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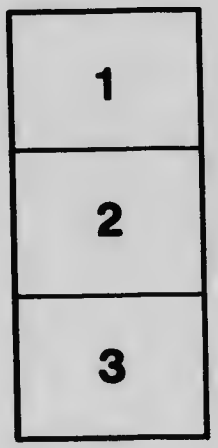

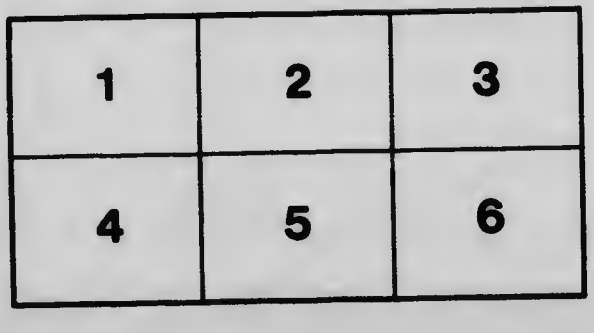

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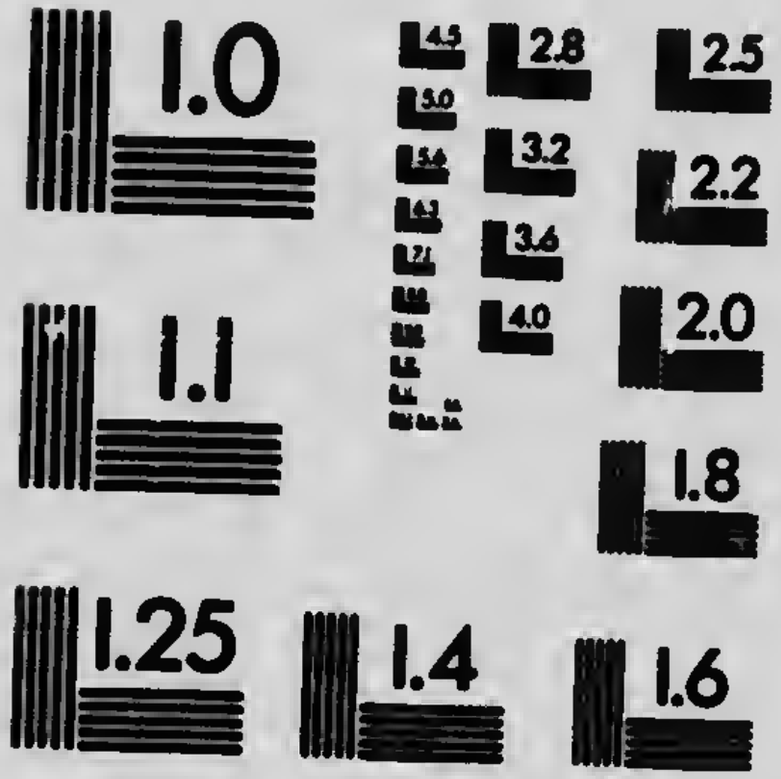

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THE LAW

OF

CRIMINAL LIBEL

A Treatise on Libel as a Criminal Offence, embracing the substantive law and the procedure and practice in prosecutions by criminal information and indictment at common law and under the Canadian Criminal Code.

BY

JOHN KING, M.A., K.C.,

of Osgoode Hall, Toronto, Lecturer to the Law Society of Upper Canada, Author of "The Law of Defamation in Canada," "The Law of Contempt," Editor of the Canadian cases in the Cyclopedia of Law and Procedure, etc.

It is ignorance of ourselves which makes us the libellers of others.—BUCKMINSTER.

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PREFACE.

This treatise on the law of criminal libel is intended to supplement the law of libel as a tort, as contained in the author's work on "The Law of Defamation," published four years ago. A liberal treatment of libel, in its dual character as a tort and as a crime, could not with advantage be embraced within the compass of a single volume. The related subject of libellous contempt, which might fitly form part of the book, is discussed in a volume now in the press concerning contempts of our Federal and Provincial Legislatures, their committees and members, and contempts committed by wrongful interference with the administration of justice.

The present treatise deals with the prosecution of libel by criminal information and indictment at common law and under the Criminal Code, but more particularly under the Code, which applies to the whole of Canada. It includes the substantive law and the law of procedure, the English and Canadian decisions in both divisions of the subject, some references to the law in the United States, and a running commentary on the legislation affecting libel as a criminal offence, and its judicial interpretation by the courts of this country. Special prominence is, for obvious reasons, given to the opinions of Canadian judges—preferably by quotations from their judgments, instead of by a bare citation of cases which necessarily entails further research.

The chapters relating to procedure will, it is believed, be found useful and instructive as to procedure in indictable offences generally, the provisions in the Code which govern procedure in prosecutions for libel exclusively being few in number. Where the Code is silent with respect to procedure in libel, as it often is, the ordinary procedure in prosecutions for indictable offences will prevail; and to this attention is given in the chapters referred to.

What is true of the articles of the Code concerning libel as a criminal offence, is equally true of the case law explaining or illustrating it; there is comparatively little bearing directly on the libel sections of the statute. In this extremity resort must be had to the civil law, which aids materially in the interpretation of the

criminal law, apart from any rule or principle formulated in the Code itself. In defamatory libel the same species of privilege is sometimes a defence either in a civil action or a criminal prosecution. "The principles of this branch of the law of defamation have, or rather the application of those principles has, admittedly varied from age to age, and has grown with the growth of social habits and sentiments. Court after court, and judgment after judgment, so far from disguising this fact, has gloried in it, and counted it as one of the chief excellences of English jurisprudence. 'The law upon such subjects must bend to the approved usages of society' (Lord Campbell); and 'those who administer it must adapt it to the varying conditions of society'" (Cockburn, C.J.). (1)

In England the tendency of legislation, as appears from the Draft Criminal Code of 1879-80, which forms the basis in part of our own statute, has been to assimilate, as far as possible, the law of defamatory libel, civil and criminal, and the same is true of legislation in Canada. (2)

This is particularly noticeable in the articles of the Code touching fair comment, (3) the discussion of matters of public interest, (4) and in fact the whole series of statutory rules conferring privilege on defamatory matter, (5) so much so, that authorities in the civil law are generally relevant as authorities in the criminal law. These are freely cited in the explanatory portions of the text, although, to save repetition, the reader is occasionally referred to the cases in the author's work on "The Law of Defamation." Any differences existing between the principles of defamatory libel, as a tort and as a crime, are referable to the distinction between the rights of the individual and the interests of the community, and not unfrequently these are identical. In an action by a public official for a libel contained in a newspaper, Armour, C.J., (6) defined for the jury two of the principal defences

(1) Bower's Actionable Defamation, p. vii.

(2) See the remarks of MacMahon, J., in *Douglas* v. *Stephenson* (1898), 29 O. R. 616, at p. 640, and referred to at p. 177, *post*. "When there is a question of pleading at common law, there is no distinction between the pleadings in civil cases and criminal cases" (*Heymann* v. *Reg.* (1873), L. R. 8 Q. B. 102, at p. 105, *per* Blackburn, J.) This statement is adopted by Lord Russell, C.J., in *R.* v. *Munslow* (1895), 1 Q. B. 758, at p. 763. It refers to the rules of pleading in civil cases before the Judicature Acts, and to such survival of their principles as exists in the present system.

(3) C. C. s. 325.

(4) C. C. s. 324.

(5) C. C. ss. 319-328.

(6) Chief Justice of the Queen's Bench Division of the High Court of Justice for Ontario, and thereafter a member of the Supreme Court of Canada.

almost in the very words of the Code. (7) The boundary line between the two systems of jurisdiction would appear at times to be indistinguishable, if not actually one and the same.

The Canadian decisions, which, where not *sui generis*, generally reflect the learning of the English courts, are brought down to the time of publication. Some of the cases are not to be found in the law reports of any of the provinces. An endeavour has also been made to present something like an orderly and scientific treatment of the topics discussed, and this, with a complete index, tables of cases and tables of the enactments of the Criminal Code and other statutes affecting the subject, should prove of practical service to the profession.

Toronto, January, 1912. J. K.

(7) ss. 824, 825, *supra*.

LIST OF ABBREVIATIONS.

(Omitting the Abbreviations of English Reports.)

Am. R.	American Reports.
B. C. R.	British Columbia Reports.
C. C.	Criminal Code of Canada.
C. C. C.	Canadian Criminal Cases.
C. L. J.	Canada Law Journal.
C. L. T. (Occ. N.)	Canadian Law Times—Occasional Notes.
C. S. N. B.	Consolidated Statutes of New Brunswick.
G. & R.	Geldert & Russell's Nova Scotia Reports.
James	James's Nova Scotia Reports.
Kerr	Kerr's New Brunswick 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).
M. L. R.	Manitoba Law Reports.
N. B. R.	New Brunswick Reports.
N. E. R.	North Eastern Reporter.
N. S. R.	Nova Scotia Reports.
N. S. D.	Nova Scotia Decisions.
N. W. R.	North Western Reporter.
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.
P. & B.	Pugsley and Burbidge's New Brunswick Repts.
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 Conrt.
R. L.	Revue Légale (Quebec).
R. & G.	Russell & 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.
S. C. R.	Supreme Conrt of Canada Reports.
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.
W. L. R.	Western Law Reporter.

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ADDENDA.

Seditious libel.—Whoever by language, either written or spoken, incites or encourages others to use physical force or violence in some public matter connected with the State, is guilty of publishing a seditious libel.

The accused may not plead the truth of the statement that he makes as a defence to the charge, nor may he plead the innocence of his motives.

The test of seditious libel is this: Was the language used calculated, or was it not, to promote public disorder or physical force or violence in a matter of State?

If the accused published the libel, there is no distinction in law between what he wrote in it and what any other person wrote in it (*Rex* v. *Aldred* (1909), 22 Cox C. C. 1.)

Threatening to publish, etc.—Evidence.—Upon a charge under Lord Campbell's Act, 1843 (6 & 7 Vict. c. 96), s. 3, against P., the editor of a newspaper, for "threatening to publish or . . . . proposing to abstain from publishing," an article in his newspaper, "touching" the conduct of T., the manager of a friendly society, in refusing to re-engage H., a former servant, "with intent to procure" the re-engagement of H., it was sought to give evidence as to the manager's treatment of the discharged servant, and, secondly, as to the motives which prompted the editor to write the letters, the subject of the charge.

Held, that evidence as to both these matters was inadmissible; that whether the letters did or did not amount to "a threat to publish, or a proposal to abstain from publishing, any matter or thing . . . with intent to procure from any person an appointment or office of profit" . . . within the meaning of the Act, was a question for the jury; and that the jury must decide this from the language of the letters themselves, the motives of the person proved to have written them being immaterial to the charge (*Rex* v. *Henry Plaisted* (1909), 22 Cox C. C. 5).

THE LAW
OF
CRIMINAL LIBEL

CHAPTER I.

INTRODUCTION.

The nature of the offence.—Libel is well understood to be one of those injuries cognizable by both the civil and criminal law as affecting a person's reputation or good name. Taken in its largest sense, a libel, *libellus famosus*, signifies any writing, picture, or the like, of an immoral or illegal tendency. Lord Kenyon said that nothing is punished criminally as a libel, unless in the opinion of twelve honest, independent and intelligent men it is mischievous, and ought to be punished, (1) a statement which was adopted by Lord Campbell in his Lives of the Chancellors (p. 350), and which probably expresses the opinion of the average juror.

The offence summarized.—The cases in which libel is a crime have been thus summarized by an eminent writer on the law of evidence, who takes an English text book (2) and its authorities as the basis of the summary: "The crime of libel is committed by the publication of writings blaspheming the Supreme Being; or turning the doctrines of the Christian religion into contempt and ridicule; or tending, by their immodesty, to corrupt the mind, and to destroy the love of decency, morality and good order; or wantonly to defame, or indecorously to calumniate, the economy, order and constitution of things which make up the general system of the law and government of the country; to degrade the administration of government or of justice; or to cause animosities between our own and any foreign government, by personal abuse of its sovereign, its ambassadors, or other public ministers; and by malicious defamations expressed in printing or writing, or by signs or pictures, tending either to blacken the memory of one who is dead, or the reputation of one who is living, and thereby to expose

(1) *R.* v. *Cuthell* (1799), 27 St. Tr. 675.
(2) Russell on Crimes, 6th Eng. ed., vol. 1, p. 595.

him to public hatred, contempt and ridicule. This descriptive catalogue embraces all the several species of this offence which are indictable at common law; all of which, it is believed, are indictable in the United States, either at common law or by virtue of particular statutes." (3) The authorities, English and United States, upon which this summary is based, are substantially the same.

Libel as a crime and as a tort. Result of the authorities.—As to what is libellous in the criminal, as compared with the civil, sense of the term, it is said that wherever an action will lie, without laying special damage, in other words, wherever the language is libellous *per se*, an indictment will also lie; and that wherever an action will lie for verbal slander without laying special damage, an indictment will lie for the same words if reduced to writing and published. (4) The result of the authorities would seem to be, that any writings, pictures, or signs, which derogate from the character of an individual by imputing to him either bad actions or vicious principles, or which diminish his respectability and abridge his comforts, by exposing him to disgrace and ridicule, are actionable without proof of special damage, (5) and therefore indictable. In short, an action lies for any false, malicious and personal imputation, effected by such means, and tending to alter the party's situation in society for the worse. (6)

When words actionable or indictable and when not.—An action or an indictment, however, may be maintained for words written, for which an action could not be maintained if they were merely spoken. (7) For example, if a man write, or print and publish, of another, that he is a swindler, (8) a villain, (9) a rogue, (10) a cheat, (1) or that he is guilty of immoral or profligate conduct, (2) it is a libel, and punishable as such. But if this were merely spoken, it would not be actionable without proof of special damage. As a rule, whatever amounts to libel in a civil action, will be held a defamatory libel on a criminal trial; but the

(3) Greenleaf on Evidence, 16th ed., vol. 3, s. 164.
(4) Archbold's Cr. Pl. & Ev., 20th ed., 1886, 975.
(5) Folkard's S. & L., 5th ed., 180.
(6) *Ibid.*
(7) *Thorley* v. *Lord Kerry* (1812), 4 Taunt. 355.
(8) *I'Anson* v. *Stuart* (1787), 1 T. R. 748; *Savile* v. *Jardine* (1795), 2 H. Bl. 531; *Ward* v. *Weeks* (1830), 7 Bing. 211; 4 M. & P. 796.
(9) *Bell* v. *Stone* (1798), 1 Bos. & P. (3rd ed.) 331; *Stanhope* v. *Blith* (1585), 4 Rep. 15.
(10) *Stanhope* v. *Blith*, *supra*; *Hopwood* v. *Thorn* (1[illegible]), 8 C. B. 293; 19 L. J. C. P. 94; 14 Jur. 87.
(1) *Per* Pollock, C.B., in *Barnett* v. *Allen* (1858), 2[illegible] J. Ex., at p. 414.
(2) *Lumby* v. *Allday* (1831), 1 Cr. & J. 301; *Ayre* v. *Craven* (1834), 2 A. & E. 2.

converse will not hold. (3) An indictment will lie in some cases where an action will not lie. For example, in cases where the only publication is to the party libelled, an indictment will lie, because such publication tends to provoke a breach of the peace, especially when the defamatory matter is, in the words of the Code, "designed to insult the person of or concerning whom it is published."(4) But no action can be maintained in such cases, because the primary ingredient to sustain it is wanting, namely, publication by the defendant to a *third* party. So also, in some cases where the libel is true, proof that it is true is an answer to an action at law, however spiteful or vindictive the libel may be. But the truth is no answer to an indictment or information, unless 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; (5) in which case such defence must be specially pleaded in accordance with the statute. (6) In no other case is the truth of the libel any defence to an indictment or information, unless the accused is charged 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. (7) On an indictment for publishing a defamatory libel knowing the same to be false, the defendant may be convicted of merely publishing a defamatory libel. (8)

A crime at common law and indictable.—The common law regarded libel as a crime on the technical ground of its tendency to disturb the public peace, (9) by provoking the object of it to revenge, but in reality because the attack on reputation is so flagrant a private injury as to amount to a public wrong. The evil done is so extensive, and the example set so pernicious, that it is desirable that libel should be repressed for the public good. "There are many instances in which the law has rendered it either necessary or advantageous to the party immediately injured to prosecute as it affects his own private interests, wisely interweaving his own advantage with the public benefit." (10) A civil action would have no terrors for some penniless wrong-doers, while the

(3) 3 Mod. 139; Com. Dig. tit. Libel, A. 2.
(4) S. 317 (1).
(5) S. 331.
(6) S. 910.
(7) S. 911.
(8) *Reg.* v. *Boaler* (1888), 21 Q. B. D. 284; 59 L. T. 554; 37 W. R. 29; 16 Cox C. C. 488; 52 J. P. 791.
(9) *R.* v. *Garrett, Hick's Case* (1618), Hob. 215; Poph. 139; *Clutterbuck* v. *Chaffers* (1816), 1 Stark. 471; *R.* v. *Wegener* (1817), 2 Stark. 245; *R.* v. *Brooke* (1856), 7 Cox's C. C. 251.
(10) Chitty's Crim. Law, vol. 1, p. 5.

tendency of the wrong is to arouse resentment, provoke reprisals, and thus endanger the peace of society. This serves to explain the force of the words in the Code which define libel as something "designed to insult the person of or concerning whom it is published."(1) A defamatory libel is an indictable offence, not because of the injury which may be done to the reputation of the person against whom it is directed, but because it tends to create a breach of the peace and so to disturb the public tranquillity. (2) In an indictment for a libel reflecting on the prosecutor in his profession as a solicitor, and which has been addressed and sent to him only, it must be alleged to have been written and sent with intent to provoke the prosecutor to a breach of the peace, and not with an intent to injure him in his profession. (3) In a later case, however, in which on the trial of an indictment for libel the only evidence of publication was the sending it in a letter addressed to the prosecutor himself, and the receipt of it by him, it was held that there was sufficient evidence to go to the jury, although the indictment contained no allegation of an intent or a tendency to provoke a breach of the peace. (4) The criminality of a defamatory libel, therefore, depends not upon the damage which it may cause to the person against whom it is directed, but upon its tendency, by exciting the anger of such person, to produce a breach of the peace. (5)

Criticisms of the common law doctrine. — The reason for ranking libel as a criminal offence (viz., its supposed tendency to disturb the public peace), has been criticized in a work of high authority. It is there said that it is very questionable whether this ground is not too narrow, if not altogether fallacious. The true principle would seem to be that a libel on a private individual should be punishable as a criminal offence, for the protection of individual character, or for reputation's sake, as well as for the preservation of the public peace; both the private individual and the public would then be protected, upon the same principles as in the cases of assault and battery. In practice, prosecutions for libels on private individuals are almost invariably instituted by the party defamed, either with the view to the vindication of his character, or of revenge upon his defamer, rarely with any view to the protection of the public peace. (6)

(1) S. 317 (1).
(2) 1 Bishop, Cr. L., s. 591.
(3) *Reg.* v. *Wegener* (1817), 2 Stark. 245; 19 R. R. 712.
(4) *Reg.* v. *Brooke* (1856), 7 Cox C. C. 251.
(5) *Per* Wurtele, J., in *Reg.* v. *Cameron* (1898), 2 C. C. C. 173; 7 Q. O. R. (Q.B.) 162.
(6) Folkard's S. & L., 5th ed., pp. 167-8.

Lord Campbell, who had charge in the House of Lords of the bill which was afterwards known as his Libel Act, expressed a similar opinion. In his evidence before the committee of the Lords, upon whose report the bill was introduced, he says: "It seems to me that the ground upon which it is said that private defamation is criminal is wholly fallacious. The ground generally alleged is, that it leads to a breach of the peace. I do not think that that is so, either on principle or in practice. On principle, I think that defamation is a crime like theft or battery of the person; it is doing an injury to a member of society, who is entitled to the protection of the law. In practice, prosecutions for libel are uniformly instituted and conducted by the party injured, and merely with a view of vindicating the character of the party injured, or of having revenge upon the libeller, and not in the remotest degree with any view to the protection of the public peace."

It has also been argued, that a criminal prosecution ought not to be instituted unless the offence be such as can be reasonably construed as calculated to disturb the peace of the community. In such a case the public prosecutor has to protect the community in the person of an individual. But private character should be vindicated in an action for libel, and an indictment for libel is only justified when it affects the public as an attempt to disturb the public peace. (7) The vindication by action has been supported on other grounds. It seems to be very doubtful, it is said, whether, in point of principle, any penalty by fine or imprisonment ought to be inflicted in respect of personal defamation, where the injured individual can obtain complete satisfaction in damages. It would obviously be an inconvenient and unwarranted restraint on natural liberty to impose a sentence of imprisonment where ample amends could be made to the injured party by awarding damages. The point at which penal visitation ought to begin to attach, either in the absence of reparation to the individual, or in addition to it, is, where either civil reparation cannot be enforced, on account of the difficulty of making the wrongdoer responsible, or where the compelling civil amends is not sufficient to protect the interests of the public. (8)

Opinion of Coleridge, C.J.—At the Berkshire Assizes, Reading, February, 1889, Coleridge, C.J., directed the grand jury that there ought to be some public interest concerned, something affecting the Crown or the guardians of the public peace, to justify the recourse by a private person to a criminal remedy by

(7) *Wood* v. *Cox* (1888), 4 T. L. R., at p. 654.
(8) Folkard's S. & L., 5th ed., p. 71

way of indictment. If either by reason of the continued repetition or infamous character of the libel, a breach of the peace was likely to ensue, then the libeller should be indicted; but in the absence of any such conditions, a personal squabble between two private individuals ought not to be permitted by grand juries, as indeed it was not permitted by sound law, to be the subject of a criminal indictment, and he invited them to throw out the bill, which, in accordance with his suggestion, was done. (9)

A two-fold remedy.—Under the law of England and of this country, a party libelled may proceed, at the same time, both civilly for damages and criminally by indictment or information. But the effect of permitting an offender to be visited with both civil and criminal process, in respect of the same personal injury by defamation, may frequently be hazardous to both proceedings. A court or jury would, in all cases, be inclined to diminish the amount of civil damages, where they supposed that the defendant would, in addition to the exaction of those damages, be further subjected to a criminal prosecution and to fine, or even imprisonment; whilst after the payment of damages, even though inadequate to the real injury, a court or jury would strongly lean against a criminal conviction. In practice, however, it very rarely happens that the party proceeds in both ways. And where an application is made for a criminal information for a libel, which is a rare occurrence in this country, the ordinary condition of granting it is that the applicant shall waive his civil remedy by action. For these and other reasons it may be worth considering whether, in all cases, the party should not be restricted to one mode of proceeding; and, in adopting either, should be considered as having made his election.

The criminal more extensive than the civil remedy.—The criminal remedy is, however, more extensive than the civil remedy; and, therefore, there are cases in which a libel may be indictable though not actionable. At common law it is a misdemeanor to publish defamatory words of a deceased person, if it be alleged in the indictment and proved, that this was done with intent to bring discredit on living persons, *e.g.*, the deceased's surviving family and relatives, or with intent to stir up hatred against them, or to excite to a breach of the peace; otherwise the indictment cannot be maintained. Coke expressed the opinion that although the private man or magistrate be dead at the time of the making of the libel, yet it is punishable; for in the one case it stirs up others of the same family, blood and society to revenge and break

(9) 33 Sol. J. 250.

the peace; in the other the libeller slanders and traduces the State, which dies not. (10) But an action would not lie in such a case for want of a proper plaintiff who could aver that he had been defamed. (1) The principle, however, is never carried so far as to trespass on the utility of history, and the salutary freedom of the press therein. The court will always take into consideration the mind with which such publications are made, and discriminate the historian from the slanderer. (1*a*.) In *Reg.* v. *L..sor* (*supra*), which was an indictment for the publication in a newspaper of a suggested libellous epitaph, the ruling was in accordance with the law laid down in *R.* v. *Topham* (*supra*). The prosecution failed on account of the indictment not alleging an intent to bring the surviving family and relations of the deceased into hatred, contempt and ridicule. The effect of the ruling may be taken to have been that if such intent had been alleged and proved, the indictment might have been sustained. In *Reg.* v. *Labouchere*, (2) a remedy for libelling the dead was refused; but it was only the remedy by way of information. The application was for a criminal information for a libel upon a deceased person, and was made by his representative. The court, in its discretion, refused to grant it, and Lord Coleridge, C.J., in pronouncing judgment, said: "It must be, I think, some very unusual publication to justify an indictment or information for aspersing the character of the dead. If such a case should ever arise it must stand upon its own foot." If it be done with a malevolent purpose to vilify the memory of the deceased with a view to injure his posterity, then it is done with a design to break the peace. (3) In the Labouchere case, the court held that the weight of authority was against granting a criminal information for a libel on the dead, unless the character of the applicant himself is also individually aspersed; and, in that case, as the applicant himself was neither resident nor sojourning in the country, thereby rendering it very unlikely that the libel would lead to a breach of the peace, the application was refused. (4) It is noticeable in the Labouchere case, that a number of decisions *infra*, which might have been referred to, do not appear to have been quoted, either on the

(10) 5 Coke's Rep. 125.

(1) *R.* v. *Darby* (1687), 3 Mod. 139; *R.* v. *Topham* (1791), 4 T. R. 126; 2 R. R. 343: *per contra*, *Reg.* v. *Ensor* (1887), 3 T. L. R. 366.

(1*a*) Holt on Libel, 2nd ed., 227.

(2) (1884), L. R. 12 Q. B. D. 320; 53 L. J. Q. B. 362.

(3) *Per* Kenyon, C.J., in *R.* v. *Topham*, *supra*.

(4) See, also, *The Commonwealth* v. *Origen Batchelder* (1829), Thacher's Criminal Cases, 191.

argument, or in the judgment of the court; (5) and that, although it has been contended that that case is an authority that an indictment will not lie for a libel on a deceased person, a motion in the Q. B. Division to quash such an indictment was refused. (6) So also, while a libel published to the person libelled is indictable because it tends to a breach of the peace, it is not actionable because it cannot injure the reputation of the person libelled. (7) A man's reputation is the estimate in which others hold him; not the good opinion which he has of himself.

Intent of the publication.—The intention of the publication will not necessarily alter its libellous character, except in the case of privileged publications, and of proceedings against a newspaper proprietor. (8) Generally speaking, everything printed, or written, or marked upon any substance, as above stated, which reflects on the character or reputation of another, and which is made public without just cause or excuse, is a libel, whatever the intention may have been. (9) In the case of privileged publications, however, the intent, as we shall see, must be considered, because such publications are neither actionable nor indictable, even if false, unless it appears that the publisher was actuated by express malice or ill-will. In the case of a newspaper proprietor, who is presumed to be criminally responsible for defamatory matter inserted and published in his newspaper, the presumption may be rebutted by proof that such matter was inserted without his cognizance, and without negligence on his part. (10) The words, statements or signs expressed otherwise than by words, and complained of by the person affected, need not necessarily impute odious conduct to him; it is sufficient if they render him contemptible or ridiculous; (1) and, as we have seen, any caricature or scandalous painting or effigy, will constitute a libel quite as much as anything printed or written.

The basis of the law of Canada.—In Canada the criminal offence of libel is founded on the common law of England modified or amended by Dominion legislation. This is true both of the

(5) *R.* v. *Hunt* (1824), St. Tr. 2 N. S. 69: *R.* v. *Weaver, et al.*: *Sir John Wrottesley's Case*, E. T. 2 Geo. IV.: *R.* v. *Paine*, 8 Wm. III., Holt Rep. 294; Comb. 358; Carth. 405; *R.* v. *Taylor* (1703), 3 Salk. 198; 2 Lord Raym. 879: *R.* v. *Critchley*, H. T., 7 Geo. II.; 4 T. R. 129, note (*a*); *R.* v. *Walter*, T. T. 39 Geo. III., 3 Esp. 21. In some of the United States libels upon deceased persons are expressly provided for by statute. See, *e.g.*, the New York Penal Code, s. 242.

(6) *R.* v. *Carr* (1886), 82 L. T. Jour. 100.

(7) *R.* v. *Burdett* (1820), 4 B. & Ald. 95.

(8) See comments on s. 329, chapter 8.

(9) *Per* Parke, B., in *O'Brien* v. *Clement* (1846), 5 M. & W. 437.

(10) S. 329 (1).

(1) *Cropp* v. *Tilney* (1694), 3 Salk. 225; *Villers* v. *Monsley* (1769), 2 Wils. 403; *Watson* v. *Trask*, 6 Ohio (Hammond) 531.

substantive law and the law of procedure, whenever these are distinguishable; and in any matter in which modification or amendment is wanting, or is unprovided for, resort will still be had to the English law and to the procedure and practice in the English courts, in so far as these can be made applicable by the judicial tribunals of this country. The practice and procedure in all criminal cases and matters in the High Court of Justice of Ontario, which are not provided for in the Code, shall be the same as the practice and procedure in similar cases and matters prior to the statute. (2) There is no similar enactment with respect to any of the other provinces.

The statutory law.—The statutory law of libel, which is contained in the Criminal Code, (3) is a product of Dominion legislation, and derives its existence, jurisdiction and authority primarily from the British North America Act, 1867, (4) which came into force on the first day of July, 1867. By that Act the provinces of Ontario, Quebec, Nova Scotia and New Brunswick were united into one Dominion under the Crown of Great Britain, with a constitution based on the federal principle of a general legislature having jurisdiction and powers of government over the whole of Canada, and a local legislature for each of the provinces. The Province of Manitoba and the North-West Territories were subsequently admitted into the Union in 1870; British Columbia was admitted in 1871; and Prince Edward Island in 1873. Alberta and Saskatchewan were carved out of the North-West Territories and established as separate provinces in 1905.

Under the division of jurisdiction thus created and defined by the Act, the right to legislate as to the criminal law and criminal procedure is vested exclusively in the Dominion Parliament, (5) while the legislative powers and authority of the Act extend to all the provinces and territories named, and form the basis of all the legislation touching criminal matters, including libel as a criminal offence.

Law embraced in the Code.—The law is concisely, although not completely, contained in the Code, which was assented to on the ninth day of July, 1892, and came into force on the first day of July, 1893. The Code is not intended to embody the whole of the law relating to indictable offences. Its purpose is to include, as far as practicable, all those crimes, whether at common law or

(2) S. 599.
(3) R. S. C. 1906, c. 146.
(4) 30-31 Vict., c. 3 (Imp.).
(5) 30-31 Vict., c. 3, s. 91 (27).

created by statute, which, in the ordinary course of affairs, come to be tried in our courts of criminal justice. "It has never been contended," says Sedgewick, J., "that the Criminal Code of Canada contains the whole of the criminal common law of England in force in Canada. Parliament never intended to repeal the common law, except in so far as the Code, either expressly or by implication, repeals it. So that, if the facts stated in the indictment constitute an indictable offence at common law, and that offence is not dealt with in the Code, then unquestionably an indictment will lie at common law; even if the offence has been dealt with in the Code, but merely by way of statement of what is law, then both are in force. As stated by a text writer: (6) 'We can always separate the offence from the punishment. So that, for example, a statute which provides a new punishment for an old offence, repeals by implication only so much of the prior law as concerns the punishment, leaving it permissible to indict an offender, either under the old law, whether statutory or common, and inflict upon him, upon conviction, the punishment ordained by the new, or under the new statute, at the election of the prosecuting power. The offence and punishment, therefore, may be defined by different laws; and so, as we have seen, if a statute simply creates an offence, the common law punishment may, by implication, be imposed.'" (7)

Objects of the Code.—The objects of the Code, which are observed in the sections relating to libel, are tersely stated in the report of the Royal Commission which investigated the subject of the criminal law of England some thirty years ago. In defining the efforts at codification in an Imperial Parliamentary bill for that purpose, the report says: "It is a reduction of the existing law to an orderly written system, freed from needless technicalities, obscurities and other defects, which the experience of its administration has disclosed. It aims at the reduction to a system of that kind of substantive law relating to crimes and the law of procedure, both as to indictable offences and as to summary convictions." Libel, however, is not punishable summarily in Canada as it may be, in certain cases, in England. (8)

Basis of the Code.—The Canadian Code is founded on the English Draft Code prepared, in 1879-80, by the Royal Commission of Judges appointed under the presidency of Lord Blackburn, on

(6) Bishop on Statutory Crimes, 2nd ed., p. 166.

(7) *Per* Sedgewick, J., in *R.* v. *The Union Colliery Company* (1900), 31 S. C. R., at p. 87. The learned judge was Deputy Minister of Justice when the draft Code was submitted to Parliament.

(8) See the Newspaper Libel and Registration Act, 1881, 44-45 Vict., c. 60, ss. 4 & 5 (Imp.).

Stephen's Digest of the Criminal Law (edition of 1887), Mr. Justice Burbidge's Digest of Canadian Criminal Law of 1889, and the Canadian statutes. It is a codification of both the common law,—that is, popularly speaking, the unwritten as distinguished from the statutory law—and the statutory law relating to crimes and criminal procedure. While it aims at superseding the statutory law, it does not abrogate the rules of the common law. These are retained and will be available, wherever necessary, to aid and explain the express provisions of the Code, to supply any possible omissions, or to meet any new combination of circumstances that may arise. So that in this way the elasticity which is claimed for the rules and principles of the old common law system, and the want of which is sometimes urged against codification of the law generally, is preserved for the new and modern system established by the Code. This freedom of interpretation pervades the codified law of libel, which, although of very ancient origin, has been gradually developed and moulded, in the course of many generations, quite as much by the force of public opinion as by legislative action and judicial decision.

The different kinds of libels distinguished by the Code.—The Code distinguishes blasphemous, seditious, obscene and defamatory libels, and also libels on persons exercising sovereign authority over any foreign state. It contains separate provisions as to each of these, although obscene libels (covered by section 207 (*a*) relating to obscene publications generally), are not mentioned in express words, except in section 861 (1) which relates to the form of indictments for libel. Blasphemous libels are dealt with in that part of the Code relating to offences against religion; seditious libels, and those directed against persons exercising sovereign authority over foreign states, in that part relating to seditious offences; and obscene libels in the part relating to offences against morality. Defamatory libels are assigned a part or division separate and distinct from all the rest, and are treated as offences against private persons, or against bodies or associations of persons small enough to enable their individual members to be recognised as such. Blasphemous, seditious and obscene libels constitute a class by themselves. They come more within the category of crimes, strictly speaking, than defamatory libels, although, of course, a seditious libel may also be defamatory. But a libel that is blasphemous, seditious or obscene, is more criminal in the legal sense than one that is defamatory, because it is directed more against the state and all that the state represents, by provoking disorder and outraging public feeling. Libels of that class are injuries to the state rather than to private individuals,

who are more immediately affected by libels of a defamatory character. These latter may form a subject of a civil action for damages, may be privileged on various grounds, and, if true, may be absolutely justified, and are in these respects distinguishable from the so-called disorderly libels for which a criminal prosecution would appear to be the only fitting remedy. The intent of publication, coupled with the particular evil or mischief aimed at, seems to be the test, or at least one of the tests, by which to distinguish disorderly from defamatory libels. Indeed, prior to Lord Campbell's Libel Act, (9) part of which is incorporated in the Code, the expression "defamatory libel" had no ascertained meaning, and it was held not to include seditious or blasphemous libels. (10)

Punishment of defamatory libel.—Under the Code every one is guilty of an indictable offence and liable to one year's imprisonment, or to a fine not exceeding two hundred dollars, or to both, who publishes any defamatory libel. (1) And every one is guilty of an indictable offence and liable to two years' imprisonment, or to a fine not exceeding four hundred dollars, or to both, who publishes any defamatory libel knowing the same to be false. (2) These enactments, it will be noticed, discriminate between publication with and without a *scienter*, the publishing in the latter case being double what it is in the former case. Upon an indictment for publishing a defamatory libel "knowing the same to be false," the jury may negative the *scienter* and convict the defendant of the minor offence of publishing a defamatory libel. (3) These sections are the same as the corresponding sections in the English Draft Code, but differ slightly from those in the English statute known as Lord Campbell's Libel Act. (4) In England the punishment by imprisonment for the offence, whether committed knowingly or not, is the same as in similar cases in Canada; but the amount of the fine in both cases is not limited, and may be such as the court shall see fit to award.

The Code and its interpretation.—Although the Criminal Code has produced, as was intended, a certain uniformity of the law, it is of itself no guarantee of uniformity of decision. There will necessarily be differences of opinion, even under the Code, as

(9) 6-7 Vict., c. 93.
(10) *Reg.* v. *Duffy* (1870), 9 Ir. L. R. 329; 2 Cox C. C. 45.
(1) S. 334.
(2) S. 333.
(3) *Reg.* v. *Boaler* (1888), 21 Q. B. D. 284; 57 L. J. M. C. 85; 59 L. T. 554; 37 W. R. 29; 16 Cox C. C. 488.
(4) 6-7 Vict., c. 96, ss. 4 & 5.

to what the criminal law really is, and also as to questions in regard to which the criminal law and the civil law are identical. These differences are apt to be accentuated in Canada by the fact that, under our present constitutional system, the Dominion Parliament has exclusive jurisdiction over libel as a crime, and over criminal procedure, while the legislature of each Province has exclusive jurisdiction over libel as a tort or civil wrong, and over civil procedure, and has exercised it to a greater or less extent; and also by the fact that, in many cases, the same defences are open to a defendant in a civil action as in a criminal prosecution, and *vice versa*. In a certain newspaper libel case in Ontario, *e.g.*, the principal defences to the action were defined to the jury by the trial judge (Armour, C.J.) in the words of the Code. (5) After a verdict for the defendants a new trial was granted by the Divisional Court (MacMahon, J., *diss.*) for misdirection on those points. This judgment was affirmed by the Ontario Court of Appeal, simply, however, on the question of discretion exercised by the Court below in granting a new trial, and without any discussion of the law as laid down by the judge at the trial. (6)

This interweaving of the two branches or divisions, criminal and civil, of the law of libel, and the complexity of the subject in other respects, furnish some reason at least for a reference to decisions showing the gradual development of the law in this country. It is just as true of Canada as of England, the fountain source of our jurisprudence, that, "the law of libel being a case-made law is the outgrowth of public opinion, and every legislative modification attempted has been to cure some admitted grievance, or to formulate the principles of a decision. It is thus the product of the age evolved from the wants of society, and the shape and form it has taken are due to the varying phases of public opinion." (7)

(5) SS. 324, 325 (1).
(6) *Douglas* v. *Stephenson* (1898), 29 O. R. 616; (1899), 26 O. A. R. 26.
(7) Kelly on Newspaper Libel, IX.

PART I.

CHAPTER II.

Blasphemous Libels.

Blasphemous libel a question of fact.—Blasphemous libels are indictable both at common law and under the Code as offences against religion.

Every one is guilty of an indictable offence and liable to one year's imprisonment who publishes any blasphemous libel. (1)

Whether any particular published matter is a blasphemous libel or not is a question of fact: Provided that no one is guilty of a blasphemous libel for expressing in good faith, and in decent language, or attempting to establish, by arguments used in good faith and conveyed in decent language, any opinion whatever upon any religious subject. (2)

Not defined by the Code.—The Code does not define a blasphemous libel any more than by the use of that expression, following in this respect the English Draft Code, whose authors say, at page 21 of their Report: "Section 141 provides a punishment for blasphemous libels, which offence we deem it inexpedient to define otherwise than by the use of that expression. As, however, we consider that the essence of the offence (regarded as a subject for criminal punishment) lies in the outrage which it inflicts upon the religious feelings of the community and not in the expression of erroneous opinions, we have added a proviso to the effect that no one shall be convicted of a blasphemous libel only for expressing in good faith and decent language any opinion whatever upon any religious subject. We are informed that the law was stated by Mr. Justice Coleridge to this effect, in the case of *R.* v. *Pooley*, tried at Bodmin, 1857. We are not aware of any later authority on the subject." (3)

The gist of the offence.—A blasphemous libel has, however, been said to consist in the publication of any profane words vilifying or ridiculing God, Jesus Christ, the Holy Ghost, the Old or New

(1) S. 198 (1).
(2) *Ibid.* (2).
(3) But see *Rex* v. *Boulter*, *post*, p. 19.

Testament, or Christianity in general, with intent to shock and insult believers, or to pervert or mislead the ignorant or unwary. (4) This intent is the gist of the offence, according to the maxim, *actus non facit reum nisi mens sit rea;* and, in the absence of such an intent, there is no blasphemy. The Crown must prove the intent, the existence of which is a question of fact for the jury, the best evidence of it being found in the language of the publication itself. If it is full of scurrilous and opprobrious language, if sacred subjects are treated with offensive levity, if indiscriminate abuse is employed instead of argument, then a malicious design to wound the religious feelings of others may be readily inferred; but where the language of the publication is free from all offensive levity, abuse and sophistry, and is in fact the honest and temperate expression of religious opinions, conscientiously held and avowed, then it is not blasphemous. (5) A publication stating Jesus Christ to be an impostor and a murderer in principle, is a libel at common law, for which an information will lie. (6) And a general attack upon Christianity is unlawful, because Christianity is the established religion of the country. (7) It is an offence at common law to publish a blasphemous libel, and a defendant may be convicted on an information for such an offence; (8) *e.g.*, it is an indictable offence at common law to publish a blasphemous libel of and concerning the Old Testament. (9)

Apart from the question whether Christianity is part of the common law, we may regard it as settled that maliciously to revile Christianity, as a religious faith of general acceptance, is an indictable offence at common law. *A fortiori* published blasphemy, written or printed, is indictable. And the weight of authority is, that blasphemy is only indictable when uttered in such a way as to insult the religious convictions of those at whom it is aimed. The gist of the offence is the insult to the religious sense of individuals irrespective of the truth of those religious views or the extent of their prevalence. (10) Every man may fearlessly advance any new doctrines, provided he does so with proper respect to the religion and government of the country. (1) By the law of this country every man has a right to express his sentiments in

(4) Odgers, L. & S., 3rd ed., p. 463.
(5) *Ibid.* 464.
(6) *Rex* v. *Waddington* (1822), 1 B. & C. 26.
(7) *Reg.* v. *Gathercole* (1838), 2 Lewin C. C. 237.
(8) *Rex* v. *Carlile* (1819), 3 B. & Ald. 161; 1 Chit. 451.
(9) *Reg.* v. *Hetherington* (1841), 5 Jur. 295.
(10) Whart. C. L., 9th ed., vol. 2, s. 1605; *Commonwealth* v. *Haines*, 4 Clark (Phil.) 17; 6 Penn. L. J. 239.
(1) *Per* Best, C.J., in *Rex* v. *Burdett* (1821), 4 B. & Ald. 314. And see *Reg.* v. *Collins* (1839), 9 C. & P. 450.

decent language. (2) The disputes of learned men upon particular controverted points of religion are not punishable as blasphemy. (3) Publications discussing with decency and gravity questions as to Christian doctrines or statements in the Hebrew Scriptures, and even questioning their truth, are not punishable as blasphemy; but publications which, in an indecent and malicious spirit, assail and asperse the truth of Christianity, or of the Scriptures, in language calculated and intended to shock the feelings and outrage the belief of mankind, are punishable as blasphemous libels. (4) In the prosecution for the publication of a blasphemous libel, in which this opinion was expressed, it was held that the provision in Lord Campbell's Libel Act (5) as to allowing exculpatory evidence in answer to a *prima facie* case of liability for publication, being quite general in its terms, was applicable. The defendant was acquitted on the ground that his connection with the publication in question was not proved. The essence of the offence, regarded as a subject for criminal punishment, lies in the outrage which it inflicts upon the religious feelings of the community, and, as declared in the Code, not in the expression of erroneous opinions in good faith and in decent language.

Tolerant view of the law as expressed in the Code.—The declaration in the Code, as to what is not a blasphemous libel, represents the more tolerant view of the law, comparatively speaking, as expounded in the latest leading English cases. (6) In the former of these cases (*Reg.* v. *Pooley*), the defendant was convicted of blasphemy for writing, on a gate on a public road, some foolish and irreverent words about the Bible, and his hatred of Christianity. In the latter case (*Reg.* v. *Ramsey & Foote*), the defendants were indicted for publishing in a newspaper called *The Freethinker* certain blasphemous libels derisive of the Old and New Testaments, ridiculing the birth and divinity of the Saviour, and comprising offensive pictures or wood-cuts called "Comic Bible Sketches" and "Divine Mummination." The defendants were convicted before North, J., on one charge; and, on a second charge before Coleridge, L.C.J., who summed up strongly in their favour, the jury were unable to agree and were discharged.

(2) *Per* Erskine, J., in *Reg.* v. *Adams* (1842).—Trial of Holyoake, London (1842).

(3) *Per Cur.* in *Rex* v. *Woolston* (1720). 2 Str. 834; Fitzgib. 66; Barnard. 162.

(4) *Per* Coleridge, L.C.J., in *Reg.* v. *Bradlaugh et al.* (1883). 15 Cox C. C. 217.

(5) 6-7 Vict., c. 96, s. 7.

(6) *Reg.* v. *Pooley* (1857), tried at the Bodmin Summer Assizes before Coleridge, J., and unreported: and *Reg.* v. *Ramsey & Foote* (1883). 48 L. T. 739; 1 Cab. & El. 126; 15 Cox C. C. 231.

Opinion of Coleridge, L.C.J., in Reg. v. Ramsey & Foote (1883).—In *Reg.* v. *Ramsey & Foote,* Coleridge, L.C.J., in the course of his charge to the jury, read an extract from Starkie's Law of Slander and Libel, (7) in which occurs the following passage, as a correct exposition of the law: "The very absurdity and folly of an ignorant man, who professes to teach and enlighten the rest of mankind, are usually so gross as to render his errors harmless; but, be this as it may, the law interferes not with his blunders so long as they are honest ones, justly considering that society is more than compensated for the partial and limited mischiefs which may arise from the mistaken endeavours of honest ignorance, by the splendid advantages which result to religion and truth from the exertions of free and unfettered minds. It is the mischievous abuse of this state of intellectual liberty which calls for penal censure. The law visits not the honest errors, but the malice of mankind. A wilful intention to pervert, insult, and mislead others, by means of licentious and contumelious abuse applied to sacred subjects, or by wilful misrepresentations or artful sophistry, calculated to mislead the ignorant and unwary, is the criterion and test of guilt. A malicious and mischievous intention, or what is equivalent to such an intention, in law, as well as morals — a state of apathy and indifference to the interests of society — is the broad boundary between right and wrong. If it can be collected from the circumstances of the publication, from a display of offensive levity, from contumelious and abusive expressions applied to sacred persons or subjects, that the design of the author was to occasion that mischief to which the matter which he publishes immediately tends, to destroy or even to weaken men's sense of religious or moral obligations, to insult those who believe, by casting contumelious abuse and ridicule upon their doctrines, or to bring the established religion and form of worship into disgrace and contempt, the offence against society is complete."

In another part of his charge the Lord Chief Justice said: "It is no longer true, in the sense in which it was true when these *dicta* [*i.e.*, of the old judges] were uttered, that Christianity is part of the law of the land. (8) In the time when these *dicta* were uttered, Jews, Roman Catholics, Nonconformists of all sorts were under heavy disabilities for religion, were regarded as hardly having civil rights. Everything, almost, short of

(7) 6th ed. The extract begins with the words, "There are no questions," etc., and ends with the words, "boundary between right and wrong."
(8) This and other parts of the charge were dissented from by Huddleston, B., and Manisty, J., in *Parkhurst* v. *Thompson* (1886), 3 T. L. R. 199.

the punishment of death, was enacted against them." He proceeded to point out that these disabilities were removed, and that the late Master of the Rolls (9) might have had to go circuit to try for a blasphemous libel a Jew who denied that Christ was the Messiah, a thing which he himself did deny, which parliament had allowed him to deny, and which is just as much part of the law that any one may deny, as it is your right and mine, if we believe it, to assert. The learned Chief Justice also said that, if it were illegal to attack Christianity because it is part of the law of the land, that implied that to attack any part of the law would be, if not blasphemous, yet seditious; and this, he said, was an absurdity. For these reasons "to base the prosecution of a bare denial of the truth of Christianity *simpliciter* and *per se* on the ground that Christianity is part of the law of the land, in the sense in which it was said to be by Lord Hale, and Lord Raymond and Lord Tenterden, is, in my judgment, a mistake. It is to forget that the law grows, and that though the principles of law remain unchanged, yet (and it is one of the advantages of the common law) their application is to be changed with the changing circumstances of the time." It was in this same charge that Lord Chief Justice Coleridge said that, "if the decencies of controversy are observed, even the fundamentals of religion may be attacked without a person being guilty of blasphemous libel."

