act of the third party ought to be rejected if it is not pleaded in the declaration(*x*).

Evidence as to loss of custom.

Where special damage is sought to be recovered in an action for libel, or for verbal slander where the words are actionable *per se*, such special damage must be alleged and pleaded with particularity, and, in case of special damage by reason of loss of custom, the names of the customers must be given, otherwise evidence of the special damage is not admissible; and this rule is not confined to cases of verbal slander where the words are not actionable *per se*—cases in which special damage is a necessary ingredient in the cause of action(*y*). The established rule in all cases, whether of actions for words actionable *per se*, *or* actionable only when accompanied by special damage, is, that no evidence of particular damage can be given unless it is alleged in the declaration, and the general allegation of loss of customers is not sufficient to enable a plaintiff to shew a particular injury, or the loss of a particular customer. This also is the law as laid down by the Supreme Court of the State of New York in *Tobias* v. *Horland*(*z*)(*zz*). Where, therefore, evidence of special damage was admitted, in the absence of any allegation in the pleadings of such damage, a new trial was directed(*a*).

Proper mode of proving loss of custom.

Where the words charged the plaintiff with using false weights and measures, whereby he had been injured in his business as a trader, the evidence of special damage was that given by the plaintiff himself, who said that, in consequence of the speaking of the words, several of his former customers refused

(*x*) *Per* Strong, J., in Silver *et al.* v. Dominion Telegraph Co. (1882) 10 S.C.R. 238, at p. 263.

(*y*) *Per* Strong, J., in Ashdown v. Manitoba Free Press Co. (1891) 20 S.C.R. 43, at p. 50.

(*z*) 14 Wendell, 540.

(*zz*) *Per* Gwynne, J., in Silver *et al.* v. Dominion Telegraph Co. (1882) 10 S.C.R. 238, at pp. 273-74.

(*a*) Silver *et al.* v. Dominion Telegraph Co., *supra*.

to deal with him, alleging as their reason for such refusal the charge which the defendant had made against him. It was held that this evidence was improperly admitted. The proper way to prove that fact was to call the persons who made the declarations, and let them testify, under oath, that they had refused to deal with the plaintiff in consequence of the defendant's charge. But, as the only effect of the evidence was to increase the damages, a new trial was refused, on condition that the plaintiff would consent to reduce the verdict, on that branch of the case, to nominal damages(*b*).

Evidence admissible to enhance damages where no special damage alleged or proved.

Evidence, however, may be given to enhance the damages, although no special damage is alleged or proved. The plaintiff, a medical student, and the executor of his deceased father's estate, sued his stepmother for slander, in having said of him, that, when his father was ill, he and his sister gave him a drug, after which he went into a doze and never recovered, and that the plaintiff and his sister had killed him. One of the plaintiff's witnesses stated that the plaintiff had been a student of medicine for some time, and the verdict in his favour was moved against for the improper admission of this evidence, which, it was alleged tended to aggravate the damages by attacking the professional character of the plaintiff, there being no allegation of special damage, and no claim that he had been slandered, in that character. The evidence was held to be admissible(*c*).

Evidence of character, etc., inadmissible in aggravation of damages.

But evidence of plaintiff's good character in aggravation is inadmissible. This was so held in an action by an infant plaintiff, by her next friend, for slander imputing theft(*d*); as was also evidence of other thefts in the same neighbourhood on the same night(*e*); and evidence of a conversation between plaintiff's father and defendant's son, a mere child(*f*).

(*b*) McCann v. Kearney (1880) 20 N.B.R. (4 P. & B.) 84.
(*c*) Cook v. Cook (1875) 36 U.C.Q.B. 553.
(*d*) Johnston v. Kidston (1898) 31 N.S.R. 283.
(*e*) *Ibid.*
(*f*) *Ibid.*

Admissibility of alleged "illegal evidence" for which damages reduced.

In *Levi* v. *Reed*(*g*), in which there was an appeal to the Supreme Court of Canada from a judgment of the Court of Queen's Bench (appeal side) of the Province of Quebec, reducing the damages awarded by the Superior Court for gross slanders of a medical practitioner, one of the reasons given by the Queen's Bench for the reduction of the damages was the additional costs to which the defendant, in the court below, had been subjected by the plaintiff's "illegal evidence."

Opinion of Gwynne, J.

Referring to this opinion in the Supreme Court, Gwynne, J., says (at p. 502): "The evidence here referred to was said to be the evidence of the medical gentlemen called by the plaintiff to contradict the medical evidence which the defendant, on being examined by the plaintiff to prove the slanders complained of, took the opportunity of giving in his own favour. Such evidence was, in my judgment, not only quite legal evidence, but such as, under the circumstances, the plaintiff's counsel very naturally felt called upon to advise the plaintiff to give, and was very proper to be given."

Opinion evidence in proof of damage.

Evidence of opinions by witnesses that the libel in question is injurious to the plaintiff's business is not proper, but is unobjectionable where the opinion expressed was that of only one witness, and the jury were told to form their own opinion as to the damages, and the amount awarded was small. This was the decision in the *Journal Printing Co.* v. *Maclean*(*h*), which was an action by a newspaper publishing company for libellous statements, injurious to their business reputation, contained in a municipal election address published by the defendant in the Ottawa *Daily Citizen*. The plaintiff's manager was asked, at the second trial of the action before Boyd, C., what effect the statements made by the defendant would have on the business of the company. The question was objected to, but was admitted, the witness answering generally that allegations that a newspaper could

(*g*) (1881) 6 S.C.R. 482.
(*h*) (1894) 25 O.R. 509; (1896) 23 O.A.R. 324.

be bought must injure its business. The objection to the question was, that there being no special damages claimed and no attempt to prove any actual loss, the evidence that the libel had a tendency to injure the plaintiffs' business was improper, as it was the province of the jury to say what general damages should be given, if any, and to form their own opinion from the facts proved as to the tendency of the libel. The Court of Appeal for Ontario, upon appeal by the defendant from the judgment of the Divisional Court affirming the judgment against him at the second trial, held that this evidence was strictly not admissible, but they refused to interfere for the reasons above mentioned.

Evidence of witness's understanding of slanderous words.

Evidence of what the plaintiff or any of his witnesses understood the slanderous words to mean is improper, unless, under the rule laid down in *Daines* v. *Hartley*(*i*), it be first shewn that there was something to prevent the words from conveying the meaning they would ordinarily convey(*j*); or until evidence is given to shew that the words had some local or technical meaning, or something different from their ordinary and natural meaning(*k*). But, though the witness should not have been asked what he understood by the words, yet, where there is no ambiguity about the meaning of the words, it is not a ground for setting aside a verdict for the plaintiff, the answer of the witness being in accordance with the meaning ascribed to the words in the declaration. It was a question for the jury whether the words bore that meaning, and they having found in the affirmative, the verdict should stand(*l*). And where a witness for plaintiff, who was ruled to be hostile, was improperly allowed to answer a question as to what she understood by the words used by defendant in her presence imputing to plaintiff an unnatural crime, and her answer was, that she did not understand anything more than she was told, and that she understood that plaintiff had "done something wrong," it was held, that no harm could have been done by such a question to a reluctant witness, and that, even if

(*i*) (1848) 3 Ex. 200.

(*j*) Wood v. Mackey *et ux.* (1881) 21 N.B.R. (5 P. & B.) 109.

(*k*) Currie v. Stairs (1885) 25 N.B.R. 4.

(*l*) *Ibid.* The decisions in Daines *et al.* v. Hartley, *supra*, and Barnett v. Allen (1858) 3 H. & N. 376; 4 Jur. N.S. 488, were referred to.

her answer had been that she understood the language to mean what plaintiff contended it meant, it could not be allowed to affect the verdict for plaintiff, because, without it, the jury could not reasonably have understood the defendant's language otherwise(*m*).

Communications between husband and wife inadmissible against husband. Opinion of Weldon, J.

Communications between husband and wife are also inadmissible. Where, therefore, in an action against a husband and wife, for a slander of the plaintiff published by the wife, evidence of a statement of the wife made subsequent to the slander, that her husband had compelled her to utter it, and of his object in doing so, was held to be inadmissible. "I think," said Weldon, J., "the husband and wife cannot be considered as joint tort-feasors; the relation is different; the communications between husband and wife cannot be disclosed to the prejudice of each other. The Con. Statutes, c. 46, of witnesses and evidence, while it allows parties in a suit to be witnesses, distinctly declares that no wife shall be compellable to disclose any communication made to her by her husband during the marriage. So that she could not be a witness for that purpose; neither could her statement be evidence; and, even if the Act did not exclude her testimony, it would be excluded from motives of policy"(*n*).

When decision as to improper reception and rejection of evidence unnecessary.

Where the verdict in his favour is moved against by plaintiff for the improper reception and rejection of evidence, and not for the smallness of the damages, a decision as to the evidence is unnecessary. This was so held in an action for words imputing want of skill and malpractice to a physician in his professional treatment of a patient, where the jury found one shilling damages. Notwithstanding the verdict in his favour, the plaintiff moved for a new trial on the ground of the improper admission of evidence for defendant of statements by the deceased patient as to what was the cause of her death, and of what was said by

(*m*) Gates v. Lohnes *et al.* (1898) 31 N.S.R. 221.

(*n*) Wood v. Mackey *et ux.* (1881) 21 N.B.R. (5 P. & B.) 109.

other persons respecting other cases in which the plaintiff had been engaged; and for the improper rejection of evidence that the plaintiff's treatment of the deceased was proper. The court held, that while it might be doubtful whether evidence of statements made by the deceased patient to the same effect as the words charged was admissible, yet that its reception was no ground for a new trial, because the verdict was in plaintiff's favour, which was all he had contended for at the trial, and all he could contend for in the event of another trial; and that it was unnecessary to decide the questions raised as to the evidence, especially as the plaintiff was not moving against the smallness of the damages(*o*).

Evidence of defendant's disputed handwriting.

In actions of libel, the admissibility of evidence to prove defendant's handwriting by comparison and otherwise, where the writing is disputed, has given rise to some diversity of judicial opinion. In an action against the alleged writer of a libellous communication published in a newspaper, the defendant was asked, on cross-examination at the trial, if he had not changed his signature since the action began. He said he had not; and certain documents were then shewn to him in which his signature was different somewhat from his usual signature. These documents were admitted, subject to objection. It was held by the Supreme Court of Canada (Gwynne and Patterson, JJ., *diss.*), that the documents were admissible to shew that the defendant's signature had been changed. The dissenting judges expressed the opinion that a witness could properly be asked, on cross-examination, if he had not changed his signature, but the opposing party must be satisfied with his answer, and could not go further and give affirmative evidence of the fact(*p*).

Production by plaintiffs of document, on which libellous comments based, improperly compelled.

In an action for alleged libellous comments in a newspaper on an advertisement of a business firm which was refused publication in the newspaper, but was published in a rival paper contemporaneously with the comments, the trial judge ruled

(*o*) Rogers v. Munns (1866) 25 U.C.Q.B. 153.
(*p*) Vye v. Alexander (1889) 16 S.C.R. 501.

that the plaintiffs were bound to produce and put in, as part of their case, the written advertisement referred to by the defendant in the article complained of. The ruling was held to be erroneous, but no ground for a new trial, the only result being to give defendant's counsel the last address to the jury. "The established rule," said Street, J., "is, that an erroneous ruling as to the right to begin, or to reply, is not a sufficient ground for a new trial, unless it is manifest that the ruling has done clear and manifest wrong: *Brantford* v. *Freeman*, 5 Ex. 734; *Geach* v. *Ingall*, 14 M. & W. 95"(*q*).

New trial for improper admission or rejection of evidence.

Under a rule of the Provincial Judicature Acts, the improper admission or rejection of evidence is no ground for a new trial unless the court is satisfied that a substantial wrong or miscarriage has been thereby occasioned(*r*). The defendant, the general manager of a life insurance company, wrote a letter to F., a policy-holder in the company, in which he stated that the plaintiff had been "removed" from his office as local agent of the company, and assigned as the reason for such removal that they had tried for a considerable time past to get the plaintiff to attend properly to their business, and that it was only because it was clearly necessary that the change was made. He also stated that, to give the plaintiff the opportunity of getting the benefit of commissions on outstanding business, certain matters had been left in his hands, but that he (defendant) now found that the plaintiff had collected money which, up to the present time, they "had been unable to get him to report." It was held by the Supreme Court of Canada(*rr*), reversing the judgment of the Supreme Court of Nova Scotia(*s*), that the reception of the evidence of F. of her understanding of the letter, as imputing to the plaintiff a wrongful retention of money, was a substantial wrong or miscarriage of justice and was ground for a new trial.

(*q*) Graham *et al.* v. McKimm (1890) 19 O.R. 475, at pp. 480-81.

(*r*) R. 785, O.J.A.

(*rr*) Green v. Miller (1903) 33 S.C.R. 193.

(*s*) Miller v. Green (1902) 35 N.S.R. 117. See, also, cases in chapter on New Trial.

Plaintiff's improper use of a letter on cross-examination of defendant.

In the course of the cross-examination of a defendant in an action for libel, a letter was put into her hands, said to have been written by a correspondent in England to the plaintiff, in answer to a letter from him on the subject of the alleged libel. In this letter, the admission of which, in whole or in part, was objected to, the writer made certain statements as to what the defendant had written to him concerning the plaintiff, and also said that he considered his letter to her confidential, and that she had no right to quote a word of it. In his charge to the jury the trial judge commented upon this letter, so admitted, unfavourably to the defendants—the charge in this and other respects being objected to by defendants' counsel. The jury were subsequently recalled and told to disregard the letter, and the learned judge's comments thereon, but the Court of Appeal held that the letter should not have been admitted; that, the mischief having been done, there had been a substantial wrong or miscarriage under the above rule; and that there should be a new trial(*ss*). In the same case the court also held, following *Bray* v. *Ford*(*t*), that a substantial wrong was occasioned by the trial judge's comments on the defendants' case with respect to evidence of malice, and on the question of damages.

Witness's previous inconsistent statements no ground for exclusion of evidence.

The evidence of a party's hostile witness should not be excluded because of witness's previous inconsistent statements. Where, therefore, upon a motion to set aside a verdict for the plaintiff, it was objected that a certain witness called for plaintiff having been ruled to be hostile, and evidence having been admitted for the purpose of proving that she had previously made a statement inconsistent with part of her testimony, the whole of her evidence should have been excluded as discredited, it was held, that there was no authority for such a contention, and that it could not be sustained. *Bradley* v. *Ricardo*(*u*), and a

(*ss*) Fenton v. Macdonald, 1 O.L.R. (1901) 422.

(*t*) (1896) A.C. 44.

(*u*) (1831) 8 Bing. 57.

nisi prius decision of Lord Campbell in *Faulkner* v. *Brine et al.* (*v*) were referred to(*w*).

Rejection of admissible evidence for plaintiff as to credibility of defendant's witness, etc.

The rejection of admissible evidence for plaintiff as to the credibility of defendant's witness, and touching a plea of justification found in defendant's favour, where the jury found no malice, is no ground for a new trial. In an action by a surgeon for a libel published in a newspaper imputing unskilful and negligent treatment of a patient, it was held, that evidence tendered by the plaintiff, that the failure to cure was due to the rough treatment of the patient by his master, should have been admitted, as bearing upon the credibility of the patient, who had been called as a witness for the defendant, and as affecting the plea of justification, which had been found in favour of the defendant; but that the evidence on that plea being conflicting, and the jury having also found on the general issue that the defendant did not maliciously publish the libel, a new trial was refused(*x*).

Proof of publication of a libellous message by telegraph company.

Evidence that the head man in an office of a telegraph company furnished a libellous message for publication in a newspaper, and which was published therein, has been held sufficient proof of publication by the company. The plaintiffs, a firm of Halifax merchants, sued the defendants for transmitting over their wires from Halifax, N.S., to St. John, N.B., and causing to be published in the St. John *Daily Telegraph*, and elsewhere, the following message: "John Silver & Co., wholesale clothiers of Granville St., have failed, liabilities heavy." One of the grounds for a motion against the verdict for plaintiff was, that there was no express evidence to shew that one S., who furnished the telegram, was appointed by defendants as their agent; but as the publisher of the *Telegraph* swore to an agreement by which he took telegraphic information from the defendant company paying only for such telegrams as he published, and that S. was

(*v*) (1858) 1 F. & F. 254.
(*w*) Gates v. Lohnes *et al.* (1898) 31 N.S.R. 221.
(*x*) Smith v. McIntosh (1857) 14 U.C.Q.B. 592.

the head man in St. John, and had been so ever since the establishment of the company, and that his transactions were entirely with S., whom he took to be acting as agent of the company, the bills being rendered in their name, the court held (Wetherbe, J., *diss.*) that the jury were warranted in finding that S., in furnishing the telegram, was acting as agent of the defendants(*y*). Upon an appeal by the defendants, the Supreme Court of Canada (Taschereau and Gwynne, JJ., *diss.*) affirmed the judgment of the court below as to the proof of the agency of S., who furnished the telegram to the newspaper publisher, and that the defendants were liable for the publication of the libel in question(*z*). Publication of a post card containing defamatory matter may be proved by shewing that the card was sent by mail addressed to the plaintiff(*a*).

Correction of error of trial judge on question of fact.

Weight should not be attached to the findings of a trial judge, on a question of fact, where the reasons given disclose error in weighing the testimony. In an action for slander, arising out of a family quarrel, for words imputing perjury to plaintiff during the progress of a trial before a justice of the peace, six witnesses for the plaintiff testified to the use of the words complained of, while four for the defendant, including the justice, testified that they had not heard the words used, and defendant denied having uttered them. The county court judge, before whom the action was tried without a jury, treated the evidence for defendant as a contradiction of that for plaintiff, and held that, under these circumstances, plaintiff had not proved his case, and he gave judgment for defendant, in whose favour he thought the testimony preponderated. It was held that his reasons for doing so disclosed error in weighing the testimony, and that there must be a new trial before a jury.

Opinion of Wetherbe, J.

Wetherbe, J., who analyzed the evidence, and with whom Henry, J., concurred (Ritchie and Townshend, JJ., concurring

(*y*) Silver *et al.* v. Dominion Telegraph Co. (1881) 14 N.S.R. (2 R. & G.) 171; 1 C.L.T. 284.

(*z*) Silver *et al.* v. Dominion Telegraph Co. (1882) 10 S.C.R. 238.

(*a*) Mothersill v. Young (1897) 18 C.L.T. (Occ. N.) 5, referring specially to Williamson v. Freer, L.R. 9 C.P. 393, and to Robinson v. Jones, 4 L.R. Ir. 391.

as to the error of the trial judge, but doubting the propriety of a verdict in plaintiff's favour), said: "It was contended that, on a question of fact, weight must be attached to the view of the trial judge. No doubt. But this is not the case where the reasons disclose erroneous judgment in weighing the testimony. . . The case cited to us from the Supreme Court of Canada [*Lefeunteum* v. *Beaudoin*, *infra*], where two courts had decided the facts upon negative evidence against the affirmative statements of what had taken place, and were overruled, is in point." The learned judge also referred to a case of *McInnes* v. *Ferguson* (unreported), then recently decided by the Supreme Court of Nova Scotia, which, he said, was authority for disturbing a verdict of a trial judge on a matter of fact(*b*).

Lefeunteum v. Beaudoin (1897).

The case of *Lefeunteum* v. *Beaudoin*, above referred to, was a successful appeal to the Supreme Court of Canada from the judgment of the Court of Queen's Bench for Lower Canada (appeal side), confirming the decision of a Superior Court, which dismissed, upon a question of fact, the plaintiff's action with costs. In the judgment of Girouard, J., which was concurred in by all the members of the court, it was held, following *The North British & Mercantile Insurance Company* v. *Tourville*(*c*), that the Supreme Court of Canada will take questions of fact into consideration on appeal, and if it clearly appear that there has been error in the admission or appreciation of evidence by the court below, their decision may be reversed or varied. In the estimation of the value of evidence in ordinary cases, the testimony of a credible witness, who swears positively to a fact, should receive credit in preference to that of one who testifies to a negative. The evidence of witnesses who are near relatives, or whose interests are closely identified with those of one of the parties, ought not to prevail in favour of such party against the testimony of strangers who are disinterested witnesses. Evidence of common rumour is unsatisfactory, and should not generally be admitted.

Opinion of Taschereau, J.

Taschereau, J., gave as an additional reason for interfering, upon a question of fact, with the concurrent findings of the two

(*b*) Zwicker v. Zwicker (1900) 33 N.S.R. 284.
(*c*) (1895) 25 S.C.R. 177.

courts below, the "rule of presumption that ordinarily a witness who testifies to an affirmative is to be credited in preference to one who testifies to a negative, *magis creditur duobus testibus affirmantibus quam mille negantibus*, because he who testifies to a negative may have forgotten a thing that did happen, but it is not possible to remember a thing that never existed.

Evidence of conversations.

Then, as to the various conversations upon which an important part of the case turns, the following sentence of the Master of Rolls in *Lane* v. *Jackson*, 20 Beav. 535, has full application: "I have frequently stated that, where the positive fact of a particular conversation is said to have taken place between two persons of equal credibility, and one states positively that it took place, and the other as positively denies it, I believe that the words were said, and that the person who denies their having been said has forgotten the circumstance. By this means, I give full credit to both parties." In *Chowdry Deby Persad* v. *Chowdry Dowlut Sing*, 3 Moo. Ind. App. 347, Mr. Baron Parke remarks: "In estimating the value of the evidence, the testimony of a person who swears positively that a certain conversation took place, is of more value than that of one who says that it did not, because the evidence of the latter may be explained by supposing that his attention was not drawn to the conversation at the time"(*d*).

(*d*) Lefeunteum v. Beaudoin (1897) 28 S.C.R. 89, at pp. 93-94.

CHAPTER XXXVI.

The Evidence for Defendant.

How affected by rules of Judicature Acts.

Although the matters which may constitute a defence in an action of defamation are, with some exceptions, substantially the same in the courts of all the Provinces, except Quebec, the evidence of such matters is materially affected by the different modes of pleading. Under the comprehensive plea of not guilty, or the general issue, of the former procedure, evidence might be given in support of various defences not specifically disclosed in the pleading itself. The legal results of the facts are set forth by the pleader, and not the facts themselves. Under the rules of the Judicature Acts, the material facts upon which the defendant relies must be concisely stated, but not the evidence by which they are to be proved(*a*). The court in that case, and not the pleader, decides what is the legal result of the facts(*b*). Although the defendant is required to admit in his statement of defence such of the material allegations in the statement of claim as are true(*c*), the rule is in practice permissive, and the silence of his pleading, as to any allegation in the plaintiff's pleading, is not to be taken as an admission of its truth(*d*). The defendant must also raise all such grounds of defence as if not so raised would be likely to take plaintiff by surprise, or would raise new issues of fact not arising out of the pleadings, as, *e.g.*, the statute of limitations in bar, or a release, of the claim sued for(*e*). The purpose and effect of these and other rules of pleading, which relate to the evidence for the defendant, are explained in the chapter on the Defendant's Pleadings.

(*a*) R. 268, O.J.A.
(*b*) Hanmer v. Flight, 35 L.T.N.S. 127.
(*c*) R. 269, O.J.A.
(*d*) R. 272, O.J.A.
(*e*) R. 271, O.J.A.

Evidence of surrounding circumstances under plea of not guilty.

Although under the Judicature Acts the plea of not guilty is no longer available, except as a statutory plea, it is still in use wherever the former system of pleading prevails. In slander, evidence may be given under this plea of the circumstances attending the speaking of the words, which would be more than mere evidence in mitigation, and would acquit the defendant, if the jury believed that he acted honestly and in good faith and without actual malice towards the plaintiff. In a declaration for slander it was averred that certain mail matter, containing letters of great value, was lost, and that the defendant, in the presence and hearing of a number of persons, said that the plaintiff "and no other person, robbed the mail." The evidence shewed that it was reported and generally believed that the mail had been stolen. The defendant was a magistrate, and one of his sons was contractor for the mail. Suspicion fell upon plaintiff, and the defendant's son expressed suspicion of him to the defendant. The defendant told the postmaster that it was the plaintiff, or that he thought it was the plaintiff. Many houses and persons in the village were searched, and it was in the midst of this excitement that the defendant, the only magistrate present, spoke the words complained of to the postmaster. The trial judge ruled that it was necessary that any circumstances justifying suspicion should have been pleaded, and that evidence of the circumstances could only be admitted in mitigation of damages, if the defendant, being a magistrate and present during the search, while there was a general anxiety and endeavour to discover the mail and detect the offender, spoke the words charged to the postmaster as his own real opinion of what had become of the mail. The jury found for the plaintiff and £25 damages. The court granted a new trial.

Opinion of Robinson, C.J.

"The learned judge," said Robinson, C.J., "seems to have been under the impression that the evidence, which the defendant offered to give, could only have the effect of mitigating damages, and could not entitle the defendant to a verdict, and that, if offered with that view, the facts should have been specially pleaded. But we consider that the plea of not guilty, in slander, operates precisely as it did before the new rules, not merely in denial of speaking the words, but of speaking them maliciously,

in order to defame: *Smith* v. *Thomas*, 4 Dowl. 334; *Padmore* v. *Lawrence*, 11 Ad. & Ell. 380; and that the defendant should have been allowed to give evidence of all the circumstances immediately preceding and attending the speaking of the words, which would have enabled the jury to judge whether the words were uttered as the sincere declaration of a suspicion really entertained and upon probable ground, and uttered at a moment when the defendant as a magistrate, and others, were earnestly consulting and endeavouring, for the public good, to detect the author of a supposed robbery of the mail"(*f*).

The rule as to shewing the surrounding circumstances was also upheld in a Nova Scotia case for words imputing theft to the plaintiff, the defence being that the words were not used in a defamatory sense, but were mere words of abuse. Defendant's counsel offered to shew this, and that a bystander would so understand them, and proposed certain questions with that view, which the trial judge disallowed. The Supreme Court of Nova Scotia held, that the verdict for the plaintiff must be set aside and a new trial granted for the rejection of this evidence.

Daines v. Hartley (1848), as to proper course of examination at trial.

The case of *Daines* v. *Hartley*(*g*) was referred to by Townshend, J., as completely establishing "the right of the defendant to prove the circumstances under which the words were uttered, and thereby place before the jury such facts as will enable them to form a correct opinion as to the sense in which they were used by the defendant, and understood by the bystanders. Pollock, C.B., in delivering the judgment of the court, says: "The bystander may perceive what is uttered is uttered in an ironical sense, and, therefore, that it may mean the reverse of what it professes to mean. Something may have previously passed which gives a peculiar character and meaning to some expression, and some word, which ordinarily or popularly is used in one sense, may, for something that has been done before, be restricted and confined to a particular sense, or may mean something different from that which it ordinarily and naturally does mean. But the proper course for a counsel who proposes to get rid of the plain

(*f*) Keegan v. Robson (1850) 6 U.C.Q.B. 375.
(*g*) (1848) 3 Ex. 199.

and obvious meaning of words imputed to a defendant, as spoken of a plaintiff, is to ask the witness not: 'What did you understand by those words?' but 'Was there anything to prevent those words from conveying the meaning which ordinarily they would convey?' because, if there was, evidence of that may be given, and then the question may be put: "What did you understand by them?' A comparison of the questions proposed in this case, with those suggested in the above extract, will shew that they were substantially the same, and being evidence which bore on the most material part of the defence, should have been received"(*h*).

In slander evidence of secret intent, or of facts unknown to bystanders, inadmissible. Opinion of Ferguson, J.

But while in slander evidence of the surrounding circumstances is admissible, evidence of the secret intent of the defendant, or of facts unknown to the bystanders when the words were uttered, is not admissible. In *Johnston* v. *Ewart*(*i*), Ferguson, J., said: "The charge of the learned Chief Justice seems to me to have left it to the jury to say whether, in their opinion, the defendant was really charging the plaintiff with having committed the crimes mentioned, instead of whether or not the circumstances were such that all the bystanders would understand that the defendant did not mean to charge the plaintiff with the commission of crime according to what he (defendant) actually said, the undisclosed intention of the defendant, in this respect, having nothing to do with the question, and being wholly immaterial. The defendant might not have been really charging the plaintiff (as mentioned by the Chief Justice in his charge to the jury), and yet the bystanders might well imbibe, and go away with, the conviction that the defendant was so charging the plaintiff, who would, in such case, be a grievously slandered and defamed person. . . . The defendant cannot give in evidence any facts that were not known to the bystanders at the time the words were uttered; but he is allowed to give evidence of all the surrounding circumstances in order to place the jury, as far as possible, in the position of bystanders. The defendant's secret intent, in uttering the words, is wholly immaterial."

(*h*) Shea v. O'Connor (1894) 26 N.S.R. 205.
(*i*) (1893) 24 O.R. 116.

When rumours admissible, and when inadmissible.

Where the words charged impute a criminal offence, and not guilty only is pleaded, the defendant may shew, solely in mitigation of damages and to rebut the presumption of malice, that, before speaking the words, it was a common rumour in the neighbourhood that plaintiff had been guilty of the specific offence charged(*j*). But where the words are not actionable *per se*, rumours in the neighbourhood, unknown to the defendant, in proof of the statement that the plaintiff had committed a crime, are inadmissible(*k*). The weight of authority, however, is against the admissibility of evidence of rumours(*kk*).

A verdict against the weight of evidence will not be set aside as of right. Opinion of Hagarty, J.

A court is not bound as of right to set aside a verdict that is against the weight of evidence, even though it be a verdict of which they cannot approve. In an action for slander imputing theft, the defendant justified and gave strong evidence to shew that the theft charged had been committed by the plaintiff about three years previously. The jury found for the plaintiff and $150 damages, and on a motion for a new trial, on the ground that the justification was clearly proved, the court refused to interfere. After describing the evidence against the plaintiff as "very strong," Hagarty, J., who delivered the judgment of the court, said: "It does not follow because a man has once committed an offence, that a jury will regard with favour a person who persists in casting it up against him at any period, however remote. A person may make the charge relying on his being able to prove it to the satisfaction of a jury. We think he must always run this risk. But we do not think a court is bound to set aside, as a matter of right, a verdict rendered against the weight of evidence, but may leave the defendant to the consequences of his own rashness. It is not usual to put a plaintiff, deliberately charged with fraud or felony in a civil action, twice as it were upon his trial; at all events, an action for slander is not one in which the ordinary wholesome rule should be set aside. We think we cannot properly interfere on the merits"(*l*).

(*j*) *Per* Hagarty, C.J., in Edgar v. Newell (1865) 24 U.C.Q.B. 215.
(*k*) Grant v. Simpson (1878) 12 N.S.R. (3 R. & C.) 141.
(*kk*) See chapter on Evidence in Mitigation of Damages, p. 717, *post*.
(*l*) Edgar v. Newell, *supra*.

Evidence of judgments in crim. con. and alimony adverse to married woman suing for slander imputing adultery.

Evidence of judgments in actions for criminal conversation and alimony adverse to a married woman, who sues for a slander charging her with adultery, is an effective answer to the action. A husband and wife, or, as the evidence shewed, the wife, in the name of the husband and wife, sued for slander of the wife in charging her with adultery, special damage being claimed by the wife for the loss of the *consortium* of the husband, and of the hospitality of friends. The pleas were not guilty and justification. The husband was called as a witness for the defendant, and testified, in effect, that he had obtained information which satisfied him of his wife's wrong doing with one G. He also produced letters which he had found in her possession, addressed to her, which pointed to improprieties with another person, and in which reference was made to G. The witness stated that he fully believed the charges; that he had communicated the matters discovered to his wife, her father, and her brother; that he had turned her out of his house; and that she had proceeded against him by an action for alimony, in which judgment was given against her on the ground of adultery. The wife, who was called and examined on her own behalf, denied the charge of adultery. She also called the person with whom she was charged to have committed adultery, and he admitted that a verdict had been recovered against him by the male plaintiff for criminal conversation. Upon the argument of a rule *nisi* to shew cause against a verdict for the plaintiff, the court held, that in view of the evidence above mentioned, the verdict must be set aside; and that thereafter the male plaintiff, if so advised, might raise the question whether he was not *dominus litis*(*m*).

Evidence of non-registration of medical practitioner.

The defendant may also, of course, avail himself of any statutory defence, as, *e.g.*, non-registration under a Provincial Medical Act, where the action is by a physician for a slander published of him professionally. And where in such an action in the Province of Ontario, the evidence shewed that, at the time the words complained of were uttered, the plaintiff was not entered on the Provincial Medical Register pursuant to the pro-

(*m*) Campbell *et ux.* v. Campbell (1875) 25 U.C.C.P. 368.

visions of the Provincial Medical Act then in force, although he was registered as a medical practitioner in Great Britain, it was held that the action was not maintainable(*n*).

Evidence that words prima facie actionable are really innocent.

Evidence may also be given to shew that words *primâ facie* importing an indictable offence were used in a different sense, *e.g.*, as importing trespass, which would prevent them being actionable *per se*(*o*).

Evidence of plaintiff's hostility to defendant.

The rejection of evidence tendered to shew bias or hostility on the part of a plaintiff, who has been called as a witness on his own behalf, is no ground for a new trial, especially where no substantial wrong has been done, and the evidence sought to be impeached is immaterial. On the trial of an action by husband and wife for words imputing unchastity to the wife, evidence was rejected which was tendered to shew that the husband was influenced by a bias or a feeling of hostility to defendant. Part of the evidence given by the husband was hearsay, and would have been rejected had it been objected to. The remainder was immaterial. Upon a verdict for plaintiff it was held, refusing a new trial (Meagher, J., *diss.*), that the rejection of the evidence did not occasion a substantial wrong to defendant within the meaning of Order 37, Rule 4, of the Revised Statutes of Nova Scotia.

Opinion of Graham, E.J.

"It is hardly necessary," said Graham, E.J., "to prove that a party to the cause has a bias. It would be assumed that he had a feeling of hostility to his opponent in the litigation. The evidence is given to shew that a witness who would be considered an independent witness and impartial, is really biased through relationship or hostility, etc. . . . It must be remembered that the reason for allowance of this kind of evidence is to shew bias or want of impartiality, not for the purpose of contradiction, because it is not allowable to contradict a witness in regard to a statement which is not relative to the subject matter of the cause. . . . Again, there is no object in impeaching the testi-

(*n*) Skirving v. Ross (1880) 31 U.C.C.P. 423.
(*o*) Herrington v. McBay (1888) 29 N.B.R. 670.

mony of a witness if he has given no evidence affecting the case. All of the plaintiff's evidence, which was legal, related to matters about which there could be no controversy. The remainder of it was hearsay. . . . It would be an abuse of the rule to allow evidence to be given disparaging the plaintiff before the jury merely because he went on the witness stand to prove something merely formal, or to escape comment because he was not called, under the pretence of impeaching his evidence by shewing declarations tending to prove he had a quarrel with his opponent." The learned judge referred to *Teets* v. *Village of Middleton* (N.Y.) 12 N.E.R. 347, and *People* v. *Brooks* (1892), 30 N.E.R. 189, in the New York Court of Appeals, in support of his opinion.

Meagher, J.

Meagher, J., who dissented, thought the evidence should have been admitted as going to the credibility of the plaintiff. He referred to *Tennant* v. *Hamilton*, 7 C. & F. 133; Roscoe's Law of Evidence, p. 181; *Melhuish* v. *Collier*, 15 Q. B. 878; *Attorney-General* v. *Hitchcock*, 1 Ex. 94, 100, 102; *Ib.* Parke, B., during the argument; *Ib.* Pollock, C.B., at p. 100; Taylor on Evidence, sec. 1443(*p*).

Matter favourable to plaintiff, unconnected with the libel, is irrelevant and inadmissible for the defence.

Where defamatory matter concerning the plaintiff has been published in a newspaper, other matter favourable to him, published in the same paper and unconnected with the defamatory matter, is irrelevant, and will not be received on behalf of the defendant. And so where in an action by a judge of the Supreme Court of British Columbia against the editor of the *British Colonist*, Victoria, B.C., for the publication of an article in that newspaper which, in effect, charged him with a corrupt partnership while holding offices of public trust, and with thereby unlawfully acquiring large sums of money, part of the evidence tendered by the defendant consisted of other matter published in the *Colonist* favourable to the plaintiff, but not relating to the matter complained of, the evidence was rejected(*q*).

(*p*) Creelman *et al.* v. Tupper (1893) 25 N.S.R. 334.

(*q*) Walkem v. Higgins (1889), unreported in B.C. reports. See report of appeal in 17 S.C.R. 225.

Where the trial is before a judge without a jury, and the evidence is contradictory on a question of fact, a new trial will be granted for the erroneous judgment of the judge in weighing the testimony(*r*). And where the words proved are different from those alleged, and there is no evidence of the innuendoes alleged and of how the words used were understood, the court, in the absence of any amendment by the plaintiff, cannot frame an innuendo to conform to the plaintiff's evidence, but they may suggest an innuendo which justifies the evidence for the defence(*s*).

The fact that a charge of bribery, published in a newspaper, formed part of a statutory declaration (made with the object of bringing the charge before a municipal council, which had power to investigate the charge and to dismiss the official complained of, but which was unnecessary for that purpose), is no evidence of *bonâ fides*, and such a declaration tendered in proof of *bonâ fides* was held to have been rightly rejected(*ss*).

Evidence to rebut malice in the Quebec courts.

In the Province of Quebec, evidence of every fact in an action for slander that rebuts the inference of malice may be proved by the defendant upon the *defense en fait*(*t*). And, in a case of criminal libel, evidence of subsequent publications in the same newspaper has been admitted to rebut malice in the publication of the article charged. This ruling was given in a prosecution of the publishers of the *Daily Witness* at Montreal, for a libellous article which appeared in that journal on the 17th February, 1874. The defence wished to prove and put in two copies of the *Witness*, one of the 19th and the other of the 20th February, to rebut malice. It was objected, on the part of the Crown, that though parts of the same paper or book might be used, no subsequent acts of the defendants could avail them; the absence of malice must be at the time of the offence. Counsel for the defence argued that, in a case of homicide, the acts of the party immediately after would be admitted to shew how the death happened, and that there was no malice, and consequently that there could be no murder. Ramsay, J., took time

(*r*) Zwicker v. Zwicker (1900) 33 N.S.R. 284.
(*s*) Tobin v. Gannon (1901) 34 N.S.R. 9.
(*ss*) McDonald v. Sydney Post Publishing Co. (1906) 39 N.S.R. 81.
(*t*) Dupont v. St. Pierre (1819) 2 R.L. (K.B.) 334.

to consider, and, after conferring with Sanborn, J., said that the case was not without difficulty, but that they were both of opinion that, though not very strong evidence, it should go to the jury, it apparently having been admitted in one case, *R.* v. *Hone*, mentioned in Starkie, 3rd Ed., p. 714(*u*).

Defence of reconciliation.

A settlement by reconciliation may, in an action *d'injures*, including libel and slander, be proved by witnesses as a good defence(*v*). In an action for slander, the defendant pleaded reconciliation founded on a meeting with the plaintiff at a hotel, where they drank together, but where, according to the evidence, there was nothing said by plaintiff to indicate that he had abandoned his right of action. It was held that there was no presumption of reconciliation, and that the plea of defendant was not sustained(*w*). Although the presumption of reconciliation in a case of slander is, as a general rule, favourably received, it is not so where the slanders complained of are atrocious and dictated apparently by persistent malice(*x*).

Slander of defendant by plaintiff.

The defendant may also shew that he has been slandered by plaintiff. Where, therefore, in an action for slanderous words spoken by the defendant concerning the plaintiff and the plaintiff's wife the pleas denied the slander, and set up as compensation defamatory words spoken by the plaintiff concerning the defendant, and there was proof that the words used by the plaintiff were as bad as those used by the defendant, the action was dismissed(*y*). Under the rules of the Judicature Acts the defendant, in such a case, could counterclaim for the slanders spoken of him by the plaintiff.

See Counterclaim in chapter on Defences to Action.

(*u*) R. v. Dougall *et al.* (1874) 18 L.C.J. 85, at p. 98.
(*v*) Peltier v. Miville (1818) 2 R.L. (K.B.) 334.
(*w*) Pepin v. Pacaud (1864) 8 L.C.J. 218; 14 L.C.R. (S.C.) 364.
(*x*) Veilleux v. Lanouette (1882) 5 L.N. (Q.B.) 419.
(*y*) Coutu v. Lefebvre (1884) 7 L.N. (S.C.) 111.

CHAPTER XXXVII.

Evidence in Mitigation of Damages.

The scope of evidence in mitigation of damages.

Evidence in mitigation of damages may take a wide range. It may embrace every fact and circumstance which will tend to lessen the defendant's responsibility, or diminish the injurious consequences of the publication. The defendant may plead and prove an apology made and tendered(*a*); may shew *bonâ fides* and honesty of purpose, or an absence of actual malice or of gross carelessness; may prove provocation on plaintiff's part, or, under certain circumstances, previous publications of the libel by other persons; the character of the plaintiff, etc. But he may not shew facts or circumstances which would be a bar to the action, *e.g.*, justification of any part of the libel(*b*). This should be specially pleaded, although, where it is pleaded, facts falling short of the truth may be allowed in mitigation(*c*).

Evidence in mitigation under the general issue.

"In ordinary civil cases formerly," said Macaulay, J., in an early case, "the truth was allowed to be proved under the general issue in cases of verbal slander (and equally perhaps if written) in bar of the action, or in mitigation of damages; but it was ultimately decided that such defence should be pleaded, since which the truth is only admissible in bar when so pleaded; and facts shewing probable cause can only be received in mitigation of damages (for nothing short of the truth will be a bar); when the truth is pleaded, then they can be received as tending to prove the truth, and though they fall short of it, they are with the jury to reduce damages—Willis, 20-4; Str.

(*a*) For the statutory provisions as to an apology, its sufficiency, etc., see Retraction and Apology in chapter on Defences to Action.

(*b*) Smith v. Richardson (1732) Willes 20; Underwood v. Parks (1744) 2 Str. 1200; Speck v. Phillips (1839) 5 M. & W. 279; 8 L.J. Ex. 277; 7 Dowl. 470; Vessey v. Pike, 3 C. & P. 512; Moore v. Mitchell (1886) 11 O.R. 21.

(*c*) *Per* Tindal, C.J., in Chalmers v. Shackell *et al.* (1834) 6 C. & P. 475.

1200; 5 B. & A. 645; D. & R. N. P. C. 10. Under the general issue, surmises, etc., may be proved in mitigation of damages, by repelling malignity, and so weakening the implied malice, also because they could not form ingredients of evidence tending to support a plea of the truth, as the grounds of probable cause would; but probable cause, that is, facts and circumstances shewing the ground of such cause, are not admissible in mitigation of damages under the general issue"(*d*).

Slander of clergyman.

As to this last observation it may be noted that, in an action for imputing perjury to a clergyman, evidence in mitigation of damages was tendered by defendant on the ground that such evidence might be given under the general issue, provided it did not amount to proof of the truth of the words spoken. The evidence having been rejected, the verdict for plaintiff was set aside and a new trial granted without costs(*e*).

Slander of school trustee.

Upon the same point there was a difference of opinion in a New Brunswick case, in which the plaintiff alleged, that at a meeting of the ratepayers of the district, at which the accounts of the school district, while the plaintiff was trustee, were discussed, the defendant charged him with having stolen the school funds. The defendant denied having used the words charged, and swore that he only stated at the meeting that, as he understood the plaintiff's books, he had received more money than he had paid out, and that he (defendant) had received a letter from the Chief Superintendent of Education stating that the trustees had paid a teacher a certain sum out of the school funds. Neither the letter nor the book was read before the meeting. In an action for slander in charging the plaintiff with stealing and embezzling the moneys, to which defendant pleaded not guilty only, it was held by the court (Wetmore, J., *diss.*), that the letter and the book were admissible in evidence in mitigation of damages and to rebut any presumption of malice —no objection having been made that such evidence was not admissible under the plea(*f*).

(*d*) Stanton v. Andrews (1836) 5 U.C.R. (O.S.) 211.
(*e*) Johnson v. Eastman (1825) 1 U.C.K.B. 327; Tay. Rep. 243.
(*f*) Bolser v. Crossman (1886) 25 N.B.R. 556.

Evidence of previous rumours. Opinion of Hagarty, J.

There is some diversity of opinion as to whether previous rumours, to the same effect as the defamatory words, are admissible in mitigation of damages, but the weight of authority is against evidence of that character. In *Edgar* v. *Newell* (*g*), Hagarty, J., expressed the opinion that, where the action is for words imputing a crime and not guilty only is pleaded, the defendant may shew, solely in mitigation of damages and to rebut the presumption of malice, that, before speaking the words, it was a common rumour in the neighbourhood that plaintiff had been guilty of the specific offence charged. "This would tend to shew that defendant may have acted, not from malice, but rather from heedlessness"(*h*). See, also, *Earl of Leicester* v. *Walter*(*i*), and *Sir John Eamer* v. *Merle*, cited therein; ——— v. *Moor*(*j*), and *Richards* v. *Richards*(*k*). But, in *Jones* v. *Stevens*(*l*), the court were unanimously of opinion that the *Earl of Leicester* v. *Walter* was not law. And in a more recent case it was held, that while general evidence of the reputation of the plaintiff might be given in mitigation, evidence of rumours to the same effect as the libellous statements are not admissible as falling short of justification, and as being within the rule against hearsay; and that, since the Judicature Act and the rule which requires the "material facts" on which the defendant relies to be stated in the pleadings, the defendant could not avail himself of such evidence, even if it were admissible, as he had not stated his intention of so doing in his pleading(*ll*). This decision, however, does not restrict defendant's liberty of cross-examination. See, also, the cases *infra*(*m*), all

(*g*) (1865) 24 U.C.Q.B. 215.

(*h*) Edgar v. Newell (1865) 24 U.C.Q.B. 215.

(*i*) 2 Camp. 251.

(*j*) 1 M. & S. 284.

(*k*) 2 Moo. & Rob. 557.

(*l*) 11 Price, 235.

(*ll*) Scott v. Sampson (1882) 8 Q.B.D. 491; 51 L.J.Q.B. 380; 30 W.R. 541; 46 L.T. 412.

(*m*) Mills *et ux.* v. Spencer *et ux.*, Holt N.P. 533; Rodriguez *v.* Tadmire, 2 Esp. 721; Withman v. Weaver, 11 Price, 257*n*; 1 D. & R.N. P.R. 10; Snowden v. Smith, 1 M. & S. 286, note(*a*); Woolmer v. Latimer, 1 Jur. 119; Thompson v. Nye, 16 Q.B. 175; Bell v. Parke, 11 Ir. C.L.R. 413, 420, and Wilson v. Fitch, 41 Cal. 363.

of which are against the admissibility of previous rumours in mitigation of damages.

Evidence of rumours under the Quebec law.

The law is different in the Province of Quebec. There proof of rumours current in plaintiff's neighbourhood, before the uttering of the slander, may be adduced in mitigation under the general issue(*n*). In the case of criminal proceedings for libel, however, evidence of previous rumours to the same effect as the libel charged was rejected, for the reason apparently—because the case, as reported, is not clear on the point—that the libel charged could not be justified. The defendants, the publishers of the *Daily Witness*, of Montreal, attempted to prove, in justification of the articles complained of, that rumours of a similar character had existed in the city prior to the 17th February, when the articles appeared. This was objected to, and the court, in maintaining the objection, held, that the truth could not be proved in justification(*o*), much less then could the defendants be allowed to prove that the statements in the articles were rumoured to be true. The belief of the defendants in the truth of their statements might be shewn upon a motion in mitigation of punishment(*p*).

Evidence of plaintiff's general bad character previous to publication.

The once controverted question whether evidence of plaintiff's general bad character previous to the publication of the libel or slander complained of can be given in mitigation, may now be regarded as settled. In an Ontario case, *Edgar* v. *Newell*(*q*), the state of the authorities was considered by Hagarty, J., to be "most unsatisfactory." But, as remarked by Wilson, C.J., in a later decision in the same court, *Moore* v. *Mitchell*(*r*),

(*n*) Fournier v. Noreau *et ux.* (1868) 12 L.C.J. (S.C.) 342.

(*o*) Presumably—although it is not so stated—unless it were pleaded that the publication was for the public benefit, which would have been the proper form of a plea of justification, on a criminal prosecution, in Quebec and all the other Provinces at that time. See C.C. ss. 331 and 910, and Reg. v. Dougall *et al. infra.*

(*p*) Reg. v. Dougall *et al.* (1874) 18 L.C.J. 85, at p. 89.

(*q*) (1865) 24 U.C.Q.B. 215.