Opinion of Stephen, J.—Mr. Justice Stephen, in his History and Digest of the Criminal Law, and also in a pamphlet published by him in 1884, (10) thinks this too favourable a view of the law, and that the weight of authority is against it. He contends that the cases, meaning the cases prior to those just mentioned, all proceed upon the plain principle that the public importance of the Christian religion is so great that no one is to be allowed to deny its truth; and that the history of the offence confirms this view. (1). In his Digest of the Criminal Law (2) he gives alternative definitions of blasphemy of which the following, he says, correctly states the law laid down by Coleridge, J., in *Reg* v. *Pooley* (*supra*): "Every publication is blasphemous which contains matter relating to God, Jesus Christ, the Bible, or the Book of Common Prayer, intended to wound the feelings of mankind, or to excite contempt

(9) Jessel, M.R., a Jew.
(10) See Law Times, June 7th, 1884, p. 91.
(1) 2 Steph. Hist. Cr. L. 475. This view is disputed by other historical reviewers. See an able paper by John Macdonnell in the Fortnightly Review for June, 1883. See, also, *Rex* v. *Boulter*, *post*, p. 19.
(2) 3rd ed., Art. 161, p. 108.

and hatred against the Church by law established, or to promote immorality. But publications intended in good faith to propagate opinions on religious subjects, which the person who publishes them regards as true, are not blasphemous (within the meaning of this definition), merely because their publication is likely to wound the feelings of those who believe such opinions to be false, or because their general adoption might tend by lawful means to alterations in the constitution of the Church by law established."

When the criminal law may be invoked.—A learned commentator has said, that "the course hitherto adopted in England respecting the offences of blasphemy and profaneness, has been to withhold the application of the penal law, unless in cases where insulting or contumelious language is used, and where it may fairly be presumed that the intention of the offender is not grave discussion, but a mischievous design to wound the feelings of others, or to injure the authority of Christianity, with the vulgar and unthinking, by improper means. For although the law distinctly forbids all denial of the being and providence of God, or the truth of the Christian religion, (3) works in which infidelity is professed and defended have been frequently published, and have undergone no legal question or prosecution; and it is only where irreligion has assumed the form of blasphemy, in its true and positive meaning, and has constituted an insult both to God and man, that the interference of the criminal law has taken place. There is no instance of the prosecution of a writer or speaker who has applied himself seriously to examine into the truth on this most important of all subjects, and who arriving in his own convictions at scepticism, or even unbelief, has gravely and decorously submitted his opinions to others, without any wanton and malevolent design to do mischief. Such conduct, indeed, could not properly be considered as blasphemy or profaneness; and, at the present day, a prosecution in such a case would probably not meet with general approbation." (4)

Opinion of Phillimore, J.—In *Rex* v. *Boulter,* (5) in which the prisoner was indicted for publishing a blasphemous libel, Phillimore, J., told the jury that the mere denial of the truth of the Christian religion, or of the Scriptures, is not enough *per se* to constitute a speech a blasphemous libel. A wilful intention to pervert, insult and mislead others by means of licentious and contumelious abuse applied to sacred subjects, or by wilful misrepresentations or wilful sophistry calculated to mislead the ignorant and unwary,

(3) See opinion of Phillimore, J., *contra, infra.*
(4) Starkie's Com. in Folkard's S. & L., 5th ed., 44.
(5) (1908), 72 J. P. 188.

must also appear. The summing up of Coleridge, L.C.J., in *R.* v. *Ramsey and Foote,* (6) as to what constitutes blasphemous libel, was approved and followed in preference to the view (*supra*) expressed by Stephen, J., in his Digest of the Criminal Law, 5th ed. (1894), p. 125. In his charge to the jury, the learned judge referred to previous decisions, and said: "A man is free to think, to speak and to teach, what he pleases as to religious matters, though not as to morals. He is free to teach what he likes as to religious matters even if it is unbelief. But when we come to consider whether he has exceeded the permitted limits, we must not neglect to consider the place where he speaks, and the people to whom he speaks. A man is not free in a public place, where passers-by, who might not willingly go to listen to him, knowing what he was going to say, might accidentally hear his words, or where young people might be present—a man is not free in such places to use coarse ridicule on subjects which are sacred to most people in this country. He is free to advance argument. You must draw the line, and you would probably draw it in favour of the accused, if he were arguing for an honest belief in a doctrine or a non-doctrine to which he was attached. In such a case, he would not be convicted of publishing a blasphemous libel. But if, not for the sake of argument, he were making a scurrilous attack on doctrines which the majority of persons hold to be true, in a public place where passers-by may have their ears offended, and where young people may come, he will render himself liable to the law of blasphemous libel. Such conduct may well lead to a breach of the peace from hot-headed believers."

The learned judge then read to the jury extracts from the transcript of shorthand notes taken of the prisoner's speeches, and subsequently refused to state a case as to whether the direction of Coleridge, L.C.J., in *R.* v. *Ramsey and Foote* (*supra*), was the proper test as to whether the words uttered by the prisoner could constitute blasphemous libel, and also as to whether the circumstances under which the words were uttered, the fact that they would be heard by passers-by, including children, and the fact that they might so lead to a breach of the peace, could affect the question of law as to whether these words did or did not constitute a blasphemous libel.

The prisoner was convicted and was released on his own recognizances in £50 to come up for judgment, if called upon, having given the following undertaking: "I do hereby express my sincere regret for the utterance of the expressions attributed to and found

(6) (1883), 1 C. & E. 126; 15 Cox C. C. 231.

against me, and I promise that I will not, at any meeting in public, attack Christianity or the Scriptures in the language for which I have been found guilty, or in any similar language, or in any language calculated to shock the feelings or outrage the belief of the public."

Blasphemy as affecting civil liabilities.—The law of blasphemy has been dealt with by the Ontario courts, in connection with contractual liabilities in the province. In *Pringle* v. *The Corporation of the Town of Napanee,* (7) the plaintiff claimed damages for breach of contract to let him the town hall for three lectures by one B. J. Underwood, a well-known free thinker. The defendants pleaded (*inter alia*), that the purpose for which the hall was intended to be used was for the delivery of certain irreligious, blasphemous and illegal lectures. The subjects of lecture were "Evolution v. Creation," "What Liberalism offers as a Substitute for Christianity," and "Fallacies and Assumptions of Theologians regarding the Bible and Christianity." The lecturer advocated the truth of evolution, or the gradual development of everything from the simple to the complex, in opposition to the doctrine of special creation contained in the Bible. He denied the inspiration of the Bible, which, he said, was a fabulous and false book. He also denied that God created the universe, and said that the arguments advanced by theologians about the divinity of Christ were a mistake, and that he did not believe in Christ as a divine being, or as a Saviour. The trial judge (Moss, J.A.), who tried the case without a jury, entered a verdict for the defendants, upon the authority of *Cowan* v. *Milbourn.* (8) This action was for breach of a contract similar to that sued on in *Pringle* v. *The Corporation of the Town of Napanee* (*supra*), and the defence was the same. The lectures sought to be given in the room the use of which was refused by the defendants, maintained that the character of Christ was defective and his teaching misleading, and that the Bible was no more inspired than any other book. The Court of Exchequer held the defence to be sufficient, that the publication of such doctrines was blasphemy, and, therefore, that the purpose for which the plaintiff intended to use the room in question was illegal, and the contract one which could not be enforced at law. Moss, J.A., in his judgment in the Pringle case, said he thought it better to follow that decision, leaving it to the court to determine whether that case truly stated the English law, and, if it did, whether such a law was applicable to this province. Upon appeal to the Court of Queen's

(7) (1878), 43 U. C. Q. B. 285.
(8) (1867), L. R. 2 Ex. 230; 16 L. T. N. S. 290; 36 L. J. Ex. 124.

Bench, the court (Harrison, C.J., and Armour, J.) held, that Christianity in general, and not merely the tenets of particular sects, is part of the recognized law of Ontario, and that the defendants' plea constituted a good defence. In the judgment of Harrison, C.J., in which Armour, J., concurred, the statute and case law on the subject is reviewed, and many authorities cited, including some of those already mentioned. The learned Chief Justice makes it clear that the broad question before the court, and which it actually determined, was, whether Christianity was so far a part of the law of the land that an attack upon it, or upon some of its fundamental doctrines, was illegal. He refers to the criminal cases *infra*, (9) which are all cases of blasphemous libels, as establishing that Christianity is in a broad sense a part of the common law of England, and that to libel it by attacking any of its cardinal principles is an indictable offence. The opinion is also expressed that the Christian religion was, in 1792, a part of the common law of England, and as such became, in effect, a part of the common law of Ontario under the operation of the Act of 1792. (10) "This [Cowan] case correctly expresses the common law of England. If the case now before us were in England it could only result as that case did" (p. 298).

Harrison, C.J., on the latitude of present day religious opinions.—The following observations of Harrison, C.J., in the closing part of his judgment, are in point: "We admit that more latitude is allowed to religious discussions, in the present day, than was allowed when some of the cases to which we have referred were decided . . . It is not likely that any man in the present day will be convicted, or, if convicted, punished, for the honest and temperate expression of his opinion. . . . There is no fear . . . of the people at large, in any portion of the British Empire, in these days of enlightenment and religious toleration, ever so far forgetting what is due to themselves, to their country and to their God, as to punish men for the honest and temperate exercise of liberty of conscience where the interests of the State are not imperilled. The question as to what is or is not a libel, on a prosecution for libel, is a question for a jury. The good sense of jurors will prevent anything like

(9) *Rex* v. *Taylor* (1675), 3 Kib. 607; 1 Vent. 293; *Rex* v. *Woolston* (1720), 2 Str. 834; Fitzgib. 66; Barnard. 162; *Rex* v. *Hive* (1756), Hil. Term. 29 Geo. II.; Dig. Law Lib. 83 and 126; *Rex* v. *Annett* (1763), Mich. T., 3 Geo, III.; Dig. Law Lib. 84 and 128; *Rex* v. *Wilkes* (1764), 4 Burr. 2527; *Rex* v. *Williams* (1797), 26 St. Tr. 653; *Rex* v. *Eaton*, 31 St. Tr. 927; *Rex* v. *Hetherington* (1841), 5 Jur. 529 (Q.B.).

(10) 32 Geo. III., c. 1, passed on the 15th October, 1792. The Legislature of Upper Canada, by 40 Geo. III., c. 1, s. 1, introduced the criminal law of England as it stood on 17th September, 1792.

oppression for the temperate and honest expression of religious belief, however erroneous. The greatest latitude is permitted both in the mother country and here to discussions about religion in every form. Men holding high office, in what is called the Established Church in England, are now permitted with impunity to question fundamental doctrines of the Christian religion. Men outside of the church, and holding no office in any church, are allowed the utmost freedom in the discussion of their peculiar views about religion. Church dignitaries, instead of attempting to have such men burned or otherwise punished for their utterances, now content themselves with answering what they conceive to be their errors. Those discussions which lead to the overturning of the Christian religion are, strictly speaking, illegal, but it is felt that it is better not to make martyrs of men who, however ignorant or misguided they may be, are honestly in search of truth. If the Christian religion is grounded on truth, as we believe it is, it has nothing to fear from such discussions." And, referring to the grounds of defence, he adds: "No one is attempting to punish Mr. Underwood for the expression of his opinions about the supposed fallacies of the Bible and Christianity. The guardians of the town hall, in Napanee, simply refused, when they learned of his peculiar views, to permit him to express them in that hall. This was not more than the exercise of the legal right, which they possess, of refusing to allow their property to be used for what the law holds to be an illegal purpose. As said by Bramwell, B., in *Cowan* v. *Milbourn*, L. R. 2 Ex. 236: "A thing may be unlawful in the sense that the law will not aid it, and yet the law will not immediately punish it." The purpose being illegal, the contract is illegal. The illegal purpose was not known to the defendants when they made the contract with the plaintiff. The law, upon the discovery of the purpose, gives defendants the right to repudiate the contract. Their plea, therefore, is a good one, and is sustained by the evidence." The rule was discharged. (1)

The conversion of anti-Christian pamphlets: Boucher v. Shewan (1864).—One of the cases referred to in the above judgment, in which a similar question was argued but not finally decided, is *Boucher* v. *Shewan*. (2) It was an action for the conversion of a number of pamphlets which defendant alleged were anti-Christian in character and sentiment. He pleaded not guilty. Upon the production of one of the pamphlets at the trial, the judge ruled

(1) *Pringle* v. *The Corporation of the Town of Napanee* (1878), 43 U. C. Q. B., pp. 305, 306.

(2) (1864), 14 U. C. C. P. 419, an appeal from the County Court.

that, as the printed matter contained a scoffing and indecent attack on Christianity, the action could not be maintained, and he directed a non-suit. A new trial being refused in the court below, it was held, on appeal, by the Upper Canada Court of Common Pleas, that the defendant could not rely on the illegality of the publication under a plea of not guilty, but should have pleaded it specially; that the plaintiff had a right to be indemnified for his property in the materials composing the pamphlets, independently of the printed matter; and that the judge below, on the new trial granted by the court, should direct the jury, to whom should be submitted the question whether the work was of the character imputed to it, what kind of publications the law protects and what it prohibits. If the pamphlets were not illegal, he should direct the jury to give damages for their value at the time of their conversion, but if the pamphlets were illegal, they should give damages for the value of the paper, etc., irrespective of the printed matter. This decision is some authority for the view that the character of such a publication is a question of fact for the jury.

The reported decisions, both in England and the United States, certainly furnish authority for the view expressed in the Code, which has not yet been passed upon by any of the Canadian courts. It was stated by counsel (3) in *Pringle* v. *The Corporation of the Town of Napanee* (3a), that, up to that time, no case was to be found in the books of Ontario of an indictment for blasphemy. Nor has there been any since; and we believe this is true of the other provinces. Most of the cases on the subject are old, and it does not appear, as is observed by the framers of the English Draft Code, that any one has been convicted of blasphemy in modern times for a mere decent expression of disbelief in Christianity.

The punishment.—Under the Code, the publisher of a blasphemous libel is liable to one year's imprisonment, and to a fine in lieu of, or in addition to, such punishment. He may also be required to give security to keep the peace and be of good behaviour. (4) Unlike the publisher of a seditious or defamatory libel, he may be tried at the General Sessions of the Peace. (5)

Defendant cannot plead justification.—A defendant is not allowed to set up as a defence, upon the trial of an indictment or information for the publication of a seditious or blasphemous libel,

(3) The late James Bethune, Q.C.
(3a) (1878), 43 U. C. Q. B. 285.
(4) SS. 198, 1035, 1058.
(5) SS. 582, 583.

that the statements complained of are true, and that it is for the public benefit that they should be published. (6)

Particulars.—No count for publishing a blasphemous libel shall be deemed insufficient on the ground that it does not set out the words thereof; (7) but the court may, if satisfied that it is necessary for a fair trial, order that the prosecution shall furnish a particular further describing any document or words the subject of a charge. (8)

Judge's order initiating prosecution.—In England no criminal prosecution can be commenced against the proprietor, publisher, editor, or any person responsible for the publication of a newspaper, for any libel published therein, without the order of a judge at chambers being first obtained. (9)

The law in the United States.—In the United States the law, as declared in some of the state codes and in some of the decisions of the courts, appears to be in accord with the opinions of Starkie quoted (*ante*, p. 17) by Coleridge, L.C.J., and with the statement in our own Code. The Criminal Code of the state of New York, for example, defines blasphemy as "wantonly uttering or publishing words casting contumelious reproach or profane ridicule upon God, Jesus Christ, the Holy Ghost, the Holy Scriptures, or the Christian Religion." (10) But "if it appears, beyond reasonable doubt, that the words complained of were used in the course of serious discussion, and with intent to make known or recommend opinions entertained by the accused, such words are not blasphemy." (1)

In *The People* v. *Ruggles*, (2) after a judgment for blasphemous words spoken against Jesus Christ, Kent, C.J., on appeal, said: "After conviction we must intend that the words were uttered in a wanton manner, and, as they evidently import, with a wicked and malicious disposition, and not in a serious discussion upon any controverted point in religion. The language was blasphemous, not only in a popular but in a legal sense; for blasphemy, according to the most precise definitions, consists in maliciously

(6) *Cook* v. *Hughes* (1824), Ry. & M. 115; *Reg.* v. *Duffy* (1870), 9 Ir. L. R. 329; 2 Cox C. C. 45; *Ex parte O'Brien* (1883), 12 Ir. L. R. 29; 15 Cox C. C. 180; *Reg.* v. *Bradlaugh* (1883), 15 Cox C. C. 217; *Reg.* v. *Ramsey, et al.* (1883), 15 Cox C. C. 231; *Reg.* v. *McHugh* (1901), 2 Ir. Rep. 569.

(7) S. 861 (1).

(8) S. 859 (*e*).

(9) Law of Libel Amendment Act, 1888, (51-52 Vict., c. 64, s. 8).

(10) Art. 31.

(1) Art. 32.

(2) 8 Johns. 292.

reviling God or religion, and this was reviling Christianity through its Author. The free, equal and undisturbed enjoyment of religious opinion, whatever it may be, and free and decent discussions on any religious subject, are granted and secured; but to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community, is an abuse of that right."

In *Updegraph* v. *Commonwealth*, (3) Duncan, J., said: "No author or printer, who fairly and conscientiously promulgates opinions with whose truths he is impressed, for the benefit of others, is answerable as a criminal. A malicious and mischievous intention is, in such a case, the broad boundary between right and wrong; it is to be collected from the offensive levity, scurrilous and opprobrious language, and other circumstances, whether the act of the party was malicious." (4)

(3) Pa. R. 11 Ser. & Raw., 394, 405, 406.
(4) See, also, Shaw, C.J., in *Commonwealth* v. *Kneeland*, 20 Pick. 206, 221; Whart. Crim. Law, s. 2538.

CHAPTER III.

Obscene Libels.

Enactments against obscene publications.—Except the provision in section 861 (*infra*), as to setting out the words in the indictment, there is no enactment in the Code, as in the English Draft Code, as to publishing an obscene libel *eo nomine;* but there are enactments against publishing obscene matter generally, which cover the offence of obscene libel, or at least serve the same purpose. In the United States a publication is an obscene libel when its tendency is to deprave and corrupt the minds of persons reading it. It is no defence there that the writer's object was scientific or philanthropic, if the matter is so published that it is likely to fall into the hands of persons to whom it will be of no value scientifically or otherwise, but whose minds will be contaminated by its perusal. (1) It was for a time doubtful whether the English common law courts had jurisdiction with respect to publications of an immoral character, the judges being disposed to hold that they were ecclesiastical offences. (2) The temporal jurisdiction of the courts was, however, settled by *Rex* v. *Curl,* (3) and has not since been questioned.

Obscene books, pictures, etc., tending to corrupt morals.—Every one is guilty of an indictable offence and liable to two years' imprisonment, who knowingly, without lawful justification or excuse, (*a*) makes, manufactures, or sells, or exposes for sale or to public view, or distributes or circulates, or causes to be distributed or circulated, or has in his possession for sale, distribution or circulation, or assists in such making, manufacture, sale, exposure, having in possession, distribution, or circulation, any obscene book, or other printed, typewritten, or otherwise written matter, or any picture, photograph, model, or other object, tending to corrupt morals, or any plate for the reproduction of any such picture or photograph. (4)

See *Rex* v *Beaver* (5) (*infra*), as to the meaning of "obscene" in this section. The onus is on the prosecution to prove

(1) Merrill's Newspaper Libel, pp. 86-7.
(2) See *ic.* v. *Read,* Fortesc. Rep. 98.
(3) (1727), 2 Str. 789; 1 Barnard. 29.
(4) S. 207 (1) in part, as amended by The Criminal Code Amendment Act, 1909, (8-9 Edw. VII., c. 9 (D.).
(5) (1905), 9 O. L. R. 418.

that the offence stated in paragraph (*a*) (*supra*) was committed "knowingly," *i.e.* with knowledge of the contents of the obscene publication charged, as in *Rex* v. *Beaver* (*infra*). The onus is also upon the Crown to shew that the accused, as editor and proprietor of a paper, had "knowingly" published the obscene matter; but knowledge may be inferred, in the absence of evidence to the contrary, from proof that he had full control as to what should be published or not published, and that he published the paper under an assumed name. (5*a*). An indictment for wilfully publishing obscene matter contrary to this section (207) is sufficient if the publication is of such a nature as a jury can reasonably say upon the evidence that it is obscene under the circumstances attending its publication, although the words may not be obscene under all circumstances. But the trial judge may withdraw the case from the jury if there be nothing in the evidence to shew that, in the subject matter and its treatment, there was something to deprave and corrupt. (5*b*)

A person who knowingly purchases an obscene picture for another, and has possession of the same for the purpose of delivering it to such other person, is guilty of having in his possession for circulation a picture tending to corrupt morals, although he did not exhibit the picture to any person. (5*c*)

No offence where public good served.—No one shall be convicted of any offence in this section mentioned, if he proves that the public good was served by the acts alleged to have been done, and that there was no excess in the acts alleged beyond what the public good required. (6) There is no similar enactment in the English Draft Code. In determining whether published matter is obscene, or not, and whether the public good could be served by the publication, the jury may consider not only the words themselves but the fact that the publication was in a paper which was not a newspaper in the ordinary sense, that such paper was refused transmission by mail, and that the editor and proprietor published it under an assumed name. (6*a*)

Questions for judge and jury respectively.—It shall be a question for the court or judge [*i.e.*, a question of law], whether the occasion of the manufacture, sale, exposing for sale, publishing, or exhibition, is such as might be for the public good, and whether

(5*a*) *The King* v. *Macdougall* (1909), 15 C. C. C. 466.
(5*b*) *Ibid.*
(5*c*) *The King* v. *McCutcheon* (1909), 15 C. C. C. 362.
(6) S. 207 (2).
(6*a*) *The King* v. *Macdougall, supra.*

there is evidence of excess beyond what the public good required in the manner, extent or circumstances in, to, or under which the manufacture, sale, exposing for sale, publishing or exhibition is made; but it shall be a question for the jury whether there is or is not such excess. (7)

It will be observed that the onus is on the accused to prove that the public good was served by what he has done, and that he did no more than was necessary for the public good.

Honest motives no defence: Reg. v. Hicklin (1868).—The motives of the manufacturer, seller, exposer, publisher, or exhibitor, shall in all cases be irrelevant. (8) The publication of indecent matter does not, therefore, cease to be an offence because the person publishing it is actuated by honest motives. (9) In the leading case, *Reg.* v. *Hicklin*, in which the law was so laid down, the following were the facts: Under the statute 20-21 Vict. c. 83 (Imp.), which empowered justices to seize and destroy obscene books, prints and pictures, a number of copies of a pamphlet entitled "The Confessional Unmasked: Showing the depravity of the Romish priesthood, the iniquity of the Confessional, and the questions put to females in Confession," were seized by justices and destroyed as obscene books. One half of the pamphlet was of a conversational character, and the other half grossly obscene. The appellant, the publisher, did not keep or sell the pamphlet for the sake of gain, nor to prejudice good morals, but for a purpose which he considered to be good, namely, to expose the errors of the church of Rome and the immorality of the confessional. The Court of Queen's Bench held the seizure to be right.

Opinion of Cockburn, C.J.—"I take it," said Cockburn, C.J., "that, apart from the ulterior object which the publisher of this work had in view, the work itself is, in every sense of the term, an obscene publication, and that consequently, as the law of England does not allow of any obscene publication, such publication is indictable. We have it, therefore, that the publication itself is a breach of the law. But then it is said for the appellant: 'Yes, but this purpose was not to deprave the public mind; his purpose was to expose the errors of the Roman Catholic religion, especially in the matter of the confessional.' Be it so. The question then

(7) S. 207 (3).
(8) *Ibid.* (4).
(9) *Reg* v. *Hicklin* (1868), L. R. 3 Q. B. 360; 37 L. J. M. C. 89; 16 W. R. 801; 18 L. T. 398; 11 Cox C. C. 19; *Steele* v. *Brannan* (1872), 20 W. R. 607; L. R. 7 C. P. 261; 41 L. J. M. C. 85; 26 L. T. N. S. 509.

presents itself in this simple form: May you commit an offence against the law in order that thereby you may effect some ulterior object which you have in view, which may be an honest and even a laudable one? My answer is emphatically, No. The law says you shall not publish an obscene work. An obscene work is here published, and a work the obscenity of which is so clear and decided, that it is impossible to suppose that the man who published it must not have known and seen that the effect upon the minds of many of those into whose hands it would come would be of a mischievous and demoralizing character. . . . I think the old, sound and honest maxim, that you shall not do evil that good may come, is applicable in law as well as in morals; and here we have a certain and positive evil produced for the purpose of effecting an uncertain, remote and very doubtful good. I think, therefore, the case for the order is made out; and although I quite concur in thinking that the motive of the parties who published this work, however mistaken, was an honest one, yet I cannot suppose but what they had that intention which constitutes the criminality of the act; at any rate, that they knew perfectly that this work must have the tendency which, in point of law, makes it an obscene publication, namely, the tendency to corrupt the minds and morals of those into whose hands it might come. The mischief of it, I think, cannot be exaggerated. But it is not upon that I take my stand in the judgment I pronounce. I am of opinion, as the learned recorder has found, that this is an obscene publication. I hold that where a man publishes a work manifestly obscene, he must be taken to have had the intention which is implied from that act; and that, as soon as you have an illegal act thus established, *quoad* the intention and *quoad* the act, it does not lie in the mouth of the man who does it to say: 'Well, I was breaking the law, but I was breaking it for some wholesome and salutary purpose.' The law does not allow that. You must abide by the law, and, if you would accomplish your object, you must do it in a legal manner, or let it alone; you must not do it in a manner which is illegal."

Opinion of Blackburn, J.—On the same point in the same case, Blackburn, J., said: "I think it can never be said that, in order to enforce your views, you may do something contrary to public morality; that you are at liberty to publish obscene publications, and distribute them amongst every one,—school-boys and every one else,—when the inevitable effect must be to injure public morality, on the ground that you have an innocent object in view, that is to say, that of attacking the Roman Catholic religion, which you have a right to do. It seems to me that never could be made a

defence to an action of this sort, which is, in fact, a public nuisance. If the thing is an obscene publication, then, notwithstanding that the wish was not to injure public morality, but merely to attack the Roman Catholic religion and practices, still I think it would be an indictable offence."

Steele v. Brannan (1872).—One M. was indicted for selling a new edition of the pamphlet held to be obscene in *Reg.* v. *Hicklin.* The pamphlet was still obscene, though some of the most offensive passages had been omitted, and at the trial it was not read, but was taken as read. S. published a substantially correct report of M.'s trial, in which, however, he set out the whole of the new edition of the book. It was held, that the publication of the report, setting out the new edition of the book, was a misdemeanour; that the obvious consequence of it would be to corrupt the public morals; and that S., however pure his motives, must be taken to have intended the consequences of his act. It was held, also, that the report was not privileged as being a fair report of a trial in a court of competent jurisdiction; and that copies of the re- were rightly ordered to be destroyed under 20-21 Vict. c. 83, .. (10)

It is an indictable offence to procure indecent prints with intent to publish them; but to preserve and keep them in possession with such intent is not. (1) And, *semble,* a count charging the defendant with having an obscene libel in his possession, with an intent to publish it, is not good. (2) The sale of an obscene print to a person in private, he having in the first instance requested that such print should be shown to him, his object being to prosecute the seller, is a sufficient publication to sustain the charge. (3) But if on the trial of an indictment for publishing an obscene snuff box, a witness proves that the defendant exhibited to him the box produced on the trial, or a box exactly similar, this is not sufficient, if the witness cannot identify the very box exhibited to him. (4) The defendant inserted in a newspaper, of which he was the editor, advertisements, which, though not obscene in themselves, related, as he knew, to the sale of obscene books and photographs. A police officer wrote to the addresses given in the advertisements, and received in return from the advertisers, who were foreigners resident abroad, obscene books and photographs. The defendant was tried

(10) *Steele* v. *Brannan* (1872), 20 W. R. 607; 26 L. T. N. S. 509; 41 L. J. M. C. 85; L. R. 7 C. P. 261.

(1) *Dugdale* v. *Regina* (1853), 1 El. & Bl. 435; Dears. C. C. 64; 22 L. J. M. C. 50; 17 Jur. 546. But see the words, "has in his possession for sale, distribution or circulation," in S. 207 (1) of the Code, *supra.*

(2) *Rex* v. *Rosenstein* (1826), 2 Car. & P. 414.

(3) *Reg.* v. *Carlile* (1845), 1 Cox C. C. 228.

(4) *Rex* v. *Rosenstein, supra.*

on an indictment charging him with causing and procuring obscene books and photographs to be sold and published, and to be sent by post contrary to section 4 of the Post Office (Protection) Act, 1884. The defendant was convicted, and, upon a case reserved, it was held that the conviction was right. (5)

The meaning of "obscene" in S. 207 (a): Rex v. Beaver (1905).—In a case reserved under section 743 [1014] of the Code, by a judge of the County Judge's Criminal Court, the prisoner, a woman, was indicted under section 179 [207 (*a*)], for unlawfully, knowingly, and without lawful justification or excuse, distributing and circulating certain obscene printed matter tending to corrupt morals, contained in a printed paper bearing the title: "To the public; the evil exposed; the plot against Prince Michael revealed" The county judge found the offence proved as charged, and reserved the following questions for the opinion of the Court of Appeal: (1) Is the printed matter complained of obscene within the meaning of section 179 [207 (*a*)] of the Criminal Code? (2) Did the prisoner, without lawful justification or excuse, distribute or circulate such obscene printed matter?

Opinion of Osler, J.A.—Osler, J.A., who had more doubt as to the first point than as to the second, said: "Section 179 [207 (*a*)] of the Act is not aimed merely at libellous publications, nor at those couched in merely coarse, vulgar and offensive language. The word 'obscene' has a great variety of meanings, but its meaning in this section is to be ascertained from the company in which it is found. The section is one of a group forming Part XIII. of the Code, which is headed 'Offences against morality.' With the exceptions mentioned in sec. 177 (*a*) [205 (*a*)], the doing of any indecent act in a public place, 179 (*b*) [207 (*b*)], publicly exhibiting any disgusting object; and 180 (*c*) [209 (*c*)] transmitting by post any letter or circular concerning schemes devised or intended to deceive the public, or for the purpose of obtaining money under false pretences, this part of the Code strikes at conduct involving sexual immorality and indecency, and it is in that sense, in my opinion, that the word is used in sec. 179 [207 (*a*)]. One class of meanings given to it in the Oxford Dictionary, as contrasted with others 'somewhat archaic' and latinisms, is "(2) offensive to modesty or decency; expressing or suggesting unchaste or lustful ideas; impure, indecent, lewd." It is within this class that the word as here used falls. In *United States* v. *Wales,* (6) the

(5) *R.* v. *De Marney* (1907), 1 K. B. 388; 76 L. J. K. B. 210; 71 J. P. 14; 96 L. T. 159; 23 T. L. R. 221; 21 Cox C. C. 371.
(6) (1892), 51 Fed. Rep. 41.

question was very much considered and many authorities are cited. It was held, to quote the head note, that "revised statute, sec. 3893, punishing the mailing of any 'obscene, lewd, or lascivious book,' etc., applied only to matters tending to excite impure and unchaste thoughts, and not to language which was merely coarse, vulgar and indecent." He thought that there were certain references and allusions in the paper which warranted the county judge in concluding that it was a 'document of obscenity' within the meaning of the section, and he would, therefore, affirm the conviction.

Opinion of Maclaren, J.A.—Maclaren, J.A., gave reasons in writing for the same conclusion, referring, on the question as to whether the matter was obscene, to *The Queen* v. *Hicklin* (1868), L. R. 3 Q. B. at p. 371; and, on the second question, to *Sherras* v. *De Rutzen* (1895), 1 Q. B. at p. 921; *Bank of New South Wales* v. *Piper* (1897), A. C. at p. 389, and *Mullins* v. *Collins* (1874), L. R. 9 Q. B. 292. The other members of the court concurred in affirming the conviction. (7) Accusations of adultery against unnamed parties may also constitute obscene matter, where published for gain by a paper in an offensive and indecent way, and to such a degree as to tend to corrupt morals. (*7a*)

Conviction quashed for not setting out obscenity charged.—Upon a motion to quash a summary conviction of the defendant by a police magistrate, "for that he (defendant) did at the town of P., on the tenth day of February, 1894, without lawful excuse or justification, expose to public view an obscene book tending to corrupt public morals, contrary to the Criminal Code," the evidence taken before the magistrate showed that the book in question was one describing certain diseases, and that it was distributed gratis among the citizens of P., by the defendant, in order to assist the sale by him of certain medicines. It was contended, for defendant, that the conviction was bad on its face, because it did not disclose the offence which the defendant had committed, but simply followed the language of section 179 (8) of the Criminal Code, citing *Reg.* v. *Spain* (1889), 18 O. R. 385, and *Reg.* v. *Coulson* (1893), 24 O. R. 246; and that it should not be amended because an offence was not committed of the nature specified in the conviction, the book not being one tending to corrupt public morals, citing *Reg.* v. *Bradlaugh* (1883), 15 Cox C. C. 217. The

(7) *Rex* v. *Beaver* (1905), 9 O. L. R. 418.
(7a) *The King* v. *Macdougall* (1909), 15 C. C. C. 466.
(8) S. 207 (1), *supra*, prior to its amendment by The Criminal Code Amendment Act, 1909.

Divisional Court (Armour, C.J., and Falconbridge, J.), held, that the conviction was bad on its face, and could not now be amended by setting out such parts of the book as might be deemed obscene or tending to corrupt public morals. It was extremely difficult to define what offences came within section 179 [207 (1)] of the Code, and probably different tribunals would come to different conclusions. The conviction was quashed without costs. (9)

In *Reg.* v. *Spain*, referred to *supra*, a summary conviction, under R. S. C. 1886, c. 168, s. 59, alleging, in the words of the statute, that the defendant unlawfully and maliciously committed damage, injury and spoil to and upon the real and personal property of the Long Point Company, was quashed for uncertainty, because it was not alleged what the particular act was which was done by the defendant which constituted such damage, etc., and what the particular nature and quality of the property, real and personal, was in and upon which such damage, etc., was committed.

In *Reg.* v. *Coulson*, referred to *supra*, a conviction under the Ontario Medical Act, R. S. O. 1887, c. 148, s. 45, for practising medicine for hire, was quashed for uncertainty in not specifying the particular act or acts which constituted the practising; (10) and the court refused to amend, and quashed the conviction, where the practising consisted in telling a person which of several patent medicines, sold by the defendant, was suitable to the complaint which the person indicated, and in selling him such medicine. Where a summary conviction, valid on its face, has been returned with the evidence upon which it was made, in obedience to a *certiorari*, the court is not to look at the evidence for the purpose of determining whether it establishes an offence, or even whether there is any evidence to sustain a conviction. But where a conviction for an offence over which a magistrate had jurisdiction is bad on its face, the court is to look at the evidence to determine whether an offence has been committed, and, if so, it should amend the conviction. (1)

It has been held in the United States, that it is not enough to charge the defendant in the indictment with publishing an indecent and obscene newspaper, called *John Donkey*, manifestly designed to corrupt the morals of the youth of said country; but the language charged with being obscene must be sufficiently described to enable the court to judge of its character. (2)

(9) *Reg.* v. *Gibbons* (1894), 14 C. L. T. 503.
(10) Following *Re Donelly* (1869), 20 U. C. C. P. 165; *Reg* v. *Spain*, *supra*; and *Reg.* v. *Somers* (1893), 24 O. R. 244. In the case last named the conviction of the defendant, a cab driver, under the Act for unlawfully exercising the worldly business of his ordinary calling as a cab driver on the Lord's day, was held bad for uncertainty.
(1) *Reg.* v. *Coulson* (1893), 24 O. R. 246.
(2) *The State* v. *Hanson* (1859), 23 Texas, 232.

Posting obscene books, etc.—Then again, by section 209, every one is guilty of an indictable offence and liable to two years' imprisonment, (3) who posts for transmission or delivery by or through the post, (*a*) any obscene or immoral book, pamphlet, newspaper, picture, print, engraving, lithograph, photograph, or any publication, matter or thing of an indecent, immoral or scurrilous character, or (*b*) any letter upon the outside or envelope of which, or any post card or post band or wrapper upon which there are words, devices, matters or things of the character aforesaid, or (*c*) any letter or circular concerning schemes devised or intended to deceive and defraud the public, or for the purpose of obtaining money under false pretences.

Offence complete if posting in Canada.—Upon a charge under sub-section (*c*) of this section, it was held, on demurrer, by the Supreme Court of New Brunswick, (4) that the posting must be in Canada, but that it is immaterial whether the delivery is in or out of Canada. Posting the letter or circular in Canada, for transmission through the post for the purpose alleged, makes the offence complete; and it matters not whether the intention was to deceive and defraud the public here or in the United States. (5) Having regard to the character of the offence and to the fact that all persons have the right to use the post office, whether subjects or foreigners, and that the person to whom a letter is addressed has, upon its being posted, the right to its possession, the word "public" may well mean the general body of people who have the right to use, or do in fact use, the post office either as senders or receivers of letters. (6)

In a prosecution in the Court of Queen's Bench at Montreal, before Wurtele, J., for the publication of an immoral weekly paper known as *Town Topics*, the defendant was convicted and sentenced to one month's imprisonment, and ordered to be bound over to keep the peace and be of good behaviour for a year, or be kept in gaol for that space of time. (7)

When publication for "public good" justified.—It has been said that the publication or exhibition, referred to in section 207 of the Code, may be justified as being for the public good if, in

(3) The offender may also be fined in addition to, or in lieu of, his imprisonment (S. 1035), and may be required to find sureties to be of good behaviour (S. 1058).
(4) *Reg.* v. *McKay, et al.* (1889), 28 N. B. R. 564.
(5) *Per* Tuck, J., at p. 572.
(6) *Per* King, J., at pp. 579-580.
(7) *Reg.* v. *Richard O'Bryan*, Toronto *Globe*, 25th November, 1898.

either case, it is necessary or advantageous to religion or morality, to the administration of justice, (8) the pursuit of science, literature, or art, or other objects of general interest; but that there should be no such justification if the publication is made in such a manner, to such an extent, or under such circumstances, as to exceed what the public good requires in regard to the particular matter published. (9)

What sort of obscene matter is justifiable.—It is difficult to say under what circumstances the publication of obscene matter is justifiable. Many of the classics contain matter which, if inserted in a book or newspaper published for the first time to-day, would constitute the publication an offence, and yet no one thinks of prosecuting the publishers of such matter; (10) and so with certain kinds of pictures and sculptures. There is no doubt, also, that many passages and illustrations in medical, surgical, and scientific works, which are necessarily lawful when confined to such works, would be unlawful if circulated broadcast among the people. Mr. Justice Stephen, in discussing this point, says: "There are many authors—*e.g.*, Aristophanes, Swift, Defoe, Rabelais, Boccacio, Chaucer—whose works can be published in a whole without the possibility of a prosecution, from whom, however, extracts could be made which, if put together, could not be published with impunity." And, as to scientific publications, he says that "the line between obscenity and purity may be said to trace itself, as is also the case in reference to the administration of justice. It may be more difficult to draw the line in reference to works of art, because it undoubtedly is part of the aim of art to appeal to emotions connected with sexual passion. (1) Practically, I do not think any difficulty could ever arise, or has ever arisen. The difference between naked figures, which pure-minded men and women could criticize without the slightest sense of impropriety, and figures for the exhibition of which ignominious punishment would be the only appropriate consequence, makes itself felt at once, though it would be difficult to define it." (2) The article of the English Draft Code on the subject, corresponding in part to

(8) On this point it should be observed that *Steele* v. *Brannan*, *supra*, is authority for the statement that, if a full report of judicial proceedings would contain obscene matter, such matter must be omitted, or the publisher will commit an offence.

(9) Steph. Dig. C. L., 3rd ed., Art. 172. See the illustrations and foot notes to this article. One of the illustrations is based upon *Reg.* v. *Hicklin*, *supra*.

(10) See opinion of Minister of Justice of Canada in *The King* v. *Skill et al.*, *post*, p. 40 *et seq.*

(1) See remarks of Riddell, J., in *Rex* v. *Graf*, *post*, p. 39.

(2) Steph. Dig. C. L., 3rd ed., note to Art. 172.

our own, is said by its authors to express the existing law, only in a more definite form than before. They do not, however, think it desirable to attempt any definition of obscene libel other than that conveyed by the expression itself.

Tendency of alleged obscenity is the test.—It is difficult also to lay down a precise definition of obscenity, but one test which has been given (3) is this: whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands the matter is likely to fall. This was the test adopted by Benedict, J., in his charge to the jury in *United States* v. *Bennette*. (4) It was there held that, under the federal statute prohibiting the mailing of obscene publications, it was for the jury to determine whether a publication was obscene.

Conditions of test of obscenity.—This test, which has been accepted as a fair one, imposes two conditions, namely, (1) that the obscenity charged must have a tendency to corrupt; and (2) that it must be published in such a way as to be likely to reach persons liable to be corrupted. Were it not for this latter condition works of the class already mentioned, which are published for medical, surgical and scientific purposes, and not usually in such a way as to be harmful to those likely to be injured by them, would be in the proscribed list. The circumstances of the publication in question, its object or purpose, the medium through which it is made, the extent of its circulation, the price at which it may be procured, etc., are all proper to be considered in determining its innocence or criminality. That which under one set of circumstances might be regarded as innocent, under other circumstances might be held to be criminal. As already noticed, (5) the indiscriminate publication of a pamphlet, half of which related to controversial questions, which were not obscene, but the other half of which was obscene, as relating to impure acts and words, was a crime, and proper to be prosecuted as such, although the publisher

(3) *Per* Cockburn, C. J., in *Reg.* v. *Hicklin* (1868), L. R. 3 Q. B. 360; 37 L. J. M. C. 89; 16 W. R. 801; 18 L. T. 398; 11 Cox C. C. 19. Other cases relating to obscene libels are: *Rose* v. *Wilkes* (1770), 4 Burr. 2527; 2 Wils. 151; *Reg.* v. *Carlile* (1845), 1 Cox C. C. 229; *Steele* v. *Brannan*, *supra*; *Sir Charles Sedley's Case* (1663) Keb. 720; 2 Str. 790; *Rex* v. *Crunden* (1809), 2 Camp. 89; *Reg* v. *Watson* (1847), 2 Cox C. C. 376; *Reg.* v. *Holmes* (1853), 1 Dears. C. C. 207. See, also, *Reg.* v. *Adams* (1888), 16 Cox C. C. 544, which was a prosecution of the writer of a letter containing indecent proposals to a young woman. The letter was not received by her but by one of her relatives, and was held to be a defamatory libel, calculated to provoke a breach of the peace.

(4) (1879), 6 Blatch. C. C. 338.

(5) In *Reg.* v. *Hicklin* and *Steele* v. *Brannan*, *supra*.

did not sell the pamphlet for purposes of gain, nor to prejudice good morals—although the indiscriminate sale of it was calculated to have that effect—but sold it as a member of a politico-religious society to promote the objects of that society, and to expose what he deemed to be the errors of the Church of Rome, and particularly the immorality of the confessional. (6)

Must have a corrupt tendency and intent.—It is an essential part of the offence of publishing an obscene libel that it should have a tendency to corrupt, and should have been published with the intention of corrupting, the public morals, and the indictment must contain an averment to this effect. (7) In *R.* v. *Thomson*, (8) which was a prosecution for publishing the *Heptameron*, the jury were directed to consider the book as a whole, as well as the extracts referred to in the particulars, and to consider the circumstances of the publication, and the nature of the general business of the defendant, before deciding whether the publication was with "intent to corrupt" public morals. An indictment for publishing a libel, which was bad as a charge of publishing a defamatory libel for not setting out the passages relied upon, (9) contained an averment that the defendant "unlawfully . . . did publish . . . a . . . libel . . . in the form of a document . . . which said document . . . contains divers . . . obscene . . . matters and things." The judge at the trial held that this amounted to an indictment for an obscene libel, and the prisoner was convicted. Upon a case reserved it was held, that, although it would have been better for the indictment to have followed the old forms, and to have averred that the tendency of the obscene matter was to corrupt the public morals, and that the libel had been published with that intent, the conviction might, under the circumstances, be upheld. It was also held, that it was not necessary, in order to satisfy the provisions of section 7 of the Law of Libel Amendment Act, 1888, (10)—which provides that the obscene matter need not be set out in the indictment, but that it shall be sufficient to deposit the document "containing the alleged libel with the indictment or other judicial proceedings"—that the incriminated document should be handed in

(6) See, also, the following United States cases: *Commonwealth* v. *Holmes*, 17 Mass. 336; *Knowles* v. *State*, 3 Day's Cas. 103; *Commonwealth* v. *Sharpless*, 2 Serg. & Rawle 91; *People* v. *Muller*, 96 N. F. 409; 39 Hem. 207.

(7) Archbold's Cr. Pl., 23rd ed., 1190. But see *The King* v. *Barraclough*, *infra*.

(8) (1900), 64 J. P. 456.

(9) See *Bradlaugh* v. *Reg.* (1878), 3 Q. B. D. 607. Law since amended.

(10) 51-52 Vict., c. 64 (Imp.).

with the bill of indictment, if it was already in the custody of the clerk of assize as an exhibit attached to the depositions. (1)

Rex v. Graf (1909).—In the recent Ontario case of *Rex* v. *Graf*, (2) the defendant was summarily tried and convicted by one of the police magistrates of the city of Toronto upon a charge of selling obscene books and pictures. Upon a return of *habeas corpus* it was objected that, before the actual trial of the case, the magistrate had looked at the books and pictures found in the defendant's possession, and had thereby necessarily become prejudiced against the defendant. Riddell, J., said (at p. 243): "The magistrate must satisfy himself that a case has been made out before issuing a summons or warrant; to do that he may need to look at the pictures, etc., which it is alleged are obscene. It is perfectly notorious that many of the best people in the world look upon that as obscene which others, equally good but of different training or temperament, consider not only harmless, but even a thing of beauty: see *Commonwealth* v. *Buckley* (1909), 86 N. E. Repr. 910, for an instance. It is not safe for any magistrate to take the opinion of some persons—even some policemen—as to what is and what is not obscene. And what will 'tend to corrupt morals' is very much a matter of individual opinion and judgment. Thousands of the best people would suffer persecution rather than look at a theatrical performance or a horse-race, while both are held harmless by many—some of whom assert that the former at least may be and often is edifying and of great moral value. The police magistrate might well, then, look at these productions—and if he could do so before, he might after the prisoner was in custody, or at any time."

In *The Commonwealth* v. *Buckley* (*supra*), the defendant was convicted of selling a printed book, entitled *Three Weeks*, alleged to contain "obscene, indecent and impure language manifestly tending to the corruption of the morals of youth." In overruling an appeal by the defendant on his exceptions taken in the court below, Hammond, J., for the Supreme Court of Massachusetts, said: "A reader may be so interested in the development of the character of a woman—no matter how wanton—as a merely psychological study as to read such a book as this without a single impure or unworthy thought. And it may be that the author of this book was in full sympathy with such a state of mind when she wrote it and sent it forth to the reading public. It may be, also, that the

(1) *Rex* v. *Barraclough* (1906), 1 K. B. 201; 75 L. J. K. B. 77; 70 J. P. 14; 54 W. R. 147; 94 L. T. 111; 22 T. L. R. 41; 21 Cox C. C. 91.
(2) (1909), 19 O. L. R. 238.

literary style of the book is such that many a reader finds that to be the most attractive feature; and the thinly veiled allusions to an intense desire for sexual intercourse, and to the arts of seduction leading to it and exciting it, may be unheeded by him. But such an author cannot expect that the reading public as a whole will so read her production. Descriptions of seductive actions and of highly wrought sexual passion, even when sanctified by what the author has called 'love,' are very likely to be seen in another light tending towards the obscene and impure."

The court held, that it was a question for the jury whether such matter was so indecent as to manifestly tend to the corruption of the morals of youth.

Rex v. Skill et al. (1909).—At the General Sessions of the Peace at Toronto, in the month of December, 1909, two persons, named L. J. Skill and J. C. King, were indicted under section 207 (*supra*) of the Code as amended, for that they "at Toronto in the month of June, 1909, knowingly, and without lawful justification or excuse, did sell, distribute and circulate, certain obscene books tending to corrupt morals, contrary to the provisions of the Criminal Code." There were two other indictments against the accused individually for the same offence. They pleaded guilty to all of the indictments, and were sentenced each to one year's imprisonment in the provincial central prison, but were subsequently pardoned and released after serving two weeks of their term. The executive clemency thus extended was made the subject of criticism in the newspaper press, and also of inquiry of the Minister of Justice (3) in the House of Commons during the parliamentary session of 1909-10.