(*r*) (1886) 11 O.R. 21, at p. 24.

the law was determined by "the convincing and conclusive judgment in *Scott* v. *Sampson*"(*s*), which was followed by Rose, J., in two decisions, *Livingston* v. *Trout* and *Wilson* v. *Woods*, respectively(*t*).

Scott v. Sampson (1882).

Scott v. *Sampson* was an action for a libel alleging that the plaintiff, a theatrical critic, had extorted money by threatening to publish defamatory matter concerning a deceased actress. The defendant pleaded justification. It was held, that evidence of rumours before the publication of the libel that the plaintiff had committed the offences charged in it, and that evidence of particular facts and circumstances tending to shew the misconduct of the plaintiff as a theatrical critic, was inadmissible in reduction of damages; that principle and authority were against the reception of such evidence; and that assuming such evidence to be admissible, it was rightly rejected for the reason that the "material facts" on which the defendant relied were not stated in his pleadings as required by the then rule of the English Judicature Act(*u*).

Evidence as to character under the rule of the Judicature Acts.

The same rule prevails in the Canadian Provinces which have adopted the Judicature Acts. And now, under that rule, in actions for libel and slander, in which the defendant does not by his defence assert the truth of the statements complained of, the defendant shall not be entitled on the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence(*v*).

The facts must be pleaded.

The effect of this rule and of *Scott* v. *Sampson* (*supra*), is,

(*s*) (1882) 8 Q.B.D. 491.

(*t*) 9 O.R. 488 and 687.

(*u*) Now R. 461 (1883).

(*v*) R. 488, O.J.A.; N.S.J.A. 1900, Ord. 34, R. 30; R.S.M. 1902, c. 40, s. 471 (The King's Bench Act); R. 359, B.C. Supreme Court Rules, 1900. See pp. 731-32, *post*, for comments on R. 488, O.J.A., and as to matters pleadable under it.

that whether the truth of the alleged libel or slander be pleaded or not, evidence as to the plaintiff's character, with a view to mitigation of damages, is not admissible unless the particulars of the facts relied on are pleaded. The following decisions indicate judicial opinion on the subject both before and since the Judicature Acts:

Evidence of plaintiff's general bad character under plea of not guilty.

For words imputing theft, the defendant, in mitigation of damages, tendered evidence (which was rejected) of the plaintiff's general bad character previous to the speaking of the words, and the plaintiff had a verdict for $15 damages. A new trial was moved for before the Upper Canada Court of Queen's Bench on account of the rejection of this evidence, but the rule was refused, and the court also refused leave to appeal, the case of *Bracegirdle* v. *Bailey*(*w*) being referred to by Hagarty, J., as authority for the judgment of the court, and as governing also the practice of the Upper Canada Court of Common Pleas(*x*). Adam Wilson, J., was clearly of opinion that evidence of general bad character was inadmissible, though, as to whether a reputation for the particular offence charged might be proved, there were different opinions expressed, more especially by the text writers. Hagarty, J., observed that, in *Bell* v. *Parke*(*y*), which was cited on the argument for defendant, the point was not in any way *sub judice*, and, therefore, the remarks upon it were wholly extra-judicial. *Willeston* v. *Smith*(*z*) is a New Brunswick decision to the same effect as *Myers* v. *Currie* (*supra*). In *Bracegirdle* v. *Bailey* (*supra*), which was approved of in *Myers* v. *Currie*, it was held(*a*) that where there is no plea of justification, evidence of bad character, or questions relating to the plaintiff's previous life or habits, tending to discredit him, and to mitigate the damages, are inadmissible either on cross-examination or examination in chief. It should be observed, however, that in that case the plaintiff was not examined in chief,

(*w*) (1859) 1 F. & F. 536.
(*x*) Myers v. Currie (1863) 22 U.C.Q.B. 470.
(*y*) 11 Ir. C.L.R. 413.
(*z*) 5 N.B.R. (3 Kerr) 443.
(*a*) *Per* Byles, J., after consulting Willes, J.

so that questions as to credit were inadmissible, while, in the absence of a plea of justification, the questions tending to justify had to be disallowed.

Where not guilty and justification pleaded.

Where the words charged imputed theft, and not guilty and justification were pleaded, the defendant tendered evidence to shew that the plaintiff's character for honesty, and his general reputation in that respect were bad, but the evidence was rejected on the ground that there was a plea of justification on the record. The jury found for the plaintiff and $150 damages. Upon a motion for a new trial for the rejection of this evidence, the court held, that it was properly rejected, and, apparently, that it would have been inadmissible even without the justification; but that where not guilty only is pleaded, a defendant may shew, solely in mitigation of damages and to rebut the presumption of malice, that before speaking the words it was a common rumour in the neighbourhood that the plaintiff had been guilty of the specific offence charged.

Opinion of Hagarty, J.

Hagarty, J., who delivered the judgment of the court, discusses the question of the rejection of the evidence, from two standpoints: first, as to whether such evidence should be admitted under any circumstances; and, secondly, whether, if admissible in mitigation of damages, it could be received after evidence in bar on a plea of justification(*b*).

Evidence of character where plea amounts to justification, but restricted to mitigation.

There has been some difference of opinion as to whether, under a plea of facts amounting to justification, but restricted to mitigation of damages, a defendant may prove the bad character of the plaintiff as a fact in mitigation. Rose, J., held such a plea good on demurrer(*c*), but his decision was disapproved of by the Divisional Court in a later case(*d*).

(*b*) Edgar v. Newell (1865) 24 U.C.Q.B. 215.
(*c*) Wilson v. Woods (1885) 9 O.R. 687.
(*d*) Moore v. Mitchell (1886) 11 O.R. 21, at p. 25. See notes of these two cases, *infra*.

Evidence of bad character in mitigation not admissible under plea of justification. The effect of plea in mitigation.

Evidence of bad character in mitigation is not admissible under a plea of justification. This was distinctly held in an action for the publication in the Ottawa *Free Press* of a notice signed by the defendant, the publisher of the paper, under the caption of "Caution," in which it was stated that plaintiff had "been representing himself as connected with the *Free Press*, and, on the strength of such connection, applying for railroad passes. This is to give notice that no such person has any connection with the *Free Press*, and all persons are hereby cautioned against any one of that name representing himself as belonging to the *Free Press*, and asking favours in such connection." The innuendo was, that the plaintiff had been falsely representing himself as being connected with the *Free Press*, and had been fraudulently attempting, upon the strength of such false representations, to obtain railway passes. The 6th and 7th paragraphs of the statement of defence set out that the defendant had dismissed the plaintiff from his employment on account of gross misconduct and dishonesty in having collected large sums of money for the defendant, which, on his own confession, he had appropriated to his own use without defendant's knowledge. The 10th paragraph alleged that the defendant, knowing the plaintiff's antecedents, bad character and dishonesty, as set forth in the 6th and 7th paragraphs, and believing he might make similar applications, unless prevented, to other railway companies on account of the *Free Press*, and for the protection of the defendant's interests, and for the character of his paper, published the caution *bonâ fide* and without malice, and that the publication was necessary to protect the defendant's interest, and that of railway companies, and to prevent frauds on said companies, and was the only way of effecting defendant's object, and was made by the defendant believing it to be his duty so to do. The Master in Chambers refused to strike out any of these paragraphs; but, on appeal, Galt, J., ordered them to be struck out, and his order was affirmed by the Divisional Court. The court (Wilson, C.J., and Armour, J.) held that, in libel, a plea in mitigation of damages must, in its nature, be an admission that the plaintiff is entitled to recover some compensation, the amount of which shall be limited to the value of his character, as affected by the

facts pleaded and proved; that a plea, based upon his bad character, must shew that he is either a man of bad general reputation or character, or that he has a bad character with regard to some specific act relating to the charge in the libel complained of; but that a defendant may not plead justification to a libel, and, under that defence, offer evidence of the plaintiff's bad character in mitigation of damages. *Wilson* v. *Woods*(*e*), on that point,, was disapproved of(*ee*).

The law in Quebec.

In an action for libel in the Province of Quebec, evidence tendered by defendant as to the previous conduct and character of the plaintiff was held to have been properly rejected, especially when such matters were not referred to in the pleadings(*f*).

Matter received from usual source and sent to press without time for investigation.

In the case of newspapers, and particularly those which are published daily, the haste incident to the preparation or revision of matter before going to press, and the opportunities for verifying it beforehand, may be considered. In an action for a libel contained in an associated press despatch published in a newspaper, one of the pleas was, that the words complained of were received in the usual course of business, in stereotype form, from the Central Press Agency, a very short time before going to press, and that the matter was inserted, in the ordinary course of business, and without any knowledge of its contents. Upon demurrer the plea was held good by the Ontario Court of Appeal(*g*).

The opportunities for supervising and verifying matter for publication beforehand.

The same sort of evidence has been held to be admissible in actions against newspapers in some of the courts of the United States. In an action against the principal proprietor of the

(*e*) (1885) 9 O.R. 687.

(*ee*) Moore v. Mitchell (1886) 11 O.R. 21.

(*f*) Laflamme v. Mail Printing Co. (1888) Mon. L.R. 4 Q.B. 84.

(*g*) Beaton v. Intelligencer Printing and Publishing Co. (1895) 22 O.A.R. 97. See, also, Vansycle v. Parish, 1 O.L.R. (1901) 13; McKenzie v. McLaughlin (1902) 38 C.L.J. 131; Fulford v. Wallace, 1 O.L.R. (1901) 278.

Detroit *Evening News*, for publishing a libellous article purporting to give the substance of a bill of complaint filed against a third party and seriously implicating plaintiff, it was held, that the haste incident to issuing the paper, the time at which the libellous article was handed in, the opportunities for examining the truth or falsity of the contents of the article, and the sufficiency of the force employed on the paper for gathering the news and preparing and supervising articles for publication, may be considered as bearing on the question of the publisher's negligence, and fixing the amount of damages(*h*).

Inadmissible evidence in mitigation of libel of candidate for public office.

But the excitement of an election contest, and the publication in his newspaper, by the defendant, of matter defamatory of a candidate for public office in what defendant regarded as the public interest and for the public benefit, are not circumstances which may be given in mitigation. In an action by a candidate for the office of police magistrate, who was charged in a local newspaper with dishonesty and corruption, it was held, that it is erroneous to instruct the jury that they may, in mitigation of damages, consider the excitement of an election leading to the publication, or the fact that the article was published for the sole purpose of defeating the plaintiff's election. The fact that the defendant, as the proprietor of a newspaper, in publishing a libellous article against the plaintiff while a candidate for office, was actuated by what he believed to be for the public good, cannot be taken and considered in mitigation of damages. An intention to serve the public good does not authorize a defamation of private character(*i*). And where, in the Province of Quebec, a false report, implicating an entirely innocent person in the commission of a serious crime, was published in a newspaper, not maliciously, but without any effort to verify the statements contained therein, it was held, that the fact that the newspaper was about to go to press at the time the information was received, was not a valid excuse for failure to investigate the truth of the charge(*j*).

(*h*) Rielly v. Scripps (1878) 38 Mich. 10.

(*i*) Rearick v. Wilcox (1816) 81 Ill. 77.

(*j*) *Per* Doherty, J., in Auburn v. Berthiaume (1903) Q.O.R. 23 (S.C.) 476.

Correction of a libellous report or article.

The correction of a libellous report or article may be pleaded and proved in mitigation. An insurance inspector and adjuster, and, at the time of action brought, the liquidator of an insurance company, sued the publisher of the *Monetary Times* newspaper, of Toronto, for the publication in that paper of statements contained in a report of the trial of a previous action of libel between the same parties, in which plaintiff had recovered one shilling damages. The paragraph in question stated that "the court refused to allow proof of specific acts of alleged improper conduct, etc., and that he (plaintiff) would have been asked, for instance, to explain the purchase of the claim in respect of a loss, one-half of the amount being afterwards received from him by the company while he was adjuster of that company. And again as to the receipt of certain gifts of money, admitted on his examination, from certain parties whose losses he had adjusted, and a number of similar matters"; meaning that the plaintiff had been dishonest in adjusting insurance claims, and had been guilty of accepting bribes from certain parties whose losses he had adjusted. The defendant admitted publication, but denied the innuendo, and alleged that the article was published without actual malice or gross negligence, etc. He further alleged that there was an inaccuracy in the article, but that this was corrected at the earliest opportunity, in a subsequent article in defendant's newspaper—the correction being set out in the pleading. The plaintiff demurred to the paragraph in the statement of defence admitting publication and containing the correction above mentioned, on the grounds, that the paragraph admitted the cause of action, and did not contain any answer thereto in law; and that the paragraph, instead of containing a plea of publication of a full apology for the alleged libel, contained, in effect, a portion of the same libel complained of in the action expressed in slightly different language, and was no answer to the cause of action set forth in the statement of claim. It was held (*per* Rose, J.), that the difference between the first and second articles, as to the payment on the alleged purchase, was material; for if it was proved that the first article was in this respect false to the knowledge of the defendant, and he made no correction, this would be evidence of malice, and would probably materially affect the damages(*k*); but even if

(*k*) Odgers on Libel and Slander, St. Am. Ed. 302.

immaterial, the plaintiff was not prejudiced, as the correction was only offered as a defence in mitigation of damages(*l*).

Evidence of confession of a crime only admissible under plea of justification, and not in mitigation, except under special circumstances.

In an action for libel and slander imputing theft, the defendant pleaded in mitigation of damages, that plaintiff had confessed to defendant's mother that he had done the act charged against him. At the trial defendant's mother was called as a witness to prove the alleged confession, whereupon the trial judge (Street, J.) interposed and held, that evidence of the confession could not be given except under a plea of justification, which was not upon the record. The defendant having given no evidence, the case went to the jury who found in favour of the plaintiff and $300 damages. Upon a motion for a new trial it was held, that evidence of the alleged confession was only admissible under a plea of justification, unless the defendant added on the record that she had now good cause for discrediting that part of the admission or confession alleged to have been made by the plaintiff, although she honestly believed it to be true at the time she repeated the words complained of. It was also held, that objection should have been taken by the plaintiff to this particular plea in mitigation either by demurrer or by application to strike it out as embarrassing. The cases of *King* v. *Dollar*(*m*), *Smith* v. *Richardson*(*n*), *Watkins* v. *Hall*(*o*), and *Speck* v. *Phillips*(*oo*), were referred to as shewing that where a defendant relies upon the truth as an answer to the action, he must plead that matter specially(*p*).

Evidence of provocation by libellous newspaper articles.

Evidence of provocation by the publication of newspaper articles defamatory of the defendants may also be given in mitigation. In an action, *e.g.*, for damages for assault and battery, the defendants tendered evidence to prove that libellous

(*l*) Livingston v. Trout (1885) 9 O.R. 488.
(*m*) 23 Q.B. 388.
(*n*) (1737) Willes, 20.
(*o*) (1868) L.R. 3 Q.B. 396.
(*oo*) (1839) 5 M. & W. 279.
(*p*) Switzer v. Laidman (1889) 18 O.R. 420.

articles reflecting on them were published prior to the assault, in a newspaper of which the plaintiff was the proprietor. The trial judge refused to admit this evidence, holding that at that time the plaintiff had done nothing to provoke an assault, and that, under the circumstances, the evidence could not be given in mitigation. "It is difficult to see," said Hagarty, C.J., "on what principle we can exclude evidence, offered not as a bar, but merely in mitigation of the circumstances and moving cause of assault committed by a defendant, from whom damages are sought. We are of opinion that the evidence should not have been rejected"(*q*). This case was cited for the defendant on the argument, and is referred to in the judgments, in *Stirton* v. *Gummer* (*infra*). So, also, where in trespass for assault and battery, the defendant offered to prove in mitigation of damages that the plaintiff had slandered his wife, and that he had committed the trespass immediately on being informed of such slander, a new trial was granted, after a verdict for the plaintiff, for the rejection of this evidence in order that all the circumstances might be elicited(*qq*).

Evidence of a previous, but not of a subsequent, libel by plaintiff, admissible in mitigation of damages.

A previous, but not a subsequent, libel of defendant by plaintiff, may be given in evidence to shew provocation. This was decided in an action in which the editor of the Guelph *Herald* claimed damages for libels upon him professionally, contained in a letter written and published by the defendant in the *Advocate* and *Mercury*, two other local newspapers. The action arose out of a series of publications in the local press following upon an election contest for the Provincial Legislature. A protest against the return of the successful candidate having been dropped, the defendant, who had supported him, dictated an "interview" be-

(*q*) Percy v. Glasco *et al.* (1872) 22 U.C.C.P. 521. The following authorities are referred to in the judgment: Watts v. Fraser (1835) 7 C. & P. 370; and, in the note to this case, Judge v. Berkeley *et al;* May v. Brown (1824) 4 D. & R. 670; 3 B. & C. 113; Fraser v. Berkeley (1836) 7 C. & P. 621, a case which the learned Chief Justice said he had never seen questioned; Selwyn's Nisi Prius, 13th Ed., vol. 1, p. 52; Thomas v. Powell, 7 C. & P. 807; Tarpley v. Blabey (1836) 2 Bing. N.C. 437; Taylor on Evidence, 6th Ed., vol. 1, p. 355, and cases there cited; Robertson v. Meyers (1850) 7 U.C.Q.B. 423.

(*qq*) Short v. Lewis (1834) 3 U.C.R. (O.S.) 385.

tween himself and the editor of the *Advocate*, which was published in that paper, attacking the *Herald*. The *Herald*, in an article written by the plaintiff as its editor, thereupon attacked the defendant as the author of the *Advocate* "interview." The defendant replied over his own signature in the letter in question. Plaintiff followed with a second article in the *Herald*, partly in prose and partly in rhyme, repeating substantially what had appeared about the defendant in the *Herald's* first article. The defendant then brought an action against the proprietor of the *Herald* for certain statements contained in its two articles, and plaintiff, in turn, brought the present action against the defendant for the defamatory statements contained in his published letter. In the action by the defendant against the proprietor of the *Herald*, a verdict was recovered for $500 damages, which, though subsequently set aside, was still standing when the present action was tried(*r*). In the present action the defendant pleaded justification, and a special plea that the letter, written and published by him in the *Advocate* and *Mercury*, was by way of retort to a libellous attack by the plaintiff in the *Herald's* first article. The jury found in favour of the plaintiff and $100 damages. Upon an appeal by the defendant to the Divisional Court, one of the questions argued and decided was the admissibility of the *Herald's* first article as evidence for the defendant of provocation and in mitigation of damages, and also the admissibility of the *Herald's* second article criticising the defendant, which appeared two days subsequent to the publication of the letter complained of by the plaintiff. Both of the *Herald's* articles had been admitted by the trial judge (Falconbridge, J.), so that, as pointed out by MacMahon, J., in his judgment in the Divisional Court, the jury, in estimating the damages to which the plaintiff was entitled, must necessarily have taken the second *Herald* article into consideration, and thus there was a mitigation of the damages by reason of an act by the plaintiff which had in no way provoked the defendant's attack upon him in the letter in question. The court (Rose, J., *diss.*) held, that the first *Herald* article, but not the second, was admissible as evidence for the defendant of provocation and in mitigation of damages(*s*).

(*r*) See Stirton v. Gummer (1899) 31 O.R. 227, reversing the judgment at the trial.

(*s*) Downey v. Stirton, 1 O.L.R. (1901) 186.

Evidence of newspaper attacks by plaintiff on other persons not admissible. Opinion of MacMahon, J.

Another ground of appeal by the defendant was the refusal of the trial judge to allow an amendment of the pleadings setting up publication by the plaintiff in the *Herald* after issue joined, and six months after the publication by the defendant of the libel sued on in this action, of an article alleged to reflect on the character of other persons at G. The article in question was a report of the trial of the libel action of *Stirton* v. *Gummer*, which was at that time being tried at the local assizes, and contained a synopsis of the opening speech of counsel for the plaintiff, and of the evidence of a number of the witnesses. "Counsel for the defendant," said MacMahon, J., "relied upon *Kelly* v. *Sherlock* (1866), L.R. 1. Q.B. 686, as an authority entitling him to an amendment. The judgment of Mr. Justice Blackburn in that case goes further than any previously decided case, and text writers on the law of libel, and on the law of evidence, disagree with the dictum of Mr. Justice Blackburn where he says, at p. 698, that the jury "in estimating the compensation for the plaintiff's injured feelings, might fairly consider the plaintiff's conduct, and the degree of respect he has shewn for the feelings of others." If that was to be regarded as settled law, it might, on a trial for libel, involve this strange condition: the defendant in an action might, as shewing the plaintiff's conduct and the degree of respect he had for the feelings of others, set up that he had libelled A., B., C., and D., and, if he did, the plaintiff could both justify and reply, as to each of the parties, that he (plaintiff) had been first attacked, and that he had merely rebutted the charges made by each of the persons named. There would thus be involved the trial of four actions before the jury could be satisfied that the plaintiff had improperly attacked the characters and reputations of those others. The law was never in that condition." The defendant's appeal was dismissed (Rose, J., *diss.*) (*t*).

Rule 268 and Cons. Rule 384, O.J.A.

Under the rules of the Ontario Judicature Act, the pleadings must contain a concise statement of the material facts upon which the party relies, but not the evidence by which they are to be

(*t*) Downey v. Stirton, 1 O.L.R. (1901) 186.

proved(*u*); and (formerly) where the pleadings set up a distinct defence, it might be demurred to on the ground that the facts alleged did not shew any defence to which the court could give effect against the party demurring(*v*).

Facts in mitigation must be pleaded, and, where they are properly pleadable, a demurrer will not lie.

These rules had to be considered in an action against the proprietors and publishers of the Belleville *Intelligencer* newspaper, for an alleged libel contained in an associated press despatch. The 5th paragraph of the statement of defence alleged that the words complained of were received in the usual course of business, in stereotype form, from the Central Press Agency, a very short time before going to press, and that the matter was inserted in the ordinary course of business, and without any knowledge of its contents. The 7th paragraph alleged that the article complained of had, for some days prior to its alleged publication, appeared in the New York and Toronto daily newspapers, and had, before its alleged publication, become a matter of public, national and international interest, and that it was a fair and *bonâ fide* report of what was then public news, and was printed and published *bonâ fide* and without malice, and for the benefit of the public and not otherwise. The 8th paragraph alleged that the article was a benefit to the plaintiff, as it gave her denial to what she alleged were slanderous stories which had been circulated about her in the village where she lived. These paragraphs were demurred to on the grounds that they disclosed no defence, and were not properly pleadable in mitigation of damages; and that the facts set forth in the paragraphs could not be given in evidence. The demurrer was allowed by Robertson, J., for these and other reasons, but the Ontario Court of Appeal held otherwise. The court were of opinion that the facts intended to be relied on in mitigation of damages in a libel action must be set out in the statement of defence, and, unless this is done, they cannot be given in evidence; that Consolidated Rule 399 was inconsistent with Consolidated Rule 573(*w*), and governed in

(*u*) R. 268, O.J.A.

(*v*) Cons. R. 384, O.J.A. See present R. 259 as to raising questions of law in pleadings.

(*w*) Now R. 488.

such a case; and that the matters of defence above mentioned were as a whole pleadable in mitigation(*x*).

A plea in mitigation as to different words improper.

A defendant is not at liberty to allege, by way of defence, that the words actually spoken were different from those charged in the statement of claim to have been spoken, and to plead as to such other words something either by way of answer or in mitigation of damages(*y*).

Rule as to furnishing particulars of matters in mitigation.

Wherever the procedure is governed by the Judicature Acts, there is the important rule(*z*) adopted from the English rules, 1883, and quoted at page 719, *ante*, under which particulars must be furnished to the plaintiff seven days before the trial, or, by leave of the judge, at the trial, of the matters intended to be given in evidence in chief in mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff. One of the objects of this rule was to obviate the effect of *Scott* v. *Sampson*(*a*), although it does not change the law as there laid down. But the rule was also rendered necessary on account of the change in the system of pleading, introduced by the Judicature Acts, under which the defendant may no longer plead not guilty, except as a statutory plea(*b*), and is required to plead the "material facts" on which he relies(*c*). "It is well established that facts to be given in evidence in mitigation of damages in a libel action must be set out in the statement of defence: *Beaton* v. *Intelligencer Printing Co.* (1895), 22 O.A.R. 97"(*d*). The same rule applies in actions of slander. Where, therefore, in an action for words

(*x*) Beaton v. Intelligencer Printing and Publishing Co. (1895) 22 O.A.R. 97.

(*y*) Fulford v. Wallace, 1 O.L.R. (1901) 278. See, also, Dryden v. Smith (1897) 17 O.P.R. 505, as to the proper mode of pleading privilege, fair comment, and matters in mitigation of damages, which, in that case, were pleaded so as to be embarrassing.

(*z*) R. 488, O.J.A.

(*a*) (1882) 8 Q.B.D. 491.

(*b*) Peterborough v. Midland Ry. Co. (1887) 12 O.P.R. 127; R. 286, O.J.A.

(*c*) R. 268, O.J.A.

(*d*) *Per* Teetzel, J., in Hopewell v. Kennedy (1904) 4 O.W.R., at p. 436.

charging the plaintiff with stealing the defendant's newspaper, the defendant pleaded that "if he spoke the words complained of, which he does not admit but denies, they were so spoken in good faith and without any malice whatever towards the plaintiff, under the following circumstances (setting out the circumstances), which led the defendant to believe that the plaintiff had stolen his newspaper," it was held, following *Beaton* v. *Intelligencer Printing and Publishing Co.* (*supra*), that this plea might be properly pleaded in mitigation of damages(*e*). And where the defence is privilege, a defendant, though not able to prove all that is necessary to be shewn to establish this defence, is entitled to the benefit of what he does shew, in mitigation of damages, if it goes to that—subject, perhaps, to his having given the notice required by Rule 488, O.J.A.(*f*).

Wherever this rule can be made use of, the notice required should be given, otherwise the evidence referred to cannot be admitted without the special leave of the trial judge. Its admissibility would be in his discretion, which would hardly be interfered with. If the evidence were material it might influence the jury to give no more than nominal damages. The effect of the provision in the rule for the seven days' notice is not, it seems, to enable the defendant to give in evidence what, before the rule came into force, he could not give, but merely to prevent him giving the evidence mentioned without such notice.

Matters pleadable under the Rule.

Matters in mitigation, which may be pleaded under the rule, are the same as under the former procedure; the legal admissibility of such matters as evidence is not affected. Where, therefore, justification is not pleaded, the defendant may prove in mitigation the circumstances under which the libel or slander was published, *e.g.*, its source, whether provoked by plaintiff or in self-defence, etc. But he may not give evidence in mitigation tending to prove the truth of the words. In an unreported English case(*g*), Vaughan Williams, J., held that the defendant, having admitted that he had called the plaintiff a perjurer, and

(*e*) Vansycle v. Parish, 1 O.L.R. (1901) 13; 21 C.L.T. (Occ. N.) 128.

(*f*) McKenzie v. McLaughlin (1902) 22 C.L.T. (Occ. N.) 92. But see Fulford v. Wallace, 1 O.L.R. (1901) 278.

(*g*) Penny v. Stubbs, tried February 19, 1892.

not having justified, could not give evidence, under the corresponding English rule(*h*), to prove that the plaintiff had made statements in the witness box in another action which were not in fact true(*i*). Neither may he prove that he was told by a third person of the particular thing which he has published, and which is complained of as a slander(*j*); nor that the plaintiff has contradicted or complained of previous publications by some other persons of the same libel(*k*). But in libel he may prove the source of his information(*l*); that the libel has been previously published in a newspaper(*m*); that it was copied from other newspapers, or had appeared therein(*n*); that it had become a matter of public or national interest(*o*); that it was a fair and *bonâ fide* report of what was then public news(*p*); that a report of a judicial trial, complained of as unfair, was contained in another newspaper which may be admitted as evidence of that fact(*q*); although the signed letter of a correspondent, upon whose authority a libel was published in a newspaper, will not be admitted(*r*); that offensive passages were omitted in a copy of a libel as published(*s*), or in the report of a public meeting(*t*); that prior to the publication of the libel complained of, plaintiff had libelled or slandered the defendant, and that this provoked defendant to publish the libel sued for(*u*), but not

(*h*) Ord. 36, R. 37.

(*i*) Fraser's Law of Libel and Slander, 2nd Ed., 232.

(*j*) Mills *et ux.* v. Spencer *et ux.*, Holt's Cas. 513.

(*k*) Ingram v. Lawson (1840) 9 C. & P. 333; Pankhurst v. Hamilton (1886) 2 T.L.R. 682.

(*l*) Duncombe v. Daniell (1866) 2 Jur. 32, 33; 8 C. & P. 222; *per* Wightman, J., in Davis v. Cutbush (1859) 1 F. & F. 87.

(*m*) Mullett v. Hulton, 4 Esp. 248; De Bensaude v. Conservative Newspaper Co. (1887) 3 T.L.R. 538.

(*n*) Beaton v. Intelligencer Printing and Publishing Co. (1895) 22 O.A.R. 97.

(*o*) *Ibid.*

(*p*) *Ibid.*

(*q*) Saunders v. Mills (1829) 6 Bing. 220. But see *per* Lord Denman, C.J., in Talbutt v. Clark *et al.* (1840) 2 Moo. & Rob. 313, where this decision is questioned.

(*r*) *Ibid.*

(*s*) Creevy v. Carr (1835) 7 C. & P. 64.

(*t*) Creighton v. Finlay, Arm. M. & A. 385.

(*u*) Wakley v. Johnson (1826) R. & M. 422; Tarpley v. Blabey (1835-6) 2 Bing. N.C. 437; 7 C. & P. 395; Watts v. Fraser *et al.* (1837) 7 A. & E. 223; 7 C. & P. 369.

otherwise(*v*); that, although a report of proceedings in a court of justice was inaccurate, it was intended to be honest and fair(*w*); that there was no malicious motive at the time of publication(*x*); and that the defendant published letters from the plaintiff explaining and contradicting the libellous charge(*y*). And where justification was pleaded, but not proved, the circumstances proved may be considered in mitigation(*z*).

Evidence in mitigation of damages for libel in newspapers in Ontario and British Columbia.

In some of the Provinces evidence of previous publications and of damages or compensation therefor, which was formerly regarded as irrelevant, may now be admitted. This occurs in actions for newspaper libel under the Libel Acts of Ontario and British Columbia. The Ontario Act provides that, upon the trial of any action for libel contained in a newspaper, the defendant shall be at liberty to give in evidence, in mitigation of damages, that the plaintiff has already brought actions for, or has recovered 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(*a*). There is a like provision in the British Columbia statute(*b*).

These enactments, which are taken from the English Law of Libel Amendment Act, 1888(*c*), only apply to newspapers as defined by the provincial statutes, namely, in Ontario, to those appearing at intervals not exceeding thirty-one days; and, in British Columbia, to those appearing at intervals not exceeding thirty-one days.

The previous "actions" of which evidence may be given.

The previous "actions" mentioned of which evidence may be given, are not actions against the same defendant referred to in the enactments. but "actions" against third parties. This is

(*v*) May v. Brown (1824) 3 B. & C. 113; 4 D. & R. 670.

(*w*) Smith v. Scott (1847) 2 C. & K. 580.

(*x*) Pearson v. LeMaitre (1843) 5 M. & G. 700; 7 Jur. 748; 6 Scott N.R. 607; 7 J.P. 336.

(*y*) Harle v. Catherall *et al.* (1866) 14 L.T. 201.

(*z*) Chalmers v. Shackell *et al.* (1834) 6 C. & P. 475.

(*a*) R.S.O. 1897, c. 68, s. 16.

(*b*) R.S.B.C. 1897, c. 120, s. 9.

(*c*) 51-52 Vict. c. 64, s. 6.

obvious from the language of the sections, and from the law of the case both before and since the passing of the Acts in question. It always was a good defence to an action for libel, that the plaintiff had already brought an action in respect of the same libel against the same defendant in the action, or against a third person with whom the defendant was jointly concerned in the publication of the libel. In *Macdougall* v. *Knight*(*d*) the plaintiff having failed in an action against the defendant, for publishing certain alleged libellous passages in a report of a judgment against the plaintiff, brought a second action against the defendant based on certain other passages in the same report. The court stayed the action on the ground that, if it were allowed to proceed, a plea of *res judicata* must be successful(*e*). This defence was and is available whether the plaintiff succeeded or failed in the previous action. The question is, whether the legal liability for publication is joint or several. That is the test. Generally speaking, the author of a libel, the printer, editor, publisher and proprietor of the newspaper in which it appears, and any person who sells, gives, or lends, a copy of the newspaper containing it, are each and all liable for its publication, and each or all may be proceeded against by the person defamed. But if a defendant, in a certain libel action, is jointly concerned with a third party in the publication of the libel, it was and is a good defence in that action, that the plaintiff has already brought an action against the third party for the same libel. For instance, where A., the third party against whom the previous action has been brought, is a partner of B., the defendant in a publishing firm, the legal liability is joint, and the fact of the previous action having been brought against A., would be an effectual answer to an action for the same libel against B.(*f*) If, however, A. should happen to have been the writer of a libellous article, and B. the publisher of the newspaper in which it has appeared, there the legal liability would be several, and a previous action against A. would be no answer to an action against B., and *vice versa*(*g*). So, also, actions against the printer or publisher do not prevent other

(*d*) (1890) 25 Q.B.D. 1.

(*e*) See defence of *res judicata*.

(*f*) Brinsmead v. Harrison (1872) L.R. 7 C.P. 547.

(*g*) Creevy v. Carr (1835) 7 C. & P. 64; Frescoe v. May (1860) 2 F. & F. 123.

actions against the proprietor, and *vice versa*(*h*). Nor does the fact that the same person has sued previously as a joint plaintiff prevent him suing again as an individual plaintiff for the same libel, and *vice versa*. And, therefore, the members of a firm may proceed jointly for the injury to the firm, and severally for the injury to each one personally(*i*). In the case of joint liability, the defence of a previous action brought and verdict recovered is, of course, stronger than it would be for an action merely pending. The recovery of a verdict, in an action for libel against some of several parties concerned in the libel, and payment of the amount of verdict and costs, even without judgment being entered, is a bar to an action against the other parties concerned in the same libel(*j*). It has been held in Quebec, that a person may have a distinct recourse against all the persons concerned in a libel against him, but he can claim but one compensation therefor(*k*).

The law prior to the statutory amendments.

The law as it stood before these statutory amendments, with respect to mitigation of damages, is illustrated by a number of English decisions.

Hunt v. Algar (1833).

Hunt v. *Algar*(*l*) was an action against the publisher and two of the proprietors of the *True Sun* newspaper, for a libellous paragraph imputing criminal conduct to the plaintiff in a "riot at Preston." The paragraph was credited to the *Liverpool Courier*, but was really copied from the *Liverpool Journal*. The plaintiff had already recovered damages and costs in separate actions against the *Journal* and the *Globe* for publishing substantially the same libel. He was held entitled to recover damages and costs in the present action also. In the case as reported it does not appear whether the fact of the plaintiff having recovered damages in the other two actions was tendered in evidence; but, according to the decision in *Creevy* v. *Carr* (*infra*),

(*h*) Martin v. Kennedy (1800) 2 B. & P. (O.S.) 69; Banning v. Perry (1800) 2 B. & P. (O.S.) 69.

(*i*) Le Fanu v. Malcolmson (1848) 1 H.L.C. 637.

(*j*) Wilcocks v. Howell *et al.* (1885) 8 O.R. 576.

(*k*) Gauthier v. Amyot (1871) 3 R.L. (S.C.) 446.

(*l*) (1833) 6 C. & P. 245.

some two years later, there can hardly be a doubt that the evidence would not have been received.

Creevy v. Carr (1835).

In *Creevy* v. *Carr*(*m*), the plaintiff sued for a libel contained in the *Morning Advertiser* imputing to him the crime of arson. It was proposed, on the part of the defendant, to prove in mitigation of damages, that the alleged libel had appeared in the *Weekly Despatch* newspaper, and that the plaintiff had recovered damages against the proprietors of that paper. Gurney, B., the trial judge, after consulting six other judges who were sitting in the Exchequer Chamber, held that the evidence was inadmissible. But evidence was received in mitigation that the libel was copied in substance from the *Weekly Despatch*, with an omission of certain passages reflecting on the plaintiff.

Tucker v. Lawson (1886).

Tucker v. *Lawson*(*n*) was an action by a solicitor against the proprietor of the London *Standard*, which, through the mistake of a reporter, published an item stating that a person of the same name, and of the same street address, as the plaintiff, had been ordered to be struck off the roll for misconduct. The mistake was widely circulated in other newspapers, and a number of these, including the *Standard*, were sued for damages. The plaintiff complained of loss of business and of heavy expenses incurred in searching the files of newspapers, discovering other publications of the libel, having corrections made, etc. Thereupon the defendant applied for leave to interrogate the plaintiff as to such other publications of the libel, and as to money received or recovered in such actions, etc. This was refused in Chambers and also on appeal. It was urged that the defendant was entitled to the benefit of the information as to other publication obtained by plaintiff, and which, it was claimed, should be paid for by defendant, and that, having regard to the damages, the defendant was also entitled to know whether the plaintiff had received money in any of the other actions. Otherwise, it was said, the plaintiff might recover damages for the loss of business caused by the other publications of the libel. Twenty-

(*m*) (1835) 7 C. & P. 64.
(*n*) (1886) 2 T.L.R. 593.

three provincial newspapers, against which actions had been brought, were represented on the appeal motion, which was dismissed by Denman, J., on the ground that the information sought was irrelevant in the action, except for cross-examination, for which purpose, of course, it could not be granted.

Frescoe v. May (1860).

In *Frescoe* v. *May*(*o*) a distinction was made between the liability of the writer and that of the publisher of the same libel, each of whom was sued separately by the person defamed. The libel was published in the *Medical Circular*, and imputed that the plaintiff was a "quack" dentist, for which the plaintiff recovered forty shillings damages against the proprietor and publisher of the newspaper. In the present action the plaintiff proved that the defendant admitted having written the libellous paragraph at the request of the former defendant, who, it was argued, was the party really responsible. Earl, C.J., held, that the defendant, as the writer, was liable for the injury sustained by the plaintiff in consequence and since the publication of the libel, notwithstanding the previous verdict against the publisher. The verdict for £450 damages was upheld by the Court of Exchequer.

Harrison v. Pearce (1858).

Harrison v. *Pearce*(*p*) was an action by the proprietor of three Sheffield newspapers against the proprietor of a rival local paper, for a libellous address or statement by a printer's society published in the defendant's paper as an advertisement, and charging the plaintiff with oppressive conduct towards his printers, and with disreputable practices as a newspaper proprietor. The damage laid was that the circulation of the plaintiff's newspapers had decreased. The address was sent by one B., president of the society, to one H., to be printed as a placard, and several thousand copies were thus printed and circulated in addition to the circulation in the defendant's newspaper. Actions were pending against B., as writer, and H., as publisher, of the address when the present action was tried. It was shewn that the publication of the libel, as a placard and

(*o*) (1860) 2 F. & F. 223.
(*p*) (1858) 1 F. & F. 567.

as an advertisement, had caused a decline in the circulation of the plaintiff's papers. This evidence was objected to on the ground that it went to establish special damage not necessarily arising from the defendant's publication, that the present defendant was not responsible for the publication of the placard, and that, as another action was pending for that injury, the jury could not consider it. The trial judge, Martin, B., held that the jury were not bound to consider the fact that the other actions were pending against the other two parties for publishing the same libel, and that, in this action, they might give the plaintiff such general damages as they thought had arisen from the decline of circulation, even subsequent to the action. The verdict for £500 damages was sustained by the Court of Exchequer.

Aylmer v. Gray.

In a later unreported case of *Aylmer* v. *Gray*, in the Irish courts, where damages were recovered against the proprietor of the *Freeman's Journal*, the plaintiff had already been awarded large damages against other newspapers for the same libel. The libel consisted of a misprint in the report of a divorce suit which had been sent by a news agency to all the journals amerced. Each action was tried separately, but none of the defendants was permitted to prove, in mitigation, any previous verdict for the same libel.

Objects and scope of the enactments permitting evidence in mitigation.

One of the objects of these Provincial enactments, permitting evidence of previous actions for the same libel in mitigation of damages, was to discourage frivolous suits for libel against newspapers, and to protect their publishers against penalties disproportionate to the offence. The provisions in the Provincial Libel Acts, for the consolidation of different actions for the same libel(*q*), had the same purpose in view. It is noticeable that, under the clause as to mitigation of damages in the Ontario and British Columbia Acts(*qq*), proof may be given of a verdict for any plaintiff in any previous action for the same libel, and that it is not necessary that the previous action should have been against a newspaper, although newspapers are benefited by the

(*q*) See R.S.O. 1897, c. 68, s. 14; C.S.N.B. 1903, c. 136 ,s. 10; R.S.B.C. 1897, c. 120, s. 12.

(*qq*) R.S.O. 1897, c. 68, s. 16; R.S.B.C. 1897, c. 120, s. 9.

enactment which makes such evidence admissible. It would also appear that the compensation may have been received, or agreed to be received, by the complainant, without an action actually brought, and that this fact may be given in evidence. So that wherever (1) an action has been commenced against any person, whether he be a newspaper publisher or not, for a libel to the same purport or effect as the libel in question in a newspaper, (2) or where damages have been recovered in such action, (3) or where compensation has been received, or agreed to be received, by the plaintiff, either before or after action brought, for the same libel as that contained in the newspaper, the fact is available and may be proved in mitigation of damages.

The law in Quebec.

Where, in the Province of Quebec, the action is for verbal injuries, the defendant may plead and prove facts and circumstances connected with the complaint against him which, if they do not fully justify his conduct, at least make more apparent the extent of the provocation and mitigate the damages(*r*). And so where the secretary-treasurer of a municipal council, who prepared an electoral list for the municipality and acted as a clerk and adviser of the council, said to an elector who (in order to intimidate the council and cast contempt on its ruling) ostentatiously threatened an appeal, that it was easy for the elector to take appeals, because he was insolvent, had not paid his taxes and had already incurred costs to the municipality, it was held, that the conduct of the elector might be taken into consideration by the court by reducing the damages in an action subsequently taken against the secretary-treasurer for the language complained of(*s*). And where a speaker at an election meeting referred to one of the candidates as a thief, it was held in an action by the candidate, that anything which may be truthfully said at an election against a candidate will be taken into consideration in mitigation of damages(*t*). But the slander cannot be justified by facts of which no mention was made at the time it was uttered(*u*). The fact, however, that the injurious

(*r*) Renault v. Lortie (1901) 3 Q.P.R. (S.C.) 495. See, also, Dion v. Fafard (1902) 4 P.Q.R. (S.C.) 351.

(*s*) Desmarais v. Geoffrion (1902) Q.O.R. 22 (S.C.) 229.

(*t*) Crébassa v. Ethier (1872) 4 L.R. (S.C.) 210; 4 R.L. 459 S.C.R.

(*u*) *Ibid.*

statements complained of were made in the privacy of the family, and that evidence of the slander was obtained by concealing a witness for the purpose of overhearing what transpired, will be considered in mitigation of damages(*v*).

Where a false report, implicating an entirely innocent person in the commission of a serious crime, has been published in a newspaper, not maliciously, but without any effort to verify the statements contained therein, the fact that subsequently a retraction and apology were published in the same journal, while it may be taken into consideration in the assessment of damages, is not a sufficient reparation for the wrong inflicted, and the court, in such a case, will award exemplary damages to an amount proportioned to the degree of negligence proved(*w*). Reparation made by one of the authors of a libel does not release the others, though it may mitigate the damages, because there is a joint and several responsibility on the part of him who suggests the libel with him who published it(*x*).

Where the alleged libels were in defence of the rights of the R.C. clergy.

The defendant, being sued for a libel contained in a work written by him and published by his co-defendants, pleaded, *inter alia*, that he was a Roman Catholic priest, and a member of a religious society among the objects of which were the defence of the discipline and recognition of the rights and powers of the church; that among the powers which he wished to maintain was that of compelling the observance of its laws, decrees and ordinances; that a certain other action then pending, directed against the archbishop, was intended to prevent the exercise of the ecclesiastical jurisdiction in the sense of the papal bull *Apostolicæ Sedis*, etc. The plaintiff demurred to those paragraphs of the plea which asserted qualities in some sense creating for the defendant special immunities, and the demurrer was maintained in part by the court below. Upon appeal it was held (reversing the judgment of Davidson, J., Hall, J., *diss.*)(*y*), that in view of the public nature of the discussion and the public

(*v*) Waldron v. White (1886) Mon. L.R. 3 Q.B. 375.
(*w*) Auburn v. Berthiaume (1903) Q.O.R. 23 (S.C.) 476.
(*x*) McMillan v. Boucher (1868) 12 L.C.J. (S.C.) 319.
(*y*) Q.O.R. 5 (S.C.) 247.

interest involved, the defendant was entitled to plead, if not in justification, at least in mitigation of damages, all the circumstances connected with the publication of the libel, including his quality and position at the time the work complained of was published, and the truth and sincerity of the statements and opinions on which the charge of libel was founded(*z*).

(*z*) Lacasse v. St. Louis (1894) Q.O.R. 4 (Q.B.) 103.

CHAPTER XXXVIII.

NONSUIT.

Nonsuit, when it arises.

A nonsuit arises when the case is withdrawn from the jury, and judgment is directed for the defendant without a verdict, or, when having been reserved, it is granted after a verdict for the plaintiff(*a*). With respect to libel, 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(*b*). The same is true of slander. He may also withdraw the case from the jury if he can clearly see, upon the face of the record, that the matter charged cannot in any way be libellous(*c*). If there is no evidence at all there should of course be a nonsuit; but if there is evidence to go to the jury, and it is such as to make the verdict found for the plaintiff not against the weight of evidence, it follows, of course, that the case was not one in which the judge should have taken upon himself to have directed a nonsuit(*cc*). In strictness the nonsuit may take place either at the close of the plaintiff's case, or at the close of the evidence for both parties; and this practice is followed wherever the old system of procedure prevails. Under the rules of the Judicature Acts nonsuit is virtually abolished, the judge directing judgment for either one party or the other.

Where nonsuit is requested or voluntary.

Where a plaintiff, finding that the case is going to the jury upon a charge so unfavourable to him upon the merits that, rather than take the risk of a verdict against him, he interposes with a request to be nonsuited, he is held to be precluded from moving

(*a*) Macdonald v. Mail Printing Co. (1900) 32 O.R. 163; 2 O.L.R. (1901) 278.

(*b*) *Per* Kelly, C.B., in Cox v. Lee (1869) L.R. 4 Ex., at p. 288.

(*c*) Fray v. Fray, 17 C.B.N.S. 603; Teacy v. McKenna, Ir. R. 4 C.L. 374.

(*cc*) *Per* Herschell, L.C., for the Judicial Committee, in Peart v. Grand Trunk Railway Co. (1886), on appeal by defendants, in an action for negligence, from the Court of Appeal for Ontario, 10 O.A.R. 191.

afterwards against the nonsuit(*d*). But this rule was held not to apply where the preliminary question was raised whether the publication had been sufficiently proved, and it appeared that both parties were unwilling to press the cause on, from a reluctance to enter upon a very tedious and disagreeable mass of evidence under special pleas, while the preliminary objection was open and unsettled(*e*). Where, however, on a motion for a nonsuit, the trial judge expressed the opinion that the plaintiff's evidence was extremely weak, but did not suggest that there was nothing for the jury, and the plaintiff's counsel thereupon offered to accept a nonsuit with leave to set it aside, which leave was given, it was held, that the nonsuit was voluntary and could not be disturbed(*f*).

Where granted.

In addition to cases mentioned elsewhere, a nonsuit was granted, on the principle of *Jackson* v. *Adams*(*g*), where the slander in question charged plaintiff, a school trustee, with embezzling the moneys of a school section, he not having the moneys in his hands as secretary or treasurer of the school board, or in any official capacity, and his duty as trustee not requiring or authorizing him to receive it(*h*). In *Jackson* v. *Adams* it was held that, although as a charge against him in his office such words might be actionable, yet it was no slander to say of a church-warden that he stole the bell ropes of his parish church, for they are officially his property, and a man cannot steal his own goods. A nonsuit was also granted where the words being privileged and there being no evidence of malice, there was nothing to be left to the jury as to *bonâ fides*, or otherwise(*i*); where the occasion was one of qualified privilege, and evidence of malice was equally consistent with the existence or

(*d*) *Per* Robinson, C.J., in McGrath v. Cox (1867) 3 U.C.Q.B. 332. See judgment of Macaulay, J., at pp. 340, *et seq.*, where the cases are reviewed.

(*e*) *Ibid.*

(*f*) Oakes v. Keating *et al.* (1883) 16 N.S.R. (4 R. & G.) 554, particularly the judgment of Weatherbe, J.