Opinion of the Minister of Justice.—In his first explanation (April 15th, 1910) of the advice which he had seen fit to tender His Excellency the Governor-General, the Minister stated, in effect, that the offence charged was the circulating of obscene books tending to corrupt morals, and the question was, whether, upon the admitted facts, the offence really existed. So far as appeared by the papers or any report received up to that time in the matter, the prisoners were Toronto booksellers, and among the books sold by them were English translations of Balzac and Brantôme, French writers, and of Petronius and other Latin authors; and undoubtedly in these books, which are classics, and were to be found on the shelves of the parliamentary library, or of any other large library, there were passages, just as there were in that best of books that

(3) Hon. A. B. Aylesworth, M P.

we all revered, which, if they were singled out or collected and published together, might properly be described by the word indecent. As to the application for clemency he wished to say that he had received a large number of confidential letters urging clemency from persons of undoubted respectability and standing in Toronto, who were acquainted with the prisoners and knew the style of business that they had been carrying on. He had also discussed the case with the Attorney-General of Ontario, who had written him a candid frank letter expressing his own views and his own recommendation in the matter. He (the Minister) assumed the whole responsibility for the advice which he had given to His Excellency, because, in his judgment as a lawyer, the prisoners were not guilty of the offence with which they were charged. (4)

On a subsequent occasion (April 28th, 1910), when the matter was again brought up in the House of Commons, the Minister of Justice said that he had taken the course which he thought was right, and which he still thought was right; and that he placed no responsibility for his action on any of the persons who had petitioned for clemency, or who had written to him on the subject. It was upon his advice and responsibility alone that His Excellency had exercised the prerogative of pardon. "The instructions to His Excellency from His Majesty himself, under his own hand, are that, in the exercise of the prerogative of pardon, he is to be guided by the advice of his Minister, not by the advice of his Council; and His Excellency acted in this matter upon my sole advice, without my having conferred with any of my colleagues, without there being the slightest responsibility upon the First Minister, or upon any other member of the Cabinet." If he made a mistake it was an error of judgment. He based his action simply and solely upon the fact that as a lawyer he was of opinion that those men by selling the books in question, which was admitted, had not committed the offence with which they were charged. He would say nothing as to whether they had committed some other offence; that did not arise for consideration. In addressing the House on a former occasion, he had referred to certain authors of the books sold by the accused as classics, but he did not include by that term those of the modern French school; as to these he could express no opinion.

The question here was upon the undisputed facts, whether or not the books in evidence, which were marked by the officer of the court and sent to him as Minister, were books which properly fell within the meaning of the word "obscene" as used in the particular

(4) *Hansard*, vol. 43, pp. 7226-7227.

section of the Criminal Code upon which the charge was founded. Having examined the books in question, he had simply to say that they they did not constitute such literature as he understood would be covered by the term "obscene" as a matter of law. He looked upon it entirely as a lawyer's question—whether the admitted sale of those books did or did not constitute the particular offence which was described by that section of the Act, and, in his opinion as a lawyer, uninfluenced by any other consideration, it did not. If he had made a mistake in the matter it was just like other mistakes that he had made in matters of law, in coming to a conclusion which, upon a legal question, was in truth erroneous, though honestly believed to be correct. (5)

The pleadings on charges of obscene libels.—The English Law of Libel Amendment Act, 1888, (6) contains some provisions in regard to obscene libels which have suggested articles in the Code affecting the mode of pleading every species of criminal libel in this country. Section 7 of the English Act provides that it shall not be necessary to set out in any indictment, or other judicial proceeding instituted against the publisher of any obscene libel, the obscene passages, but it shall be sufficient to deposit the book, newspaper or other documents containing the alleged libel with the indictment or other judicial proceedings, together with particulars showing precisely, by reference to pages, columns and lines, in what part of the book, newspaper, or other documents, the alleged libel is to be found, and such particulars shall be deemed to form part of the record, and all proceedings may be taken thereon as though the passage complained of had been set out in the indictment or judicial proceeding. The British Columbia Law of Defamation Amendment Act (7) contains a clause based on this section of the English Act, and to the same effect, with respect to obscene matter in pleadings in actions for libel. The clause in the English statute was designed, *inter alia*, to overcome objections presented in cases like *Bradlaugh and Besant* v. *The Queen*, (8) where the conviction of the appellants for publishing an obscene book was quashed by the

(5) *Hansard*, vol. 43, pp. 8526-8530, where the statement of the Minister of Justice is fully reported, the above brief summary covering the main points. The second statement on April 28th, 1910, was made in reply to a speech of a member of the House who, in the course of his remarks, read an article from the Toronto *Globe* strongly criticizing the character of the matter contained in the books in question and the recommendation of pardon.

(6) 51-52 Vict. c. 64, passed 24 December, 1888, and amending the Newspaper Libel and Registration Act, 1881 (44-45 Vict. c. 60), passed 27 August, 1881.

(7) R. S. B. C. 1897, c. 120, s. 14.

(8) (1878) (C. A.) 3 Q. B. D. 607: 48 L. J. M. C. 5: 26 W. R. 410: 38 L. T. 118: 14 Cox C. C. 68.

Court of Crown Cases reserved, on the ground that the indictment described the book by its title only, without setting out the passages charged as obscene, and that the defect was not cured by the verdict. The defendants were prosecuted for the publication of a work called "Fruits of Philosophy." The jury found that the book was calculated to deprave public morals, but exonerated the defendants from all corrupt motives in publishing it.

Counts for and particulars of obscene publications.—The object aimed at by the English Act is effected under the Code by a variety of provisions. No count for publishing an obscene libel, or for selling or exhibiting an obscene book, pamphlet, newspaper, or other printed or written matter, shall be deemed insufficient on the ground that it does not set out the words thereof. (9) But the court may, if satisfied that it is necessary for a fair trial, order that the prosecutor shall furnish a particular stating what passages in any book, pamphlet, newspaper, or other printing or writing, are relied on in support of a charge of selling or exhibiting an obscene book, pamphlet, newspaper, printing or writing; and further describing any document or words the subject of a charge. (10)

When the particular is delivered, a copy shall be given without charge to the accused or his solicitor, and it shall be entered in the record, and the trial shall proceed in all respects as if the indictment had been amended in conformity with such particular. (1)

In determining whether a particular is required or not, and whether a defect in the indictment is material to the substantial justice of the case or not, the court may have regard to the depositions. (2)

Judge's order initiating prosecution.—In England no criminal prosecution can be commenced against the proprietor, publisher, editor, or any person responsible for the publication of a newspaper, for any libel published therein, without the order of a judge at chambers being first obtained. (3)

(9) S. 861.
(10) S. 859 (*d*) (*e*).
(1) S. 860 (1).
(2) *Ibid.* (2).
(3) Law of Libel Amendment Act, 1888, (51-52 Vict., c. 64, s. 8).

CHAPTER IV

Seditious Libels.

Enactments against seditious offences.—A seditious libel is defined in that part of the Code (1) which relates to seditious offences, and to unlawful oaths favouring seditious and other unlawful objects. (2) The substance of some of these enactments was originally derived from certain statutes (3) passed in consequence of sedition and mutiny having been promoted by persons binding themselves together under the obligation of an oath. They are taken in their present form from the first four sections of chapter 10 of the Consolidated Statutes of Lower Canada, of which sections 5, 6, 7, 8 and 9 remain unrepealed.

Seditious libel defined.—The definition of a seditious libel is contained in the section which defines seditious offences generally. These offences are made to consist in a seditious intention. Seditious words are words expressive of a seditious intention; (4) a seditious libel is a libel expressive of a seditious intention; (5) a seditious conspiracy is an agreement between two or more persons to carry into execution a seditious intention. (6)

Phillimore, J., defined a seditious libel as one that tends to disturb the government of England; therefore a document published in England calculated to disturb the government of some foreign country is not a seditious libel, nor is it punishable as a libel. (7)

Seditious words.—Seditious words spoken at an unlawful meeting or assembly may be the subject of indictment. (8) And every person is guilty of the common law misdemeanour of seditious libel if, with seditious intention, he either speaks and publishes any words or publishes a libel. The libel may be in writing, print, or may be contained in a drawing or engraving or painted picture or sculpture, or any permanent representation. (9).

(1) Part 2. S. 132 (2).
(2) See SS. 129-134.
(3) 52 Geo. III., c. 104, and 37 Geo. III., c. 123 (Imp.).
(4) S. 132 (1).
(5) *Ibid.* (2).
(6) *Ibid.* (3).
(7) *Rex* v. *Antonelli et al.* (1905), 70 J. P. 4.
(8) *Reg.* v. *Vincent et al.* (1839), 9 C. & P. 91.
(9) *R.* v. *Sullivan* (1868), 11 Cox C. C. 44, at p. 55.

Where in a prosecution for uttering seditious words with intent to incite to riot, it is proved that, previously to the happening of the riot, seditious words were spoken by the defendants, it is a question for the jury whether or not such rioting was directly or indirectly attributable to the seditious words so proved to have been spoken. A meeting lawfully convened may become an unlawful meeting, if, during its course, seditious words are spoken of such a nature as to produce a breach of the peace. And those who do anything to assist the speakers in producing upon the audience the natural effect of their words, will be guilty of uttering seditious words as well as those who spoke the words. (10) Every man has a right to give every public matter a candid, full, and free discussion; but although the people have a right to discuss any grievances they have to complain of, they must not do it in a way to excite tumult; and if a party publishes a paper on any such matter, and it contains no more than a calm and quiet discussion, allowing something for a little feeling in men's minds, that will be no libel; but if the paper goes beyond that, and is calculated to excite tumult, it is a libel. (1) And if a paper published by a defendant has a direct tendency to cause unlawful meetings and disturbances, and to lead to a violation of the laws, it is a seditious libel, and, with respect to the intent, every one must be taken to intend the natural consequences of what he has done. (2) In short, sedition embraces everything, whether by word, deed, or writing, which is calculated to disturb the tranquillity of the state, and lead ignorant persons to endeavour to subvert the government and the laws of the Empire. (3) But with respect to seditious libel, the mere publication of the libel does not in itself, as in most cases, constitute the crime. The jury must consider the intention of the accused, and must find it to be seditious.

Seditious intention defined negatively.—The sections in the Code as to seditious offences are silent, except in a negative way, as to what is a seditious intention. No one, section 133 declares, shall be deemed to have a seditious intention only because he intends, in good faith, (*a*) to show that His Majesty has been misled or mistaken in his measures; or (*b*) to point out errors or defects in the government or constitution of the United Kingdom or of any part of it, or of Canada or of any Province thereof, or in either House of Parliament of the United Kingdom or of Canada, or in any

(10) *Per* Cave, J., in *Reg.* v. *Burns et al.* (1886), 16 Cox C. C. 355.
(1) *Reg.* v. *Collins* (1839), 9 C. & P. 456.
(2) *Reg.* v. *Lovett* (1839), 9 C. & P. 462, 466, *per* Littledale, J.; *R.* v. *Sullivan*, *infra*, at p. 58; *R.* v. *Horne* (1777), 20 St. Tr. 651, 762.
(3) *Reg.* v. *Burns et al.*, *supra*; *Reg.* v. *Sullivan* (1868), 11 Cox C. C. 44.

Legislature, or in the administration of justice; or to excite His Majesty's subjects to attempt to procure, by lawful means, the alteration of any matter in the state; or (*c*) to point out, in order to their removal, matters which are producing, or have a tendency to produce, feelings of hatred and ill-will between different classes of His Majesty's subjects.

The definition of a seditious intention in Stephen's Digest of the Criminal Law, Article 93, paragraph 2, page 65, is substantially the same. In the illustrative case, *R.* v. *Lambert and Perry*, (5) the law relating to seditious libels, which attack the Sovereign personally, is fully stated by Lord Ellenborough, C.J., in his summing up to the jury. See, also, *Reg.* v. *Vincent* (1839), 9 C. & P. 91. Lambert and Perry were the proprietors of the *Morning Chronicle*, and were prosecuted for the following alleged libel: "What a crowd of blessings rush upon one's mind that might be bestowed upon the country in the event of a total change of system! Of all monarchs, indeed, since the Restoration, the successor of George III will have the finest opportunity of becoming nobly popular." As to the difference between high treason and sedition, see 1 East, P. C. 48.

Seditious intention defined in English Draft Code.—The English Draft Code, on the other hand, defines a seditious intention as an intention to bring into hatred or contempt or to excite disaffection against, the person of her Majesty, or the government and constitution of the United Kingdom, or of any part of it as by law established, or either House of Parliament, or the administration of justice; or to excite her Majesty's subjects to attempt to procure, otherwise than by lawful means, the alteration of any matter in Church or State by law established. (6)

Opinion of Minister of Justice.—Referring to sections 132 and 133 (*supra*) of the Code, the late Sir John Thompson, who, as Minister of Justice, introduced the bill in the House of Commons, said: "That covers the case of every man in the country who seeks even to change entirely the constitution or the administration of the country, or of any of its departments, by any lawful means whatever that can be devised. The one thing which is forbidden by it is the treasonable attempt, not against the person of the Sovereign, but to excite her subjects to rebellion." (7) The section of the English Draft Code, which gives the above definition, also con-

(5) (1810), 2 Camp. 398.
(6) See remarks *infra* as to a suggested addition.
(7) *Hansard*, vol. 2, Sess. 1892, p. 2830.

tains the corresponding clause in our own Code. (8) The English Commissioners, in their report accompanying the Draft Code, state that their definition is as exact an application as they can make of the existing law. They cite authorities in support of their view, (9) and add that, on so very delicate a subject, they do not undertake to suggest any alteration of the law.

A suggested addition to definition of seditious intention.—The words "or to incite any person to commit any crime in disturbance of the peace," are inserted after the definition (*supra*) in the English Draft Code of a seditious intention, which, otherwise substantially the same, is given in Stephen's Digest of the Criminal Law. (10) The learned author says: "I do not think they enlarge the scope, but they make it more explicit. They were intended to meet such cases as those of Most and Mertens, tried in 1881 and 1882, for publishing articles in the *Freiheit* applauding the assassination of the Emperor of Russia, and that of Lord Frederick Cavendish and Mr. Burke at Dublin. See, also, *Reg.* v. *Collins* (1839), 9 C. & P. 456, and judgment of Littledale, J., 460."

Opinion of Prof. Dicey.—Referring to the definition of seditious intention in Stephen's Digest, Professor Dicey says: "The law, it is true, permits the publication of statements meant only to show that the Crown has been misled, or that the government has committed errors, or to point out defects in the government or the constitution with a view to their legal remedy, or with a view to recommend alterations in Church or State by legal means, and, in short, sanctions criticism on public affairs, which is *bonâ fide* intended to recommend the reform of existing institutions by legal means. But any one will see at once that the legal definition of a seditious libel might easily be so used as to check a great deal of what is ordinarily considered allowable discussion, and would, if rigidly enforced, be inconsistent with prevailing forms of political agitation." (1)

Reg. v. Most (1881).—In *Reg.* v. *Most*, above referred to, the defendant was indicted, under 24-25 Vict. c. 100, s. 4 (Imp.), for the publication of an article in the *Freiheit* newspaper published

(8) S. 133.
(9) 60 Geo. III. and 1 Geo. IV., c. 8; *O'Connell* v. *Reg.* (1844), 11 Cl. & F. 155, 234; *R.* v. *Lambert and Perry* (1810), 2 Camp. 398; *Reg.* v. *Vincent* (1839), 9 C. & P. 91. See, also, as to sections 132 and 133 in the Code: *R.* v. *Frost*, 22 St. Tr. 471; *R.* v. *Winterbotham*, 22 St. Tr. 823; *R.* v. *Binns*, 26 St. Tr. 595; *R.* v. *Pigott* (1868), 11 Cox C. C. 44; *R.* v. *Burns et al.* (1886), 16 Cox C. C. 355.
(10) 3rd ed. Art. 93, par. 1, p. 65.
(1) The Law of the Constitution, 4th ed., p. 232.

in London, in the German language, exulting in the murder of the Emperor of Russia, and commending it as an example to revolutionists. The jury were directed that if they thought by the publication of the article in question, the defendant did intend to, and did, encourage or endeavour to persuade any person to murder any other person, whether a subject of her Majesty or not, and whether within the Queen's dominions or not, and that such encouragement and endeavouring to persuade was the natural and reasonable effect of the article, they should find the defendant guilty; and such was held to be a right direction. The defendant was convicted and sentenced to imprisonment.

Reg. v. Mertens (1882).—In *Reg.* v. *Mertens*, the defendant was indicted, under the same statute, for printing and publishing an article in the same newspaper eulogizing the murder of Lord Cavendish and Mr. Burke. The defendant was a compositor who had set up the type of the paper, although there was also evidence of his having taken part in other ways in the publication of the paper. The jury were directed by the trial judge (Stephen, J.), that if they thought the defendant set up the type mechanically, and without any intelligent perception of the meaning of what he was printing, he ought to be acquitted, but that if he knowingly printed matter which they considered libellous, he ought to be convicted. The defendant was convicted and punished on this direction. (2)

Opinion of Fitzgerald, J., in Reg. v. Sullivan and Reg. v. Pigott (1868).—The law on the subject of sedition was thus laid down by Fitzgerald, J., (3) in his charge to the grand jury in *Reg.* v. *Sullivan* (4) and *Reg.* v. *Pigott*, (5) in some cases in the Irish courts: "Sedition is a crime against society nearly allied to that of treason, and it frequently precedes treason by a short interval. Sedition is in itself a comprehensive term, and it embraces all those practices whether by word, deed, or writing, which are calculated to disturb the tranquillity of the State and lead ignorant persons to endeavour to subvert the government and the laws of the empire. The objects of sedition generally are, to induce discontent and insurrection, to stir up opposition to the government, and to bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion. Sedition has been described as disloyalty in action; and the

(2) Stephen's Hist. C. L., vol. 2, p. 362, note 1.
(3) Afterwards one of the Lords of Appeal in Ordinary, appointed under the Appellate Jurisdiction Act, 1876.
(4) (1868), 11 Cox C. C. 51.
(5) (1868), 11 Cox C. C. 60; Ir. State Trials, 1868.

law considers as sedition all those practices which have for their object to excite discontent or disaffection, to create public disturbance, or to lead to civil war; to bring into hatred or contempt the Sovereign or the government, the laws or constitution of the realm; and, generally, all endeavours to promote public disorder."

This statement of the law was subsequently adopted and followed by Cave, J. (6)

Seditious intention under the Code.—The Canadian Code, as originally introduced, contained a clause defining a seditious intention in terms similar to the English Draft Code; but the criticism which it evoked in the course of a lengthy discussion led to its excision from the bill, and to the definition being left to the common law. This would have given to the intent of a seditious libel the usual legal meaning, namely, that every person is generally deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he conducts himself. (7) But in the revision of the Code, (8) seditious intention was defined as already stated in section 133 (*supra*).

The essence of a seditious libel.—The essence of a seditious libel would seem to be nothing short of direct incitement to disorder and violence. (9) So that if a paper published by the defendant has a direct tendency to cause unlawful meetings and disturbances, and to lead to a violation of the laws, it is a seditious libel: and, with respect to the intent, every one must be taken to intend the natural consequences of what he has done. (10) The intention alleged is to be collected from the paper itself, unless explained by the mode of publication or other circumstances. It is a material matter for the consideration of the jury, and is particularly within their province. If it appears that the contents of the paper were likely to excite sedition and disaffection, the defendant must be presumed to have intended that which his act was likely to produce. (1) The document containing an alleged seditious libel must be considered as a whole; if it is contained in a newspaper, the defendant is entitled to have read in evidence other passages in the same newspaper tending to show his intention in publishing the specific para

(6) In *Reg.* v. *Burns et al.* (1886), 16 Cox C. C. 355.
(7) *R.* v. *Burdett* (1820), 4 B. & Ald. 95; *R.* v. *Harvey* (1823), 2 B. & C. 257; Stephen's Digest Cr. L., 3rd ed., Art. 94, p. 66.
(8) R. S. C. 1906, c. 146.
(9) Steph. Hist. C. L., vol. 2, p. 375
(10) *Per* Littledale, J., in *Reg.* v. *Lovett* (1839), 9 C. & P. 462. See, also, *R.* v. *Richard Carlile* (1819), 4 C. & P. 417; St. Tr. 2 N. S. 464.
(1) *R.* v. *Burdett* (1820), 4 B. & Ald. 95; 22 R. R. 539.

graph complained of. (2) On the trial of Horne Tooke for high treason passages from his writings some years previously were allowed by Eyre, C.J., to be read on the prisoner's behalf to show his political sentiments; (3) but Lord Ellenborough, C.J., apparently doubted whether that evidence had been properly admitted. If the words used, however defamatory, were not spoken with a seditious intention, the defendant is not guilty, such an intention being of the essence of the offence; but the character of the words may form irresistible evidence of the nature of the intention. (4) In *R.* v. *Hunt et al.*, (5) the defendants were charged, in a criminal information, with publishing in the *Examiner* newspaper a libel tending to create disaffection in the army. "The question for you to try," said Lord Ellenborough to the jury, "is, whether the publication has fairly the tendency imputed to it. If it has that tendency, the persons must be punished who have published it intending to produce that effect. If it shall appear to you that such is the obvious tendency of the paper which is in evidence, then what it is incumbent on the prosecutor to prove will have been made out."

In *Reg.* v. *McHugh* (*supra*), the defendant, Patrick A. McHugh, member of Parliament for the North Division of Leitrim, and the publisher of *The Sligo Champion*, was convicted of seditious libel and sentenced by O'Brien, L.C.J., to six months' imprisonment. It appeared that, at the Connaught Winter Assizes, in 1899, two men, named Muffeny and Maguire, were put on trial before Mr. Justice Andrews, in county Sligo, on a charge of conspiracy to compel by intimidation a man named Hughes to surrender a certain farm. They were found guilty and sentenced to six months' imprisonment. The defendant published in his newspaper a report of a speech in which it was alleged that Muffeny and Maguire were found guilty by a packed jury, that the members of the jury were not worthy of the respect, patronage or friendship of their neighbours, and that they should be taught a lesson in each district. In a later issue of the paper the defendant published a list of the names of the jurors, and they were said to have done the bidding of Dublin Castle.

The Lord Chief Justice said that these names were plainly published that the jurors might be boycotted, and continue to be objects of opprobrium and hatred. A public journalist had, and undoubtedly ought to have, a wide privilege in commenting

(2) *R.* v. *Lambert* (1810), 2 Camp. 398.
(3) *R.* v. *Horne Tooke* (1794), 25 St. Tr. 1, 321, 344, 361.
(4) *R.* v. *McHugh* (1901), 2 Ir. R. 569, 587.
(5) (1811), 31 How. St. Tr. 408.

fully, candidly and freely upon the proceedings of a court of justice, but, under the pretence of complaining that the right of the Crown to direct jurors to stand by had been oppressively exercised, he must not impute criminal misconduct to jurors, and endeavour to terrify them into a verdict of acquittal, and thus frustrate the law and procure immunity for crime. The punishment he imposed appeared to him, having regard to the character of the libels, to be a lenient one, but it should be remembered that this was the first sentence that for many years past had been imposed in Ireland for seditious libel.

Evidence of publication of seditious libel.—Evidence of the defendants having published other copies of the same libel, (6) or other libels, (7) provided they expressly refer to the subject of the libel set out in the indictment, (8) is receivable in order to prove the malicious or seditious intent. (9) If the manuscript of a seditious libel is proved to be in the handwriting of the accused, and it is also proved that the same libel was in fact published, this is *prima facie* evidence for the jury of a publication by the accused, though no evidence is adduced that he directed the publication. (10) To prove that the publication was with an unlawful intent, or was not accidental, evidence of the publication of other libels is admissible, provided they expressly refer to the subject matter of the libel which is charged in the indictment. (1) In this last cited case evidence was admitted by Lord Kenyon, C.J., to prove the fact of publication, and that the accused was the author of a libel; but see cases *infra* in connection with this ruling. (2) It is essential that so much of the words alleged be proved at the trial as will support the charge of sedition, but it is immaterial that a portion is unproved, if what is proved substantially constitutes sedition. (3) The whole of the writing or speech need not be set out in the indictment, and if any part of it varied or controlled the sense of the matter alleged to be seditious, the onus is upon the accused to show it. (4)

(6) *Plunkett* v. *Cobbett* (1804), 5 Esp. 136.
(7) *R.* v. *Pearce* (1791), Peake 106.
(8) *Finnerty* v. *Tipper* (1809), 2 Camp. 72.
(9) See *Chubb* v. *Westley* (1834), 6 C. & P. 436.
(10) *R.* v. *Lovett* (1839), 9 C. & P. 462. See, also, chapter on "Publication."
(1) *R.* v. *Pearce* (1791), Peake 75.
(2) The cases referred to *supra* are *Finnerty* v. *Tipper*, *Chubb* v. *Westley* and *Plunkett* v. *Cobbett*, *supra*; *Pearson* v. *Lemaitre* (1843), 5 M. & G. 700, 719, 720.
(3) *R.* v. *Fussell* (1848), 3 Cox C. C. 291, 294.
(4) *Re Crowe* (1848), 3 Cox C. C. 123.

The jury sole judges.—The jury must determine the whole question, whether the publications charged in the indictment are or are not seditious libels; and they are the sole judges of the guilt or innocence of the defendant. If they find that the publications in question are libels, then they must find whether they were published with the intent alleged in the indictment. (5) And this, notwithstanding that the House of Commons has resolved it to be a malicious, scandalous and seditious libel, tending to create jealousies and divisions among Her Majesty's subjects, and to alienate the affections of the people from the constitution. (6) The defendant, said Lord Kenyon, C.J., in a case of this sort, is not to be crushed with the name of his prosecutor, however great the name might be; this was not the first prosecution commenced under the directions of the House of Commons which had failed. In *The King* v. *Stockdale* the House of Commons were also the prosecutors, but the defendant in that case was not weighed down by the weight of the prosecution, nor did the jury hold themselves bound to find the publication a libel, because the House of Commons had noted it to be such. The jury is to consider whether the defendant published it with a criminal intent or not. The jury in that case (*Rex* v. *Reeves*) returned a verdict of not guilty. And so they did in *Rex* v *Stockdale*, (7) which was the case of a criminal information filed against the defendant, in accordance with a vote of the House of Commons, for publishing a review of the articles of impeachment against Warren Hastings.

Criminal act and intent must concur.—To constitute the crime of seditious libel the criminal act and the criminal intent should concur. (8) If the jury come to the conclusion that the defendant published the articles in question, that the true meaning has been given to them by the innuendoes, and that they are seditious libels, published with the intention imputed to them, then they have all the elements which could warrant them in bringing in a verdict of guilty. (9)

Bona fide intentions not seditious.—There can be no seditious intention under the Code, where the defendant "intends, in good faith," to do the various things referred to in the section. (10)

(5) *Reg.* v. *Sullivan* (1868), 11 Cox C. C. 51.
(6) *Rex* v. *Reeves* (1796), 2 Peake's N. P. Cases, 84, 86, 87; 4 R. R. 891; 26 Howell's St. Tr. 530.
(7) (1789) 22 Howell's St. Tr. 238.
(8) *Per* Fitzgerald, J., in *Reg.* v. *Sullivan* (1868), 11 Cox C. C. 51; *per* Deasy, B., in *Reg.* v. *Pigott* (1868), same vol., p. 60.
(9) *Per* Fitzgerald, J., in *Reg.* v. *Sullivan*, *supra*, at p. 52.
(10) S. 133.

Good faith, or *bonâ fides*, is simply an equivalent for "honestly." The correct province of the phrase is to qualify things or actions that have relation to the mind or motive of the individual; and it has no meaning when joined to things or actions common to all mankind, though sometimes it is used in a figurative, but inaccurate, sense. A fact completely within physical apprehension can neither be *bonâ fide*, nor *mala fide;* a mental fact may be either. (1) There may be a *bonâ fide* intention; or a person's conduct may be *bonâ fide*. Each of these is, so to speak, a mental fact having its origin in the individual. (2) Every man may publish, at his discretion, his opinions concerning forms and systems of government; if they be wise and enlightening, the world will gain by them—if they be weak and absurd, they will be laughed at and forgotten—if they be *bonâ fide*, they cannot be criminal, however erroneous. (3) "It is open to the community and to the press to complain of a grievance. Well, the mere assertion of a grievance tends to create a discontent, which in a sense may be said to be seditious; but no jury, if a real grievance was put forward, and its redress *bonâ fide* sought, although the language used might be objected to—no jury would find that to be a seditious libel. It might be the province of the press to call attention to the weakness or imbecility of the government, when it was done for the public good. How closely that touches on the law of sedition; and yet such writing, when *bonâ fide*, would receive protection from a jury." (4)

Pleading and procedure.—None of these offences mentioned in sections 132, 133 and 134, libel included, may be tried at the General Sessions of the Peace. (5) No count for a seditious libel shall be deemed insufficient on the ground that it does not set out the words thereof; (6) but the court may, if satisfied that it is necessary for a fair trial, order that the prosecution shall furnish a particular further describing any document or words the subject of a charge. (7) An information exhibited for seditious libel is not bad because the words "seditious," "seditiously," are not expressly used, if it clearly appear on the face of the information that the publication was with seditious intent. (8) A seditious

(1) Stroud's Jud. Dict. 83.
(2) *Ibid.*
(3) Lord Loughborough, in the debate upon the Libel Bill, A. D. 1792.
(4) *Per* Fitzgerald, J., in *Reg.* v. *Sullivan* (1868), 11 Cox C. C. 51, at p. 57.
(5) S. 583.
(6) S. 861.
(7) S. 859 (*e*).
(8) *R.* v. *McHugh* (1901), 2 Ir. R. 560

libel cannot be justified, *i.e.*, the truth of it cannot be pleaded as a defence to the indictment; (9) nor is a plea admissible that it was for the public benefit that it should be published. (10) This decision was under the Newspaper Libel and Registration Act, 1881. (1) So that section 331 of the Code, permitting truth as a defence, does not apply to such a libel; (2) it is in fact limited expressly to defamatory libels. Section 329, under which every proprietor of a newspaper is presumed to be criminally responsible for defamatory matter inserted and published therein, but which permits him to rebut the presumption by proof that the matter was inserted without his cognizance, and without negligence on his part, is applicable to seditious libels. (3)

The punishment.—Every one is guilty of an indictable offence and liable to two years' imprisonment, who speaks any seditious words or publishes any seditious libel, or is a party to any seditious conspiracy, (4) and to a fine in lieu of, or in addition to, such punishment. (5) He may also be required to give security to keep the peace and be of good behaviour for any term not exceeding two years. (6)

Seditious libel modified by the law of defamatory libel.—The law on the subject of seditious libels has been considerably modified by the law of defamatory libels upon private persons, which has produced a great many important decisions. The effect of these has been, among other things, to give the right to every one to criticize fairly, that is, honestly, even if mistakenly, the public conduct of public men, and to comment honestly, even if mistakenly, upon the proceedings of Parliament and the courts of justice. (7) "A writer may criticize or censure the conduct of the servants of the Crown or the acts of the government; he can do it freely and liberally, but it must be without malignity and not imputing corrupt or malicious motives. With the same motives a writer may freely criticize the proceedings of courts of justice and of individual judges—nay, he is invited to do so, and to do so in a

(9) *Reg.* v. *Duffy* (1870), 9 Ir. L. R. 329; 2 Cox C. C. 45; *Reg.* v. *McHugh, supra.*
(10) *Ex parte O'Brien* (1883), 15 Cox C. C. 180; 12 Ir. L. R. 12 Q. B. D. 29.
(1) 44-45 Vict., c. 60, s. 4 (Imp.).
(2) *Reg.* v. *McHugh, supra.*
(3) *Ex parte O'Brien, supra; Reg.* v. *Bradlaugh* (1883), 15 Cox C. C. 217; *Reg.* v. *Ramsey et al.* (1883), 15 Cox C. C. 231.
(4) S. 134.
(5) S. 1035.
(6) S. 1058.
(7) 2 Steph. Hist. C. L. 376.

free and fair and liberal spirit. The law does not seek to put any narrow construction on the expressions used, and only interferes when plainly and deliberately the limits are passed of frank and candid and honest discussion. There is no sedition in censuring the servants of the Crown, or in just criticism on the administration of the law, or in seeking redress of grievances, or in the fair discussion of all party questions." (8)

Duty of the jury in determining the seditious intention.—In Ireland the Fenian conspiracy of 1867 gave rise to a number of prosecutions prompted evidently by the disturbed state of the country, and by the fact that the matters charged were calculated to cause public disorder. These are circumstances which the jury may take into consideration in deciding whether the libel is seditious. In one of the Irish prosecutions (9) the defendant was convicted of seditious libel, in publishing in the *Irishman* newspaper certain articles copied from the Boston *Pilot* and other United States papers relating to the Fenian movement. The republication was sought to be justified on the ground that the articles in question were copied merely as items of foreign news, but this was held to be no excuse. It was, however, a matter for the jury in considering the intention of the defendants; but the jury must also consider the circumstances under which the matter was copied, the state of the country at the time, the class of persons to whom the newspaper is addressed, and the general tone of the other writings in the newspaper. Referring to the attempted justification, Fitzgerald, J., said to the grand jury: "I am bound to warn you against this very unsound contention; and I may now tell you, with the concurrence of my learned colleague (Deasy, B.), that the law gives no such sanction, and does not, in the abstract, justify or excuse the republication of a treasonable or seditious article, no matter from what source it may be taken. In reference to all such publications the time, the object, and all the surrounding circumstances are to be taken into consideration, and may be such as to rebut any inference of a criminal intention in republication. If, for instance, one of the leading newspapers should, in good faith, publish the proceedings of a foreign conspiracy, with a view to communicate intelligence or a warning to the nation, accompanying it with proper editorial comments, the circumstances would, in every rational mind, negative the idea of any seditious design. If, on the other hand, at a period of great political excitement, where a treasonable confederacy existing amongst them was

(8) *Per* Fitzgerald, J., in *Reg.* v. *Sullivan* and *Reg.* v. *Pigott* (1868), 11 Cox C. C. 49. 50.
(9) *Reg.* v. *Pigott* (1868), 11 Cox C. C. 45.

urging the deluded people to armed insurrection, a journal was found habitually devoting a considerable portion of its space to the republication from a foreign source of treasonable or seditious articles, addressed to the people of this country, without one word of warning or one note of disapproval, then it would be reasonable to infer that the publisher intended what would be the natural consequence of his acts, namely, to promote some seditious object. If the law be powerless in the case of such publications, then we may as well blot out from the statute book the chapter on seditious libel, which would take away from society the great protection which the law affords to their institutions."

Seditious pictures, cartoons, etc.—In another prosecution (10) the defendant, who was the proprietor and editor of the *Weekly News* published in Dublin, was convicted of publishing in that newspaper certain comments and cartoons on the execution of three men for the murder of an English police officer, and also certain articles which referred to freeing Ireland from British misrule by force of arms. In summing up to the jury, Fitzgerald, J., said that the question was not what was meant by the cartoons and articles, but what persons who saw them thought they meant. Although the judge should point out what sedition was, the jury were not bound by his ruling, but should exercise their own judgment in deciding whether the matter alleged to be seditious was calculated to promote disorder, and in deciding this they might take into consideration the condition of affairs in the country.

These cases show that a seditious libel does not necessarily consist of written or printed matter, but may be evidenced by a woodcut, picture, or engraving. (1)

Jurisdiction of the U. S. courts.—The United States courts have no jurisdiction as to libels against the national government, and no common law jurisdiction. (2) "The nature of the criminal thing done," says Bishop, "though done within the exclusive local limits of a particular state, may make it an offence against the United States. Treason, therefore, is a crime against either the United States or an individual state, according as it aims at the subjugation of the one government or the other. But as we have no common law national crimes, the thing cannot be deemed an offence against the general government, unless there is a statute, within the constitutional powers of Congress, forbidding it, and

(10) *Reg.* v. *Sullivan* (1868), 11 Cox C. C. 50.

(1) *Reg.* v. *Sullivan* (1868), 11 Cox C. C. 44; *Reg.* v. *Pigott* (1868), 11 Cox C. C. 51, 53-55.

(2) *United States* v. *Hudson* (1812), 7 Cranch. 32.

probably also, prescribing the punishment. Some acts violate the duties due to both the United States and to a particular state. Some of these acts, moreover, are made offences against both, by the positive laws of each. On this subject the doctrine probably is, that, wherever Congress has the power to make a particular thing punishable as a crime against the United States, it can declare its legislation to be exclusive of all other law touching the matter; but this proposition is not quite clear on principle. And, be the proposition correct or not, if the statute of the general government neither in its terms nor by necessary implication excludes the state law, the authority of the states in the premises is not superseded." (3)

(3) Bishop's Cr. Law, 4th ed., ss. 144, 145.

CHAPTER V.

Libels on Foreign Sovereigns.

Enactment against libels on foreign sovereigns.—Under the Code it is also indictable, without lawful justification, to publish 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. (1) The offender is liable to one year's imprisonment, (2) and to a fine in lieu of, or in addition to, the punishment. (3)

The libel here meant is anything by the publication of which the offence is committed, and is covered by that part of section 317 (2) of the Code, which declares how defamatory matter may be expressed. There must also, it is said, be an intent in the publication to disturb peace and friendship with the country to which any such person belongs; but fair criticism on such persons, in a matter of public interest, would, of course, not be libellous. (4)

Reasons for the law.—"The law which binds States together," says Mr. Bishop, "is called the law of nations. It is in truth common law; or, rather, the common law has appropriated the law of nations, making it a part of itself. Any conduct, therefore, in one of our citizens, or in a foreigner within our borders, tending to involve our government in difficulty with a foreign power, is an offence for which, on general principles and according to English doctrine, an indictment can be maintained. Of this nature are endeavours to excite a revolt against a government in amity with ours, (5) libelling a foreign prince, (6) or other person in official station abroad, (7) and the like." (8) Any publication which tends to degrade, revile and defame persons in considerable situations of power and dignity in foreign countries, may be taken to be and treated as a libel, and particularly where it has a tendency to interrupt the pacific relations between the two countries;

(1) S. 135.
(2) *Ibid.*
(3) S. 1058.
(4) Steph. Dig. C. L., 3rd ed., Art. 99.
(5) Phillimore International Law, 416, 417; 124 English *Hansard*, 1046.
(6) Phillimore International Law, 417; *Rex* v. *Peltier* (1804), 28 Howell's St. Tr. 617.
(7) *Rex* v. *Vint, infra; Rex* v. *Gordon* (1787), 22 Howell's St. Tr. 175.
(8) 1 Bishop's Cr. Law, 4th ed., s. 934.

if the publication contains a plain and manifest incitement and persuasion addressed to others to assassinate and destroy the persons of such magistrates, as the tendency of such a publication is to interrupt the harmony subsisting between two countries, the libel assumes a still more criminal complexion. (9)

Illustrative cases: Rex v. Lord George Gordon (1787).—The following cases illustrate the law as enunciated in the Code: Lord George Gordon was convicted, in 1787, upon an information for having published in the *Public Advertiser* defamatory libels upon Marie Antoinette, Queen of France, and on the French Ambassador in London, imputing to the former tyranny and oppression, and charging the latter with being an instrument in the Queen's hands for that purpose. (10) It was remarked by the presiding judge (Ashurst, J.), in passing sentence, that the State would be regarded as conniving at such libels unless their authors were punished. The defendant was sentenced to pay a fine of £500, to be imprisoned in Newgate for two years, and afterwards to give security, himself in £10,000 and two sureties in £2,500, for his good behaviour for the space of fourteen years. He was unable to give security, and died in prison on 1st November, 1793.

Rex v. Vint et al. (1799).—The defendants, John Vint, George Ross and John Parry, were found guilty, in 1799, upon an information charging them with having published the following libel upon the Emperor Paul I., of Russia: "The Emperor of Russia is rendering himself obnoxious to his subjects by various acts of tyranny, and ridiculous in the eyes of Europe by his inconsistency; he has lately passed an edict to prohibit the exportation of deals and other naval stores. In consequence of this ill-judged law, a hundred sail of vessels are likely to return to this country without their freight"; with intent to traduce the Emperor of Russia, and to interrupt and disturb the friendship subsisting between that country and Great Britain. Lord Kenyon, C.J., told the jury that such a publication, holding up the sovereign of Russia as a tyrant and ridiculous over Europe, might tend to his calling for satisfaction, as for a national affront, if it passed unreprobated by the British Government, and in their courts of justice. (1) The proprietor of the paper was sentenced to six months' imprisonment, to pay a fine of £100, and to give

(9) *Per* Lord Ellenborough, C.J., in *Rex* v. *Peltier* (*supra*), upon an information for a libel on Napoleon Bonaparte, First Consul of France.
(10) *Rex* v. *Lord George Gordon* (1787), 22 Howell's St. Tr. 175.
(1) *Rex* v. *Vint et al.* (1799), 27 Howell's St. Tr. 627, 643.

security for his good behaviour for five years, himself in £500, and two sureties in £250 each. The printer and the publisher received each one month's imprisonment.

Rex v. Peltier (1804).—Jean Peltier, for whom a brilliant defence was made by Sir James Macintosh, was convicted upon an information charging him with having published the following, amongst other, libels upon Napoleon Bonaparte, the first Consul of the French Republic: "Oh! eternal disgrace of France, Cæsar, on the banks of the Rubicon, has against him in this quarrel the Senate, Pompey and Cato; and in the plains of Pharsalia, if fortune is unequal, if you must yield to the destinies, Rome, in this sad reverse, at least there remains to avenge you, a poignard among the last Romans." "He is proclaimed chief and Consul for life. As for me, far from envying his lot, let him name (I consent to it) his worthy successor. Carried on his shield, let him be elected Emperor! Finally (and Romulus recalls the thing to mind), I wish that on the morrow that he may have his apotheosis. Amen." These and other passages were charged to be a malicious libel published with intent to vilify Napoleon Bonaparte, and to excite and provoke the citizens of the republic to deprive him of his consular dignity, and to kill and destroy him, and to interrupt the friendship and peace subsisting between the King and his subjects, and the said Napoleon Bonaparte and the French Republic. Lord Ellenborough, C.J., who presided at the trial, referred to the previous cases of Lord George Gordon and Vint *et al.*, and said that it appeared to him that the aim and tendency of the passages above quoted was to degrade and vilify, to render odious and contemptible, the person of the First Consul in the estimation of the people of England and of France, and likewise to excite to his assassination and destruction. "That appearing to be the immediate and direct tendency of these publications, I cannot," he said, "in the correct discharge of my duty, do otherwise than state that these publications, having such a tendency in respect of a foreign magistrate, and being published within this country, and the consequence of such publications having a direct tendency to interrupt and destroy the peace and amity between the two countries, are, in point of fact, libels. And, in the correct discharge of your duty, I am sure no memory of past, or expectation of future, injury, will warp you from the straight and even course of justice; but your verdict will mark with reprobation all prospects of assassination and murder. Consider, likewise, how dangerous projects of this sort may be, if not discountenanced and discouraged in this country: they may be

retaliated on the head of all those whose safety is most dear to us." Although found guilty, the defendant, on account of a renewal of hostilities between France and Great Britain soon after the trial, was never called upon for judgment.

See, also, *Reg.* v. *Most*, (2) referred to in the chapter on "Seditious Libels" at page 47 *ante*.

Inciting to murder of sovereigns.—A. was indicted for publishing a libel, in the form of a pamphlet, attempting to justify the crimes of assassination and murder, and to incite persons to commit these crimes upon the sovereigns and rulers of Europe. B. was charged with aiding and abetting A. to commit this misdemeanour. It was objected by the accused that the indictment was bad for uncertainty, in that no definite person was named to be murdered, the words "sovereigns and rulers of Europe" being too vague and not sufficiently specific. In *R.* v. *Most* ((1881), 7 Q. B. D. 244) the names were set out, and the point did not arise in that case; a vague incitement to murder people at large was not sufficient.

Opinion of Phillimore, J.—Phillimore, J., the trial judge, held the indictment good. The word "rulers" was, perhaps, a somewhat vague word, as he did not quite know what "rulers" are; but if you once get a class, and a well defined class, that is sufficient. There were, he believed, some eighteen or twenty sovereigns in Europe, and, he thought, a sufficiently defined class. The case was covered by *R.* v. *Most* (*supra*). As to the second point, he held that the words could be interpreted as an incitement to murder Emmanuel III.; it was for the jury to say whether there was such an incitement.

In summing up to the jury the learned judge said, in part, that there are libels which are criminal because they convey an incitement to commit crime. Libels which bring persons into hatred and contempt may apply to persons outside the dominions of the King, because they are liable to bring the peaceful relations existing between states to an end; so Lord Gordon was tried and punished for libelling Marie Antoinette, Queen of France. Seditious libels are such as tend to disturb the government of this country. In my opinion a document published here, which was calculated to disturb the government of some foreign country, is not a seditious libel, nor punishable as a libel at all. If that is all that this document is, then the prisoners are entitled to be acquitted. To hold

(2) (1881), 7 Q. B. D. 244: 50 L. J. M. C. 113: 14 Cox C. C. 583.

otherwise would be to hold that all the strong language used against the government of Turkey, at the time of the Bulgarian rebellion, was seditious libel, and it would make many of our great statesmen guilty of seditious libel, and those persons also who espoused the cause of Italian freedom, and gave the present King of Italy his throne. You must look at this libel here only as inciting people to murder the present King of Italy, or the rulers or sovereigns of Europe; in other words, there is not much gained by charging this as a libel. If I were you I would ask myself whether this document incites to murder. If so, the prisoner Antonelli is guilty, otherwise he is not. The second pair of counts charge, in effect, the inciting to murder the sovereigns and rulers of Europe, and the third pair the inciting to murder Emmanuel III., King of Italy. What you have really got to consider is, does this document with that particular paragraph about Bresci, printed and published as it was, amount to an incitement to murder? Whether Antonelli was the writer, or, as has been suggested, merely corrected the proofs of the document, matters nothing. We are not dealing with the question whether this was a libel on the memory of Humbert I.; nor are we dealing with it because it is abusive of Humbert I., or Emmanuel III. The question is—does it, by the praise of Bresci, incite any one to murder Emmanuel III., or any other sovereign of Europe? If you find that it is such an incitement, then it is for you to say whether Barberi aided and abetted Antonelli. If you think he knew what was in the document, or deliberately shut his eyes to what was in it, then you must find him guilty of aiding and abetting. Both prisoners were convicted on all the counts. (3)

The Montalembert case.—In the year 1858, Comte de Montalembert, a French publicist and journalist, was prosecuted by the Government of France for a libel alleged to be against the law of nations, and presumably against the French law corresponding, in part, to section 135 (*supra*) of the Code. The libel was an article on "A debate on India in the English Parliament," and was published in France in a monthly journal called *The Correspondent*. The debate commented upon, which was listened to by Montalembert, arose out of the proceedings in the British Parliament consequent upon Lord Ellenborough's famous despatch censuring Lord Canning, the then Viceroy of India. The writer of the article stated that he perceived in British government "something else than an indolent and docile flock to be clipped

(3) *Rex* v. *Antonelli & Barberi* (1906), 70 J. P. 4.

and pastured under the silent shades of an enervating security"; he compared invidiously the institutions of the two countries, warmly praising those of Great Britain, and strongly condemned the rule of Napoleon III. The charges contained in the *assignation* (indictment) against Montalembert were: 1. That the publication was inciting to the hatred and contempt of the Emperor and his Government. 2. Was an attack on the respect due to the laws. 3. Was an attack on the rights which the Emperor derived from the constitution, and on the principles of universal suffrage. 4. Was an incitement to the hatred and contempt of the citizens one against another. The accused was convicted and sentenced to six months imprisonment, but was pardoned by the Emperor.

Libels in a Canadian newspaper.—Some of the worst libels which have appeared against a foreign sovereign, in the press of Canada, were published in a leading Toronto newspaper on July 15, 1902, on the King of Spain. They were contained in a lengthy cable despatch from Madrid the day previous. King Alfonso was described as causing, by his eccentric actions, great anxiety as to his sanity; as antagonizing his ministers and angering the military authorities; as combining the depraved tastes of his notorious grandmother with the irresponsibility of his half imbecile father; as having repeatedly and grossly insulted the Queen mother, and estranged the sympathy of his family and the Court by his fondness for low associates; as cursing his mother in the presence of servants and others in the language of a coal heaver; as spitting in the faces of his servants; as passing the night dancing and carousing in the slum quarters of Madrid; as showering all the oaths of his low associates upon his mother when she remonstrated with him, and as threatening to throw her out into the streets of the city, etc., etc. All this and much more in the same strain, and in specific detail, was narrated in the despatch under scare headings, constituting a series of charges of the most defamatory character. It is barely possible there may have been "lawful justification" for such a publication; but had it appeared in the *Times*, or any other leading English journal, it could scarcely have escaped official notice by the Spanish Government. No notice was taken of the despatch by any agent of that government in Canada.

CHAPTER VI.

Defamatory Libels.