(*g*) (1835) 2 Bing. N.C. 402.

(*h*) Ferris v. Irwin (1860) 10 U.C.C.P. 116.

(*i*) McIntee v. McCulloch (1864) 2 U.C.E. & A. 390; Jackson v. Hopperton, 10 L.T.N.S. 529; Nolan v. Tipping (1858) 7 U.C.C.P. 524; and Whitely v. Adams, 9 L.T.N.S. 483; 10 Jur. N.S. 470, referred to. See, also, on the same point, Smith v. Armstrong (1866) 26 U.C.Q.B. 57.

non-existence of malice(*j*); where the slander was of a medical practitioner professionally, he being registered in Great Britain, but not in Ontario under the Provincial Medical Act(*k*); where in an action against a corporation for libellous letters, written and sent by the manager and assistant manager in one Province to the manager of a branch office in another Province, express malice could not be imputed to the corporation in the absence of evidence that the corporation, its directors, or managing board, authorized, or had any knowledge of, such letters(*l*); or where, in an action against a newspaper publishing company, there was no evidence, apart from the newspaper article in which the libel appeared, to shew that the words bore any other than their ordinary meaning, which was not libellous, and, therefore, that the onus of proof of the innuendo, which assigned a libellous meaning, was not satisfied, and there was no reasonable evidence to go to the jury that the words conveyed the defamatory meaning assigned to them(*m*). The same rule, as to evidence for the jury, has been applied to the newspaper article itself, where the article consists of a fair comment upon a literary work, or other such production, submitted to the judgment of the public. A comment which is the expression of honest opinion, and does not go beyond the limits of what may fairly be called criticism, is no libel, even although the comment be not such as a jury might think to be a just or reasonable appreciation of the work criticized. And if, in an action of libel, there is no evidence of any thing beyond such a comment as above mentioned, there is no case for the jury(*mm*).

A nonsuit was also granted where the evidence adduced to connect the defendant with the authorship of certain anonymous, typewritten circulars of a defamatory character was entirely circumstantial, and insufficient, in the opinion of the

(*j*) Somerville v. Hawkins, 10 C.B. 583; Harris v. Thompson, 13 C.B. 333; Taylor v. Hawkins, 16 Q.B. 308.

(*k*) Skirving v. Ross (1880) 31 U.C.C.P. 423.

(*l*) Freeborn v. Singer Sewing Machine Co. (1885) 2 M.L.R. 253 (In appeal).

(*m*) Macdonald v. Mail Printing Co. (1900) 32 O.R. 163; 2 O.L.R. (1901) 278. See, also, Hunt v. Goodlake, 43 L.J.C.P. 54; 29 L.T. 472; Mulligan v. Cole *et al.*, L.R. 10 Q.B. 549; 33 L.T. 12.

(*mm*) McQuire v. Western Morning News Co. (1903) 2 K.B. 100 (C.A.).

trial judge(*n*); *e.g.*, evidence tendered as to the defendant's style of composition(*o*). But a nonsuit should not be granted where the words, though primarily not actionable, are yet reasonably susceptible of a defamatory meaning(*p*).

When set aside.

Besides cases mentioned elsewhere, a nonsuit was set aside where it had been granted for calling plaintiff a "sodomite," there being no innuendo respecting the term, and an amendment by adding an innuendo having been refused at the trial(*q*); where the defendant spoke of the plaintiff, a miller and grain buyer, that one of the big millers (meaning plaintiff) had run away owing money to him and others; that he (defendant) had come in to catch plaintiff, but that he had gone or cleared out; and a nonsuit had been granted on the ground that the words were not shewn to have been used with reference to the plaintiff's business, and no special damage was proved(*r*); where the defendant, at the trial of his son before a magistrate, charged the plaintiff, on his being called as a witness, with perjury, and the occasion was improperly held to be privileged(*s*); where privilege was held to attach to the statement by a post office inspector, when investigating complaints as to lost letters, to a partner of one of the sureties of the postmaster, that the postmaster's wife had stolen the letters in question, and had given him a written confession of her guilt, which she denied(*t*); but not where the nonsuit was granted as to the inspector's statement to the plaintiff's husband as postmaster, and to his two sureties, the occasions being privileged(*u*).

A nonsuit equivalent to dismissal of action granted after verdict for plaintiff.

Where, in the course of the trial of an action before a judge and jury, a motion for a nonsuit is made at the close of the

(*n*) Scott v. Crerar (1886) 11 O.R. 541; (1887) 14 O.A.R. 152.
(*o*) *Ibid.*
(*p*) Hart *et al.* v. Wall, 2 C.P.D. 146; 25 W.R. 373.
(*q*) Anonymous (1869) 29 U.C.Q.B. 462.
(*r*) Lott v. Drewry (1882) 1 O.R. 577.
(*s*) Cowan v. Landell (1886) 13 O.R. 13.
(*t*) Hanes v. Burnham (1895) 26 O.R. 528; affirmed on appeal (1896) 23 O.A.R. 90.
(*u*) *Ibid.*

plaintiff's case, and again at the close of the whole evidence, and the judge adopts the course of taking a verdict, and of fully hearing and considering the motion after the verdict, he may, in a proper case, nonsuit the plaintiff, notwithstanding a verdict of the jury in his favour. It was there said that the respective functions of judge and jury, in an action of libel, are in no way different from such functions in other actions, except for the statutory provision in favour of a defendant only, contained in R.S.O. 1897, c. 68, s. 2. "It is the duty of the court to consider whether there is any reasonable evidence to go to the jury in support of the plaintiff's claim, and, if not, to dismiss the action: See *Ryder* v. *Wombwell* (1868), L.R. 4 Ex. at pp. 35-9"(*v*). The course adopted by the trial judge in dealing with the motion for a nonsuit in that case—although not as to allowing the nonsuit on both branches of the case—was subsequently approved of by the Divisional Court(*w*). The branch of the case on which the nonsuit was not approved, but was set aside, was where there was conflicting evidence to go to the jury on the charge of "blackmailing" against the plaintiff in the newspaper's report of a public meeting. In his judgment, subsequently delivered, the trial judge (Meredith, J.) held, that there being no evidence of the falsity of the words used, but they appearing, upon uncontroverted evidence, to be true, the plaintiff's case failed, and he dismissed the action. Upon appeal to the Divisional Court his judgment was reversed. The court (Boyd, C., and Ferguson, J.) were of opinion that the truth of the charge complained of by the plaintiff not having been admitted by him, or proved on uncontroverted evidence, and that the evidence as to the use of the word "blackmailing" being contradictory, it was for the jury to pass upon the evidence, and, therefore, that the judgment dismissing the action on the ground that there was no evidence to go to the jury should be set aside, the verdict of the jury in favour of the plaintiff restored, and judgment directed to be entered for $50 damages and costs(*x*).

Nonsuit reserved, and action dismissed as against evidence and judge's charge.

In an action for slander by the conductor on an electric rail-

(*v*) *Per* Meredith, J., in Macdonald v. Mail Printing Co. (1900) 32 O.R. 163.

(*w*) Macdonald v. Mail Printing Co., 2 O.L.R. (1901) 278.

(*x*) *Ibid.*

way, against a woman who had been a passenger on a car in charge of the plaintiff, the words complained of imputed rudeness, incivility, and insult, by actions rather than by words, on the part of the plaintiff towards the defendant while the latter was riding in the car by night. The words were spoken to the superintendent of the company, and plaintiff was thereupon dismissed from the company's service. The trial judge (Falconbridge, C.J.) ruled that the case was one of qualified privilege, and, upon the jury finding in favour of the plaintiff, directed a nonsuit (which he had reserved), and dismissed the action on the ground that the verdict was against the evidence and the judge's charge(*y*).

(*y*) Tapp v. Brenot (1904) 3 O.W.R. 80.

CHAPTER XXXIX.

DAMAGES.

Damages, general and special.

The damages which a plaintiff may recover in an action of defamation are either general or special. General damage is always presumed whenever the words, whether verbal or written, are actionable *per se*. Special damage is never presumed, but must be pleaded and proved, even when it is claimed, as it may be, along with general damage. Failure to prove special damage does not prevent the recovery of general damage(*a*) in any case in which general damage presumably follows the publication of the words. It is not necessary, *e.g.*, to prove special damage when the published words are libellous, nor in any case of slander in which the published words are actionable *per se*(*aa*). Special damage may, of course, be pleaded and proved in aggravation of general damage, but cannot be proved unless it is pleaded(*b*). But, in every case in which special damage is claimed, it must appear (1) that it accrued before the commencement of the action; (2) that it was the natural and probable consequence of the words complained of(*c*); (3) that it consisted of some actual temporal loss or benefit(*d*); and (4) that it was

(*a*) Cook v. Field (1788) 3 Esp. 133; Smith v. Thomas, 2 Bing. N.C. 372; 4 Dowl. 333; 2 Scott 546; Silver *et al.* v. Dominion Telegraph Co. (1882) 10 S.C.R. 238; Lemay v. Chamberlain (1886) 10 O.R. 638; Journal Printing Co. v. Maclean (1896) 23 O.A.R. 324.

(*aa*) See chapter on Slander actionable only on proof of Special Damage.

(*b*) Silver *et al.* v. Dominion Telegraph Co., *supra;* Ashdown v. Manitoba Free Press Co. (1891) 20 S.C.R. 43.

(*c*) Lumley v. Gye (1853) 2 E. & B. 216; 22 L.J.Q.B. 463; Lynch v. Knight *et ux.* (1861) 9 H.L.C., at p. 600; Bowen v. Hall (1881) 6 Q.B.D. 333.

(*d*) The loss of a client, King v. Watts (1838) 8 C. & P. 614; Brown v. Smith (1853) 22 L.J.C.P. 151; or customer, Storey v.. Challands (1837) 8 C. & P. 234; or the refusal of some appointment, Sterry v. Foreman (1827) 2 C. & P. 592; or employment, Martin v. Strong (1836) 5 A. & E. 535; Rumsey v. Webb *et ux.* (1842) 11 L.J.C.P. 129; or the loss of a pecuniary gift, Corcoran v. Corcoran (1857) 7 Ir. L.R.N.S. 272; or of hospitality, Moore v. Meagher (1807) 1 Taunt. 39; Lynch v. Knight (1861) 9 H.L.C. 577, 589.

not caused by a mere repetition of the words, or by an independent act done by some third person(*e*). Otherwise the special damage is regarded as too remote. And so where an action of slander was brought in respect of a statement made by the defendant to the plaintiff's employers, that the plaintiff had removed from premises leaving rent due to his landlord, the plaintiff alleging that he had in consequence of that statement been dismissed from the service of his employers, it was held that the action would not lie, the damage alleged being too remote(*ee*).

The amount of damages.

So far as the amount awarded for the injury is concerned, damages may be (1) nominal, where a mere vindication of character or reputation is sought, or is considered sufficient; (2) substantial, where the jury have given what they regard as a fair or adequate compensation for the injury; and (3) exemplary or vindictive, where, for any good reason, their award exceeds what would otherwise be adequate. In the reported cases in the courts of Quebec the terms "substantial" and "exemplary," as applied to damages, appear to be used as equivalents. In an action for slander, *e.g.*, the court will award exemplary damages, although the plaintiff may not have proved specific damage, if the verbal injuries have been made with persistence and in a manner to cause vexation to the plaintiff(*f*). And in libel the court will also award exemplary damages proportionate to the degree of negligence proved. This was done where there was a failure to verify a false report implicating an entirely innocent person in the commission of a serious crime, even though the newspaper was about to go to press when the information was received, and though a retraction and apology were subsequently published in the newspaper, these circumstances not being a sufficient reparation for the wrong inflicted(*g*).

(*e*) Tunnicliffe v. Moss, 3 C. & K. 83; Hirst v. Goodwin (1862) 3 F. & F. 257; Adams v. Kelly (1824) Ry. & Moo. 157; Ward v. Weeks (1830) 7 Bing. 211; Parkins *et ux.* v. Scott *et ux.* (1862) 1 H. & C. 153; Riding v. Smith (1876) 81 Ex. D. 91; 45 L.J. Ex. 281; Ecklin v. Little (1890) 6 T.L.R. 366; Speight v. Gosnay (1891) 60 L.J.Q.B. 231; 55 J.P. 501.

(*ee*) Speake v. Hughes (1903) 1 K.B. 138 (C.A.).

(*f*) Chalin v. Gagnon (1898) 5 Rev. de Jur. 320.

(*g*) Auburn v. Berthiaume (1903) Q.O.R. 23 (S.C.) 476.

The standard of damages for the jury. Cameron, C.J.

In an action of slander or libel there is no precise measure of damages. The damages are wholly in the discretion of the jury(*h*); and, in libel, are peculiarly within their province(*i*); and so also in slander(*ii*); but, if excessive, may be reduced on appeal by the court(*j*).

Lord Esher, M.R.

If the case be one of libel, whether on a person, a firm, or a company, the law is that the damages are at large. It is not necessary to prove any particular damage; the jury may give such damages as they think fit, having regard to the conduct of the parties respectively, and all the circumstances of the case(*k*).

Sherwood, J.

"The court have no standard in actions of this nature [*i.e.*, of slander] by which they can undertake to measure the damages. It is one of those questions which must be left to the sentiment and feeling of the jury, who hear the evidence and most probably know both parties. I do not think the smallness of the damages is to be considered as necessarily reflecting on the plaintiff's character. The jury in the first place find the slander untrue, but that the plaintiff sustained little or no injury from it. His accuser, in their estimation, was probably unworthy of credit, or, as was urged at the trial, he was not in his right mind"(*l*).

Hagarty, C.J.

In such an action as libel, the only tribunal for trial (except by consent) is the jury, to whom every question, libel or no libel, damages or no damages, is referred; and, in my judgment, no tribunal but the jury can decide such questions. . . . I think

(*h*) *Per* Cameron, C.J., in Central Bank of Canada v. Osborn *et al.* (1889) 12 O.P.R. 160.

(*i*) Davis & Sons v. Shepstone (1886) 11 App. Cas. 187; 55 L.J.P.C. 51; 34 W.R. 722; 55 L.T. 1.

(*ii*) McLean v. Campbell (1905) 38 N.S.R. (G. & R.) 416.

(*j*) Belt v. Lawes (1884) (C.A.) 12 Q.B.D. 356; 53 L.J.Q.B. 249; 32 W.R. 607; 50 L.T. 441; and other cases, *post*.

(*k*) *Per* Lord Esher, M.R., in South Hetton Coal Co. v. North Eastern News Association (1894) 1 Q.B. 133.

(*l*) *Per* Sherwood, J., in Atkins v. Thornton (1830) Drap. Rep. 239.

in an action of this character the question of damage or no damage rests wholly with them(*m*).

Huddleston, B.

But, in considering the question of damages, the jury may consider the manner in which the defence was conducted, and an attack made upon the plaintiff in cross-examination(*n*).

Jury must not be improperiy influenced, or be actuated by improper motives.

At a meeting of the members and servants of a manufacturing company of which defendant was president, a resolution was passed expressing confidence in the innocence of the superintendent of the company, who had been sued by the plaintiff, an employee of the company, for the seduction of the plaintiff's daughter. A letter to the superintendent was at the same time drawn up and signed by a number of persons present, including the defendant, declaring the belief of the signers in the superintendent's innocence of the charges against him which had previously appeared in the newspapers. The letter, in which plaintiff was not named, concluded thus: "We believe you are the victim of a conspiracy as base and ungrateful as was ever sprung on an innocent man," etc. The letter was afterwards published in several newspapers, without any objection on defendant's part, and plaintiff thereupon sued defendant for libel. The jury found in plaintiff's favour and $1,500 damages. Upon a motion for a new trial on the ground, *inter alia*, that the damages were excessive, the Divisional Court held, following the rule laid down in the same Division in *Moody* v. *Canadian Bank of Commerce*(*p*), that the question of damages was one entirely for the jury, unless they were improperly influenced, or were actuated by some improper motive, and that the verdict should not be disturbed on that ground.

Opinion of Street, J.

"The question of the right of the court to interfere with the finding of a jury upon the question of damages," said Street, J.,

(*m*) *Per* Hagarty, C.J., in Wills v. Carman (1888) 14 O.A.R. 656, at p. 659.

(*n*) *Per* Huddleston, B., in Kelly v. O'Malley *et al.* (1889) 6 T.L.R. 62.

(*p*) (1890) (unreported).

"was lately considered at length in this Division in *Moody* v. *Canadian Bank of Commerce*, where a number of cases bearing upon the question were referred to. I may refer, in addition, to *Turner* v. *Meryweather*, 7 C.B. 251, an action for a libel stating that the plaintiff had, by undue influence, procured the execution of a power of attorney for the transfer of a sum of money. The jury gave £1,000 damages to the plaintiff, and Wilde, C.J., says, with reference to the objection that the damages were excessive: "Looking at the nature of the imputations cast upon the plaintiff by the publication in question, and having no certain test for ascertaining the precise measure of damages in such a case, I cannot say that the sum awarded is excessive"(*q*).

Moody v. Canadian Bank of Commerce (1890). Opinion of Armour, C.J.

Moody v. *Canadian Bank of Commerce* (1890), referred to (*supra*), was an action for malicious prosecution, and the damages were assessed at $8,500. Armour, C.J., in delivering the judgment of the court, said: "The law has confided to juries, and not to judges, the power of awarding damages in actions of malicious prosecution, and, unless we can see that they have been subject to some improper influence, or have been actuated by some improper motive in awarding them, we ought not to interfere with their award. It is impossible for us to say that any improper appeal was made to the jury by the plaintiff's counsel, or any appeal that ought to induce us, on that account, to interfere with their award of damages; and it is equally impossible for us to say that the jury was actuated by any improper motive in awarding the damages they did. The damages awarded were such as, in our opinion, twelve reasonable men might have given, and are larger than those awarded in many, and not so large as those awarded in some, cases which the court have declined to interfere with: *Hewlett* v. *Cruchley*, 5 Taunt. 277; *Fabrigas* v. *Mostyn*, 2 W. Bl. 929; *Leith* v. *Pope*, *Ib.* 1327; *Robertson* v. *Meyers* (1850) 7 U.C.R. 423; *Praed* v. *Graham* (1889) 24 Q.B.D. 53."

The same rule in Quebec.

In an action for newspaper libel in the Province of Quebec,

(*q*) Taylor v. Massey (1891) 20 O.R. 429.

where an action also lies for defamatory matter contained in the pleadings, it was held, that in actions for libel the assessment of damages is peculiarly the province of the jury, and a verdict of $6,000 for the newspaper libel complained of in the case, and of $4,000 for the libellous allegations of the plea, was not so excessive as to lead to the inference that the jury were led into error or were actuated by improper motives. In the Supreme Court of Canada, however, the amount was reduced to $6,000 for both, by giving the plaintiff the option of accepting that sum, or taking a new trial. The plaintiff elected to accept the reduced amount(*r*).

Opinion of Dorion, C.J.

In discussing the question of damages, on the appeal from the court of first instance, Dorion, C.J., said there was "no proper measure by which a jury can assess the exact amount of damages which should be awarded in such cases. It is quite possible that the respondent may not have suffered any material pecuniary injury from the publication of this libel. His standing may have been such that nothing said or written of him could have destroyed or diminished the confidence which his friends or the public reposed in him. But is a man in such a position to have no redress against such malicious attacks? Undoubtedly not; and the juries in such cases are the proper, and, I might say, the only, competent authority to determine, according to each particular case, the amount of damages to be awarded. They generally take into consideration the position and standing of the complainant, the degree of influence, the extent of publicity given to the libel, and the motives and degree of malice which may have actuated the publishers of the libel, and these are all proper elements to determine the amount of damages in every case. In the present case all these considerations are in the direction of an award for a large amount of damages. That the jury should have given a verdict for $6,000, although the sum is large, it is not such as can induce the court, under the circumstances, to hold that the jury was moved by improper motives, or that they gave their verdict through error or mistake. The verdict cannot, therefore, be considered excessive"(*s*).

(*r*) Laflamme v. Mail Printing Co. (1888) Mon. L.R. 4 Q.B. 84.
(*s*) *Ibid.*, at p. 98.

Opinion of Cameron, C.J.

"I quite understand," said Cameron, C.J.,(*l*), "the difficulty of interfering on this head [*i.e.*, excessive damages], as it is not possible to lay down any rule or guide by which the jury could measure the damages sustained with any degree of accuracy, and sending it down to another jury is merely to take the chance of their finding for a less amount. The jury is by statute made, in this particular kind of action, judges of the law and fact, and to interfere with what they have done is a *quasi*-usurpation of their province and function. It is to be remembered, too, that the change in the law giving to the jury the right to judge of the law and fact was an amendment sought by, and obtained on behalf of, the public press, whose freedom was supposed to be imperilled by observance of the rules of law which courts and judges were bound by; and it is singular that, under these circumstances, an appeal should be made to the court to stand between this particular member of the press community and the jury to moderate the severe punishment that has been awarded against the defendants. I am clearly of opinion, however, that the court has a right in this action, as well as in all others, to set aside the verdict of the jury when the damages awarded are far heavier than the circumstances of the case call for, and this, too, when no precise or accurate rule can be laid down for the measurement of the damages."

Belt v. Lawes (1884).

In *Belt* v. *Lawes*(*u*), which was followed in the above judgment, the right of the court to grant a new trial for excessive damages in an action of libel was conceded. The jury gave £5,000 damages, and the court, with the consent of the plaintiff, directed the amount to be reduced to £500, and the defendant's rule for a new trial to be discharged. The defendant having appealed, the Court of Appeal did not question the power of the court below to grant a new trial, and affirmed the right of the court, instead of granting a new trial, to reduce the damages without the consent of the defendant, and with the consent of the plaintiff.

(*t*) In Massie v. Toronto Printing Co. (1886) 11 O.R. 362.

(*u*) (1884) 12 Q.B.D. 356.

Opinion of Meredith, C.J.

In a case in which the jury awarded $2,500 damages for a libel imputing to the plaintiff dishonourable or discreditable conduct in connection with the formation of a hotel company, Meredith, C.J., said in his judgment in the Divisional Court, in which Britton and Anglin, JJ., gave similar reasons for concurring, that the damages were no doubt large, but, in view of the justification pleaded by the defendant and the other circumstances of the case, not so large as to warrant the court directing a new trial, according to the well understood principles upon which the finding of a jury as to damages may and ought to be set aside(*v*).

Duty of jury in awarding damages for slander.

Where the words charged were: "You are a perjured man," and special damage was claimed because the plaintiff was prevented from standing for, and being elected to, the office of township councillor, the jury awarded £150 damages. Although a new trial was granted mainly for the reason that the occasion was privileged, the court were also of opinion that the damages were excessive, and that the jury were unduly influenced by a feeling that the defendant had shewn throughout an unusual and unbecoming eagerness to prevent the plaintiff being returned, and had resorted to unfair means of preventing it. "That may be very true," said Robinson, C.J., "but still it was necessary for them to remember that this was an action of slander they were trying, which must be disposed of upon legal principles applicable to such actions, and that it was not sufficient for them to disapprove of the spirit shewn by the defendant. They were bound also to consider what were the exact words which he did utter; whether they supported the declaration, and were spoken in the unqualified manner described in the declaration, or spoken otherwise—that is, hypothetically—and in the course of a discussion upon an occasion which fairly allowed of such discussions, where there was no intended abuse of a necessary privilege"(*w*). The jury, however, should not consider the question of damages until they have decided the question of the defendant's guilt or innocence. It is necessary that there should be a finding on that question before a finding as to damages. A refusal of the

(*v*) Stone v. Jaffray (1905) 5 O.W.R. 725.
(*w*) Swan v. Clelland (1856) 13 U.C.Q.B. 335.

jury to assess damages, or the finding of no damages, does not dispose of the action(*x*).

Directions to jury as to damages.

In an action for slander by a workman against his former employer, for words imputing theft, which were subsequently held to be privileged, some reference was made in the evidence to a report of the dispute between the parties which had appeared in a newspaper; but there was no mention of this in the plaintiff's pleadings and no claim for damages in respect thereof, and the evidence as to the report was rejected. In his charge to the jury the trial judge (Boyd, C.) said, that if the jury took the view that the defendant and his witnesses were telling the truth, they were to measure the damages by the very smallest coin they could find; but if they thought the plaintiff and his witnesses were telling the truth, and that the charge was a trumped up thing on the part of the defendant to get rid of the plaintiff, and to avoid paying him his wages, and that he had been calling him a thief, and spreading it about in the papers to cause him as much damage as possible, they were to give the plaintiff good round damages. Referring to this direction in the charge, Meredith, J., in the Divisional Court, observed that the jury were not warned that they were not to give damages for the slander referred to in evidence of the newspaper report, but not sued for in the action. "They ought to have been so warned, and, if the observations, as to the amount of damages, were intended as binding upon them, and not merely as suggestions as to what they might or probably would do, they encroached upon the province of the jury"(*y*).

Direction to jury in slander of title and libel.

And where the pleadings in an action and the evidence and law of the case disclose two distinct causes of action arising out of the same published matter, namely, slander of title and libel of the plaintiff personally, the attention of the jury should be directed to the difference between the two parts of the publication complained of, and the separate character of each, in view of their possibly finding one part to be true and the other untrue;

(*x*) *Per* Rose, J., in Bush v. McCormack (1891) 20 O.R. 497.
(*y*) Gildner v. Busse, 3 O.L.R. (1902) 561, at p. 563.

and the damages should be specially awarded for that part which is untrue(*z*).

The question of nominal damages where no damages awarded. The old and the new rule.

The question whether the plaintiff is entitled to nominal damages where the jury give no damages, is discussed in several cases. In *Lemay* v. *Chamberlain*(*a*), the defendant published of a tradesman, in a circular called "The Legal Record, County Renfrew," a statement that plaintiff had given a chattel mortgage on his property, whereas in fact he had only assigned such an instrument held by him against another person. It appeared that the defendant was employed to furnish confidentially to the local business men, twice in each month, a list of the writs issued, judgments entered, and bills of sale and chattel mortgages filed in the public offices of the county. In the course of this employment, the clerk of the county court gave the defendant's clerk the statement complained of, which was published *bonâ fide*, but was corrected when complained of, and the correction published to all the subscribers to the circular. The acting judge at the assizes ruled that the statement was privileged and that there was no malice, and dismissed the action, but asked the jury, in case his ruling was wrong, to assess the damages. The jury found no damages, and an order *nisi* for a new trial was discharged by the Divisional Court. In referring to an objection by plaintiff's counsel at the trial, that the jury should have been told that, even if the plaintiff failed to prove special damage, they were bound, the libel being proved, to give at least nominal if not general damages, because the plaintiff was not bound to prove special damages, Wilson, C.J., said: "I think it has been decided that, since the Judicature Act, the plaintiff is not as of course entitled to nominal damages, unless it may be in an action for the establishment of a right of way, or ferry, or the like. That is not the case here. There is no right involved, and if the jury find no damages, it is, in effect, a verdict for the defendant under our present system. Under the former law, when the plaintiff could only recover costs when he recovered damages, the court

(*z*) Cousins v. Merrill (1865) 16 U.C.C.P. 114, where Brook v. Rawl (1849) 4 Ex. 528, is referred to.

(*a*) (1886) 10 O.R. 638.

would enter a verdict for a nominal sum when it was manifest the plaintiff was entitled to recover some damage: *Feize* v. *Thompson*, 1 Taunt. 121; *The Queen* v. *Fall*, 1 Q.B. 636; *Dods* v. *Evans*, 15 C.B.N.S. at p. 624. Applying this rule in the strictest form the plaintiff is not entitled to nominal damages, even if the publication in question be not a privileged communication"(*b*).

Where the jury found that the defendant had libelled the plaintiff, but gave no damages, Patterson, J.A., said: "What purpose does an award of nominal damages now serve? Its effect in former times was to declare that the plaintiff's rights, in respect of which he sued, had been invaded by the defendant; that a wrong had been done him, or a contract broken, but that no actual damage resulted. . . . A judgment for nominal damages awards relief in form only, for nominal damages are nothing"(*c*).

Not allowable where verdict for plaintiff and no damages.

In the case in which these remarks occur, the trial judge (Cameron, C.J.), considering himself bound by the decision in *Lemay* v. *Chamberlain* (*supra*) that such a finding amounted to a verdict for the defendant, gave judgment dismissing the action, but at the same time ordered the defendant to pay the plaintiff's costs. The Divisional Court varied the judgment by ordering the action to be dismissed with costs. Plaintiff then appealed direct to the Court of Appeal for Ontario from the judgment at the trial dismissing the action, and also from the judgment of the Divisional Court, upon the ground that, upon the findings of the jury, the plaintiff was entitled to nominal damages, and that judgment should have been directed for him at the trial for 1s. damages and costs, or that a new trial should be ordered. It was held (*per* Hagarty, C.J.O., and Galt, J.) that no court has, or ought to have, the right *ex proprio motu* to direct judgment for nominal damages where the jury has refused to award them; and (*per* Osler, J.A.) that nominal damages should not be added unless it clearly appear that such damages are a matter of form, or that the omission to find them was accidental or unintentional, or an oversight following a distinct in-

(*b*) Lemay v. Chamberlain (1886) 10 O.R. 638, at pp. 643-44.
(*c*) Wills v. Carman (1888) 14 O.A.R. 656.

tention to find the plaintiff's cause of action proved. Patterson, J.A., who dissented, was of opinion that, the jury having left no fact undetermined, plaintiff was entitled to judgment, which might properly be entered for nominal damages with full costs. In the result the appeal of the plaintiff from the judgment at the trial was allowed without costs by the awarding of a *venire de novo* (Patterson, J.A., *diss.*). "I can see no more power in the court to order a verdict for one shilling than for a hundred pounds," said Hagarty, C.J., who cited many authorities(*d*). A finding of no damage does not dispose of the action. There should be a finding on the charge of guilt, and where this is not done through the jury failing to agree on the damages, and the action is dismissed, a new trial will be directed(*dd*).

Nominal damages where innocent error in newspaper report.

The plaintiff, who was both a physician and a chemist, was arrested upon a coroner's warrant for manslaughter, in having filled a prescription which caused the death of a child. The defendants, in publishing in their newspaper a statement referring to the matter, by error substituted the word "*ordonné*" for "*rempli*" in relation to the plaintiff's dealings with the prescription. It was held that there being no proof of malice, or that the damages were increased in any ascertainable amount by the error, nominal damages only could be allowed, and defendant's tender of $1 was held sufficient(*e*).

General damage recoverable without proving special damage. Opinion evidence.

An incorporated trading company may recover general damages for the publication of defamatory matter calculated to injure their reputation in the way of their business, without claiming or proving special damage. In such a case evidence of opinions by witnesses that the libel in question is injurious to the plaintiff's business is not proper, but such evidence is unobjectionable where the opinion expressed was that of only one witness, and the jury were told to form their own opinion as to the

(*d*) See judgment of Patterson, J.A., for explanation of the process *venire de novo*.

(*dd*) Bush v. McCormack (1891) 20 O.R. 497.

(*e*) Leonard v. La Compagnie d'Imprimerie et de Publication de Montreal (1894) Q.O.R. 6 (S.C.) 333.

damages, and the amount awarded was small(*f*). It is unnecessary, also, to claim or prove special damage in an action for slander for words imputing to the plaintiff that he has brought a blackmailing action(*ff*).

Special damage recoverable only when pleaded. Opinion of Strong, J.

In an action against an electric telegraph company in which $7,000 damages were given for the transmission of a message, to be published in a newspaper, imputing insolvency to a mercantile firm, but in which a new trial was granted by the Supreme Court of Canada for the wrongful admission of evidence of special damage, Strong, J., who based his judgment on that ground, said: "This being an action for libel, or written slander, actual damage is not an element of the cause of action, and consequently no allegation or proof of any was requisite to entitle the plaintiffs to maintain the action. Even words spoken imputing insolvency to traders are actionable *per se*(*g*), and, in such cases, the plaintiff can recover substantial damages without alleging, or proving, any special damage. If, however, the plaintiff, either in libel or in actions for defamatory words actionable *per se*, seeks to prove any special damage, this must be alleged in the declaration, and in the absence of such an allegation, evidence of it is not admissible(*h*). . . . And this principle applies where the damage relied on is the act of a third party, to the prejudice of the plaintiff, induced by the slander or libel complained of. In such a case evidence of the prejudicial act of the third person ought to be rejected if it is not pleaded in the declaration"(*i*). The trial judge may, however, allow plaintiff to amend his claim of special damage so as to meet the evidence, as, *e.g.*, where a schoolmaster, suing for libel, laid his dismissal from his school

(*f*) Journal Printing Co. v. Maclean (1894) 25 O.R. 509; (1896) 23 O.A.R. 324. See chapter on Evidence for the Plaintiff.

(*ff*) Marks v. Samuel (1904) 2 K.B. 287 (C.A.).

(*g*) Brown v. Smith (1853) 13 C.B. 596; Odgers on Slander and Libel, 4th Ed., p. 63, and cases there cited.

(*h*) Williams' Notes to Saunders, vol. 1, p. 322, and cases cited; Odgers, 4th Ed. 583.

(*i*) Silver *et al.* v. Dominion Telegraph Co. (1882) 10 S.C.R. 238. See, also, the opinion in the same case of Gwynne, J., who cites the same rule as laid down by the Supreme Court of the State of New York in Tobias v. Horland, 4 Wendell, 540.

as special damage, whereas it appeared at the trial that the real effect of the libel was to prevent his being examined by the superintendent, with a view to his qualification for receiving a renewal certificate(*ii*).

Special damage of a person in his business. Per Ritchie, J.

Special damage need not be alleged or proved in slander of a person in his business, but, if claimed, should be alleged with certainty. "Where the words," said Ritchie, J., "are not actionable in themselves special damage is considered the gist of the action, not so when words are spoken of a man in the way of his trade or calling, when they *are* actionable in themselves, which means without the necessity of alleging special damage or proving it. If the plaintiff has sustained special damage for words actionable in themselves, and he seeks compensation for it, such special damage should be stated in the declaration with as much certainty as the subject matter is capable of, so that the defendant may be prepared to meet it; but in *Evans* v. *Harries*, 1 H. & N. 251, it was held to be sufficient to allege and prove a general loss of customers as special damage, without stating their names"(*j*). *Evans* v. *Harries* is explained *infra*.

A general allegation of damage, by loss of custom, is not a claim for special damage.

But a general allegation of damage, by loss of custom, is not a claim for special damage either in libel or for words actionable *per se*. The 11th section of the former Manitoba Libel Act (*k*), which is omitted in the present Act(*l*), provided that, "Except in cases where special damages are claimed, the plaintiff, in all actions for libel in newspapers, shall be required to prove either actual malice, or culpable negligence, in the publication of the libel complained of." In an action against the publishers of the *Manitoba Free Press*, the declaration contained two counts, each containing a general allegation of damage by loss of custom, the declaration concluding with a general claim for $10,000 damages. The plaintiff obtained a verdict for $500, which the

(*ii*) Jackson v. Simpson (1848) 4 U.C.Q.B. 287.
(*j*) Paint v. Maclean (1873) 9 N.S.R. (3 N.S.D.) 316.
(*k*) 50 Vict. c. 22.
(*l*) R.S.M. 1902, c. 97.

Manitoba Court of Queen's Bench set aside and ordered a new trial(*m*).

Opinion of Taylor, C.J.

Referring to the above section of the Manitoba Act, Taylor, C.J., said: "That must mean not merely claim special damages by the declaration, but also by evidence at the trial. To hold otherwise would be to hold that a plaintiff, by inserting in his declaration a claim for special damages, however unfounded or incapable of proof, would relieve himself from having to prove either actual malice or culpable negligence. . . . . The defendants are within the protection of the statute. Special damages are neither claimed nor proved"(*n*).

Opinion of Strong, J.

This decision was affirmed by the Supreme Court of Canada, who held that a general allegation of damages, by loss of custom, was not a claim for special damages under the above section of the Provincial Libel Act. "I take it to be clear," said Strong, J., "that where special damages are sought to be recovered in an action for libel, or in an action for verbal slander where the words are actionable *per se*, such special damage must be alleged and pleaded with particularity, and that in case of special damages, by reason of loss of custom, the names of the customers must be given, or otherwise evidence of the special damage is not admissible, and that this rule is not confined to cases of verbal slander where the words are not actionable *per se* —cases in which special damage is a necessary ingredient in the cause of action." Having quoted from Odgers on Libel(*o*) the passage which notes the distinction between the loss of individual customers, and a general diminution in annual profits, the learned judge concludes: "The learned writer is no doubt here referring to cases of verbal slander, but it must be the same in cases of actions for written defamation as in those where the cause of action is for words spoken which are actionable *per se*.

(*m*) 6 M.L.R. 578.

(*n*) Ashdown v. Manitoba Free Press Co. (1890) 6 M.L.R. 578.

(*o*) 2nd Ed., p. 302.

Evans v. Harries and Riding v. Smith (supra), explained.

This consideration gets rid of any difficulty which might seem to arise from *Evans* v. *Harries*(*p*), and *Riding* v. *Smith*(*q*), which were both actions for verbal slander of the plaintiff in his trade, and in which it was held that evidence of loss of custom generally was admissible, under similar allegations to those in the present case, as proof of general damages. It is, therefore, clear, both on authority and principle, that the declaration does not claim special damages, and that the plaintiff did not bring himself within the exception of such cases provided for by the 11th section of chapter 22''(*r*).

Where, however, the words are spoken with reference to a person's trade or business, it is not necessary that they should disparage him as to his unfitness for business, want of capacity, or unskilful conduct therein; it is sufficient to impute insolvency, or anything calculated to impugn his financial credit or standing. And it is not necessary to prove special damage(*s*).

Proof of damage for loss of custom.

If the damage claimed be loss of custom, the customers who have discontinued their dealings with plaintiff should be called to establish that fact. And so where the words charged the plaintiff with using false weights and measures, whereby he had been injured in his business, and the only evidence of the special damage alleged, namely, that former customers refused to deal with him on account of the defendant's charge, was given by the plaintiff himself, it was held that this was not the proper mode of proving that fact, and that the customers themselves should have proved it; but, as the only effect of the plaintiff's evidence was to increase the damages, a new trial was refused on the condition that he would consent to reduce the damages, on that branch of the case, to nominal damages(*t*).

Special damage for words imputing adultery to a married woman.

A husband and wife, or, as appeared from the evidence, the wife, in the name of the husband and wife, sued for slander of

(*p*) 1 H. & N. 251.
(*q*) (1876) 1 Ex. D. 91.
(*r*) Ashdown v. Manitoba Free Press Co. (1891) 20 S.C.R. 43.
(*s*) Lott v. Drewry (1882) 1 O.R. 577.
(*t*) McCann v. Kearney (1880) 20 N.B.R. (4 P. & B.) 84.

the wife, in charging her with adultery. The wife alleged as special damage the loss of the *consortium* of her husband, and also that she had lost and been deprived of the hospitality of friends who now refused to associate with her. Upon a motion in arrest of judgment for the plaintiff the court held, that the allegation of special damage was sufficient to support the action, but doubted whether the allegation of the loss of the *consortium* of the husband would have been alone sufficient; that the declaration claiming the damages as the wife's, although when recovered they might belong to the husband, was no objection, and, at all events, was merely a matter of form and was amendable(*u*).

Special damage for words charging incest.

In *Palmer* v. *Solmes*(*v*), in which it was held, on demurrer, that an action for slander charging incest against a married man would not lie without proof of special damage, incest not being at that time a crime cognizable by our courts(*w*), the following grounds of special damage were alleged: (1) That the plaintiff had been shunned and avoided by divers persons, and had lost the society of friends and neighbours, who refused to and did not associate with him as they otherwise would have done, whereby illness of body and great pain of mind and injury to his feelings had been caused; and (2) that he had incurred great loss and expense in procuring and paying for medicines and medical attendance in and about himself during the said illness.

Opinion of Osler, J.

"None of this," said Osler, J., who delivered the judgment of the court, "is sufficient special damage to make the words actionable. As to the first head, the loss of *consortium vicinorum*, that will not do, because, as has been said, the most capricious motives may deprive a man of it, and it was so held in *Mason* v. *Meagher*, 1 Taunt. 39, approved of in *Lynch* v. *Knight* (1861) 9 H.L. 577, and admitted by counsel, and assumed by the court, in *Roberts* v. *Roberts* (1864) 5 B. & S. 384. There is a clear distinction between loss of hospitality and loss of the society of friends, the former importing, which the latter does not, a

(*u*) Campbell *et ux.* v. Campbell (1875) 25 U.C.C.P. 368.
(*v*) (1880) 30 U.C.C.P. 481.
(*w*) Green v. Campbell (1856) 6 U.C.C.P. 50.

temporal damage, of which the law will take notice. See *Moore* v. *Meagher* (1807), 1 Taunt. 39, where both were held as grounds for special damage, and the declaration was expressly upheld on the former ground: *Davies* v. *Solomon* (1871), L.R. 7 Q.B. 112. And even where loss of hospitality is laid as special damage, the names of the friends of whose hospitality the plaintiff has been deprived must be set forth in the declaration. As to the second head of special damage, viz., illness and expense consequent thereon, the case of *Allsop* v. *Allsop* (1860), 5 H. & N. 534, also approved of in *Lynch* v. *Knight* (1861), 9 H.L. 577, is an express authority that it is not sufficient. It is not the natural and necessary consequence of the words spoken"(*x*).

Special damage for words charging incest and adultery.

In a declaration for words constituting a charge of incest and adultery committed by a married woman after marriage, alleging as special damage loss of the *consortium* of her husband, and also the loss of hospitality of friends named, and of the society of friends not named, Osler, J., held, on demurrer, that the first two grounds of special damage were sufficient, referring to *Moore* v. *Meagher* (*supra*), *Davies et ux.* v. *Solomon* (*supra*), *Campbell* v. *Campbell* (*supra*), and *Ashford* v. *Choate*(*y*); but that the loss of hospitality of friends, without naming them, was clearly insufficient, referring to *Moore* v. *Meagher* (*supra*), and *Roberts* v. *Roberts* (*supra*)(*z*).

Special damage for injury to property.

In an action for slander of realty, the Court of Appeal for Manitoba has held, that the publication in a newspaper of a statement that the plaintiff's house is haunted, is, under the Statute of Westminster II., 13 Edw. 1, c. 24 (Bac. Abr. vol. 1, 102), an actionable wrong if special damages result, though there be no actual malice or any intention to injure the plaintiff, or to depreciate the value of the property(*a*). The action was

(*x*) Palmer v. Solmes (1880) 30 U.C.C.P. 481.

(*y*) (1870) 20 U.C.C.P. 471.

(*z*) Palmer v. Solmes (1880) 45 U.C.Q.B. 15.

(*a*) Nagy v. Manitoba Free Press Co. (1907) 16 M.L.R. 619. (In appeal). Appealed to the Supreme Court of Canada.

dismissed by the trial judge (Macdonald, J.), and upon the appeal, with the above result, Richard, J.A., said that the members of the court, should, as educated men, assume that there are not such things as ghosts, and, therefore, that the statement published by defendants was necessarily false. It should also be presumed that the reporter and the sub-editor, who were responsible for the publication of the article, knew, as educated men, that it was false, and, therefore, had no reasonable justification or excuse for publishing it. The evidence shewed that the plaintiff lost a sale of the house in consequence of the publication, and that the house, being vacant, was damaged by crowds resorting to it on account of the report that it was haunted, and the plaintiff should be awarded $1,000 and costs. Phippen, J.A., who concurred with Richards, J.A., said the case fell within the principle of *Riding* v. *Smith*(*b*) and *Bruce* v. *Smith*(*c*), rather than within that other class of cases where, on the ground of public policy, or protection of property, or for other sufficient reason, the courts have held honest statements to be lawful, although occasioning damage to the innocent. Perdue, J.A., who dissented, said that the plaintiff in such a case must prove that the statement is false, that it was published maliciously, and that special damage resulted. Its manifest falsity could deceive no one, and as to the other points the case failed. The statement could only be actionable if it was intended to be believed, and was believed, by some person to the detriment of the plaintiff: *Langridge* v. *Levy*(*d*); and the intention to injure must be established either directly or by reasonable inference: *Quinn* v. *Leathem*(*e*); *Read* v. *Friendly Society*(*f*). The case has been appealed to the Supreme Court of Canada.

In the course of a controversy carried on between rival newspapers published in the same place, and of which plaintiff and defendant were the publishers, the defendant printed a statement in his paper that the circulation of his paper was "20 to 1 of any other paper in the clay district," and that "where others count by the dozen we count by the hundred." It ap-

(*b*) (1876) 1 Ex. D. 91.
(*c*) 1 Fraser (Court of Sessions Cases, Scotland) 327.
(*d*) (1837) 2 M. & W. at p. 531.
(*e*) (1901) A.C. 495, at p. 524.
(*f*) (1902) 2 K.B. 732, at p. 739.

peared that the plaintiff's and defendant's papers were the only ones locally published, though there were other papers in the district. Eady, J., found that the statements referred to plaintiff's paper and were wholly untrue, but was of opinion that the plaintiff had not proved special damage, and that the action therefore failed. He adopted the following statement of the law in the judgment of Watson, L.J., in *White* v. *Mellin*(*g*): "In order to constitute disparagement which is, in the sense of the law, injurious, it must be shewn that the defendant's representations were made of and concerning the plaintiffs goods, that they were in disparagement of his goods and untrue, and that they have occasioned special damage to the plaintiff"(*h*).

Where damages for slander not excessive, and special damage improperly included.

Where the words alleged and proved were: "He is a bad man with the women; he drugged Mrs. A. M."; the innuendo being that the plaintiff was an immoral and bad character, and had committed a crime on the person of A. M., special damage was alleged but not proved. The county court judge, who tried the action without a jury, found in favour of the plaintiff and $25 damages, part of which was evidently allowed as special damage. Upon appeal it was held that, the plaintiff having failed to prove special damage as alleged, the trial judge was wrong in awarding damages on that ground; but, as the amount assessed was not larger than it should have been for the slander proved, without proof of special damage, the appeal should be dismissed with costs(*a*). In any event, where substantial damages are claimed, there should be material and instructive evidence to guide the jury in their award of compensation(*b*).

When verdict should be set aside for excessive damages. Per Lord Esher, M.R.

The principle on which the court should act in setting aside a jury's verdict on the ground of excessive damages, is thus

(*g*) (1895) A.C. 154, at p. 167; 11 T.L.R. 236.

(*h*) Lyne v. Nicholls (1906) 23 T.L.R. 86.

(*a*) Gamble v. Hirschfield (1894) 26 N.S.R. 468.

(*b*) *Per* Gwynne, J., in Silver *et al.* v. Dominion Telegraph Co. (1882) 10 S.C.R. 238.

stated by Lord Esher: "The first question is, what is the rule of conduct which should be followed by the court—either a Divisional Court or the Court of Appeal—to which an application is made in such an action as an action for a libel, to set aside the verdict on the ground that the damages given by the jury are excessive? I think that the rule of conduct is as nearly as possible the same as when the court is asked to set aside a verdict on the ground that it is against the weight of evidence. If the court, having fully considered the whole of the circumstances of the case, come to this conclusion only: 'We think that the damages are larger than we ourselves should have given, but not so large as that twelve sensible men could not reasonably have given them'; then they ought not to interfere with the verdict. If, on the other hand, the court thinks that, having regard to all the circumstances of the case, the damages are so excessive that no twelve men could reasonably have given them, then they ought to interfere with the verdict. If the authorities are looked at, that will be found to be the rule of conduct which the judges have adopted. If the court can see that the jury, in assessing damages, have been guilty of misconduct, or made some gross blunders, or have been misled by the speeches of counsel, these are undoubtedly sufficient grounds for interfering with the verdict; but they come within the larger rule of conduct which I have laid down, and are grounds which are included in that rule"(*c*).

Damages reduced with plaintiff's consent without ordering a new trial.

Where there is a cause of action but the damages are excessive, the court may, with the plaintiff's consent, reduce them without ordering a new trial, whether the defendant consents or not(*d*). This decision has been frequently followed in Canada. In an action, *e.g.*, for libels contained in letters of a very gross character, published in the *Irish Canadian* newspaper, of Toronto, reflecting on the plaintiff as warden of the Provincial Central Prison, the defendants refused to give the name of the writer of the letters, and assumed responsibility therefor. The jury found for the plaintiff and $8,000 damages. Upon a motion against the verdict on the ground, *inter alia*, that the damages

(*c*) Praed v. Graham (1889) 24 Q.B.D. (C.A.) 53, at pp. 54-5.
(*d*) Belt v. Lawes (1884) 12 Q.B.D. 356.

were excessive, it was held by a majority of the court (Cameron, C.J., and Galt, J., Rose, J., *diss.*), following *Belt* v. *Lawes* (*supra*), that the damages were excessive, and should be reduced to $1,000, provided plaintiff elected to take such sum and costs to be paid by a named date, otherwise a new trial to be directed upon payment of costs by the defendants(*e*).

Damages reduced where case improperly left to the jury.

The damages have also been reduced on account of the case having been improperly left to the jury, and a new trial directed unless the reduced amount was accepted by the plaintiff. In that case the plaintiff, a judge of the Supreme Court of British Columbia, sued the editor of the *British Colonist*, of Victoria, B.C., for the publication in that paper of an article charging, as was alleged, that the plaintiff corruptly entered into a partnership with one McN. while holding offices of public trust, and had thereby unlawfully acquired large sums of money; that he did so under cloak of his public position, and by fraudulently pretending that he acted in the interests of the Government; that he committed criminal offences punishable by law; and that he continued to hold his interest in the contract after his elevation to the Bench. In his charge to the jury the trial judge did not refer to the innuendoes set out in the declaration, but simply directed them to find whether the publication was, or was not, a libel, and, if it was, whether it was true or untrue. The jury found that the article was a libel and awarded $2,500 damages. Two motions against the verdict, one for a nonsuit and the other for a new trial, having been refused by the Supreme Court of British Columbia, the defendant was allowed to bring two appeals to the Supreme Court of Canada. It was there held, that the article was susceptible of the first of the above innuendoes, but not of the others, which should have been, but were not, distinctly withdrawn from the consideration of the jury at the trial; and (*per* Strong, Fournier, and Taschereau, JJ., who concurred with Gwynne, J.) that the case was improperly left to the jury, but that the only prejudice sustained by the defendant was as to excessive damages; and that the verdict might stand on the plaintiff consenting to the damages being reduced to $500. Ritchie, C.J., was of opinion that there had been a mistrial, and that the consent of both parties was necessary to any such reduction of

(*e*) Massie v. Toronto Printing Co. (1886) 11 O.R. 362.

the damages. The appeal was dismissed with costs on the plaintiff filing a consent to the damages being reduced to $500(*f*).

Damages reduced in Quebec where libel in newspaper and additional libel in plea.

The plaintiff, an ex-Minister of Justice of Canada, claimed $10,000 damages for the publication of an article in the Toronto *Mail* charging him with having planned and promoted election frauds of a gross character for which the real perpetrators of the frauds had been convicted more than six years previous. The article also contained other charges against plaintiff's public and private character. The defendants' plea, it was alleged, contained an additional libel, and plaintiff filed, as he was entitled to do under the law of Quebec, an incidental demand claiming $5,000 damages therefor. The jury awarded the plaintiff $6,000 for the libel in the newspaper, and $4,000 for the additional libel in the plea. The Court of Review granted the motion of the plaintiff for judgment on the verdict, and rejected the motion by the defendants in arrest of judgment, for judgment *non obstante veredicto*, and for a new trial. An appeal by the defendants to the Court of Queen's Bench (appeal side) was dismissed, the majority of the court (Dorion, C.J., and Tessier and Cross, JJ.) being of opinion that the assessment of damages was peculiarly within the province of the jury, and that the damages were not so excessive as to lead to the inference that the jury were led into error or actuated by improper motives. On appeal to the Supreme Court of Canada it was held, that upon the plaintiff consenting to reduce the verdict to $6,000, the appeal should stand dismissed without costs, the plaintiff to have his costs in the court below, and that, in the event of the plaintiff not consenting to a reduction of the verdict, there should be a new trial. Plaintiff consented to the reduction and judgment went accordingly. The case in the Supreme Court is unreported(*g*).

Damages reduced against telegraph company for libellous message.

A firm of merchants carrying on a wholesale and retail business at Halifax, N.S., sued an electric telegraph company for transmitting over their wires from Halifax to St. John, N.B., and causing

(*f*) Walkem v. Higgins (1889) 17 S.C.R. 225.

(*g*) Laflamme v. Mail Printing Co. (1888) Mon. L.R. 4 Q.B. 84. See remarks, *supra*, of Dorion, C.J., in this case.

to be published in the St. John *Daily Telegraph* and elsewhere, the following message: "J. S. & Co. (plaintiffs), wholesale clothiers of Granville St., have failed, liabilities heavy." There was no allegation of special damage. The jury found in favour of the plaintiffs and $7,000 damages. Upon a motion before the Supreme Court of Nova Scotia to set aside the verdict on the ground that the damages were excessive, the court held (Weatherbe, J., *diss.*) that the damages were, perhaps, larger than the court empannelled as a jury would have given, yet the verdict should not be set aside on that ground(*h*). On appeal to the Supreme Court of Canada it was held (Ritchie, J., doubting, and Henry, J., *diss.*), that the damages were excessive, and, therefore, a new trial ought to be granted; and (*per* Strong, Taschereau and Gwynne, JJ.) that no special damages having been alleged in the declaration, the evidence as to such damages, having been objected to, was inadmissible, and there should be a new trial on that ground(*i*).

Excessive damages for libel of a manufacturing company.

An advertisement published by the defendant stated that the plaintiffs, who were manufacturers of lightning rods, were charging from 37 to 42½ cents per foot for their rods, whereas the defendant could furnish the same and even a better rod from 7 to 10 cents per foot, and that defendant, having a thorough knowledge of the lightning rod business, felt it to be an imposition practised by plaintiffs on the public in charging such exorbitant prices when the rods could be sold at the above low prices. These statements were shewn to be untrue, in that the prices charged by the plaintiffs included the cost of erecting the rod, while the prices named by the defendant only included the price of the rod, although the advertisement, as the jury found, was intended to convey the meaning that they also included the cost of erecting the rods. The jury awarded $4,000 damages, which were held to be excessive and unwarranted by the evidence, and a new trial was directed unless the plaintiffs would consent to reduce the amount to $1,000(*j*).

(*h*) Silver *et al.* v. Dominion Telegraph Co. (1881) 14 N.S.R. (2 R. & G.) 17.

(*i*) Silver *et al.* v. Dominion Telegraph Co. (1882) 10 S.C.R. 238.

(*j*) Ontario Copper Lightning Rod Co. v. Hewitt (1879) 30 U.C.C.P. 172.

Excessive damages for imputations of crime.

The plaintiff, a medical student and executor of his deceased father's estate, sued his stepmother for slander, in having said of him that, when his father was ill, he and his sister went into his father's bedroom and gave him a drug, after which he went into a doze and never recovered, and that the plaintiff and his sister had killed him; and also for words charging the plaintiff with having robbed the defendant. It appeared that the parties were unfriendly on account of the defendant's marriage with the plaintiff's father; that the defendant was a garrulous person, prone to talk of the family differences; and that the words alleged were spoken when the plaintiff's brother-in-law and another person went to see her to get a release of dower. The plaintiff had administered some medicine to his father shortly before his death; but the defendant denied having charged any criminal offence, and explained what she meant by the words used. There was no proof of any actual damage, and the jury awarded the plaintiff $500. On a motion against the verdict, with which the trial judge was dissatisfied, the court ordered a new trial unless the plaintiff consented to reduce the damages to $100 (*k*).

When damages not reduced as excessive.

The damages, however, should not be reduced as being excessive unless they are such as to shock the understanding, or are altogether and palpably unreasonable, or unless there be error in law or in fact, or judicial partiality. In slander for accusing the plaintiff of larceny, and a verdict for £150 damages, the court refused a new trial for excesive damages (*kk*). In an action for libel against a mercantile agency company, for publishing false and injurious reports to a customer who applied for information as to the plaintiff's commercial standing and business and the charges on his real estate, the plaintiff obtained a judgment in the Superior Court of the Province of Quebec for $2,000. This was reduced to $500 by the Court of Queen's Bench (appeal side), with costs of the appeal against the plaintiff. Upon appeal to the Supreme Court of Canada the appeal was allowed, and

(*k*) Cook v. Cook (1875) 36 U.C.Q.B. 553. See, also, Swan v. Clelland, (1856) 13 U.C.Q.B. 335.

(*kk*) Eakins v. Evans (1834) 3 U.C.R. (O.S.) 383.

the judgment of the Superior Court restored. The court held (Taschereau and Patterson, JJ., dissenting on the ground that the appeal did not lie for want of jurisdiction, and Taschereau, J., expressing no opinion on the merits), that the amount of damages awarded in his discretion by the judge who tries the case, in the court of first instance, should not be interfered with by a court of appeal, unless clearly unreasonable and unsupported by the evidence, or unless there be some error in law or in fact, or some partiality on the part of the judge, following *Gingras* v. *Desilets* (1880) 10 R.L. (Q.B.) 275, and *Levi* v. *Reed* (1880), 6 S.C.R. 482(*l*).

Failure to justify imputations.

The courts have also refused to reduce the damages awarded for gross imputations which the defendant has failed to justify. In one case the libel complained of was in the German language, and was published in a printed circular addressed "To the public," and headed "Statement of the seven rough lies and slanders which were contained in a sheet which the long-fingered P. G. (the plaintiff) circulated last week, with the prospectus of the new *Preston Gazette*, through the public." This statement professed to answer some publication which had been issued by the plaintiff with reference to certain moneys alleged by the defendant to have been stolen from him, and for which he had caused a search warrant to be executed at the plaintiff's house. The declaration set out the whole libel and alleged that the defendant meant thereby that the plaintiff had stolen his trunk containing the sum of seven hundred dollars, also goods out of his (defendant's) store, ready-made clothing, muslin and shawls; also that the plaintiff was a notorious swindler, cheat, gambler, defaulter, and soul-trader, and that the plaintiff had never been punished for past crimes; defendant's object being to cause the public to distrust plaintiff, and to prevent them subscribing for the paper which he was then printing. The defendant pleaded not guilty and justification. The jury awarded £200 damages, which the court refused to disturb on account of the imputations being of a very defamatory character, and no attempt being made to prove the plea of justification, although the court

(*l*) Cossette v. Dun *et al.* (1890) 18 S.C.R. 222.

would have been much better satisfied with a verdict for a smaller amount(*m*).

Libel on the Lieutenant-Governor of Quebec.

So, where the Lieutenant-Governor of the Province of Quebec sued for a libel in a French newspaper charging him with corruptly abusing his powers, and the jury awarded him $5,000 damages, it was held, that the amount was not excessive; that, unless the damages given by a court of first instance are so great as to shock the sense of a reasonable man, they should not be interfered with on appeal; and that for the application of this rule the Court of Review is a court of appeal, and its judgment reducing damages may be reversed by the Queen's Bench. Article 1053 of the *Code Civile*, of the Province of Quebec, it was said, is the only part of the Code which gives a remedy to a person libelled, and the expression "damages caused" therein, notwithstanding the qualifying words, "real," etc., should always represent the compensation for the injury(*n*).

Where libel in newspaper serious, unfounded and unprovoked.

The publishers of the Halifax *Morning Herald* were sued for defamatory matter published in that paper concerning the plaintiff as Deputy Provincial Secretary of the Province of Nova Scotia, in an article under the caption "Concerning Martyrs." The plaintiff was charged, among other things, with being a willing and active participator in an office which, for eleven years, was a sink of iniquity wherein public robbery ran riot, and where political villainy of almost every species was concocted and perpetrated; with lacking fidelity and honesty; and that, if his name was to be placed in the roll of martyrs, it must be in the same list with the chief baker whom Pharaoh hanged. It was held by the Supreme Court of Nova Scotia that $3,000 damages were not excessive, in view of the serious charges contained in the article, and the subsequent conduct of the defendants. "There can be no doubt," said McDonald, J., "that the degree of insult may vary according to the station in life of the party: *Price* v. *Severn*, 7 Bing. 319. Here the station in life is evidenced by the fact, that the plaintiff for eleven years occupied

(*m*) Gfroerer v. Hoffman (1858) 15 U.C.Q.B. 441.

(*n*) Angers v. Pacaud (1896) Q.O.R. 5 (Q.B.) 17.

the respectable and responsible position of Deputy Provincial Secretary. The court will not interfere with the damages unless they are grossly disproportionate to the injury sustained: *Williams* v. *Currie*, 1 C.B. 841"(*o*).

Charge of theft against P.O. clerk.

So, where a clerk in the post office was charged, by the chief post office inspector for Canada, with abstracting missing money letters, and the jury found in favour of the plaintiff and $6,000 damages, the Supreme Court of New Brunswick held the amount not to be excessive. The verdict was, however, subsequently set aside by the Supreme Court of Canada for the reason that, as the words making the charge were addressed to the assistant postmaster of the office in presence of the plaintiff, they were privileged(*p*).

Where substantial verdict on two occasions. Per Blake, V.C.

In *Holliday* v. *Ontario Farmers' Mutual Insurance Company*(*q*), in which $1,000 damages were awarded by the jury for a "Caution" advertisement by defendants in a newspaper alleging that plaintiff, who had left their service, was making "false statements" as to being their agent, Blake, V.C., said in the Ontario Court of Appeal, which reversed the judgment in the court below affirming the nonsuit at the trial, that he thought the damages were $950 more than they should have been, but as this was the second verdict that had been rendered for the plaintiff for substantial damages, he did not see that there would be much use in seeking to moderate the verdict by a new trial. The verdict must be permitted to stand, and the appeal allowed with costs.

Where gross slanders of plaintiff professionally. Rule as to interference with discretion of trial judge.

In an action in the Province of Quebec by one medical practitioner against another, for very gross slanders of the plaintiff professionally, no special damages were claimed, but

(*o*) Crosskill v. Morning Herald Printing and Publishing Co. (1883) 16 N.S.R. (4 R. & G.) 200.

(*p*) Waterbury v. Dewe (1878) 18 N.B.R. (2 P. & B.) 6; (1886) 6 S.C.R. 143.

(*q*) (1876) 38 U.C.Q.B. 76; (1877) 1 O.A.R. 483, at p. 519.

damages generally for $10,000. The defendant pleaded that the statements were privileged; and that, in any event, they were true in substance and in fact. The Superior Court of Arthabaska, where the presiding judge, under the law of Quebec, acted both as judge and jury, awarded the plaintiff $1,000 for special and vindictive damages and costs. The defendant appealed to the Court of Queen's Bench (appeal side), and the plaintiff did not ask, by way of cross appeal, for an increase of damages, but contended that the judgment for $1,000 should be confirmed. The Court of Queen's Bench concurred, in part, in the judgment of the Superior Court, but differed as to the amount, because the plaintiff had not proved special damage. They reduced the amount to $500, and gave the costs of the appeal against the plaintiff, who thereupon appealed to the Supreme Court of Canada. It was there held allowing the appeal (Taschereau, J., who thought the court had no jurisdiction, *diss.*), that, in an action for damages, if the amount awarded by the court of first instance is not such as to shock the sense of justice, or to make it apparent that there was error or partiality on the part of the judge (the exercise of discretion on his part being, in the nature of the case, required), the Appellate Court will not interfere with the discretion such judge has exercised in determining the amount of damages. *Gingras* v. *Desilets*(*r*), *Lambui* v. *South Eastern Railway Company*(*s*), and *Ball* v. *Ray*(*t*), are referred to by Ritchie, C.J., as supporting the judgment of the court.

Raison d'être of damages in Quebec.

It was stated, *in arguendo*, by counsel for the plaintiff, that the law of Quebec differs from the law of England, and awards damages, without proof of damages, to punish the moral wrong, and as a solatium for his mental suffering to the person whose sense of honour has been justly offended; and that defamation, by the law of Quebec, is considered an offence which is destructive of society, and one which should be specially punished with heavy damages—referring to Darreau's *Traites des Injures*(*u*). The courts of that Province have decided that exemplary damages

(*r*) (1880) 10 R.L. (Q.B.) 275.
(*s*) 5 App. Cas. 361.
(*t*) 30 L.T. (N.S.) 1.
(*u*) Vol. 1, p. 8, 1st s.; vol. 11, p. 425.

will be given without proof of actual damage, and that the court will assess the exemplary damages, thus carrying out the doctrine of the Provincial law which leaves the case a *l'arbitrage du juge*(*v*).

A member of a firm of stevedores complained that the defendant called out to a captain of a steamship, whose vessel the firm was accustomed to unload, not to give the firm the unloading because one of the firm (meaning the plaintiff) had stolen some of the vessel's coal. He also claimed for the loss of the work on behalf of himself and partners. The court below found the expression unjustifiable, and condemned defendant to pay $50 damages. This judgment was affirmed by the Court of Review, but the damages were allowed for the slander only, and not because of any rights which the plaintiff represented in the firm of stevedores(*w*).

When damages increased by the court.

While in many of the cases noted the damages have been reduced, there are a number of instances in which the damages have been increased. Where, *e.g.*, the evidence established a gross case of slander against the defendant, it was held in Quebec, that $50 damages and costs, awarded by the court below, were inadequate, and the amount was increased to $200 and costs(*x*). And in another Quebec case in which the defendant, in an action for libel, admitted that he committed an error, paid money into court as compensation for the injury, and offered to publish a retraction, but did not actually do so, it was held that the court in maintaining the tender should also give effect to the offer as to the retraction; but as the publication of a retraction, at the time the judgment was rendered by the Appellate Court, had become useless, owing to the lapse of time since the date of the first judgment, and as there was no procedure for enforcing an order to publish, the court, instead of ordering such publication, should grant the plaintiff increased damages(*y*). But increased damages were refused by the Superior

(*v*) Levi v. Reed (1881) 6 S.C.R. 482.

(*w*) Bowden v. Hart (1880) S.C.R.. (In review) 2 Stephens Quebec Digest, 240.

(*x*) Leger v. Leger (1867) 3 L.C.L.J. (Q.B.) 60.

(*y*) Leonard v. La Compagnie d'Imprimerie et de Publication de Montreal (1895) Q.O.R. 4 (Q.B.) 218.

Court of Quebec where the judgment was for $20 damages, with costs of the Cirsuit Court, for calling the plaintiff a prostitute (*voleur*)(*z*).

How the damages may be enhanced.

Evidence may also be given of any fact or circumstance of an aggravating character to enhance the damages. But the plaintiff's pleadings must contain allegations entitling him to give such evidence. According to our system of pleading the material facts upon which the pleader relies must be set forth in his pleading. It would be a highly inconvenient practice to require a defendant to go to trial at the risk of being met with a number of circumstances which the other side was permitted to give evidence of without setting them forth in the pleading, and which might, if unanswered, seriously affect the damages(*a*). The manner of conducting the defence may also be taken into account, as, *e.g.*, by cross-examining the plaintiff in order to shew that he was guilty of a crime of which he has been acquitted(*b*). In an action for libel brought by an attorney, in which defendant's counsel ridiculed the profession and assailed the character of the plaintiff, Cockburn, C.J., told the jury that if they thought it was a libel, and directed against the plaintiff, "a defence of that description is ten-fold, if not a hundred-fold, an aggravation for any libel which can be brought against a man for any departure from the propriety of his profession . . . a most grievous aggravation, and one which it is your bounden duty to take into your serious consideration"(*c*). And, where the libel is published in a newspaper, evidence may be given of the gratuitous circulation of the paper in the place where the plaintiff resided, even though the newspaper publisher were no party to it(*d*).

Justification where no public interest served, or justice delayed.

Under the law of Quebec the justification of a libellous charge, where no public interest is to be served, is also an aggra-

(*z*) Godin v. Ennis (1879) S.C.R. (In review) 2 Stephens Quebec Digest, 241.

(*a*) *Per* Meredith, C.J., in Milligan v. Jamieson, 4 O.L.R. (1902) 650.

(*b*) Risk Allah Bey v. Whitehurst *et al.* (1868) 18 L.T. (N.S.) 615; *per* Huddleston, B., in Kelly v. O'Malley *et al.* (1889) 6 T.L.R. 62.

(*c*) Law Times, August 29, 1857.

(*d*) Gathercole v. Miall (1846) 15 M. & W. 319.

vation(*e*). So, where an action for libel contained in a petition was tried in Quebec, without a jury, a long time after expensive proceedings connected with the petition, which were terminated by the Privy Council in plaintiff's favour, it was held, that the plaintiff must be allowed substantial damages; that in estimating these it was the duty of the court to take into account the posi-ion and standing of the plaintiff in the community; and that where there had been a long delay in getting judgment in the original proceedings through no fault of the plaintiff, during which he was prevented from obtaining justice, this was an aggravation of the injury which the court should take into consideration in awarding the amount of damage suffered(*f*).

Other cases.

There may also be an aggravation of the wrong, justifying increased damages, where the defendant refused to disclose the name of the person at whose request the libellous matter was published(*g*); but evidence of plaintiff's good character in aggravation of damages is inadmissible(*h*), unless to shew that the libel was false to defendant's knowledge(*i*); or is put in issue on the pleadings; or has been assailed by the cross-examination of plaintiff's witnesses; for till then plaintiff's character is presumed to be good(*j*). Attention may also be called to the fact that there is a plea of justification on the record, which has been persisted in but not proved, as enhancing the damages(*k*).

Jurisdiction of Supreme Court of Canada on appeals as to damage. Levi v. Reed (1881).

The jurisdiction of the Supreme Court of Canada to enter-

(*e*) *Per* Dorion, C.J., in Laflamme v. Mail Printing Co. (1888) Mon. L.R. 4 Q.B. 84.

(*f*) Brown v. City of Montreal (1886) 31 L.C.J. (S.C.) 138.

(*g*) Archambault v. Great North Western Telegraph Co. (1886) Mon. L.R. 4 Q.B. 122. See, also, Dussault v. Bacon (1887) 19 R.L. 441 (Q.B.), and Massie v. Toronto Printing Co. (1886) 11 O.R. 362.

(*h*) Johnston v. Kidston (1898) 31 N.S.R. 283.

(*i*) Fountain v. Boodle, 3 Q.B. 5; 2 G. & D. 455.

(*j*) Guy v. Gregory (1840) 9 C. & P. 584, 587; Cornwall v. Richardson, Ry. & M. 305; Brine v. Bazalgette (1849) 3 Ex. 692; 18 L.J. Ex. 348.

(*k*) Warwick v. Foulkes, 12 M. & W. 508; Wilson v. Robinson, 7 Q.B. 68; 14 L.J.Q.B. 196; 9 Jur. 726; Simpson v. Robinson (1848) 12 Q.B. 511; 18 L.J.Q.B. 73; 13 Jur. 187.

tain appeals against the reduction of damages has been questioned in some of the Quebec cases(*l*). In *Levi* v. *Reed* (*supra*), in which the declaration concluded with a general claim for $10,000 damages, counsel for the defendant contended that the judgment appealed from to the Court of Queen's Bench having been for $1,000, and the plaintiff not having taken out a cross appeal, he had acquiesced in the judgment, thereby reducing the matter in dispute between the two parties to a sum less than $2,000, and so had debarred himself of the jurisdiction of the court(*m*). Counsel for the plaintiff relied on *Joyce* v. *Hart* (*infra*). The court held (Taschereau, J., *diss.*), that the plaintiff, although respondent in the court below, and not seeking in that court, by way of cross appeal, an increase of damages beyond the $1,000, was entitled to appeal, for, in determining the amount of the matter in controversy between the parties, the proper course was to look at the amount for which the declaration concluded, and not at the amount of the judgment, *Joyce* v. *Hart*(*n*), which reviewed all the decisions and so laid down the law, being referred to and approved. Taschereau, J., distinguished *Joyce* v. *Hart*, and was of opinion that the court had no jurisdiction(*o*).

Cossette v. Dun et al. (1890).

In *Cossette* v. *Dun et al.*(*p*) the Supreme Court of Canada held that they had jurisdiction to entertain an appeal in an action for libel, in which the damages for the plaintiff were reduced by the Quebec Court of Queen's Bench (appeal side) from $2,000 to $500. An objection was taken by defendants (who filed a cross appeal on the ground of the communication complained of being a privileged communication), that the court had no jur-

(*l*) This was under the Supreme and Exchequer Courts Acts (R.S.C. 1886, c. 135), section 29 of which provided that "no appeal shall lie under this Act from any judgment rendered in the Province of Quebec in any action, suit, cause, matter, or other judicial proceeding, wherein the matter in controversy does not amount to the sum or value of two thousand dollars, unless such matter, if less than that amount," involves the question of the validity of an Act or Ordinance, or relates to fees to the Crown, titles to property, etc., such appeals to be only from the Court of Queen's Bench. See R.S.C. 1906, c. 139, s. 46, for the revised law.

(*m*) *Sirey Code annoté de Proc.* Art. 453, p. 290, par. 1, No. 7.

(*n*) (1877) 1 S.C.R. 321.

(*o*) Levi v. Reed (1881) 6 S.C.R. 482, at p. 501.

(*p*) (1890) 18 S.C.R. 222.

isdiction on account of the value of the matter in controversy; but it was held (Taschereau and Patterson, JJ., *diss.*), that an appeal lay, the value of the matter in controversy as regards the plaintiff being the amount of the judgment of the Superior Court, namely, the court of first instance where the judgment for $2,000 was recovered.

Restriction of damages recoverable for newspaper libel.

The libel Acts of Ontario and British Columbia contain enactments restricting, on certain conditions, the damages recoverable for a libel contained in a newspaper to "actual damages only." In Ontario, the plaintiff shall recover actual damages only if it appears on the trial of the action, that the article was published in good faith, and that there was reasonable ground to believe that the same was for the public benefit, and if it did not involve a criminal charge, and if it appears that the publication took place in mistake or misapprehension of the facts, and that a full and fair retraction of any statement therein alleged to be erroneous was published either in the next regular issue of the newspaper, or in any regular issue thereof published within three days after the receipt of such notice, and was so published in as conspicuous a place and type as was the article complained of(*q*).

Where the libel is against a candidate for public office.

The British Columbia Act(*r*), in which, unlike the Ontario Act, there is no provision for notice of the statements complained of, requires the retraction to be made in the next regular issue of the newspaper, or in any regular issue published within three days "after the service of the writ." There is a proviso in the sections of both statutes, that the enactments shall not apply to any libel against a candidate (for "a public office" in Ontario, and at "a parliamentary or a municipal election" in British Columbia), unless the retraction is made editorially and conspicuously "at least five days before the election."

Conditions of the restriction and the onus of proof.

These enactments are for the benefit of the newspaper press, and restrict, conditionally, the damages recoverable against

(*q*) R.S.O. 1897, c. 68, s. 6(2).
(*r*) R.S.B.C. 1897, c. 120, s. 6(1).

the publisher to such damages in fact, *i.e.*, such actual specific loss as the plaintiff can prove he has sustained by the publication in question. Any libel not contained in a "newspaper," as defined by the Act, is not within the section. The onus is on the defendant to shew (1) publication in good faith, *i.e.*, with honesty of purpose; (2) reasonable belief that it was for the public benefit; (3) that it did not involve a criminal charge; (4) that it took place in mistake or misapprehnsion of the facts, *i.e.*, honest mistake or misapprehension; (5) a full and fair retraction of alleged erroneous statements either in the next regular issue of the paper, or in any regular issue within three days after the receipt of notice of the statements complained of; and (6) publication of the retraction as conspicuously as the offending article(*s*). If on the trial these conditions appear to be established by the defendant's evidence, the plaintiff cannot rely on the mere presumption of damage, but must shew actual specific loss arising from the publication. Should he fail in this, the case may be withdrawn from the jury and the action dismissed. If, however, the defendant fail to establish any of the conditions imposed as a restriction, the plaintiff will not be confined to the actual damages sustained; these will be at large and the jury will have a free hand. But they may at the same time be properly directed to consider any mitigating circumstances presented by the defendant's evidence as to the conditions.

Assessment of damages and apportionment of costs in consolidated actions.

The libel Acts of Ontario, New Brunswick and British Columbia also provide for the assessment of damages, and the apportionment of costs, in the event of the consolidation and trial together of different actions for the same libel. In a consolidated action for libel brought in any of these Provinces, the jury(*t*) shall assess the whole amount of 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 con-

(*s*) See chapter on Security for Costs for explanations and cases illustrative of these conditions.

(*t*) In the British Columbia Act the words are "the court or jury."

solidated, 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(*u*).

The duties of the jury and the judge.

This enactment imposes a duty on the jury and the court respectively, or possibly, as in British Columbia, on the court alone. Firstly, the jury have to determine (1) who of the defendants, if any, are liable for damages; (2) the total amount of such damages; and (3) the share or proportion of the sum total which each defendant should bear; and secondly, the judge must determine (1) whether any costs should be awarded; and, (2) if so, the share or proportion which should be payable by each defendant. For the purpose of fixing the quantum of damages the several actions are treated as one, and a certain sum is named by the jury as the full amount to which the plaintiff is entitled. But for all other purposes the actions are regarded as distinct, and each action must be considered and determined on its own merits. This necessitates a separate verdict as to each; and, in the event of a verdict against two or more defendants, an apportionment of the damages.

The provisions as to consolidation and assessment of damages, respectively, are plainly in aid of each other. Without the powers given the jury as to assessment the previous provision as to consolidation would be of comparatively little value. Each defendant would be liable for the whole amount awarded (as in fact he still is in any action not being a consolidated action), and the degrees of culpability, which in the case of a number of newspapers might be important, could not be properly measured. The procedure, it will also be noticed, is general in its application. It is not confined to actions against newspapers in which "the same, or substantially the same, libel" has appeared, but includes actions against all persons who are amenable to the law for a libel of that character. Reasonable protection is given every defendant without depriving the plaintiff of any legal right to redress. Where a number of newspapers are involved,

(*u*) R.S.O. 1897, c. 68, s. 14(2); C.S.N.B. 1903, c. 136, s. 10; R.S.B.C. 1897, c. 120, s. 13.

the damages and costs may be fairly adjusted. The original publishers may be obliged to pay more than the mere copiers, and the papers that gave undue publicity may be made to suffer heavier penalties than those which published the defamatory matter as an ordinary news item without comment. These enactments are also of service in discouraging actions set on foot for extortionate purposes, which could be multiplied with impunity under the pre-existing law.

Hopley v. Williams (1889).

In *Hopley* v. *Williams*(*v*), the libel complained of, which appeared in the Worcester *Advertiser*, was as follows: "In 1870 Moreton tried his fortune in the United States, whither he was accompanied by a woman known as 'Polly' (the plaintiff), who had passed as his wife in 1885, and who was afterwards said by the police to be a most skilful forger." The Worcester *Chronicle*, the Worcester *Echo*, and the Nottingham *Daily Express* contained a similar paragraph, but it stated that the woman "is an excellent forger," without the words "the police said." The Liverpool *Daily Post* added—"has been convicted abroad and is an excellent forger." The Manchester *Courier*, the York *Herald*, and the Liverpool *Courier* each had a paragraph similar to that in the Worcester *Chronicle*. The plaintiff claimed damages in separate actions from each of the proprietors of these newspapers, whereupon the actions were consolidated. The defence was that the plaintiff had suffered no damage, and that the words complained of were a fair and accurate report of a notice issued and published at the request of the chief constable, for the information of the public, and for the purpose of identifying the said Moreton, and that the publication, being *bonâ fide* and without malice, was privileged under section 4 of the English Libel Act of 1888. The trial judge (Charles, J.), having been asked by counsel for the defence for a ruling on the point, held that the Act was not retrospective, and did not apply to the case, but—as appears from his charge to the jury—that the section as to the apportionment of the damages did apply. The jury returned a verdict of forty shillings, and apportioned five shillings each to be paid by the proprietors of the Worcester *Chronicle*, the Worcester *Advertiser*, the Worcester *Echo*, and the Nottingham *Express*, twenty-five shillings by the Liverpool *Courier*, and one farthing

(*v*) (1889) 6 T.L.R. 3; 53 J.P. 822.

against each of the other three defendants. On the question of the apportionment of costs the learned judge said: "After some hesitation I have come to the conclusion that I must look at this as a whole. It seems to me, in spite of the provisions of section 5, I am bound to deal with it under Order 65, Rule 1, of the Judicature Rules, 1883. I think costs ought to follow the event, unless good cause is shewn. It has been held that contemptuous damages are good cause, and go a long way to shew that the action ought never to have been brought. Here the damages awarded, though not large, are not contemptuous, and the result is, judgment against the four newspaper proprietors among whom the damages were apportioned with costs—costs to be apportioned between them. In each of the other three cases, judgment for plaintiff for one farthing, each party to pay their own costs."

In holding, as reported, that the Act was "not retrospective," Charles, J., evidently meant those sections, including section 4, which did not relate to procedure, and which permitted such defences on the merits as could not have been previously pleaded in libel actions. The defence under section 4 was one of these. This is evident from the fact that the different actions had been consolidated, and from the learned judge's direction to the jury to find and apportion the damages in accordance with section 5, which relates to procedure. It has been held, time and again, that there is no vested right in procedure(*w*).

Setting aside verdict for improper or small damages.

In slander the verdict was not disturbed where the words were actionable *per se*, and the special damages, improperly allowed, were no larger than ordinary damages for the slander proved(*x*). Nor will it necessarily be disturbed for the smallness of the damages. Where, therefore, in an action for slander in which the defence set up, but not proved, was insanity on the part of the defendant, and a verdict was given for one shilling damages, a rule *nisi* for a new trial, on the ground of the smallness of the damages, was refused. "I think it quite impossible," said Robinson, C.J., "to grant a new trial in this case consistently with the authorities. . . . Giving one shilling damages shews

(*w*) Republic of Costa Rica v. Erlanger, 3 Ch. D. 69.
(*x*) Gamble v. Hirschfield (1894) 26 N.S.R. 468.

the slander to have been indisputably proved, while it also shews that the jury thought the plaintiff entitled to no compensation"(*y*). Where the jury were of opinion that the plaintiff had sustained no damage, and found in favour of the defendant, and a new trial was moved for on the ground that the verdict was perverse, that the slander was in fact admitted, and that there should have been a verdict for at least nominal damages, Meredith, C.J., who delivered the judgment of the court, said that *Simonds* v. *Chesley*(*z*) and *Scammell* v. *Clarke*(*a*) established the principle, that where a verdict was found for the defendant, when it should have been for the plaintiff for nominal damages, the court will not send the case down for another trial; in other words, that a new trial will not be granted to enable the plaintiff to obtain nominal damages(*b*). Nor will it be granted for that purpose where the jury found no actual damage, although, on a proper direction, they might have given nominal damages(*c*). And where the slander imputed want of skill and mal-practice to a physician, and the jury found in his favour and one shilling damages, a motion by the plaintiff against the verdict for the improper admission and rejection of evidence was dismissed, because, notwithstanding the objections to the evidence, the verdict in his favour was all he had contended for at the trial, and all he could contend for in the event of another trial(*d*).

Assessment of damages under Rule 578, O.J.A.

An action for slander was commenced by writ of summons indorsed: "The plaintiff's claim is for damages for slander." No appearance having been entered, the plaintiff signed interlocutory judgment against the defendant, set the cause down for assessment of damages at a sittings of the High Court, and gave the defendant notice thereof. The defendant moved to strike the case out of the list, and the presiding judge made an order striking it out on the ground that it had been irregularly set down for assessment of damages. The

(*y*) Atkins v. Thornton (1830) Drap. Rep. 239.
(*z*) (1891) 20 S.C.R. 174.
(*a*) (1894) 23 S.C.R. 307.
(*b*) Milligan v. Jamieson, 4 O.L.R. (1902) 650.
(*c*) Lemay v. Chamberlain (1886) 10 O.R. 638.
(*d*) Rogers v. Munns (1866) 25 U.C.Q.B. 153.

Divisional Court, in the judgment delivered by Armour, C.J., held, that there being nothing to shew that the action was brought under section 5 of the Ontario Act respecting libel and slander, it must be treated as an ordinary action of slander; that Rule 578, O.J.A., applied to the case; that the delivery of a statement of claim was unnecessary; and that the plaintiff had the right to sign interlocutory judgment and have damages assessed as she proposed(*f*).

Contrainte par corps on a judgment for slander in Quebec.

Since the new Code of Procedure came into force in Quebec, an arrest (*contrainte par corps*) on a judgment for slander can only be ordered when the damages awarded amount to $50, Art. 833 of the new Code having been substituted for Art. 2272, C.C. In this case, though the proceedings were begun before the new Code came into force, the plaintiff could not invoke a vested right to arrest, since the modes of executing a judgment are only derived from the law, and the legislature may change or modify them at will without regard to existing rights. *Contrainte par corps,* as it existed up to September 1, 1897, was abolished by a special Act which came into force on that day; the abolition was made without reserve, and, therefore, applied to causes pending when it took effect(*g*).

Although in Quebec a person may have a distinct recourse against all the persons concerned in a libel against him, he can claim but one compensation therefor(*h*). And where the claim is for damages generally, without any special allegation of actual damages, the court should assume the claim to be for vindictive damages, and particulars should not be ordered(*i*). Where, in Manitoba, under the King's Bench Act, Rule 926, the jury, in an action for libel, find a verdict for plaintiff for only $1.00 damages, the defendant should not be ordered to pay costs(*j*).

(*f*) Stanley v. Litt (1900) 19 O.P.R. 101.
Section 5 of the Ontario Act (R.S.O. 1897, c. 68) permits a woman to recover nominal damages for an imputation of unchastity without averment or proof of special damage, but requires an allegation in the statement of claim, that the action is brought under that particular section, failing which she shall not be entitled to recover.

(*g*) Royer v. Loranger *et vir* (1898) Q.O.R. 8 (Q.B.) 119.

(*h*) Gauthier v. Amyot (1871) 3 R.L. (S.C.) 446.

(*i*) Gauvreau v. Chapais (1900) Q.O.R. 18 (S.C.) 135.

(*j*) Manitoba Farmers' Hedge and Wire Fence Co. v. Stovel Co. (1902) 14 M.L.R. 55.

CHAPTER XL.

NEW TRIAL.

Grounds of application for a new trial.

An application for a new trial, or to set aside a verdict, finding, or judgment, in an action of defamation, may be made on the ground (1) of misdirection, or non-direction; (2) of improper admission, or rejection, of evidence; (3) that the verdict is against the weight of evidence; (4) that the damages are excessive or inadequate; (5) surprise; and (6) mistrial arising out of improper conduct on the part of the parties or others, or for any other reason, which has prejudiced the fair trial of the action(*a*).

Rule as to "substantial wrong or miscarriage."

But a new trial shall not be granted on the ground of misdirection, or of the improper admission or rejection of evidence; or because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to them; unless some substantial wrong or miscarriage has been thereby occasioned(*b*); and if it appears that such wrong or miscarriage affects part only of the matter in controversy, or some or one only of the parties, the court may give final judgment as to part thereof, or as to some or one only of the parties, and direct a new trial as to the other part only, or as to the other party or parties(*c*).

Misdirection.

Misdirection as to privilege.

A new trial was granted for misdirection, where, in an action for slander imputing crime, the words laid, considering the rela-

(*a*) See as to (6) *supra*, Gildner v. Busse, 3 O.L.R. (1902) 561.

(*b*) Anthony v. Halstead, 37 L.T. 433; Faund v. Wallace, 35 L.T. 361; Miller v. Green (1902) 35 N.S.R. 117; Bray v. Ford (1896) A.C. 44; 73 L.T. 609; Wells v. Lindop (1888) 15 O.A.R. 695; English v. Lamb (1900) 32 O.R. 73.

(*c*) Rule 785, O.J.A.; Marsh v. Isaacs, 45 L.J.C.P. 505; Price v. Harris, 10 Bing. 331; Purnell v. Great Western Ry. *et al.* (C.A.) 1 Q.B.D. 636; 45 L.J.Q.B. 687; 24 W.R. 720, 909; 35 L.T. 605.

tion of the parties by and to whom they were spoken, would seem to have formed a privileged communication, and the jury were told that the defendant should have offered some evidence in support of his charges, and that, not having done so, he must be taken to have knowingly uttered them without foundation, and therefore maliciously. The verdict for the plaintiff was set aside on the ground, that the failure of the defendant to give evidence of the truth did not necessarily raise the implication of malice. It should have been submitted explicitly to the jury to say (1) whether they believed the words to have been spoken on an occasion which might give the defendant the privilege of speaking them; and (2) whether they really were spoken in the exercise of that privilege, or maliciously and for the purpose of injuring the plaintiff. Express malice should be found by the jury, and the evidence should be sufficient to warrant them in finding it.

Opinion of Robinson, C.J.

In reviewing in the full court his charge at the trial, Robinson, C.J., said: "I find that my impression at the trial was erroneous, and I am satisfied that the principle which I overlooked is well established, and is in itself just and reasonable. To utter defamatory words of another, where there is no occasion to justify or call for it, is in itself malicious; the malice is implied from the unexplained injury, and the very uttering of the words gives the right of action. But when the words are shewn to have been spoken on an occasion when either a public duty or private interest, or a peculiar relation between the parties, renders necessary and allowable a free discussion of the character of the person complaining, then malice is no longer implied, but the contrary; because, as the defendant in such a case might have justifiably said all he did, whether true or untrue, provided he had no malicious motive and believed it, it follows that it will be presumed he exercised his privilege honestly unless malice is proved against him. Upon any other principle, there would not be sufficient safety or freedom of conduct upon occasions when public policy, or the protection of private interests in the ordinary occurrences of life, makes it necessary to speak openly what people know or believe. In some cases the party may speak from his own knowledge; in others upon the testimony of others which he cannot produce when called upon;

in others he may have been led into impressions which he cannot satisfactorily account for. The only fair and proper security is, that, when he had a justifiable occasion for speaking of the character of the individual, the jury must be made to say upon their oaths, after they have heard all the evidence, whether they are or are not convinced that he spoke the words maliciously in order to injure the plaintiff"(*d*).

Misdirection as to malice where no privilege.

A new trial was also granted for misdirection where the defendant failed to justify words imputing perjury, and the jury were told that, if he believed the charge to be true and acted *bonâ fide*, and did not make the charge before more persons or in stronger language than was necessary, they might consider the circumstances of the speaking, and entertain them as evidence to rebut the legal inference of malice. The court held that, as there was no ground for saying the communication was privileged, the jury should have been told that they might consider the defendant's conduct in pleading and attempting to prove justification as some evidence of malice, and an aggravation of the injury. *Warwick* v. *Foulkes*(*e*) and *Simpson* v. *Robinson*(*f*) were referred to, and *Padmore* v. *Lawrence*(*g*) was distinguished(*h*).

So, also, where there is undisputed evidence that the words complained of applied to the plaintiff, it is misdirection to leave to the jury to find whether the defendant, when he spoke the words, intended the plaintiff, without pointing out such evidence to them(*i*). It is also misdirection to tell the jury to consider whether the defendant really intended to impute the crimes alleged, or whether he used the words as mere words of abuse. The undisclosed intention of the defendant, in making the statements complained of, has nothing to do with the question, and is wholly immaterial. What should have been left to the jury was, whether or not the circumstances were such that the

(*d*) Richards v. Boulton (1835) 4 U.C.K.B. (O.S.) 95, at pp. 97-8. See, also, the judgment of Macaulay, J., in the same case.
(*e*) 12 M. & W. 507.
(*f*) (1848) 12 Q.B. 511.
(*g*) (1840) 11 A. & E. 380.
(*h*) Faucitt v. Booth (1871) 31 U.C.Q.B. 263.
(*i*) Good v. Good (1883) 22 N.B.R. 439.

bystanders would understand that the defendant did not mean to charge the plaintiff with the commission of the crimes mentioned, according to what he actually said, irrespective of his undisclosed intention at the time(*j*). It is also misdirection to tell the jury that, from the fact that the defendant refused, for fear of self-crimination, to answer a question tending, if answered, to criminate him as to the publication of a libel, they might infer what the true answer would have been. No inference adverse to the defendant should have been drawn from his refusal to answer(*k*).

Misdirection in defining malice.

In an action for slander imputing criminal dishonesty to the plaintiff in the sale by him of a ticket for a race meeting, the trial judge (Falconbridge, J.) held that the occasion was one of qualified privilege, and, in charging the jury, said: "There is a case, if at all, against the defendant of reckless statement, a case of a statement not true, made without consideration of what the possible consequences might be to another person, and that is malice." The court were of opinion that there was error in this definition of malice, and that it should have been left to the jury as well to consider whether or not the defendant, in making the statement, acted by reason of a wrong feeling in his mind against the plaintiff, some unjustifiable intention to inflict injury upon the plaintiff, and, if they could not find this against the defendant, they could not properly find against him on the question of malice, and, without a finding on this question against the defendant, there could properly be no verdict for the plaintiff. The finding of the jury, that "the defendant was reckless in the statement that he made," was consistent with the absence of malice on the part of the defendant, and was not a finding on which a verdict or judgment could properly be entered for the plaintiff(*l*).

Where refused for alleged misdirection.

A new trial on the ground of misdirection was refused, where in an action for words imputing theft, spoken in answer to inquiries by a relative of plaintiff and by another person as to

(*j*) Johnston v. Ewart (1893) 24 O.R. 116.

(*k*) Nunn v. Brandon (1893) 24 O.R. 375.

(*l*) English v. Lamb (1900) 32 O.R. 73, in which Robinson v. Dun (1897) 24 O.A.R. 287, is specially referred to.

why defendant had dismissed plaintiff from defendant's service, the jury were told that, if defendant had, in good faith, without malice, and believing what he said to be true, made the statements complained of, they were privileged and no action would lay(*m*); where, in newspaper libel, the jury were told that justification was provable by plaintiff's admissions of the truth of the charge, which admissions might be taken as against him to be true, whether in fact true or false(*n*); where for slander of plaintiff's title to an article of his manufacture and for libel of plaintiff personally, it was left to the jury to say, whether the publication had been made by the defendant in good faith, with a view of protecting his own rights, or maliciously, for the mere purpose of injuring the plaintiff personally and in his business(*o*); where, justification having been pleaded to a criminal information for libel, the jury were told that the defendant was bound to shew the truth of the whole libel to which the plea was pleaded(*p*); where, in newspaper libel, the evidence as to publication of the newspaper was left to the jury as being doubtful, complicated or contradictory(*q*); where the jury were told that, by law, they should find the newspaper article to have been published falsely and maliciously, inasmuch as the defendant did not plead and prove the truth of it(*r*); where in slander the jury were told, substantially, that the occasion was privileged, and that unless they were satisfied that defendant had abused the privilege and availed himself of it to make the statement maliciously, they should find for the defendant(*s*); where in slander for an alleged charge of an indictable offence, made in presence of plaintiff's relatives who knew to what the charge related, the jury were told they could consider what the defendant meant to have charged by the words used(*t*); where the jury were told that a witness could speak from recollection as to the comparison

(*m*) Nolan v. Tipping (1858) 7 U.C.C.P. 524.

(*n*) Hill v. Hogg (1858) 9 N.B.R. (4 Allen) 108.

(*o*) Cousins v. Merrill (1865) 16 U.C.C.P. 114.

(*p*) Regina v. Wilkinson (1878) 42 U.C.Q.B. 492.

(*q*) Crosskill v. Morning Herald Printing and Publishing Co. (1883) 16 N.S.R. (4 R. & G.) 200.

(*r*) Mail Printing and Publishing Co. v. Canada Shipping Co. (1887) Mon. L.R. 4 Q.B. 225.

(*s*) Wells v. Lindop (1887) 14 O.R. 275; (1888) 15 O.A.R. 695.

(*t*) Harrington v. McBay (1888) 29 N.B.R. 670.

of handwriting in writings which had been destroyed(*u*); where the jury were told they might take into consideration the fact that the defendant, in an action for libel, had recovered damages for libellous articles relating to the same matter in an action against the proprietor of the newspaper(*v*) of which the plaintiff in the present action was the editor(*w*); where words imputing theft were used by defendant while he was conducting an inquiry, on behalf of a steamship company, into a shortage of accounts of an agent of the company, and when all the persons present were employees of the company, and were endeavouring to ascertain what had become of money which appeared by the accounts to have been taken from the office at the place where the inquiry was being held, and where the judge told the jury, that the occasion was privileged, and that the words were not the subject of an action unless the jury found that defendant, in uttering the words, was actuated by ill will, or by some indirect motive other than a sense of duty, and that the burden of proving this was upon plaintiff(*ww*); and where there was no objection to the judge's charge at the trial(*x*).

New trial although no objection on ground of misdirection.