Defamatory libel defined.—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. (1)

The words "of or concerning," in the above definition, were substituted for the word "to" by the Criminal Code Amendment Act, 1900. (2)

In order to prove the allegation in an action of libel that the defamatory words were written and published "of and concerning the plaintiff," it must be shewn affirmatively, that the defendant intended them to refer to the plaintiff. (2*a*) The same affirmative proof would be required of the Crown, in a criminal prosecution for defamatory libel. "The writing, according to the old form, must be malicious, and it must be of and concerning the plaintiff. Just as the defendant could not excuse himself from malice by proving that he wrote it in the most benevolent spirit, so he cannot shew that the libel was not of and concerning the plaintiff by proving that he never heard of the plaintiff. His intention in both respects equally is inferred from what he did. His remedy is to abstain from defamatory words." (2*b*)

How expressed.—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. (3)

Wide latitude of the definition.—The above definition is taken from the Imperial Draft Code of 1880, which its authors declared to be a re-enactment of the existing law, the only difference being that the Draft Code has the word "calcu-

(1) S. 317 (1).
(2) 63-64 Vict., c. 46, s. 3 (D.).
(2*a*) *Per* Fletcher Moulton, L.J., and Farwell, L.J., in *Jones* v. *Hulton & Co.* (1909), 2 K. B. (C.A.), 444. Affirmed (1910), A. C. 20.
(2*b*) *Hulton & Co.* v. *Jones* (1910), A. C. 20, *per* Lord Loreburn, L.C., at p. 24.
(3) S. 317 (2).

lated" instead of the word "likely" in the above definition in our own Code. (4) This provision, and, indeed, all the provisions of the Code relating to libel, are so drawn that wide latitude is left to the jury in determining whether a given publication is libellous or not. The libellous matter may be "upon any substance whatever," which, taken in the literal sense, means upon paper, parchment, linen, wood, copper, glass, stone, etc. "The object signifying such matter," (*i.e.*, which by its own nature conveys defamatory matter) may be a model, a statue, a gallows set up before a man's door, (5) or some other ignominious sign, *e.g.*, a lamp erected and kept burning close to plaintiff's house, imputing that it was a brothel, (6) an effigy, (7) a woodcut, (8) a sign or picture, (9) pictorial cards, (10) a drawing, a caricature, (1) a cinematograph, (2) a sketch, a painting, (3) an engraving, a lithographed print, (4) chalk marks on a wall, (5) a photograph, (6) etc. So, too, hieroglyphics, a rebus, an anagram, or an allegory, may be a libel, (7) or ironical praise, (8) or ironical advice. (9) Indeed, under special circumstances, it might be a libel

(4) Both words are intended to express the same idea, and it may appear finical to attempt to distinguish them; but we prefer the word "likely" in the lexicologist's sense of *as may reasonably be thought*—"while man was innocent, he was *likely* ignorant of nothing that imported him to know."—*Glanville*. At all events, the word "likely" seems to be accurate and precise, as expressing the judicial idea of *tending* to injure, which runs through the leading cases on the subject. The judge ought not to leave it as a question to the jury, whether the defendant intended to injure the person libelled, but whether the *tendency* of the publication was injurious to such person. (*Haire* v. *Wilson* (1829), 9 B. & C. 643; 4 M. & R. 605.) This is a decision in a civil action, but, as will be noticed, decisions in civil actions often furnish some of the best illustrations of the criminal law of libel.

(5) Hawk., 8th ed., Vol. I., 542; 5 Rep. 125. C.

(6) *Jefferies* v. *Duncombe* (1809), 11 East, 226.

(7) 5 Rep. 125; *Monson* v. *Tussaud's Limited* (1894), 1 Q. B., judgment of Henn Collins, J., at p. 678; 63 L. J. Q. B. 454; 70 L. T. 335; 58 J. P. 524; 9 R. 177.

(8) *Carr* v. *Hood* (1808), 1 Camp. 355; 10 R. R. 701*n*; *Levi* v. *Milne* (1827), 4 Bing. 195; *R.* v. *Sullivan* (1868), 11 Cox C. C. 44, at p. 45.

(9) *Eyre* v. *Garlick* (1878), 42 J. P. 68.

(10) *Corelli* v. *Wall* (1906), 22 T. L. R. 532.

(1) *Anon.* (1706), 11 Mod. 99; *Austin* v. *Culpepper* (1684), 2 Show. 313; Skinn, 123; *Du Bost* v. *Beresford* (1811), 2 Camp. 511.

(2) *Palmer* v. *National Sporting Club. Times*, 17 November, 1906.

(3) *Eyre* v. *Garlick*, *supra*.

(4) *Watts* v. *Fraser et al.* (1835), 7 C. & P. 369.

(5) *Tarpley* v. *Blabey* (1836), 7 C. & P. 395; *Mortimer* v. *McCallan* (1840), 6 M. & W. 58; *Spall* v. *Massey et al.* (1819), 2 Stark. 559.

(6) *Monckton* v. *Ralph, Dunn & Co., Times*, 30 January, 1907.

(7) Holt's L. L., 2nd ed., 235; *Hoare* v. *Silverlock* (No. 1) (1848), 12 Q. B. 632; 17 L. J. Q. B. 308.

(8) *Boydell* v. *Janes* (1838), 4 M. & W. 446; 1 H. & H. 408; 7 Dowl. 210; *R.* v. *Garrett*; *Sir Baptist Hick's Case* 1618), Hob. 215; Popham, 139; *R.* v. *Cooper* (1846), 8 Q. B. 533; 15 L. J. Q. B. 206.

(9) *R.* v. *Dr. Brawn* (1707), 11 Mod. 86; Holt, 425.

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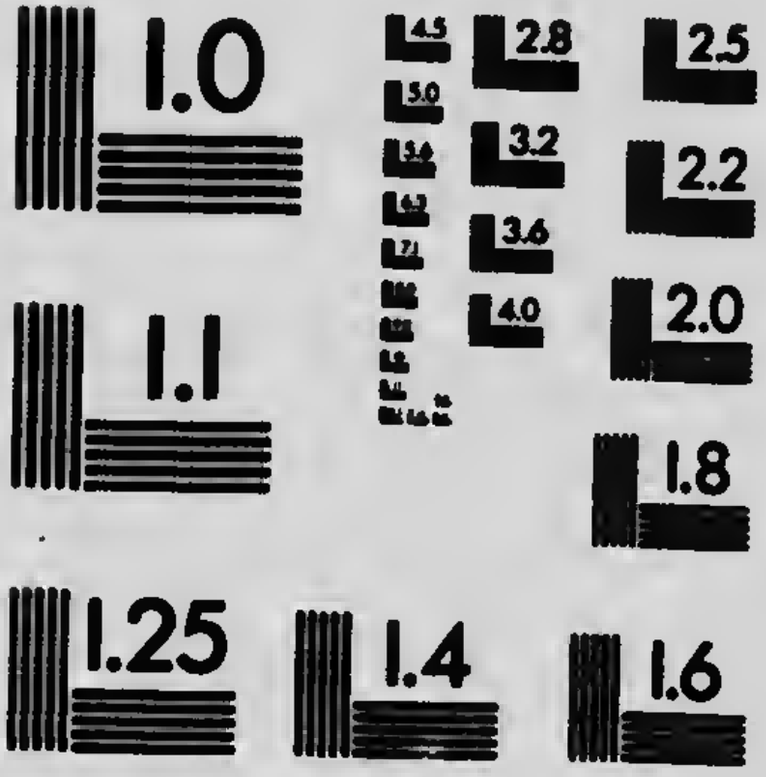

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to say of a person something apparently quite inoffensive. Suppose, for instance, one person wrote of another, "his name is A," meaning that his real name was A, and that the name of B, by which he passed, was falsely assumed, would not this be a libel?(10) There may also be a libel in illiterate language, (1) or in ambiguous language, (2) or in slang terms, (3) or in a foreign language, (4) or by publishing, not the full name, but only the first and last letters of the name, (5) or merely the initials, (6) or whether the person defamed is named in the libel or not, (7) or in the form of a dialogue, (8) or by question and insinuation, (9) or by comparison with odious, notorious, or disreputable persons, even though they may be characters in a work of fiction. (10)

Essence of the offence.—Under the above definition, the expression of the defamatory matter (*i.e.*, the matter constituting a libel) must be in some permanent form, and although usually, need not necessarily be, in writing or printing. It is this permanence which is of the essence of libel, and which distinguishes it from slander. Words spoken can in no case be a libel, although they may convey defamatory matter. (1)

Libel of a body of persons.—A body of persons, definite and small enough for its individual members to be recognized as such, may also be libelled as well as any particular individual. (2) General imputations upon a body of men are indictable though no individuals be pointed out, because such writings have a tendency to inflame and disorder society, and are, therefore, within the cognizance of the law. (3) A libel upon one of a body of persons, without naming him, is a libel upon the whole, and may be so described; and where a paper is published equally reflecting upon a number of people it reflects upon all; and readers, accord-

(10) Steph. Dig. C. L., 3rd ed., Art. 269, note 7.
(1) *R.* v. *Edgar*, 2 Sess. Cas. 29 Pl. 33; 5 Bac. Abr. tit. Libel, 199.
(2) *Fisher* v. *Clement* (1830), 10 B. & C. 472; *Bolton* v. *O'Brien* (1885), L. R. (Ir.) 16 Q. B. D. 100.
(3) *Digby* v. *Thompson* (1833), 4 B. & Adol. 821; 1 Nev. & Man. 485.
(4) *R.* v. *Peltier* (1804), K. B. 43 Geo. III.; 28 Howell's St. Tr. 529.
(5) *Reg.* v. *Hart*, Dig. Law of Lib. 7.
(6) *Roach* v. *Read et al.* (1742), 2 Atk. 469; Dick. 794.
(7) *R.* v. *Yates* (1883), 11 Q. B. D. 750.
(8) *Fisher* v. *Clement* (1830), 10 B. & C. 472.
(9) *R.* v. *Gathercole* (1838), 2 Lewin C. C. 255, *per* Alderson, B.
(10) *Woodgate* v. *Ridout* (1865), 4 F. & F. 202.
(1) Steph. Dig. C. L., 3rd ed., Art. 268.
(2) Steph. Dig. C. L., 3rd ed., Art. 267.
(3) Holt on Libel, 237; *Rex* v. *Osborne* (1732), 2 Kel. 230; 2 Barnard. 138, 166; *Rex* v. *Williams* (1822), 2 B. & Ald. 595; *Rex* v. *Gathercole* (1838), 2 Lewin C. C. 237; *Summer* v. *Buel* (1815), 12 Johnson (N.Y.) 475.

ing to their different opinions, may so apply it. (4) So, on the other hand, a body of persons, for example, a company or corporation, may be the libellers, and may be made defendants in a prosecution for libel, precisely as in a civil action. (5)

Libels of the dead.—It has been said that the amendment of section 317 (1) has changed the law with respect to libels of the dead, and that such libels are no longer criminal. (6) This is at least arguable. "To say in general that the conduct of a dead person can at no time be canvassed—to hold that, even after ages are passed, the conduct of bad men cannot be canvassed with the good, would be to exclude the most valuable part of history." (7) "The half of history is defamation of the dead." (8) The amendment referred to would seem rather to have broadened the definition of the crime, and to have extended its application to the defamation of a deceased as well as of a living person. A libel may be published "to" a living person whom it is "designed to insult;" it could hardly be published "to" a dead person with such "design." But it may be published with such a "design" "of or concerning" either the dead or the living. The test seems to be whether, by the publication defamatory of a deceased person, there was a "design" or intent to injure a living one, *e.g.*, a relative or kinsman, and so provoke a breach of the peace, which is the chief reason for punishing offences of this nature. The intent to injure, however, is a fact requiring proof, and

(4) *R.* v. *Jenour* (1739), 7 Mod. 400. See reference to *Reg.* v. *Sheppard*, a prosecution at Montreal of the publisher of the Toronto *News*, mentioned in chapter on the "Jurisdiction of the Criminal Courts," *post*. The case is unreported, except in the newspapers of the time.

(5) *Whitfield* v. *South E. R. Co.* (1858), E. B. & E. 115; 27 L. J. Q. B. 229. See, also, observations of Lord Blackburn in 5 App. Cas. 869; 49 L. J. Q. B. D. 742, and *Abrath* v. *N. E. R. Co.* (1886), 11 App. Cas. 247; *Lawless* v. *Anglo-Egyptian Cotton & Oil Co., Ltd.* (1869), 10 B. & S. 226; L. R. 4 Q. B. 262; 38 L. J. Q. B. 129; *Tench* v. *G. W. R. Co.* (1872-73), 32 U. C. Q. B. 452; and (in Error and Appeal) 33 U. C. Q. B. 8; *McLay* v. *Corporation of the County of Bruce* (1887), 14 O. R. 398; *Silver et al.* v. *Dominion Telegraph Co.* (1881), 14 N. S. R. (2 R. & G.) 17; (1882), 10 S. C. R. 238; *D'Ivry* v. *The World Newspaper Co. et al.* (1897), 17 O. P. R. 387, in Court of Appeal, and in which reference is made to the observations of Lord Blackburn (*supra*) in *Pharmaceutical Society* v. *London & Provincial Supply Association* (1880), reported as above, and also in 28 W. R. 960 and 43 L. T. 389. Other more recent cases are *Citizens' Life Assurance Co.* v. *Brown* (1904) A. C. 423; *Thomas* v. *Bradbury Agnew & Co. et al.* (1906), 2 K. B. 627; *Pearson & Sons* v. *Lord Mayor of Dublin* (1907) A. C. 351; *Hamlyn* v. *Houston* (1903), 1 K. B. 81, at p. 85; *Ellis* v. *National Free Labour Assocn.* (1905), 7 F. 629, a Scotch case, which followed *Citizens' Life* v. *Brown* (*supra*), cited at p. 632, and in which, at p. 633, reliance is placed on *Borwick* v. *English Joint Stock Bank* (1867), L. R. 2 Exchq. 259.

(6) See 38 C. L. J. 250.

(7) *R.* v. *Topham* (1791), 4 T. R. 126, at p. 129. *per* Lord Kenyon.

(8) *Broome* v. *Ritchie* (1905), 6 F. 942.

is necessary to be found by a jury. (9) The same conclusion (*i.e.*, a tendency to provoke a breach of the peace) is to be drawn from the consideration that the law punishes libels on the dead as well as on the living, out of the just apprehension that otherwise the family of the deceased would visit the insult as a personal affront to themselves; and one reason, and that a forcible one, for punishing libels, even on the subject of religion, is the consideration that to revile a man's religion cannot but be regarded as an indirect affront to himself. (10) At common law, as is pointed out in numerous cases, any publication of matter so libellous as to tend to a breach of the peace has always been an offence punishable by fine and imprisonment. (1)

Summary of what is indictable.—The result of the authorities would seem to be, that any malicious defamation of any person, expressed in print or in writing, or by means of pictures or signs, and tending to provoke him to anger and acts of violence, or to expose him to public hatred, contempt or ridicule, amounts to a libel in the indictable sense of the word; and, since the reason is that such publications create ill blood, and manifestly tend to a disturbance of the public peace, the degree of discredit is immaterial to the essence of the libel since the law cannot determine the degree of forbearance which the party reflected upon will exert. (2)

A personal wrong rather than a public crime.—In *Reg.* v. *Patteson* (3) opinions are expressed, incidentally, by the Ontario Court of Queen's Bench, that defamatory libel is not a crime in the sense generally understood and applied with respect to other indictable offences, but is a wrong of a quasi-criminal nature, affecting rather the individual than the community, and for which he is given the remedy of a formal criminal prosecution. The issues raised by such a prosecution are in fact not strictly of a public nature, but only personal to the private prosecutor—private libels prosecuted criminally, at the instance of the person defamed, who is thus permitted a more strenuous and exemplary vindication of his character and reputation than is afforded by a civil action for damages.

(9) See *Rex* v. *Hunt* (1824), St. Tr. 2 N. S. 69; *Rex* v. *Critchley* (1734), 4 T. R. 129, note (*a*); *Rex* v. *Topham* (1791), 4 T. R. 126; 2 R. R. 343; *Rex* v. *Weaver et al.: Sir John Wrottesley's Case* (1822), Folkard's S. & L., 7th ed., 437.

(10) Folkard's L. & S., 5th ed., p. 45.

(1) See *Boaler* v. *Reg.* (1888), 21 Q. B. D. 284, at pp. 286-7, *per* Field, J.; and *R.* v. *Munslow* (1895), 1 Q. B. 758, at p. 759, *per* Lord Russell, C.J.

(2) 2 Starkie on Slander, 210, 211.

(3) (1875), 36 U. C. Q. B. 129.

Judicial opinions: Morrison, J.—Referring to the Act 37 Vict. c. 38 (D), (4) the provisions of which are substantially incorporated in the libel sections of the Criminal Code, Morrison, J., says: "The preamble of the Act and all its provisions point to, and deal with, only one class of libels, viz., defamatory libels, libels reflecting on individuals. The term defamatory libel used in the statute is one which is ordinarily used in text books and authorities as applicable to and meaning libels reflecting on private persons, as contradistinguished from seditious or blasphemous libels, or libels reflecting on the administration of justice. It is quite clear that the Imperial statute, 6 & 7 Vict., which our Act followed, was intended to apply and is only applicable to libels on individuals" (p. 137). The case of *Reg.* v. *Duffy* (5) is cited as an authority to that effect, and the remarks of Lord Campbell, before the House of Lords Committee, are also partly quoted.

The indictment in *Reg.* v. *Patteson,* which was at the instance of an immigration agent of the Ontario Government for an alleged libel in the *Mail* newspaper of Toronto, is described by Morrrison, J., in the same judgment (at p. 143), as being clearly one for the publication of a private defamatory libel, "and the issues raised in all such cases. under the statute," as being "issues which in fact are not strictly of a public nature, but only personal to the private prosecutor." (p. 144).

Adam Wilson, J.—In the same case Adam Wilson, J., said, that the reason why the person injured is usually the prosecutor, is, that he naturally desires to have punished the person who has wronged him; and because he cannot, in most cases, prosecute civilly for his own private redress until he has prosecuted criminally for the public wrong (p. 151). (6) He agreed with Morrison, J., that the provisions of the statute in question apply to all defamatory publications upon private persons, however high in rank or office (p. 152). And, referring to the distinction between a prosecution in the interests of the public generally and of a private individual, he remarks further, that the Crown prosecution is in the nature of an inquisition to inquire into and determine what

(4) An Act respecting the Crime of Libel.
(5) (1870), 2 Cox C. C. 45.
(6) The law in this respect is no longer doubtful. See C. C., s. 13, which provides that no civil remedy for any act or omission shall be suspended or affected by reason that such act or omission amounts to a criminal offence. This enactment has been held to be not *ultra vires* of the Dominion Parliament: *Gambell* v. *Heggie* (1905), 6 O. W. R. 184, followed in *Monypenny* v. *Goodman* (1906), 7 O. W. R. 209.

the facts are. "It is not a vindictive proceeding, nor a compensatory action, to punish, or to recover damages. The proceedings by the Crown are always conducted temperately, and I may say favourably, for the person accused, and it is for the public interest that it should be so. A private prosecution, no matter by what officer it is conducted, cannot or is not likely to be so managed. There is usually a desire to convict, and the animosity of the litigant is imported into what he wrongly calls a public prosecution" (p. 153).

Richards, C.J.—"The statute," says Richards, C.J., "does not seem to contemplate, nor does the practice for many years past in England shew, that the Attorney-General, on behalf of the Crown, is to institute proceedings for a purely defamatory libel on a private individual" (p. 155). "The parties [to the prosecution] are looked upon as ordinary litigants, so far as to be allowed to recover and compelled to pay costs, when they succeed or are defeated on the issues raised on the trial of the indictment" (p. 157). And he quotes Crompton, J., in *Reg.* v. *Duffy,* (7) as saying that the justification allowed by this statute [Lord Campbell's Act] to be put in is just such a one as would be a justification in a civil action for libel, before the statute, shewing that it was personal libels which were intended by the legislature to be affected by the Act (p. 156).

Setting out the words.—No count for publishing a defamatory libel shall be deemed insufficient on the ground that it does not set out the words thereof. (8) But the court may, if satisfied that it is necessary for a fair trial, order that the prosecutor shall furnish a particular further describing any document or words the subject of a charge; (9) or further describing any person, place or thing, referred to in any indictment. (10)

This last subsection (*g*) covers the case of a libel in the form of a model, an effigy, a picture or painting, or any other object or representation not in words, and which is included in the definition of libel in section 317 (2) (*supra*).

State prosecutions for libel.—The records of the courts in Canada furnish a number of instances of proceedings in the nature of State prosecutions for defamatory libel. Most, if not all, of these appear to have arisen out of the political differences of the

(7) (1870), 2 Cox C. C. 45, at p. 49.
(8) S. 861.
(9) S. 859 (*e*).
(10) *Ibid.* (*g*).

time. In Upper Canada there were two prosecutions in the ordinary courts of the province, and one of these was abandoned at an early stage of the proceedings. The other cases were for alleged libels on the House of Assembly, involving breaches of privilege, for which the accused were prosecuted and the punishment adjudged by the Assembly itself, instead of by the law officers of the Crown on the Assembly's instructions.

The Durand case (1817).—One of the earliest cases was a prosecution of Charles Durand, M.P., member for Wentworth in the Upper Canada House of Assembly. The libel complained of arose out of an irregular suspension of the *Habeas Corpus* Act by Sir Gordon Drummond, Administrator of the Government of Upper Canada, during the latter part of the war of 1812. This Act had been suspended during the former part of the war; and the House having refused to renew the suspension, Sir Gordon Drummond took it upon himself to declare the suspension by proclamation. In a newspaper called the *St. David's Spectator*, Mr. Durand alleged that great atrocities had been committed both by the regular troops and the militia, and that these occurred at the time when the Administrator of the Government assumed the exercise of a disputed power. That importance was attached to these charges is evident from the fact that the Assembly, in 1815, asked the Administrator for any papers in his possession explaining his action with respect to the suspension of the Act. His reply was: "All measures of that nature were adopted by me as commanding His Majesty's forces, and resulted from the exercise of my discretion."

Mr. Durand's arraignment in the House appears to have been founded on alleged libellous imputations as to the condition of things in the Assembly when the renewal of the *habeas corpus* suspension was proposed. In the statements published by him in the newspaper he said, that "the House at this time seemed agitated by prospects before them according to their various feelings. The tide of temptation, at this crisis, ran high. The terrors of the bill were on one hand, good contracts were on the other; and of course the man who opposed the President's bill was for ever shut out." For these and other statements of a similar character, Mr. Durand, on the 4th March, 1817, was adjudged guilty by the House of a "false, scandalous and malicious libel," and ordered to be imprisoned in the jail at York during the remainder of the session. The offending member evaded arrest by the official of the House who was sent to apprehend him; and for this "high contempt" of the authority of the House, and "flagrant breach" of its privileges, he was ordered to be expelled.

Rex v. Mackenzie (1828).—This was a prosecution of William Lyon Mackenzie, editor and proprietor of the *Colonial Advocate*, for an alleged libel on certain members of the Upper Canada House of Assembly, published in an issue of that paper at the town of York, now Toronto, on the 3rd of April, 1828. (1)

Immediately upon a true bill being presented to the court, the defendant, who was present and intended to defend in person, notified the Attorney-General (Hon. J. B. Robinson), that he would be ready for trial on the following day. This offer being declined, he made a personal application to the court for a direction requiring the Crown to proceed promptly. His application was refused, and he was thereupon bound over in £200 to appear and answer to the indictment at the next assizes. It was nearly a year before any further steps were taken by the Crown officers. Meanwhile Mr. R. B. Sullivan (subsequently one of the justices of the Court of Queen's Bench), had applied, on the defendant's behalf, for a list of the petty jurors, and was informed by the sheriff that, by the direction of Mr. Justice Sherwood, the list had not been returned to the Crown office. A special jury was then demanded by the defendant. Two days before the date fixed for striking the special panel, the Attorney-General notified Mr. Sullivan that the prosecution was abandoned and this ended the proceedings.

Rex v. Collins (1828).—In April of the same year (1828), the Hon. J. B. Robinson, Attorney-General, preferred a bill of indictment before the grand jury, for several alleged libels, one of these being for a libel upon the grand jury, and the others for libels upon Mr. Justice Hagerman and the Attorney-General himself. These had appeared in the *Freeman* newspaper published at York, by Francis Collins, who was the editor and proprietor of the

(1) The following is the article charged in the indictment as libellous: "Valuable Report on the Conduct of the Crown Lawyers.—Always anxious to inform our readers of the most important proceedings of the Colonial Legislature, we hasten to direct their attention to the report of a select committee of the House of Assembly on the petition of Mr. Forsyth, of Niagara Falls, loudly complaining of the conduct of the Crown officers, and of a defective and partial administration of justice. The report speaks a language not to be misunderstood, and we trust that a perusal of it will serve to stir up the dormant energies of the wholesome part of the population, and induce them to exert themselves manfully to clear the House of Assembly next election of (naming the Attorney-General and thirteen other members of the House), and the whole of that ominous nest of unclean birds which have so long lain close under the wings of a spendthrift Executive, and (politically so to speak), actually preyed upon the very vitals of the country they ought to have loved, cherished and protected. No wonder it is that Parliament should find its energies all but paralyzed, when such an accumulation of corrupt materials is left unswept with the besom of the people's wrath out of the halls they have so long and so shamefully defiled with their abominations."

paper and the writer of the defamatory matter complained of. One of the libels upon the Attorney-General consisted of an imputation of "native malignancy," and of his having been guilty of "an open and palpable falsehood" in the discharge of his professional duties in open court. The grand jury returned true bills in all the cases laid before them, including the libel upon themselves. At the fall assizes at York in October, 1828, the defendant was tried by Mr. Justice Sherwood and a jury, and convicted of publishing the libel upon the Attorney-General. He was sentenced to imprisonment for twelve months in the jail at York, and to pay a fine of £50. The fine was paid by public subscription, and public meetings were held and committees appointed for the purpose of securing a favourable consideration of the case by the Executive. A petition for the release of Collins was presented to the Lieutenant-Governor, Sir John Colborne, who had recently arrived in the province. To this His Excellency replied, on the 8th November, that he respected the liberty of the press very much, but that he had an equal respect for trial by jury; and that the danger of interfering with their decisions must be very great, unless they were clearly illegal. Ten days later a petition by the defendant himself to the Executive for a remission of his sentence elicited a reply, through the Governor's secretary, that the Governor was unwilling to interfere, but that at the expiration of defendant's term of imprisonment, any application he might decide to make would be taken into consideration upon the facts alleged in his statement. At a later period the House of Assembly interposed in Collins's behalf, but they failed in their efforts to influence the Executive. Collins was obliged to serve the prescribed term of his sentence.

This prosecution gave rise to something like a conflict between the House of Assembly and the two judges who had taken part in the proceedings. The committee of the Assembly, to whom the case had been referred, called upon Mr. Justice Sherwood, who had presided at the trial, to give evidence before the committee, which he properly refused to do. He declined to answer any of the questions put to him, or to have his judicial conduct inquired into in that way, on the ground that he was not required to account to Parliament, or to any of its committees, for his charge to the jury, or for his action otherwise in the matter of the prosecution. He afterwards gave a statement of the facts of the case, and an explanation of his conduct, to the Executive Government, but as he was not obliged to do this, and his action was purely voluntary, it exposed him to a good deal of adverse criticism. Mr. Justice Hagerman was also summoned before the committee and inter-

rogated as to the proceedings, but he declined to answer any questions on the ground that they impeached the conduct of a brother judge.

The conduct of both judges was animadverted upon by the Assembly. They pronounced Mr. Justice Sherwood's charge "an unwarrantable deviation from the matter of record and a forced construction of language, contrary to the ends of fair and dispassionate justice." They also resolved that "Mr. Justice Hagerman, one of the persons alleged upon the record to be libelled, refused to receive the verdict first tendered by the jury, namely, "Guilty of libel against the Attorney-General only," with which direction the jury complied, whereby the defendant was made to appear on record guilty of charges of which the jury had acquitted him, and whereby false grounds were afforded upon the record for an oppressive or unwarrantable sentence." They also declared that "Mr. Hagerman concerned himself with Mr. Justice Sherwood in measuring the punishment of defendant; thereby, without necessity for it, violating the rule that a man shall not be judge in his own cause." The whole matter was subsequently made a subject of complaint in a petition to the Imperial authorities, and was laid before the law officers of the Crown for their opinion. They reported that they saw nothing objectionable in the directions of the judge or the verdict of the jury. (2)

Libel on the King.—A notable trial of a criminal information for defamatory libel took place in London, England, on the first of February, 1911. The information was laid against Edward F. Mylius, one of the editors of a paper called *The Liberator*, published in Paris by Edward H. James. The accused, who had been arrested in London a few weeks previously and confined in jail in default of $100,000 bail, was charged with publishing and circulating the gross defamatory libels *infra* concerning the King. (3) No proceedings were taken against the

(2) See Journals of the Upper Canada House of Assembly, 1828-29.

(3) The following article in *The Liberator*, under the heading "Sanctified Bigamy," contained the libels complained of:

"During the year 1890 in the Island of Malta, the man who is now the King of England was united in lawful and holy wedlock with the daughter of Sir Michael Culme-Seymour. Of this marriage offspring were born. At the time of the marriage, the Duke of Clarence, eldest brother of the present King, was heir to the throne. Subsequently, the Duke of Clarence died, leaving the present King heir to the throne.

"It is now that we are offered the spectacle of the immorality of monarchy in all its sickening, beastly monstrosity. In order to obtain a woman of Royal blood for his pretended wife, George Frederick foully abandoned his true wife, the daughter of Sir Michael Culme-Seymour, of the British navy and entered into a sham and shameful marriage with a daughter of the Duke of Teck in 1893. This same George Frederick, not having obtained any divorce from his first wife, who by the common law

chief editor and publisher of the paper who was beyond the jurisdiction of the court. The trial took place in the King's Bench Division of the High Court of Justice, before Alverstone, L.C.J., and a special jury. The prosecution was represented by the Attorney-General, the Solicitor-General, and two junior counsel. The accused, who appeared in person, admitted that he wrote the libels and mailed them to *The Liberator;* he pleaded justification and publication for the public benefit. The King himself was not present. The accused first demanded the return of his private papers, which were seized at the time of his arrest, alleging the seizure to have been in violation of law. This request was disregarded. He then asked whether the King was present. "I demand his presence here," he said, "because every accused man is entitled to be confronted by his accuser. It is also necessary for the prosecutor personally to appear in connection with libel suits. Unless he is present there is no proof that he is alive." His Lordship replied: "You know perfectly well that the King cannot appear"

In his opening address the Attorney-General said that he regretted the disadvantage which his Majesty suffered in not being able, under the constitution, to appear in court and deny the allegations against him under oath. This was an absolute incapacity which the King could not waive at will. The proceedings against Mylius had not been taken to protect the monarchy, but the protection of the court had been sought for the King as a man, a husband, and a father. "There was not the faintest vestige of truth in the allegations against him."

This statement by the Attorney-General was fully verified by the evidence of Admiral Seymour, his three sons and his daughter Mary Grace Napier (the wife of a naval officer) to whom, it was alleged, the King as Prince George had been married in Malta in 1890. His only other daughter, who died in 1895, had never been married, and as a matter of fact, neither of the daughters had ever met Prince George in Malta.

of England and by the law of the Christian Church remained, and if she lives, remains his true wife, committed the crime of bigamy and he committed it with the aid and complicity of the prelates of the Anglican Church.

"This is the sickening and disgusting crime which has been admitted by the English Church, which married one man to two women. Our very Christian King and defender of the faith has a plurality of wives just like any Mohammedan Sultan, and it has been sanctified by the Anglican Church. The daughter of Sir Michael Culme-Seymour, if she lives, is by the unchangeable law of the Christian Church, as well as by the ancient common law of England, the rightful Queen of England, and her children are the rightful heirs to the English throne."

Upon being asked whether he had any evidence to offer, the prisoner replied that he had, but he would first quote legal authorities. He then read quotations for the purpose of shewing that the charge against him was political instead of personal, and argued that the proceedings were personal, and that rank did not exempt any person from attendance at court. If the privileges of the Crown were sacred, the constitutional rights of a subject were equally sacred. Upon being overruled by the court on these points, the prisoner said: "Then I refuse to proceed further." He was again asked if he had any evidence and replied: "What I have said is my evidence." A verdict of guilty was promptly returned, and the prisoner sentenced to the maximum penalty, one year's imprisonment, which, it was remarked by the court, was wholly inadequate.

After sentence had been passed on the prisoner, the Attorney-General read a signed letter from the King authorizing him to state publicly that the King had never married any one except the present Queen; that he had never gone through any ceremony of marriage except with the Queen; and, further, that he would have attended the trial and given evidence to that effect if he had not been advised by the law officers of the Crown, that it would be unconstitutional for him to do so.

CHAPTER VII.

Extortion by Defamatory Libel.

The enactment.—The Code contains a special enactment against extortion by defamatory libel. Every one is guilty of an indictable offence and liable to two years' imprisonment, or to a fine not exceeding six hundred dollars, or to both, who publishes or threatens to publish, or offers to abstain from publishing, or offers to prevent the publishing of, a defamatory libel with intent to extort any money, or to induce any person to confer upon, or procure for, any person any appointment or office of profit or trust, or in consequence of any person having been refused any such money, appointment or office. (1)

Distinguishable from other species of extortion.—The wording of this enactment is not the same as the corresponding clause in the English statute, (2) and is distinguishable in its purpose and effect from section 451 of the Code, which is directed against extortion by a written demand with menaces, and from section 453, which is against extortion by threats of accusation of any of the crimes stated therein. The intent (*a*) to extort money, or (*b*) to coerce any person into procuring an office, etc., for the accused, is the gist of the offence under section 332. Defamatory libel, employed in a variety of ways, is the instrument of extortion. So that where it appears that the accused (*a*) has published a defamatory libel, or (*b*) has threatened to publish it, or (*c*) has offered not to publish it, or (*d*) has offered to prevent the publishing of it, with either of the intents mentioned, the offence is complete. The clause in the English Act includes the publishing, etc., "of any matter or thing touching another" as well as the publishing of any libel. Under that clause a person who was indicted for so publishing, threatened to publish and to abstain from publishing certain matter with intent to extort money from one W. G. It appeared that the "matter" in question was a placard stating that a debt due by the said W. G., if not previously disposed of by private contract, would be disposed of by public auction. The alleged debt had arisen out of some business transactions, and the accused had not demanded money but an account. The trial judge (Bramwell, B.) ruled that, in order to sustain the indictment, it was not necessary that

(1) S. 332.
(2) 6-7 Vict., c. 96, s. 3.

the "matter" published, or threatened to be published, should be libellous; that, if there was an intent to extort money, the indictment might be sustained; but that if the threat was made with intent to obtain a statement of account from the prosecutor, that did not amount to an intent to extort money, and the indictment could not be sustained. The prisoner was acquitted. (3) It was also ruled (*per* Crompton, J.), under the same clause, that the commencement of legal proceedings was not a "publishing of any matter or thing" within the meaning of the section. (4)

In *Sir W. Garrow's Case*, which is stated in the "Precedents of Indictments," etc., in the second edition of Chitty's Criminal Law, (5) and in which an information was granted in the name of the Master of the Crown Office for a malicious libel of Sir W. Garrow in the conduct of a cause, the libellous matter consisted of both prose and verse, attributing to the advocate the grossest professional turpitude in the management of a case before Lord Kenyon, C.J. It also contained a print or engraving of "the figures of persons, that is to say, several children and a man leading by a rope a certain other figure in the dress of a counsellor at law," which "other figure," it was alleged, was intended to represent Sir W. Garrow. The object of the defendant, it was charged, was (*inter alia*) "to extort of and from the said Sir W. Garrow large sums of money as an inducement to abstain from producing the second edition of the libel"—a case which, if happening in our time, would come plainly within the above section of the Code.

The intention to extort money is one of the worst palpable forms of malice, though in the strict sense of the word, or, perhaps, in the popular sense, such a motive would be called fraudulent or dishonest, rather than malicious. (6)

(3) *Reg.* v. *Coghlan* (1863), 4 F. & F. 316.
(4) *Reg.* v. *Yates et al.* (1853), 6 Cox C. C. 441.
(5) Or in 3 Chit. Cr. Law, 884.
(6) *Searles* v. *Scarlett* (1892), 2 Q. B. 56, *per* Lord Esher, M. R., at p. 60.

CHAPTER VIII.

The Criminal Responsibility of Newspaper Proprietors.

Responsibility of newspaper publishers prior to Lord Campbell's Act (6-7 Vict. c. 96).—The conflicting views as to the criminal responsibility of a newspaper proprietor, prior to Lord Campbell's Libel Act, (1) are clearly stated in *Rex* v. *Gutch et al.*, (2) which was a criminal information, filed by the Attorney-General, for a libel published in the *Morning Journal* newspaper. Counsel for the defendant, Gutch, (3) stated that, even taking the paper to be libellous, still he was in a position to shew that the defendant was perfectly innocent of any share in the criminal publication, as he was living, at the time, at a country residence more than one hundred miles from London, without taking any share whatever in the actual publication of the newspaper in London, the work of which was conducted by the managing proprietor, Alexander; and that, in fact, he was himself confined to his house by illness when the paper complained of appeared. This being so, it was impossible to infer a criminal participation, inasmuch as he could not but be ignorant of the nature and character of the particular article. The notion that the proprietor of a newspaper was necessarily responsible criminally for the act of his partner or agent, was against the universal principle of criminal law, that a malicious intention is essential to constitute guilt in the agent, whatever the act is; even the act of killing another is merely presumptive evidence of murder, and may be either mitigated, or explained away altogether, by the particular circumstances, and the intention of the party. The mere employment of another to conduct and publish a newspaper was lawful: it might be intended by the principal to be conducted lawfully and beneficially for the public; and although the proprietor, by furnishing capital, might be said to cause the publication of a newspaper, he could not be said "knowingly and unlawfully to cause to be published" a libel, unless he knew its contents, and intended that his agent should publish that which was libellous. To hold otherwise would be to carry the responsibility of a principal or partner further in criminal cases than was intended even in civil cases; for, although a principal was liable civilly for

(1) (1843), 6-7 Vict., c. 96.
(2) (1829), 1 Moo. & Mal. 433.
(3) Sir F. Pollock, afterwards Chief Baron.

the negligent acts of his servant, he was not so for the intentional wrongs of the agent, though he had himself furnished the means or instrument of committing the wrong, these means being provided and entrusted with the servant for a lawful purpose. It would, therefore, be altogether at variance with the known principles of the law, in every other criminal or civil case, to hold that, as against the defendant, the case established was conclusive of his guilt, even admitting it to furnish any presumption at all. But, inasmuch as some modern authorities appear to have held such proof to be decisive against a defendant, it was necessary to examine these authorities, and to see how far they are binding as such, contrary as they are to reason and justice. It must be admitted to have been ruled in *Rex* v. *Walter,* (4) that the proprietor of a newspaper was criminally answerable for the publication of a libel by his servants, though he himself had nothing to do with the publication, and the same doctrine was acted upon in *Rex* v. *Cuthell* (5); and in *Rex* v. *Almon* (6) it was held, that the publication by the servant was *prima facie* evidence against the master; but Lord Mansfield expressly says that it may be answered by contrary evidence showing "that he was not privy nor assenting to it, nor encouraging it." And, in Hawkins, P. C. Lib. 1, c. 73, s. 10, similar doctrine was laid down with "as it is said," and authorities to the contrary cited. But it was remarkable that these modern authorities were not only unsupported by the more ancient, but were at variance with the better and more just principle, as laid down in the older cases. The first case in which the doctrine contended against was laid down, and on which the others must rest as their foundation, was *Rex* v. *Dodd.* (7) This was certainly the *dictum* of the court in granting a criminal information. But in *Rex* v. *Nutt,* (8) where the jury refused to find any but a special verdict on similar facts, the Attorney-General did not dare to accept it, and a juror was withdrawn. But the true doctrine and principle of criminal responsibility was fully expounded in *Lamb's Case,* (9) in which it was resolved, by the Court of Star Chamber, that every one who shall be convicted of the offence of publishing a libel, ought to be either a contriver of the libel, or a procurer of the contriving of it, or a malicious publisher of it knowing it to be

(4) (1799), 3 Esp. 21.
(5) (1799), 27 How. St. Tr. 142. The rulings in both these cases were by Lord Kenyon, C.J.
(6) (1770), 5 Burr. 2686.
(7) (1736), 2 Geo. II., 2 Sess. Cas. 33; Digest L. Lib. 27.
(8) (1729), 1 Barnard 306; Fitzg. 47.
(9) 9 Co. 59; Moore, 813.

a libel. (10) When, therefore, the reason and principle were one way, and were supported by the ancient authorities, though not by certain modern cases, the jury should have the sanction of the court in following and acting on the ordinary principles of justice and good sense, and it was, therefore, unnecessary to the defendant's defence to discuss the particular merits of the paper in question as to its libellous or innocent character.

Opinion of Lord Tenterden, C.J.—Lord Tenterden, C.J., in summing up, said that, on the part of the defendant Gutch, it was contended that a proprietor of a newspaper who was not known to take, or who could show that he took no part in . publication of the newspaper, and of the libel in question, w. not criminally responsible. Now whether it was so shown in this case was a fact for the jury to consider, but he was bound to state the law as he had received it from his predecessors. He could not propose to the jury a different rule from what he found adopted by those who had filled his situation before him. It was conceded that it had been held, in several cases, that a proprietor so situated was criminally answerable. But it was said that this was a different principle from that which prevailed in all other criminal cases; but this did not appear to him to be so. The rule seemed to him to be conformable to principle and to common sense. "Surely a person who derives benefit from, and who furnishes means for carrying on the concern, and entrusts the conduct of the publication to one whom he selects and to whom he confides, may be said to cause to be published what actually appears, and ought to be answerable, although you cannot show that he was individually concerned in the particular publication. It would be exceedingly dangerous to hold otherwise, for then an irresponsible person might be put forward, and the person really producing the publication, and without whom it could not be published, might remain behind and escape altogether." The jury found all the defendants guilty. (1)

(10) The first reported cases, in which this doctrine was disregarded, were all for the same libel, which was of a treasonable nature and dangerous tendency at the time. The first was for printing and publishing a libel on the King, the defendant being only a servant to the printer, and his only business being to clap down the press: *Rex* v. *Clerk* (1729), 1 Barnard, 304. The second was against one of the printer's compositors who set the types and figures: *Rex* v. *Knell* (1729), 1 Barnard, 305. The third was *Rex* v. *Nutt* (*supra*). The first two defendants were convicted on the direction of Lord Raymond, C.J. These were mischievous precedents for a century or more, and were followed, as the text shows, in other cases, notwithstanding that the true doctrine, stated in *Lamb's Case* (*supra*), was restated in *Rex* v. *Almon* (*supra*), by Lord Mansfield, C.J., and Aston, Willes and Ashurst, JJ.

(1) *Rex* v. *Gutch et al.* (1829), 1 Moo. & Mal. 433.

As to the concluding remark of Tenterden, C.J., it should be said that the proprietor is, and always was, liable civilly, although the libel be published without his authority, knowledge or consent.

On the trial subsequently of another *ex officio* information against the same defendants, Lord Tenterden said he did not mean that some possible case might not occur in which the proprietor of a newspaper would not be criminally responsible for what appeared in it. (2)

The criminal intention.—The absence of criminal responsibility on the part of a defendant, in any case of libel, is also referred to in some other decisions. In one of these, (3) Lord Kenyon said that there might be cases, as was so admitted in *Rex* v. *Nutt*, (4) of a publication in point of law, where no criminal intention could be imputed to the party; as where a party delivered a letter without knowing its contents, or delivers one paper instead of another. In another case the same learned judge said that an inadvertent publication would not be a libel. (5) In *Rex* v. *Nutt* (*supra*), the defendant kept a pamphlet shop, where, in her absence, her servant sold a paper which was charged in a criminal information as being a treasonable libel. The defendant knew nothing of its contents, but Raymond, C.J., held, that the defendant had published it, and that it would be very dangerous if the law were otherwise. The jury not agreeing on a general verdict, and wishing to give a special verdict, the Attorney-General consented to the withdrawal of a juror. Where the libel imported to be printed for the defendant, and was bought in his shop, he could rebut the *prima facie* presumption of publication. (6) And in a civil case it was held, that libellous hand-bills, delivered in ignorance of their contents by the defendant in the course of his business, were not actionable. (7)

Lord Campbell's Libel Act.—Some of these decisions, as in *Rex* v. *Gutch*, carried the responsibility of booksellers and newspaper proprietors for the acts of their servants to such a revolting extent, and were so opposed to the opinions of eminent judges like Lord Campbell and Lord Denman, that, acting upon the report of the committee appointed by the House of Lords to consider the law

(2) 1 Moo. & Mal. 438. See, also, *Colbourn* v. *Patmore* (1834), 1 C. M. & R. 73.
(3) *Rex* v. *Topham* (1791), 4 T. R. 127; 2 R. R. 343.
(4) (1729), Fitzgib. 47; 1 Barnard. 308.
(5) *Rex* v. *Lord Abingdon* (1794), 1 Esp. 228.
(6) *Rex* v. *Almon* (1770), 5 Burr. 2689.
(7) *Per* Patteson, J., in *Day* v. *Bream* (1837), 2 Moo. & Rob. 55. See, also, *Emmens* v. *Pottle* (1885), 16 Q. B. D. 354; 55 L. J. 51.

of defamation and libel, the Parliament of Great Britain passed the Libel Act of 1843, (8) commonly known as Lord Campbell's Libel Act. The 7th section of that statute enacts, that "whensoever upon the trial of an indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part."

The effect of this section was to declare the law as laid down in *Lamb's Case* and in *Rex* v. *Almon* (*supra*), which had been disregarded, in the first instance, by Lord Raymond, C.J., and afterwards by Lord Kenyon, C.J., and by Lord Tenterden, C.J. The first reported case under this section is *Reg.* v. *Holbrook et al.* (*infra.*)

The statutory law in Canada prior to the Code.—Prior to Confederation, (9) the legislatures of the provinces adopted, in a slightly modified form, the above clause from Lord Campbell's Libel Act. It was therein enacted that, whenever upon the trial of any indictment or information for the publication of a libel, to which the plea of not guilty has been pleaded, evidence is given which establishes a presumptive case of publication against the defendant by the act of any other person by his authority, the defendant may prove, and, if proved, it shall be a good defence, that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part. (10) This enactment, which covered newspaper proprietors, was reproduced in an Act respecting the Crime of Libel, (1) which came into force May 26, 1874, and made the criminal law of libel uniform throughout the Dominion. It also appears in the Act respecting Libel in the first Consolidated Statutes of Canada, 1886, (2) and so remained until the passage of the Criminal Code, which contains the following enactment:

(8) 6 & 7 Vict., c. 96.
(9) July 1st, 1867.
(10) See C. S. U. C. 1859, c. 103, s. 8.
(1) 37 Vict., c. 38, s. 10 (D.).
(2) c. 163, s. 5.

The law of the Code—Criminality rebuttable.—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. (3)

General authority of editor not negligence unless with intent.—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 [*i.e.*, by the prosecution] that the proprietor, when originally giving such general authority, meant that it should extend to inserting and publishing defamatory matter, or continued such general authority knowing that it had been exercised by inserting defamatory matter in any number or part of such newspaper. (4).

Selling newspapers.—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. (5)

Section 329 (2), which is taken from the Imperial Draft Code of 1879, and defines negatively what is meant by the "negligence" of a newspaper proprietor under the law of Canada, the commissioners regarded as embodying the true meaning and construction of the corresponding section of Lord Campbell's Act, as explained by the majority of the Court of Queen's Bench in *Reg.* v. *Holbrook*. (6)

"Newspaper" defined.—The expression "Newspaper" in this section, and wherever it occurs in the articles of the Code relating to defamatory libel, means any paper, magazine, or periodical 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 between the publication of any two such papers, parts or numbers; and also any paper, magazine, or periodical printed in order to be dispersed and made public, weekly

(3) S. 329 (1).
(4) *Ibid.* (2).
(5) *Ibid.* (3). See, also, S. 330, and comments thereon in chapter on "The Sale of Libellous Matter."
(6) Cockburn, C.J., and Lush, J., Mellor, J., *diss.* (1877), L. R. 3 Q. B. D. 60; (1878), L. R. 4 Q. B. D. 42.

or oftener, or at intervals not exceeding thirty-one days, and containing only or principally advertisements.(7)

This definition is substantially the same as that contained in some of the provincial libel Acts. The expression itself, and the reported cases on the question of what is a "newspaper" within the meaning of those Acts, and what has been held to be a "newspaper" in the United States, is fully discussed in the chapter on the same subject in the author's treatise on "The Law of Defamation" in civil cases. The definition, it will be observed, not only covers "magazines," but also, having regard to the intervals of publication, monthly trade papers and all other monthly publications as well. These are entitled to the protective provisions of the statute.

"**Without such proprietor's cognizance.**"—In the absence of any express decision on the point, this expression, in the above section (329), may be taken to mean without his actual knowledge, or without such notice to him as would be equivalent to knowledge. If the "proof" mentioned in the section went the length of showing that the proprietor was absolutely ignorant of the insertion of the defamatory matter, or of its receipt by his servants for the purpose of insertion, until it had actually appeared in his newspaper, the defamatory matter might then be said to have been inserted without his "cognizance." If, on the other hand, he had actual personal knowledge of the defamatory matter having been received by his servants for insertion, or if he had the means of knowledge of that fact to which he wilfully shut his eyes—a suspicion in his mind and the means of knowledge in his power, which he wilfully disregarded—it could hardly be said that the subsequent insertion was without his "cognizance." Nor, indeed, in the latter case, could it be argued that it was inserted "without negligence on his part," because there would have been a breach of a present duty or legal obligation to prevent the publication—the not doing of that which he ought to have done, and which he had the power to do, *i.e.*, the not preventing or avoiding that which he might have prevented or avoided.

"**Without negligence.**"—In order to rebut the presumption of criminal responsibility, the publication must have taken place not only without the proprietor's "cognizance," but also "without negligence on his part." The onus is on him as to both these conditions. What would constitute negligence on his part

(7) S. 2 (22).

would, of course, depend on the circumstances of each particular case. If the author of a libel, though he never intended to publish it, were so negligent to keep it that through mere inadvertence the contents became public, to the detriment of another's reputation, he would no doubt be considered amenable in damages. He had no right to place the character of another in jeopardy without lawful excuse, and, in law as well as in morals, he would be responsible for the injury which his culpable negligence had occasioned. Every man ought to take care that he does not injure his neighbour; and, therefore, whenever a man receives a hurt through the default of another, though the same were not wilful, yet if it be occasioned by negligence or folly, the law gives him an action to recover damages for the injury so sustained. (8)

Negligence in law.—The meaning of negligence, in the common use of language, is very general and indefinite. It is practically synonymous with heedlessness or carelessness, not taking notice of matters relevant to the business in hand, of which notice might and ought to have been taken. This meaning is no doubt included in the legal sense of the word, but, in reference to criminal law, the word has also the wider meaning of omitting, for whatever reason, to discharge a legal duty. (9) Negligence is the omitting to do something that a reasonable man would do, or the doing something that a reasonable man would not do. (10) It is in law a breach of duty, *i.e.*, a legal duty, the breach of which the law takes cognizance. (1) Like the term "default," it is a purely relative term, and means nothing more, nothing less, than not doing what is reasonable under the circumstances—not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction. (2) The law considers injurious acts to be in general culpable which are such as a reasonably careful man would foresee might be productive of injury, and which he would abstain from doing. (3) It cannot be predicated of any particular act that it is *per se* negligent; it is only so because it is a breach of duty, so that an act done by one man may be negligent which, done by another, would not be so, because he had no duty in respect to it. Sometimes the duty may have arisen out of a con-

(8) Buller's Nisi Prius, 95.
(9) 2 Stephen's Hist. C. L. 122.
(10) *Per* Alderson, B., in *Blyth* v. *Birmingham Water Works Co.* (1856), 25 L. J. Ex. 212; 11 Ex. 781.
(1) Smith on Neg. Bl. ed., p. 1.
(2) *Per* Bowen, L.J., in *Re Young & Harston* (1885), 31 Ch. D. 174; 53 L. T. 837; 34 W. R. 84; 50 J. P. 245.
(3) *Blyth* v. *Birmingham Water Works Co., supra.*

tract between the parties; but it is not necessary that it should have so arisen. It may arise out of the relative situation of the parties, or be imposed by statute. (4)

Section 329 as explained by Lord Campbell's Libel Act.—What is "not negligence" within the meaning of section 329 is defined by the section itself. the reasons for which may be explained by a reference to the corresponding section of the English statute (5) and its judicial interpretation. Section 7 of Lord Campbell's Libel Act, (6) which permits a defendant to rebut the presumption of criminality arising from publication, declared rather than altered the existing law in England. It has been said that this section does not expressly state whether such evidence shall be a complete defence, or go in mitigation of punishment only. (7) But, although the section only says that evidence may be given of such facts, it has always been considered to mean that such facts, if proved, shall be an answer to the indictment; for such evidence was always admissible at common law in mitigation of punishment, if not in defence. (8) The original enactment on the same point in this country, (9) which was based on the English Act, (10) and which was subsequently incorporated in C. S. U. C. c. 103, s. 8, (1) made such evidence "a good defence."

Decisions explanatory of section 329.—The English Act gave rise to some decisions which serve to explain the enactment in the Code. In *Ex parte Parry*, (2) in which an application was made for a criminal information against the proprietors and publishers of *Reynolds Newspaper* for an alleged libel upon the chief constable of Derbyshire, counsel for the defence, on shewing cause, produced affidavits stating that the libel was inserted inadvertently during the absence of the editor. By consent the rule was thereupon discharged. In the following case the question was fully considered and decided:

(4) *Collett* v. *L. & N. W. Ry. Co.* (1851), 16 Q. B. 984.
(5) 6-7 Vict. c. 96, s. 7.
(6) 6-7 Vict. c. 96, "An Act to Amend the Law respecting defamatory Words and Libel," which took effect 1st November, 1843. This Act, it is said, applies only to defamatory libels, and not to blasphemous, seditions and obscene libels: *Reg* v. *Duffy* (1846), 9 Ir. L. R. 329; 2 Cox C. C. 45; *Reg.* v. *Patteson* (1875), 36 U. C. Q. B. 129; *Ex parte O'Brien* (1883), L. R. (Ir.) 12 Q. B. 29. But see, *per contra*, Lord Coleridge, C.J., in *Reg.* v. *Bradlaugh et al.* (1883), 15 Cox C. C. 318, and in *Reg.* v. *Ramsey & Foote*, in the same volume, p. 231, where it was held that section 7, being quite general in its terms, applies to all cases of criminal libel.
(7) Archbold's Cr. Pl. & Ev., 21st ed. 890.
(8) Odgers' S. & L., 2nd ed., 434. See, also, *Ex parte Parry*, *infra*.
(9) 13-14 Vict. c. 60, s. 8.
(10) *Per* Morrison, J., in *Reg.* v. *Patteson* (*supra*), at pp. 136, 137.
(1) An Act respecting Slander and Libel.
(2) (1877), 41 J. P. 85.

Reg. v. Holbrook et al. (1877 & 1878).—On the trial of a criminal information against the defendants for a libel published in their newspaper, it appeared that the duty of editing the paper was left entirely by them to an editor whom they had appointed. The libel was inserted in the paper by the editor without the actual authority, consent, or knowledge, of the defendants. The trial judge, on these facts, having directed a verdict of guilty against the defendants, it was held by Cockburn, C.J., and Lush, J., (Mellor, J. *diss.*), that there must be a new trial; for upon the true construction of 6-7 Vict. c. 96. s. 7, the libel was published without the defendants' authority, consent, or knowledge, and it was a question for the jury whether the publication arose from any want of due care and caution on their part. Mellor, J., who dissented, held that the defendants, having for their own benefit employed an editor to manage a particular department of the newspaper, and given him full discretion as to the articles to be inserted in it, must be taken to have consented to the publication of the libel by him; that 6-7 Vict. c. 96, s. 7, had no application to the facts proved; and that the case was properly withdrawn from the jury. (3)

Upon the second trial of the action, the same facts having been proved as on the first trial, the trial judge summed up in terms which might have led the jury to suppose that the general authority given to the editor to manage the editorial department of the paper was *per se* evidence that the defendants had authorized the publication of the libel within the meaning of section 7 of 6-7 Vict. c. 96. The jury having returned a verdict of guilty, a new trial was granted on the ground of misdirection, Cockburn, C.J., and Lush, J., (Mellor, J., *diss.*), being of opinion that a general authority to an editor to conduct the business of a newspaper, in the absence of anything to give it a different character, must be taken to mean an authority to conduct it according to law, and, therefore, not to authorize the publication of a libel. (4) The prosecution having dropped there was no third trial.

Reg. v. Bradlaugh et al. (1883).—The following cases, which bear on the same point, were decided after the preparation of the English Draft Code: Three persons were jointly indicted for publishing blasphemous libels in certain numbers of a newspaper. Two of them, whose names appeared in the newspaper as editor

(3) *Reg.* v. *Holbrook et al.* (1877), 3 L. R. Q. B. D. 60; 47 L. J. Q. B. 35; 37 L. T. (N.S.) 530; 26 W. R. 144; 13 Cox C. C. 650.
(4) *Reg.* v. *Holbrook et al.* (1878), 4 L. R. Q. B. D. 42; 48 L. J. Q. B. 113; 39 L. T. (N.S.) 536; 27 W. R. 313; 14 Cox C. C. 185.

and publisher, had been previously convicted on a charge of publishing similar libels in another number of the paper. The third defendant, whose case was that he was not connected with the paper at all, was permitted to be tried separately. This defendant, it appeared, had originally published the paper, and had, after he had ceased to be ostensibly connected with it, continued to allow it—knowing its character—to be published on his premises, by a person in his employ, who was permitted, in consideration of a reduction of salary, to carry on there a business of his own as bookseller and newspaper publisher. The defendant was occasionally on these premises, and knew that the paper was sold there; but it was not proved that he had knowledge of any particular numbers of or articles in the paper, or that he had had otherwise any connection with it during the publication of the libels. It was held, that though there was a *prima facie* case against him, yet there was also a case in answer to it, under the Libel Act, on which the jury might well acquit him; and he was acquitted accordingly. (5)

Reg. v. Ramsey and Foote (1883).—Upon the trial of two persons on an indictment for publishing blasphemous libels in a certain newspaper, in which their names were given as printer and publisher respectively, it was held that proof of their identity with the persons whose names were so given, or any evidence merely connecting them with the paper, was not sufficient to fix them with liability, the 7th section of Lord Campbell's Libel Act (6-7 Vict. c. 96) being held to apply, and to require evidence that they published the libels, and not merely the papers in which they were contained. Evidence that one of them published the paper was held a sufficient *prima facie* case as against him, without any express evidence that he knew of the libels; but express evidence as to the other, that he was editor, was held insufficient, without evidence that he directed the insertion of the libels. (6)

It has also been held that the directors of a printing company are not criminally liable for a libel contained in a paper printed by the servants of the company, unless they knew of or saw the libel before its publication, or gave express instructions for its appearance. (7)

These decisions in *Reg.* v. *Holbrook* (*supra*) having been assumed to settle the law on the points in question, the commis-

(5) *Reg.* v. *Bradlaugh et al.* (1883), 15 Cox C. C. 217.
(6) *Reg* v. *Ramsey & Foote* (1883), 15 Cox C. C. 231: 48 L. T. 733: 1 C. & E. 126.
(7) *Reg.* v. *Allison et al.* (1888), 37 W. R. 143: 59 L. T. 933: 53 J. P. 215: 16 Cox C. C. 559.

sioners, who prepared the English Draft Code of 1879, so declared the law in a section which appears as section 329 (2) (*supra*) in our own Code. An enactment to the same effect may be found in the New York Penal Code, section 246. In *Reg.* v. *Holbrook* it will be noticed that the word "authority," in the corresponding section of Lord Campbell's Libel Act, (8) was held to mean a good deal more than the general authority given by the proprietor of a newspaper to the editor to insert in the paper whatever he thinks fit. This appears to have been considered in the framing of the above enactment in the Code.

"**Inserted**" **and** "**published.**"—A distinction is evidently intended between the terms "inserted" and "published" in the connection in which they occur in the first two subsections of this section of the Code. The newspaper proprietor is presumed to be criminally responsible for defamatory matter "inserted and published" in his newspaper, but may rebut this presumption by proof that the matter was inserted without his cognizance and negligence. (9) This seems to imply that the acts of "inserting" and of "inserting and publishing" are two distinct things, the former being (1) either the writing by the editor, or other servant of the proprietor, of the matter charged, and the delivery of it to the compositor to be put into type; or (2) the delivery by the servant to the compositor of such matter, already written or printed, for the same purpose; the latter being, in addition, the printing and giving to the public of the edition of the newspaper with the defamatory matter contained in it. It is for this second act, or combination of acts, namely, the "inserting and publishing," that the statute makes the proprietor criminally responsible, but at the same time permits him to shew that he was no party to the former act of "inserting" by his servant. This, of course, he could not do where, as frequently happens, he is both editor and proprietor, and sees beforehand whatever is afterwards printed and published in his newspaper. In such a case it would be impossible for him to say that "the particular defamatory matter" was "inserted" "without his cognizance and without negligence on his part." Where, however, he does not occupy this dual position, but has an editor, or some such person, to manage or conduct his newspaper, to whom he has given general authority "to insert therein what he [the editor] in his discretion thinks fit," such general authority so given by the proprietor does not in itself fix him with responsibility for his editor's acts in "inserting" defama-

(8) 6-7 Vict. c. 96, s. 7.
(9) S. 329 (1).

tory matter. The prosecution must go further, and must prove one of two things, namely, (1) either that the proprietor, when he gave such general authority to his editor in the first place, "meant that it should extend to inserting and publishing defamatory matter;" in other words, meant that it should embrace those very acts which make the proprietor himself criminally responsible; or (2) "continued such general authority knowing that it had been exercised by [the editor's] inserting defamatory matter in any number or part of such newspaper:" (10) in other words, was criminally negligent in the control of his newspaper by giving a perfectly free hand to the person who was managing it.

Distinction between "inserting" and "printing and publishing."—In *Colburn* v. *Patmore* (1) a distinction is indicated between the expressions "inserting" and "printing and publishing." That was an action by the proprietor of a newspaper against his editor for falsely, maliciously and negligently *inserting* a libel therein, without the knowledge, leave or authority of the plaintiff, in consequence of which the plaintiff was convicted and fined for falsely and maliciously *printing and publishing* the said libel. After verdict for the plaintiff, judgment was arrested, and the case was determined on a slip in the pleading, the court being of opinion that it was consistent with the statement in the declaration, that the plaintiff, though he did not know of the original insertion of the libel, might afterwards have knowingly and wilfully permitted it to be printed, and so have been convicted in consequence of his own criminal act, and not that of the defendant.

Opinion of Lord Lyndhurst.—It was remarked by Lord Lyndhurst, C.B., during the argument, that, "consistently with the declaration, the libel might have been originally 'inserted' by the defendant as editor, and afterwards sold [*i.e.*, published] by the plaintiff at his shop." And in his judgment he says: "The declaration shews that the first act relating to the libel in question was that done by the defendant, viz., the inserting and publishing it in the *Court Journal*. The charge of insertion would have been satisfied by proof of his putting the matter into writing, and handing it to the printer. This act of the defendant appears from the declaration to have been followed up by the additional act of the plaintiff, namely, printing and publishing what had been thus previously prepared by the defendant. And it is quite consistent with the allegations on the record, that the latter act might be

(10) S. 329 (2).
(1) (1834), 1 C. M. & R. 73; 4 Tyr. 677.

distinct from the former. The plaintiff may have chosen to adopt an article furnished him by the defendant. He has been convicted of maliciously publishing the libel, nor does anything appear to shew him not practically, and in fact, a participator in that transaction. The averment, that the defendant inserted and published the libel without the plaintiff's knowledge or consent, may be true, and yet the plaintiff may have been so pleased with it as to have suffered it to be printed, or may have published it again on a subsequent occasion." (2)

Although the action was determined on this technical ground, it plainly appears, though not actually decided, that the plaintiff could not recover against the defendant, either on the ground of breach of contract or otherwise, the damages sustained by such conviction: for a person who is declared by the law to be guilty of a crime, cannot be allowed to recover damages against another who has participated in its commission.

"Insert" and "publish," why distinguished.—In common parlance the terms "insert" and "publish" are synonymous; and any distinction between them in this section of the Code is evidently for the purpose of limiting the responsibility of a newspaper proprietor for the act of publication. Otherwise the term "published," which is well understood and is defined by the Code, (3) would suffice, and no other need to have been employed. The term "published" is the proper and technical term to be used in the case of libel, without reference to the precise degree in which the defendant has been instrumental to such publication; (4) since if he has intentionally lent his assistance to its existence for the purpose of being published, his instrumentality is evidence to shew a publication by him. (5)

Scope of responsibility.—So that, although the presumption of criminal responsibility is against the newspaper proprietor in the first instance, subject to rebuttal as provided by the statute, an editor, or any other servant of the proprietor, who "inserts" libellous matter in the newspaper, is quite as liable to indictment as the proprietor himself; but, of course, may make any defence that is open to him either at common law or under the statute.

(2) 4 Tyr. 687.
(3) S. 318.
(4) Folkard's L. & S., 5th ed. 439.
(5) *Lamb's Case* (1611), 9 Co. Rep. 59.

Raison d' être of the law.—These provisions in the libel clauses of the Code, which are protective of newspapers, are due to the peculiar position in which, apart from the statute, the proprietor of a newspaper stands with respect to the general law of master and servant. Generally speaking, a master is not criminally responsible for the acts of his servants, unless he expressly command or personally co-operate in them. In criminal cases they must each answer for their own acts, and stand or fall by their own behaviour. (6) But there are cases—and libel is one of them—in which the act of the servant, having been within the usual scope of his employment, was considered to have been done by the implied command of the master, and the master was held criminally responsible for it, although he might in the particular instance have been perfectly ignorant of what was done. And so it happened that, under this general law, the publishers and proprietors of newspapers and other publications were frequently held liable to criminal informations for libels published by their servants in the usual course of their employment, although such publishers and proprietors personally had nothing to do with the publication, which took place without their knowledge, consent, or authority. (7)

The need of legislation.—The necessity for legislation arose out of the anomalous position of a newspaper proprietor under the general law. As was said in one case, the proprietor of a newspaper was a master giving general authority to publish everything, whether libellous or not, and so was held criminally responsible. He was presumed to authorize the publication of a libel by his servant, whereas in other cases of torts by his servants he was not. His liability was based on the broad ground of public policy, that by holding masters liable for the acts of their servants, they might

(6) *R.* v. *Huggins*, 2 Str. 882; 2 Lord Raym. 1574; Paley on Ag. 303; Story on Ag. s. 452; *The King* v. *Almon* (1770), 5 Burr. 2688; *Lamb's Case* (1611), 9 Co. Rep. 59.

(7) *R.* v. *Almon* (1770), 5 Burr. 2686; *R.* v. *Walter* (1799), 3 Esp. 21; *R.* v. *Gutch* (1829), 1 Moo. & Mal. 433, 438. Referring to the Almon case, Sir Thomas Erskine May says: "Almon, the bookseller, was tried for selling the *London Museum*, in which the libel [contained in Junius's celebrated letter to the King] was reprinted. His connection with the publication proved to be so slight that he escaped with a nominal punishment. Two doctrines, however, were maintained in this case, which excepted libels from the general principles of the criminal law. By the first, a publisher was held criminally answerable for the acts of his servants, unless proved to be neither privy nor assenting to the publication of a libel. So long as exculpatory evidence was admitted, this doctrine was defensible, but judges afterwards refused to admit such evidence, holding that a publication of a libel by a publisher's servants was proof of his criminality. And this monstrous rule of law prevailed until 1843, when it was condemned by Lord Campbell's Libel Act." *May's Const. Hist.*, 3rd ed., vol. 2, p. 252.

be driven to employ trustworthy persons. The principle was that, in his capacity of proprietor, he assumed the task of preventing the insertion of libellous matter in his newspaper, under the penalty that, if he failed in so doing, he should be criminally responsible, whether cognizant of the offence or not. He was bound to take care that nothing libellous appeared, and the neglect of this duty was, for reasons of public policy, criminally punishable. There was this distinction between his case and that of other masters who were made liable for the acts of their servants, that even if a libel were published wilfully by his servant, he was criminally as well as civilly amenable; while in the other case the master was liable only for the negligent or unskilful act of the servant. (8) The proprietor of a newspaper was, for the security of the public, rendered the single exception to that otherwise universal rule of law, that a master shall not be criminally responsible for the act of his servant, done without his knowledge or authority. (9) His liability to indictment was, as Lord Lyndhurst expressed it, (10) "an anomaly." It was this "anomaly" which, at times, pressing hardly on the newspaper proprietor, had to be mitigated by legislation. In England it was mitigated by Lord Campbell's Libel Act, (1) and, in Canada, by similar legislation in the different provinces prior to the Dominion Act of 1874, (2) and by the last named Act, which made the law uniform, and which has been superseded by the present enactments in the Code. (3)

(8) *M'Manus* v. *Crickett* (1800), 1 East, 106.
(9) See *R.* v. *Gutch* (1829), 1 Moo. & Mal. 433.
(10) In *Colburn* v. *Patmore* (1834), 4 Tyr., at p. 682.
(1) 6-7 Vict. c 96.
(2) 37 Vict. c. 38 (D)—"An Act respecting the Crime of Libel," passed 26 May, 1874. The preamble recites that "it is expedient that the law respecting the crime of libel should in all respects be uniform throughout all portions of Canada, and for the better protection of private character, and for more effectually securing the liberty of the press, and for better preventing abuses in exercising the said liberty."
(3) SS. 329 and 330, which are also commented on in the chapter on "The Sale of Libellous Matter."

CHAPTER IX.

Reports of Parliamentary Proceedings.

Fair reports of parliamentary proceedings privileged.—Fair reports of the proceedings of Parliament are the subject of qualified privilege, and as such are not punishable. The article in the Code which gives this privilege confers a like privilege on fair reports of proceedings of courts of justice. It will be convenient to deal with these separately. As to the former it is enacted, that 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.*, Legislative Council, Legislative Assembly, or House of Assembly], or any committee thereof, . . . nor by publishing, in good faith, any fair comment upon any such proceedings. (1)

This article of the Code has no reference to defamatory matter published in the legislative bodies mentioned by a member thereof, in the course of any debate or proceeding. To every such publication absolute immunity attaches at common law. Section 1 of the Bill of Rights (2) declares, that "the freedom of speech and debates and proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament;" which is simply an affirmation of an ancient right or liberty. "It is clear," said Cockburn, C.J., (3) "that statements made by members of either House of Parliament, in their place in the House, though they might be untrue to their knowledge, could not be made the foundation of civil or criminal proceedings, however injurious they might be to a third person." And where statements of an alleged defamatory character are so made, and an action is brought, the statement of claim will be struck out. (4)

Report and comment distinguished.—The above section of the Code distinguishes report and comment, and the distinction is obvious. A report is an account, abbreviated or otherwise, of proceedings which have actually taken place. Comment, on the

(1) S. 322.
(2) 1 W. & M. Sess. 2, c. 2.
(3) In *Ex parte Wason* (1869), L. R. 4 Q. B. 573, at p. 576.
(4) *Dilkon* v. *Balfour* (1887), 20 Ir. L. R. 600.

other hand, is the judgment or opinion of the writer on those proceedings. (5)

Conditions of privilege.—The article deals with both reports and comments. As to reports the privilege is dependent (1) upon their being fair statements of the proceedings; (2) publication in good faith, *i.e.*, with honesty of purpose; and (3) publication for the information of the public. The comments are protected simply when they are fair and published in good faith. With respect to both reports and comments the onus is upon the defendant of proving the conditions which confer protection: and it is for the jury to say whether these are satisfied.

The earlier cases.—Prior to the celebrated case against the London *Times* (*infra*), (6) which settled the law, there were several decisions which illustrate the law of the time as to the immunity of publishers of reports of speeches, debates and proceedings in Parliament. In one of these (7) the court refused to grant a criminal information against a bookseller for printing a report of the House of Commons which contained matter of a libellous nature reflecting on an individual. It was in that case that Lawrence, J., said, that when the general advantage to the community in having the libel made public more than counterbalances the inconvenience to the private person whose conduct may be the subject of the libel, its publication will be held to be for the public benefit. In two other cases (8) it was decided, that an information will lie for a libel upon an individual occurring in the single speech of a member of Parliament (out of several delivered in the debate or proceedings purporting to be reported), which had been delivered in the House and published in the newspapers, though had the statements complained of been merely published in Parliament, they would not have been punishable in the courts at Westminster. One of the latest decisions, (9) before the settlement of the law, gave a qualified privilege to a speech printed and circulated by a member amongst his own constituents only. "I should think," said Lord Campbell, C.J., in that case (Wightman, J., and Crompton, J., concurring), "that a publication of a report of his speech, by a member of the House *bonâ fide*

(5) Fraser, L. & S., 3rd ed., p. 87.
(6) *Wason* v. *Walter* (1868), L. R. 4 Q. B. 73; 38 L. J. Q. B. 34.
(7) *Rex* v. *Wright* (1799), 8 T. R. 293; 4 R. R. 649.
(8) *Rex* v. *Abingdon* (1794), 1 Esp. 226; Peake, 236; and *Rex* v. *Creevey* (1813), 1 M. & S. 273, which were adopted and approved by Lord Campbell, C.J., and Wightman, J., in *Davison* v. *Duncan*, [illegible], and also in *Wason* v. *Walter*, *infra*.
(9) *Davison* v. *Duncan* (1857), 7 E. & B. 229; 26 L. J. Q. B. 104; 28 L. T. (O. S.) 265.

addressed to his constituents, would be privileged"—especially, it may be added, if published for their information or benefit, or in vindication or explanation of his action or conduct in Parliament. The privilege, in any case, would be determined by the circumstances, and might not be claimed or relied on, where, for any reason, an action was invited. See *Wernher, Beit & Co.* v. *Markham* (10), where a member of the House of Commons, after making a speech in the House alleged to be defamatory of plaintiff, courted an attack in the courts by repeating it in another place to his constituents.

It should be noticed, that, in respect of privilege, as appears by the above section of the Code, reports of parliamentary debates or proceedings are on the same footing as reports of judicial proceedings. This was so stated by Lawrence, J., in *Rex* v. *Wright* (*supra*), and by Cockburn, C.J., in *Wason* v. *Walter* (*infra*). In the latter case Cockburn, C.J., said, that "the analogy between the two cases is in every respect complete"; that "all the limitations placed on the one, to prevent injustice to individuals, will necessarily attach on the other; a garbled or partial report, or of detached parts of proceedings, published with intent to injure individuals, will equally be disentitled to protection": and that "whatever would deprive a report of the proceedings in a court of justice of immunity, will equally apply to a report of proceedings in Parliament" (pp. 93, 94, 95.) This rule of law is sometimes more honoured in the breach than in the observance by Canadian newspapers.

Privilege finally settled by Wason v. Walter (1868).—The question of the protection of reports of parliamentary proceedings was finally settled in 1868. That such reports are privileged, though containing matter defaming some particular person, was then decided in an action against the proprietor of the London *Times*. (1) The plaintiff, who had procured the presentation to the House of Lords of a petition charging an eminent judge with misconduct, complained of defamatory matter occurring in a fair report in the *Times* of a debate in the Lords in which plaintiff was severely criticized. It was held that he could not recover. Cockburn, C.J., directed the jury, that if they were satisfied that the report was faithful and correct, it was in point of law a

(10) (1901), 18 T. L. R. 763.
(1) *Wason* v. *Walter* (1868), L. R. 4 Q. B. 73; 38 L. J. Q. B. 34.

privileged communication; and the Court of Queen's Bench subsequently discharged a rule *nisi* for a new trial on the ground of misdirection.

Defamatory matter contained in parliamentary papers.—Should the report contain any defamatory matter taken from any paper published under the authority of the legislative bodies mentioned in section 322 (*supra*), and a prosecution be instituted therefor, the statute provides for exculpatory evidence: In any criminal proceeding commenced or prosecuted for publishing any extract from, or abstract of, any paper containing defamatory matter, which has been published by or under the authority of the Senate, House of Commons, or any Legislative Council, Legislative Assembly, or House of Assembly, such paper may be given in evidence, and it may be shewn that such extract or abstract was published in good faith and without ill-will to the person defamed, and, if such is the opinion of the jury, a verdict of not guilty shall be entered for the defendant. (2) The corresponding provision in the English Act (3 & 4 Vict., c. 9, s. 53) covers both civil and criminal proceedings, and permits the above defence to be made under the general issue. See chapter on "Publication of Parliamentary Papers," *post*, for further comments on the law affecting this matter.

Reports of committee proceedings.—Reports of the proceedings of every committee of every legislative body in Canada, as well as of the proceedings of those legislative bodies themselves, are, it will be observed, privileged, and the publishers are exempt from punishment so long as the reports are fair accounts of what has transpired, and are given to the public in good faith for their information. Fair and *bonâ fide* comments on such proceedings are also protected. There has not been, so far as the writer can ascertain, any criminal prosecution, in Canada, for any libel contained in the published reports of legislative proceedings.

(2) S. 947.

CHAPTER X

Reports of Proceedings in the Courts.

Fair reports of judicial proceedings privileged.—A qualified privilege is also extended to fair reports of proceedings in the courts of justice. The enactment in the Code on the subject is included in the same article which gives a like protection to reports of parliamentary proceedings. Omitting that portion of the enactment which relates to the reports last named, and which is dealt with in the previous chapter, it is provided, that no one commits an offence by publishing, in good faith, for the information of the public, (1) 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. (2) Both report and comments are protected, if the conditions of the protection be observed. These are, with respect to the report, (*a*) publication of the public proceedings in good faith; (*b*) for the information of the public; and (*c*) fairness; and, with respect to the comments, simply publication in good faith and fairness. The onus is on the defendant to prove these conditions, the sufficiency of the proofs being a matter for the jury.

Scope of the rule.—The rule here laid down embraces all proceedings of a public nature before any court exercising judicial authority, (3) superior or inferior, of record or not of record; (4) whether the proceedings be *ex parte* or not; (5) whether they be preliminary, *e.g.*, before a magistrate, or at the subsequent trial;

(1) *Cox* v. *Feeney* (1863), 4 F. & F. 13, at p. 19; *Salmon* v. *Isaac* (1869), 20 L. T. 885, *per* Hannen, J.

(2) S. 322.

(3) *Smith* v. *Scott* (1847), 2 C. & K. 580; *Salmon* v. *Isaac* (1869), 20 L. T. 885, and *Hope* v. *Sir W. Leng* (Sheffield *Telegraph*) (1907), 23 T. L. R. 243 (County Court); *Lewis* v. *Levy*, *infra*, *Usill* v. *Hales*, *infra*, *Kimber* v. *Press Association*, *infra*, and *Furniss* v. *Cambridge Daily News* (No. 1), *Times*, 12 January, 1907, (Magistrate or bench of magistrates); *Lynam* v. *Gowing* (1880), 6 L. R. (Ir.) 259 (Coroner's Court); *Ryalls* v. *Leader* (1865), L. R. 1 Exchq. 296 (Registrar in Bankruptcy); *Kane* v. *Mulvany* (1866), Ir. R. 2 C. L. 402 (a Committee of the House of Lords); *Roberts* v. *Brown* (1834), 10 Bing. 519 (Commission in Lunacy); *Allbutt* v. *General Medical Council* (1889), 23 Q. B. D. 400 (Council constituted by the Medical Act, 1858); *Risk Allah Bey* v. *Whitehurst* (1868), 18 L. T. 615 (a Belgian Court).

(4) *Lewis* v. *Levy* (1858), E. B. & E. 537; 27 L. J. Q. B. 282,

(5) *Usill* v. *Hales*, *infra*.

whether contemporaneous or not; (6) whether the matter be one over which the court has jurisdiction or not; (7) and whether it disposes of the case finally, or sends it for trial to a higher tribunal. (8)

"**Judicial authority.**"—The word "judicial" has two meanings. It may refer to the discharge of duties exercisable by a judge or by justices in court, or to administrative duties which need not be performed in court, but in respect of which it is necessary to bring to bear a judicial mind—that is, a mind to determine what is fair and just in respect of the matters under consideration. Justices, for instance, act judicially when administering the law in court, and they also act judicially when determining in their private room what is right and fair in some administrative matter brought before them. (9) A judicial proceeding is a trial, hearing, investigation, or inquiry, by or before any judicial tribunal, whether in open court or in private, (10) and whether of a final or of an interlocutory or preliminary character, (1) and whether *ex parte* or *inter partes*. (2)

Ground of privilege.—The reason for the privilege thus given is, that though individuals may occasionally suffer from reports of proceedings of courts of justice, yet, as these reports are published without 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 protected. The broad principle 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. (3) 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

(6) *Blake* v. *Stevens* (1864), 4 F. & F. 232; 11 L. T. 543.

(7) *Usill* v. *Hales, infra.*

(8) *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* (1878), 3 C. P. D. 319; 47 L. J. C. P. 323; 38 L. T. 65; followed in *Kimber* v. *The Press Association* (1892), 8 T. L. R. 671; (1893) 1 Q. B. 65 (C. A.).

(9) *Per Lopes*, L.J., in the *Royal Aquarium, etc. Society* v. *Parkinson* (1892), 1 Q. B. at p. 452.

(10) *Taaffe* v. *Downes* (1815), 3 Moore P. C. 36*n*; *Pedley* v. *Morris* (1891), 61 L. J. Q. B. 21.

(1) *Gompas* v. *White* (1889), 54 J. P. 22; *Home* v. *Bentinck* (1820), 8 Price 225; 2 B. & B. 130; 22 R. R. 748; *Bottomley* v. *Brougham* (1908), 1 K. B. 584.

(2) *Bottomley* v. *Brougham* (*supra*); *Bower's Actionable Defamation*, 99.

(3) *Per* Campbell, C.J., in *Taylor* v. *Hawkins* (1851), 16 Q. B. 308; 20 L. J. Q. B. 313; 15 Jur. 746.

place in court, and the proceedings are under the control of the judges. The inconvenience, therefore, arising from the chance of the injury to private character is infinitesimally small as compared to the convenience of publicity. (4) And, in the same case, Wightman, J., said: "The only foundation for the exception is the superior benefit of the publicity of judicial proceedings which counterbalances the injury to individuals, though it at times may be great." See, also, the remarks of Cockburn, C.J., in *Wason* v. *Walter*. (5). In his evidence before the select committee of the House of Lords, in 1843, on the law of libel, Lord Denman, C.J., who was a member of the committee, said of these reports, that "the practice . . in reality only extends the area of the court." The report of the committee also stated, that "a full and faithful report may be considered as enlarging the court, and allowing the great body of the public to be present at the trial." And, in *Popham* v. *Pickburn*, (6) the court said, that "such reports only extend that publicity which is so important a feature of the administration of the law in England, and thus enable to be witnesses of it, not merely the few whom the court can hold, but the thousands who can read the report." Moreover, "perfect publicity of judicial proceedings," as testified by Lord Denman before the Lords, "is of the highest importance in other points of view, but in its effect on character I think it desirable. The statement made in open court will find its way to the ears of all in whose good opinion the party assailed feels an interest, probably in an exaggerated form, and the imputation may often rest on the wrong person; both these evils are prevented by correct reports."

Reports not privileged.—As the proceedings the reports of which are protected must be "public proceedings," (7) a report of an inquiry before a grand jury, which is not public, would not be privileged. A report of a case heard by a judge in his private room will be privileged only if the public have free access to the room during the hearing. If he is hearing the proceedings *in camera*, the report, it seems, will not be privileged. (8) Nor will privilege attach to a report which is prohibited by order of the

(4) *Per* Campbell, C.J., in *Davison* v. *Duncan* (1857), 7 E. & B. 229; 26 L. J. Q. B. 104; 28 L. T. (O.S.) 265.
(5) (1868), L. R. 4 Q. B. 73; 38 L. J. Q. B. 34.
(6) (1862), 7 H. & N. 891, at p. 894.
(7) *Rex* v. *Wright* (1799), 8 T. R. 293; *Lewis* v. *Levy* (1858), E. B. & E. 5. 7; 27 L. J. Q. B. 282.
(8) *Smith* v. *Scott* (1847), 2 C. & K. 580; *Ryalls* v. *Leader* (1865), L. R. 1 Exchqr. 296; 35 L. J. Exchqr. 185. *Myers* v. *Defries*, *Times*, 23 July, 1877; *Per* Lord Halsbury, L.C., in *Macdougall* v. *Knight* (1889), 14 App. Cas. 200

court, (9) or which contains blasphemous, (10) seditious or indecent matter. (1)

Fair and unfair reports.—The reports of judicial proceedings must also be fair reports, that is, they must be accurate and impartial. A report is said to be "fair" when it is substantially accurate, and when it is either complete or condensed in such a manner as to give a just impression of what took place. (2) In the following cases the condensation was regarded as impartial and fair, viz., *Chalmers* v. *Payne* (1835), 2 C. M. & R. 156; *Hoare* v. *Silverlock* (No. 2) (1850), 9 C. B. 20; *Lewis* v. *Levy* (1858), E. B. & E. 537; *Allbutt* v. *General Medical Council* (1889), 23 Q. B. D. 400; *Macdougall* v. *Knight* (No. 1) (1889), 14 A. C. 194; *Macdougall* v. *Knight* (No. 2) (1890), 25 Q. B. D. 1; *Kimber* v. *Press Association* (1893), 1 Q. B. 65; *Hope* v. *Sir W. Leng* (1907), 23 T. L. R. 243. A condensed report must fairly represent both sides of the case. If one side is given at length and the other very briefly, for example, if the material evidence of one witness is omitted entirely, a jury may properly find that such a report is not a fair one. (3) In so far as reports of judicial proceedings are concerned, "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. (4)

Fair report of a judgment privileged.—In the case in which this last observation occurs 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 jury found that the pamphlet was a fair, accurate and honest report of the judgment, and was published *bonâ fide* and without malice. The Court of Appeal held, affirming the judgment of Day and Wills, JJ., that it was not necessary to ask the jury whether the pamphlet was a fair report of the trial; that the right questions

(9) *Rex* v. *Clement* (1821), 4 B. & Ald. 218; 11 Price, 69.
(10) *Rex* v. *Carlile* (1819), 3 B. & Ald. 167.
(1) *Steele* v. *Brannan* (1872), L. R. 7 C. P. 261; 41 L. J. M. C. 85; 26 L. T. 509; *Re Evening News* (1886), 3 T. L. R. 255.
(2) Steph. Dig. Cr. Law, 3rd ed., p. 206.
(3) *Duncan* v. *Thwaites* (1824), 3 B. & C. 556.
(4) *Per* Esher, M.R., in *Macdougall* v. *Knight & Son* (1886), 17 Q. B. D. (C.A.) at p. 640.

had been left to the jury, and defendants were entitled to the judgment on the findings; and that a fair and accurate report of the judgment in an action, published *bonâ fide* and without malice, is privileged, although not accompanied by any report of the evidence given at the trial. This decision was discussed and approved by the Court of Appeal in a judgment reversing the judgment of the Queen's Bench Division, in a second action between the same parties, for the publication of other defamatory statements in the same pamphlet. The appeal was allowed and the action dismissed upon the ground of *res judicata*. (5)

Doubts expressed in the House of Lords.—It should, perhaps, be noticed that, upon the appeal to the House of Lords against the judgment of the Court of Appeal in the former action, upon which appeal the decision of the Court of Appeal was approved, but upon a different ground, Halsbury, L.C., said he was not prepared to admit that the judgment of a learned judge must necessarily be privileged; that if the report of a judge's judgment or summing up to the jury did not in fact give reasonable opportunities to the reader to form his own judgment as to what conclusion should be drawn from the evidence given, the publication of such partial, and in that respect inaccurate, representations of the evidence, might be the subject of an action for libel to which the supposed privilege in what was said by a judge would be no answer. There is no presumption one way or the other as to whether a judge's judgment does or does not give such a complete and substantially accurate account of the matters upon which he is adjudicating as to bring it within the privilege. If it be so it must be proved to be so by evidence, and certainly not inferred as a presumption of law. (6) See, also, the observations of Lord Bramwell in the same case at p. 203. Their lordships, it will be observed, did not expressly dissent from the Court of Appeal.

Comments of Lord Esher, M.R., on the Lords' judgment.—In delivering judgment in the second action (7) the Court of Appeal, while upholding their former judgment, referred to the remarks of the Lord Chancellor and Lord Bramwell, and Lord Esher, M.R., said: "The first thing to remark is, that the decision of this court in *Macdougall* v. *Knight* as to privilege (8) was not overruled in the House of Lords. Further, their lordships did not express any opinion on any point of law; all that happened was that two

(5) *Macdougall* v. *Knight* (1890), 25 Q. B. D. (C.A.) 1.
(6) *Ibid.* (1889), 14 App. Cas., pp. 200-1.
(7) *Ibid.* (1890), 25 Q. B. D. (C.A.) 1.
(8) (1886), 17 Q. B. D. (C.A.) 636.

learned lords intimated their desire that it should not be taken that they had expressed any opinion . . . It [*i.e.*, the doctrine that reports of judgments are not *ipso facto* privileged] would be, it seems to me, against public policy and contrary to the very ground of the privilege—which is that publication of what took place is merely a means of putting those who are not present in court in the position of those who were present. There would be another and a practical difficulty as to what, if this were the rule, the reporter would do. If he reports the judgment, is he bound to plead that what the judge said was true and correct? In making the report he did not allege this, but only held out that the report was an accurate one of the judgment, and that may be true. Yet, if the suggestion is upheld, the accuracy of the report would be no justification, and it would be put on the reporter to go further and say that what the judge said was true. That may be the duty of a properly constituted Court of Appeal, but I do not see it can be the duty of a reporter" (pp. 8-9). Shortly stated, Lord Esher's opinion of the rule of law is, that 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 is said or done would, but for the privilege, be libellous against an individual, and actionable at his suit; and 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. (9)

Requisites of the report.—The report need not be verbatim, but it must be substantially a fair account of what took place in court. (10) A fair abstract will be sufficient. (1) A report will not be privileged which gives the opening statement of counsel as a statement of the real facts of the case where the evidence does not fully support it, or which gives a synopsis of the addresses of counsel omitting all reference to the evidence; (2) or where the speech of one counsel in the case commented on was given and the speech of the opposite counsel omitted; (3) or which only refers to the evidence by stating that the witnesses proved all that had been

(9) *Macdougall* v. *Knight & Son* (1890), 25 Q. B. D. (C.A.) 1, at p. 7.
(10) *Per* Lord Campbell, C.J., in *Andrews* v. *Chapman* (1853), 3 C. & K. 289.
(1) *Per* Mellish, L.J., in *Milissich* v. *Lloyds* (1877), 46 L. J. C. P. 404; 36 L. T. 423; 13 Cox C. C. 575. See, also, cases *supra*, as to condensed reports being impartial and fair.
(2) *Woodgate* v. *Ridout* (1865), 4 F. & F. 202.
(3) *Ibid.*

stated by the counsel for the prosecution; (4) or which states that certain facts were disclosed by the evidence, when no evidence had been really given of such facts. (5) So, too, a report is not privileged which states "from inquiries made by our reporter," etc., etc., when in fact the reporter of proceedings before a coroner had not made inquiries, but had merely copied an affidavit not produced at the inquest. (6) Reports of judicial proceedings were also held to be unprivileged where there was a pretended summary of the facts, and descriptions of and extracts from the speech of counsel at the expense of plaintiff, who had acted as attorney for one of the parties to the action; (7) where the reports were similar to that in *Flint* v. *Pike* (*supra*); (8) where there was a defamatory heading; (9) where imputations unwarranted by the evidence were contained in the report, putting forward, as the court said, "what is inculpatory, withholding what is exculpatory;" (10) where the heading implied unprofessional conduct on the part of plaintiff, a solicitor: (1) where the evidence was unfairly summarized; (2) where only the speeches of counsel on one side, and not the evidence, were reported; (3) where the report contained unfair comments and charges regardless of the evidence. (4) A libellous heading to a report, which is not justified by the facts of the case, will also take away the privilege, for example, a report of a case headed "Judicial Delinquency," (5) "Shameful Conduct of an Attorney," (6) "An Honest Lawyer," (7) "Wilful and Corrupt Perjury." (8) Another species of report which is not privileged, is the publication, before trial, of the statements contained in a pleading filed in the course of a civil action merely because such statements form part of such a pleading. (9) This decision of the Supreme Court of

(4) *Lewis* v. *Walter* (1821), 4 B. & Ald. 605; *Roberts* v. *Brown* (1834), 10 Bing. 519; 6 C. & P. 757.
(5) *Pinero* v. *Goodlake* (1866), 15 L. T. 676; *Ashmore* v. *Borthwick* (1885), 49 J. P. 792; 2 T. L. R. 113, 209.
(6) *Hayward & 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.
(7) *Flint* v. *Pike* (1825), 4 B. & C. 473.
(8) *Saunders* v. *Mills* (1829), 6 Bing. 213; *Roberts* v. *Brown* (1834), 10 Bing. 519.
(9) *Harvey* v. *French* (1832), 1 C. & M. 11; and other cases *infra*.
(10) *Frescoe* v. *May* (1860), 2 F. & F. 123.
(1) *Bishop* v. *Latimer* (1861), 4 L. T. 775.
(2) *Turner* v. *Sullivan* (1862), 6 L. T. 180.
(3) *Kane* v. *Mulvany* (1866), Ir. R. R. 2 C. L. 402.
(4) *Risk Allah Bey* v. *Whitehurst* (1868), 18 L. T. 615.
(5) *Stiles* v. *Nokes* (1806), 7 East. 493.
(6) *Clement* v. *Lewis et al.* (1822), 3 Br. & Bing. 297; 7 Moore, 200; 3 B. & Ald. 702.
(7) *Boydell* v. *Jones* (1838), 7 Dowl. 210; 1 Horn. & H. 408; 4 M. & W. 446.
(8) *Lewis* v. *Levy* (1851), 27 L. J. Q. B. 282; E. B. & E. 537.
(9) *Shallow* v. *Gazette Printing Co.* (1909), 41 S. C. R. 339.

Canada affirmed the judgment appealed from, (10) which reversed the judgment of the Quebec Superior Court. (1) The court last named held, that an impartial and accurate report in the public press of any proceedings in a court of law is privileged, and that this rule applied to the publication of pleadings (*i.e.*, declarations, exceptions, rejoinders, etc.), before issue joined, as well as after trial. The King's Bench judgment reversing this held, that the common law rules as to the privilege of fair and correct reports of the proceedings of courts of justice did not extend to the publication of extracts from, or summaries of, pleadings filed before trial in a suit at law. Pleadings and documents which form the record (*dossier*) of a suit at law are, it was held, not open to public inspection, but remain in the custody of prothonotaries and clerks of courts for the use of the parties alone. The affirming of this judgment, by the Supreme Court of Canada (*supra*), may be regarded as decisive of the question of qualified privilege with respect to such publications. (2)

The privilege of comments.—The report to be privileged must be confined to what actually took place before the judicial tribunal. The reporter must not add defamatory comments of his own. (3) It has been said that, 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. (4) This remark has been often quoted in this connection, but it is subject to qualification so far as section 322 in the Code is concerned, because comments on parliamentary and judicial proceedings are privileged by that section, and, so long as they are fair and published in good faith, it could make no difference whether the comments are contained in the report or not. A newspaper, publishing and commenting upon proceedings in a judicial or semi-judicial investigation, may comment upon the fact that further damaging evidence against a party might have been given if the tribunal had been disposed to receive it, but it is not fair comment to state such evidence or the purport

(10) (1907), 17 Q. O. R. (K.B.) 309.
(1) (1907), 31 Q. O. R. (S.C.) 338.
(2) It may be arguable whether the rule laid down by the Supreme Court would cover the publication, before trial, of the pleadings on both sides. This was done in the libel action of *Foster* v. *Macdonald and the Globe Printing Company*, which was tried at the Spring Assizes (1910) at Toronto. The report, which is privileged under the Code, is "a fair report of the *public* proceedings, preliminary or final, heard before any Court exercising judicial authority." (S. 322 *supra*.)
(3) *Cooper* v. *Lawson* (1838), 8 A. & E. 746; 2 Jur. 919; *Risk Allah Bey* v. *Whitehurst* (*supra*).
(4) *Per* Lord Campbell, C. J., in *Andrews* v. *Chapman* (1853), 3 C. & K. 286.

of it. (5) But comment upon judicial proceedings, however fair, if published before the case is concluded, is contempt of court. (6) But no order for committal will be made where though, technically speaking, the subject matter of complaint is contempt of court, it is not likely to substantially prejudice the parties to the action. (7) It should also be noticed that the publication of comments on pending proceedings in an action whether defamatory, (8) or not, (9) may be restrained by injunction by virtue of the inherent jurisdiction of the court to intervene where the due administration of justice is concerned. (10)

Jury must consider the whole report.—In every case, however, where a report of such proceedings is in question, the whole report must be considered, and the jury should satisfy themselves what effect it would have upon an unprejudiced person who knew nothing of the case beforehand. It is generally a question for them, after hearing the evidence on both sides, whether the report is substantially correct, and was published *bonâ fide*. If no charge of bad faith is made out against the publisher, and the report is clearly a fair one, the judge may properly stop the case. (1)

(5) *Patterson* v. *Edmonton Bulletin Co.* (1908), 1 Alberta R. 477.

(6) *Tichborne* v. *Mostyn* (1867), L. R. 7 Eq. 55*n*; 17 L. T. 5; *In re The Cheltenham and Swansea Wagon Co.* (1869), L. R. 8 Eq. 580; 38 L. J. Ch. 330; 20 L. T. 169; *Tichborne* v. *Tichborne* (1870), 39 L. J. Ch. 398; 22 L. T. 55; *Robertson* v. *Labouchere* (1877), 42 J. P. 710; *Buenos Ayres Gas Co.* v. *Wilde* (1880), 42 L. J. 657; *Kitcat* v. *Sharp* (1882), 52 L. J. Ch. 134; 48 L. T. 64; *Dollar* v. *Ledger* (1888), 52 J. P. 328; *Hunt* v. *Clarke; Re O'Malley* (1889), 58 L. J. Q. B. 490; 37 W. R. 724; 5 T. L. R. 496, 650; 61 L. T. 343; *In re Crown Bank; In re O'Malley* (1890), 44 Ch. D. 649; 59 L. J. Ch. 767; 39 W. R. 45; 63 L. T. 304.

(7) *Hunt* v. *Clarke: Re O'Malley (supra)*.

(8) *Coleman* v. *West Hartlepool Ry. Co.* (1869), 8 W. R. 734; 2 L. T. 766; *Bowden et al.* v. *Russell* (1877), 46 L. J. Ch. 414; 36 L. T. 177; *Kitcat* v. *Sharp* (1883), 52 L. J. Ch. 134; 48 L. T. 64.