On this last point, however, it should be observed that the Ontario courts have entertained misdirection as a ground for appeal although the appellant had made no objection on that ground to the charge at the trial. In *Douglas* v. *Stephenson*(*y*), in which that objection was not taken, the Divisional Court (Meredith, C.J., and Rose, J., MacMahon, J., *diss.*) granted a new trial for misdirection of the trial judge (Armour, C.J.) in telling the jury that certain alleged libellous comments in a newspaper, on the conduct of a city solicitor and county crown attorney, must be based on the truth, or at least must be believed upon reasonable grounds to be true. This judgment was affirmed by the Ontario Court of Appeal, simply on the ground that the discretion of the court below in granting a new trial should not be

(*u*) Vye v. Alexander (1889) 16 S.C.R. 501.
(*v*) Stirton v. Gummer (1899) 31 O.R. 227.
(*w*) Downey v. Stirton, 1 O.L.R. (1901) 186.
(*ww*) Wilcox v. Stewart (1905) 38 N.S.R. (G. & R.) 409.
(*x*) Wills v. Carman (1889) 17 O.R. 223.
(*y*) (1898) 29 O.R. 616.

interfered with(*z*). It may be remarked as to this decision, that the charge of the trial judge was based on the sections in the Code relating to fair discussion and fair comment(*a*), which latter is the same in both civil and criminal matters, so that the judgment as affirmed by the Court of Appeal cannot be regarded as satisfactory.

Objections to rulings at the trial, how to be taken.

An objection taken by either party to the case of the other, or to any part of the proceedings, and ruled upon by the judge, is not to be considered as an objection to that ruling, so as to entitle the party to move for misdirection. If nothing more take place upon the question raised after the opinion of the judge has been pronounced, it is and must be then assumed that the parties acquiesce in the ruling. If they do not submit, or do not intend to submit to it, they must expressly object and state their objection to it. If this be done the judge has an opportunity to reconsider his opinion, and may, perhaps, be led to change it. If this be not done, it can scarcely be expected that an appeal shall be allowed from a judgment which has never been complained of, and which, if it had been, might have been corrected by the judge appealed from(*b*).

How charge of trial judge to be regarded.

Some portions of the charge may not be quite accurate. One should not expect as high a degree of accuracy in words in a necessarily verbal statement as where the statement is reduced to writing(*c*). And, as was said in the same case in the Ontario Court of Appeal: "We must read the charge as a verbal direction in reference to the particular facts before the court, not as a scientific treatise on the nature of privileged communications. In Lord Bramwell's language(*d*) a summing up is "not to be rigorously scrutinized, and it would not be right to set aside the verdict of a jury because, in the course of a long and elaborate summing-up, the judge used inaccurate language; the whole

(*z*) Douglas v. Stephenson (1899) 26 O.A.R. 26.
(*a*) C.C. ss. 324, 325.
(*b*) Cousins v. Merrill (1865) 16 U.C.C.P. 114, at p. 120.
(*c*) *Per* Ferguson, J., in Wells v. Lindop (1887) 14 O.R., at p. 280.
(*d*) Clark v. Molyneux, 3 Q.B.D., at p. 243.

of the summing up must be considered in order to determine whether it afforded a fair guide to the jury, and too much weight is not to be allowed to isolated and detached expressions." The question before us is not whether every expression is perfectly accurate, but whether there is any reason to believe that a verdict, which is certainly correct and warranted by the evidence, has been found against the defendant, not in consequence of being the proper conclusion on the evidence, but caused or induced by an erroneous enunciation of the law by the court"(*e*).

Non-direction.

Objection should be taken at the trial.

The remarks as to objections to misdirection at the trial are equally applicable to objections as to non-direction. The objections, if entertained, should be distinctly taken. "When," said Lord Halsbury, L.C., "you are complaining of non-direction of the judge, or that he did not leave a question to the jury, if you had an opportunity of asking him to do it and you abstained from asking for it, no court would ever have granted you a new trial; for the obvious reason that, if you thought you had got enough, you were not allowed to stand aside and let all the expense be incurred and a new trial ordered simply because of your own neglect"(*ee*).

When granted for non-direction as to meaning of words, etc.

A new trial for non-direction was granted, where, in an action by a public official, the *custos rotulorum* of a county, for defamatory matter published in hand-bills and in a newspaper, the jury were not directed as to whether the words complained of were capable of the meaning assigned, and were used with that meaning on the occasion in question(*f*). The plaintiff in that case was a parliamentary candidate, and the defendant an elector in the constituency, who pleaded that, believing plaintiff had been guilty of criminal misconduct in connection with the purchase of the right of way of a certain railway, and, for that

(*e*) *Per* Hagarty, C.J.O., in Wells v. Lindop (1888) 15 O.A.R. 695, at pp. 696-7.

(*ee*) Nevill v. Fine Art and General Ins. Co. (1897) A.C. 68, at p. 76 (H.L.).

(*f*) Ray v. Corbett (1883) 16 N.S.R. (4 R. & G.) 407.

reason, was unfit to represent the county, he published the facts of the transaction as being matters of public interest, together with fair and *bonâ fide* comments thereon, all of which related to plaintiff in his public capacity, and was legitimate criticism. It was held that, besides the non-direction above mentioned, the jury should have been told whether or not the occasion created a privilege, and, if so, that it should have been left to them to say whether the defendant was actuated by malice in fact, which, if it existed, would destroy his privilege and entitle the plaintiff to a verdict(*g*). Where, however, the occasion of speaking the words is not privileged, proof of express malice on the defendant's part is unnecessary, and the jury need not be told that, unless they find express malice, there should be a verdict for defendant(*h*).

For non-direction as to malice.

A new trial was also granted for non-direction on the question of malice where it appeared that the defendant, the general manager of a life insurance company, had made statements knowingly false in a letter to a policy holder a client of the plaintiff, who was a solicitor as well as an agent of the company, that plaintiff had been "removed" from the agency "because it was clearly necessary," and that he had collected money which the company "were unable to get him to report." The trial judge, being of opinion that the point was sufficiently covered by his charge, declined to tell the jury that the defendant's knowledge of the falsity of the statements was evidence from which actual malice might be inferred. The Supreme Court of Nova Scotia (Townshend, J., *diss.*) held there was non-direction, and granted a new trial(*hh*), and their judgment was affirmed by the Supreme Court of Canada (Gwynne and Sedgewick, JJ., *diss.*)(*i*).

Opinion of King, J.

In the court last named, King, J., who delivered the judgment of the majority, said: "It is not to be expected that a judge, in trying an action of libel, shall attempt to define or specify all instances or tests of malice. To attempt to do so would be likely

(*g*) Ray v. Corbett (1883) 16 N.S.R. (4 R. & G.) 407.
(*h*) Clunis v. Sloan (1902) 1 O.W.R. 27.
(*hh*) Miller v. Green (1900) 33 N.S.R. 517.
(*i*) *Ibid.* (1901) 31 S.C.R. 177.

to confuse the jury. It is sufficient that he should explain the law to the extent required in dealing with the facts arising in the case. . . . It is clear that if a party, speaking or writing on a privileged occasion, states what is untrue to his knowledge, this is evidence of malice sufficient to destroy the privilege of the communication: *Clark* v. *Molyneux* (1877), 3 Q.B.D. 237; *Fountain* v. *Boodle*, 3 Q.B. 5." And, having quoted the direction of the trial judge on the point, he added, that it seemed "to fall short of an instruction to the jury as to the effect of falsity within the knowledge of the defendant as constituting a test of malice," and that "the plaintiff was entitled, if he so requested, to have a more explicit statement of the law on a point directly affecting the proof of an issue the burden of which was upon him."

When refused for non-direction.

On the other hand, a new trial for non-direction was refused where the defendant having written a libellous letter against the plaintiff to her mother, which was read in presence of the mother, daughter and other persons, the trial judge refused to tell the jury that the defendant was not responsible for the further publication of the letter made by the plaintiff or her mother. The court were of opinion that the jury not having been invited to increase the damages by reason of the publication to other persons, and the verdict for plaintiff not being against the evidence, and the damages not excessive, there was no ground for interference(*j*).

Improper admission of evidence.

The general rule.

"As a general rule," said Wetmore, J., in a New Brunswick case in which a new trial was granted for the improper admission of evidence by the plaintiff of what he understood the words to mean, "improper admission of evidence is a ground for a new trial; and the court will set aside a verdict given for the party producing the evidence unless they are clearly satisfied that the improper evidence had no influence upon the jury: *Baron de*

(*j*) Benner v. Edmonds (1899) 30 O.R. 676.

Rutzen v. *Farr*(*k*); *Key* v. *Thomas*(*l*); *Wright* v. *Tatham*(*m*), cited in *Jackson* v. *McLellan*(*n*); and it seems impossible to say what effect the plaintiff's evidence, in this respect, had upon the minds of the jury. I am by no means prepared to say it had no effect. The rule in *Daines* v. *Hartley*(*o*) must, I think, prevail, which is fatal to sustaining the present verdict"(*p*). But it does not necessarily follow that a new trial must be granted because improper evidence has been received, if such evidence was wholly immaterial: *Carter* v. *Saunders*(*q*); *McKenzie* v. *Scovill*(*r*); *Bryson* v. *Hamilton*(*s*); or where it is evident it cannot have affected the verdict(*t*).

When granted for improper admission of evidence.

A new trial was granted where evidence was admitted, under the general issue and without a plea of justification, justifying libellous comments on judicial proceedings(*u*); where on a verdict for plaintiff in slander, it was not shewn that there was anything to prevent the words conveying the meaning they would ordinarily convey, and evidence was given by plaintiff of what he understood the words to mean(*v*); where a document, held to be privileged, was admitted as evidence of malice on the part of the defendant(*w*); where in the case of newspaper libel,

(*k*) 4 A. & E. 53.

(*l*) 2 Han. 224.

(*m*) 7 A. & E. 313.

(*n*) 2 Pugs. 84.

(*o*) (1848) 3 Ex. 200.

(*p*) Wood v. Mackey *et ux.* (1881) 21 N.B.R. 109.

(*q*) 6 All. 147.

(*r*) 2 Han. 6.

(*s*) Stev. Dig. 928; *per* Allen, C.J., in Herrington v. McBay (1888) 29 N.B.R. 670.

(*t*) *Per* Patterson, J., in Vye v. Alexander (1889) 16 S.C.R. 501.

(*u*) Small v. Mackenzie (1830) Drap. Rep. 174. See, also, Brown v. Moyer, *infra*, (which, in effect, overruled Wills v. Carman (1886) 17 O.R. 223), and Martin v. Manitoba Free Press Co., *infra*.

(*v*) Wood v. Mackey *et ux.*, *supra*, following Daines v. Hartley (1848) 3 Ex. 200.

(*w*) Bradley v. McIntosh (1884) 5 O.R. 227. It was in consequence of this decision that the Ontario Act respecting Witnesses and Evidence (R.S.O. 1897, c. 73) was amended by adding s. 27, which enables a member of the Executive Council, or the head of a department of the provincial public service, or any officer acting by their direction and on their behalf, to object to produce official documents on the ground that they are privileged.

in which there was no plea of justification, evidence of the truth of the charge was received and evidence in rebuttal rejected(*x*); where the libel in question was alleged to charge plaintiff with personal dishonesty, and the jury, who were asked to find whether or not the words bore the meaning alleged, or were fair comment on the subject matter of the article, found generally for the defendants, without considering the meaning ascribed to the words in the innuendo(*y*); where, no plea of justification being on the record, evidence of the truth of the defamatory matter was admitted under a plea of fair comment(*z*); where, in an action based on a libellous letter published in defendant's newspaper (in which action there was a verdict for defendant), evidence was admitted for the defendant of a libel by the plaintiff subsequent to the libel sued for and making no reference to the defendant(*a*); but not for the admission of evidence for the defendant of an article by plaintiff, published previous to the libellous letter complained of and connected with it(*b*).

For evidence of rumours in proof of innuendo. Opinion of Smith, J.

Where words not actionable *per se* were alleged to impute a criminal offence, a verdict for plaintiff was set aside, and a new trial granted, for the admission of evidence of rumours in the neighbourhood, unknown to the defendant, in proof of the innuendo that the plaintiff had committed the offence. "I cannot understand the law to be," said Smith, J., "that words not actionable in themselves can be assigned a meaning by witnesses, resting upon the knowledge of some fact and circumstances known to themselves, and of which the utterer of the words may be entirely ignorant. This would be a rather dangerous doctrine to uphold. I think the evidence of rumour should not have been received, as having no bearing on the case; and, although admitted, that it furnishes no foundation which would justify the reception of the testimony as to what the witnesses understood

(*x*) Martin v. Manitoba Free Press Co. (1892) 8 M.L.R. 50; 21 S.C.R. 578.

(*y*) *Ibid.*

(*z*) Brown v. Moyer (1893) 20 O.A.R. 509, which, in effect, overruled Wills v. Carman (1886) 17 O.R. 223.

(*a*) Downey v. Armstrong, 1 O.L.R. (1901) 237.

(*b*) *Ibid.*

to be the sense in which the words, *per se* not actionable, were spoken"(*c*).

When refused for admission of evidence.

A new trial was refused, in an action for slander of a physician professionally, where the verdict was in plaintiff's favour for one shilling damages, and he moved against it for wrongful admission and rejection of evidence, making no objection to the smallness of the damages. "Let it be conceded," said Draper, C.J., "that some evidence was rejected or received improperly, or that there was a misdirection in point of law. Nevertheless the plaintiff has the verdict, and, apart from the amount of damages, had everything at the trial been ruled in his favour, a verdict for the plaintiff was all he contended for, or could contend for, before another jury"(*d*). Where the only effect of improper evidence of special damage was to increase the damages, a new trial was refused on condition that the plaintiff would consent to reduce the verdict, on that branch of the case, to nominal damages(*e*).

For evidence of meaning of unambiguous, or of ambiguous, words.

Where the meaning of words is unambiguous, evidence of what a witness understood by the words is inadmissible, but is not a ground for setting aside a verdict for the plaintiff where such evidence is in accordance with the meaning ascribed to the words in the declaration. It is a question for the jury whether the words bore that meaning, and if they have found in the affirmative, the verdict should stand(*f*). Where, however, the words have not a plain and obvious meaning, but are ambiguous or equivocal, evidence of the meaning attached to the words is not "a substantial wrong or miscarriage," nor is it necessary to ask the witness the preliminary questions required in *Daines* v. *Hartley*(*g*), and a new trial will be refused(*h*).

For opinion evidence.

A new trial was also refused for the reception of evidence of

(*c*) Grant v. Simpson (1878) 12 N.S.R. (3 R. & G.) 141.
(*d*) Rogers v. Munns (1866) 25 U.C.Q.B. 153.
(*e*) McCann v. Kearney (1880) 20 N.B.R. (4 P. & B.) 84.
(*f*) Currie v. Stairs (1885) 25 N.B.R. 4.
(*g*) (1848) 3 Ex. 200.
(*h*) Miller v. Green (1902) 35 N.S.R. 117.

an opinion that the libel in question was injurious to the plaintiff's business, the opinion having been that of only one witness, and the jury having been told to form their own opinion as to the damages which were small(*i*).

For evidence that writer of libel had changed his signature since action begun.

In an action against the alleged writer of a libellous communication, published in a newspaper, the defendant, who denied that he had written or sent any such communication, also denied, on cross-examination at the trial, that he had changed his signature since the action began. Certain documents were then shewn to him in which his signature was different somewhat from his usual signature, and these documents were admitted subject to objection. The jury found against the defendant. A new trial was refused by the Supreme Court of New Brunswick, whose judgment was affirmed by the Supreme Court of Canada (Gwynne and Patterson, JJ., *diss.*). The dissenting judges were of opinion that, although the defendant could properly be asked the question, his answer should have been accepted as conclusive, and that the documents should not have been submitted to the jury(*j*). An application was subsequently made for leave to appeal to the Judicial Committee of the Privy Council, but leave was refused.

For evidence of proceedings of a meeting and newspaper report of same.

At a meeting of the members and servants of a manufacturing company of which the defendant was president, a resolution was passed expressing confidence in the innocence of the superintendant of the company who had been sued by an employee of the company for the seduction of his daughter. A letter to the superintendent was at the same time drawn up and signed by a number of persons present, including the defendant, declaring the belief of the signers in the superintendent's innocence of the charges against him which had previously appeared in the newspapers. The letter, in which plaintiff was not named, concluded

(*i*) Journal Printing Co. v. Maclean (1894) 25 O.R. 509; (1896) 23 O.A.R. 324.

(*j*) Vye v. Alexander (1889) 16 S.C.R. 501.

thus: "We believe you are the victim of a conspiracy, as base and ungrateful as was ever sprung on an innocent man, and we pledge ourselves to stand by you until your innocence shall have been clearly established, or until—which we are confident will never be—you are shewn to be the monster depicted by the public press." The letter was afterwards published in several newspapers, without objection on defendant's part, and plaintiff thereupon sued defendant for libel. The jury gave $1,500 damages. Upon a motion for a new trial for the admission of evidence as to what took place at the meeting, and of the newspaper reports of the meeting, it was held that the evidence was admissible.

Opinion of Street, J.

"I think," said Street, J., "the evidence of what took place at the meeting was admissible as proof that the plaintiff was the person intended by the resolution passed at it, the defendant having been present. The account published in the newspaper was referred to by the witness as being an accurate report, written by himself at the time while the event was fresh in his recollection, of what took place at the meeting; and, if the occurrences at the meeting were, as I think they were, admissible in evidence for the purpose of shewing the meaning of the resolution passed at it, the defendant having been present throughout, there seems no reason why the witness, who took notes at it and printed them, should not refer to the printed copy, after the destruction of the original notes, for the purpose of shewing exactly what those occurrences were"(*k*).

For evidence of motive.

Where the newspaper article complained of charged that "shortages" of grain had been common in an elevating company's warehouse, it was held to be no error at the trial to admit evidence of frequent previous "shortages," such evidence not being immaterial as to the motive of publication(*l*).

Improper rejection of evidence.

When granted for rejection of evidence.

A new trial was granted for the rejection of evidence ten-

(*k*) Taylor v. Massey (1891) 20 O.R. 429.
(*l*) McDougall v. Mason (1893) Q.O.R. 3 (S.C.) 171.

dered to shew that words imputing theft were privileged(*l*); that the words did not impute a crime but were mere words of abuse(*m*); also for the rejection of evidence to shew the defendant's motive in writing the libellous letter in question(*n*); of evidence of the make-up of a newspaper in proof of its publication(*o*); of evidence in rebuttal of evidence of justification, which was not pleaded(*p*); of certain evidence of coincidences and circumstances as to the authorship of the libel in question and of publication of the same(*q*); and of evidence by the defendant explanatory of certain alleged libellous words when coupled with the rejection of other material evidence tendered by defendant(*r*).

Rejection of evidence of provocation and in mitigation of damages.

In the case last mentioned evidence was also tendered by the defendant, the publisher of the Guelph *Herald*, and rejected, of the publication of editorials in two other local papers, the *Mercury* and *Advocate*, published in the same place, commenting upon a letter by plaintiff which appeared in those two papers defamatory of the editor of the defendant's paper. This evidence was offered to shew provocation for the statements complained of by plaintiff in a second article in defendant's paper, written by the editor, which was the article in question in the action. The court were divided as to the admissibility of the evidence, Rose, J., holding it to be admissible, and Meredith, C.J., *contra*(*s*). But the court held, following *Percy* v. *Glasco*(*ss*), that the letter above mentioned, which was written by plaintiff and published in the *Mercury* and *Advocate*, assailing the *Herald* and its editor (not the defendant), which had been rejected by the trial judge (Ferguson, J.), should have been admitted as evidence of provocation and in mitigation of damages. This

(*l*) Wells v. Lindop (1887) 13 O.R. 434.

(*m*) Shea v. O'Connor (1894) 26 N.S.R. 205.

(*n*) Miller v. Green (1899) 32 N.S.R. 129.

(*o*) Wright v. Morning Herald Printing and Publishing Co. (1881) 14 N.S.R. (2 R. & G.) 298; 2 C.L.T. 106.

(*p*) Martin v. Manitoba Free Press Co. (1892) 8 M.L.R. 50; 22 S.C.R. 518.

(*q*) Harkins v. Doney (1888) 17 O.R. 22.

(*r*) Stirton v. Gummer (1899) 31 O.R. 227.

(*s*) *Ibid.*

(*ss*) (1873) 22 U.C.C.P. 521.

letter was in reply to a *Herald* article criticising plaintiff and an "interview" dictated by him and published in the *Advocate*. It was the *Herald's* criticism, partly in prose and partly in rhyme, of this letter, which was the subject of the present action(*t*).

Percy v. *Glasco* (*supra*) was an action for assault in which it was held, that evidence of libellous and abusive articles reflecting on the defendant, published, on the day of and preceding the assault, in a newspaper of which the plaintiff was the proprietor, was admissible in mitigation of damages.

When refused for rejection of evidence.

On the other hand, in an action for libel of a surgeon alleging unskilful treatment by him of a patient, a new trial was refused for the rejection of evidence going to the credibility of a witness for the defendant, and affecting a plea of justification, where the evidence on that plea was conflicting, and the jury had found for the defendant on that and the general issue(*u*); in an action for slander imputing a crime, which was justified, for the rejection of evidence of the plaintiff's bad character for honesty, and his general bad reputation in that respect(*v*); in an action for libel by one solicitor against another, where the evidence was circumstantial, for the rejection of evidence of the defendant's style of composition(*w*); and also for the rejection of evidence tendered to shew bias or hostility on the part of a party plaintiff, who had been called as a witness on his own behalf, there being no substantial wrong occasioned thereby, and the evidence sought to be impeached being immaterial. The rule, it was said, permitting evidence to shew bias or partiality on the part of a witness, is intended to apply to a witness presumably independent and impartial, but who is really biased by reason of relationship or hostility, etc., and is not applicable to a party to a cause who is assumed to be hostile to his opponent in the litigation(*x*).

(*t*) i.e., Stirton v. Gummer, *supra*.

(*u*) Smith v. McIntosh (1857) 14 U.C.Q.B. 592.

(*v*) Edgar v. Newell (1865) 24 U.C.Q.B. 215.

(*w*) Scott v. Crerar (1886) 11 O.R. 541; (1887) 14 O.A.R. 152.

(*x*) Creelman v. Tupper *et al.* (1893) 25 N.S.R. 334.

The weight of evidence.

Verdict against the weight of evidence.

A court is not bound, as a matter of right, to set aside a verdict and grant a new trial in an action of defamation, on the ground that the verdict is against the weight of evidence(*y*); and it is only on very strong grounds that the court will interfere(*z*). It will not interfere if the verdict was one which reasonable men could have found(*a*).

Kelly v. Journal Printing Co. (1905).

In his judgment for the court in an action for libel, in which a new trial was refused on the ground of the verdict for the defendants being against the weight of evidence, Meredith, J., said: "That a verdict is against the weight of evidence, is a ground upon which in these days a new trial is seldom granted. The old rule that a verdict once found ought to stand, has been very firmly adhered to for the past twenty years at least; and that rule is especially applicable to an action for libel, not only since the legislation which gives to jurors wider power upon the trial of such an action than upon any other(*b*), but also long before, it having been said by a very eminent judge, in the year 1696, that "the court never, or very rarely, grants new trials for words." The case, Meredith, J., added, had to go to the jury at large, if at all; it could not be controlled by compelling them to answer questions, or to find a special verdict; and their verdict could not rightly be disturbed if it was in any manner supported by the evidence, that is to say, if reasonable men could so find upon any ground of defence pleaded and disclosed in the evidence; just as it also would have been upon any cause of action disclosed in the statement of claim and the evidence, if the verdict had been for plaintiff and defendants

(*y*) Edgar v. Newell (1865) 24 U.C.Q.B. 215.

(*z*) Odger v. Mortimer (1873) 28 L.T.N.S. 472; Martin v. Manitoba Free Press Co., *infra*.

(*a*) Webster v. Friederberg (1886) C.A. 17 Q.B.D. 736; 55 L.J.Q.B. 493; 34 W.R. 728; 55 L.T. 49, 295, correcting Solomon v. Bitton, 8 Q.B.D. 176; Australian Newspaper Co. v. Bennett, 1894, A.C. 284; Metropolitan Ry. Co. v. Wright, 11 App. Cas. 152; Commr. of Govt. Railways v. Brown, 13 App. Cas. 133; Praed v. Graham, 24 Q.B.D. p. 55; Beamish v. Dairy Supply Co., 13 T.L.R. 484 (C.A.).

(*b*) R.S.O. 1897, c. 65, s. 2, and c. 51, ss. 111 and 112.

were moving against it(c). And where in an action against a newspaper publisher, for reflections upon the plaintiff as county treasurer, to which the principal defence was fair comment, and the jury found in favour of the defendant, it was held that new trials are not granted, in actions of libel, merely on the grounds that the verdict is against evidence and the weight of evidence. It is for the jury to say whether the alleged defamatory matter published is a libel or not, and the widest latitude is given to them in dealing with it(d).

Martin v. Manitoba Free Press Co. (1892).

This is especially the case where the question for the jury is, whether the matter complained of is, or is not, fair comment on the acts of a public man. The plaintiff, the Attorney-General of Manitoba, complained that he was charged in the defendants' newspaper with having procured the Province to enter into a contract with a railway company for raising a large sum of money for the company, "a portion of which was to be dishonestly and corruptly received by the plaintiff for his own use and benefit, to the great detriment of the Province." To this the defendant pleaded not guilty, and fair comment on a matter of great public interest. At the trial, the jury, to whom certain questions had been left, brought in a general verdict for the defendants, and, in reply to questions by the trial judge, the foreman said, that the jury found the article complained of was a fair comment on a matter of public interest, but, while giving the verdict, desired to state that it would have been better if more temperate language had been used. Upon a motion for a new trial on the ground that the verdict was against the weight of evidence, the Court of Queen's Bench held, that in an action for libel, the court will rarely grant a new trial on the ground of weight of evidence, especially where the question for the jury was, whether the matter complained of was, or was not, fair comments on the acts of a public man. *Wills* v. *Carman* and *Odger* v. *Mortimer* (*supra*); and *Wilcocks* v. *Howell*, 5 O.R. 360; *Napier* v. *Daniel*, 3 Bing. N.C. 77, and *Broome* v. *Gosden*, 1 C.B. 728, are referred to in the judgments of the court in support of that view(e).

(c) Kelly v. Journal Printing Co. (1905) 5 O.W.R., at pp. 83-4-5.
(d) Wills v. Carman (1889) 17 O.R. 223.
(e) Martin v. Manitoba Free Press Co. (1892) 8 M.L.R. 50.

The law in Quebec.

So, also, in an action for newspaper libel in Quebec, in which the article complained of charged, among other things, that "shortages" of grain had been common in an elevating company's warehouse, to which the defendant pleaded the truth of the article, and that it had been published in good faith concerning a matter of public interest, it was held, that in considering a motion for a new trial on the ground of the verdict being without or contrary to evidence, it is not enough that the judge who tried the case, or the court where the new trial is moved for, might have come to a different conclusion from the jury, but there must be such preponderance of evidence, assuming that there is evidence on both sides to go to the jury, as to make it unreasonable for them to return such a verdict(*f*).

When new trial granted on ground that verdict against the weight of evidence.

There are, however, cases in which a new trial has been granted on the ground of the verdict being against the weight of evidence. Where an attorney was charged, in a letter, with being governed entirely by a craving after his own gains, without regard to the interests of his clients, and reckless of bringing them to ruin, it was held by the Supreme Court of New Brunswick, that libel is not so peculiarly within the cognizance of the jury that the court will not interfere with a wrong verdict, and that as the charges in this case were plainly libellous and the verdict wrong, there should be a new trial. The following decisions were referred to: *Attorney-General* v. *Rogers,* 11 M. & W. 670; *Chalmers* v. *Payne,* 2 C. M. & R. 156; *Stockdale* v. *Tarte,* 4 A. & E. 1016; *Todd* v. *Hawkins* (1837), 8 C. & P. 88; *Smith* v. *Thomas,* 2 Bing. N.C. 381; 1 Saund. (6th Ed.) 139, note (d), 248, note (2) (*g*). So also, where the evidence preponderated greatly in plaintiff's favour, and the adverse result at the trial was a serious matter to him professionally as a civil engineer, he was allowed a new trial on payment of costs(*h*). Plaintiff was also allowed a new trial where, in an action for newspaper libel tried by a judge without a jury, the action was dismissed on the ground

(*f*) McDougall v. Mason (1893) Q.O.R. 3 (S.C.) 171.
(*g*) Andrews v. Wilson (1845) 5 N.B.R. (3 Kerr) 86.
(*h*) Peters v. Wallace (1856) 5 U.C.C.P. 238.

that it was not proved that defendant procured the publication of the libel, although there was evidence that defendant handed a copy of the statements complained of to the editor of the paper in which they appeared, who, after dictating them to his stenographer, handed the copy back to the defendant; and that, before the stenographer extended his notes, another copy (from whom received it did not appear) was found in the office from which the printer composed the type(*i*).

On questions of damages.

There may also be a new trial on the ground that the damages are excessive or inadequate. The cases are referred to in the chapter on Damages.

Surprise.

Where the application is on the ground of surprise the facts should appear on affidavit. "Surprise," said Maule, J.(*j*), "is a matter extrinsic to the record and the judge's notes, and consequently can only be made to appear by affidavit; and here we have no affidavit of surprise, in the sense required by the practice of the court." And where a specific meaning was ascribed by innuendoes to libellous matter, and the trial was conducted and evidence given in accordance with such innuendoes, and the plaintiff's counsel at the close of the evidence claimed the verdict upon another construction different to that alleged by the innuendoes, it was ruled, that, if upon such different construction, the verdict were found for the plaintiff, it would be cause for a new trial on the ground of surprise(*k*).

Where objections to general verdict.

Where the declaration disclosed a cause of action for slander of title, and also for libel on the plaintiff personally, and the defendant was entitled, under the law and evidence, to a verdict as to the former, it was held that the general verdict for plaintiff must be set aside unless he would consent to confine it to the

(*i*) Mackenzie v. Cunningham *et ux.* (901) 8 B.C.R. 36.

(*j*) In Hoare v. Silverlock (No. 2) (1850) 9 C.B. 22.

(*k*) *Per* Cockburn, L.C.J., in Hunter v. Sharpe (1866) 4 F. & F. 983; 15 L.T. 421.

general issue applicable to the personal libel(*l*). But where each count in the declaration disclosed a sufficient cause of action for charging the plaintiff with a statutory misdemeanour, and only the plea of not guilty was pleaded, it was held, that a verdict for the plaintiff should not be interfered with on the ground that the verdict was general, while some of the counts in the declaration were defective; nor was the defendant entitled to a trial *de novo*: *Leach* v. *Thomas*, 2 M. & W. 427. Such a trial might, however, be ordered on a motion for a new trial, although usually adapted to cases in arrest of judgment, or where the judgment of the court upon the verdict is reviewed upon writ of error(*n*). And where a declaration contained several counts, some of which were bad, and a general verdict was entered on all the counts, it was held, that the *postea* might afterwards be amended by confining the verdict to the good counts, if the evidence given at the trial was admissible upon them, and it could not be inferred that any of the evidence, or any part of the damages, was given distinctly on the bad count(*o*).

Where occasion privileged.

The plaintiff was assistant in the shop of C., a druggist, over which the defendant and her husband, a physician, lived, the latter being C.'s landlord and customer. The defendant having, in the presence of a witness, accused the plaintiff of having taken a sum of money from her trunk upstairs, her husband told C. that the plaintiff must be discharged or he would send him no more prescriptions. At a subsequent meeting between the parties in the presence of a witness, arranged for the purpose, as they said, of an investigation, the slanderous words were repeated, and the plaintiff was discharged from C.'s employment. It was held, that what was said at this meeting was privileged, and, the case having been left to the jury generally, a verdict for the plaintiff was set aside(*p*). Where, also, words accusing plaintiff

(*l*) Cousins v. Merrill (1865) 16 U.C.C.P. 114.

(*n*) Decow v. Tait (1866) 25 U.C.Q.B. 188.

(*o*) Milner v. Gilbert (1848) 6 N.B.R. (1 Allen) 51.

(*p*) Hargreaves v. Sinclair (1882) 1 O.R. 260.

of stealing from defendant were first spoken to the plaintiff herself, and were afterwards repeated to the plaintiff's father and mother, who came with her to the defendant asking for particulars, it was held, setting aside the verdict for plaintiff and ordering a new trial, that, in the absence of other evidence of publication, the trial judge erred in failing to direct the jury that the occasion was a privileged one, and that they could find for the plaintiff only if they came to the conclusion on the evidence, that the defendant was not acting *bonâ fide*, but was influenced by malice or spite, which could not, in a case like this, be inferred from the mere publication of the defamatory words(*q*). So, also, a new trial was granted to enable the plaintiff to prove express malice, where the court held the occasion to be privileged, and the defendant was not permitted to prove privilege at the trial(*r*); where, although the slanderous words were *primâ facie* privileged, and an appeal was allowed in part from the judgment at the trial, there was evidence of actual malice which could not be withdrawn from the jury in regard to the unprivileged repetition and the over-statement of the charge imputed(*s*);

Error of judge in weighing evidence, and other cases.

where in slander tried without a jury, the trial judge erred in weighing the testimony on a question of fact(*t*); where the jury found no damages, but could not agree whether their verdict should be for the plaintiff or defendant, and the trial judge dismissed the action(*u*); and where, after a verdict for the plaintiff, the defendant obtained a rule *nisi* for a new trial, but, before its return, the plaintiff died. The rule was made absolute upon defendant's paying the costs, consenting, in case of another verdict for plaintiff, that judgment should be entered as if that verdict had been rendered at the first trial, and undertaking not to assign error(*v*).

(*q*) Johnston v. Kidston (1898) 31 N.S.R. (G. & R.) 283.

(*r*) Wells v. Lindop (1887) 13 O.R. 434.

(*s*) Bourgard v. Barthelmes (1897) 24 O.A.R. 431.

(*t*) Zwicker v. Zwicker (1900) 33 N.S.R. 284.

(*u*) Bush v. McCormack (1891) 20 O.R. 497.

(*v*) Swan v. Clelland (1856) 13 U.C.Q.B. 335.

Where, under former Manitoba Libel Act, "actual malice or culpable negligence" not determined by the jury.

By the former Manitoba Libel Act(*w*) it was provided, that, "except in cases where special damages are claimed, the plaintiff, in all actions for libel in newspapers, shall be required to prove either actual malice or culpable negligence in the publication complained of." In an action against the publishers of the *Manitoba Free Press*, for the publication of a libel concerning plaintiff and his business as a hardware merchant, the plaintiff's pleadings contained no allegations of special damage and none was proved, and the jury gave a general verdict for the plaintiff for $500, but did not answer three out of five questions left to them by the judge. Two of the three questions on which the jury failed to agree required them to say, whether the defendants were guilty of "actual malice or culpable negligence" in the publication of the article. A new trial was ordered by the Manitoba Court of Queen's Bench on the ground that the jury had really disagreed(*x*); and this judgment was affirmed by the Supreme Court of Canada and the appeal dismissed(*y*).

For absence of defendant's counsel at the trial.

At the opening of the term at which the case was set down for trial, the jury cases were the first on the list, and, after the court met, cases were set down for special days. Defendant's attorney was not present at the time this was being done, nor was he represented by counsel. In consequence the case was tried in defendant's absence, and judgment given against him. The facts, as stated in the affidavits, went to shew that the defendant admitted publication of the libel, and expressed his willingness to apologize therefor in terms proposed by plaintiff's solicitors. It was held, that defendant was entitled to a new trial, if he so desired, upon payment of costs of the former trial and of the argument, but it was suggested that as plaintiff, on the facts shewn, would be entitled to a verdict, and as he had agreed to reduce the damages to a nominal sum, the verdict should be allowed to stand subject to such reduction(*z*).

(*w*) 50 Vict. c. 22, s. 11.
(*x*) (1890) 6 M.L.R. 578.
(*y*) Ashdown v. Manitoba Free Press Co. (1891) 20 S.C.R. 43.
(*z*) Kirkpatrick v. Mills (1898) 30 N.S.R. 426.

Variance and questions touching the innuendo.

A new trial was also granted where the variance from the cause of action was fatal by the innuendo being negatived by the evidence(*a*); where the innuendoes were not supported by the evidence(*b*); but not on the ground that the meaning of the words was wrongly assigned, where the words complained of were alleged in the innuendo to impute a criminal offence, and the whole question of libel or no libel was left to the jury who found in the plaintiff's favour, and whose verdict was approved by the court(*c*); nor on the ground that the innuendo was not proved, where the meaning of the words accusing plaintiff of an unnatural offence was plain and unmistakeable(*d*); nor on the ground of an immaterial variance between the words of the particular publication, as set out in the declaration, and the words as proved at the trial(*e*). And where there have been two trials with the same result on each occasion, and the unsuccessful party moves for a third trial on the same evidence, the court should not interfere unless they are quite satisfied that the verdict moved against is wrong(*f*).

For newspaper publications influencing jury during the trial.

But there may be a new trial, or at least a discharge of the jury and a postponement of the trial, where, during the trial and prior to the verdict, it appears that newspaper articles relating to the trial have influenced the jury or had some effect, actual or probable, on the verdict. A party to the action, however, who is aware of any such publications during the trial, should bring the fact to the notice of the court before a verdict is rendered. If he take his chance of the verdict being in his favour, and the verdict prove to be adverse, his laches will be, as it was in this case, fatal to the interference of the court in his favour(*g*).

(*a*) Johnston v. Macdonald (1846) 2 U.C.Q.B. 209.

(*b*) Black v. Alcock (1861) 12 U.C.C.P. 19.

(*c*) Taylor v. Massey (1891) 20 O.R. 429.

(*d*) Gates v. Lohnes *et al.* (1898) 31 N.S.R. 221.

(*e*) Smiley v. McDougall (1853) 10 U.C.Q.B. 113.

(*f*) Wells v. Lindop (1888) 15 O.A.R. 695.

(*g*) Tiffany v. McNee *et al.*, and Metcalf v. McNee *et al.* (1892) 24 O.R. 551, in which Coster v. Merest, 3 B. & B. 272; 7 J.B. Moo. 87; Spenceley, q.t. v. De Willott, 3 Smith 321; and particularly Widder v. Buffalo and Lake Huron R.W. Co. (1865) 24 U.C.Q.B., at pp. 533-34, are referred to.

Refused on account of absence of material witness.

In an action in Quebec for newspaper libel, in which a verdict was recovered against the defendants for libels upon an ex-Minister of Justice, one of the grounds for moving for a new trial was the absence of a material witness at the trial. In dismissing the motion, Sir A. A. Dorion, C.J., for the majority of the court, said: "There are only two grounds which we think it necessary to refer to here. The first is that the appellants [defendants] were deprived of the evidence of the Hon. Mr. Mackenzie, a material witness, who, although summoned, did not appear at the trial. The answer to this is, that the appellants knew before the trial whether the witness was a material one or not; they knew also that he was not present when the trial began, and, if he was an essential witness, they should have asked for a postponement of the trial. They have consented to proceed without him and thereby waived their right to his testimony. They have accepted the chance of a favourable verdict, and cannot, now that they have an unfavourable one, claim a new trial to have an occasion to examine him. There is another reason for rejecting the demand for a new trial; it is that the facts which, it is stated, could be established by Mr. Mackenzie, could not have the slightest influence on the merits of the case according to our law, which, as I have already said in another case this day, is the French law"(*h*).

Refused where jury found that apology published at "earliest opportunity," and no proof of actual malice or gross negligence.

In an action by a collector of customs, for alleged newspaper libels in relation to his office of collector, and in which one of the libels was apologized for and the other justified, the jury found that the apology was published "at the earliest opportunity" after the commencement of the suit. The court were inclined to think that this was an erroneous conclusion, but nevertheless that a new trial should not be granted for the reason that the evidence failed to prove either actual malice or gross negligence. "The only malice the case shews," said Draper, C.J., "is malice in law in publishing an untrue statement tending to lower the

(*h*) Laflamme v. Mail Printing Co. (1888) Mon. L.R. 4 Q.B. 84, at p. 96.

plaintiff's repute and so to prejudice him. This would give the plaintiff a strict legal cause of action, but if the jury, as in this case, find against him on a matter of fact only, we could not properly grant a new trial except on payment of costs, which possibly, and even probably, would exceed the amount of any verdict the plaintiff could in reason expect to obtain''(*i*). A new trial was also refused where a charge of perjury made hypothetically was justified, and the jury found, contrary to the evidence of the plaintiff, that the justification was proved(*j*); and where the case was treated by the parties as one of qualified privilege, and a verdict for the defendants was claimed to be perverse(*k*).

(*i*) Cotton v. Beatty (1863) 13 U.C.C.P. 243.
(*j*) Lang v. Gilbert (1860) 9 N.B.R. (4 Allen) 445.
(*k*) Preston v. Journal Printing Co. (1903) 2 O.W.R. 923.

CHAPTER XLI.

INJUNCTIONS.

Jurisdiction to grant injunctions in actions of defamation.

The power to grant injunctions in libel suits, or, at all events, interlocutory injunctions, was possessed by the common law courts, under the Common Law Procedure Acts, before it was exercised in equity. See *Quartz Hill Mining Co.* v. *Beall*(*a*); *Thomas* v. *Williams*(*b*); *Saxby* v. *Easterbrook*(*c*); *Hill* v. *Hart-Davies*(*d*). Whether the remedy by injunction would always be applied when the libel affected character only without being likely to cause special damage, or only in cases of the latter class, there is no doubt of the jurisdiction to grant it, and in so doing to give judgment for the plaintiff before damage is done(*e*).

Origin of the jurisdiction.

These observations by Patterson, J.A., in the Ontario Court of Appeal, are borne out by judicial decision more fully than he indicates. Until the passage of the Common Law Procedure Act, 1854, in England, and until its adoption in this country, there was no jurisdiction there or here to restrain by injunction the publication of matter defamatory of character and reputation. In England the jurisdiction was first asserted by Jessel, M.R., in *Beddow* v. *Beddow*(*f*), in which he expressed the opinion, *obiter*, that power was given by the statute to the common law courts to restrain the publication of libels. In the subsequent case of the *Quartz Hill Consolidated Gold Mining Co.* v. *Beall* (*supra*), the Court of Appeal (Jessel, M.R., Baggally and Lindley, L.JJ.) held, that by the Common Law Procedure Act, 1854, and by the Judicature Act, 1873, which transferred the jurisdiction of the common law courts to the High Court of

(*a*) 20 Ch. D. 501.
(*b*) 14 Ch. D. 864.
(*c*) 3 C.P.D. 339.
(*d*) 21 Ch. D. 798.
(*e*) *Per* Patterson, J.A., in Wills v. Carman (1888) 14 O.A.R. 656, at p. 677.
(*f*) (1878) 9 Chy. D. 92.

Justice, an interlocutory injunction might be granted to restrain the publication of a libel, however atrocious it might be, and though injurious only to reputation, whenever it appeared to the court to be "just or convenient." The effect of this state of the law was to confer jurisdiction on the Chancery Division. "In my opinion," said Jessel, M.R., "having regard to these two Acts of Parliament, I have unlimited power to grant an injunction in any case when it would be right or just to do so, according to settled legal reasons, or any legal settled principle"(*g*). The Court of Appeal subsequently refused an injunction to restrain the publication, *in futuro*, of certain newspaper articles of a libellous character against a public company, because evidently it would not be "just or convenient" to do so. The reasons given were, that an injunction might prevent the publication of innocent matter of public importance relating to the fair discussion of a subject of public interest, and this, if disobedience of an order of the court, might be followed by a motion to commit for contempt, and by a trial thereon virtually of the questions of libel or no libel, which would be unsatisfactory(*h*). The *Quartz Hill Mining Case* was followed by the Court of Appeal in *Bonnard* v. *Perryman*(*i*), in which, although an order was refused, as it had been in the former case, the court held, that it had jurisdiction to restrain by injunction, "and even by interlocutory injunction," the publication of a libel, but that it required exceptional caution in its use. The jurisdiction, it was said, was "of a delicate nature and should only be exercised in the clearest cases, where, if the jury did not find the matter libellous, the court would set aside the verdict as unreasonable"(*j*).

The practice now established.

Although opinions have been expressed by the leading text writers in England against the propriety of granting interlocutory injunctions to restrain libels and slanders, as being inconvenient, inappropriate, and contrary to the settled principles and a long series of decisions of the courts, the practice has become established, and, as we shall see, the English precedents

(*g*) (1878) 9 Chy. D. 92.
(*h*) Liverpool Household Stores Assocn. v. Smith, 37 Chy. D. 170.
(*i*) (1891) 2 Chy. 269; 60 L.J. 617.
(*j*) *Per* Lord Esher, M.R., in Coulson v. Coulson, 3 T.L.R. 846.

have been followed in this country. The court, acting on the same principles of construction as prevailed before the Judicature Act, has, in practice, greatly extended the number of cases in which an injunction can be obtained(*k*).

Classes of cases in which injunction granted.

There are three classes of cases in which injunctions may be granted in actions of defamation, namely (1) injunctions to restrain threatened contempts of court; (2) injunctions at the trial to prevent repetition of the injurious publications; and (3) interlocutory injunctions before the trial, or, possibly, without any trial.

Cases of contempt.

The court has undoubted jurisdiction to restrain publications that will misrepresent the proceedings in any action or matter before the court, that will prejudice the parties to the proceedings, or the fair trial of the action, or that will scandalize the court itself. Where, therefore, it appears that the publication of a libel which will interfere with the free and fair course of justice, or with its administration in any matter, is threatened, or is likely to take place, the court will grant an injunction to prevent the mischief or injury which might ensue from such a publication(*l*). On the same principles an injunction will be granted to prevent reports of, or comments on, the proceedings at the trial, either of a civil or criminal case (until its termination), which the court considers would be prejudicial to the course of justice(*m*).

(*k*) *Per* Crease, J., in Wolfenden v. Giles (1892) 2 B.C.R. 279. See, also, Quirk v. Dudley *et al.* 4 O.L.R. (1902) 532, *infra*.

(*l*) Kitcat v. Sharp, 52 L.J. Chy. D. 134; 48 L.T. 64; 31 W.R. 227; Bowden *et al.* v. Russell, 46 L.J. Chy. D. 414; 36 L.T. 177; Coleman v. West Hartlepool Harbour and Railway Co., 2 L.T. 766; 8 W.R. 734; Brook v. Evans, 29 L.J. Chy. 616; *Ex parte* Jones, 13 Ves. 237; Mackett v. Commissioners of Herne Bay (1876) 24 W.R. 845; Daw v. Eley, 38 L.J. Chy. 113; Fenner v. Wilson (1893) 2 Ch. 656; 68 L.T. 748.

(*m*) Fleming *et al.* v. Newton, 1 H.L.C. 363; 6 Bell's Appeals, 175; Riddell v. Clydesdale Horse Society, 12 Session cases (4th series) 976; R. v. O'Doherty, 5 Cox C.C. 348; R. v. Clement, 4 B. & Ald. 218. See, also, Watson & Sons v. Daily Record (Glasgow) p. 827, *post*, as to injunction against repetition of libels within the jurisdiction, in an action against a newspaper company out of the jurisdiction.

Injunctions at the trial to prevent repetition of libel or slander.

Where in an action for either libel or slander, the jury have found a verdict for the plaintiff, the judge, at or after the trial, may grant an injunction to restrain any further or future publication of the words complained of, or of any similar defamatory matter, especially if he thinks that injury would follow a repetition or renewal of such publication; and so, also, if he tries the action without a jury(*n*). In *Loog* v. *Bean*, which is included in the references just given, the application was to restrain oral slander of the plaintiff's business, and Cotton, L.J., said: "The court has of late granted injunctions in cases of libel, and why should it not also do so in cases of slander? . . . The defendant—though, no doubt, the tongue is an unruly member to govern—must take care that he keeps his tongue in order, and does not allow it to repeat those statements which he is by the injunction restricted from uttering." "Can there be any distinction in principle," said Bowen, L.J., "between a slander which is contained in a written document and a slander which is not?" *Loog* v. *Bean* was approved and followed, in principle, in *Punch* v. *Boyd et al.*(*o*), in which an injunction was granted to restrain the publication of a notice injurious to the plaintiffs' business as a manufacturer of butter firkins, the court holding that the Judicature Act had altered the law as stated in *Prudential Assurance Co.* v. *Knott*(*p*), in which an injunction was refused on the ground of want of jurisdiction. And where a creditor of a bankrupt firm proposed to advertise, for the information of the other creditors, that the plaintiff was a partner of the firm, but was solvent, interlocutory and final injunctions were granted to restrain the advertisement(*q*).

(*n*) Saxby v. Easterbrook *et al.* 3 C.P.D. 339; 27 W.R. 188; Thorley's Cattle Food Co. v. Massam, 6 Chy. D. 582; 46 L.J. 713, and (affirmed on appeal) 14 Chy. D. 763 (C.A.); 28 W.R. 295, 966; 41 L.T. 542; 42 L.T. 851; Thomas v. Williams, 14 Chy. D. 864; 43 L.T. 91; 28 W.R. 983; 49 L.J. Chy. D. 605; Hayward & Co. v. Hayward & Sons, 34 Chy. D. 198; 55 L.T. 729; 56 L.J. Chy. 287; 35 W.R. 392; Kerr v. Gandy, 3 T.L.R. 75. See, also, as to oral defamation, *per* Boyd, C., in Quirk v. Dudley *et al.*, 4 O.L.R. (1902) 532, p. 824, *post*, and Monson v. Tussaud (1894) 1 Q.B. 671, and Loog v. Bean (1884) 26 Chy. D. 306, referred to therein. The case last named is also reported in 51 L.T. 442; 32 W.R. 994; 53 L.J. Chy. 1128; 48 J.P. 708.

(*o*) 16 L.R. Ir. 476.

(*p*) L.R. 10 Chy. 142; 31 L.T. 866; 44 L.J. Chy. 192.

(*q*) Dixon v. Holden, L.R. 7 Eq. 488; 20 L.T. 357; 17 W.R. 482. See, also, Hinrichs v. Berndes, W.N. 1878, p. 11.

Interlocutory injunction restraining publication until the trial.

The court will grant an interlocutory injunction restraining, until the trial, the publication of what clearly appears to be a libel. Defendant, a debt collector, printed a poster containing the names of persons from whom he was employed to make collections, shewing the amounts and nature of the accounts set opposite the respective names under the heading, in large letters: "Accounts for sale. Victoria, B.C. The British Columbia Commercial Agency offer the following accounts for sale at their office," etc. This poster, which shewed the name of the plaintiff as debtor for a drug bill of $9.67, defendant sent to him, and to each of the persons in the list, together with a circular stating: "You may still have your name lifted by paying the amount on or before the 27th July, after which date the poster will positively be issued." An interim injunction having been granted to restrain further publication, it was held (*per* Begbie, C.J.), on motion to continue the injunction till the hearing, that the poster was libellous, and that the innuendo implied was not merely that the plaintiff was justly indebted in the sum mentioned, but that he was dishonest and insolvent, and an order was made to continue the injunction till the hearing or further order of the court(*r*).

As to jurisdiction when libel true.

The defendant afterwards moved before the same judge to dissolve the injunction in order to found an appeal to the Divisional Court. The motion was refused, the learned Chief Justice reiterating some of the opinions expressed on the former motion. The principal contention by the defendant on the motion was, that the court will not restrain an alleged libel until its libellous nature has been affirmed by a jury, nor at all, if the alleged libel be true; but the learned Chief Justice was of opinion that the jurisdiction to interpose by interlocutory injunction clearly existed and might be exercised—citing *Bonnard* v. *Perryman* (1891), 2 Ch. D. 269, and *Pink* v. *Federation of Trades, etc.* (1892), 8 T. L. R. 216(*s*). Upon an appeal from this judgment to the Divisional Court, Crease, J., was of opinion that the poster was libellous; and that, though in England the courts had not

(*r*) Wolfenden v. Giles (1892) 2 B.C.R. 279.
(*s*) *Ibid.*

of late restrained publication before the question of libel had been submitted to a jury, there was undoubted power to do so under C.S.B.C. c. 31, s. 14, and that the appeal should be dismissed. Drake, J., on the other hand, was of opinion that as the jurisdiction was one never admitted before the Judicature Act, and the exercise of it might prejudice the trial of the action, as being a conclusive opinion that the matter complained of was defamatory, it should be very sparingly used, and, in practice, confined to trade libels. He thought the appeal should be allowed. The court being equally divided, the appeal was dismissed without costs.

Opinion of Crease, J.

Crease, J. said: "There is a case analogous to the present one which took place in this court in 1881, *Muldoon* v. *Johnston*, B. C. Gazette, 1881, page 211. There the defendant dubbed himself an association(*t*), with the object of collecting debts. There, also, the defendant had compiled and published a black list (which any one could purchase for one dollar) of persons from whom he had debts to collect, specifying names and amounts, and signed by him as secretary; but it did not appear that there was any Society registered, or, indeed, any existing in the ordinary sense of the word. The defendant was 'secretary'; he alone compiled the lists, and managed and directed sales, etc. His offices were the only 'offices' of the 'Society.' He alone took all the purchase money for this sheet, or quarterly list. These he called 'subscriptions,' and a purchaser of his quarterly sheet he called a 'subscribing member of the Society.' The defendant paid $10 into court and filed a statement of defence, by which, and the statement of claim, the ingredients of a libel were, in effect, admitted. Judgment was, on motion, entered for plaintiff, with perpetual injunction and costs. So that this was, in principle, a similar method of collecting accounts. There, also, it was stopped by injunction, and the order of the court was not appealed. Since the hearing of the argument herein, I have found a case still more nearly on all fours with the present one, viz., *Green* v. *Minnes et al.* (1892), 22 O.R. 177, the history of which is quite instructive." The learned judge referred to the judg-

(*t*) The B.C. Trades Protection Society.

ments of Armour, C.J., and Street, J., in that case, and added: "Upon a review of the whole case I have come to the same conclusion as the learned Chief Justice."

Opinion of Drake, J.

Drake, J., said that the chief, and in fact the only, question which it was necessary to consider was: "In what cases, and under what restrictions, will the court exercise the extraordinary powers of restraining a libel before the fact whether or not it is a libel has been submitted to and decided by a jury, the tribunal which alone can say whether the defamatory matter complained of is a libel or not?" In answering this question the learned judge reviewed the following English cases, namely, the *Liverpool Household Stores Assn.* v. *Smith*(*u*), *Quartz Hill Consolidated Gold Mining Co.* v. *Beall*(*v*), *Bonnard* v. *Perryman*(*w*), *Collard* v. *Marshall*(*x*), *Pink* v. *Federation of Trades*(*y*), and *Lee* v. *Gibbings*(*z*), and concluded as above stated(*a*).

Effect of Fox's Libel Act.

The answer by Begbie, C.J., to the argument in *Wolfenden* v. *Giles* (*supra*), that he was incompetent, since Fox's Act, to form any opinion whether the matter complained of was libellous or not, was also given by an English judge in a similar case. "It was urged," said Fry, J., in *Thomas* v. *Williams*(*b*), "that the plaintiff is suing upon a libel, and that, since Fox's Act, no relief can be given by any court upon a libel unless the libel has been in the first place submitted to the decision of a jury. That objection appears to me entirely untenable, because, when Fox's Act is looked at, it is plain that it applies only to proceedings by way of criminal information or indictment for libel, and has nothing whatever to do with civil actions based upon the libel." This passage is quoted in a work of high

(*u*) (1887) 37 Ch. D. 170.
(*v*) 20 L.R. Ch. D. 508.
(*w*) (1891) 1 Ch. Kay, L.J., at p. 285.
(*x*) (1892) 1 Ch. 571-6.
(*y*) 8 T.L.R. p. 711.
(*z*) 8 T.L.R. 773.
(*a*) Wolfenden v. Giles (1892) 2 B.C.R. 279.
(*b*) 14 Chy. D, 864.

authority(*d*), whose learned author, while admitting its truth, wholly denies "the correctness of the head note which draws from this remark this inference that 'the defendant in a civil action for libel has the same right to a trial by jury as the defendant in any other civil action; he has no higher right.' For Fox's Act laid down no new principle; the procedure which it rendered imperative in criminal cases was already, before that enactment, the invariable rule in all civil cases, and has remained so ever since: it had, in earlier days, been the rule in criminal cases also. As Littledale, J., says in *Baylis* v. *Lawrence*(*e*): 'Although that Act applied more particularly to criminal cases, yet I know no distinction between the law in criminal cases and that in civil, in this respect. Therefore that which has been declared to be law in criminal cases is the law in civil cases'(*f*). The discovery, therefore, that Fox's Act applies only to criminal cases in no way impairs the right of a defendant to demand that the question of libel or no libel be submitted to a jury, and not decided against him by the judge alone."

Injunction against slanders by professed mind-readers.

The plaintiff sued the defendants, who professed to be mind-readers, for slander, and was granted an interim injunction, by the local judge at B., to restrain the defendants from in any way mentioning or alluding to the death of Q., the plaintiff's late husband, or the circumstances attending the same, at the defendants' series of entertainments then being given at B., or elsewhere within the jurisdiction of the court. The injunction was granted upon an affidavit by the plaintiff deposing to the fact of Q.'s death at B., in the month of March, 1902; that the cause of his death was the subject of a pending coroner's inquest; that one of the defendants, at a recent entertainment at B., assumed, while in a supposed trance, to give an account of the death of Q., saying that he had been killed by a supposed friend, and that she (defendant) could, if asked, give the name of the friend; that, at the time of his death, Q. was in partnership with one T.; that his death had caused a great sensation at B., and had given rise to various rumours, some of which placed the responsi-

(*d*) Odgers S. and L., 2nd Ed., p. 362. See, also, 3rd Ed., p. 587, and 4th Ed., p. 575.

(*e*) 11 A. & E., at p. 925.

(*f*) And see Parmiter v. Coupland, 6 M. & W., at p. 108.

bility of his death on T. and the plaintiff; that since the defendants' entertainment these rumours had been revived, and the plaintiff subjected to great annoyance; and that the defendants had announced their intention to resume the subject of Q.'s death and give further particulars, which would still further injure the plaintiff's reputation. The plaintiff's complaint was uncontradicted by any evidence by the defendants against whom the injunction was continued by Boyd, C., until the trial or further order. Jurisdiction, he said, undoubtedly existed in libel or slander actions to restrain the repetition of defamatory things, whether written or oral, and the principles laid down in *Monson* v. *Tussaud*(*g*), and *Loog* v. *Bean*(*h*), were ample to meet this case(*i*).

Other cases in which interlocutory injunctions granted.

Interlocutory injunctions will also be granted against slander of title to property, real or personal(*j*); or against the publication of libellous trade circulars(*k*); or of defamatory statements injuriously affecting property or trade(*l*); or tending to injure a friendly society, or (*semble*) a joint stock company(*m*); or against publications in any form containing injurious threats of legal proceedings affecting patent rights, where there is no infringement of the legal patent rights of the defendant, such absence of infringement to be shewn when application made(*n*). Such threats may be in a solicitor's letter, or any private letter(*o*); but the validity of the defendant's patent must not be

(*g*) (1894) 1 Q.B. 671.

(*h*) (1884) 26 Ch. D. 306.

(*i*) Quirk v. Dudley *et al.*, 4 O.L.R. (1902) 532. See, also, Mellin v. White (1894) 3 Ch. 276, and (where subsequently reversed on the facts), (1895) A.C. 154.

(*j*) *Per* Kay, J., in Frere v. Vidler, January 11, 1889, Folkard's S. & L., 6th Ed., p. 155; Leslie v. Cave, 3 T.L.R. 584, and (affirmed on appeal) 5 T.L.R. 5; Thomas v. Williams, 14 Chy. D. 864; 43 L.T. 91; 49 L.J. Chy. 605.

(*k*) Anderson v. Liebig's Extract of Meat Co., Limited, 45 L.T. 757. See, also, Liebig's, etc. v. Anderson, 55 L.T. 206.

(*l*) Loog v. Bean, *supra;* Mellin v. White (1894) 3 Ch. 276; and (reversed on the facts) (1895) A.C. 154.

(*m*) Hill v. Hart-Davies (1882) 31 W.R. 22; 47 L.T. 82.

(*n*) Barney v. United Telephone Co., 28 Chy. D. 394; 52 L.T. 573; 33 W.R. 576.

(*o*) Driffield and East Riding Linseed Co. v. Waterloo Mills Cake Co., 31 Chy. D. 638; 54 L.T. 210; 55 L.J. Chy. 391.

disputed(*p*). The court will also restrain by interim injunction the publication of letters(*q*); or copies of letters(*r*). The statements sought to be enjoined should be shewn to be false(*s*), whereupon an injunction will be granted against a continuance of their publication, as was done in the case of false statements as to the financial status of a friendly society(*t*). An interlocutory injunction has also been granted against a trades union to restrain the publication, *pendente lite*, of a black list of men employed by plaintiff(*u*); and against the printing or publishing of postcards containing objectionable pictures of the plaintiff as "The Typical Plainsman"(*v*).

When injunctions not granted.

But an interlocutory injunction will not be granted when the publication is *primâ facie* privileged, unless it should appear that the privilege is destroyed by the defendant's malice(*w*); or when, as to future publication, the court could not "lay down definitely some line, the crossing of which would of necessity make the publication libellous"(*x*); or when the injunction "would restrain the fair discussion in the newspapers of matters of importance, like that of the probable success or failure of a public company"(*y*); or would restrain comment in good faith on a matter of public interest(*z*). Nor will an injunction be granted to restrain the issue of a trade circular which is not a

(*p*) Kurtz & Co. v. Spence & Sons, 36 Chy. D. 770; 55 L.T. 317; 55 L.J. Chy. 919.

(*q*) Pope v. Curl, 2 Atk. 341; Anon. v. Eaton (1813) 2 Ves. & B. 23, 28; Lytton (Earl of) v. Devey *et al.*, 54 L.J. Chy. 293; 52 L.T. 121; Perceval v. Phipps, 2 V. & B. 19.

(*r*) Gee v. Pritchard *et al.* (1818) 2 Swan. 402.

(*s*) Burnett v. Tak, 45 L.T. 743.

(*t*) Hill v. Hart-Davies (1882) 21 Ch. D. 798; 51 L.J. 845. See, also, Halsey v. Brotherhood, (C.A.) 19 Chy. D. 386; 45 L.T. 640; 51 L.J. Chy. 233.

(*u*) Trollope v. London Building Trades Federation, 72 L.T. 342.

(*v*) Nettleton v. McFarlane *et al.*, Toronto Globe, 27 July, 1906.

(*w*) Quartz Hill Gold Mining Co. v. Beall, *supra*.

(*x*) *Per* Cotton, L.J., in Liverpool Household Stores Association v. Smith, 37 Chy. D. 170.

(*y*) *Ibid.*, 37 Chy. D. 180.

(*z*) Armstrong *et al.* v. Armit *et al.*, 2 T.L.R. 887, *per* Lord Coleridge, C.J., and Denman, J.

violation of a certain contract between the parties(*a*); nor to restrain a trader from publishing circulars to the effect that his goods are better than those of a rival trader, even although special damage could be proved(*b*); nor the publication of a circular which is not clearly libellous(*c*); nor the further publication of what the jury at the trial negatived as a libel(*d*); nor when the plaintiff can be fully compensated in damages(*e*); except, however, the injury be irreparable(*f*). So, also, an injunction will not be granted where there is no reason to apprehend such danger or injury to the plaintiff, in person or property, as to make it right to grant an interlocutory injunction(*g*); nor to restrain an excessive publication in the form of an advertisement of an apology by a person who had been prosecuted criminally, even though the plaintiff's business was being injured by the publication(*h*); nor to restrain, as between rival publishers of a certain book, an advertisement which, although commending the defendants' edition in preference to the plaintiff's, did not state that the defendants' work contained any matter which was the exclusive property of the plaintiff(*i*); even although the advertisement contained statements which, if true, might be actionable, as being a libel on, or disparagement of, the plaintiff's action(*j*).

In *Corelli* v. *Wall*(*k*), an interim injunction was moved for on behalf of the authoress, Marie Corelli, restraining the defendants from selling picture post cards having upon them her likeness, and purporting to depict incidents in her life. It was contended that the cards were libellous in that the likeness was untrue and the incidents fictitious, and, in any event, that the plaintiff as a private person had a right

(*a*) Societé Anonyme, etc. v. Tilghman's Patent, etc., Co., 25 Chy. D. 1.

(*b*) Hubbuck v. Wilkinson (1898) 1 Q.B. 86; 79 L.T. 429.

(*c*) Liverpool Household Stores Association v. Smith, *supra*.

(*d*) Dockrill v. Dougall, 78 L.T. 840; 80 L.T. 556.

(*e*) Mogul Steamship Co. v. McGregor & Co., 15 Q.B.D. 476.

(*f*) *Ibid.* But see Thomas v. Williams, *supra;* also Dicks v. Brooks, (C.A.) 15 Chy. D. 22; 43 L.T. 71; 49 L.J. Chy. 812.

(*g*) Solomons v. Knight (1891) 2 Ch. 294; Watson & Sons v. Daily Record (Glasgow) (1907) 1 K.B. 853 (C.A.).

(*h*) Fisher v. Apollinaris Co., L.R. 10 Chy. App. 297; 32 L.T. 628; 44 L.J. Chy. 500.

(*i*) Seeley v. Fisher (1841) 11 Sim. 581.

(*j*) *Ibid.*

(*k*) (1906) 22 T.L.R. 532.

to restrain the publication, without her leave, of what purported to be a likeness of herself. That there may be a libel by photograph was admitted, but the injunction was refused on the grounds that the fact of libel was not shewn with the distinctness required in *Bonnard* v. *Perryman*(*kk*), and that, in the absence of authority, effect could not be given to the second contention on an interim motion.

An interlocutory injunction will also be refused when there is no reasonable probability of its being granted at the trial. In this latest English case, which was an action against a newspaper company registered in Scotland and carrying on business solely in that country, the plaintiffs in England claimed damages for alleged libels in a newspaper belonging to the defendants, and also an injunction against the repetition of the alleged libels within the jurisdiction. The circulation of the newspaper was practically confined to Scotland, although a few copies were sold on the bookstalls at two railway stations just within the English border. The defendants disclaimed any intention of repeating the alleged libels in their newspaper, but intended to justify them at the trial. The court held that, although, by their claim of an injunction against a repetition of the alleged libels within the jurisdiction, and on the assumption that that claim was made *bonâ fide*, the plaintiffs had technically brought the case within the provisions of the English Rule (Order 11, Rule 1(*f*)), the court, in the exercise of its discretion, ought to refuse leave to issue a writ for service out of the jurisdiction, there being no reported case of an injunction having been granted in a libel case against a newspaper, and, under the circumstances, no reasonable probability that the plaintiff would obtain an injunction at the trial of the action(*l*).

(*kk*) (1891) 2 Ch. 269; 7 T.L.R. 453.

(*l*) Watson & Sons v. Daily Record (Glasgow) (1907) 1 K.B. 853 (C.A.).

CHAPTER XLII.

COSTS.

The Judicature Acts, wherever adopted, and the rules made in pursuance of those Acts, have materially changed the law and practice as to costs in actions of defamation. The right to such costs no longer depends on the recovery of damages, but is put on a new footing, looked at from a common law standpoint(*a*). The rule in the common law courts, under the various statutes affecting costs, was, that costs followed the event, except in the cases in which it was otherwise provided by statute. In Chancery, except in the case of a trustee, mortgagee, etc., who had a right to costs out of a particular estate or fund under the rules in equity, the costs were in the discretion of the court; but, in the absence of special circumstances, the party failing paid the costs(*aa*).

Costs in Ontario under 21 Jac. I. c. 16, 16 Vict. c, 175, and 31 Vict. c. 24.

Where in an action for slander in Ontario prior to the Judicature Act (no special damage being laid), the verdict was for one shilling damages, and the judge certified, under 16 Vict. c. 175, that the grievance was wilful and malicious, the plaintiff was restrained by 21 Jac. I. c. 16, from obtaining more costs than damages. The certificate, under 16 Vict. c. 175, s. 26, did not necessarily entitle the plaintiff to full costs, but only to such costs as might otherwise have been recovered; and this statute did not interfere with 21 Jac. I. c. 16(*b*). On the other hand, under 31 Vict. c. 24 (O.), where the verdict in an action for slander was for one shilling damages, a certificate for full costs by the trial judge entitled the plaintiff to tax the full costs of the action notwithstanding the statute Jac. I. c. 16. The statu-

(*a*) *Per* Patterson, J.A., in Wills v. Carman (1888) 14 O.A.R. 656, at p. 676.

(*aa*) Re Hoskins v. Trusts, 25 W.R. 779; James v. Norton, 1 Charl. Ca. 161; Downey v. Roaf (1873) 6 O.P.R. 89.

(*b*) Pedder v. Moore (1855) 1 O.P.R. 117.

tory law and the authorities bearing on the question are reviewed in the judgment of Hagarty, C.J. (*c*).

Costs in New Brunswick under 21 Jac. I. c. 16, and 45 Vict. c, 9, s. 7.

In the Province of New Brunswick a verdict for $8, or forty shillings currency, was held to entitle a plaintiff to costs, the statute 21 Jac. I. c. 16, having been adopted in the Province on its establishment as a part of the practice of the court, and the universal practice having been to read it as meaning forty shillings currency, and not sterling(*d*). Where, however, in an action for slander in that Province in which the plaintiff recovered a verdict for twenty cents, and the clerk refused to tax the plaintiff any costs, an application for an order directing the clerk to tax the plaintiff costs on the County Court scale was refused. "The plaintiff," said Van Wart, J., "relied upon the provisions of 45 Vict. c. 9, s. 7 (1882), which provides, *inter alia*, 'If in any action brought in the Supreme Court that could have been brought in a County Court, the plaintiff shall recover no greater amount than might have been recovered in a County Court, he shall be allowed costs according to the Table of Fees in County Courts and no more.' I think this Act does not give any new right to costs. If the plaintiff would have recovered costs in the Supreme Court on the verdict, but for this Act, then, the action being cognizable in the County Court, the plaintiff shall be allowed costs according to the County Court scale. The Act does not limit the provisions of the statute 21 James I. c. 16, which deprives the plaintiff in an action of slander of costs if he recovers less than forty shillings. This statute is in force in this Province—citing *Wood* v. *Mackay* (*supra*). The plaintiff is not entitled to costs under a recent decision of this court, *Gass* v. *Ford*(*e*), without a certificate under the provisions of section 42, chapter 60, Con. Stat. This he did not have"(*f*).

Costs in Nova Scotia under R.S.N.S., 5th Series, c. 104, App. N. 1143.

The Revised Statutes of Nova Scotia, 5th Series, c. 104, App. N., p. 1143, forbade costs, unless the judge "shall certify that

(*c*) Stewart v. Moffatt (1869) 20 U.C.C.P. 89.
(*d*) Wood v. Mackay (1880) 20 N.B.R. (4 P. & D.) 262.
(*e*) 33 N.B.R. 376.
(*f*) Gallagher v. O'Neill (1896) 34 N.B.R. 194.

the action was brought to try a right besides the mere right to recover damages for the trespass or grievance for which the action was brought, or that the trespass or grievance was wilful and malicious, or that the action was not frivolous and vexatious, and that the plaintiff had actually sustained damage to the amount recovered, and had by notice in writing demanded compensation therefor eight days before action brought." In an action for libel, the jury found a verdict in favour of the plaintiff for $5.00 damages, and the presiding judge thereupon gave a certificate that the libel complained of was wilful and malicious, so as to entitle plaintiff to costs. It was held, on appeal, that as the evidence clearly shewed malice, the certificate was properly given(*g*).

Effect of Judicature Acts and Rules.

The effect of the Judicature Acts and of the orders and rules thereunder, both in England and in this country, was to repeal the previous rules as to costs, and to supersede all practice inconsistent therewith(*h*). Where, therefore, under the English Rule, the plaintiff, in an action for slander, obtained a verdict for one farthing damages, and the trial judge refused to make any order or grant any certificate, and the Master taxed the costs for the plaintiff in the ordinary way, it was held, that the Master was right, and that notwithstanding the statute, 21 Jac. I. c. 16, s. 6, the plaintiff was entitled to his full costs, which, under such circumstances followed "the event"(*i*). And in an action for libel in which the jury gave the plaintiff only nominal damages, and the trial judge declined to certify for costs, it was held that the plaintiff was entitled to his costs(*j*). So, also, in an action for libel in Ontario, where there was a verdict for one dollar, and the judge at the trial gave no certificate for costs, it was held by the Divisional Court, on an appeal by the defendant from the taxation of the costs of the action and following *Garnett* v. *Bradley* (*supra*) (the appeal having been enlarged before the court by a judge in Chambers), that the plaintiff was entitled to

(*g*) Barss v. Wallace (1888) 20 N.S.R. (8 R. & G.) 504.

(*h*) *Re* Friedeberg, 10 P.D. 112. See Rule 2, O.J.A. The effect was the same in the other Provinces which adopted this system of procedure and practice.

(*i*) Garnett v. Bradley, 3 App. Cas. 956; 48 L.J.Q.B.D. 191.

(*j*) Parsons v. Tinling, 2 C.P.D. 119; 46 L.J. 230.

tax full costs(*k*). This decision was given after the original Rule 428, O.J.A., (now Rule 1130, *infra*,) came into force. It was followed in an action for libel in which the plaintiff obtained a verdict for twenty cents damages, and a certificate for full costs was moved for which was opposed by defendant who wished to set off his own costs. The libel charged bribery during an election contest, and was justified by a plea of justification. The court was asked by the defendant to consider the result of an election trial, arising out of the same contest, where, it was alleged, plaintiff was found guilty by the trial judge of the offence charged by the defendants, for which this action was brought. The court were of opinion that they could not regard that circumstance as a reason for depriving the plaintiff of costs, because they could not look behind or beyond a finding of a jury as to the right of a party to recover a verdict. They held that no certificate or order for full costs was necessary, and that the plaintiff could be deprived of such costs for good cause only(*l*).

Rules as to costs under the Judicature Acts.

Subject to the provisions of the Judicature Acts, and to the express provisions of any statute heretofore or hereafter passed, the costs of and incidental to all proceedings in the Supreme Court shall be in the discretion of the court or judge . . . and where an action or issue is tried by a jury, the costs shall, subject to Rule 1132, follow the event, unless the judge, before whom the action or issue is tried, in his discretion, otherwise orders(*m*). This is the Rule in Ontario, and it is substantially the same in the other Provinces which have adopted the present system, except that, as to jury cases, the Rules in those Provinces are expressed in the language of the original Rule 428, O.J.A., namely, "the costs shall follow the event, unless upon application made at the trial for good cause shewn, the judge before whom such action or issue is tried, or the court, shall otherwise order"(*n*). The original Ontario Rule, 428, was

(*k*) Wilson v. Roberts (1885) 11 O.P.R. 412.

(*l*) Wellbanks v. Conger (1888) 12 O.P.R. 447.

(*m*) Rule 1130 (1) (3) O.J.A.

(*n*) See N.S.J.A. 1900, Ord. 63, R. 1; Stat. of B.C., 3 & 4 Edw. 7, c. 15 (The Supreme Court Act), s. 100, and B.C. Supreme Court Rules 1900, Ord. 65, R. 75 (1); R.S.M. 1902. c. 40 (The King's Bench Act), s. 931. The Manitoba Libel Act contains an express provision, that in any action for libel, whether the same is contained in a newspaper or not, the judge

amended and made to conform to the equity Rule, giving the judge discretion as to the costs following the event, for the reason that the equity Rule, which was generally acceptable, got rid of any difficulties, and to a certain extent of appeals, arising out of questions as to "good cause," and at the same time left the judge free to assign reasons in any case for the exercise of his discretion. But the effect of all these rules is practically the same. In practice in Ontario, application may still be made, and "good cause" required to be shewn, in order to prevent the costs following the "event"; and the disposition of the courts and judges, as their decisions shew, is to give reasons which in their opinion constitute "good cause" wherever their discretion is exercised against a successful party.

Rule 1132, above mentioned, relates to the costs recoverable and the mode of taxation, where actions of the proper competence of a County Court are brought in the High Court. It does not apply to actions of defamation which cannot (in Ontario and in some of the other Provinces) be tried in the County Court(*o*). Whenever, therefore, such actions cannot be tried in a County Court, but must be tried in the High Court, the successful party will be entitled to his costs, however small the amount of the verdict, unless the trial judge "in his discretion" in Ontario, and "for good cause" in any other Province, "otherwise orders." The party who has the verdict in his favour has a right to his costs in the absence of any order to the contrary; they follow the "event," *i.e.*, where the "event" is the result of a single issue, and it is for the opposite party to apply to the trial judge, as soon as the verdict is given, for an order to deprive his successful adversary of his costs. Where success is divided, as it may be with respect to several distinct issues, or where there is a counterclaim, the "event" which the costs follow is subject, as we shall see, to different considerations.

Judicial "discretion" as to costs, and the manner of exercising it.

Where the right to exercise a discretion as to the costs of an action exists, no hard and fast rules can be laid down as to the

before whom the action is tried shall not award costs to the plaintiff where he recovers merely nominal damages (R.S.M. 1902, c. 97, s. 13). The rules under the New Brunswick Judicature Act have not yet been promulgated.

(*o*) R.S.O. 1897, c. 55, s. 22(3).

manner of exercising it(*p*). The discretion is a judicial one and is to be exercised judicially, and when only nominal damages are recovered, the intent and meaning of the verdict is generally taken into consideration(*q*). The discretion of the trial judge should not be arbitrarily exercised, should not be exercised "by chance medley, nor by caprice, nor in temper": *Huxley* v. *West London Extension R.W. Co.*, 17 Q.B.D. 373. There must be some reason reasonably satisfactory to the judge for depriving a person, who has the verdict of the jury, of the benefit or indemnity that usually results from such verdict(*r*). In exercising his discretion to deprive a successful party of his costs, the judge is not confined to the consideration of the conduct of the party in the course of the litigation, but may consider his conduct previous to and conducing to the litigation. He must, however, assume the truth of the facts found by the jury(*s*). He should look, in the first place, at the result of the action itself, namely, the verdict of the jury, and he should look also at the conduct of the parties to see whether either of them had in any way involved the other unnecessarily in the expense of litigation, and beyond that he should consider all the facts of the case, so far as no particular fact was concluded by the finding of the jury(*t*). It is the duty of the judge who tried the case, and the duty of the Court of Appeal also, to consider the whole circumstances of the case—everything which led to the action, everything which led to the libel, everything in the conduct of the parties which may shew that the action was not properly brought in respect of the libel complained of(*u*). The judge is not confined to the consideration of the defendant's conduct in the actual litigation itself, but may also take into consideration matters which led up to and were the occasion of that litigation(*v*). But a judge has no power to delegate his discretion to the taxing officer(*vv*).

(*p*) *Re* Friedeberg, 10 P.D. 112; Badische Anilin, etc., v. Levinstein, 29 Ch. D. 366.

(*q*) *Per* Dubuc, J., in the Manitoba Farmers' Hedge and Wire Fence Co. v. Stovel Co. (1902) 14 M.L.R. 55.

(*r*) *Per* Britton, J., in Byers v. Kidd (1906) 8 O.W.R. 759, at p. 760.

(*s*) Harnett v. Vise *et al.*, 5 Ex. D. 307; 29 W.R. 7.

(*t*) *Per* Bowen, L.J., in Jones v. Curling, 13 Q.B.D., at p. 272.

(*u*) *Per* James, L.J., in Harnett v. Vise *et al.*, *supra*, at p. 311.

(*v*) *Per* A. L. Smith, L.J., in Bostock v. Ramsey Urban District Council (1900) 2 Q.B., at p. 622.

(*vv*) Lambton v. Parkinson, 35 W.R. 545.

Costs where nominal damages recovered.

Where the plaintiff recovers only nominal damages, he is not entitled to costs as of right in all the Provinces. Where, *e.g.*, in any action for libel in Manitoba, whether the same is contained in a newspaper or not, the plaintiff recovers merely nominal damages, the judge before whom the action is tried shall not award costs to the plaintiff(*w*). In an action for libel in that Province, in which the jury found a verdict for plaintiff and one dollar damages, Dubuc, J., after quoting the Rule as to costs in the King's Bench Act(*ww*), said: "In *Moore* v. *Gill*, 4 T.L.R. 738, the jury, in an action for libel, awarded one farthing damages. Bowen, L.J., said: 'Until the Judicature Act was passed, in actions for libel and slander damages under 40 shillings did not carry costs. That shewed the intention of the Legislature that costs should not follow where nominal damages were recovered. The Judicature Act gave discretion as to costs to the judge who tried the case, and the judge was bound to exercise his discretion. It seems to me that, in this case, a farthing damages meant that the action ought not to have been brought, and that it was, *primâ facie*, good cause for depriving the plaintiff of costs, and, under the circumstances, threw the onus upon the plaintiff of shewing the reason for bringing this action." *Myers* v. *Financial News*, 5 T.L.R. 42, is another case of libel where one shilling damages was recovered. Huddleston, B., not only deprived the plaintiff of the costs, but allowed costs to the defendants. The same principle was applied in *Harris* v. *Petherick*, 4 Q.B.D. 611. On this same ground, the plaintiffs were deprived of their costs in *O'Connor* v. *Star Newspaper Co., Ltd.*, 65 L.T. 146, and in *Wood* v. *Cox*, 5 T.L.R. 272. It seems to me that the doctrine adopted in those authorities is applicable to this case, and that the verdict of one dollar recovered should not carry costs; but I do not think any costs should be allowed to the defendants"(*x*). It would appear from *Harris* v. *Petherick* (*supra*), that a judge before whom a second trial is held, has power (subject to the terms of the order granting the new trial)

(*w*) R.S.M. 1902, c. 97, s. 13.

(*ww*) R.S.M. 1902, c. 40, s. 931.

(*x*) Manitoba Farmers' Hedge & Wire Fence Co. v. Stovel Co. (1902) 14 M.L.R. 55. See, however, the cases cited at pp. 836, *et seq. post*, as to depriving plaintiff of costs on the ground of small damages.

to order a plaintiff who recovers a nominal sum to pay the costs of both trials, even where the action is tried with a jury.

Depriving of costs for "good cause."

Where the rule as to "good cause" prevails, the judge has no jurisdiction to deprive the successful party of costs, or to make an order that the costs do not follow the event, unless there be "good cause"(*y*). "Good cause" means some misconduct tending to the litigation, or in the course of the litigation, which requires the court in justice to interfere, but upon the facts of this case there was no "good cause" for interfering(*z*). The words "good cause" embrace everything for which the party is responsible connected with the institution or conduct of the suit, and calculated to occasion unnecessary litigation and expense(*a*). "Everything," said Lord Halsbury, L.C.(*f*), "which increases the litigation and the costs, and which places upon the defendant a burden which he ought not to bear in the course of that litigation, is perfectly good cause for depriving the plaintiff of costs." This opinion was acted upon in an action for slander in Ontario in which no amount of damages was named in the statement of claim, but in which substantial damages were claimed at the trial, and one dollar was awarded by the jury. The trial judge (Britton, J.), in his reserved judgment on the question of costs, said that there were two reasons urged why plaintiff should not get costs. One was that the verdict shewed that plaintiff had at most a bare right of action, and, in *McLeod* v. *The Queen*(*g*), costs were not given where the tender was thought to be not unreasonable and where the demand was extravagant, although the amount of the award exceeded the amount of the tender. The other reason was, that there was misconduct on the part of plaintiff. The litigation had arisen out of differences between the parties in the village council of which

(*y*) Jones v. Curling, 13 Q.B.D. 262; Huxley v. West London Extension Ry. Co., 17 Q.B.D. 373; 14 App. Cas. 26; Wight v. Shaw, 19 Q.B.D. 396; Bertram v. Massey Mfg. Co. *et al.* (1889) 13 O.P.R. 184.

(*z*) Farquhar v. Robertson (1889) 13 O.P.R. 156. See Proctor v. Bayley, W. N. August 10, 1889, p. 162.

(*a*) *Per* Lord Watson, in Huxley v. West London Extension Ry. Co., 14 App. Cas., at p. 33.

(*f*) In Huxley v. West London Extension Ry. Co., 14 App. Cas., at p. 32.

(*g*) (1889) 2 Ex. C.R. 106.

they were both members; plaintiff had assaulted defendant on two occasions, had threatened him in an interview with his wife, and had stated publicly that he intended to assault him; there had been a mutual understanding that their differences were to be considered as settled; and plaintiff's conduct had been very provoking. "Plaintiff could very well, without injury to himself, and without his reputation suffering at all, have avoided this litigation. Even if plaintiff deemed it necessary to issue a writ, he learned by the statement of defence that defendant denied intending to accuse him of any crime, and he could then have said—'If that is your position, pay the costs, and the suit will be stopped.' I think, under the circumstances of this case, to compel defendant to pay the costs, would, in the language of Lord Halsbury, in *Huxley* v. *West London Extension R.W. Co.*, 14 App. Cas. 32, 'place upon defendant a burden he ought not to bear.'" Judgment was given for plaintiff without costs (*h*).

Small damages not necessarily "good cause."

The mere fact, however, of a plaintiff, in an action for libel or slander, recovering only a farthing or a shilling damages, is not of itself good cause for depriving him of costs. "Good cause" must be something more than the mere smallness of damages. The smallness of the damages, however, is an important element to be considered, if there are any other circumstances which can be taken into account(*i*). Should the jury, in an action for an assault or libel, award the plaintiff an ignominious compensation, it would not follow that the judge ought, as of course, to deprive him of his costs, although he might treat it as an indication of the opinion of the jury, in which he coincided, that the character of the plaintiff was worthless, and that the action never ought to have been brought, and was therefore oppressive(*j*). But where there are circumstances, antecedent to or at the trial itself, of an injurious, provoking, or aggravating character, or which shew some tangible reason for seeking vindication, or for not interfering against the plaintiff, the smallness of

(*h*) Ellis v. Sherrin (1904) 3 O.W.R. 938.

(*i*) *Per* A. L. Smith, L.J., in O'Connor v. Star Newspaper Co., 68 L.T., at p. 148.

(*j*) *Per* Hawkins, J., in Roberts v. Jones and Willey v. Great Northern Ry. Co. (1891) 2 Q.B.D., at p. 198.

the damages should not deprive him of costs. In an action in Nova Scotia against a husband and wife, for words spoken by the wife imputing theft and other indictable offences, the County Court judge, who tried the case without a jury, found that the words having been spoken in an altercation provoked by plaintiff's wife, and in which she took a prominent and offensive part, he thought the damages should be small, and he gave judgment in plaintiff's favour for $5, and ordered each party to pay his own costs. On appeal it was held, that there was error in withholding plaintiff's costs. Meagher, J., who heard the appeal, said that the defendants had endeavoured to prove at the trial that the plaintiff's reputation was bad and had failed, and that for that reason, and because they did not plead properly to the action (he had previously intimated his opinion that defendant should have pleaded that the words spoken were words of mere general abuse), he was compelled upon the authority of Nova Scotia decisions, having regard, of course, to the findings, to hold that the learned judge erred in withholding costs from plaintiff. But for these decisions, he thought he should have reached a different conclusion(*k*). So, also, in an action in British Columbia against a husband and wife, for a libel published by the wife in which the jury returned a verdict for $10, Martin, J., said, that he had no hesitation in deciding that the costs should follow the event, and, in doing this, he was following the two cases cited in which other justices of his own court had already decided the same point(*l*). As to the liability of the husband, the case of *Seroka* v. *Kattenburg*(*m*), must be followed. No distinction could be drawn between the liability for damages and for costs, and judgment should be entered against both defendants(*n*). And in an action for slander in Ontario, in which the jury returned a verdict for plaintiff for one dollar, and the defendant sought to deprive plaintiff of his costs, the trial judge (Boyd, C.), said: "I am asked to intervene as to costs, without which costs will follow the event, as in *Wilson* v. *Roberts* (1885), 11 O.P.R. 412. There should be some reason for interfering to deprive the plaintiff of costs in such an action, which can only be

(*k*) Croft v. Jodrey, *et ux.* (1895) 28 N.S.R. 78.

(*l*) The cases above referred to are Hayden v. Beasley and Brydone *et al.* v. The World, which are unreported.

(*m*) (1886) 17 Q.B.D. 177.

(*n*) Mackenzie v. Cunningham *et ux.* (1901) 8 B.C.R. 206.

brought in the High Court, and the verdict, though small, shews that he had cause of complaint. The conduct of the plaintiff had not been reprehensible, but the same observation does not apply to the defendant. The small amount is not "contemptuous," but is explained by the condition of the defendant at the time the abusive words were uttered. Given such circumstances, though the verdict be small, the best course, in my opinion, is simply not to interfere, and let the law award the costs according to the authorities and practice"(*o*).

Where, also, in slander for words imputing unchastity to the plaintiff, and the commission of an indecent act by her in a public place under section 177 of the Code(*p*), without claim for special damage, there was a verdict for one dollar damages, it was held, that the defendant having denied the speaking of the words, and the only other defence being that it was mere abuse spoken in the course of a quarrel between the parties, and the jury by their verdict having found both these questions in the plaintiff's favour, there was no reason for depriving her of the costs of the action(*q*). So, also, misconduct which has no connection with or relation to the party's case, is not good cause for depriving him of costs(*r*).

When plaintiff may be deprived of costs.

There will, however, be "good cause" for depriving plaintiff of his costs if the action is brought or persisted in unfairly or oppressively(*s*); or if it is brought for political motives instead of a *bonâ fide* desire to obtain redress(*t*); or if there has been misconduct or oppression on his part, or on the part of any successful party(*u*); or where, although plaintiff recovered £50 damages, his claim was extravagant and extortionate, was supported by dishonest statements and acts, and was sought to be established before the jury by evidence which they very pro-

(*o*) Bell v. Wilson (1900) 19 O.P.R. 167.

(*p*) Now s. 205.

(*q*) Pickles v. Sinfield (1903) 24 C.L.T. (Occ. N.) 27.

(*r*) King v. Gillard (1905) 2 Ch. 7; 92 L.T. 605.

(*s*) *Per* Lord Esher, M.R., in Barnes v. Maltby, 5 T.L.R. 196.

(*t*) O'Connor v. Star Newspaper Co., 9 T.L.R. 233; 68 L.T. 146.

(*u*) Jones v. Curling, 13 Q.B.D. 262; Williams v. Ward, 55 L.J.Q.B. 566; Pool v. Lewin, 1 T.L.R. 165; Canning v. Turner, 3 T.L.R. 684; Pearman v. Burdett-Coutts, *ibid.* 719.

perly disbelieved(*v*); or where the action was frivolous and vexatious(*w*).

Distinction as to interference with costs of plaintiff and defendant.

But there is a very marked distinction between interfering with costs going to the plaintiff and costs going to the defendant. This distinction was pointed out in *Dick* v. *Yates*, 18 Ch. D., at pp. 76, 85. It was laid down there, that a plaintiff might be deprived of costs and might be ordered to pay the costs of the litigation, and while the defendant might be deprived of costs, there was no case in which the defendant should be ordered to pay the costs of the whole litigation, and very good cause must appear, where the defendant has succeeded, to deprive the defendant of his costs of resisting an attack made upon him unsuccessfully(*b*). The same point was decided in an action for newspaper libel, in which the jury found that the defendant was guilty of libelling but that the plaintiff had sustained no damage. The trial judge (Cameron, C.J.) considering himself bound by the decision in *Lemay* v. *Chamberlain*(*c*), dismissed the action, but ordered the defendant to pay the plaintiff's costs, and gave the plaintiff judgment therefor. The defendant thereupon moved before the Divisional Court against the judgment for costs, which that court varied by ordering the action to be dismissed with costs, and the plaintiff appealed direct to the Court of Appeal (as he was at liberty to do) from the judgment at the trial dismissing the action, and also from the judgment of the Divisional Court, so far as it varied that part of the judgment at the trial which was in his favour and deprived him of costs. The latter appeal was rested entirely on the ground that the trial judge had jurisdiction to order the defendant to pay the plaintiff's costs, even though the action was dismissed, and that the Divisional Court had no power to interfere with the exercise of his discretion in that respect. The Court of Appeal held, that, although Rule 428, O.J.A., (now Rule 1130), gave to the judge or court the power of depriving any of the parties to an action,

(*v*) Huxley v. West London Extension Ry. Co., 17 Q.B.D. 373; 14 App. Cas. 26.

(*w*) Macgregor v. Clay, 4 T.L.R. 715.

(*b*) *Per* Rose, J., in Farquhar v. Robertson, *supra*, at p. 162. See, also, Re Foster v. Great Western Ry. Co., 8 Q.B.D., at pp. 521, 522; Andrew v. Grove (1902) 1 K.B. 625.

(*c*) (1886) 10 O.R. 638.

plaintiff or defendant, of their costs, it did not (following *Mitchell* v. *Vandusen*(*d*)), confer the power of compelling a successful defendant to pay the plaintiff's general costs of the action. Hagarty, C.J., thought the Queen's Bench Division rightly held, that with judgment for defendant remaining untouched, the order as to costs was wrong. And Osler, J.A., said that it had been laid down, over and over again in the most emphatic manner by decisions in the House of Lords, more particularly in *Garnett* v. *Bradley*(*dd*), and by the English Court of Appeal, that there is no jurisdiction to make a defendant pay the plaintiff's general costs of the cause when the action is dismissed, that being a power which the Court of Chancery never possessed. The court allowed the appeal of the plaintiff from the judgment at the trial by awarding a *venire de novo* (Patterson, J.A., *diss.*) (*e*).

When defendant may be deprived of costs.

A successful defendant may, however, be deprived of his costs whenever, by misstatements made under circumstances which should have imposed truthfulness, he brought litigation on himself and rendered an action against him reasonable(*x*); but he may not be deprived of his costs for relying on a merely technical defence(*y*). "Good cause" may exist where the action was provoked or brought about by misconduct, folly, or perversity(*z*); where the conduct of a successful party has been discreditable as to some matter connected with the litigation in question(*a*), but not, in the case of a defendant, because of some act which, although a fraud on the public, is in no way connected with the issue between the plaintiff and himself(*aa*). The discretion of the trial judge was, however, exercised against a

(*d*) (1887) 14 O.A.R. 517.

(*dd*) 3 App. Cas. 956; 48 L.J.Q.B.D. 191.

(*e*) Wills v. Carman (1888) 14 O.A.R. 656. See, also, McDermid v. McDermid, 15 O.A.R. 287.

(*x*) Sutcliffe v. Smith, 2 T.L.R. 881.

(*y*) Granville v. Firth, 72 L.J.K.B. 152; 88 L.T. 9.

(*z*) Byers v. Kidd, *infra;* Harnett v. Vise, 5 Ex. D. 307; 29 W.R. 7; Bostock v. Ramsey Urban District Council (1900) 1 Q.B. 357; (1900) 2 Q.B. 616.

(*a*) Darby v. City of Toronto (1889) 17 O.R. 554; Robinson *et al.* v. Boyle (1889) 18 O.R. 387.

(*aa*) King v. Gillard (1905) 2 Ch. D. 7; 92 L.T. 605.

defendant, who had a verdict in his favour, when, in the opinion of the judge, the defendant provoked the litigation by persisting in, and stating he could prove, the slanderous charge, against the plaintiff's denial of it and with knowledge of its retraction by the original utterer of the charge; when defendant refused to carry out a promise to pay part of plaintiff's costs in settlement of the action; and when, before the verdict, the jury, by opinions twice expressed in open court, were evidently in favour of each party paying his own costs(*b*). But in the exercise of his discretion in depriving a successful defendant of his costs, the trial judge is not obliged to find, under Rule 1130, O.J.A., what would necesarily be "good cause" under the English Order 65, Rule 1(*bb*). In an action for libel against a newspaper publishing company, in which an appeal to the Ontario Court of Appeal against the allowance of a demurrer to certain paragraphs of the statement of defence was allowed, but without costs, Osler, J.A., who disapproved of the style of pleading disclosed in the paragraphs, but was unwilling to differ from the rest of the court in their opinion that material facts in mitigation of damages must still be pleaded, said that a defendant who pleaded in the manner to which he referred, and who in one paragraph had pleaded what, in the technical sense of the words, was mere scandal and impertinance, was not entitled to favourable consideration in the matter of costs(*c*).

How "event" to be construed as to distinct issues.

Under these rules costs now always follow the "event," unless the trial judge chooses to exercise his discretion in making an order, as he may do, in any case. The term "event" in the rules means the finding and the judgment(*cc*), and is to be construed distributively as regards distinct issues or causes of action. And, therefore, where there are distinct issues raised and determined on the pleadings, the general costs of the action follow the judgment, but the costs of the particular issues must be respectively taxed in favour of the party who has succeeded on them(*d*). In an action for slander there were

(*b*) Byers v. Kidd (1906) 8 O.W.R. 759; (1907) 13 O.L.R. 396.

(*bb*) *Ibid.*

(*c*) Beaton v. Intelligencer Printing and Publishing Co. (1895) 22 O.A.R. 97, at p. 103.

(*cc*) *Per* Brett, L.J., in Collins v. Welch, 5 C.P.D., at p. 33.