(9) *Mackett* v. *Commissioner of Herne Bay* (1876), 24 W. R. 845.

(10) *Lewis* v. *Levy* (1858), 27 L. J. Q. B. 282; E. B. & E. 537; *Daw* v. *Eley* (1868), L. R. 7 Eq. 49; 38 L. J. Ch. 113. The subject of contempt is fully dealt with in the second part of this volume, *post*.

(1) *Milissich* v. *Lloyds* (1877), 46 L. J. C. P. 407.

CHAPTER XI.

Reports of Public Meetings.

Reports of public meetings conditionally privileged.—A statutory privilege is conferred by the criminal law upon newspaper reports of the proceedings of public meetings. A similar privilege, which is, however, not uniform in its provisions, forms part of the civil law of the Provinces of Ontario, New Brunswick, Nova Scotia, British Columbia and Manitoba. Under the Code, 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 contradiction by or on behalf of the prosecutor. (1)

The conditions.—This enactment confers only a qualified privilege which attaches on the following conditions: (*a*) that the report was published in good faith, *i.e.*, with honesty of purpose; (*b*) that it is fair and accurate, which means impartial and reasonably correct; (*c*) that the meeting was lawfully convened for a lawful purpose and open to the public; (*d*) that the publication of the matter complained of was for the public benefit; (*e*) that the defendant has not refused, when asked (because the condition implies a request), to insert in a conspicuous place in the newspaper in which the report appeared, a reasonable letter or document of explanation or contradiction by or on behalf of the complainant. The word "statement," instead of document, appears in the clause in the English Act, and also in some of the provincial enactments, and is perhaps a better word. The onus of proof is on the defendant with respect to all these conditions. It is doubtful whether this section (323) extends the privilege already attaching to similar reports at common law; for, at common law, the test is whether

(1) S. 323. See the Law of Libel Amendment Act, 1888, s. 4 (Imp.) for the English enactment on the subject. For comments and cases explanatory of certain words and phrases in this section (323) of the Code, especially the expressions: "fair report," "public meeting," "open to the public," "fair and accurate," "for the public benefit," and "reasonable letter," see "King's Law of Defamation," ch. 20, "Reports of Public Meetings."

the matter contained in the report is fit and proper for the information of the public, which is virtually the limit prescribed by this article.

Privilege limited to reports in a newspaper as defined by the Code.—The enactment, it will be observed, applies only to a report in a "newspaper," which means a newspaper as defined by the Code. The word "newspaper" means "any paper, magazine, or periodical, 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 between the publication of any two such papers, parts or numbers; and also any paper, magazine or periodical, 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." (2) A similar definition appears in the New Brunswick and British Columbia Libel Acts. (3) In the Manitoba Act the number of days intervening between the publication periodically, or in parts or numbers, is twenty-six instead of thirty-one. (4) The privilege in the Nova Scotia Act is contained in R. S. N. S. 1900, c. 180, s. 1 (*b*) and s. 2; and, in the Ontario Act, in R. S. O. 1897, c. 68, s. 8 (1), as enacted by 6 Edw. VII., c. 22, s. 2, and (as to the meaning of "a public meeting") in R. S. O. 1897, c. 68, s. 8. (2)

Scope of the enactment.—The definition in the Code covers reports in monthly publications, which are excluded by the Manitoba Act, but it does not include a report of a public meeting in a book, pamphlet, placard or circular, or in an extract or reprint from a "newspaper" as above defined. In fact no report of any meeting other than that described in the above section is privileged under the Code, whether published in a newspaper or in any other medium than a newspaper. (5) Defamatory matter appearing in any such report would not have the protection of the statute, and the defendant would have to rely, as he was obliged to do before there was any legislation on the subject, upon the matter complained of being true and being published for the public benefit, or upon its being a fair and *bonâ fide* comment on a matter of public interest. This is still the law in respect of the published reports of the proceedings of all public meetings which are not within the above section of the statute. The publisher of defamatory matter

(2) S. 2 (22).
(3) C. S. N. B. 1903, c. 136, s. 2 (I); R. S. B. C. 1897, c. 120, s. 2.
(4) R. S. M. 1902, c. 97, s. 2 (*a*).
(5) See, however, *Allbutt* v. *General Council of Medical Education, etc.*, (1889), 23 Q. B. D. 400, *infra*.

contained in such reports would have the same defence open to him as he had before the passing of the Act. Where, therefore, by the decisions of the courts under the old law, the matter charged as libellous in any report was for any reason privileged, it would still be privileged as a defence to the prosecution.

Reports of quasi-judicial bodies privileged.—It should, however, be noticed, that the reports of the proceedings of quasi-judicial bodies, created by statute, would be privileged under section 4 of the British Columbia Act relating to civil cases, (6) although not published in a newspaper as above defined; they appear to be in the same category as fair judicial reports, which were privileged at common law, apart from any statute. In *Allbutt* v. *General Council of Medical Education, etc.,* (7) 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 interests 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" (pp. 410-413.)

The law prior to the statute.—Until the legislature intervened by giving the above qualified protection to the reports of public meetings, it was no defence to a prosecution for a libel contained in a report of a public meeting that the report was a true, correct and faithful report of the proceedings at such meeting. This was decided in *Davison* v. *Duncan,* (8) by Lord Campbell, C.J., and Coleridge and Wightman, JJ., who were of opinion that privilege did not extend to a report of what took place at all public meetings, and that the West Hartlepool Improvement Commissioners were not a body in whose proceedings the public could have a legitimate interest.

Popham v. Pickburn (1862). Opinion of Wilde, B.—Even where an Act of Parliament directed the publication, at a particular time, of a report made by a medical health officer to a vestry board, and that copies should be given to any person on paying for them, a publisher of a newspaper was held to be not justified in publishing the report (which contained matter defamatory of the

(6) R. S. B. C. 1897, c. 120.
(7) (1889), 23 Q. B. D. 400.
(8) (1857), 7 E. & B. 229; 3 Jur. (N. S.) 613; 26 L. J. Q. B. 104; 28 L. T. (O. S.) 265; 5 W. R. 253.

plaintiff), even without comment, and as a matter of public interest, as part of a report of the proceedings at the vestry meeting, at any rate before it was published by the vestry as required by the Act.(9) "The defendant," said Wilde, B., delivering the judgment of the Court of Exchequer, "has published that of the plaintiff which is undoubtedly a libel, and which is untrue. He seeks to protect himself on the ground that the publication is a correct report of a document read at a meeting of the Clerkenwell vestry, which document must have been published and sold at a small price by the vestry in a short time. But we are of the opinion this furnishes no defence. Undoubtedly the report of a trial in a court of justice, in which this document had been read, would not make the publisher thereof liable to an action for libel, and reasonably; for such reports only extend that publicity which is so important a feature of the administration of the law in England, and thus enable to be witnesses of it, not merely the few whom the court can hold, but the thousands who can read the reports. But no case has decided that the reports of what takes place at the meeting of such a body as this vestry are so privileged; indeed, the case cited in the argument (*Davison* v. *Duncan, supra*), is an authority that they are not. Then, is the publication justified by the statute? It is true that the documents would have been accessible to the public in a short time, though not published by the defendant: but this cannot justify his anticipating the publication, and giving it a wider circulation, and, possibly, without an answer which the vestry might have received in some subsequent report or otherwise, and which would then have been circulated with the libel. This defence, therefore, fails.

"It is further contended that this libel might be justified as a matter of public discussion on a subject of public interest. The answer is—this is not a discussion or comment. It is a statement of a fact. To charge a man incorrectly with a disgraceful act is very different from commenting on a fact relating to him truly stated. There the writer may, by his opinion, libel himself rather than the subject of his remarks. . . It is to be further observed that this decision does not determine or affect the question whether, after the statutory publication, it might or not be competent to others to republish these reports with or without reasonable comment."

Purcell v. Sowler (1877) and other cases.—So, also, prior to the statute, a libellous publication could not be justified on the

(9) *Popham* v. *Pickburn* (1862), 7 H. & N. 891; 5 L. T. (N. S.) 846;; 31 L. J. Ex. 133; 8 Jur. (N. S.) 179; 10 W. R. 324.

ground that the matter contained in it formed part of the report of proceedings at a meeting of a board of guardians; (10) or of the proceedings of a public meeting called to petition Parliament. (1) See, also, on the same point, the cases *infra*. (2)

Conditions of privilege. "A public meeting" "open to the public."—Then as to the conditions of the privilege conferred by the statute. It is impossible to define what is a public meeting within the meaning of the section; in fact, there is no reported decision, either in England or in Canada, on the words "a public meeting" "open to the public." (3) Each case that may arise, therefore, will have to be determined with reference to its own particular circumstances; and these are so varied that any general definition would be necessarily imperfect. Mr. Odgers mentions a case of *Hughes* v. *Gibson*, tried in 1886, in which Lord Coleridge, C.J., expressed the opinion that a meeting of a board of guardians, at which reporters were admitted, was not a "public meeting" "open to the public." This was subsequent to the passage of the Newspaper Libel and Registration Act, 1881, (4) section 2 of which, conferring privilege on newspaper reports of certain public meetings, is substantially the same as the above section of the Code. The Law of Libel Amendment Act, 1888, (5) materially extended the privilege of such reports.

Meetings of municipal councils, school boards, etc.—A question may possibly arise as to how far the meetings of municipal councils, school boards and other representative bodies of a like character, are "public meetings" "open to the public." See *Pierce* v. *Ellis*, (6) *Purcell* v. *Sowler*, (7) *Simpson et al.* v. *Downs, et al.* (8) See, also, *Jackson* v. *Sir Richard Mayne*, (9) *Hopewell* v. *Kennedy*, (10) and *Campeau* v. *Monette*. (1) Meetings of the representative bodies above mentioned, although usually open to the

(10) *Purcell* v. *Sowler* (1877), 2 C. P. D. (C.A.) 215; 46 L. J. C. P. 308; 25 W. R. 362; 36 L. T. 416; 41 J. P. 789 (C.A.). This decision was the immediate cause of the English law being amended.

(1) *Hearne* v. *Stowell* (1840), 12 A. & E. 719, 726; *Pierce* v. *Ellis* (1856), 6 Ir. C. L. R. (N. S.), 65, 66.

(2) *Henwood* v. *Harrison* (1872), 41 L. J. C. P. 206; L. R. 7 C. P. 606; 20 W. R. 1000; 26 L. T. 938; *Charlton* v. *Walton* (1834), 6 C. & P. 385.

(3) See *Parke* v. *Hale* (1903), 2 O. W. R. 1172.

(4) 44-45 Vict. c. 60 (Imp.).

(5) 51-52 Vict., c. 64, s. 4 (Imp.).

(6) (1856), 6 Ir. L. R. (N.S.), 65, 66.

(7) (1877), 2 C. P. D. (C.A.) 215; 46 L. J. C. P. 308; 25 W. R. 362; 36 L. T. 416; 41 J. P. 789 (C.A.).

(8) (1866), 16 L. T. (N.S.) 391, *per* Montagu Smith, J.

(9) (1868), 19 L. T. (N.S.) 399, *per* Keating, J.

(10) (1904), 4 O. W. R. 433; 9 O. L. R. (1904) 43.

(1) (1901), 19 Q. O. R. (S. C.) 429.

public in this country, and their proceedings as a rule reported in the press, are nevertheless within the control of their members. They may be open or closed at the will and pleasure of their conveners; the public have not, strictly speaking, the right of admission, and they may be excluded at any moment. Any doubts on this point, under the English law, have been solved by the Law of Libel Amendment Act, 1888, (51-52 Vict., c. 64), section 4 of which defines a public meeting as "any meeting *bonâ fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, *whether the admission thereto be general or restricted.*" Privilege is also extended by that Act to the reports of certain designated meetings, *e.g.*, of town councils, school boards, boards of guardians, etc., which the legislature evidently thought were not technically "public."

Meetings of creditors, shareholders and the like.—There is another class of meetings, the reports of whose proceedings would appear not to be privileged. These are meetings of creditors held under the authority of an Insolvent Act, meetings of shareholders, or stockholders of companies, and the like. Meetings of this class are usually advertised, but the invitation to attend them is, as a rule, limited to those immediately interested. There is at present no Insolvent Act applicable to the whole Dominion, but, in Ontario, there are the Act respecting assignments and preferences by insolvent persons, (2) and the Creditors Relief Act, (3) which are intended to effect the same purpose, as far as possible, and, in some of the other provinces, there are Acts of a similar nature. Newspaper reports of the proceedings of meetings, held under any such Acts, would not be privileged, and reasonably so. The admission to such meetings is not general, but more or less restricted; discussions constantly arise there affecting the character, reputation, or credit of different persons, and statements are made, the publication of which would be most pernicious to the individuals concerned. A shareholder of a railway company called a meeting of the shareholders, and invited other persons, and particularly the reporters of the newspaper press, to attend. At the meeting so held the convener made defamatory remarks on the conduct of the plaintiff (one of the directors), relating to the affairs of the company. Cockburn, L.C.J., ruled that, although a discussion of the matter before a meeting of shareholders was excusable, there was no excuse for a publication to others than

(2) R. S. O., 1897, c. 147.
(3) R. S. O., 1897, c. 78.

shareholders. (4) It has been held, however, under the English Law of Libel Amendment Act, 1888, (5) that a meeting of the shareholders of a public company, called for the purpose of obtaining the co-operation of the shareholders to a project for providing further capital, is a "public meeting." (6) But a service in a chapel does not come within that description, although it had been advertised that the sermon would be preached. (7)

"Lawfully convened for a lawful purpose." — Unlawful assembly defined.—The meeting must also be "lawfully convened for a lawful purpose." The Code defines an unlawful assembly as an assembly of three or more persons, who, with intent to carry out any common purpose, assemble in such a manner, or so conduct themselves when assembled, as to cause persons in the neighbourhood of such assembly to fear, on reasonable grounds, that the persons so assembled will disturb the peace tumultuously, or will, by such assembly, needlessly and without any reasonable occasion, provoke other persons to disturb the peace tumultuously. (8)

Persons lawfully assembled may become an unlawful assembly, if they conduct themselves with a common purpose in such a manner as would have made their assembling unlawful if they had assembled in that manner for that purpose. (9)

An assembly of three or more persons for the purpose of protecting the house of any one in their number against persons threatening to break and enter such house, in order to commit any indictable offence therein, is not unlawful. (10)

A riot is an unlawful assembly which has begun to disturb the peace tumultuously. (1) Every member of an unlawful assembly is guilty of an indictable offence and liable to one year's imprisonment. (2)

These enactments are taken from the English Draft Code, 1879-80, section 84. The Commissioners say that they have endeavoured, in that section, to enunciate the principles of the

(4) *Parsons* v. *Surgey* (1864), 4 F. & F. 247. See, also, *Davis* v. *Cutbush, et al.* (1859), 1 F. & F. 487, and *Lawless* v. *The Anglo-Egyptian Cotton and Oil Company* (1869), 38 L. J. Q. B. 130; 4 L. R. Q. B. 262; 17 W. R. 498; 10 B. & S. 226.
(5) 51-52 Vict., c. 64, s. 4 (Imp.).
(6) *Ponsford* v. *Financial Times, Ltd. and Hart* (1900), 16 T. L. R. 248.
(7) *Chaloner* v. *Lansdown Sons* (1894), 10 T. L. R. 290.
(8) S. 87 (1).
(9) *Ibid.* (2).
(10) *Ibid.* (3).
(1) S. 88.
(2) S. 89.

common law, although in declaring that an assembly may be unlawful if it causes persons in the neighbourhood to fear that it will needlessly, and without reasonable occasion, provoke others to disturb the peace tumultuously, they are declaring that which has not as yet been specifically decided in any particular case. The clause as to the defence of a man's house was inserted because of a doubt expressed on the subject.

Illustrative cases: Reg. v. Vincent et al. (1839).—Any meeting assembled under such circumstances as, according to the opinion of rational and firm men, are likely to produce danger to the tranquillity and peace of the neighbourhood, is an unlawful assembly. In viewing this question the jury should take into their consideration the hour at which the parties met, and the language used by the persons assembled, and by those who addressed them, and then consider whether firm and rational men, having their families and property there, would have reasonable ground to fear a breach of the peace; as the alarm must not be merely such as would frighten any foolish or timid person, but must be such as would alarm persons of reasonable firmness and courage. (3) In the case in which the law was so laid down, and in which the defendants were found guilty of attending unlawful assemblies, Alderson, B., said, in his charge to the grand jury, that if a meeting from its general appearance, and from all the accompanying circumstances, was calculated to excite terror, alarm and consternation, it was generally criminal and unlawful. These were the clear principles of law—an unlawful assembly differing in this respect from a riot, that a riot must go forward to the perpetration of some act which the unlawful assembly is calculated to originate and inspire. Something must be executed in a turbulent manner to constitute a riot; but in these cases it must be some enterprise of a private nature.

Reg. v. Cunningham et al. (1888).—In another prosecution an unlawful assembly was described as an assembly of persons with the intention of carrying out any common purpose, whether such purpose was lawful or unlawful, in such a manner as to give firm and courageous persons in the neighbourhood of such assembly ground to apprehend a breach of the peace in consequence of it, and in the same case a riot was described as a disturbance of the peace by three persons at the least, who, with an intent to help one another against any person who opposes them in the execution of some enterprise or other, whether lawful or unlawful, actually

(3) *Per* Alderson, B., in *Reg.* v. *Vincent et al.* (1839), 9 C. & P. 91.

execute that enterprise in such a violent and turbulent manner as to alarm firm and courageous persons in the neighbourhood. (4) In the prosecution in which the law was so stated, the commissioner of police, believing that a breach of the public peace would result from the holding of a certain public meeting in Trafalgar Square, in the city of London, issued a public notice prohibiting the meeting, and directed the police to prevent it. The three defendants attended the meeting and were convicted of taking part in an unlawful assembly; but the court held that a public meeting, convened after the publication of such a notice, was not rendered unlawful merely by reason of such publication. So also, if parties assemble to obstruct the officers of the law, all parties so assembling are guilty of an unlawful assembly whether a riot takes place or not. (5)

O'Kelly v. Harvey (1883).—In *O'Kelly* v. *Harvey*, (6) which was an action for assault and battery against an Irish magistrate, who had dispersed an assembly which he believed might be unlawful, it was held by the Irish Court of Appeal, overruling the Exchequer Division, that, assuming that the plaintiff and others assembled with him to be doing nothing unlawful, yet, if there were reasonable grounds for the defendant, being a justice of the peace, believing, as he did, that there would be a breach of the peace if they continued so assembled, and that there was no other way in which the breach of the peace could be avoided but by stopping and dispersing the plaintiff's meeting, the defendant was justified in taking the necessary steps to stop and disperse it. Law, L.C., who delivered the judgment of the court, said that he always understood the law to be that any needless assemblage of persons, in such numbers and manner and under such circumstances as were likely to provoke a breach of the peace, was itself unlawful, and that this appeared to be the view taken by the very learned persons who revised the Criminal Code Bill in 1878. He approves, in his judgment, of *Humphries* v. *Connor*, (7) and comments on and distinguishes *Beatty* v. *Gillbanks*. (8)

Reg. v. Clarkson et al. (1892).—The marching of nine men, carrying with them musical instruments, upon a Sunday, through the public streets of a town (in which processions other than those

(4) *Per* Charles, J., in *Reg.* v. *Cunningham et al.* (1888), 16 Cox C. C. 420.
(5) *Per* Fitzgerald, J., in *Reg.* v. *McNaughton et al.* (1881), 14 Cox C. C. 576.
(6) (1883), 15 Cox C. C. 435.
(7) (1864), 17 Ir. C. L. R. 1.
(8) (1882), 9 Q. B. D. 308.

of Her Majesty's naval, military and volunteer forces are prohibited from taking place on Sunday, if accompanied by instrumental music), is no evidence of an unlawful assembly (although such marching is calculated to excite and does excite others to the commission of a breach of the peace), if such men did not know that their acts were calculated to lead to a breach of the peace. But, *quære*, whether where two or more persons are assembled together in pursuit of a common object, lawful in itself, and in the carrying out of such object do something which may lead to a breach of the peace (or which is calculated to lead others to believe that a breach of the peace will be committed), such assembly does not amount at common law to an unlawful assembly? (9)

In *Spearing* v. *Wandsworth Borough News Co.*, (10) Darling, J., left it to the jury to say, whether a street meeting of "passive resisters" was a meeting "lawfully held for a lawful purpose," within the meaning of the latter part of section 4 of the Law of Libel Amendment Act, 1888. The jury found that it was not, but the Court of Appeal held, as matter of law, that it was, and they set aside the verdict for plaintiff, and directed judgment for the defendants.

The right of public meeting.—English law does not recognize any special right of public meeting either for a political or any other purpose. The right of assembling is nothing more than the result of the view taken by our courts of individual liberty of person and individual liberty of speech. No such right is known to the law of England. (1)

Is a meeting proclaimed against illegal?—The provision in the Code (S. 323), as to the lawful convening of a public meeting, evidently refers to any meeting which the publisher of a newspaper knows, or should know, is being held against lawful authority. A meeting, however, is not necessarily made unlawful by official proclamation of its illegality. "No public meeting," says Professor Dicey, in his Law of the Constitution, (2) "which would not otherwise be illegal, becomes so (unless in virtue of some special Act of Parliament) in consequence of any proclamation or notice by a secretary of state, by a magistrate, or by any other official." And he puts this case: "Suppose that the Salvationists advertise throughout the town that they intend holding a meeting in a field which they have hired near Oxford, that they intend to assemble

(9) *Reg.* v. *Clarkson et al.* (1892), 17 Cox C. C. 483.
(10) *Times*, 3rd July, 1906.
(1) Dicey's Law of the Constitution, 6th ed., Appendix, note 5.
(2) 6th ed., pp. 277-8.

in St. Giles's and march thence with banners flying and bands playing to their proposed place of worship. Suppose that the Home Secretary thinks that, for one reason or another, it is undesirable that the meeting should take place, and serves formal notice upon every member of the army, or on the officers who are going to conduct the so-called 'campaign' at Oxford, that the gathering must not take place. This notice does not alter the character of the meeting, though, if the meeting be illegal, the notice makes any one also who reads it aware of the character of the assembly, and thus affects his responsibility for attending it" —citing on this point, *Rex* v. *Fursey*. (3) "Assume," he adds, "that the meeting would have been lawful if the notice had not been issued, and it will certainly not become unlawful because a Secretary of State has forbidden it to take place. The proclamation has, under these circumstances, as little legal effect as would have been a proclamation from the Home Office forbidding one or any other person to walk down the High Street. It follows, therefore, that the Government has little or no power of preventing meetings, which to all appearances are lawful, even though they may in fact turn out when actually convened to be unlawful because of the mode in which they are conducted. This is certainly a singular instance of the way in which adherence to the principle that the proper function of the State is the punishment, not the prevention, of crimes, deprives the executive of discretionary authority."

Meaning of the term "an unlawful assembly."—The same learned authority in the same work, (4) discusses the meaning of the term "an unlawful assembly," and says that it does not signify any meeting of which *the purpose* is unlawful. If, for example, five cheats meet in one room to concoct a fraud, to indite a libel, to forge a bank note, or to work out a scheme of perjury, they assemble for an unlawful purpose, but they can hardly be said to constitute an "unlawful assembly." Besides the definition of an "unlawful assembly" given in the Code (S. 87 (1) *supra*), this term has been defined with varying degrees of precision by the authorities *infra*, (5) the definitions varying, for the

(3) (1835), 6 C. & P. 81; 3 St. Tr. (N.S.) 543.
(4) The Law of the Constitution, 8th ed., Appendix, note 5, p. 448.
(5) Hawkins, P. C. Bk. 1, c. 65, ss. 9, 11; Steph. Criminal Digest, 3rd ed., art. 70; English Draft Criminal Code, s. 84, p. 80; *Rex* v. *Pinney* (1832), 5 C. & P. 254; *Rex* v. *Hunt et al.* (1819), 3 B. & Ald. 566; 1 St. Tr. (N.S.) 171; *Redford* v. *Birley et al.* (1822), 3 Stark. 103; 1 St. Tr. (N.S.) 1076; *Rex* v. *Morris* (1820), 1 St. Tr. (N.S.) 521; *Reg.* v. *Vincent* (1838), 9 C. & P. 91, 109; 3 St Tr. (N.S.) 1037, 1082; *Beatty* v. *Gillbanks* (1882), 9 Q. B. D. 308; *Reg.* v. *McNaughton* (1881), 14 Cox C. C. 576; *O'Kelly* v. *Harvey* (1882), 15 Cox C. C. 435.

most part, in words rather than in substance. But, as stated by Professor Dicey, (6) in whatever way defined, the general and prominent characteristic of any unlawful assembly is, a meeting of persons who either intend to commit, or do commit, or who lead others to entertain a reasonable fear that the meeting will commit, a breach of the peace. This actual or threatened breach of the peace is the essential characteristic or "property" connated by the term "unlawful assembly." He then proceeds to frame the following, from the various authorities, as a reasonably accurate definition of the term, namely: "Any meeting of three or more persons who (1) assemble to commit, or, when assembled, do commit, a breach of the peace; or (2) assemble with intent to commit a crime by open force; or (3) assemble for any common purpose, whether lawful or unlawful, in such a manner as to give firm and courageous persons in the neighbourhood of the assembly reasonable cause to fear a breach of the peace, in consequence of the assembly; or (4) assemble with intent to incite disaffection among the Crown's subjects, to bring the constitution and government of the realm, as by law established, into contempt, and generally to carry out, or prepare for carrying out, a public conspiracy." As to the fourth portion of this definition the learned author cites the Irish decision already mentioned, (7) and adds that this portion must perhaps be considered as, in England, of doubtful authority, (8) but would, it is conceived, certainly hold good if the circumstances of the time were such that the seditious proceedings at the meeting would be likely to endanger the public peace. So that a meeting will not be for a "lawful purpose" if it is seditious; (9) or illegal, as *e.g.*, persons meeting for a purpose which, although not carried out, would, if carried out, make them rioters; (10) or a meeting to adopt preparatory measures for holding a national convention; (1) or held under such circumstances as are likely to cause a breach of the peace. (2)

No meeting, otherwise lawful, becomes unlawful by exciting unlawful opposition. Beatty v. Gillbanks (1882).—But no meeting, which would not otherwise be unlawful, becomes unlawful because it will excite opposition which is itself unlawful, and thus

(6) The Law of the Constitutio . 6th ed., p. 449.
(7) *O'Kelly* v. *Harvey* (1882), 15 Cox C. C. 435.
(8) See, however, *Reg.* v. *Ernest Jones*, 6 St. Tr. (N.S.) 783, 816, 817, summing up of Wilde, C.J.
(9) *Rex* v. *Hunt et al.* (1819), 3 B. & Ald. 566: *Redford* v. *Birley et al.* (1822), 3 Stark. at p. 103.
(10) *Rex* v. *Birt et al.* (1834), 5 C. & P. 154.
(1) *Rex* v. *Pursey* (1835), 6 C. & P. 81.
(2) *Rex* v. *Hunt et al.* (1819), 3 B. & Ald. 566; *Reg.* v. *Vincent* (1838), 9 C. & P. 91, 109.

will indirectly lead to a breach of the peace. In *Beatty* v. *Gillbanks*, (3) the Salvation Army met at a certain place well knowing that they would be opposed by the Skeleton Army, an unlawful organization. Notices were published by justices forbidding the meeting, but the Salvationists assembled and were told by the police to obey the notice. One of their number refused to obey, was arrested, and, along with others, was convicted by the justices of holding an unlawful assembly. There was no question that the meeting of the Salvationists was likely to lead to an attack by the Skeleton Army, and, in this sense, to cause a breach of the peace. Upon appeal the conviction was quashed. It was held, that the appellants had not been guilty of unlawfully and tumultuously assembling, etc., and could not therefore be convicted of that offence, nor be bound over to keep the peace; and that knowledge by persons, peaceably assembling for a lawful object, that their assembly will be forcibly opposed by other persons, under circumstances likely to lead to a breach of the peace on the part of such other persons, does not render such assembly unlawful. "What has happened here," said the court, "is that an unlawful organization has assumed to itself the right to prevent the appellants and others from lawfully assembling together, and the finding of the justices amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition." (4)

Two exceptions to the principle.—To the application, however, of this principle, that a meeting otherwise lawful does not became unlawful merely by reason of exciting unlawful opposition, there appear to be two exceptions based on the necessity of preserving the King's peace. One is, when illegality in the conduct of the persons convening or addressing the meeting provokes a breach of the peace. The other is, where the object of the meeting and the conduct of those present are lawful, but peace can only be kept by dispersing it.

Wise v. Dunning (1902).—In one of the English cases, (5) the appellant, a Protestant lecturer, had held meetings in public

(3) (1882), 9 Q. B. D. 308.

(4) *Beatty* v. *Gillbanks* (1882), 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* (1891), 28 L. R. Ir., Q. B. D. 440. But compare with these, *Wise* v. *Dunning* (1902), 1 K. B. 167; *Humphries* v. *Connor* (1864), 17 Ir. C. L. R. 1; *Reg.* v. *McNaughton* (1881), 14 Cox C. C. 572; *O'Kelly* v. *Harvey* (1882), 14 L. R. Ir. 105; 15 Cox C. C. 435.

(5) *Wise* v. *Dunning* (1902), 1 K. B. 167.

places in the city of Liverpool, causing large crowds to assemble and obstruct the thoroughfares. In addressing those meetings, he used gestures and language which were highly insulting to the religion of the Roman Catholic inhabitants, of whom there is a large body in Liverpool. The natural consequence of his words and conduct on those occasions was to cause, and his words and conduct had in fact caused, breaches of the peace to be committed by his opponents and supporters, and he threatened and intended to hold similar meetings in the town, and to act and speak in a similar way, in the future. At one of the meetings he told his supporters that he had been informed that the Catholics were going to bring sticks; and, on some of his supporters saying that they would bring sticks, too, he said that he looked to them for protection. A local Act in force in Liverpool prohibited, under a penalty, the use of threatening, abusive and insulting words and behaviour in the streets whereby a breach of the peace might be occasioned. It was held by the King's Bench Division, that, on proof of these facts before the Liverpool stipendiary magistrate, he had jurisdiction to bind over the appellant to be of good behaviour. Without so expressly deciding, the court indicated an opinion that justices had jurisdiction to bind over to be of good behaviour a person, who, in addressing meetings in public places, although he does not directly incite to the commission of breaches of the peace, uses language the natural consequence of which is that breaches of the peace will be committed by others, and who intends to hold similar meetings and use similar language in the future.

There are some *dicta* in the judgments in *Wise* v. *Dunning* which may undoubtedly be cited as laying down the broader rule, that a public meeting in itself lawful, and carried on, so far as the promoters and the members of it are concerned, perfectly peaceably, may become unlawful solely because the natural consequence of the meeting will be to produce an unlawful act, namely, a breach of the peace on the part of opponents. (6) It should be noted, however, that *Wise* v. *Dunning* has reference, not to the circumstances under which a meeting becomes an unlawful assembly, but to the different question, viz., what are the circumstances under which a person may be required to find sureties for good behaviour? (7) In deciding this case the King's Bench Division did not mean to overrule *Beatty* v. *Gillbanks* (*supra*), and apparently conceived that they were following *Reg.* v. *Justices of London-*

(6) See judgment of Alverstone, C.J., at pp. 175, 176; judgment of Darling, J., at p. 178; and judgment of Channell, J., at pp. 179, 180.
(7) *Ibid.* p. 272.

derry. (8) In the case last named Holmes, J., said: "Much has been said on both sides in the course of the argument about the case of *Beatty* v. *Gillbanks*. I am not sure that I would have taken the same view of the facts of that case as was adopted by the court that decided it; but I agree with both the law as laid down by the judges, and their application of it to the facts as they understood them. The principle underlying the decision seems to me to be that an act innocent in itself, done with innocent intent, and normally incidental to the performance of a duty, to the carrying on of business, to the enjoyment of legitimate recreation, or generally to the exercise of a legal right, does not become criminal because it may provoke persons to break the peace, or otherwise to conduct themselves in an illegal way." (9)

"Fair and accurate" report, what is.—As to the report being "fair and accurate," the comments and the cases cited in chapter 10 *ante*, with respect to fair reports of judicial proceedings, will be largely applicable. The report need not be *verbatim*, and a few slight errors will not destroy the privilege, so long as the impression left by the imperfect report does not differ materially from that conveyed by a perfectly correct report. But it should not be published in such a manner as to prejudice any individual by unfair omissions or incorrect insertions. (10) It has been said that the report should be substantially a fair account of what took place (1); and that it is not to be expected that, in discharging this duty, a public journalist will always be infallible. (2)

Publication "for the public benefit."—The defendant must also prove that "the publication of the matter complained of [in the newspaper report] is for the public benefit." This is a reasonable condition, because there may be circumstances connected with the meeting which make what is said there of small moment, but the consequences of which are most serious when the calumnies are printed and published to the world. Many a person is grossly calumniated by the utterances at a public meeting, and the statute requires that, in such a case, there must be some advantage to the public countervailing the injury done to the individual, otherwise the privilege is lost. If the defamatory mat-

(8) (1891), 28 L. R. Ir., Q. B. D., 440. See, in connection with this, the judgment of Darling, J., in *Wise* v. *Dunning* (1902), 1 K. B. 167, at p. 179.

(9) *Per* Holmes, J., in *The Queen* v. *Justices of Londonderry* (1891), 28 L. R. Ir. 440, at pp. 461-2.

(10) *Street* v. *Licensed Victuallers' Society* (1874), 22 W. R. 553.

(1) *Per* Lord Campbell, C.J., in *Andrews* v. *Chapman* (1853), 3 C. & K. 289.

(2) *Per* Cockburn, C.J., in *Woodgate* v. *Ridout* (1865), 4 F. & F., at p. 217.

ter be true, the newspaper publisher will have a defence under another section of the Code, where the matter published was for the public benefit in the manner and at the time it was published. (3) But, if the matter be untrue, it would be difficult to shew that its publication was for the public benefit. See *Kelly* v. *O'Malley et al.*, (4) and the charge to the jury therein by Huddleston, B., as to an accurate report in the London *Star* newspaper of a meeting of labourers in the West India dockyard, and containing the offensive remarks by way of interruption of the plaintiff, who was a speaker at the meeting. The learned judge read to the jury a report of the same meeting, produced by one of the defendants, which appeared in the *Courier and East London Advertiser*, and which omitted the offensive interruptions contained in the *Star's* report, and said it was "an example of a fair and honest report." The jury found for the plaintiff and £5 damages.

The very words must be for the public benefit. Ponsford v. Financial Times Ltd. et al. (1900).—It must also be proved that the publication of the very words complained of was for the public benefit. (5) In *Ponsford* v. *Financial Times Ltd., et al.* (*supra*), which was an action by the cashier of a public company for the publication in the defendants' 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. "This," said the learned judge, "seems to be clearly the result of the proviso in section 4 [of the Law of Libel Amendment Act, 1888], 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.' It was argued for the defendants that full effect would be given to the proviso by holding that it applied only to publications no part of which could be shown to have been of public concern, or to have been of benefit to the public. But the proviso in terms applies to any matter contained in a report, and, therefore, to any part of a report which was of a defamatory character. In this case the chairman, in his reference to the plaintiff, was not discussing the matter in which the public were interested. He was stating his opinion or impression that the plaintiff, who had

(3) S. 331.
(4) (1889), 6 T. L. R. 62.
(5) *Pankhurst* v. *Sowler* (1887), 3 T. L. R. 193; *Ponsford* v. *Financial Times Ltd. et al.* (1900), 16 T. L. R. 248.

been dismissed, had been guilty of criminal conduct as a servant of the company. But such a charge ought not to influence any reasonable man, who contemplated either the buying or selling of shares, or any other business transaction with the company. It had no other authority than the assertion of the speaker, whose knowledge must have been derived from what he had been told, and who was not unlikely to have been misled by information supplied to him for the purpose of his speech. It was, therefore, not a matter the publication of which was for the public benefit. The charges against the plaintiff were of grave importance to him and to his accuser, but were of no more public concern than any other defamatory statements which might or might not be true."

"A reasonable letter," etc.—The privilege will be lost if the defendant refuse to insert in a conspicuous place in his newspaper "a reasonable letter or document of explanation or contradiction by or on behalf of the prosecutor." The provincial statutes which contain a similar clause have the word "statement" instead of "document." The explanation or contradiction should be printed in a conspicuous place in the newspaper, and should not appear in smaller type than the rest of the printed matter. (6) This at least is the rule laid down as to the printing of an apology in civil actions for damages. In one of the cases just cited (*Lafone* v. *Smith*), the apology was in small type amongst the notices to correspondents. The jury found that, although it was sufficient in its terms, the type should have been larger, and the apology should have been inserted in a more prominent part of the newspaper. Martin, B., directed a verdict for the plaintiff for nominal damages, and, upon a motion against the verdict, Pollock, C.B., said that "an apology means the insertion of something which may operate as an apology. Inserting an expression of regret in small type, suitable only to a notice to correspondents, amounts to this, that the defendant did not insert an apology."

The law in the United States.—In the United States, the publication of defamatory matter is as a rule privileged when it appears in a true and impartial report of judicial or legislative proceedings, but the law varies as to the immunity extended to reports of political or other public meetings. It has been held, in New York State, that a report of proceedings at a public meeting, for the purpose of nominating a candidate for governor, was not

(6) *Lafone* v. *Smith et al.* (1858), 3 H. & N. 735; 28 L. J. Ex. 33; 4 Jur. (N.S.) 1004; *Risk Allah Bey* v. *Johnstone* (1868), 18 L. T. (N.S.) 621.

privileged; (7) but, in a similar case in Pennsylvania, such a report was held to be privileged. (8) So, too, a substantially true report of the proceedings of a town council has been held to be privileged. (9) The United States statutes and decisions appear to be behind the English and Canadian law in this respect.

(7) *Lewis* v. *Few* (1800), 5 Johnson 1.
(8) *Briggs* v. *Garrett* (1886), 3 Pa. R. 404.
(9) *Wallis* v. *Bozet* (1881), 34 La. An. Ref. 131.

CHAPTER XII.

Publication of Parliamentary Papers.

Publication of parliamentary papers privileged.—The cases in which a person may publish defamatory matter with perfect impunity are very few, and are not likely to be extended. One of these is in respect of parliamentary papers published in any legislative body in Canada, or by its order or authority. 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. (1)

Three kinds of protected matter.—There are, it will be observed, three kinds of defamatory matter which are protected by this section, namely, (*a*) matter contained in a petition to any of the legislative bodies mentioned; (*b*) matter contained in any paper published by the order or authority of any of these bodies; and (*c*) matter contained in any extract from, or abstract of, such papers. The first two are absolutely privileged; the third is privileged conditionally on the publication being in good faith and without ill-will to the person defamed. The existence of a narrower privilege than is thus conferred, of publishing libellous papers *to* members of parliament for their use, was never disputed. (2) The partial publication of matter comprised in any such papers, either in the form of an excerpt or an abstract, might do injustice to the person referred to, in that the particular matter, thus taken from the paper, might be explained or qualified by the rest of the document, or by its publication *in extenso;* and there is, therefore, reason for the conditional protection, which will attach wherever it appears that the partial publication was made in good faith and without ill-will to the person defamed.

(1) S. 321.
(2) *Lake* v. *King* (1680), 1 Saunders 131; 1 Lev. 240; 1 Mod. 58; *Kane* v. *Mulvany* (1866), Ir. R. 2 C. L. 402.

Defendant's remedy in case of prosecution.—In the event of a prosecution for the publication of parliamentary papers the Code provides a speedy and effective remedy on the part of the defendant: Every person against whom any criminal proceedings are commenced or prosecuted in any manner for or on account of or in respect of the publication of any report, paper, votes or proceedings, by such person or by his servant, by order or under the authority of any Legislative Council, Legislative Assembly, or House of Assembly, may submit to the court in which such proceedings are so commenced or prosecuted, or before any judge of the same, upon twenty-four hours' notice of his intention so to do to the prosecutor in such proceedings, or to his attorney or solicitor, a certificate under the hand of the Speaker or Clerk of such Legislative Council, Legislative Assembly, or House of Assembly, as the case may be, verified by affidavit, stating that the report, paper, votes or proceedings, as the case may be, in respect whereof such criminal proceedings are commenced or prosecuted, was or were published by such person, or by his servant, by order or under the authority of the Legislative Council, Legislative Assembly, or House of Assembly, as the case may be. (3)

Such court or judge shall, upon such certificate being so submitted, immediately stay such criminal proceedings, and the same shall thereupon be deemed finally ended, determined and superseded. (4)

The object of giving twenty-four hours' notice to the prosecutor of the defendant's intention to produce the certificate of the Speaker or Clerk before the court, is not quite clear. It is doubtful whether it gives the prosecutor a right to show cause, and may have been prescribed only to enable him to avoid incurring further costs. (5)

Where prosecution for publication of copies.—It is also provided that, in any criminal prosecution for or on account or in respect of the publication of any copy of such report, paper, votes or proceedings, the defendant may submit to the court or judge, before which or whom such prosecution is pending, a copy of such report, paper, votes or proceedings, verified by affidavit, and the court or judge shall immediately stay such criminal prosecution, and the same shall thereupon be deemed to be finally ended, determined and superseded. (6)

(3) S. 912 (1).
(4) *Ibid.* (2).
(5) *Per* Lord Denman, C.J., in *Stockdale* v. *Hansard* (No. 2) (1840), 11 A. & E. 299.
(6) S. 913.

No certificate, it will be noticed, is necessary in the case of the publication of a copy, but merely an affidavit as stated.

Defence for publishing libellous extract from, or abstract of, parliamentary paper.—There is a further provision in section 947, that, in any criminal proceeding commenced or prosecuted for publishing any extract from, or abstract of, any paper containing defamatory matter, which has been published by order or under the authority of the Senate, House of Commons, or any Legislative Council, Legislative Assembly or House of Assembly, such paper may be given in evidence, and it may be shewn that such extract or abstract was published in good faith and without ill-will to the person defamed, and if such is the opinion of the jury, a verdict of not guilty shall be entered for the defendant. (7)

This evidence may be given under the plea of not guilty, but the jury are required to pass upon it. The above sections of the Code (912, 913 and 947), omitting the words "containing defamatory matter," are included in an Act respecting Libel in R. S. C., 1886, (c. 163, ss. 6, 7 and 8), and were unrepealed by the Code as originally passed.

Decisions under corresponding English enactment.—Houghton v. Plimsoll (1874).—The only two decisions or rulings on the section of the English Act corresponding to this section (947), (8) and as to the meaning of "publishing," and of "order or under the authority" therein, are *Houghton* v. *Plimsoll* (9) and *Mangena* v. *Edward Lloyd Ltd. (No. 1)*, (10) in which, however, the decision of Darling, J., on the *facts*, was reversed by the Court of Appeal. (1) In the former (*Houghton* v. *Plimsoll*) case, the defendant had published extracts from a report of a Royal Commission on the "coffin ship" question, which had been presented to the House of Commons by the Queen's command, ordered by the House to lie on the table, and then, by direction of the Speaker, distributed to members and sent to Hansard for sale. Amphlett, B., before whom and a special jury the action was tried at the Liverpool Assizes, ruled that this report, though not strictly a report of Parliament itself, was a "report" within the meaning of the Act, inasmuch as it was presented to and adopted by the House of Commons. He further directed the jury that it had been published under the authority, if not the express order, of the House,

(7) S. 947.
(8) Parliamentary Papers Act, 1840, (3 & 4 Vict. c. 9, s. 3).
(9) *Times*, 2nd April, 1874).
(10) (1908), 24 T. L. R. 610; 98 L. T. 640.
(1) See *Mangena* v. *Edward Lloyd, Ltd.* (No. 2), (1908), 25 T. L. R. 26, *infra*.

and therefore any one was at liberty to publish extracts from it *bonâ fide* and without malice, and he left it to the jury to say whether the "extracts" then in question were, as alleged by the plaintiff, "garbled" or not. The jury found for the defendant, and there was no appeal. (2)

Mangena v. Edward Lloyd Ltd. (No. 1) (1908).—The ruling by Amphlett, B., was followed by Darling, J., in the case first named where the defendants, the proprietors of the *Daily Chronicle*, had published in that newspaper a letter from the Agent-General for Natal, containing a portion of a report, reflecting on the plaintiff, which appeared in an official blue book respecting native disturbances in Natal. One of the head-lines of the letter as published was—"Natal Agent-General denounces Mangena." The blue book had been presented to both Houses of Parliament by the King's command, being what is known in Parliament as a "command paper." After having been laid upon the table of the House of Commons by the Under-Secretary of State for the Colonies, it was ordered by the House to continue to lie upon the table. There was no express order of the House to print or publish it, but, as was proved by the Clerk of the House, any order that a "command paper" do lie upon the table, is taken by the King's Stationery Office as an authority to print the paper, distribute it among the members, and offer it for sale to the public. The defendants pleaded immunity under section 3 of the English statute, corresponding to section 947 (*supra*) of the Code, and also justification. The jury, in answer to questions by Darling, J., found that the statements contained in the report, as abstracted in the letter, were libellous and untrue, but that the defamatory matter complained of was an abstract of, or extract from, a paper published by Parliament, and that its publication by the defendants was *bonâ fide* and without malice. The questions then arose, (*a*) whether the blue book had been published by order or under authority of the House; (*b*) whether the alleged abstract had been "printed" within the meaning of section 3 of the statute; (*c*) whether the statutory immunity applied to any one but a servant of the House; (*d*) whether there was any evidence that the defamatory matter was an abstract or extract at all, and not an edited version; and (*e*) whether the defendants had discharged the onus upon them of proving absence of malice.

Rulings of Darling, J.—As to (*a*) Darling, J., held that though, in Houghton's case, the Speaker had expressly ordered the

(2) *Houghton* v. *Plimsoll*, *Times*, 2nd April, 1874.

"command paper" to be published, whereas, in the case before him, there had been no such express order, the proved usage of the Stationery Office, with the knowledge and acquiescence of the House, to publish and sell to the public whatever parliamentary papers had been ordered to lie on the table, was equivalent to, or involved, the "order or authority" mentioned in the statute. As to (*b*), he held that, though section 3 commences by referring to proceedings instituted for "printing," it goes on to provide that a plea of "publishing" shall be sufficient, and, therefore, that the section was not confined to "printing" only, or that "printing" must be taken to include publication otherwise than by printing. As to (*c*), he expressed considerable doubt, but he followed Amphlett, B., in deciding this point also in favour of the defendants. As to (*d*), he held that the jury were competent to find, as they did, that the matter in question was an abstract. As to (*e*), he held that in substance the burden was on the plaintiff to prove malice, and not on the defendants to negative it, because, though technically the latter burden was on the defendants, they were entitled to say that the plaintiff's failure to prove malice discharged it for them. (3)

This decision was followed in an action against the publisher of the London *Times* for an alleged defamatory libel, in the form of extracts from a letter, purporting to be written by the Agent-General for Natal, and to be addressed from the Natal Government Agency. It referred to a native petition said to have been forwarded to the King in Council by the plaintiff, and stated that he was the same native who formed the subject of a report which was found in an official blue book, etc. Parts of the letter, alleged to be libellous, were copied in the *Times*. It was held, that a person who *bonâ fide* and without malice prints and publishes an extract from, or abstract of, a parliamentary paper, though in doing so he does not act by or under the authority of either House of Parliament, is protected by section 3 (corresponding to section 321 of the Code) of the Parliamentary Papers Act, 1840, in an action for libel in respect of such publication. (3*a*)

Mangena v. Edward Lloyd Ltd. (No. 2) (1908).—Upon appeal to the Court of Appeal the decision *supra*, in the first Mangena case, was reversed on the facts. Vaughan Williams, L.J., said he was of opinion that the judgment of Mr. Justice Darling was wrong, and that they ought to order judgment to be entered on

(3) *Mangena* v. *Edward Lloyd, Ltd.* (No. 1) (1908), 24 T. L. R. 610; 98 L. T. 640.
(3*a*) *Mangena* v. *Wright* (1909), 2 K. B. 958.

the findings for the plaintiff for £100. His opinion, as his reported judgment shews, was based principally on the fact that the head-line—"Natal Agent-General denounces Mangena"—in the letter published in the *Daily Chronicle*, which was the publication complained of, was not justified. Mr. Justice Darling had held that the words complained of, published as they were, came within the protection of the Parliamentary Papers Act, 1840. He did not propose to express any opinion on that point. The learned judge had put questions to the jury, not for the purpose of ascertaining whether a good case of libel had been made out independently of privilege, but rather for the purpose of informing himself on facts which would enable him to deal with the question of privilege. . . . He did not think the question of privilege would have arisen if it had been pointed out to the jury, as, in his opinion, it ought to have been, that the head-line was something quite outside the paper (*i.e.*, the parliamentary paper) for which alone statutory protection was or could be claimed. There was no pretence for saying that the statutory protection applied to the head-line, and no justification had been pleaded with regard to it. Under these circumstances, he was of opinion that they ought not to refuse to enter judgment for the plaintiff in accordance with the findings of the jury, and judgment would, therefore, be entered for the plaintiff for £100. Lord Justices Buckley and Kennedy delivered judgments in which they arrived at the same conclusion. (4) This decision, which was based on the libellous head-line, and not on the question of protection under the Parliamentary Papers Act, 1840, is, it will be noticed, quite consistent with *Mangena* v. *Wright* (1909), *supra*.