(*d*) Myers v. Defries *et al.*, 4 Ex. D. 180; 49 L.J. 268; Stooke v. Taylor, 5 Q.B.D. 569; Bertram v. Massey Mfg. Co. (1889) 13 O.P.R. 184; Crepeau v. Pacaud, 35 C.L.J. 114.

four separate claims made for alleged slanders on different occasions. By the judgment of the trial judge, following the verdict of the jury, the plaintiff succeeded against the defendant in respect of the matters set forth in two paragraphs of the statement of claim, and costs to be taxed; and the defendant succeeded in respect of the matters set forth in the other two paragraphs of the statement of claim, and his costs to be taxed. It was claimed for the plaintiff, on appeal by defendant from the order of Meredith, C.J., dismissing defendant's application for an order to review the taxation of the local registrar, that plaintiff was entitled to the general costs of the action except so much of it as was occasioned by, or referable to, the causes of action upon which he had failed, with a set-off to the defendant of his costs of the issues upon which he had succeeded. Defendant contended that plaintiff should recover only one-half the costs of the action, against which he (defendant) was entitled to set-off one-half of his costs of defence. The taxing officer found in favour of the plaintiff's contention, and the Divisional Court held, following *Sparrow* v. *Hill*(*e*), that the taxing officer had adopted the proper mode of taxing the costs of the parties. Leave to appeal to the Court of Appeal was refused by Osler, J.A.(*f*). A like ruling (unreported) by the taxing officer was upheld by Meredith, C.J., the trial judge, in *Douglas* v. *Stephenson*(*g*), an action for newspaper libel, in which, on the second trial, the findings of the jury were divided as to the issues on the record.

Where in an action for libel the defendant pleaded justification and privilege, and the judge ruled that the occasion was privileged, and the jury negatived malice, but found that the words were not true, it was held that the defendant was entitled to the general costs of the action, and the plaintiff to the costs of those witnesses only whose evidence related exclusively to the issue whether the words were true or false(*h*). So where in an action for libel the defendant pleaded the general issue and justification, but offered no evidence in support of his plea of justification; although the verdict was for the defendant on the

(*e*) 7 Q.B.D. 362; 8 Q.B.D. 479.

(*f*) Davis v. Hurd (1902) 1 O.W.R. 418; 4 O.L.R. (1902) 466.

(*g*) (1898) 29 O.R. 616.

(*h*) Harrison v. Bush, 5 E. & B. 344, 358; 25 L.J.Q.B. 99; Brown v. Houston (1901) 2 K.B. 855; 70 L.J.K.B. 902.

general issue, and for the plaintiff on the other issue, the plaintiff was held entitled to his costs on that issue(*i*). Where there were issues on different causes of action, one for assault and the other for slander, and the plaintiff obtained a verdict on the assault count and £5 damages, but failed to establish a cause of action on the slander count, it was held that he was not entitled to any costs(*ii*).

The "event" as to each issue is the result of all the proceedings incidental to the litigation, and the costs which follow the event include the costs of all the stages of that litigation; and, therefore, where a nonsuit was set aside, and a new trial was had which resulted in plaintiff's favour, he was held entitled to the costs of the first trial as part of the costs of the action(*j*). So, also, where at the first trial the jury disagreed(*k*). But where the costs of the first trial were ordered to "abide the result" of a new trial, and at the new trial the jury gave only nominal damages, and no order was made as to costs, it was held that plaintiff was not entitled to the costs of the former trial; the "result" in such a case meant the "result" as to costs(*l*).

Recommendations of the jury as to costs.

The recommendation of the jury with respect to the costs forms no part of the verdict. They have no power to give costs(*ll*); but the recommendation may or may not be considered, according to the circumstances of the case. It was acted upon in *Skinner* v. *Mair*(*m*), and was considered in *Weaver* v. *Sawyer & Co.* (*infra*), and appears to have been considered in *Byers* v. *Kidd* (*supra*), but it was not considered in *Farquhar* v. *Robertson* (*supra*); and affidavits by some of the jurymen in that case, that they would not have concurred in a verdict for defendant if they had supposed the result would be to throw all the costs on the plaintiff, were held inadmissible(*mm*).

(*i*) Empson v. Fairfax, 8 A. & E. 296.

(*ii*) Smith v. Harnor, 3 C.B. (N.S.) 829.

(*j*) Field v. Great Northern Ry. Co., 3 Ex. D. 261; Creen v. Wright, 2 C.P.D. 354; Waring v. Pearman, 32 W.R. 429; Wright v. Shaw, 19 Q.B.D. 396.

(*k*) Copeland v. Blenheim (1885) 11 O.P.R. 54.

(*l*) Brotherton v. Metropolitan Dist. Ry. (1894) 1 Q.B. 666.

(*ll*) Campbell v. Linton (1868) 27 U.C.Q.B. 563.

(*m*) (1837) 5 U.C.Q.B. (O.S.) 337.

(*mm*) See, also, Weaver v. Sawyer & Co. (1889) 16 O.A.R. 422.

When discretion to be exercised and order made.

The discretion to direct the costs to be otherwise than according to the event, in jury cases, can be exercised only by the judge upon an application made at the trial, or by the full court, although in some cases it has been exercised subsequent to the trial(*n*). "At the trial" appears to mean at the same sittings of the court(*o*), or "substantially at the trial"(*p*); but the decision may be reserved and judgment given at a subsequent time(*q*). It is better, however, to make the application immediately after the verdict(*r*); although where the judge at the trial declined to exercise his discretion, and some weeks afterwards heard both parties on an application, and made an order depriving plaintiff of costs, it was held that he had power to do so, and was not *functus officio* by his refusal at the trial(*s*). So where he omitted to exercise his discretion at the trial, it was held (following *Fritz* v. *Hobson*(*t*)), that he might do so by making an order as to costs after his judgment had been appealed from and sustained(*u*). The judge also has power at the trial, in the presence of counsel for both parties, and without any application for the purpose(*v*), to make an order depriving the successful party of costs(*w*). Where no order has been made by the judge at the trial, the full court, in actions tried before a jury, has jurisdiction under this Rule (1130 in Ontario, and the corresponding Rules in the other Provinces), to deprive a successful party of the costs(*x*).

The combined effect of Rule 1130 and of section 72 of the Ontario Judicature Act, is to prevent appeals, except by leave

(*n*) See cases *infra*.

(*o*) Tyne Alkali Co. v. Lawson, 36 L.T.N.S. 100; Kynaston v. MacKinder, 37 L.T.N.S. 390.

(*p*) Collins v. Welch, 5 C.P.D., at p. 33.

(*q*) See Wise v. Hewson, *et al.*, 1 O.P.R. 232.

(*r*) See Collins v. Welch, *supra;* Malloch v. Johnson (1848) 4 U.C. Q.B. 352; Major v. McKenzie (1873) 23 U.C.C.P. 261.

(*s*) Huxley v. West London Extension Ry. Co., 14 App. Cas. 26.

(*t*) 14 Ch. D. 542.

(*u*) Hardy v. Pickard (1888) 12 O.P.R. 428.

(*v*) Turner v. Heyland, 4 C.P.D. 432.

(*w*) Collins v. Welch, 5 C.P.D. 27; Marsden v. Lancashire and Yorkshire Ry. Co., 7 Q.B.D. 641.

(*x*) Myers v. Defries and Siddons v. Lawrence, 4 Ex. D. (C.A.) 176.

of the court or judge, with respect to costs which are in the discretion of the court(*y*).

Costs when actions consolidated.

Where there has been a consolidation of two or more actions brought by the same person or persons, for the same or substantially the same libel, and the jury finds a verdict against the defendant or defendants in more than one of the actions so consolidated, the judge at the trial, if he awards the costs of action to the plaintiff, shall make such order as he shall deem just for the apportionment of such costs between and against such defendants(*z*).

Costs of unused evidence taken under commission.

In a prosecution for criminal libel in British Columbia, the defendant, in support of his plea of justification, had the evidence of certain witnesses out of the jurisdiction taken for use at the trial. The evidence was used at the first trial where the jury disagreed. At the second trial the jury again disagreed. At the third trial the defendant was acquitted, but the evidence was not used owing to the private prosecutors giving evidence and admitting substantially what was stated by the witnesses in their depositions before the commissioner. It was held (*per* Drake, J.), under the authorities *infra*, and following the practice in civil cases, that as the commission evidence was not put in by the defendant as part of his case, defendant was not entitled to the costs of it; and also, that defendant was not entitled to the costs of the abortive trials(*a*). In Ontario a different view was taken of the costs of a commission under similar circumstances. In an action for libel against a newspaper publishing company, the defendants, in support of their defence of justification, had the evidence of witnesses out of the jurisdiction taken under a commission for use at the trial. The evi-

(*y*) Mitchell v. Vandusen (1887) 14 O.A.R. 517; where, on an appeal by leave, the decision was reversed.

(*z*) R.S.O. 1897, c. 18, s. 14(2); C.S.N.B. 1903, c. 136, s. 10; R.S.B.C. 1897, c. 120, s. 13.

(*a*) Rex v. Nichol (1901) 8 B.C.R. 276; 22 C.L.T. (Occ. N.) 75. The authorities above referred to are—Ridley v. Sutton (1863) 1 H. & C. 741; Curling v. Robertson (1844) 7 M. & G. 525; Seely v. Powers (1835) 3 Dowl. 372, followed by Waite v. Spurgin (1836) 4 Dowl. 575; Pugh v. Kerr (1840) 8 Dowl. 218; Brown v. Clark (1843) 12 M. & W. 24, following Seely v. Powers, *supra*.

dence was not used at the trial, on account of the plaintiff, who was called as a witness by the defendants, having admitted the material facts contained in the commission evidence. Upon an appeal to the Divisional Court it was held, that the defendants, having obtained judgment in their favour with costs, were entitled to tax against plaintiff the costs of the commission, the execution of which under the circumstances was not unreasonable, and the fact that the evidence so taken was not used not being sufficient to deprive the defendants of the costs thereby incurred(*b*).

The question of costs after retraction and apology.

In an action for newspaper libel by a physician, who was charged with conspiring to defraud a life insurance company, the defendants, about a week after the notice of complaint was served, published an apology in their paper which was not acceptable to plaintiff. Some correspondence followed between the solicitors of the parties, and the writ was issued and served on the 13th May. On the 16th May the defendants published a retraction, which, on the 18th May, they were informed was regarded as ample, and that, upon payment of plaintiff's costs, the action would be discontinued. Defendants refused to pay costs and plaintiff proceeded to trial. Armour, C.J., who tried the action by consent without a jury, directed judgment to be entered for plaintiff for the costs of the action up to the 18th May, and for defendants for the costs of the action subsequent to the 18th May; the costs to be set-off, and the party against whom the balance was found to pay such balance. Upon an appeal by plaintiff, the Divisional Court held (Meredith, C.J., *diss.*), that either party could, after the publication of the apology and its acceptance by the plaintiff, have moved in Chambers to have the question of costs disposed of; but, neither party having moved, that the plaintiff should have such costs only as he would have been entitled to had he so moved, and that the defendant should have no costs. The majority of the court followed *Knickerbocker* v. *Ratz*(*c*), in which Osler, J.A., on the authority of *North* v. *Great Northern R.W. Co.*(*d*), and *Thompson* v. *Knights*(*e*), held,

(*b*) Rondot v. Monetary Times Printing Co. (1898) 18 C.L.T. (Occ. N.) 237.

(*c*) (1894) 16 O.P.R. 191.

(*d*) 2 Giff. 64.

(*e*) 7 Jur. N.S. 704.

that the jurisdiction of the Master in Chambers to dispose of the question of costs did not necessarily depend upon the consent of the parties to go before him, and, therefore, that the defendants, in the present case, were at liberty to apply at any time to have the costs disposed of in Chambers. Meredith, C.J., who dissented, distinguished *Knickerbocker* v. *Ratz* from the present case(*f*).

Costs of witnesses in reply to inadmissible evidence.

In an action for libel the defendant had not justified, but had served notice, under Rule 488, O.J.A., of his intention to adduce, in mitigation of damages, evidence of the circumstances under which the libel was published, and pursuant thereto sought to adduce evidence which the trial judge held inadmissible except in support of a plea of justification. The plaintiff had prepared for such evidence being admitted by bringing witnesses whom he intended calling in reply, and on the taxation sought to have the costs of such witnesses allowed him, which was refused by a local taxing officer. It was held (*per* Anglin, J.), on appeal, that the plaintiff was entitled to a reasonable sum for the costs in dispute, having regard to Rule 1175, O.J.A., and to the implication arising out of Rule 1176(3) O.J.A.(*ff*).

Costs of two simultaneous appeals against one adverse judgment.

In an action by a judge of the Supreme Court of British Columbia against the editor of the *British Colonist*, published at Vancouver, B.C. (more fully noted at p. 390, *ante*), the defendant instituted two appeals to the Supreme Court of Canada from the Supreme Court of British Columbia, one against the rule refusing leave to enter a nonsuit, and the other against the judgment for plaintiff upon the verdict. In dealing with the costs of the proceedings Gwynne, J., said, that under any circumstances, the former appeal being utterly without foundation must have been dismissed with costs, and as, upon the other appeal, the appellant failed upon the ground upon which he rested his appeal, and as there would be but one bill of costs as upon one appeal, there existed no reason for making any distinction be-

(*f*) Eastwood v. Henderson *et al.* (1897) 17 O.P.R. 578.
(*ff*) Ludlow v. Irwin (1906) 7 O.W.R. 720.

tween the two appeals in respect of costs. Upon plaintiff consenting to reduce his verdict to $500, and to alter the judgment already entered accordingly, the appeal should be dismissed with costs. In default of plaintiff doing this within two months, then judgment to be entered dismissing the appeal against the rule refusing leave to enter a nonsuit with costs, and allowing the appeal against the judgment already entered without costs, and directing a rule to issue in the court below for a new trial without costs. The appeal was dismissed with costs upon plaintiff filing a consent to the damages being reduced to $500(*g*).

Costs where new trial for non-direction.

In an action for libel in the Province of Nova Scotia in which a new trial was granted for non-direction, it was contended by counsel for defendant that when, through a mistake of that kind, a cause was sent back, costs should be reserved—citing *Flemming* v. *Bank of New Zealand*(*h*); *Lord* v. *Wardell*(*i*), and *Gee* v. *Lancashire, etc., Railway Company*(*j*). Counsel for plaintiff was not called on, the rule being granted with costs(*k*).

(*g*) Walkem v. Higgins (1889) 17 S.C.R. 225.
(*h*) (1900) A.C. 577.
(*i*) 30 Bing. N.S. 684.
(*j*) 6 H. & N. 211.
(*k*) Miller v. Green (1900) 33 N.S.R. 517.

GENERAL INDEX.

ABORTION,
charge of taking medicine to procure, actionable, 366.
" ABSCONDED "
as applied to " left creditors in the lurch," 397.
ABUSE,
words of vulgar or general, 34, 59, 63, 88, 102, 376.
ACCORD AND SATISFACTION,
defence of, 478.
ACTIO PERSONALIS CUM PERSONA MORITUR, 344, 485.
ACTION
against defendents jointly, for slander, not maintainable, 66.
against newspapers, venue in, 331.
by and against corporations and companies, 205.
by and against foreigners, 345.
by individuals comprised in a class, 94.
by persons in various occupations and employments, 66, 67.
consolidation of actions for the same libel, 339, 783-786.
costs, when actions consolidated, 845.
dismissal of, as against evidence and judge's charge, 747.
dismissal of, on disagreement of jury, 544.
for defamation and for inflicting loss, distinguished, 145.
for defamation, to be tried by a jury, 662.
for defamation, not triable in the County Court, 832.
for defamation, defences to, 469-490.
for defamatory statements in pleadings, 150-153.
for " series " of defamatory statements, 333.
for libel and not on the case, 360.
for libel, when it lies against corporation, 163.
for libel, and for disturbing plaintiff in his calling, distinguished, 144.
for words applicable to class of two, 49.
joint and separate, 334.
notice of, when required and when not, 489.
on the case and not for libel, 361.
second, for same publication, frivolous and vexatious, 447.
when cause of action arises, 485.
when it lies, 1, 66-67.
ACTIONABLE PER SE,
when words are, and when not, 1, 66, 67.
slander of person in his trade or business is, 68-83.

ADMISSION
in proof of publication, 269.
in proof of truth, 575.
of publication, when compulsory and when not, 165, 651-655.

ADULTERY
and incest, special damage for charge of, 764, 766.
charge of, actionable, 4.
charge of conspiracy to commit, imports indictable offence 30, 51.
charge of, and incest, 366.
charge of, justified by adverse judgments against plaintiff, 233, 565, 710.
defined, 45.

ADVERTISEMENTS
as evidence of publication, 267.

AFFIDAVITS,
privileged, 502.

AGENCY,
mercantile, privilege of, 517-524.

AGENT,
liability of corporation for publication by, 206, 207.

AMENDMENT
of pleadings, 333, 353, 361-362, 427.
omission of explanatory words in libel not amendable, 430-431.
refusal of, permitting evidence of newspaper attacks by plaintiff on third parties, 729.

ANONYMOUS
communications, what are, 338.
newspaper correspondents may be joined as defendants by defendant publisher, 336-338.

ANSWERS,
incriminating, on examination for discovery, 647-655.
incriminating, to interrogatories, 661.

APOLOGY,
costs in case of retraction and apology, 846.
defence of, 464.
mere willingness to give, no defence, 469.
publication of, within reasonable time, is for the jury, 673.
publication of, "at earliest opportunity." 814.
requisites of, 469.
statutory defence of, confined to newspaper libel, 84.
statutory provision for, when not applicable, 470.
under Provincial statutes, for libel in newspaper, 203.

APPEAL
to Supreme Court of Canada as to damages, 780-782.

ARSON,
words imputing, 25, 417, 429.

ARTICLE,
correction of libellous, in mitigation, 725.
ATTEMPT
charge of, to commit a crime, actionable, 35.
ATTORNEY,
charge of unprofessional conduct against, 152.
justification of charges against, 557.
"BAD WOMAN," 371.
BARRISTERS, ATTORNEYS AND SOLICITORS,
slander of, 62, 63.
"BAWD,"
calling a woman a "bawd," actionable, 31.
BAWDY HOUSE,
charge of keeping, actionable, 30, 31.
BELIEF
in truth of charge, 594.
BIGAMY, 563.
"BLACKGUARD," 371, 458.
"BLACKLEG,"
when defamatory and libellous, 100, 139.
"BLACKMAIL,"
charges of, 145, 448, 449.
"BLACKMAILING,"
charge of, in newspaper report of public meeting, 559.
innuendo unnecessary, 377-378.
"BLACK SHEEP," 100.
BOARDS, SCHOOL, HEALTH, EDUCATION, ETC.,
reports of proceedings privileged, 298.
"BOGUS PEDDLER," 100.
BONA FIDES,
evidence of, by newspaper publisher, on charge of bribery, 713.
of defendant, 138.
BOOKS,
criticism of, by R. C. bishops, 610.
BRIBERY,
evidence of bona fides on charge of, 713.
BUSINESS,
effect of alleging or not alleging special damage to, 367-8.
evidence as to plaintiffs, 676.
libel on a stationery firm, 138.
libel on a watchmaking firm, 131.
slander of person in his, 68-83.
slander of, summary of the law on the subject, 82.
slander of, unnecessary to allege or prove special damage, 692.
special damage of a person in his, 762.
words "touching" plaintiff in his, 99.

CALLING,
slander of person in his, 68-83.

CANADA EVIDENCE ACT
not applicable to examinations in civil actions, 649, 652, 654.

CANDIDATE
for public office, evidence in mitigation of libel of, 724.
for public office, retraction of libel against, 782.
for public office, statutory provision as to libel against, 470.

CERTAINTY
of imputation, 366.
rule as to the words and the person, 87, 91-94.

CHARACTER,
evidence of plaintiff's bad character, 574.
evidence of, in mitigation of damages, 575.
evidence of, to aggravate damages, inadmissible, 694.
evidence of plaintiff's character, when plea amounts to justification but restricted to mitigation, 721.
evidence of plaintiff's bad character in Quebec, 723.
evidence of plaintiff's bad character, under pleas of not guilty and justification, inadmissible, 721.
evidence of plaintiff's character previous to publication, 718-720.
evidence of plaintiff's character under rule of Judicature Acts, 719.

"CHEAT," 72, 75, 76, 100, 101.

CHEATING,
charge of, 366.

CHIEF OF POLICE,
criticism of, 536.

CHILD,
parent in Quebec responsible for libel by, 154.

CIRCULAR,
libel in, 140-141.

CLASS,
libel of, may be libel of individual, 129.
plaintiff not included in, 325.

CLERGYMEN AND MINISTERS OF RELIGION,
defamatory statements by, 104.
slander of, 60-62, 65.
slander of, evidence in mitigation of, 716.
words imputing incest to Methodist minister, 28.

CODE CIVILE,
articles of, forming basis of French law, 149.
libellous trade circulars and reports under, 219.
privilege under, 517, 521, 522.
(See Table of Statutes cited.)

COMMISSION,
costs of unused evidence taken under, 845.
proceedings before, privileged, 501.
COMMUNICATION,
privileged, 493, 495-6.
COMPANY,
manufacturing, damages reduced against, 772.
telegraph, damages reduced against, 771-2.
(See the Law concerning Corporations and Companies, 205-220.
CONCUBINAGE,
charge of, actionable, 4.
defined, 45.
CONFESSION,
admissible in proof of truth, 575-576.
evidence of, only admissible under plea of justification, 726.
when admissible in mitigation, 576, 726.
CONFIDENTIAL COMMUNICATIONS, 515-524.
CONSOLIDATION
effect of, in actions for libel, 341.
of actions for the same libel, 339, 342, 783-786.
when to be applied for, 342-3.
CONSPIRACY,
charge of, actionable, 683.
CONSTRUCTION
of defamatory language, rule in the United States as to, 90.
of words imputing unchastity, 45.
of words in libel and slander, 89, 374, 375.
of words or statements complained of, 5.
rule of, as to slanderous words, 14.
to support verdict, 387-8.
CONTEMPT,
injunctions against, 818.
CONVERSATIONS,
evidence of, 704.
COPYRIGHT,
slander of title to, 107.
CORPORATIONS AND COMPANIES,
the law concerning, 205-220.
charges against directors of, 534.
charges of corruption against, when action lies for, 216.
express malice against, when proof of required, 689.
express malice of, in actions against, 147.
liable civilly and criminally for libel, 210.
liability of, for letters of its servants, 147.
libel of, by impugning validity of election of directors and legality of business, 213.

CORPORATIONS AND COMPANIES.—*Continued.*
libel of, in their business, 212.
malice against, when to be shewn, 198.
may sue for slander of title, 206.
may sue one another, 218.
municipal corporation may be sued for libel, 209.
newspaper, examination of officers or agents of, 646.
responsible for transmission of libellous messages, 211.
rule as to justification of libel applies to, 549.
trading, unprivileged statements concerning, 524.
trading, may sue for libel without proving special damage, 214.
when actions lie by and against, 205.

COSTS, 828-848.
apportionment of, in consolidated actions for the same libel, 339, 783-786.
deprivation of, for "good cause," 831-832, 835-838.
how affected by the Judicature Acts, 828, 830, 831.
in actions for imputing unchastity, 47.
in British Columbia, 831.
in Manitoba, 831, 834.
in New Brunswick, 829.
in Nova Scotia, 829-830, 831.
in Ontario, 828, 831.
judicial "discretion" as to, and how exercised, 832-833, 844.
objections to bill of, privileged, 502.
of commission to examine witnesses, 845.
of distinct issues, 841-843.
of two simultaneous appeals against one judgment, 847.
of witnesses in reply to inadmissible evidence, 847.
previous rules as to, repealed by Judicature Acts, 830.
recommendations of jury as to, 843.
security for, 345.
security for, in actions against justices, 462-463.
security for, in actions against newspapers, 433-458.
security for, in actions for slander imputing unchastity, 458-462.
small damages not necessarily "good cause" for deprivation of, 836-838.
the "event," and how to be construed as to distinct issues, 841-843.
when actions consolidated, 845.
when action or issue tried by a jury, 831.
when costs follow the event, 831.
when defendant may be deprived of, 840-841.
when plaintiff may be deprived of, 838-839.
when new trial for non-direction, 848.
when nominal damages recovered, 834.
when verdict for nominal damages in Manitoba, 788.

COUNTY COURT,
action for defamation not triable in, 832.

COUNSEL,
statements by, in judicial proceedings, privileged, 501.

COUNTERCLAIM, 358-359.
when available, 404.
when allowed and when disallowed, 486-489.

COURTS OF JUSTICE,
reports of proceedings in, privileged. (See Reports of Judicial Proceedings, 278-297.)

COURTS, MILITARY,
proceedings in, privileged, 501.

CRIME,
charge of attempt to commit, actionable, 35.
charges of, privileged and unprivileged, 507-512.
charges of, replications to pleas justifying, 369-70.
evidence of confession of, only admissible under plea of justification, 726.
evidence of confession of, when admissible in mitigation, 726.
falsity of words imputing, when evidence of, inadmissible, 691.
impossible, words imputing, 101.
imputations of, 195.
imputations of, committed in a foreign country, 17-18.
imputations of, excessive damages for, 773.
imputation of, misdirection in action for, 789-791.
imputation of, must be certain, 31.
imputation of, when actionable, 3.
intention to commit, 366.
libel a crime and indictable under the Code, 125.
"provincial," word imputing, 449.
suspicion of, words imputing, 101.
words imputing, actionable although not in technical terms, 31.
words imputing, when privileged, 36.
words of suspicion, belief, or opinion, 33, 34.
words prima facie imputing, used in a different sense, 32, 33.
variance as to crime charged, 428.
vulgar words imputing, actionable, 31.

CRIMINAL CODE,
basis of, 188.
defamatory matter under, how expressed, 2.
publication of libel, defined by, 2, 155.
publication of libel under, criminal and indictable, 2.
"publishing" defined by, 272.
publications privileged under, 307. (For sections of Code concerning libel, see Table of Statutes cited.)

CRIMINAL LIABILITY
by publication to plaintiff alone, 95.
of corporations and companies, 210.
of employer, when sale of libel by servant, 274.
of newspaper proprietor, 273.
of seller of libel in newspaper, book, etc., 274.

CRITICISM
of men and things. (See Fair Comment, 580-621.)

CUSTOM,
damage for loss of, 762-764.
evidence of loss of, 368, 693.
loss of, as special damage, 368.
pleading loss of, 368.

DAMAGES, 749-788.
against newspapers, 254.
amount of, is a question for the jury, 751-756.
appeals as to, jurisdiction of Supreme Court of Canada on, 780-782.
assessment of, in consolidated actions for the same libel, 783-786.
assessment of, under Rule 578, O. J. A. 787.
before finding, jury should find defendant's guilt or innocence, 756-757.
classification of, as to amount, 750.
conditions of restriction as to, in actions against newspapers, 782-783.
discovery as to, on examination of defendant for discovery, 640.
evidence of good character in aggravation of, inadmissible, 694.
evidence in mitigation of, 715-742.
evidence to enhance, though special damage not alleged, 694.
excessive, 753-756, 768-776.
failure of jury to assess or find, effect of, 756-757.
for imputations of unchastity, 788.
for libel in Quebec, 788.
for loss of custom, 762-764.
general and special damage explained, 749.
general, recoverable without proving special, 760.
how affected by justification, 563.
how assessed, when actions consolidated, 339.
how enhanced, 779-780.
improper or small, setting aside verdict for, 786.
improper reduction of, for alleged illegal evidence, 695.
improper reduction of, in slander, 695.
in actions for imputing unchastity, 46.
in actions for slander of title and personal libel, 757.
incidental demand for increased, in Quebec, 502.
in slander, duty of jury in awarding, 756.

DAMAGES.—*Continued.*
interference with, where given by court of first instance, 775-777.
jury's finding as to, interference of court with, 752-756.
new trial on questions of, 809.
nominal, 760, 787, 788, 832, 833, 834.
opinion evidence in proof of, 695, 760.
proof of in slander, when unnecessary, 1, 3.
raison d'être of, in Quebec, 777-778.
recoverable by and against husband and wife, 225.
reduction of, by court, 755, 769-777.
requisites of special damage, 749.
restriction of, in actions against newspapers, 782-783.
special, 760.
special, for charge of incest and adultery, 765-766.
special, for injury to property, 766-768.
special, of a person in his business, 762.
special, recoverable only when pleaded, 761-762.
the question of nominal, where no damages awarded, 758-760.
when increased by court, 778-780.
when not reduced as excessive, 773-777.
when special damage too remote, 750.

DEATH
of party to action, effect of, 344-345, 485.

DEFAMATION,
action for, and for disturbing plaintiff in his calling, distinguished, 144.
actions for, by and against corporations and companies, 205.
actions for, not usually triable in the County Court, 832.
actions for, to be tried as a rule by a jury, 662.
basis of the law of, in Quebec, 149.
construction of words complained of, 374.
defences to actions, for, 464-490.
law of, embraces slander, or oral defamation, and libel, or written defamation, 1.
law of, concerning corporations and companies, 205-220.
law of, in Quebec, 523.
law of, under the Provincial Married Woman's Acts (See the Law concerning Husband and Wife, 221-236).
oral, in Quebec, under *Code Civile*, 102.
slander of goods and patent rights, is not, 107.
when an infant may sue and be sued for, 343.

DEFENCE,
accord and satisfaction, 478.
action for libel against railway corporation not barred by Railway Act, 480.
counterclaim, 358-359, 486.
death of party before verdict, 485.
fair comment, no defence to specific charge, 614-616.

DEFENCE.—*Continued.*
ignorance of defamatory character of matter distributed or sold, 183, 184, 186.
in actions for libel and slander, 400-404, 464-490.
judgments in crim. con. and alimony suits, 233.
mere willingness to apologize no defence, 469.
not guilty, apology and payment into court, 469.
of apology, in action against newspaper, 464-466.
of fair comment, 580-621.
of justification, when not well pleaded, 552.
of reconciliation in Quebec, 714.
of want of notice of action, 489.
onus when justification pleaded, 690.
payment into court, 466, 468, 469, 470, 479 .
plea of apology under Provincial statutes, 465, 466.
prescription of action in Quebec, 481.
release of cause of action, 478.
res judicata, 473-477.
retraction and apology, 464.
separate defences as to same thing should be grouped, 405.
retraction and apology in Quebec, 472.
special defences open to defendant, 464.
statute of limitations, 479.
sufficiency of apology for jury, 470.
various pleas that may be pleaded in defence, 400-404.
when defence is privilege, and no evidence of malice in fact, 668.
when provision for apology not applicable, 470.
where plaintiff candidate for public office, 470-472.

DEFENDANT,
bona fides of, 138.
interfering with costs going to defendant, 839.
irrelevant evidence for, 712.
motives and intention of, 203.
not to be found guilty on mere proof of publication, 665.
plaintiff's bias against, or hostility to, evidence of, 711.
proofs by, for restriction of damages, in actions against newspapers, 782-783.
refusal of, to answer as to publication, no proof thereof, 160.
slander of, by plaintiff, 714 .
when defendant may be deprived of costs, 840-841.
when newspaper publisher may join correspondent as, 336-338.
who may be joined as defendants, 334.

DIRECTORS
of road company, charges against, 534.

DISCOVERY.
as between husband and wife, 644, 647.
as to damages claimed, 640.

DISCOVERY.—*Continued.*
as to malice or malicious motive, 643.
by oral examination and production of documents, 635.
compelled though injurious to third party, 639.
disclosing name of anonymous contributor to newspaper, 336.
examination for, of newspaper writers, 646.
not allowed until plea of justification sufficiently pleaded, 552.
of names of witnesses, 645.
of source of information, 640-643.
privileged evidence on examinations for, 647-655.
the practice as to, 635.
under Rule 485, O. J. A., 636-639.

DISEASE CONTAGIOUS,
construction of words imputing, 39.
grounds of action for words imputing, 37.
imputation of having, when actionable, 4.
slander imputing, 37-40.
the law in the United States, 38.
when action does not lie, 39.
when special damage must be shewn, 100.

DISORDERLY HOUSE,
charge of keeping, actionable, 30.

DOCUMENTS.
inspection of, 656.
privileged, new trial for admission of, 799.
privileged from discovery, 655.
production of, 637, 655.
production of, improperly compelled, 698.

DRUNKENNESS.
charge of, against holder of office, 54, 62.
imputed to clergyman, 101.

EDITOR.
libel of, justified by his editorials, 552.
of newspaper, liability of, 186.

EFFIGY,
libel by means of, 1, 154.

EMBARRASSING.
pleadings, 355, 356, 358, 360, 407, 416-417, 564, 628.
pleading, what is, 358.

EMBEZZLEMENT,
words imputing, 19.

ESTOPPEL,
replication by way of, 370.
(See *Res Judicata*, 473-477.)

"EVENT,"
meaning of, and how to be construed as to distinct issues, 841-843.

EVIDENCE
admissible to enhance damages though special damage not alleged, 694.
as to innuendo, 681.
Canada Evidence Act, 649, 652, 654. (See, also, Table of Statutes.)
communications between husband and wife inadmissible against either, 697.
costs of witnesses in reply to inadmissible, 847.
error of trial judge in weighing, may be corrected, 702-704.
formerly necessary in newspaper libel in Manitoba, 690.
for defendant, 705-714.
for defendant, of slander by plaintiff, 714.
for defendant, how affected by rules of pleading, 705.
for defendant, of plaintiff's bias or hostility, 711.
for plaintiff, 675-704.
improper admission of, 182.
improper admission or rejection of, as grounds for new trial, 699.
improper reception and rejection of, when decision as to unnecessary, 697.
in mitigation of damages, 715-742.
in rebuttal of justification improperly rejected, 573.
irrelevant, for defendant, 712.
new trial for improper admission of, 798-801.
new trial for error of judge in weighing, 811.
of actionable meaning different from that assigned, 394.
of application of words to plaintiff, 680.
of change of signature by writer of libel, 802.
of conversations, 704.
of crim. con. and refusal of alimony in defence of action for words imputing adultery, 710.
of defamatory language, 677.
of defamatory nature of words not intelligibly defamatory, 685.
of defendant's disputed handwriting, 698.
of express malice against corporation, when required or held to exist, 689.
of falsity of words, when inadmissible, 691.
of good character to aggravate damages, inadmissible, 694.
of handwriting, 179.
of incontinence instead of crime, 396.
of innuendo, when unnecessary, 685.
of innuendo, where words proved different from those alleged, 687.
of justification, 569-579.
of justification, without plea, inadmissible, 571-573.
of knowledge of matter to which words refer, 686.
of libel provoked by plaintiff's sworn evidence, 528.
of loss of custom, 693.

EVIDENCE.—*Continued.*
of malice, 194-197.
of malice, why admissible in defence of fair comment, 621.
of malice, scintilla of, insufficient, 201.
of malice against newspapers, 254.
of malice in cases of privilege, 499, 687-689.
of matters in mitigation under rule as to particulars, 732-733.
of meaning of words, 801.
of motive, 803.
of non-registration in action by physician, 710.
of occurrences and circumstances to indicate person aimed at, 682.
of opinions, when receivable, 684.
of opinions by witnesses, as to damage, improper, 760.
of opinion as to whom libel aimed at, 681-682.
of plaintiff's identity by proof of his name and interest, 683.
of plaintiff's special character or office, 675-676.
of proceedings at and report of meeting, 802-803.
of provocation and in mitigation, 804-805.
of publication (See Publication, 154-186, *infra*, and Publication in Newspapers, 262-277, *infra*).
of publication of libellous telegram, 701.
of reconciliation, for defence, in Quebec, 714.
of rumours, when admissible and when not, 709.
of rumours in proof of innuendo, 392-393, 800.
of rumours in mitigation, 717-718.
of secret intent, or of facts unknown to bystanders, 708.
of special damage, when unnecessary, 692.
of special damage, when inadmissible, 692.
of surrounding circumstances in aid of innuendo, 706.
of truth, under plea of fair comment, 661.
of witnesses' opinions in proof of damage, 695.
of witness's understanding of words, when admissible, 393, 696.
of words conveying other than ordinary meaning, 707.
order of, for plaintiff, under plea of justification or fair comment, 691.
previous inconsistent statements of witness no ground for excluding his evidence, 700.
privileged, on examinations for discovery, 647-655.
proofs required of plaintiff, 675.
scope of, in mitigation of damages, 715.
secondary, when admissible, 143, 185, 678.
secondary, when inadmissible, 679.
self criminating, under Ontario Evidence Act, 651, 653.
self-incriminating, under Canada Evidence Act, 649, 652, 654.
that words *prima facie* actionable are innocent, 711.
the onus where justification pleaded, 690.
to rebut malice, 204, 713.
under plea of not guilty, 706-707.

EVIDENCE.—*Continued.*
verdict against weight of, 578, 709, 806, 809.
where libellous paper in possession of government, 679.
where words in relation to plaintiff's trade or business, 676.

EXCESS
in mode and extent of publication, 197.

EXECUTORS,
liability of, 9, 150.

"EX-PENITENTIARY BIRD,"
when plaintiff described as, plea and reply, 412.

FAIR COMMENT, 580-621.
a charge of an indictable offence not, 613.
advertisements, circulars and handbills, may be subject of, 606.
a specific charge of misconduct not, 614-616.
charges of corrupt motives or disgraceful conduct not, 595.
criticism by a political committee, 605.
criticism of private character, 610.
defences of, should be grouped, 405.
defined and explained, 581-586.
honest belief no defence for libellous comments, 594.
meaning of "literary production," 606.
misdirection to charge that comments must be believed on reasonable grounds to be true, 618-619.
motive, intention, and state of mind of writer, important, 580.
on a floral exhibition, 609.
on a rejected advertisement, 619.
on books and literary productions and their authors, 601-605.
on matters of public interest, a good defence, 580.
on pictures and arctitecture, 608.
on works of art, performances, entertainments, etc., 607.
pleas of, 404, 405, 408, 409, 410, 616.
provisions in the Code, 581.
record should contain facts commented on, 409, 611.
result of the cases on fair comments on public men, 600.
sermons and works for private circulation, 607.
statements by R. C. bishops as to books and newspapers, 610.
the law in Quebec, 598-600.
truth, not pleaded, inadmissible under, 611-613.
upon the public conduct of public men, 587-600.
when pleaded, order of plaintiff's evidence, 691.
why evidence of malice admissible on defence of fair comment, 621.

FAIR REPORTS,
privilege of, 544.

FALSE PRETENCES,
words imputing, 19.

FORGERY,
charge of, 366, 555.
FORNICATION,
charge of, actionable, 4.
charge of conspiracy to commit, imports indictable offence, 30, 51.
defined, 45.
FORSWEARING,
implied charge of, 146.
"FORSWORN," 74.
FOX'S LIBEL ACT,
adopted in civil and criminal cases, 665.
as affecting the mode of trial, 822.
corresponding enactments in Canada explained, 665-667.
FRAUD,
charges of, when actionable, 22, 23.
words imputing, 22-24, 58, 76, 77, 152, 369.
"FREEMASON,"
charge of being, when libellous, 135.
GOODS,
libellous disparagement of, 140.
manufactured, slander of, 107.
puffing of tradesman's own, 109.
slander of, defined, 6.
stolen, charge of having, 69.
written words defamatory of, and for inflicting loss, distinguished, 145.
GOVERNMENT
appointment, justification of charge of purchasing, 564.
department, libellous paper in possession of, 679.
communications to executive, for redress, 533.
HANDWRITING,
comparison of, 176, 180.
evidence of change of signature by writer of libel, 802.
proof of, 176, 180.
proof of, by comparison, where disputed, 698.
where disputed, diversity of opinion as to mode of proving, 698.
HUSBAND AND WIFE,
the law governing, 221-236.
action by, effect of death on, 225.
action against, for words uttered by wife, 16.
action for slander by, when it does not lie, 85.
charge of husband robbing wife, 21.
communications between, inadmissible against either, 697.
damages recoverable by, 225.
discovery as between, 644, 647.
form of pleading, when sued for slander by wife, 365.

HUSBAND AND WIFE.—*Continued.*
grounds for arresting judgment in action by, 233.
husband's common law liability, 222.
husband's limited liabilities, 222.
joinder of husband in action against wife, discussion of the law as to, 226-232.
legislation affecting, effect of want of uniformity in, 224.
married woman may sue and be sued as *fême sole*, 221, 232.
Married Woman's Property Act, effects of, 221, 224.
may be jointly sued, 221, 223.
special damage in action by, 233.
the law in Quebec, 234-236.
the statutory law of British Columbia, 224.
the statutory law of Manitoba, 224.
the statutory law of New Brunswick, 223.
the statutory law of Nova Scotia, 224.
the statutory law of Ontario, 221-223.
the statutory law of Prince Edward Island, 224.
when husband released from liability, 225.
when wife may sue husband for libel, 225.
wife's post-nuptial liabilities, 222.

"IMPOSTOR," 102.

INCEST,
charge of, 28-30, 51, 366.
special damage for charge of, 765-766.

INCONTINENCE,
words imputing, to married woman, 25.

INFANTS, 103, 154.

INJUNCTIONS, 816-827.
against libels and slanders, 7.
at the trial to prevent repetition of libels or slanders, 819.
effect of Fox's Libel Act, 822.
in cases of contempt, 818.
interlocutory, restraining publication until the trial, 820-825.
jurisdiction when libel true, 820.
the class of cases in which granted, 818.
the jurisdiction to grant injunctions and its origin, 816-817.
to restrain publication of accounts for sale, 142.
when refused, 825-827.

INNKEEPER,
slander of, 69, 70.

INNUENDO, 371-399.
bystander's or reader's understanding of words, the test, 375.
cannot add new matter, or enlarge meaning, 389-391.
changes in, by C. L. P. Act, 373.
conditions of shewing different meaning of words, 379, 381.
defendant may shew innocent meaning, 379.

INNUENDO.—*Continued.*
effect of, upon words capable of a non-actionable meaning, 21.
evidence as to, shewing another actionable meaning, 687.
evidence of, when unnecessary, 685.
evidence of, where words proved different from those alleged, 687.
failure to prove, of words implying perjury, 686.
failure to prove, nonsuit for, 382.
functions of judge and jury as to, 397-398.
how words to be construed, 374.
justification of libel with, 410.
meaning, use and office of, 371-372.
must be specific, 388.
must disclose actionable meaning, 388.
must not be changed in course of trial, 388.
not considered by jury, 392.
onus of proof of, 382-383.
plea to words without, 397.
precise, words actionable without, 377.
prefatory averments in aid of, unnecessary, 372-374.
proof of, evidence of rumours in, 800.
questions as to understanding of words, when admissible, 379, 381.
rule as to construction, (1) where meaning plain; (2) where meaning ambiguous, 375.
rules governing, 372-377.
rumours in proof of, 392-393.
secret intent of publisher inadmissible, 379.
when necessary and when unnecessary, 348-350, 371, 376, 377-378, 384-386.
when words *prima facie* defamatory, 376.
where actionable meaning different from that assigned, 394.
where no evidence or insufficient evidence of, 395.
where onus as to, not satisfied, 681.
where words capable of double meaning, 387-388.
where words charged incontinence instead of crime, 396.
where words not libellous in their natural sense, mode of examining witness, 381.
where words spoken hypothetically, 396.
will not be inquired into after libel found, 391.
withdrawal of case from jury for failure to prove, 383.
witness's understanding of words, 393.
words capable of defamatory meaning not to be withdrawn from jury, 380.
words *prima facie* harmless may be shewn to be defamatory, 379.
words to be construed to support verdict, 387-388.
words not to be taken *in mitiori sensu*, 376.

INQUIRY,
communication in answer to, 524-526.
INSANITY,
words imputing, 100.
INSOLVENCY,
words imputing, 102.
INTENT,
evidence of secret, inadmissible, 708.
INTENTION
and motives of defendant, 203.
criminal, words imputing, 100.
innocence of, to injure, goes in mitigation of damages, 5.
material, when occasion privileged, 5, 6.
of defendant, immaterial in civil cases, 5.
tendency of publication, not the intention, which must be regarded, 194.
to produce natural consequences of act, presumed, 5.
INTEREST OR DUTY
as ground of privilege, 504-514.
INTERROGATORIES, 657-661.
as to truth of libel, under plea of fair comment, 661.
as to written documents, 660.
by defendant, 660.
by plaintiff, 657-659.
"fishing," objectionable, 660.
requiring incriminating answers, 661.
rule as to, 657.
striking out or disallowing, 647.
ISSUE,
immaterial, pleas offering, 414.
JUDGE,
charge at trial, how to be regarded, 795.
decides whether occasion rebuts malice, where words spoken in good faith, 674.
defamatory petition to, 536.
determines whether occasion privileged, 497.
determines whether words capable of defamatory meaning, 87.
discretion of, as to costs, 831, 832-833, 844.
duties of, at trial, 662-674.
duty of judge and jury where defence is privilege and no evidence of malice in fact, 668.
duty of, as to innuendo, 398-399.
duty of, as to leaving case to jury, 89.
duty of, where actions for libel consolidated, 784.
JUDGMENT
against plaintiff in justification of charge, 565.
criticism of judicial, 590-592.

JUDGMENT.—*Continued.*
fair report of, without evidence, privileged, 286.
grounds for arresting, 233.
motion in arrest of, when allowable, 665.
register of, publication of copy of, 142.
unsatisfied, publication of record of, 143.

JUDICATURE ACTS,
effect of, on previous rules and practice as to costs, 830.
evidence as to plaintiff's character under the rule of, 718.
pleadings under, 402.
rules as to costs under, 831.
the law and practice as to costs under, 828, 830, 831.

JUDICIAL OFFICERS,
charges against, 533.

JUDICIAL PROCEEDINGS
absolutely privileged, 501.
cases illustrating the privilege of, 502-504.
defamatory matter in, in Quebec, 423.
in Quebec privileged, except as to defendant's pleadings, 502.
newspaper reports of (See Reports of Judicial Proceedings, 278-297)
pleadings, affidavits, etc. in, privileged, 502.
privileged in all the Provinces except Quebec, 502.
relevancy of statement not essential to privilege in, 504.
the provision in the Code, 502.
words spoken by party, witness, counsel, etc., absolutely privileged, 501.

JURISDICTION
of Supreme Court of Canada, on appeals as to damages, 780-782.

JURY
cannot usually be required to answer questions, 662.
coroner's, conspiracy to libel by members of, 154.
costs of an action or issue tried by, 831.
decide questions of malice and good faith, 673-674.
determine the meaning of words, 34, 393.
determine whether words have defamatory meaning, 87.
disagreement of, and dismissal of action, 544.
duty of, and directions to, as to damages, 756-757.
duty of, as to innuendo, 398-399.
duties of, at trial, 662-674.
duty of judge as to leaving case to, 89.
duty of, when actions for libel consolidated, 784.
finding of, as to damages, interference of court with, 752-756.
findings of, grounds of application to set aside, 789.
may give general verdict on whole matter in issue, 665.
newspaper articles influencing jury during trial, 813.
recommendations of jury as to costs, 843.

JURY.—*Continued.*
sufficiency of apology for, 470.
when case can be withdrawn from, 87, 89, 662, 665.
where meaning of specific charge not considered by, 392.
words capable of defamatory meaning not to be withdrawn from, 380.
JUSTICE OF THE PEACE,
libels on, 137.
JUSTIFICATION, 545-579.
admissions and confessions in proof of, 575-576.
by hearsay no defence, 560.
confession of criminal charge insufficient, 563.
consists of general plea and particulars, 545-546.
discovery not allowed until plea complete, 552.
evidence of, 569-579.
evidence in rebuttal of, improperly rejected, 573.
evidence of confession of crime only admissible under plea of, 726.
of libellous comments, without plea, inadmissible, 571-573.
evidence of plaintiff's bad character inadmissible under, 574, 722.
general charges not justified by single instance, 551, 554.
general statement of conduct similar to specific conduct, insufficient, 548.
how damages affected by, 563.
in actions for slander of title, 124, 550.
insufficient particulars of, should not be struck out, 628.
insufficient, of charge of "leaving creditors in the lurch," 566.
multifarious plea of, partially demurred to, 567.
must allege facts on which it is based, 547.
must allege justifying facts and cover the whole libel, 546-547, 549.
must be specially pleaded, 545.
must extend to all material statements, 570-571.
of charges against an attorney, 557.
of charge of forgery against whole community, 555.
of charge of purchasing appointment, 564.
of criminal charge, requisites of 562.
of criminal charge, must be strict, 574.
of criminal charge, when conviction reversed, 563.
of libel, an aggravation, 779.
of libel and innuendo, 558.
of libel of a newspaper editor, 552.
onus of proving, 569.
of repetition of defamatory statements, 559, 560, 561.
of slander of solicitor, 576-577.
particulars added to plea of, 631.
plea of, 545-579, 191, 351, 360, 366, 369-370, 401, 409, 410, 411, 413, 414, 416, 422, 568-569, 650.