Stockdale v. Hansard (No. 2) (1840).—All these provisions in the Code are founded on similar enactments contained in the Imperial statute, The Parliamentary Papers Act, 1840, (5) passed for the purpose of giving "summary protection to persons employed in the publication of parliamentary papers." The first case under that statute was the second case of *Stockdale* v. *Hansard et al.*, (6) in which an interlocutory judgment for a libel similar to that in the first case had been signed, but in which the proceedings were stayed upon a certificate of the Speaker of the House of Commons, verified by affidavit, that the book and paper mentioned in the declaration, and in respect of which the action

(4) *Mangena* v. *Edward Lloyd, Ltd.* (No. 2) (1908), 25 T. L. R. 26.
(5) 3-4 Vict. c. 9.
(6) (1840), 11 A. & E. 297. See the first case *infra*.

was brought, were published by and under the authority of the House of Commons. The rule for staying execution was made absolute.

Stockdale v. Hansard (No. 1) (1839).—Some such legislation was imperative because of the decision in the first famous case of *Stockdale* v. *Hansard* (*No. 1*), (7) in which the protection of the publishers of parliamentary papers was the subject of a memorable contest between the courts and the House of Commons, and in which it was held that, at common law, no privilege attached to the publication of parliamentary reports and papers even when the publication was ordered by the whole House. The action was brought by a bookseller and book publisher against the printers to the House of Commons for defamatory matter contained in a book, published by the defendants, entitled "Reports of the Inspectors of the Prisons of Great Britain," and also for defamatory matter in a printed paper containing a copy of the reply of two of the inspectors to a report of the Court of Aldermen to whom the first report had been referred for consideration. In these publications a certain medical work, published by the plaintiff, was referred to as being of a disgusting nature, the plates as being indecent and obscene, and the book as one of plaintiff's obscene books. The defendants pleaded, in effect, that the documents containing the matter complained of were printed and published by order of the House of Commons, and that the House had resolved, declared and adjudged, that the power of publishing such of its reports, votes and proceedings, as it should deem necessary or conducive to the public interests, was an essential incident to the constitutional functions of Parliament, more especially to the Commons House of Parliament, as the representative portion of it. The Court of Queen's Bench (Denman, C.J., Littledale, Patteson, and Coleridge, JJ.), held on a demurrer to this plea, that the plea was no defence to the action. The constitutional aspects of all the questions involved are fully discussed in the elaborate judgments of the court, especially in the masterly judgment of Lord Denman, C.J. Referring to the contention that the act complained of was done by order of the House of Commons, which was itself a court superior to any other, and whose proceedings could not be called in question, Lord Denman said: "It is a claim for an arbitrary power to authorize the commission of any act whatever, on behalf of a body which, in the same argument, is admitted not to be the supreme power in the state. The supremacy of Parliament, the

(7) (1839), 9 A. & E. 1; 2 Moo. & Rob. 9; 7 C. & P. 731; 2 P. & D. 1; 3 Jur. 905; 8 Dowl. 148, 522.

foundation on which the claim is made to rest, appears to me completely to overturn it, because the House of Commons is not the Parliament, but only a co-ordinate and component part of the Parliament. That sovereign power can make and unmake the laws; but the concurrence of the three legislative estates is necessary; the resolution of any one of them cannot alter the law, or place any one beyond its control. The proposition, therefore, is wholly untenable, and abhorrent to the first principles of the constitution of England." (8)

The Commons' claim of privilege.—One of the arguments for the plea was, that what was done was privileged, having been done by order of the House of Commons, that each House of Parliament is the sole judge of its own privileges. Lord Denman discussed the subject of privilege generally and said: "For speeches made in Parliament by a member, to the prejudice of any other person, or hazardous to the public peace, that member enjoys complete immunity. For any paper signed by the Speaker by order of the House, though to the last degree calumnious, or even if it brought personal suffering upon individuals, the Speaker cannot be arraigned in a court of justice. But if the calumnious or inflammatory speeches should be reported and published, the law will attach responsibility on the publisher. So, if the Speaker, by authority of the House, order an illegal act, though that authority shall excuse him from question, his order shall no more justify the person who executed it than King Charles's warrant for levying ship-money could justify his revenue officer. (9) It can hardly be necessary to guard myself against being supposed to discuss the expediency of keeping the law in its present state, or introducing any and what alterations. It is, no doubt, susceptible of improvement; but the improvement must be a legislative act. If we held that any improvement, however desirable, could be effected under the name of privilege, we should be confounding truth, and departing from our duty: and if, on such considerations, either House should claim as a matter of privilege what was neither necessary for the discharge of their proper functions, nor ever had been treated as a privilege before, this would be an enactment, not a declaration; or, if the latter name were more appropriate, it would be the declaration of a general law, to be disregarded by the courts, though never, I hope, treated with contempt." (10)

(8) 9 A. & E. 1, pp. 107-8.
(9) *Ibid.*, at p. 114.
(10) *Ibid.*, at p. 153.

According to a note (*b*) to the reported decision in this case, (1) Lord Denman also referred at the trial to this question of privilege. "I am not aware," he said, "of the existence, in this country, of any body whatever that can privilege any servant of theirs to publish libels of any individual. Whatever arrangements may be made between the House of Commons and any publisher in their employ, I am of opinion that the publisher who publishes that in his public shop (and especially for money) which may be injurious, and possibly ruinous, to any one of the King's subjects, must answer in a court of justice if he challenges him for a libel, and I wish to say so emphatically and distinctly, because I think that if, upon the first opportunity that arose in a court of justice for questioning that point, it were left unsatisfactorily explained, the judge who sat there might become an accomplice in the destruction of the liberties of the country, and expose every individual who lives in it to a tyranny that no man ought to submit to."

Closing incidents of the contest.—Judgment was given for the plaintiff on the demurrer, but the contest did not end there. Judgment was obtained against the defendants, and the money made under execution by one of the sheriffs, who was ordered by the House of Commons to refund it to the defendants. The sheriff was also committed, for contempt of the House, to the custody of the Sergeant-at-Arms; but the court made absolute the rule commanding the sheriff to pay over the money to the plaintiff. A rule was also subsequently made absolute for an attachment against the sheriff for not paying over the money. When the sheriffs were taken into custody by the Sergeant-at-Arms they moved for a writ of *habeas corpus*, the return to which, that they were in custody under the authority of the House, was held sufficient by the court; but Lord Denman, C.J., at the same time endorsed the law laid down by the court as to defamatory publications by order of the House of Commons. The contest between the House and the courts terminated in the passage of the statute above referred to, (2) which forms the basis of the Canadian law.

Stockdale v. Hansard approved in Wason v. Walter (1868).—The Court of Queen's Bench subsequently (3) expressed their strong approval of *Stockdale* v. *Hansard*, which decided, as Cock-

(1) *Stockdale* v. *Hansard* (No. 1) (1839), 9 A. & E. 101. See, also, the report in 2 Moo. & Rob. 9.
(2) 3-4 Vict. c. 9 (Imp.).
(3) In *Wason* v. *Walter* (1868), L. R. 4 Q. B. 86; 19 L. T. (N. S.) 416; 38 L. J. Q. B. 40.

burn, C.J., declares, that an order of the House of Commons cannot render lawful that which is contrary to law, and that still less can a resolution of the House supersede the jurisdiction of a court of law by clothing an unwarranted exercise of power with the garb of privilege. The masterly judgments in that celebrated case would, as he said, secure to the judges who pronounced them admiration and reverence so long as the laws of England and a regard for the rights and liberties of the subject shall endure.

CHAPTER XIII

Publications in Judicial Proceedings and Inquiries.

Privilege of publications in judicial proceedings and inquiries.—Another case in which defamatory matter may be published with impunity is in the course of proceedings before judicial tribunals, and in inquiries of a judicial nature. No one commits an offence by publishing any defamatory matter in any proceedings 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. (1)

The protection afforded by this section, against a criminal prosecution for libel, extends to the publication of defamatory matter by any person (*a*) in any proceeding before any court exercising judicial authority; (*b*) in any proceeding under the authority of any court exercising judicial authority; (2) (*c*) in any inquiry under the authority of any statute; (3) (*d*) in any inquiry by order of his Majesty; (*e*) in any inquiry by order of any department of the Dominion government; (*f*) in any inquiry by order of any department of any provincial government.

Reasons for the rule.—It would be unreasonable and oppressive were the law otherwise. To hold a person responsible for something he is compelled to do, for example, by order of the King, or of the Government, or by a court of justice or any judicial tribunal, would be thoroughly unjust. In all such proceedings and inquiries it is of the highest importance, in the interests of justice and of the state, that no restraint should be put upon the publication of statements relating to the subject matter of investigation, and that these should be made freely, fully and fearlessly. Such publications, therefore, are absolutely privileged. (4)

Privilege absolute and liable to abuse.—While such is the law, it is none the less true that it is capable of great abuse, because

(1) S. 320.

(2) This and (*a*) would include a Military Court of Inquiry: *Dawkins* v. *Lord Rokeby* (1875), L. R. 8 Q. B. 268; 42 L. J. Q. B. 71; *Home* v. *Lord Bentinck* (1820), 2 Brod. & Bing. 130; *Dawkins* v. *Prince Edward of Saxe Weimar, Wynyard, and Stephson* (1876), 1 Q. B. D. 499; 45 L. J. 567.

(3) *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.).

(4) *Dillon* v. *Balfour* (1887), 20 Ir. L. R. 600.

even if the person so publishing knows the matter published to be false, and publishes it in order to injure the person to whom it relates, he is protected. For instance, A., in an action against B., instructs his solicitor to place on the files of a court, where every one may see it, a statement of claim containing charges of gross misconduct against B., which A. knows to be wholly unfounded. (5) In the same action A. falsely and maliciously swears to an affidavit charging C. with fraud. A. also goes before a committee of the Senate or House of Commons of Canada, which is conducting an inquiry, or before a board of arbitrators—either of which bodies is a court exercising judicial authority, (6) and there presents written statements relevant to the inquiry against B., or some other person, replete with charges knowingly false. In none of these cases are A.'s statements libellous, and in none of them has he published a libel.

Scope of the privilege.—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; (7) that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the course of any proceeding before any court 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. (8) The law in this respect may occasionally do great injury to individuals, and no doubt it does, but, if it were otherwise, justice would not have a free course, and would be baffled or defeated at every turn by the fear of an indictment for libel. As it is, the chance of injury to private character and reputation is counterbalanced to an indefinite extent by the superior benefits afforded by this species of privilege which has now become a fixed rule of law.

Founded on public policy.—It is a rule of law not founded, as is the protection in other cases of privileged statements, on the absence of malice in the party suing, but is founded on public

(5) 1 Roll 33; Cro. Jac. 432; *Weston* v. *Dobniet* (1700), Cro. Jac. 432.

(6) In *Kane* v. *Mulvany* (1866), 2 Ir. C. L. R. 402, it was held, that a committee of either House of Parliament conducting an inquiry is a public court of justice. See, also, *Goffin* v. *Donelly* (1881), 6 Q. B. D. 307; 50 L. J. 303.

(7) *Per* Lord Mansfield, C.J., in *Rex* v. *Skinner* (1772), Lofft. 55.

(8) *Per Lopes*, L.J., in *Royal Aquarium Co.* v. *Parkinson* (1892), 1 Q. B., at p. 451. See, also, the following cases: *Floyd* v. *Barker* (1607), 12 Coke Rep. 24; *Astley* v. *Younge* (1759), 2 Burr. 807; *Revis* v. *Smith* (1856), 18 C. B. 126; *Dawkins* v. *Rokeby* (Lord) (1875), L. R. 7 H. L. 744; 45 L. J. Q. B. D. 13; *Seaman* v. *Netherclift* (1876), 2 C. P. D. 53.

policy, (9) which requires that a judge, in dealing with the matter before him, a party in preferring or resisting a legal proceeding, and a witness in giving evidence, oral or written, in a court of justice, shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel. (10)

Relevancy of statements immaterial.—Some of the text books declare 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. (1) The United States cases *infra* are also cited as supporting this rule. (2) But the English Court of Appeal has held that the *relevancy* of the matter is immaterial; (3) and the rule laid down in the above section (320) of the Code does not appear to be subject to any such limitation or qualification.

(9) *Dawkins* v. *Rokeby* (Lord) (1875), L. R. 7 H. L. 752; 45 L. J. Q. B. D. 13.

(10) *Per* Pigott, C. B., in *Kennedy* v. *Hilliard* (1859), 10 Ir. C. L. R. 196; 1 L. T. 578, and approved by Brett, M.R., in *Munster* v. *Lamb* (1883), (C.A.), 11 Q. B. D. 604; 52 L. J. Q. B. 726; 32 W. R. 243; 49 L. J. 252; 47 J. P. 805.

(1) See Folkard's Law of S. & L., 6th ed., 215.

(2) *Hoar* v. *Wood* (1841), 3 Metcalf's Rep. 193; *McLaughlin* v. *Cowley* (1879), 127 Mass. 316; *Rice* v. *Coolidge* (1876), 121 Mass., at p. 395.

(3) *Munster* v. *Lamb* (1883), (C.A.), 11 Q. B. D. 588; 52 L. J. 726.

CHAPTER XIV.

Publications Invited, Challenged, or in Self-defence.

Publications of defamatory matter privileged under the Code.—Publication of a libel is not always an offence, but is excusable, either absolutely or conditionally, in a number of cases. The Code sets forth many different states of fact which justify or excuse the publication of defamatory matter. In fact all the rules and principles of the common law, not altered by or inconsistent with the Code, and which render any circumstances a justification or excuse for any act, or a defence to any charge, still remain in force. (1) These rules and principles are, of course, applicable to libel. While digesting and declaring the law as it is, the Code preserves the common law in so far as it affords a defence in all cases not expressly provided for. Acting on these principles the codifiers have stated a number of cases in which publication of a defamatory libel is not criminal. These are privileged publications. The law in regard to them is comprised in no less than ten sections of the Code, in each of which it is declared that no one commits an offence by publishing defamatory matter for the purpose, on the conditions, or under the circumstances stated therein. One of the classes of publications, which is so privileged or protected, is that of defamatory matter which is invited, challenged, or published in self-defence.

Privilege as to publications invited, challenged, or in self-defence.—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 such 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 the required refutation, and the publishing does not, in manner or extent, exceed what is reasonably sufficient for the occasion. (2)

Conditions of the privilege.—This species of publication is privileged on three conditions: first, that such matter is believed

(1) C. C. s. 16. The authors of the English Draft Code say, that sections 229 to 237 inclusive, which correspond with sections 319 to 328 inclusive of our own Code (except section 323) relating to privileged communications, are believed to declare the existing common law, but that "there has been a diversity of judicial opinion upon this subject."

(2) S. 319.

by the person making it public to be true; secondly, that it is relevant to the invitation, challenge, or the required refutation: (3) and thirdly, that the publishing does not, in manner or extent, exceed what is reasonably sufficient for the occasion, as shewn by the cases *infra*. (4)

Instances of invited or challenged publications.—Instances of publishing libels on invitation or challenge are to be found in cases where, an assertion having been made, or a rumor having been circulated, affecting the character of a person, he asks what it means, or challenges inquiry into his conduct, and defamatory matter is thereupon published. (5) So, too, where one person makes an attack on another in the public press, and the other retorts through the same medium; (6) or where the attack is made in public otherwise than through the press, and the other retorts through the newspapers. (7) The retort, although defamatory, is privileged if made *bonâ fide*. A publication thus invited or challenged by the complainant is not punishable, because he himself is responsible for it. He has no right to prosecute a person for libel, the publication of which has been procured, or invited, (8) contrived, or requested, (9) by himself: and much less right has he to do so if he has entrapped the person into any such publication, as in *Weatherston* v. *Hawkins* (1786), 1 T. R. 110 *infra*. In one case, an action for slander—and the same principle would apply in libel—Parke, B., said: "This case does not go a step farther than *Toogood* v. *Spyring*. (10) I feel satisfied that there is not a doubt as to the propriety of the law that is there laid down; and I cannot doubt that it is a perfectly privileged communication, if a party who is interested in discovering a wrongdoer, comes and makes inquiries, and a person in answer makes a discovery, or a *bonâ fide* communication which he knows, or believes, to be true, although it may possibly affect the charac-

(3) *Dwyer* v. *Esmonde* (1878), Ir. L. R. 2 Q. B. D. 243, on appeal from Ir. R. 11 C. L. S. 542.

(4) *Jones* v. *Williams*, *Cooke* v. *Wildes*, *Huntley* v. *Ward*, *Robertson* v. *M'Dougall*, *Tuson* v. *Evans*, and *Hancock* v. *Case*, noted hereafter in this chapter.

(5) *Griffiths* v. *Lewis* (1845), 7 Q. B. 61; 14 L. J. Q. B. 199; *Hopwood* v. *Thorn* (1850), 8 C. B. 293; 19 L. J. C. P. 94; 14 Jur. 87; *Duke of Brunswick* v. *Harmer* (1849), 14 Q. B. 185; 3 C. & K. 10; 14 Jur. 110; 19 L. J. Q. B. 20; *Taylor* v. *Hawkins* (1851), 16 Q. B. 308; 20 L. J. Q. R. 313.

(6) *Coward* v. *Wellington* (1836), 7 C. & P. 531.

(7) *Laughton* v. *Bishop of Sodor & Man* (1872), L. R. 4 P. C. 495; 42 L. J. P. C. 11; *Murphy* v. *Halpin* (1874), Ir. R. 8 C. L. 127, followed in *Hopewell* v. *Kennedy*, 9 O. L. R. (1904), 43.

(8) *Palmer* v. *Hummerston* (1883), 1 Cab. & El., 36.

(9) *Kine* v. *Sewell* (1838), 3 M. & W. 297.

(10) (1834), 16 M. & R. 181; 4 Tyr. 582.

ter of a third person. Then the consequence of that is, that no person whose character is so injured in the course of that *bonâ fide* communication, can recover any damages in an action against the person who has expressed himself in that transaction in a way so as to affect his character, unless he can show that the person who made that communication was interested in so making it; and he must make out from some of the facts of the case that the communication was not made *bonâ fide* by the defendant. I have not the least doubt about that." (1) So that if the only publication that can be proved is one made by the defendant in reply to an application from the complainant, his agent, or some one on his behalf, (2) demanding an explanation, such reply, if fair and relevant, will be privileged; for in that case the complainant brought it on himself.

In an action in which one of the defences was, that the alleged libel was published on invitation or challenge, it was said that, "in asserting that the article in question was published on the invitation or challenge of the plaintiff, the defendant pleads a conclusion of fact and not facts. It is for the court or judge to say whether the facts pleaded amount to an invitation or challenge, and, moreover, in the absence of these facts, how is it to be ascertained that the allegation contained in this paragraph that the said words were relevant to the said invitation or challenge, and the publication complained of did not in manner or extent exceed what was reasonably sufficient for the occasion, is warranted? The latter question is undoubtedly one for the jury, but such a question cannot be left to the jury, unless there is on the pleadings an averment of facts reasonably sufficient to constitute a privileged occasion, and which averment at the trial is supported by facts of the actual existence of the occasion." (2*a*)

Inquiries caused by unprivileged publications.—But there will be no privilege where there has been a previous unprivileged publication by the defendant of the same libel which has led to the inquiry by the person defamed; because, in that case, it is the defendant himself who has brought on the inquiry. (3) If there are rumours afloat prejudicial to a person's character, and he endeavours to trace them to their source, all statements made *bonâ fide* to him, or to any agent of his, in the course of such an inves-

(1) *King* v. *Sewell* (1838), 3 M. & W. at p. 302.
(2) *Weatherston* v. *Hawkins* (1786)), 1 T. R. 110; *Taylor* v. *Hawkins* (1851), 16 Q. B. 308; *Cowles* v. *Potts* (1865), 34 L. J. Q. B. 247.
(2*a*) *Per* Johnstone, J., in *Laird* v. *Scott* (1908), 9 W. L. R., at p. 351.
(3) *Smith* v. *Matthews* (1831), 1 Moo. & Rob. 151: *Griffiths* v. *Lewis* (1845), 7 Q. B. 64; 14 L. J. Q. B. 199.

tigation, are rightly protected. It makes a great difference, however, if the rumours originated with the defendant, so that what he has himself previously circulated produces the inquiry; and if on being applied to he admits having originated the rumours, and persists in and repeats the defamatory matter, or asserts his belief in it, the repetition will not be privileged, although thus elicited by the person defamed. (4)

Publications provoked and in self-defence.—What has been said applies to invited or challenged publications. The other cases mentioned in the same article of the Code are provoked publications, namely, those which are a necessary refutation of a defamatory statement previously published by the complainant against the defendant. Publications of that character are presumably founded on the duty which a man owes to himself or his family. They are publications made in self-defence. If, for example, a person is assailed in a newspaper he may write to that newspaper, or indeed to some other newspaper, to rebut the charges, and he may at the same time retort upon his assailant, where such retort is a necessary part of his defence, or fairly arises out of the charges which have been so made against him. (5) "If," said Littledale, J., (6) "a man *bonâ fide* writes a letter in his own defence, and for the defence and protection of his interests and rights, and is not actuated by any malice, that letter is privileged, although it may impute dishonesty to another, but in such cases malice may either be proved by the letter itself or by other evidence." The man who has commenced a newspaper war can hardly complain that he has had the worst of it.

Provoked publications, to which protection is extended, also include such as may be necessary to protect the interests of a principal or client, *e.g.*, a solicitor to a creditor, who had previously become bankrupt, stopping the sale of an estate, previously mortgaged and assigned to the plaintiff, by declaring the creditor's bankruptcy, and that the docket had been made out for a commission. Malice must be established in order to sustain such an action. If the defendant acted *bonâ fide* and told the truth he only did his duty; and, though he exceeded the strict truth, yet, if there

(4) *Smith* v. *Matthews* (1831), 1 Moo. & Rob. 151; *Griffiths* v. *Lewis* (1845), 7 Q. B. 64; 14 L. J. Q. B. 199; *Richards* v. *Richards* (1844), 2 Moo. & Rob. 557; *Force* v. *Warren* (1864), 15 C. B. (N.S.) 806.

(5) *Hemmings* v. *Gasson* (1858), E. B. & E. 346; 27 L. J. Q. B. 252; *Koenig* v. *Ritchie* (1862), 3 F. & F. 413; *O'Donoghue* v. *Hussey* (1871), Ir. R. 5 C. L. 124; *Laughton* v. *Bishop of Sodor & Man* (1872), 9 Moo. P. C. C. (N.S.) 318; L. R. 4 P. C. A. C. 495; 42 L. J. P. C. 11; *Dwyer* v. *Esmonde* (1878), 2 Ir. L. R. 243.

(6) In *Coward* v. *Wellington* (1836), 7 C. & P. at p. 586.

was no material variance, and no difference made with respect to the plaintiff's title, the action was not maintainable. (7) The protection in such cases is unaffected by the fact that the statements complained of are unauthorized. (8) "If," said Lopes, L.J., (9) "a communication made by a solicitor to a third party is normally necessary and usual in the discharge of his duty to his client, and in the interests of his client, the occasion is privileged." In the case of retorts to previous attacks on defendant, the privilege extends only to such retorts as are fairly an answer to the assailant's attacks. (10) In a civil action for damages such previous attacks may form the subject of a counterclaim against the person who has made them, or they may be a bar to the action. But where the facts do not amount to such a defence, the previous attacks, which have provoked the libel complained of, may be given in mitigation of damages. (1)

Excess "in manner or extent" of publication.—One of the conditions of immunity in this section (319) for the publication of the defamatory matter charged is, that it must not "in manner or extent exceed what is reasonably sufficient for the occasion." The same language is used in section 326, which deals with publishing defamatory matter for the purpose, in good faith, of seeking remedy or redress for any private or public wrong or grievance; and also in section 327, which deals with publishing defamatory matter in answer to inquiries, on the conditions stated in that section. What is meant by this language is, that any facts tending to show that the "manner or extent" of the publication of such matter was in excess of, or other than, that which was required for the accomplishment of the purpose for which the privilege attached to such publication in the particular case, would be evidence of malice, which, if not rebutted, would deprive the accused of such privilege. But such evidence for the prosecution would be

(7) *Hargrave* v. *Le Breton* (1769), 4 Burr. 2423. See, also, *Steward* v. *Young* (1870), L. R. 5 C. P. 122; 39 L. J. C. P. 85; *Reg.* v. *Veley* (1867), 4 F. & F. 1117; *Hibbs* v. *Wilkinson* (1859), 1 F. & F. 608.

(8) *Watson* v. *Reynolds* (1826), 1 Moo. & Mal. 1.

(9) In *Boosius* v. *Goblet Frères* (1894), 1 Q. B. at p. 846. See, also, *Wright* v. *Woodgate* (1835), 2 C. M. & R. 573, and *Boker* v. *Carrick* (1894), 1 Q. B. 838.

(10) *Koenig* v. *Ritchie* (1862), 3 F. & F. 413; *Reg.* v. *Veley* (1867), 4 F. & F. 1117; *Jones* v. *Williams* (1885), 1 T. L. R. 572; *Cooke* v. *Wildes* (1855), 5 E. & B. 328; 24 L. J. Q. B. 367; *Huntley* v. *Ward* (1859), 1 F. & F. 552; 6 C. B. (N.S.) 514; *Robertson* v. *McDougall* (1828), 4 Bing. 670; 3 C. & P. 259; *Tuson* v. *Evans* (1840), 12 A. & E. 733; *Hancock* v. *Case* (1862), 2 F. & F. 711; *Hopewell* v. *Kennedy*, 9 O. L. R. (1904), 43; 4 O. W. R. 433; 25 C. L. T. (Occ. N.) 70, following *Murphy* v. *Halpin* (1874), Ir. 8 C. L. 127.

(1) *Per* Blackburn, J., in *Kelly* v. *Sherlock* (1866), L. R. 1 Q. B. 698; 35 L. J. Q. B. 213; 12 Jur. (N.S.) 937.

rebutted by evidence for the accused shewing that the "manner or extent" of the publication was reasonably necessary or incidental to the ordinary course of things, or to the exigency of the occasion, (2) or was, under the circumstances, unavoidable or reasonable. (3)

Illustrative cases.—The publication was ruled to be unprivileged, where defendant published an advertisement in a newspaper, strongly reflecting upon the character of a person who had been declared bankrupt; although published with the intention of convening a meeting of the creditors to consult upon the measures proper to be adopted for their own security, if the legal object might have been attained by less injurious means. Lord Ellenborough said that the mode of publication might have been sufficiently vindicated, if it could be shown that an advertisement was the only possible means of communicating notice of the circumstances. The want of proper caution had rendered the publication in question actionable, as being published to the world at large; this made an essential distinction which applied to all the cases." (4) And where the plaintiffs were contractors for the erection of a borough gaol, and the defendants were members of the town council, and from their business were competent judges of the work, they published in a local newspaper a letter charging the plaintiffs with serious omissions and deviations from their contract. In an action of libel, it was ruled that, although the charges contained in the letter would have been privileged if made by the defendants to the town council, they were not privileged in the form of a letter to a public newspaper. (5) So, also, where a "caution" advertisement was inserted in local newspapers, by an insurance company, against a former agent of the company, who had entered the service of another insurance company, and was seeking business among his former employers' customers, the language used and the unnecessary publicity given the "caution" made it unprivileged; (6) where the defendant wrote the representative in the Dominion Parliament for the

(2) *Lawless* v. *Anglo-Egyptian, etc. Co.* (1868), L. R. 4 Q. B. 262, followed in *Harper* v. *Hamilton Retail Grocers' Association et al.* (1900), 32 O. R. 295; *Boxsius* v. *Goblet Frères et al.* (1894), 1 Q. B. 842; *Edmondson* v. *Birch & Co.* (No. 2) (1907), 1 K. B. 371.

(3) *Jones* v. *Thomas* (1885), 53 L. T. 678; *Edmondson* v. *Birch & Co.* (No. 2), *supra*. See *Laird* v. *Scott*, *supra*, as to setting out the facts constituting the privilege.

(4) *Brown* v. *Croome* (1817), 2 Stark 297; 19 R. R. 727.

(5) *Simpson et al.* v. *Downs et al.* (1866), 16 L. T. (N.S.) 391, *per* Montagu Smith, J.

(6) *Holliday* v. *Ontario Farmers' Mutual Insurance Company* (1876), 38 U. C. Q. B. 76; (1877) 1 O. A. R. 483, a leading case on the point. See, also, *Hamel* v. *Lauziere* (1901), Q. O. R. 22 (S.C.) 194.

county in which the parties resided, requesting him to have the plaintiff, a postmaster, removed from office, and charging him in strong language with dishonesty; (7) where a communication, privileged if made by letter, became unprivileged if sent by telegraph, because communicated to all the clerks through whose hands it passed. "It was never meant by the legislature," said Brett, J., "that these facilities for postal and telegraphic communication should be used for the purpose of more easily disseminating libels. Where there is such a publication, it avoids the privilege, because it is communicated through unprivileged persons." (8) It is like the case of a libel contained on the back of a post card, (9) in which a similar publication would have avoided the privilege had the plaintiff been named in the card, or have been identifiable by those through whose hands the card passed.

In fact in all actions of defamation, and, by parity of reason, in all prosecutions for defamatory libel, in which a defence is based on qualified privilege, the violence of the language charged as libellous may avoid the privilege. In an action for slander in Ontario, it was contended by the appellant defendant, that it could only be by extrinsic evidence that malice could be shewn, and that resort could not be had to such intrinsic evidence as the words themselves for the purpose of shewing malice. "But," said the court, "the whole current of authority since then [*i.e.*, since *McIntyre* v. *McBean* (1856), 13 U. C. R. 534, where a different opinion was expressed] is directly opposed to that view; and in one of the cases cited . . *Laughton* v. *Bishop of Sodor and Man* (1872), L. R. 4 P. C. 495, at p. 505, this statement of the law is found in the judgment: "It has been contended that malice in this [intrinsic] sense is to be inferred from the language of the bishop's charge, and undoubtedly a privileged communication may be couched in language so much too violent for the occasion as to afford in itself evidence of malice, whereby the privilege is forfeited." It is not necessary to go through the cases. All the modern cases, at all events, shew that that is the law, and the law is so stated by all the text writers.

Undoubtedly, as said in *Laughton* v. *Bishop of Sodor and Man*, "to submit the language of privileged communications to a

(7) *Graham* v. *Crozier* (1879), 44 U. C. Q. B. 378, following *Fryer* v. *Kinnersley* (1863), 15 C. B. (N.S.) 430.
(8) *Williamson* v. *Freer* (1874), L. R. 9 C. P. 393; 43 L. J. C. P. 161.
(9) *Robinson* v. *Jones* (1879), 4 L. R. (Ir.) 391. See, also, *Sadgrove* v. *Hole* (1901), 2 K. B. 1.

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. Therefore, undoubtedly, in determining, as the learned judge had to determine in this case, whether there was any evidence of malice to go to the jury, he had to consider whether there was such excess as warranted, if the jury chose to draw it, the inference of malice." (10)

Excess in extent of publication.—Excess in the *extent* of what is reasonably sufficient for the occasion will arise where a circular, issued by a member of a friendly society to other members of the same society, for the purpose of obtaining a statutory investigation into the solvency of the society, is issued with a knowledge that it contains statements that are untrue; (1) where if a person receive a letter containing libellous matter with authority from the author to publish it, the person receiving it inserts it in a newspaper—a case in which it was held that the giving up of the author's name was no answer to the action, but that he must also show that he inserted it on a justifiable occasion and believed it to be true; (2) where a defamatory letter was republished in a pamphlet; (3) where defendant, in reply to plaintiff's statements concerning him in a letter published in a newspaper, did not confine himself to rebutting plaintiff's assertions, but retorted through the same medium by raking up plaintiff's antecedents, and indulging in other uncalled for personalities. (4) This decision was followed in an Ontario case in which the defendant, a contractor, in vindicating himself against some reflections on his work by plaintiff at a public meeting, made a defamatory attack on plaintiff in a local newspaper. (5)

(10) *Crate* v. *McCallum* (1905), 6 O. W. R. 825, at pp. 826-27.
(1) *Hill* v. *Hart-Davis* (1882), 21 Ch. D. 798; 51 L. J. 845.
(2) *De Crespigny* v. *Wellesley* (1829), 5 Bing. 392, 404; *Tidman* v. *Ainslie* (1854), 10 Exch. 63.
(3) *Tidman* v. *Ainslie*, *supra*.
(4) *Murphy* v. *Halpin* (1874), Ir. R. 8 C. L. 127.
(5) *Hopewell* v. *Kennedy*, 9 O. L. R. (1904), 43; 4 O. W. R. 433; 25 C. L. T. (Occ. N.) 70.

CHAPTER XV.

Publications Seeking Remedy or Redress.

Publications of this character are privileged conditionally under the Code, and where the statutory condition exists, with respect to the particular publication set out in the indictment, a good defence may be established.

The enactment conferring privilege.—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. (1)

The conditions of privilege.—Under this article the defamatory matter charged to have been published must, in the first place, be believed by the accused to be true; and secondly, must be relevant (*i.e.*, pertinent or material) to the particular remedy or redress which is sought by its publication. The belief of the accused in the statements alleged to be libellous must be an honest belief, and this may be shewn either by his actual personal knowledge of the facts stated, or may be inferred from a reasonable means of knowledge, *e.g.*, possession of documents containing the information. The notoriety of the facts in a party's business, or calling, or neighbourhood, may also in some cases support an inference of knowledge, (2) though mere rumour or reputation would be insufficient and inadmissible. (3) So, in order to shew the *bonâ fides* of his belief in the statements made, it would be proper to show the state of his knowledge, and that he had reasonable grounds for such belief; (4) *e.g.*, that it was shared by the community, or even by individuals similarly situated to himself; (5) while the absence of reasonable grounds of belief in the

(1) S. 326.
(2) *Preston's Case* (1851), 2 Den. C. C. 353.
(3) *R.* v. *Gunnell* (1886), 16 Cox C. C. 154.
(4) *Derry* v. *Peek* (1889), 14 A. C. 337.
(5) *Sheen* v. *Bumpstead* (1863), 2 H. & C. 193.

statements made (*e.g.*, the means of knowing the opposite), would be evidence of want of honest belief. (6) In *McKergow* v. *Comstock*, (7) it was held by a Divisional Court that, on an examination for discovery in an action of libel, the plaintiff may be required to answer questions tending to show a lack of honest belief on his part, and, by parity of reason, the defendant may be required to answer questions impugning his statements of honest belief. (8)

Further conditions.—Assuming the honest belief of the accused in the defamatory matter charged, and the relevancy of the matter itself with respect to the relief sought, there are other conditions necessary to give immunity to the publication. It is essential that the publication of the defamatory matter must be made (*a*) in good faith, i.e., with honesty of purpose or intention; (*b*) in order to obtain a remedy or redress for a wrong or grievance either of a public or private nature: (*c*) either from a person who has the right, or is reasonably believed by the accused to have the right, to remedy or redress such wrong or grievance: (*d*) or from a person who is reasonably believed by the accused to be under a duty or obligation (*i.e.*, by virtue of his office, situation, or position), to remedy or redress such wrong or grievance; and (*e*) the publishing must not in manner or extent exceed what is reasonably sufficient. That is, it must not go beyond what the occasion requires, otherwise it will exceed or abuse the privilege intended to be conferred and be no longer privileged. The question of "excess of the occasion" is another way of expressing the question of malice, and is proper to be left to the jury, if there is any evidence at all. (9)

Scope of the enactment.—This article of the Code would seem, therefore, to be applicable wherever the person accused has published the defamatory matter with a view to the detection or punishment of any offence or offender, or by way of complaint as to the acts or conduct of any public officer or servant, or as to any public abuse, and where such publication was made to the authority or person competent to investigate or deal with such offence, acts, conduct, or abuse, or to remove, punish, or reprimand, such offender, officer or servant. It would also be applic-

(6) *Derry* v. *Peek*, *supra*.
(7) (1908), 11 O. L. R. 637.
(8) *Per* Boyd, C., in *Harrison* v. *Madill* (1910), 1 O. W. N. 583, at p. 584.
(9) *O'Donoghue* v. *Hussey* (1871), Ir. R. 5 C. L. 264; *Dwyer* v. *Esmonde* (1878), 2 L. R. (Ir.) 243, in which the Irish Court of Appeal reversed the Irish Court of Exchequer; *Jacob* v. *Lawrence* (1879), 14 Cox C. C. 321.

able, and the defamatory matter would be none the less privileged, where the publication was made by mistake to the authority or person not competent to do this; (10) and possibly, also, where the accused, in seeking a remedy or redress for any wrong or grievance, published the defamatory matter by way of caution or warning as to the illegal or immoral conduct of any servant, agent, or subordinate, and such publication was made to the employer, principal, or superior of such servant, agent or subordinate; or where, in any other manner, the publication was made in aid or furtherance of justice or public order to any person having a duty or obligation in relation to the administration, execution, or maintenance of the same. (1)

Illustrative cases.—This enactment as to the publication of defamatory matter being no offence where it seeks remedy or redress, is illustrated, as in fact are all the enactments concerning privilege, by the decisions in civil actions for libel. Where 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, and held the petition to be absolutely privileged. (2) Where the defendant, and a number of other inhabitants of a borough, signed and transmitted to the Home Secretary a memorial complaining of the plaintiff, a justice of the peace, during the election of a member of parliament for the borough, imputing to plaintiff speeches inciting the people to a breach of the peace, charging that, after reading the Riot Act, plaintiff had given orders to a man to strike persons on the street, praying an inquiry into plaintiff's conduct, and, if the memorial was substantiated, that he should be removed from the commission of the peace, the court held, that although the memorial might have been more properly addressed to the Lord Chancellor, who had power to remove the magistrate (in which case it would certainly have been privileged), instead of to the Home Secretary, who had no such power, yet that, in being presented to him, it was really presented to the Sovereign and was, therefore, privileged. Lord Campbell said that a *bonâ fide* petition to the Queen, for the removal of a magis-

(10) *McIntyre* v. *McBean et al.*; *Kerr* v. *Davison*; *Harrison* v. *Bush*; *Scarll* v. *Dixon*; *The King* v. *Bayley*, *infra*.
(1) Bower's Actionable Defamation, p. 128.
(2) *Stenton* v. *Andrews* (1836), 5 U. C. R. (O.S.) 211.

trate, by an aggrieved person living within his jurisdiction, would be a privileged communication. *Blagg* v. *Sturt*, (3) in so far as it decided anything contrary to the opinion of the court, was distinctly disapproved of, the substantial difference between the two cases being that, in *Blagg* v. *Sturt*, the jury found express malice, but, in the present case, that the defendant acted *bonâ fide*. (4) Where the defendant had addressed a letter to a General and the principal officers of the Guards, for presentation to the King, stating that the prosecutor had obtained from defendant a warrant for the payment of money due to him from the government, under promise of paying it to defendant, and that the prosecutor had received the money, and had not paid it over to the defendant, the Court held that this was no libel, but a statement of an injury properly made for redress, although neither the officers nor the King could give the defendant direct assistance in obtaining payment of the money wrongfully withheld. (5) Where a memorial was sent by the defendant to the Governor-General complaining of the conduct of the plaintiff, a magistrate and militia officer, and other persons, in pulling down the enclosures of defendant's land and throwing open the land for a public road, without the sanction of the district council, the court held that, the memorial having been presented for the purpose of obtaining redress, the action could not be sustained in the absence of malice and probable cause. (6) Where a petition was addressed and sent by a tradesman creditor of an officer in the army, to the Secretary of War, complaining of unjust conduct, in respect of a debt due to him from the plaintiff, the petition containing a fair and honest statement of facts, and being sent for the purpose of procuring payment of the debt, through the interference of the Secretary, the court held that the petition was no libel. Best, J., said "that the circumstances of its transmission made it privileged, it being an application for the redress of a grievance to a minister of the Crown, who, the defendant honestly believed, had authority to afford him redress. And this, he said, may be done without hazard of an action or prosecution, if the application be made *bonâ fide*, with a view to obtain redress for some injury received, or to

(3) (1846) 10 Q. B. 899.

(4) *Harrison* v. *Bush* (1855), 5 E. & B. 344; 25 L. J. Q. B. 28. *Blagg* v. *Sturt*, in the Queen's Bench, but *sub nom. Sturt* v. *Blagg*, in the Exchequer Chamber, was a case in which the plaintiff was town clerk and clerk to the justices of a borough, and the libel complained of was contained in a letter to the Secretary of State, written by the defendant, who was an inhabitant of the borough, imputing to the plaintiff corruption in his office of clerk to the justices.

(5) *The King* v. *Bayley*, Bac. Ab. Libel, A. 2, cited by Best, J., in *Fairman* v. *Ives* (1822), 5 B. & Ald. 647.

(6) *Rogers* v. *Spalding* (1844), 1 U. C. Q. B. 258.

prevent or punish some public abuse. (7) 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, the letter was held to be privileged. (8) Where the plaintiff was an inspector appointed, under the Contagious Diseases (Animals) Act, 1878, by the local authorities, but removable by the Privy Council for misconduct, and the defendant wrote a letter to the Privy Council accusing plaintiff of dereliction of duty and of having received a bribe, it was held, in an action on the letter, that the case was one, not of absolute but of qualified privilege only, the action being maintainable on proof of express malice. (9) Where there were defamatory statements by the defendants in a petition to a judge, supported by affidavits, and presented for the purpose of securing the release of defendant's brother, who was under arrest on a false charge of lunacy, the statements were held to be privileged, being substantially true and made in good faith and with probable cause. (10) So, also, where a complaint was written by a private individual to a public officer, in regard to the misconduct of a person under him, even though some of the charges made were not true, if made *bonâ fide* and without malice; (1) and also a complaint by the serjeant of a volunteer corps to the proper officers of the corps respecting the disaffection and misconduct of one of its members. (2) Where a written paper, signed by a number of ratepayers of a school section and presented to the local superintendent of schools, contained charges against the habits and moral character of the public school teacher of the section, protested against the payment of any school rates, and requested the withholding of the government grant to the school section until the matters referred to were satisfactorily adjusted, the statements and complaints were held to be privileged. Robinson, C.J., said, "that the parents of any children who have the misfortune to be placed under such a teacher, or any other of the inhabitants of the school division who are rated to the support of the school, are doing a commendable thing when, without loss of time, they bring any such case under the notice of the proper authority in order that the public evil may be redressed; and if, under an erroneous impression, they should happen to address their complaint to the wrong quarter, they are safe from

(7) *Fairman* v. *Ives* (1822), 5 B. & Ald. 642, 647.
(8) *Kerr* v. *Davison* (1873), 9 N. S. R. (3 N. S. D.) 354.
(9) *Proctor* v. *Webster* (1885), 12 Q. B. D. 112; 55 L. J. 150.
(10) *Legault* v. *Legault et al.* (1892), Q. O. R. 1 (S.C.) 528.
(1) *Blake* v. *Pilfold* (1832), 1 M. & Rob. 198.
(2) *Barbaud* v. *Hookham* (1804), 5 Esp. 109, *per* Lord Ellenborough, C.J.

any prosecution at the instance of the party of whom they are complaining, so long as it appears that the representation was well founded, or that they had good reason to believe it was, and that they acted in sincerity and good faith, not maliciously and without just cause or excuse. We do not wish it indeed to be understood that any inhabitant of the province, even though he should have no interest in that particular school district, would not be privileged in making a communication of this nature to the proper quarter, if done in a proper spirit and for the purpose of preventing a public evil. It is not necessary, however, to go into that question." And, referring to the question of malice, the learned Chief Justice said: "In the infinite number of cases in which the question of privileged communication has been discussed, we do find the law again and again laid down in such a manner that we might well understand the learned judges to mean, that however clear might be the fact that the alleged libel was, under the circumstances, a privileged communication, yet if the defendant acted maliciously in making it, he should be convicted of libel. Now the evidence might shew in any such case a strong feeling of ill will against the plaintiff, such as the jury might well call a malicious feeling, if they were considering it apart from the cause which produced it, and not a little malicious even when considered in connection with the cause which did produce it; but yet we conceive that would not signify, so long as the jury were convinced from the evidence that there was really good ground for making the complaint; and this good ground, we must always bear in mind, consists not exclusively in the complaint being literally or substantially true, but may consist also in the fact that the defendant was warranted in believing it to be true." Draper and Burns, JJ., concurred. (3)

Privilege was also held to exist where a letter, written by a commanding officer and member of the executive government of St. Helena, to the Colonial Secretary of that island, imputed drunkenness and disorderly conduct, at a certain time and place, to the assistant master of the government school at that island. (4) So where a timekeeper employed on public works, on behalf of a public department, wrote a letter to the secretary of the department imputing fraud to a contractor, it was held that the question for the jury was, whether or not the imputations were in good faith, and in the discharge of the writer's duty to his employers; and that, if so, they were privileged, although the letter was

(3) *McIntyre* v. *McBean et al.* (1856), 13 U. C. Q. B. 534.
(4) *Stace* v. *Griffith* (1869), 6 Moo. P. C. C. (N.S.) 18; L. R. 2 P. C. A. C. 420.

written to the wrong person; (5) and where a member of an Incorporated Law Society wrote to the society charging plaintiff, a solicitor, with unprofessional conduct, it was held, by a majority of the court, that defendant had sufficient interest in the matter of the complaint to sustain his plea of privilege, and that the society had such a concern in the matter of the complaint, in respect of interest or duty, as rendered the letter privileged. (6) A like protection was given to a complaint made to the Postmaster-General of the conduct of a postmaster, a case in which it was said that particular expressions in such a communication are not to be too strictly scrutinized, if the intention of the complainant be good; (7) and to a communication made to a member of parliament, as to a question to be put in the House of Commons in regard to the dismissal of a colonel of a regiment, on charges contained in letters from the commanding officer of a regiment to his immediate superior. The letters containing the charges against the colonel were also ruled to be privileged, although circumstances shewing that they were not written from a sense of duty, but from personal resentment, on account of other matters, would be evidence of actual malice, which, if proved, would take away the privilege. (8) There was privilege, also, in a case in which the attorney for a township council, which had differences with a road company, examined the company's books under the council's instructions, and thereafter wrote a letter to a loan company objecting to a loan which was being negotiated by the road company, and stating that the directors were strongly suspected of "misappropriation" of the company's funds, that defendant's firm could get no account from the directors of the company's expenditure, etc., "all of which we can ourselves vouch for," etc.; (9) and where a letter from the clerk of the peace to the finance committee of a body of magistrates gave reasons for discontinuing the employment of the plaintiff as a printer to that body, and stated that he had no alternative but to adopt that course "rather than submit to what appears to have been an attempt to extort a considerable sum from the county by misrepresentation," the occasion of writing the letter was held to be privileged: but that the words quoted were evidence of express malice which ought to have been left to the jury; and that, therefore, the judge could neither non-suit, nor direct a verdict for the defendant; (10) where a letter was

(5) *Scarll* v. *Dixon* (1864), 4 F. & F. 250.
(6) *Hammerton* v. *Green* (1863), 16 Ir. C. L. R. 77 (Lefroy, C.J., *dubitante*).
(7) *Woodward* v. *Lander* (1834), 6 C. & P. 548.
(8) *Dickson* v. *Wilton* (1859), 1 F. & F. 419.
(9) *Hansa* v. *De Blaquiere* (1854), 11 U. C. Q. B. 310.
(10) *Cooke et al.* v. *Wildes* (1855), 5 E. & B. 328; 24 L. J. Q. B. 367.

written by a member of a church, a non-resident of the district, to a bishop, as to current rumours with respect to the disgraceful conduct and behaviour of an incumbent in his diocese; (1) where a clerk to guardians complained to their relieving officer of the drunkenness of the medical officer; (2) where a communication was sent by a vicar to his curate, to the rural dean, and to others in a similar relation to himself, as to the misconduct and bad character of a clergyman engaged to preach in the locality; (3) where a letter containing complaints and charges against a sheriff officially, was written and sent to the Provincial Secretary, by a barrister, in the belief of the truth of the charges and without malice; (4) where defamatory representations were made to the foreign board at Peking by the defendant, in the course of his duty as an officer of the Chinese government, complaining of the conduct of the plaintiff as a professor in the college at Peking, whereby the plaintiff was dismissed by the board: (5) where the defamatory statements had reference to the investigation of a criminal offence, a case in which Pollock, B., said that, where it is sought to be shewn that such statements are privileged, the extent of the privilege can only be commensurate with the propriety or fitness of the occasion on which the statements were made, and that the mere casual presence of a third party would not take away the privilege, unless it appeared that the occasion was abused; (6) where a complaint was made by a ratepayer to the watch committee of a borough, concerning the conduct of a police superintendent; (7) where a communication of a similar nature was made to the chief constable concerning the conduct of a sergeant of police; (8) 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, criticizing the conduct of the chief of police as a public official: (9) where the report of a police surgeon to a superintendent of the division contained statements that a constable was suffering from the effects of a venereal disease. (10)

On the other hand, where the libel complained of was a handbill offering a reward for the recovery of lost bills of exchange,

(1) *James* v. *Boston* (1845), 2 C. & K. 4, *per* Pollock, C.B.
(2) *Sutton* v. *Plumridge* (1867), 16 L. T. 741.
(3) *Clarke* v. *Molyneux* (1877), 3 Q. B. D. 237; 47 L. J. 230.
(4) *Des Barres* v. *Tremaine* (1883), 16 N. S. R. (4 R. & G.) 215.
(5) *Hart* v. *Gumpach* (1873), 9 Moo. P. C. C. (N.S.) 241; L. R. 4 P. C. 439; 42 L. J. P. C. 25.
(6) *Jones* v. *Thomas* (1885), 53 L. T. 678; 34 W. R. 104.
(7) *Bannister* v. *Kelty* (1895), 59 J. P. 793.
(8) *Cassidy* v. *Connachie* (1907), Scotch Ct. of Sess. Cas. 1112.
(9) *Hebert* v. *Lapointe* (1895), Q. O. R. 12 (S.C.) 123.
(10) *A.* v. *B.* (1907), Scotch Ct. of Sess. Cas. 1154.

which were described in the handbill, and imputing embezzlement of the bills to the plaintiff, a clerk of defendant, the publication, under a proper direction of the judge to the jury, was held to be unprivileged. Tindal, C.J., was of opinion that, without the imputation of embezzlement, the publication was clearly entitled to *prima facie* protection; but, in his charge to the jury, he said that, unless the statement relating to the plaintiff was "necessary either for the purposes of justice, with the view to the discovery and conviction of the offender, or for the protection of the defendant from the liability to which he might be exposed on the bills," the defendant was liable. He at the same time expressed his own opinion that the libel would not bear that construction. The mention of the plaintiff was not necessary for defendant's protection, nor for the purposes of justice. There was a verdict for the plaintiff. (1) Other cases, where the publication was considered unnecessary for the purposes of justice, are *Hooper* v. *Truscott* (2) and *Bruton* v. *Downes*. (3)

Alleged libels were also held to be privileged where a letter, containing a charge of a criminal offence against an insolvent, was shewn to two of his creditors by a fellow creditor and inspector of his estate; (4) where the defendants sent a petition to the local license commissioners defamatory of the plaintiff's tavern, and praying that a liquor license might not be granted to plaintiff; (5) but not 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 provincial Liquor License Act, even though 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; (6) nor 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; (7) nor where the publication of the libellous matter

(1) *Finden* v. *Westlake* (1829), M. & M. 461; 31 R. R. 748.
(2) (1836) 2 Bing. N. C. 437.
(3) (1859) 1 F. & F. 668.
(4) *Howarth* v. *Kilgour* (1880), 19 O. R. 640.
(5) *Wilcocks* v. *Howell et al.* (1884), 5 O. R. 360.
(6) *Roberts* v. *Climie* and *Murphy* v. *Climie* (1881), 46 U. C. Q. B. 204, *per* Osler, J.
(7) *Lowther* v. *Baxter* (1890), 22 N. S. R. 372. For other decisions illustrative of this section (326), see chapter on "Privilege" in "King's Law of Defamation."

was made in a newspaper merely 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 made public;" or on the ground, that the defamatory matter has been embodied in a statutory declaration made before a justice of the peace, with the object of bringing the charges contained in the declaration before the municipal council having power to inquire into the charges made, and to dismiss the official complained of. (8) But a communication addressed to the warden of the council, and sent to him, might have been considered privileged. (9)

As to these publications seeking remedy or redress exceeding "in manner or extent what is reasonably sufficient for the occasion," see comments and the cases cited under section 319 in the preceding chapter on "Publications Invited, Challenged, or in Self-defence."