JUSTIFICATION.—*Continued.*
similar charges by others no justification, 562.
specific act may be justified by general form of plea, 547.
the law in Quebec, 565.
under plea of fair comment, 661.
when pleaded, order of plaintiff's evidence, 691.
when imputations separable, 556.
when imputation of crime not justified, evidence of falsity of words inadmissible, 691.
when pleaded, onus on defendant, 690.
when restricted, in effect, to mitigation of damages, 63.
withdrawal of, or misdirection as to, evidence of justification, 577.
"KNAVE," 75.
LAND SURVEYOR,
charges against, 535.
LAW,
raising questions of, 403.
LAWYERS,
libels on, 127, 138, 527, 551.
slander of, 62, 102. (See Solicitor).
"LEFT CREDITORS IN THE LURCH,"
"absconded" as applied to, 397.
charge of "leaving creditors in the lurch" insufficiently justified, 566.
LEGISLATURE,
statements in, absolutely privileged, 500.
"LIAR," 100.
LIBEL
actionable without proof of special damage, 2.
against candidate for public office, 253, 256,, 470, 782.
all material words must be pleaded, 352, 354, 355, 357.
and slander of title, directions to jury in, 757.
by disparagement of trader's goods, 140.
by inflicting loss on plaintiff, instead of libel on his goods and patent rights, 145.
caused by mistake and published *bona fide*, 138.
"caution" advertisement concerning maker of promissory note, 128.
charge of being a convict when conviction reversed, 130, 133.
charge of being an "ex-penitentiary bird" when conviction reversed, 133,
charges of ignorance, partiality, corruption, bad motives, 137.
charges of "swindling," 128-129.
communications privileged in, 504-506.
compensation for in Quebec, 788.
consolidation of different actions for the same, 339, 783-786.
conspiracy to libel, 154.

LIBEL.—*Continued.*
construction of words, 89, 90.
conviction of, pleaded in mitigation, 412.
defamatory, defined by the Code, 125.
defences to actions for, 464-490.
defined, 1, 126.
difficulty of defining, 125, 126.
distinguished from slander, 2-3.
duties of judge and jury in actions for, 664, 668.
effect of plea in mitigation of damages for, 722.
false statement of indebtedness in printed poster, 140.
how expressed, 125.
imputation of having had illegitimate child, 128.
in advertisement, 140.
in defence of rights of R. C. clergy, evidence in mitigation of, 741.
in foreign language, form of pleading, 353.
injunction to prevent repetition or publication of, 819-820.
in newspaper and in defendant's plea, damages reduced where, 771,
in newspapers, evidence in mitigation of, 734-736.
in newspapers, object and scope of the amended law as to mitigation of, 739.
in newspapers, the law as to mitigation prior to its amendment, 736-739.
in petition to county council, 134.
in Quebec, illustrative cases of 153, 154.
is criminal, 125.
joinder of defendants in, 335.
joinder of libellous correspondents in actions for, 336-338.
justification of, an aggravation, 779.
justification of, with the innuendo, 410.
"left creditors in the lurch," 129.
liability of corporation for libellous letters of its servants, 147.
"more like an assassin than an honest man," 127.
newspaper, 237.
no costs in action for, in Manitoba, when only nominal damages recovered, 831-832.
obscene, 125.
of a class, may be libel of an individual, 129.
of a newspaper, not necessarily libel of its staff, 110.
of a public official in Quebec, 154.
of companies in their business, 212.
of candidate for public office, evidence in mitigation of, 724.
of corn merchant, commission merchant, wheat buyer, 129.
of deputy acting postmaster, 148.
of plaintiff personally, and slander of title of his goods, 108.
of trading company, 524.
of watchmaking firm, 367.

LIBEL.—*Continued.*
on a foreign sovereign, defined, 125.
on a solicitor, 127, 527.
on a stationery firm, 138.
on a watchmaking firm, 131.
on ex-mayor and justice of the peace, 137.
on parliamentary candidates, 135-137.
publication of (See Publication).
publication of, defined by the Code, 155.
publication of register of judgment, 143.
publication of unsatisfied judgment, 143.
publication of, where the joint act of two or more, 160.
publication to plaintiff alone, not actionable, 95.
remedies for, civil and criminal, 3.
rule as to certainty of the words and the person, 87.
seditious, 125.
statutory law of newspaper libel, 237.
telegraphic messages, 135.
use of the word "libel" in plaintiff's pleadings, 354.
varianee, by omission of explanatory words, fatal, 430-431.
what is, and when actionable, 125-154.
when actionable against corporation, 163.
when wife may sue husband for, 225.
when writing not libellous, 127.
when words harmless *per se*, and no evidence of their defamatory character, 148.
who may be joined as plaintiffs in, 331-333.
words of low abuse, certainty and construction of, 88.

"LIBELLOUS JOURNALIST," 554.

LIMITATIONS,
defence of statute of, 150, 479.

"LOAFER," 102.

LORD CAMPBELL'S ACT
a basis of legislation in Canada, 126.

LOSS
of custom, allegations of damage for, 762-764.
of custom, proper mode of proving, 693.

LUNATIC,
liability of, 172.

MALICE, 187-204.
discovery as to, 643.
evidence of, 190-191, 202.
evidence of defendant's motive, 500.
evidence, in cases of privilege, 499.
evidence to rebut, 204, 713.
express, when required against corporation, 689.
express, when to be proved, 191.

MALICE.—*Continued.*
in fact and in law, defined, 188, 190.
in slander of title, 106, 111, 112.
in the case of corporations, 147.
"involved in a criminal charge," 452.
later signification of, as "the gist of the action," 188.
malice and the evidence of it in Quebec, 203.
may be raised on the face of the libel itself, 688-689.
misdirection as to, where there is no privilege, 791.
misdirection in defining, 792.
no evidence of, where defence is privilege, 668.
of corporation, when properly chargeable, 689.
onus of proof of, in cases of privilege, 190-191.
plea that libel inserted without actual, 203.
presumption of, when rebutted, 189.
relations of, and privilege, 187.
scintilla of evidence of, insufficient, 201.
slanderous words, before and after those charged, evidence of, 193.
statements knowingly false, 194, 199.
strong epithet not necessarily malicious, 192.
tendency of the publication, the main question, 188.
tests of, when privilege in question, 537.
use of the words "falsely and maliciously" in pleading, 188-189.
what is not evidence of, 202.
when inferred and when not inferred, 36, 150.
when to be shewn against a corporation, 198.
when occasion or communication privileged, 498, 499.
why evidence of, admissible on defence of fair comment, 621.

MANITOBA NEWSPAPER ACT,
plea of, when unnecessary, 419.

MARRIED WOMAN,
actions by and against, 85.
charge of adultery against, special damage for, 764.
charge of prostitution, 371.
imputation of incontinence instead of crime, 396.
judgments in crim. con. and alimony, as defence in action by, 710.
slander of, 85, 366.
special damage in action by, 223.
(See, also, the Law concerning Husband and Wife, 221-236).

MASTER AND SERVANT,
privileged communications by master, 495, 498.

MEANING,
actionable, when different from that assigned, 394.
defamatory, words capable of, should not be withdrawn from jury, 380.

MEANING.—*Continued.*
evidence as to meaning of words, 696.
must be understood as defamatory by other persons than plaintiff, 96.
of "a public meeting," 299.
of malice in a pleading, 190.
of words, according to vulgar import, not technical legal sense, 31.
of words of low abuse, 88.
sufficiency of, in cases of variance, 158.
the word "meaning" inadequate, 371.
where words harmless *per se*, and no evidence of defamatory, 148.

MEDICAL MEN,
privileged statements concerning, 514-515.

MEETING,
evidence of proceedings at and report of, 802-803.

MERCANTILE AGENCY,
daily sheet issued by, a "newspaper," 243.
privilege of, 517-524.
the law in Quebec as to libel by, 219.

MERCHANTS,
words concerning, 102.

MILITARY OFFENCE,
words imputing, 101.

MINISTERS OF RELIGION,
defamatory statements by, 104

MISCONDUCT,
charges of, privileged and unprivileged, 507-512.
fair comment no defence to charge of, 614-616.
general charge of, cannot be justified by single act or instance, 551.

MISTAKE,
publication by, 138, 172.

MITIGATION OF DAMAGES,
evidence in, 715-742.
correction of libellous report or article, 196, 725.
effect of plea in, in libel, 722.
evidence in, 804-805.
evidence in, in actions against newspapers, 723-724, 734-736.
evidence in, objects and scope of the law as amended, 739.
evidence in, of plaintiff's character, in Quebec, 723.
evidence of bad character in, 575.
evidence of character in, under rule of Judicature Acts, 719.
evidence in, of plaintiff's bad character, where justification pleaded, 721.
evidence in, of plaintiff's general bad character, 718-720.

MITIGATION OF DAMAGES.—*Continued.*
evidence in, of plaintiff's bad character, under plea of not guilty. 720-721.
evidence in, under the general issue, 715, 720, 721.
evidence of character in, where plea amounts to justification but restricted to mitigation, 721.
evidence of confession of crime, when admissible in, 726.
evidence of rumours in, 717-718.
facts in, must be pleaded, 730.
matters in, when pleaded, should be grouped, 405.
matters pleadable under rule as to particulars, 732-733.
newspaper attacks by plaintiff on other persons than defendant, not admissible in, 729.
plea in, as to different words, improper, 731.
plea of apology in, 464, 465, 466.
plea of correction of libel, 412.
pleas in, 413, 417.
provocation by libellous newspaper articles, 726.
rule as to furnishing particulars of matters in mitigation, 731.
the law in Ontario and British Columbia prior to its amendment, 736-739.
the law in Quebec, 740-742.
when confession admissible in, 576.

MOTIVE,
allegation that defendants actuated by same motive, in each of similar transactions between them and distinct plaintiffs, 333.
evidence of, 193, 803.
motive and intention of defendant, 203.
unjust and corrupt, imputation of, libellous, 137-138.

MUNICIPAL COUNCIL,
reports of proceedings privileged, 298.

MURDER,
words imputing, 18.

NEWSPAPER,
actions against, objects and scope of amended law as to mitigating circumstances, 739.
articles influencing the jury, 813.
attacks by plaintiff's newspaper on third parties, not admissible in mitigation, 729.
criticism of, by R. C. bishops, 610.
defence of apology in action against, 464-466.
defined, 239-241.
defined by the Code, 241.
disclosing name of anonymous correspondent, 336.
editor of, liability of, 186.
evidence in mitigation in actions against, 723-724, 725, 726, 734-736.

NEWSPAPER.—*Continued.*
French, untenable pleas in actions against, 421.
ligislation concerning, objects and effects of, 238.
libel, statutory law of, 237.
libel in, the law as to mitigation prior to its amendment, 736-739.
libel in Manitoba, evidence required under former Act, 690.
meaning of the term, cases illustrating, 245-250.
mere writer on, not examinable for discovery, 646.
newspaper companies, examination of officers or agents of, 646, 647.
newspaper libel—what is a newspaper? 237-250.
notice of complaint before action against, 251-261.
origin of definition of, in Provincial Acts, 241.
"printed for sale," meaning of, 244-5.
printer of, liability of, 186.
property, special damage for injury to, 767-768.
proprietor, criminal responsibility of, 273, 274.
publication in, 174-176, 181, 183-184. 185, (See, also, Publication, 154-186, and Publication in Newspapers, 262-277).
publisher, 355.
publisher, evidence of *bona fides* of, 713.
publishers sued for libel may join writer of libellous correspondence, 336-338.
reports of proceedings at meetings, 802-803.
what is a, within meaning of Provincial Acts, 243.
when and where "published," 270-271.
when provision for apology by, not applicable, 470.
writers, privilege of comment by, 588-592.

NEWSPAPER LIBEL.
damages recoverable for, restriction of, 782-783.
newspaper libel—what is a newspaper? 237-250.
notice of complaint before action for, 251-261.

NEW TRIAL, 789-815.
failure to prove malice and negligence, 812, 814.
for absence of counsel, 812.
for error of judge in weighing evidence, 811.
for excessive or inadequate damages, 809.
for improper admission or rejection of evidence, 699, 787, 798-801.
for misdirection, 618, 789-792, 794.
for newspaper articles influencing the jury, 813.
for non-direction, 618, 796-798.
for objections to general verdict, 809-810.
for objections to judge's charge not taken at the trial, 794.
for rejection of evidence, 803-805.
for variance and questions touching the innuendo, 813.
grounds of application for, 701, 702, 706, 707, 709, 711, 713, 721, 789.

NEW TRIAL.—*Continued.*
in action for libel, 755.
motion for, by plaintiff, where verdict in his favour, 697.
not ordered, where damages reduced with plaintiff's consent, 769.
on ground of substantial wrong or miscarriage, 699, 700.
on ground of surprise, 809.
refused for absence of witness, 814.
refused for admission of evidence, 801-803.
refused for alleged misdirection, 792-794.
refused for non-direction, 798.
refused for rejection of evidence, 805.
refused where apology published at "earliest opportunity," 814.
rule as to "substantial wrong or miscarriage," 789.
"substantial wrong or miscarriage" as ground for, 711.
when not granted unless substantial wrong or miscarriage occasioned, 789.
when action tried twice unsuccessfully and no new evidence, 813.
where occasion privileged, 810-811.
verdict against weight of evidence, 806-809.

NONSUIT, 743-748.
for not proving innuendo, 382.
may be reserved at trial and granted after verdict, 746-748.
when case may be withdrawn from jury, 87, 89.
when it arises, 743.
when set aside, 746.
when granted or refused, 744-748.
when requested or voluntary, 743.
virtually abolished under rules of Judicature Acts, 743.

NOT GUILTY
by statute, 403.
plea of, 410, 469.
abolished in civil cases under Judicature Acts, 400.
evidence under, 706-707.

NOTICE OF ACTION.
want of, when a defence and when not a defence, 489.

NOTICE OF COMPLAINT
before action commenced against newspapers, 251-261.
essential in actions against newspapers, 253.
form and contents of, 252.
how damages affected by, 254.
in actions against newspapers, must be served on publisher in every case, 464, 472.
in cases of libel of candidates for public office, 253, 256.
insufficient, 259.
must comply strictly with the statute, 253.
effect of, 252.

NOTICE OF COMPLAINT.—*Continued.*
omission to serve, where action for libel and other wrongs, 261.
statements in, alone actionable, 253, 254, 255.
statutory provisions as to, 251.
striking out of plaintiff's pleading of matter not complained of, 254-257.
summary dismissal of action for want of, 256, 261.
when to be given, 252.
where "other libels" included in action for particular libel, 484.
whole of matter complained of in pleading must have been set out in notice, 355.

OCCASION,
privileged, 493-495, 496, 497.

OCCUPATIONS AND EMPLOYMENTS,
actions by persons in various, when words actionable *per se*, 66.
when words not actionable *per se*, 67.

OFFICE,
charges of ignorance, partiality, corruption, or bad motives, against person in, 137.
charge of misconduct in, 137.
evidence as to plaintiff's, 675-676.
present holding of, when proof of unnecessary, 137.
words hurtful to a person in his, actionable, 4.
words "touching" plaintiff in his, 99.
words defaming person in his (See Slander of a Person in his Office, 52-59.)

OPINION
evidence, 801.
evidence, in proof of damage, 695.
evidence, when admissible, 684.

PAMPHLET,
publication of, when sufficiently and when insufficiently proved, 158.

PARLIAMENTARY CANDIDATES,
libel on, 135-137.
limits of newspaper criticism of, 597.

PARTIES,
foreigners, 345.
infants, 343.
joinder, as defendants, of newspaper correspondents, 336-338.
lunatics, 344.
mis-joinder or non-joinder of, 334.
plaintiff, 331-333.
statements by, as witnesses, privileged, 501.

PARTNERS,
result of the cases as to actions by, 81.
right of action by partnership firm or company, and its individual members, 79-81.
PARTICULARS, 622-634.
added to plea of justification, 631.
examination of defendant for, 627.
general rule as to, 622.
insufficient, of justification, should not be struck out, 628.
of acts or instances in proof of general charge, 551.
of immorality, 631.
of justification, must be given before examination for discovery, 633.
of plea of justification, 545-546, 622.
of publication of a libel, 626-627.
of slander, 623-626.
rule as to, of matters in mitigation, 731.
the law in Quebec, 633-634.
when refused, 629-630.
PATENT,
slander of title to, 107.
PATENT RIGHTS,
written words defamatory of, and for inflicting loss, distinguished, 145.
"PAYE TES DETTES," 103.
PAYMENT INTO COURT,
defence of, 466, 468, 469.
PERJURY,
charges of, 74, 192, 293, 557, 578.
failure to prove innuendo of words imputing, 686.
repetition of charge of, 150.
words imputing, 25-28.
"PETTIFOGGER," 551.
PETITION,
defamatory statements in, 536.
libel in petition to municipal council, 134.
publication by signers of, 160.
PHYSICIAN,
admissibility of alleged "illegal evidence" in slander of, 695.
evidence of non-registration in action by, 710.
slander of, interference with damages for, 776-777.
"PICKPOCKET," 100.
PLACARD,
libel in, 140-141.
PLAINTIFF,
application of defamatory language to, 680.
consent of, to reduction of damages, 769.

PLAINTIFF.—*Continued.*
evidence of his hostility to defendant, 711.
illiterate, non-publication of libel concerning, 161.
joint plaintiffs, 331.
slander by, of defendant, 714.
substitution and addition of plaintiffs by consent, 333.
the evidence for, 675-704.
when plaintiff may be deprived of costs, 838-839.

PLEADINGS.
actio personalis cum persona moritur, 344.
admissions in, 402.
allegations as to loss of custom, 368.
allegations of special damage, 367.
all material words must be pleaded, 352.
amendment of, 332, 333, 353.
averments in, as to office or employment, 363-364.
changes effected by C. L. P. Act, 346-348.
correction of libel pleaded in mitigation, 412.
counterclaim, 358-359. (See Counterclaim.)
defamatory matters in, in Quebec, 423, 502.
defects in, cured by plea of justification, 568.
defences available under defendant's pleas, 404.
defences of privilege and fair comment distinguished, 408.
defendant's mode of pleading, 404.
defendant's pleadings, 400-424.
double character of plaintiff's pleading, 350-351.
in actions of defamation in Quebec, 420-424.
joinder, by newspaper publishers sued for libel, of writers of libellous matter, 336-338.
joinder of defendants in libel, 334-335.
joinder of defendants in Quebec, 335.
joinder of plaintiffs, under Rule 185, O. J. A., where "series" of defamatory statements, 333.
joint and separate action of slander, 334.
justification inadmissible under plea of fair comment, 409.
justification of libel with the innuendo, 410.
may shew words complained of to be harmless, 370.
may shew words *prima facie* harmless to be defamatory, 379.
misjoinder or non-joinder of parties, 334.
must contain the facts when evidence in mitigation to be given, 730.
nature of generally, 328.
objected to, instances of, 365-366.
particulars of, 353.
plaintiff's pleadings, 328-370.
plea of privilege by Post Office Inspector, 406.
pleading matters of opinion or hearsay, 417.
privilege must be specially pleaded, 407.

PLEADINGS.—*Continued.*
privileged, except in Quebec, 150, 502.
raising questions of law in, 403.
replications to plea of justification of criminal charges, 369-370.
rule as to contents of, 729.
separate defences as to same thing should be grouped, 405.
should contain facts commented on under plea of fair comment, 409.
statement of claim, 254-258, 328. (See Statement of Claim.)
striking out matter in, 258.
striking out or amending, 355, 356, 357, 358, 360, 361-362, 404.
striking out, for not giving particulars, 628.
substitution or addition of plaintiff by consent, 333.
suing or defending *in forma pauperis*, 346.
suits by and against infants, 343.
the innuendo, 371-399. (See Innuendo.)
the venue, 329-331.
under Judicature Acts and rules, 352.
use of the words "falsely and maliciously" in, 188-189.
variance in, 425-432. (See Variance.)
want of averments in, as to office or employment, 364.
when innuendoes necessary and when not necessary, 348-350.
when foreigner a party, 345.
when lunatic a party, 344.
when slander or libel in foreign language, 353.
when undischarged insolvent a party, 345.
who may be joined as defendants, 334.
who may be joined as plaintiffs, 331.
whole of libellous article may be set out in, 355.
word "libel" unnecessary, when publication charged as false and malicious, 354.
pleading over, meaning and effect of, 356, 364, 568.

PLEAS.
embarrassing, 333, 355-356, 358, 360, 407, 416-417, 564, 628.
evidence of plaintiff's bad character under plea of justification, 722.
fair comment and not guilty may be pleaded together, 410.
in mitigation of damages, 405, 417.
in mitigation, as to different words, improper, 731.
justification and privilege, 401. (See Justification and Privilege.)
not guilty, 400-401, 410.
not guilty, evidence under, 706-67.
not guilty and apology and payment into court, 401.
not guilty by statute, 403.
objectionable, as offering immaterial issue, 414.
of bar of action by Railway Act, 480.
of fair comment, 405, 410, 580-621.

PLEAS.—*Continued.*
of justification, 545-579.
of justification and privilege, 401.
of Manitoba Newspaper Act, 419.
of privilege, 404, 405, 406, 407, 408, 417, 491-544.
of privilege and fair comment, distinguished, 408.
of *res judicata*, 447.
of statute for protection of public officers, 418.
pleas available by defendant, 404.
plea to words without innuendo, 397.
to words imputing crime without the meaning alleged, 415.
untenable, in actions against French newspapers, 421.

POST CARD,
publication of libel by, 148, 167, 175.

POST OFFICE INSPECTOR,
plea of privilege by, 406.

POSTER,
libel in, 140-141.

PRINTER,
liability of, 186.

PRIVILEGE, 491-544.
absolute and qualified, explained, 492-493.
a defence in actions of defamation, 491.
as between solicitor and client, 656.
charges against directors of road company, 534.
charges against land surveyor, 535.
charges against public school teacher, 535.
communications privileged under the Code, 506.
communications to Government, 533.
defence of, and no evidence of malice in fact, 668.
defences of, should be grouped, 405.
evidence of defendant's motives, 500.
evidence of malice in cases of, 499.
excess or abuse of, 536-542.
excess of, who should decide as to, 669-672.
is really "a right," 496.
libellous communications privileged, 504-506.
libellous communications unprivileged, 506.
misdirection as to malice where no privilege, 791.
must be specially pleaded, 407.
of answers to inquiries, 524-526.
of comments by newspaper writers, 588-592.
of confidential communications, 515-524.
of fair reports, 544.
of mercantile agencies, 517-524.
of provoked communications in Quebec, 529.
of provoked statements, 526-530.

PRIVILEGE.—*Continued.*
on examinations for discovery, 647-655.
on examinations under Canada Evidence Act, 649, 652, 654.
pleas of, 401, 404, 408, 417.
privileged communications distinguished, 491.
privileged occasion and privileged communication distinguished, 493.
questions in pleading affecting, 543.
rule as to malice, 498.
statements concerning medical men, 514-515.
statements concerning public officials, 531-536.
statements to protect defendant's interests, 530.
tests of malice in cases of, 537.
the law in Quebec, 542.
unprivileged statements concerning trading company, 524.
who should decide questions of, 669-672.

PRIVILEGED OCCASIONS, 493-495.
defamatory matter in pleadings and judicial proceedings, in Quebec, 423.
evidence of motive where occasion privileged, 193.
explained, 5-6.
imputation of unchastity, when privileged, and when not privileged, 51.
in slander, 431.
in the Province of Quebec, 103-105.
occasions absolutely privileged, 500-502.
onus of proof in cases of, 190-191, 498.
publication of copy of register of judgments, 142.
where statement knowingly false or not corrected, 195.
whether occasion privileged is for the judge, 497.
words repeated in presence of third party, 76.

PROCEDURE AND PRACTICE,
before enactments as to consolidation of actions, 340-341.
striking out matter in pleadings, 258.
want of uniformity in, in the Provinces, 238.

PRODUCTION
of documents, 698.

PROFESSION,
slander of a person in his, 60-67.
words hurtful to a person in his, actionable, 4.
words touching plaintiff in his, 99.

PROFLIGACY,
words imputing, 100.

PROOF
for defendant (see Evidence for Defendant).
for plaintiff. (See Evidence for Plaintiff.)

PROOF.—*Continued.*
of publication, by proof of defendant's writing, 168.
of publication, not shewn by refusal to answer as to same, 160.
of slanderous words, 156-158.
onus of, in cases of privilege, 190-191.

PROPERTY.
injury to, special damage for, 766-768.

PROPRIETOR
of newspaper, liability of, 183, 184, 186.

PROVOCATION
by complainant, 526-530.
by libel or slander, of a breach of the peace, 726.
by plaintiff's conduct, 727-728.
by previous libels, when evidence in mitigation, 726-727.
evidence of, and in mitigation, 804-805.

PUBLICATION, 155-186.
admission of, when compulsory, 165, 651-655.
at defendant's request, 276.
by admissions of officers of corporation, 163.
by a postcard, 167, 175.
by a telegram, 167, 173-175.
by corporations and companies, 206-209. (See Law concerning Corporations and Companies.)
by distribution or sale of libellous paper or book, 183, 184, 185.
by handing manuscript to newspaper editor, 164.
by mistake, 172.
by posting of libellous letter, 272.
by public singing of libellous song, 185.
by railway companies, 175.
by signers of a petition, 160.
criminal responsibility for, 184.
defamation not actionable without, 2.
defects in mode of proving, 262, 263.
distinction between, in civil and criminal cases, 156.
each sale of book or paper a separate, 185.
effect on proof of, where words used in a peculiar sense, 182.
evidence of plaintiff's character previous to, 718-720.
"for the public benefit," 438.
in criminal cases, 272.
in newspapers, 174-176, 181, 183-184, 185, 262-277.
in Quebec, 272.
insufficient proof of, 275, 277.
modes of proving, 264-269, 276.
must be to third person in civil cases, 155, 156.
no action maintainable without, 155.
of accounts for sale, injunction against, 142.
of a pamphlet, sufficient and insufficient proof of, 158.
of apology "at the earliest opportunity," 466, 467.

PUBLICATION.—*Continued.*
of a copy of register of judgments, privileged, 142.
of libel and slander generally, 155-186,
of libel, defined by the Code, 155.
of libellous letters, 166, 167, 168, 171, 172.
of libellous mercantile agency reports, 164.
of newspaper articles influencing the jury, 813.
of reports in newspapers, 298, 300.
of reports of judicial proceedings, 278-297.
of reports of public meetings, 298-322.
of resolution of censure legally defective and not actionable, 159.
place and manner of, as evidence of malice, 197.
proof of, by proof of defendant's handwriting, 168, 176.
proof of, of libellous telegram, by secondary evidence, 173.
proof of, under Provincial Acts, 262-263.
question of, when to be left to the jury, 672.
refusal to answer as to, no proof thereof, 160.
reports of public meetings, 298-322.
secondary evidence of, 173.
sufficiency of proof of, in slander, 156, 157.
to a stenographer, 168-171.
to person defamed, criminal and indictable, 2.
to third person, essential in slander, 95.
uncommon expressions and style of composition as proof of, 181.
under a mistake and *bona fide*, 138.
under Manitoba Newspaper Act, 262.
usual mode of proving, 264.
when presumed, 181.
when protected, 189.
when the joint act of two or more, 160.
when invited, challenged, or provoked, 526-530.
when libel sent in unsealed envelope to illiterate plaintiff, 161.

PUBLICATION IN NEWSPAPERS, 262-277.
admissions in defendant's letters as proof of, 269.
advertisements as evidence of, 267.
as defined by the Code, 272.
by insertion at defendant's request, 276.
criminal responsibility of employer where sale by servant, 274.
criminal responsibility of newspaper proprietors for, 273.
criminal responsibility of seller of libel in newspaper, book, magazine, etc., 274.
defects in mode of proving, 262, 263.
defendant must be proprietor or publisher at date of publication, 274.
insufficient evidence of, by newspaper correspondent, 277.
mode of proving, under the Manitoba Newspaper Act, 262.
newspaper is "published" when and where it is offered to the public by the proprietor, 270-271.

PUBLICATION IN NEWSPAPERS.—*Continued.*
non-compliance with Manitoba Newspaper Act deprives defendant of benefits of Libel Act, 263.
proof required, in criminal cases, of newspaper proprietor's negligence, 273.
proof of, in Prince Edward Island, 263.
proof of, under the New Brunswick Act, 263.
proof of, under the Quebec Act, 263.
provable by admission of business manager of paper, 264.
payable by evidence as to the type and make-up of paper, 264, 265, 266.
provable by evidence of subscriber who received paper by mail, 264, 267, 268.
provable by evidence of the insertion and payment of advertisements in paper, 264.
provable by identification of marked copy of paper purchased at office of publication, 268.
provable by newspaper employees, 269.
provable by production and identification of copy of paper at the trial, 264, 265, 266, 268.
provable by vendor of defendant's papers, 268.
shewn in affidavit for writ of capias, 276.
technically defective, 275.
usual mode of proving, in the absence of any provision, 264, 268.
where newspaper printed in Montreal and circulated in Quebec, 272.

PUBLISHER,
newspaper, charges against, 355.
newspaper, evidence of *bona fides* of, 713.

PUBLIC INTEREST,
discussion of matters of, 323-327.
fair comment on matters of, 326.
matters of, the protection given discussion of, 326, 327.
matters not of, 326.
provision in the Code, 323.
subjects of, grouped, 323-325.

PUBLIC MEETINGS
defined, 299, 301.
newspaper reports of, conditionally privileged, 298, 300.
reports of, 298-322.
what is a public meeting, 312.

PUBLIC OFFICE,
candidate for, apology for libel against, 470.
privileged statements concerning public officials, 531-536.

"QUACK," 102.

QUI FACIT PER ALIUM FACIT PER SE, 338.

RAILWAY ACT
no bar of action for libel against railway corporation, 480.

"RASCAL," 74.

"REBEL," 13, 365, 377.

RECONCILIATION,
defence of, in Quebec courts, 714.

REDRESS,
communications to Government for, privileged, 533.

RELEASE
of cause of action, 478.
not binding where improperly obtained, 478-9.
must be specially pleaded, 479.
by husband, when an answer to wife's cause of action, 479.

REPETITION
of charge, 150.
of defamatory statements, justified, 559.
of slander, in answer to inquiries, 76.
of slanderous words, evidence of malice, 197.

REPLICATION
to plea of justification of criminal charge, 369-370.

REPORT,
correction of libellous, in mitigation, 725.
differs from comments, 293-294.
in newspapers conditionally privileged, 298, 300.
of judicial proceedings, 278-297 (*infra*).
of meetings, 802, (*infra*).
of parliamentary proceedings, 298, 299.
of proceedings of municipal council, and other local or Provincial authorities, government officers or departments, etc., 298, 300.
of public meetings, 298-322 (*infra*).
portion or fair synopsis of, privileged, 298.
question of fair, is question for the jury, 663.

REPORTS OF JUDICIAL PROCEEDINGS, 278-297.
"authentic" report, meaning of, 293.
conditions of privilege in British Columbia, 295-297.
conditions of privilege in Ontario and Manitoba, 285, 293.
development of the privilege, 280.
ex parte proceedings, 280-282.
fairness and accuracy of, provable by adverse party's evidence, 292.
fair report of a judgment without the evidence, privileged, 286-290.
"fair" report, meaning of, 285.
ground of the privilege of, 282-284.
onus of fairness and accuracy on defendant, 292.
privileged by statute, 278.
"proceedings in any court of justice," meaning of, 285.
"published contemporaneously," meaning of, 295.

REPORTS OF JUDICIAL PROCEEDINGS.—*Continued.*
statutory privilege qualified, and confined to reports in newspapers, 284.
the enactment in the Code, 279.
the law prior to Provincial legislation, 279.
the rule of law on the subject, 289.
true criterion of the privilege, 280-285.
when not privileged, 291.
"without comments" in Ontario and Manitoba, meaning of, 293.

REPORTS OF PUBLIC MEETINGS, 298-322.
"a public meeting" partially defined, 299.
"any meeting *bona fide*" held, 302.
effect of the enactments as to, 308.
"fair and accurate and published without malice," 317.
in British Columbia, 300-301, 302-303, 304, 308.
in Manitoba, 305, 308, 311, 312.
in New Brunswick, 304-305, 308, 311, 312.
in Nova Scotia, 305-306, 308.
in Ontario, 298-300, 301, 303, 304, 308, 311.
"lawfully convened for a lawful purpose," 316.
lectures and concerts, 313.
limitations of the statutory law, 308.
meetings of creditors and shareholders, 315.
municipal, political and religious meetings, 312-313.
municipal councils, school boards, etc., 314.
newspaper, privileged by statute, 298.
"open to the public," 312.
publication "for the public benefit," 318-322.
refusal to insert letter or statement by plaintiff, 322.
the law prior to Provincial legislation, 309-310.
what defendant must prove, 303, 311.
what is a public meeting, 312.
when not privileged, 298-299, 301.

RES JUDICATA,
plea and defence of, 447, 473-477.

RESOLUTION,
publication of, not proved, 159.

RETRACTION
of libel against candidate for public office, 470.

RETRACTION AND APOLOGY,
costs in case of retraction and apology, 846.
in Quebec, 472.

ROBBERY,
charges of, 57, 158, 203, 363, 368-369.

"ROGUE," 72, 74, 75, 77, 100.

RUMOURS,
evidence of, to same effect as defamatory words, in mitigation, 717-718.
evidence of, when admissible and when not, 709.
in proof of innuendo, 392-393, 800.
new trial for evidence of, 800.
when evidence in mitigation, 36.

SCHOOL TRUSTEE,
slander of, evidence in mitigation of, 716.

SCHOOLMASTER,
charges against, 535.

SECURITY FOR COSTS, 433-463.
amount of, increase or diminution of, 440.
application for, contentious affidavits in answer inadmissible on, 443.
application for, merits not to be tried or determined on, 442, 462.
application for, procedure on, 436-439.
conditions for obtaining, 436-439.
confined to editor, publisher, or proprietor of newspaper, 441.
defence aided by examination of defendant on his affidavit, 461.
in actions against Ontario newspapers, 434.
in actions against public officers, 462.
in actions by candidates for public office, 472.
in actions for libels in newspapers, 433-458.
in actions for slander of women, 458-462.
in actions of defamation generally, 433.
in actions of slander for imputing unchastity, 458-463.
"involved in a criminal charge," meaning of, 451.
object of legislation as to, 454.
onus on defendant on applications for, 438, 459.
order for, of High Court Judge in Ontario, final, 435.
practice as to giving, 439.
the general rule, 433.
the law in British Columbia and Manitoba, 435.
when action "trivial or frivolous," 447.
when allowed, 442, 444, 445, 446, 451, 453.
when refused, 448-450, 454, 456-457.
when criminal charge involved, 437.
when good defence on merits alleged and not denied, 447.
when no criminal charge involved, 436.

SELF-INCRIMINATION
on examinations for discovery, 647-655.
under the Ontario Evidence Act, 651, 657.
under the Canada Evidence Act, 652.

SERVANT,
charges against, when privileged, 193.

SHERIFF,
charges against, personally and officially, 532, 535.
SLANDER.
action for, against defendants jointly, not maintainable, 66, 84.
all material words must be pleaded, 352, 354, 355, 357.
arrest (*contrainte par corps*) on a judgment for, in Quebec, 788.
assessment of damages for, under Rule 578, O. J. A., 787.
communicated by gestures, 91.
construction of words, 89, 90.
damages for, duty of jury in awarding, 756.
defined, 1.
distinguished from libel, 2-3.
duties of judge and jury in actions for, 663-664.
evidence of secret intent in uttering, inadmissible, 708.
as defences in action for, 233.
imputing adultery, judgments in crim. con. and alimony suits as defences in action for, 233.
in foreign language, form of pleading, 353.
injunctions to prevent repetition or publication of, 819-820.
joinder of defendants in, 334.
joinder of plaintiffs in, 331-333.
joint and separate action of, 334.
of clergymen, 101.
of defendant by plaintiff in Quebec, 714.
of goods, 6.
of infants, 103.
of land speculator, 101.
of manufactured goods, 107.
of members of legislature, 102.
of Methodist minister, 365.
of money lender and trader in land, 365.
of physicians, 102.
of solicitor, justified, 576-577.
of women, security for costs in actions for, when refused, 458.
privileged and unprivileged, 507-510, 511-514.
proof of all the words not always necessary, 426.
publication of, by professed mind-readers, injunction to prevent, 823.
publication to third person essential, 95.
repetition of, in answer to inquiries, 76.
security for costs, in actions for imputing unchastity, 458-463.
variance in, between words laid and words proved, 431.
when actionable only on proof of special damage, 97-105.
when actionable without proof of special damage, 8.
when not actionable, 84-96.
when words not set out in plaintiff's pleading, 85.
SLANDER IMPUTING CRIME, 9-36.
actionable, although person slandered not jeopardized, 9.

SLANDER IMPUTING CRIME.—*Continued.*
actionable without proof of special damage, 9, 10, 12.
grounds of action for, and rule governing, 9, 10.
imputations of arson, 24.
imputations of crime committed in a foreign country, 17-18.
imputations of embezzlement, 19, 20.
imputations of false pretences, 19.
imputations of incest, 28-30.
imputations of murder, 18.
imputations of perjury, "false swearing," or a "false oath," 25-28.
imputations of statutory offences, 24.
imputations of theft, 15-19, 20.
incontinence, imputation of, and not of criminal conduct, 25.
must impute crime punishable by imprisonment in first instance, 9.
petty thefts, words imputing, not actionable *per se*, 32.
rule as to, as disclosed by pleadings and evidence, 22.
sodomy, 31.
when proof of special damage required for, 9, 10, 12.
words importing an inclination or intent, 34.
words imputing an attempt to commit a crime, 35.
words imputing crime, when privileged, 36.
words of suspicion, belief, or opinion, 33, 34.
words *prima facie* imputing crime, used in a different sense, 32, 33.
words referring prospectively to some criminal act, 34.
SLANDER IMPUTING A CONTAGIOUS DISEASE, 37-40.
grounds of action, 37.
rule of construction of words used, 39.
the law in the United States, 38.
when action does not lie, 39.
SLANDER IMPUTING UNCHASTITY, 41-52.
rules as to special damage for, where proof of same required, 41.
when proof of special damage not required 43-44 (See, also, Unchastity).
SLANDER OF A PERSON IN HIS OFFICE, 53-59.
actionable without proof of special damage, 60.
"a public robber," 57.
averment of office, when unnecessary, 57.
church wardens, 58.
constables, 58.
member of a Royal Commission, 58.
office must be legal, 57.
officers of justice, 58, 59.
parliamentary candidates, 59.
rule as to this species of slander, 53.

SLANDER OF A PERSON IN HIS OFFICE—*Continued.*
when office elective, and words not followed by special damage, 57.
where office is not one of profit, 56.
words actionable by holders of offices of honour or credit, and by holders of offices of profit, distinction between, 53-54.
words imputing want of ability and want of honesty, distinction between, 54-55.

SLANDER OF A PERSON IN HIS PROFESSION, 60-67.
action for, lies without proof of special damage, 60.
architects, 65.
barristers, attorneys, and solicitors, 62.
clergymen and ministers of religion, 60-62.
lecturers, 65.
medical men, 64-65.
physicians, 64-65.
schoolmasters, 65, 66.
surgeons, veterinary, 66.
surveyors, land, 65.

SLANDER OF A PERSON IN HIS TRADE OR BUSINESS, 68-83.
averment of trade or business, when unnecessary, 57.
basis of the action for, 68.
imputations of crime in relation to trade or business, 69, 74.
imputations of dishonesty in relation to trade or business, 72, 74, 75, 78.
plaintiff must have been in trade or business when words spoken, 70.
summary of the law on the subject, 82.
trader in land and money lender, 70.
where words relate to matter with which bystanders unacquainted, 68.
words impugning financial credit or standing, 78, 79 (See, also, Trade and Business).

SLANDER OF TITLE, 106-124.
character and essentials of action for, 106, 110-117.
corporations and companies may sue for, 107, 206.
distinguished from ordinary defamation, 107-109.
estoppel in action for, 477.
justification of, must be complete, 550.
libel of plaintiff and slander of title, directions to jury in, 757.
may be implied, 123.
must be false, malicious and damaging, 106, 110.
not maintainable in *bona fide* assertion of right, 112-113.
of manufactured goods, 108.
plaintiff must have had actual temporal loss, 113.
pleadings in actions for, 124.

SLANDER OF TITLE.—*Continued.*
registered instrument containing, liabilities of parties to, 119-124.
to copyright, 107.
to lands, allegations and proofs of special damage, 117.
when actionable, 6,

"SODOMITE." 377.

SODOMY,
words imputing, 31.
insufficiently pleaded, 31.

SOLICITOR,
charge of unprofessional conduct against, 152.
justification of slander of, 576.
libels on, 127, 138, 527, 551.
slander of, 62, 102.

SPECIAL DAMAGE,
allegations as to, must be certain, 367-368.
by disparagement of trader's goods, 140.
in action for slander of title, 106, 113-119.
in action for slander of title, 166, 113-119.
must be the fair and natural result of the words, 98.
rule as to, in slander, 84.
rules as to proof of, in slander, 97.
should be alleged with certainty, 68.
though not alleged, evidence to enhance damages admissible, 694.
trading companies need not prove, in action for libel, 214.
unnecessary to prove, when words hurtful in person's business, 77.
what is essential to constitute, 41.
when allegation and evidence of, unnecessary, 367, 692.
when essential to maintain action, 97-105.
when evidence of, inadmissible, 367-369.
when evidence of unnecessary, 77, 79, 367, 692.
where claimed must be distinctly alleged, 692.
where person slandered holds elective office, 57.
words imputing crime actionable without proof of, 9.
words or expressions requiring proof of, 98-105.
words or expressions not requiring proof of, 98-105.

STATEMENT OF CLAIM
against newspapers, confined to matter stated in notice of complaint, 254.
necessary allegation in, under Ontario Act, in action for imputation of unchastity, 788. (See, also, Plaintiff's Pleadings, 328-370.)

STATUTES.
(See Table of Statutes cited.)

STATUTORY OFFENCES,
technicalities as to words imputing, removed by the Code, 24.

STENOGRAPHER,
publication to, actionable, 168-171.

SUBSCRIBER,
evidence of newspaper, in proof of publication, 267.

SURPRISE,
new trial on ground of, 809.

"SWINDLER," 72, 77, 99, 139, 365, 398.

"SWINDLING,"
charges of, 99, 366, 548, 567.

TELEGRAM,
libellous, damages reduced for, 771-772.
libellous, liability for transmitting, 135.
libellous, proof of publication of, 701.
libellous, publication of, 173.

THEFT,
charges of, privileged, 776, 792, 804.
excessive damages for, 773, 776.
imputations of, in answer to inquiries, 192.
variance in charges of, 429.
words imputing, 15-19, 20 (See, also, New Trial).

"THIEF," 73, 192, 365.

THREAT
to advertise accounts for sale, 141.

TITLE,
slander of, 106-124.
slander of, when actionable, 6.
(See Slander of Title.)

TRADE,
evidence as to plaintiff's, 676.
puffing tradesman's own goods, when slanderous, 109.
slander of person in, 68-83.
summary of the law on the subject, 82.
words hurtful to a person in his, actionable, 4.
words "touching" plaintiff in his, 99.

TRADER,
libellous disparagement of his goods, 140.

TRIAL
de novo, 810.
duties of judge and jury at, 662-674.
newspaper articles influencing the jury, 813.
objections not taken at, new trial for, 794.

TRIAL.—*Continued.*
objections to rulings at, how to be taken, 795, 796.
report of fair, a question for the jury, 663.
statutory rules governing judge and jury, 664-665.
trade libel not within rule as to trial by jury, 662.
when case may be withdrawn from jury, 662, 668.

TRUTH.
admissions and confessions in proof of, 376, 575.
as a justification in civil actions, 545.
onus of proving, on defendant, 569.
when a defence under the Code, 568.
why a defence, 545.

UNCHASTITY.
construction of words imputing, 45.
costs in actions for imputing, 47, 838.
damages, in actions for imputing, 46.
imputations of, actionable *per se* in some Provinces, not in others, 224.
imputations of, in Quebec, 52.
imputations of, when not actionable, 99.
imputations of, in British Columbia, 43.
imputations of, in Nova Scotia, 43.
imputations of, in North-West Territories, 43.
imputations of, in Ontario, 43.
imputations of, in the Yukon Territory, 44.
imputations of, in the United States, 52.
imputations of, law affecting, not uniform, 224.
imputations of, nominal damages for, without averment or proof of special damage, 788.
imputations of, under Ontario Act, requisites of statement of claim in action for, 788.
imputations of, when actionable, 4, 42-43, 44.
imputations of, when privileged, 51.
imputations of, when words applicable to class of two, 49-50.
innuendo in imputation of, 371.
security for costs in actions for imputing, 458-463.
special damage and arrest of judgment in action for imputing, 233.

"*UN HOMME DANGEREUX*," 104.

UNITED STATES DECISIONS.
application of, 374.

VARIANCE IN PLEADINGS, 425-432.
as to specific crime charged, 428.
between words alleged and those proved, 156-158.
equivalent words, 428-429.
from the cause of action fatal, 687.
immaterial, 427.

VARIANCE IN PLEADINGS.—*Continued.*
in charges of arson, 429.
in charges of theft, 429.
in libel, by omission of explanatory words, fatal, 430-431.
in slander, 431.
proof of all the words not always necessary, 426.
rules as to, 425-426.
where imputation the same with or without, 427.

VENUE, 329-331.
change of, rules as to, 329.
grounds for change of, 329-330.
in actions against newspapers, 331.
in Quebec, 331.
plaintiff may select, except when restricted by rule or statute, 329.

VERDICT
against the weight of evidence, 578, 709.
death of party before, 485.
for improper or small damages, setting aside, 786.
in his favour moved against by plaintiff, 697.
motion against, where verdict in party's favour, 787.
must be general, 602.
new trial for objection to general verdict, 809-810.
on whole matter in issue, jury may give, 665.
setting aside, grounds of application for, 789.
subject to reserved questions of law, 148.
the allegations in the pleadings where verdict moved against, 347.
when set aside for excessive damage, 768-769.

"VILLAIN," 73, 100, 365.

WITNESS,
costs of, in reply to inadmissible evidence, 847.
disicovery of names of witnesses, 645.
evidence of, as to meaning of words, 696.
evidence of, as to understanding of meaning of words, 393.
mode of examining, to shew defamatory meaning of innocent words, 707.
new trial for absence of, 814.
previous inconsistent statements of, as affecting his evidence, 700.
statements by, in judicial proceedings, privileged, 501.

"WHORE,"
actionable, in Quebec, 42.
calling a woman, under New Brunswick Act, 36, 48, 377.
(See, also, Slander imputing Unchastity, 41-52).

WORDS
actionable *per se*, 66.
all material, must be pleaded, 352, 354, 353, 357.
applicable to class of two, 49-50.
defamatory of manufactured goods, 145.
defamatory of patent rights, 145.
evidence of meaning of, 801.
" forsworn," when word not actionable, 15.
hurtful to a person in his office, profession, etc., actionable, 4.
importing only an inclination or intent, not actionable, 34.
imputing an attempt to commit a crime, actionable, 35.
imputing contagious disease, 37-40.
imputing crime, 9-36.
imputing criminal breach of trust, 20.
imputing fraud or fraudulent conduct, 22-23.
imputing unchastity, construction of, 45.
meaning of, how affected by surrounding circumstances, 706-708.
meaning of, how to be gathered, 31.
must be distinctly stated in pleadings, 47.
must be used in a felonious sense, when imputing crime, 33.
not actionable *per se*, 67.
not intelligibly defamatory, may be shewn to be defamatory, 685.
of double meaning, 387.
of low abuse, construction of, 88.
of suspicion, belief, or opinion, 33, 34.
of vulgar or general abuse, not actionable, 34.
plea to, without innuendo, 397.
prima facie actionable, may be shewn to be innocent, 711.
prima facie imputing crime, used in a different sense, 32, 33.
proof of, in slander, 156-158.
proof of knowledge of matter referred to by, 686.
proved different from those charged, 395.
referring to a class of persons, 94.
referring to some act which, if committed, would be a crime, although not actionable, 34.
spoken hypothetically, 396.
testing words being actionable, 375.
stating an offence, words imputing, 24.
touching" plaintiff in his office, profession, trade, or business, 99, 101, 102.
used in a peculiar sense, publication affected by, 182.
when actionable *per se*, and when not, 1.
where words refer to plaintiff and other persons, 94.