(8) *McDonald* v. *Sydney Post Publishing Co.* (1906), 39 N. S. R. 81
(9) *Ibid. per* Graham, E.J.

CHAPTER XVI.

Publications in Answer to Inquiries.

Publications of defamatory matter in answer to inquiries are also privileged conditionally, and, where the accused is indicted for such a publication and no malice appears, the conditions, if sufficiently proved, will constitute a good defence.

The enactment conferring privilege.—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. (1)

Conditions of privilege.—Under this section of the Code, the defamatory matter charged to have been published, must, as under section 326, be believed by the accused to be true, and secondly, must be relevant (*i.e.*, pertinent or material) to the particular inquiries made. The same remarks as to the honesty and *bonâ fides* of the accused's belief, and as to evidence of this, apply as in the case of the preceding section. The other essential conditions are, (*a*) that the defamatory matter must relate to a subject concerning which the inquirer, or the person acting for him, has an interest in knowing the truth; (*b*) *or* that the accused believed on reasonable grounds, that the inquirer had such an interest; (*c*) that the accused published the matter in good faith, *i.e.*, with honesty of purpose; (*d*) that he published it for the purpose of giving the inquirer information as to the subject of inquiry; and (*e*) that the publishing did not, in manner or extent, exceed what was reasonably sufficient under the circumstances.

Conditions (*c*) and (*d*) relate to the *intent* of the accused in giving the particular answers which constitute the libel or libels complained of.

(1) S. 327.

Scope of the enactment.—Judging by the course of judicial opinion this section covers an answer, or part of an answer, to inquiries concerning the character, competence, or credit, of the complainant, and where the information sought by the inquirer is for the purpose of enabling him to determine the advisability, (*a*) of engaging the complainant in his service or employment; (*b*) or of appointing or promoting him to any office; (*c*) or of entering into any contract or partnership with him; (*d*) or of otherwise dealing, or continuing, or refusing to deal with him in any profession, business, vocation, or transaction.

Other answers or parts of answers of a defamatory character which appear to be protected by this article of the Code, are (*e*) those which the accused published in order to correct a previous answer made by him to the inquirer of the nature above mentioned, but which he afterwards discovered to have been incorrect when made, or to have become so in the meantime; (2) and (*f*) those tending to shew that the complainant ought not to be taken into the service or employment of, or be allowed to have business or professional relations with, the inquirer to whom the publication was made, or that the inquirer ought not to recommend, or continue to recommend, the complainant to others as fit for such service, employment, or relations. (3)

Publications in pursuance of duty or interest. — All these publications of defamatory matter, in answer to inquiries, come within the class of publications in pursuance of duty or interest, some of which are also covered by section 328. To entitle a matter, otherwise libellous, to the protection which attaches to communications made in the fulfilment of a duty, *bonâ fides*, or (to use our own equivalent) honesty of purpose, is essential. And to this, again, two things are necessary: first, that the communication be made not merely in the course of duty, that is, on an occasion which would justify the making it, but also from a sense of duty; secondly, that it be made with an honest belief in its truth. (4) An interest in the matter of the communication, such as will be recognized in law as affording a privilege, or an excuse for the publication of the defamatory matter by reason of the occasion, must be, if not an actual personal or mutual interest, at all events an unequivocal interest, capable of being clearly recognized as

(2) *Child* v. *Affleck* (1829), 9 B. & C. 403; *Gardner* v. *Slade* (1849), 13 Q. B. 796.

(3) *Pattinson* v. *Jones* (1828), 8 B. & C. 578; *Dixon* v. *Parsons* (1856), 1 F. & F. 24; *Fryer* v. *Kinnersley* (1863), 15 C. B. (N.S.) 422; 33 L. J. C. P. 96.

(4) *Per* Cockburn, L.C.J., in *Dawkins* v. *Paulet* (1869), 39 L. J. Q. B. 62.

such; for if it be an interest arising out of mere idle curiosity or other improper feeling, not recognizable as a legitimate interest, it will afford no ground of protection. Such recognized interest may be either of a public or a private nature; and may exist in a great variety of cases. But a mere interest in making a defamatory communication is not alone sufficient; either the party making it, or the party to whom it is made, must have an actual interest in the matter communicated. (5)

Illustrative cases.—The accused may shew in his defence that the publication was by contrivance of the complainant himself, *e.g.*, that the complainant himself procured the act to be done of which he complains; for he cannot complain of that as an injury which he has himself willingly occasioned. (6) In *King* v. *Waring* (*supra*), the complainant got some one to write for a character, not because he wanted one, and knowing it would be a bad one, but solely for the purpose of obtaining something on which to found an action. In *Smith* v. *Wood* (*supra*), some one requested the defendant to let him see a caricature of the plaintiff, which he did, but it was held to be no publication—a decision which, being inconsistent with the *Duke of Brunswick* v. *Harmer,* (7) must be regarded as overruled by it. So, also, privilege attached where the plaintiff's brother-in-law wrote to the defendant inquiring why he had discharged the plaintiff, and had refused to give him a character, and the defendant's answer, alleged to be libellous, was followed by a writ sued out on the following day. The action was held to be not maintainable, the defendant having been entrapped into writing the answer. (8) Where a master has given a bad character of a servant to persons inquiring after such character, he is not required to substantiate by proof what he has said or written; but the servant may, if he can, prove the character to be false; and the question between the master and servant will always, in such case, be, whether what the former has spoken or written concerning the latter is malicious and defamatory. (9)

In a case in which the question was the fitness of plaintiff to continue in a trusteeship, he requested his employer to obtain

(5) Folkard's S. & L., 5th ed., 533; and see *Simmonds* v. *Dunne* (1871), Ir. R. 5 C. L. S. 358; *Botteril et al.* v. *Whytehead* (1879), 41 L. T. 588.

(6) *King* v. *Waring* (1803), 5 Esp. 14; and see *Smith* v. *Wood* (1813), 3 Camp. 323; 14 R. R. 752.

(7) (1849), 14 Q. B. 185, in which case it was held that the republication was a distinct and independent act, and not a mere continuance of the original publication.

(8) *Weatherston* v. *Hawkins* (1786), 1 Term. R. 110.

(9) *Rogers* v. *Clifton* (1803), 3 Bos. & P. 587; *Edmonson* v. *Stevenson et ux.* (1766) Buller's N. P. ed. 1817, 7*a*.

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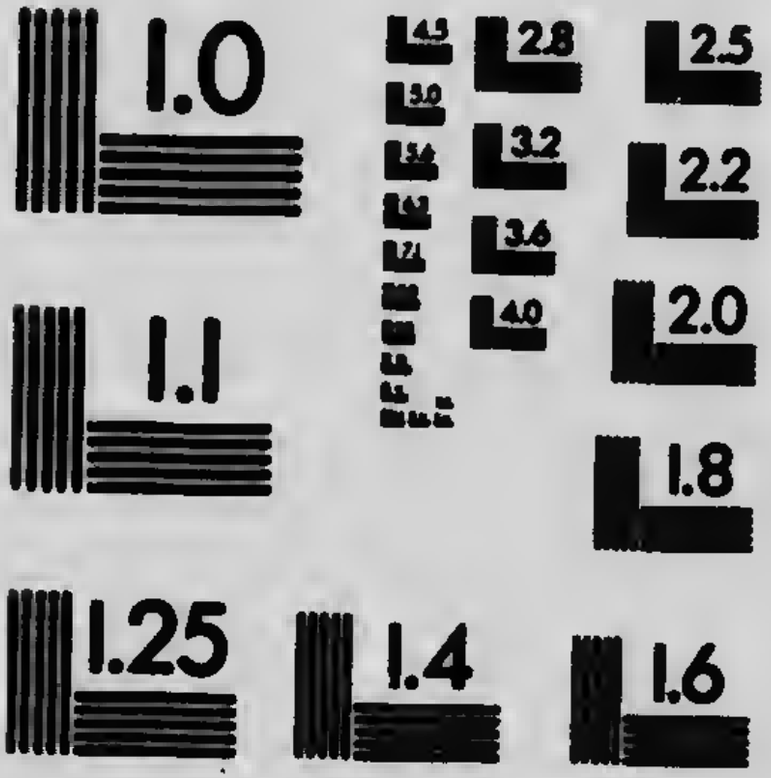

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signatures to a protest against his being turned out of the office. The defendant, on being asked his reasons for refusing his signature, said he would never sign to keep a big rogue like plaintiff in the trust, adding that plaintiff had left the parish discreditably, had not settled with his creditors of whom he (defendant) was one, and that he was surprised at the employer retaining plaintiff in his service. Plaintiff was thereupon dismissed from his employment as farm bailiff. The jury found that defendant acted without malice; and it was held that, assuming the words to have been spoken *bonâ fide*, as to the propriety of retaining plaintiff as trustee, they were relevant to the question whether he was fit to be trusted, and were privileged by the occasion. (10) It has also been held, that the defendant, a banker, was justified in shewing to a *bonâ fide* inquirer, as to the financial position of plaintiff, an anonymous letter received a year previously, containing matter highly defamatory of the plaintiff who was the subject of the inquiry—the letter having been sent "for what it was worth," and, although perhaps not a proper act on the part of defendant as a banker, not sufficient to avoid his privilege; (1) that defendant having wrongfully converted to his own use a letter defamatory of plaintiff, written by A. to plaintiff, shewed and read it to B.—the relation between plaintiff and B. being such as to render the publication privileged despite the conversion. (2)

The publication in one of the cases last cited (*Thurston* v. *Charles*) was in pursuance of a duty or interest, and although not literally within the privilege stated in section 327, is, along with the case preceding (*Robshaw* v. *Smith*), illustrative of the principle, that where the accused is entitled to privilege for his publication of defamatory matter, he is not deprived of the benefit of the privilege as a defence to a prosecution, by reason only of the fact that the publication is, as between the accused and the complainant, a breach of duty or a wrongful act which is not in itself of a defamatory character.

In *Bromage* v. *Prosser*, (3) which, although an action for slander, is sometimes cited as an illustration of the privilege conferred by section 327, the words complained of were concerning plaintiffs in their business as bankers. It was proved that A. B. met the defendant, and said: "I hear that you say that the plaintiffs' bank at M. has stopped. Is it true?" Defendant answered: "Yes it is, I was told so. It was so reported at C., and nobody

(10) *Cowles* v. *Potts* (1865), 34 L. J. Q. B. 247.
(1) *Robshaw* v. *Smith* (1878), 38 L. T. (N.S.) 423.
(2) *Per* Walton, J., in *Thurston* v. *Charles* (1901), 21 T. L. R. 658. See, also, *Hamon* v. *Falle* (1879), 4 A. C. 247.
(3) (1825), 4 B. & C. 247; 1 C. & P. 475.

would take their bills, and I came to town in consequence of it myself." It was proved that C. D. told the defendant that there was a run on the plaintiffs' bank at M. At the trial the case was not treated as one of privilege, but the court (*per* Tindal, C.J., at pp. 257, 258) held, that it should have been left to the jury as admitting at least of that treatment, because, if properly directed, the jury might have found that the defendant's alleged slander was only in the nature of an honest answer to an inquiry as to the reasons for the bank's rumoured insolvency, and for the guidance of the inquirer, or to regulate his conduct, in which case it would have been the duty of the judge to rule that it was privileged.

Privilege was also held to attach to a report of the secretary of a charity society containing defamatory imputations on the plaintiff, a lady who applied to the society for assistance, and issued to an inquirer who was interested in the matter; (4) to a letter in reply to inquiries as to the competency of a governess; (5) to a communication by defendant, acting on behalf of a member of plaintiff's congregation, and addressed to a person acting on behalf of plaintiff, as to plaintiff's conduct in a certain partnership, and as to an investigation of plaintiff's dealings in such partnership, which plaintiff was demanding—a case in which the communication was one of mutual interest; (6) to the answer of defendant, a medical practitioner, to the husband of a woman whom, at the husband's request, he had examined professionally as to her mental condition and whom he pronounced insane; (7) to an alleged libellous communication concerning plaintiff, a grain and general merchant, and containing information procured for the purpose of being communicated, and which was communicated without malice, to a person interested in making relevant inquiries as to plaintiff's business standing; (8) to alleged libellous statements, based on the mistaken report of the agent of a mercantile agency, and published without malice in answer to pertinent inquiries concerning plaintiff as a shopkeeper; (9) to the verbal publication of a criminal charge to the plaintiff and her parents who came with plaintiff to defendant and asked for particulars; (10) to a verbal answer by the deputy head of a public office to his chief, stating that he had no confidence in the officer

(4) *Waller* v. *Loch* (1881), 7 Q. B. D. 619; 51 L. J. 274.
(5) *Fountain* v. *Boodle* (1842), 3 Q. B. 5.
(6) *Hopwood* v. *Thorn* (1849), 8 C. B. 293; 19 L. J. C. P. 94.
(7) *Weldon* v. *Winslow* (1884), *Times*, March 14th-19th.
(8) *Todd* v. *Dun Wiman & Co.* (1888), 15 O. A. R. 85.
(9) *Robinson* v. *Dun et al.* (1897), 24 O. A. R. 287.
(10) *Johnston* v. *Kidston* (1898), 31 N. S. R. 283.

next after the deputy, with respect to the custody of the keys of the office safe; (1) to words imputing theft to plaintiff, in answer to questions by a relative of plaintiff as to why defendant had dismissed him; (2) to words imputing a criminal charge to plaintiff, in answer to questions by a third party to defendant, after the latter had laid the charge against plaintiff before a magistrate. (3)

Several of the above decisions occur in actions for slander, but if the same answers to such inquiries were written instead of verbal, the defence of privilege under this section (327) would be equally available and effective in prosecutions for libel on the answers.

As to the publication of the answers exceeding "in manner or extent what is reasonably sufficient for the occasion," see comments and the cases cited under section 319 in chapter on "Publications Invited, Challenged, or in Self-defence."

(1) *Hamel* v. *Amyot* (1887), 14 Q. L. R. (S.C.) 56.
(2) *Nolan* v. *Tipping* (1858), 7 U. C. C. P. 524.
(3) *McCann* v. *Preneveau* (1885), 10 O. R. 573.

CHAPTER XVII.

Voluntary Publications to Persons Interested.

Another species of defamatory matter to the publication of which a qualified privilege is extended, in criminal prosecutions, is information given voluntarily, without inquiry, on some subject in which the person receiving the information is interested.

Enactment conferring the privilege.—No one commits an offence by publishing 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. (1)

Scope and conditions of the enactment.—This article of the Code is intended to cover defamatory communications which are *volunteered,* as distinguished from those which are made in answer to inquiries, and which come within the protection of the previous article (327). Although the meaning is clear, the section is somewhat loosely worded; because evidently it is not the defamatory matter which "is made without ill-will to the person defamed," but the publication of such matter. The section as a whole gives a conditional privilege to any defamatory communication on a subject in which the person to whom the communication is made is interested, or is reasonably believed to be interested, socially, legally, morally, commercially, or privately, in knowing the truth, so long as the conduct of the informant is reasonable under the circumstances. The reasonableness of his conduct will admit of considerable latitude of judgment. If the information was given for the protection or promotion of the interest of the person to whom it was given, in which case he would of course be interested in receiving the information, *e.g.,* if it was given for the purpose of enabling him to refute any charge or imputation made against him, or to vindicate his character, (2) the informant's conduct in making the communication might well be regarded

(1) S. 328.
(2) *Davies* v. *Snead* (1870), L. R. 5 Q. B. 608.

as reasonable. And it would certainly be reasonable if there was any legal, moral, or social duty on the part of the informant to give the information complained of. The conditions of this privilege otherwise are, (*a*) that the defamatory matter charged in the indictment is relevant (*i.e.*, pertinent or material) to the subject in regard to which the person receiving the information is interested, or is reasonably believed to be interested, in knowing the truth; (*b*) that the defamatory matter is true; (*c*) *or* that the defamatory matter is published without ill-will (*i.e.*, without actual or express malice) to the person defamed (presumably the complainant), and in the reasonable belief that it is true.

Illustrative cases.—Where the alleged libel was contained in a letter written by the defendant to certain bankers, charging the plaintiff, a solicitor, with professional mismanagement of their affairs, Lord Ellenborough, C.J., said, if the letter had been written confidentially, and under an impression that its statements were well founded, he was clearly of opinion that no action could be maintained. It was impossible to say that the defendant had maliciously published a libel to aggrieve the plaintiff, if he was acting *bonâ fide* with a view to the interests of himself and the persons whom he addressed; and if a communication of this sort, which was not meant to go beyond those immediately interested in it, were the subject of an action for damages, it would be impossible for the affairs of mankind to be conducted. (3) And so where a tenant, being desired by his landlord to inform him if he saw or heard anything respecting the game on the property, wrote the landlord informing him that his gamekeeper sold game, Parke, B., ruled that, if the tenant had been so informed, and believed the fact to be so, it was a privileged communication, and the gamekeeper could not maintain an action for libel; also, that the defendant, in such a case, might give evidence of representations made to him as to the conduct of the gamekeeper, but not evidence of acts done by the gamekeeper. (4) Where, also, plaintiff, an infant, was party to a suit in equity, and defendant was one of a firm of solicitors retained in the suit on behalf of the plaintiff, plaintiff informed defendant that he intended to change his solicitor. Defendant thereupon wrote a letter on the subject to plaintiff's next friend, who was responsible for the costs of the action, stating amongst other remarks on plaintiff's conduct, that a civil engineer, to whom plaintiff had been apprenticed, had made plaintiff a present of his indentures, because he was worse

(3) *McDougall* v. *Claridge* (1808), 1 Camp. 267; 10 R. R. 679. See. also, *Warren* v. *Warren* (1834), 1 C. M. & R. 250.
(4) *Cockayne* v. *Hodgkisson* (1833), 5 C. & P. 543.

than useless in his office. It was held, in the absence of proof of express malice, that the letter was a privileged communication. (5) Privilege also attached to a letter, written by a subscriber to a charitable society to the committee, impugning the moral conduct of the plaintiff, who was secretary of the society, with reference to a young woman defendant had recommended as matron, if the statements, although founded on hearsay, were made in an honest and reasonable belief in their truth. (6) The same rule has been held to apply to communications to prevent imprudent marriages. Where a son-in-law, *e.g.*, wrote to his mother-in-law, who was about to marry plaintiff, a letter containing imputations on plaintiff's character, and urging an investigation, Alderson, B., ruled that the letter was written on a justifiable occasion, and was justified, provided the jury were satisfied that it was written *bonâ fide*, although the imputations were false, or based on erroneous information; that defendant was justified even if his expressions, although harsh, hasty, or untrue, were written *bonâ fide* and believed to be true; that it was for the common good of all that such communications between parties situated as these were should be free and unrestrained; and that the jury should find for the defendant, unless they saw that the letter was written with a malicious intention of defaming the plaintiff. (7) Privilege was also held to exist where a ratepayer, who was unable to attend a meeting held for the purpose of investigating the accounts of a parish constable, wrote a letter to the meeting containing imputations of misappropriation of money by the constable. Parke, B., ruled that the letter was *prima facie* privileged; and that, in the absence of direct evidence of malice, the onus was on the plaintiff to prove that the defendant was wilfully absent from the meeting. (8) And where a letter was written to a bishop informing him of a current report, that the incumbent of a district, in a parish in the bishop's diocese, had been guilty of disgraceful conduct, it was held that the letter was privileged, if the statements were made honestly, for the purpose of calling the bishop's attention to a rumour which was bringing scandal on the church, and not from any malicious motive; and that it was not material that the writer of the letter was not a resident of the same district as the incumbent complained of. (9)

(5) *Wright* v. *Woodgate* (1835), 2 C. M. & R. 573.
(6) *Maitland* v. *Bramwell* (1861), 2 F. & F. 623, *per* Byles, J.; and see *Hartwell* v. *Vesey et ux.* (1860), 3 L. T. (N.S.) 275.
(7) *Todd* v. *Hawkins* (1837), 8 C. & P. 88: 2 Moo. & Rob. 20. See, also, *Atkinson* v. *Congreve* (1857), 7 Ir. C. L. R. 109.
(8) *Spencer* v. *Hamerton* (1835), 1 Moo. & Rob. 470; and see *George* v. *Goddard* (1861), 2 F. & F. 689, *per* Cockburn, L.C.J.
(9) *James* v. *Boston* (1845), 2 C. & K. 4, *per* Pollock, C.B.

In *Pattinson* v. *Jones* (10) a distinction is indicated between the privilege in the case of answers to inquiries, and privilege in the case of information volunteered. The defendant, hearing that A. B. was intending to employ plaintiff, wrote him a letter stating that he had dismissed plaintiff from his (defendant's) service for misconduct, and, in answer to A. B.'s inquiries, gave further particulars. Upon motion for a new trial, after a verdict for plaintiff, the verdict was upheld on the ground that there was some evidence of malice, and not, as sometimes supposed, because the voluntcered information was unprivileged. Bayley, J., said (at p. 584): "I do not mean to say that, in order to make libellous matter privileged, it is essential that the party who makes the communication should be put into action in consequence of a third party's putting questions to him. I am of opinion he may (when he thinks that another is about to take into his service one whom he knows ought not to be taken) set himself in motion, and do some act to induce that other to seek information from and put questions to him. The answers to such questions given *bonâ fide* with the intention of communicating such facts as the other party ought to know, will, although they contain slanderous matter, come within the scope of a privileged communication. But in such a case it will be a question for the jury whether the defendant has acted *bonâ fide,* intending honestly to discharge a duty; or whether he has acted maliciously, intending to do an injury to the servant." And Littledale, J., said (at p. 586): "Where the master volunteers to give the character, stronger evidence will be required that he acted *bonâ fide* than in the case where he has given the character after being required to do so."

On these principles where the defendant had written a letter to the person who recommended plaintiff to his service, informing him that plaintiff had not justified the character given with him, and cautioning the person against giving him a recommendation for morality or honesty, Watson, B., ruled that, in the absence of malice (which was a question for the jury), the letter was a privileged communication. (1) There are also instances of volunteered corrections of a character previously given (where facts subsequently learned justified the correction) being held entitled to protection. (2) So that the mere fact of a written communication containing defamatory matter being *voluntarily* made does not necessarily deprive it of privilege; if it be a publication

(10) (1828), 8 B. & C. 578.

(1) *Dixon* v. *Parsons* (1856), 1 F. & F. 24. But see *Fryer* v. *Kinnersley* (1863), 15 C. B. (N.S.) 422; 33 L. J. C. P. 96.

(2) See *Child* v. *Affleck* (1829), 9 B. & C. 403, and *Gardner* v. *Slade* (1849), 13 Q. B. 796; 18 L. J. Q. B. 334.

warranted by an occasion apparently beneficial and honest, it is not actionable and (subject to the other conditions in section 328), is not criminal, in the absence of express malice.

In *Coxhead* v. *Richards*, (3) which is regarded as a leading case on the subject of voluntary communications, there was a marked difference of judicial opinion. The mate of a ship sent a letter to a personal friend in which he charged the captain with drunkenness and gross misconduct in the navigation of the ship. The friend shewed the letter to two persons, and subsequently, on their advice, to the owner of the ship, who dismissed the captain. In an action of libel against the mate's friend, Tindal, C.J., held the communication to be privileged, and, there being no evidence of express malice, the defendant succeeded.

Upon a motion for a new trial the question of privilege was twice argued, and on each occasion the court was divided, Tindal, C.J., and Erle, J., being of opinion that the letter was protected, and Coltman and Cresswell, JJ., that it was not, thus leaving the verdict for defendant undisturbed. Tindal, C.J., said that the rule of law is not so narrowed and restricted by any authority that a person having information materially affecting the interests of another, and honestly communicating it in the full belief, and with reasonable grounds for the belief, that it is true, will not be excused, though he has no personal interest in the subject matter. And Erle, J., said that the information was given for the purpose of preventing damage from misconduct, and that in furnishing such information it is not essential that the giver of the information should stand in any relation to the other parties, the rule being founded on the importance of the information to the interests of the receiver. Coltman, J., on the other hand, said there was no legal duty calling on the defendant to make the communication, and that the moral duty was plainly the other way—the duty of not slandering your neighbour on insufficient grounds. This, he said, "is so clear, that a violation of that duty ought not to be sanctioned in the case of voluntary communications, except under circumstances of great urgency and gravity"—the defendant's acting *bonâ fide* and without malice being no justification. And Cresswell, J., said that there was no duty of any kind calling for the communication by the defendant; that the mate (if he really believed that which he wrote to be true) might, indeed, be under a moral duty to communicate it to the owner, but the defendant had no right to take that vicarious duty

(3) (1846), 2 C. B. 569; 15 L. J. C. P. 278.

on himself; he was not requested by the mate to do so, but was, on the contrary, enjoined not to make the communication.

In a case which came before the same judges soon afterwards (4), in which a verbal caution was given voluntarily, but *bonâ fide*, to a tradesman not to trust a certain customer, the advice being founded on a transaction between defendant and plaintiff, the court was divided in the same way, each of the judges named adhering to his former opinion.

For Canadian cases, not mentioned in this chapter and illustrative of the principles of this section (328) of the Code, see "King's Law of Defamation," pp. 504 *et seq.*

(4) *Bennett* v. *Deacon* (1846), 2 C. B. 628.

CHAPTER XVIII.

Fair Comment and Discussion of Matters of Public Interest.

These two subjects are so closely related that the separate articles in the Code, concerning the qualified privilege given them, may be conveniently treated in the same chapter. The rule as to comment has no application to private communications, but only to statements made about public acts or matters of public interest, (1) and also, it may be added, to statements about public persons.

Fair comments on public persons.—No one commits an offence by publishing fair comments upon the public conduct of a person who takes part in public affairs. (2)

Fair comments on literary or art productions.—No one commits an offence by publishing fair comments on any published book or other literary production, (3) or on any composition or work of art, (4) or performance publicly exhibited, (5) or any other communication made to the public on any subject, (6) if such comments are confined to criticism on such book or literary production, composition, work of art, performance, or communication. (7)

Scope of the rule.—The law thus stated simply means that fair comment, in any of the cases mentioned, is no libel. The onus is on

(1) *Per* Hunter, C.J., in *Williams* v. *Morris* (1906), 4 W. L. R., at p. 100.

(2) S. 325 (1). See *Turnbull* v. *Bird* (1861), 2 F. & F. 508; *Odgers* v. *Mortimer* (1873), 28 L. T. 472; *O'Brien* v. *Salisbury* (1890), 54 J. P. 215; *Dakhyl* v. *Labouchere* (1907), 96 L. T. 399; (1908), 2 K. B. 325.

(3) "Whatever is fairly written of a work . . . or of its author, as connected with it, is not actionable [and not a subject for criminal prosecution] unless it appears that the party, under the pretext of criticising the work, takes an opportunity of attacking the character of the author." (*Per* Lord Tenterden, C.J., in *Macleod* v. *Wakley* (1828), 3 C. & P. 311, at p. 313, and approved by Bowen, L.J., in *Merivale* v. *Carson* (1887), 20 Q. B. D. 275. See, also, the observations of Lord Ellenborough, C.J., in *Carr* v. *Hood* (1808), 1 Camp. 355, at pp. 357, 358; 10 R. R. 701, *note*.

(4) For unfair comments, see *Dibdin* v. *Swan* (1793), 1 Esp. 28; 5 R. R. 717; *Fraser* v. *Berkeley* (1836), 7 C. & P. 621; *Green* v. *Chapman* (1837), 4 Bing. N. C. 92; *Whistler* v. *Ruskin* (1878), *Times*, 26 and 27 November; *Belt* v. *Lawes* (No. 2 (1882), *Times*, July, Aug., Nov. and Dec.; *Duplany* v. *Davis* (1886), 3 T. L. R. 184; *McLellan* v. *Dutton* (1906), *Times*, 23 May.

(5) See *Gregory* v. *Brunswick* (No. 1) (1843), 6 N. & G. 205, and Serjeant Talfourd, *in arguendo*, at pp. 219, 220; *Cathercole* v. *Miall* (1846), 15 M. & W. 319, *per* Pollock, C.B., at pp. 338, 336, as to unfair comment.

(6) *Dunne* v. *Anderson* (1825), 3 Bing. 38, a criticism on plaintiff's petition to Parliament; *Eastwood* v. *Holmes* (1858), 1 F. & F. 347; *Paris* v. *Levy* (1860), 9 C. B. (N.S.), 342, *per* Erle, C.J., at p. 367, on the tendency of the poster commented upon.

(7) S. 325 (2).

the defendant to establish the defence of fair comment, and the jury are the judges of its sufficiency. In the case of public men who take part in public affairs, the comments are apparently, although not always or necessarily, restricted to their public actions and conduct, which, being matters of public interest, are, for that reason, proper subjects of fair criticism. But the criminal law, any more than the civil law, does not protect the imputation of wicked or corrupt motives; this, said Parke, B., is unquestionably libellous. (8)

Sydney Post Publishing Co. v. Kendall (1910).—The latest Canadian decision on this point is by the Supreme Court of Canada on an appeal from the Supreme Court of Nova Scotia. K. was a member of the House of Commons prior to the Dominion general elections in 1908, and, in August of that year, a letter was published in the *Sydney Post* containing the following references to him:—"The Doctor had a great deal to say of the elections in 1904. Well, I have some recollections of that contest myself, and I ask the Doctor: Why did you at that time withdraw your name from the Liberal convention? The majority of the delegates came there determined to see you nominated. Why did you not accede to their request? Doctor Kendall, what was your price? Did you get it? Take the good Liberals of this county into your confidence, and tell them what happened in those two awful hours in a certain room in the Sydney Hotel that day? . . . The proceedings of the convention were held up for no reason that the delegates saw, but for reasons which are well known to you and three or four others whom I might mention. One speaker after another killed time at the Alexandria Hall while you were in dread conflict with the machine. Finally the *consideration* was fixed, and you took off your coat and shouted for Johnston. What was that *consideration?*"

On the trial of an action by K. against the proprietors of the *Post*, the jury gave a verdict for the defendants which the Supreme Court of Nova Scotia set aside, directing a new trial. Upon appeal by the defendants to the Supreme Court of Canada it was held (Davies and Duff, JJ., *diss.*), that the publication could only be construed as charging K. with having withdrawn his name from the convention for personal profit, and was libellous; and, therefore, the verdict was properly set aside by the court below and a new trial ordered. (9).

(8) *Parmiter* v. *Coupland et al.* (1840), 6 M. & W. 108. See, on the same point, *Campbell* v. *Spottiswoode, infra; R.* v. *Sullivan* (1868), 11 Cox C. C. 44; *Thomas* v. *Bradbury, Agnew & Co., infra; Boal* v. *Scottish Catholic Printing Co.* (1901), Sc. Ct. of Sess. Cas. 1120.

(9) *Sydney Post Publishing Co.* v. *Kendall* (1910), 43 S. C. R. 461.

Opinions of the Court.—Girouard, J., thought the article was libellous on its face (p. 462). "The word 'price,'" said Idington, J., "is an ugly one, and it seems on reflection hard to give another meaning to it than respondent claims. And it is by no means clearly intended in this production to have been synonymous with the word 'consideration,' which is used later and clearly might be ambiguous if it stood alone" (p. 469).

"Counsel for the appellants," said Anglin, J., "pressed upon us as reasonably possible one or two constructions of the letter published by the appellants, such as that it might be taken to mean that the plaintiff had withdrawn his candidature on a previous occasion in order to prevent the disastrous consequences of a split in his own political party, upon some sort of understanding, more or less definite, that his doing so would be to his own political advantage in the future—which would rather redound to the credit of the plaintiff than prove injurious to him. But, having regard to the manifest purpose of the letter before us to injure and discredit the plaintiff, then a prospective parliamentary candidate, apparent to everybody who read it, I have no doubt that the words complained of are not susceptible of any construction which is not defamatory. To charge that a political candidate, in such circumstances, withdrew his candidature for a consideration or a price (the interrogative form in which it is couched does not render the charge less plain or pointed) is to impute to him, if not the making of a corrupt and criminal bargain, at least that he was a party to a discreditable transaction. The question is not what the readers of the letter would believe of the plaintiff, but what they would understand the writer to charge. That, I think, admits of no doubt. Publication having been conclusively proven, in the absence of any defence whatever the verdict for the defendants was, in my opinion, clearly perverse and so unreasonable as to lead to the conclusion that the jury have not honestly taken the facts into their consideration" (*O'Brien* v. *Marquis of Salisbury*, 6 T. L. R. 133, at page 137); "was such as no jury could have found as reasonable men" (*Australian Newspaper Co.* v. *Bennett* (1894), A. C. 284, at page 287). (pp. 474-5).

"It is necessary," said Davies, J. (*diss.*), "to look at the article as a whole, at its subject matter, and at the relative positions in which the parties stood towards each other." Having explained these, he said: "They (the jury) must clearly, as shewn by their verdict, have concluded that, under all the circumstances, the people who read the article would discount its violence and extravagance, and would not understand it as conveying the grave imputation which its reading in the serene atmosphere of the courts, and apart from the local facts and circumstances, might justify. I cannot

believe this court, in a libel action, is justified in setting aside such a finding of a jury, and is compelled to accept as the only possible meaning of the words complained of that which may be said to be their natural and ordinary meaning when used under ordinary circumstances, and with reference to the every day matters of life. . . Applying to the case before us the law as I understand to be laid down alike by the House of Lords as by the Judicial Committee of the Privy Council,(10) I am of the opinion that the jury having, under all the circumstances of this case, found a verdict for the defendants, it would be exceeding the legitimate function of this court if such verdict was set aside and a new trial ordered. The court would then in reality be taking upon itself the function which the law has committed to the jury, of looking at the alleged libellous matter as a whole, and determining whether, under all the facts and circumstances, as proved before them, it is defamatory of the plaintiff."(pp. 464, 466, 468).

"Does this." [statement complained of], said Duff, J. (*diss.*), "necessarily involve a disgraceful imputation? I do not think anybody would suggest that, were it not for the use of the words 'price' and 'consideration.' It is said that these words imply that the arrangement included a provison for bestowing upon Mr. Kendall personally some profit or material benefit in return for the withdrawal of his name or his support of Mr. Johnston. I do not think that is necessarily so. In the language of political controversy the words 'price' and 'consideration' are constantly used, with perhaps some rhetorical exaggeration, to characterize concessions of a purely political nature involved in political arrangements, without any idea of conveying and without conveying any imputation damaging to personal character. Illustrations of this would immediately occur to any intelligent person." He thought the jury were not bound to hold, from the language in question, that plaintiff "was necessarily playing a dishonourable part." (pp. 473-4). (1)

Comments, however, on the private character and conduct of men in public positions, or who aspire or are called to such positions, are not wholly forbidden, and, if made, are not necessarily libellous and unprotected. There are certain qualities of private character, mental and moral, which cannot be ignored in estimating fitness or qualification for public office, and these may sometimes be proper subjects for even severe criticism. The thing commented upon

(10) Referring to Lord Penzance in *Capital & Counties Bank* v. *Henty*, 7 A. C. 741, at p. 762, and Lord Blackburn, at p. 775: and *Australian Newspaper Co.* v. *Bennett*, *supra*, at p. 287.

(1) *Sydney Post Publishing Co.* v. *Kendall* (1910), 43 S. C. R. 461.

may have become public property, or it may, as in *Seymour* v. *Butterworth*, (2) where the private character of the plaintiff formed a subject of public comment, have been made such by the complainant himself. The private character of an individual which has thus of necessity, or by his own act, become part of a subject of public interest, may, under such circumstances, be commented upon, in fact may be open to public animadversion, as, *e.g.*, where the merits and propriety of an appointment to public office is under discussion, or where the complainant himself, by his public speeches and writings, has, so to speak, "offered up his private life for public dissection." (3) The question then is, is it, or has it in any way become, a subject of public interest? If so, it is open to comment and criticism, and to this extent the article in the Code must be qualified. (4)

Public men and private individuals.—In *Parmiter* v. *Coupland* (*supra*), Alderson, B., distinguishes between criticism of public persons and private individuals, and says 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." This would depend, we should say, on the particular thing criticized; if it were a subject of public interest, it would be difficult to make a distinction. On this point it has been said that "at one time the distinction drawn was between *public* men and *private* men. This is clearly wrong; the law knows no such distinction. At a later period a distinction was made between the public acts of public men or of public servants on the one hand, and the private life of private men on the other. This is still an incomplete statement of the law, for it is now well established that the public act or work of the most retiring hermit, if for that purpose he chooses to emerge from his seclusion, is amenable to public censure, and that the private life, character, or conduct, or the privately-circulated work, of the most notorious politician, or the most widely-known author, is not. . . . If it is objected that public scandals can be denounced without defaming individuals, the answer is, that such censure wholly fails of its object. To one who counsels this milder course, in a dialogue in Pope's Satires, "Spare, then, the person, and expose the vice," the

(2) (1862), 3 F. & F. 372.

(3) See the observations to this effect of Cockburn, C.J., in *Seymour* v. *Butterworth*, *supra*; in *Hunter* v. *Sharpe* (1866), 4 F. & F. 983, at p. 990, and in *R.* v. *Tanfield* (1878), 42 J. P. 423, at p. 424.

(4) See *Pankhurst* v. *Hamilton* (1887), 3 T. L. R. 500.

pertinent reply is, "How so? Not damn the sharper, but the dice?" (5)

The conditions of fair comment.—Comments are fair (*a*) when they are honest, *i.e.*, when they are a genuine expression of opinion by the accused. (6) (*b*) When they are based on facts, which, if not admitted, must be alleged and proved by the accused to be true. (7) (*c*) When they arise out of or are relevant to such facts, and do not contain or introduce any new or independent defamatory matter. (8) (*d*) When they do not impute disgraceful motives to the complainant, or contain defamatory matter reflecting upon him otherwise than as the person responsible for, or connected with, the particular thing commented upon. (9)

Discussion of Matters of Public Interest.

No one commits an offence by publishing any defamatory matter which he, on reasonable grounds, believes to be true, and

(5) Bower's Actionable Defamation, pp. 112, 382. That the "private life," etc., of the politician, or the "privately-circulated work," is not "amenable to public censure," is no doubt the rule, but, as already stated, the rule is not invariable.

(6) *Campbell* v. *Spottiswoode* (1863), 3 B. & S. 769, *per* Blackburn, J., at p. 781; *Merivale* v. *Carson* (1887), 20 Q. B. D. 275, *per* Lord Esher, M. R., at p. 281; *Plymouth, etc. Society* v. *Trades Publishing Association* (1906), 1 K. B. 403, *per* Vaughan Williams, L.J., at p. 413, and *per* Moulton, L.J., at p. 418, and adopted by Collins, M.R., in *Thomas* v. *Bradbury, Agnew & Co.* (1906), 2 K. B. 627; *Morrison* v. *Belcher* (1863), 3 F. & F. 614, *per* Cockburn, C.J., at pp. 619, 620; *Hedley* v. *Barlow* (1865), 4 F. & F. 224, *per* Cockburn, C.J., at p. 230; *Risk Allah Bey* v. *Whitehurst* (1868), 18 L. T. 615, *per* Cockburn, C.J.

(7) *R.* v. *White* (1808), 1 Camp. 359; 10 R. R. 705, *note; Tabart* v. *Tipper* (1808), 1 Camp. 350; 10 R. R. 698; *Gathercole* v. *Miall* (1846), 15 M. & W. 319; *Popham* v. *Pickburn* (1862), 7 H. & N. 891; *Campbell* v. *Spottiswoode, Morrison* v. *Belcher, Risk Allah Bey* v. *Whitehurst, supra; Harle* v. *Catherall* (1866), 14 L. T. 801; *R.* v. *Carden* (1879), 5 Q. B. D. 1; *R.* v. *Flowers* (1880), 44 J. P. 377; *Davis* v. *Shepstone* (1886), 11 A. C. 187; *Merivale* v. *Carson*, and *Thomas* v. *Bradbury, Agnew & Co., supra; S. Hetton Coal Co.* v. *N. E. News Association* (1894), 1 Q. B. 133; *Joynt* v. *Cycle Trade, etc. Co.* (1904), 2 K. B. 292; *Digby* v. *Financial News, Ltd.* (1906), 1 K. B. 502, at p. 507, *per* Collins, M. R.; *Hunt* v. *Star Newspaper Co., Ltd.* (1908), 2 K. B. (C.A.) 309; *Dakhyl* v. *Labouchere* (1907), 2 K. B. 325, *per* Lord Atkinson, at p. 329. The plea of fair comment is only referable to a case where the facts taken as the basis of the comments are either admitted by all the parties, or are proven to be true. (*Patterson* v. *Plaindealer Co.* (1909), 2 Alberta R., 29). While a newspaper may publish a report of the proceedings of a public body, and comment upon facts and statements there made that may be defamatory to individuals, it is not fair comment, as against any such individuals, to republish, after a considerable interval of time, such statements as facts or as alleged facts—a statement of the law in which *Hibbins* v. *Lee* (1865), 4 F. & F. 243; 11 L. T. 541; and *Helsham* v. *Blackwood* (1851), 11 C. B. 111; 20 L. J. C. P. 187; 15 Jur. 861, were approved and followed. Fair comment must never consist of the assertion of fact; it consists of opinions and inferences from facts assumed or proven to be true. (*Patterson* v. *Edmonton Bulletin Co.* (1908), 1 Alberta R., 477.)

(8) See cases in previous foot note.

(9) See cases cited in foot notes to s. 325 (1), (2), *supra*, and *Permiter* v. *Coupland et al.*, and the other cases, in the same foot note, as to imputation of motives.

which is relevant to any subject of public interest, the public discussion of which is for the public benefit. (10)

This article is a copy of section 226 of the English Draft Code of 1880. In the original bill of 1878, which was drawn by Sir James Stephen, this section appears as follows: "No one commits an indictable offence by the publication of defamatory matter which he honestly and on reasonable grounds believes to be true, if the publication thereof is reasonably necessary to the discussion of a subject of public interest, and if such publication is made in good faith in the course and for the purpose of such discussion. Whether any particular subject is of public interest, and whether the publication of any matter is reasonably necessary for the discussion of it, shall be questions of fact." In their report, dated 12th June, 1878, the commissioners say (at p. 9), that all the provisions relating to libel are so drawn that wide latitude would be left to the jury in determining whether a given publication is or is not libellous; and (at p. 25), that the sections in the bill of 1878 re-enact in substance what they believe to be the existing law. No reason is given for the amendments of the original section by the bill of 1880, and we are, therefore, left in doubt whether the article in the Code, which is taken as already stated from the bill of 1880, is to have the same meaning in its abbreviated form as the original section. Assuming, however, that the meanings are identical, the defendant, in any case to which this section of the Code is applicable, must establish: (*a*) that he honestly believed the defamatory matter to be true; (*b*) that he had reasonable grounds for such belief; (*c*) that the publication of the defamatory matter was relevant, *i.e.*, reasonably necessary, to the discussion of a subject of public interest; (*d*) that the publication was made in good faith, *i.e.*, with honesty of purpose; (*e*) that it was made in the course and for the purposes of such discussion; and (*f*) that the public discussion of the subject in question was for the public benefit. Where the general advantage to the community of having the public discussion of the subject in question more than counterbalances the injury or inconvenience to the person defamed, the discussion would appear to be for the public benefit. There is no reported decision in Canada, so far as the writer is aware, on the section as it stands, but the enactment is apparently supported by some of the English decisions.

Meaning of the statutory rule.—The section is fairly open to the interpretation that no offence is committed, even if the defama-

(10) S. 324.

tory matter be false, so long as the defendant can shew reasonable grounds for believing it to be true, and satisfies in other respects the statutory conditions as to the relevancy of the subject discussed, and that its public discussion is for the public benefit. If so it is at variance with *Campbell* v. *Spottiswoode*, (1) where it was held, that the *bonâ fide* belief of the writer in the truth of the imputations is no defence to a civil action; but it agrees with the ruling of Erle, C.J., in *Turnbull* v. *Bird*, (2) (which is disapproved of in the former case) and with other decisions, (3) which held that defamatory comments on an individual in a matter of public interest are justified, provided the defendant honestly believes that they are fair and just. But it is no defence to shew that the defendant did not intend to defame the plaintiff, if reasonable people would think the language to be defamatory. The defendants, owners and publishers of a newspaper, published defamatory statements of a named person believed by the author of the article and the editor of the paper to be a fictitious personage with an unusual name. The name was that of the plaintiff, who was unknown to the author and the editor. In an action for libel it was admitted, that neither the writer nor the editor nor the defendants intended to defame the plaintiff, but evidence was given by his friends that they thought the article referred to him. It was held that the plaintiff was entitled to maintain the action, (4) and this decision was affirmed on appeal by the House of Lords. "A man in good faith," said Lord Loreburn, L.C., "may publish a libel believing it to be true, and it may be found by the jury that he acted in good faith believing it to be true, and reasonably believing it to be true, but that in fact the statement was false. Under those circumstances he has no defence to the action, however excellent his intention." (5)

Where, however, an allegation is made against a person in a privileged document, as, for instance, in a parliamentary paper, a comment upon that allegation, by a person who is not the person making the allegation, may be fair comment, even though the allegation be untrue. (6) And a communication by a public servant of a matter within his own province, concerning the conduct of a person who is for the time taking a public part, the matter being one of public interest as to which the public are

(1) (1863), 3 B. & S. 769; 32 L. J. Q. B. 185.
(2) (1861), 2 F. & F. 524.
(3) *Henwood* v. *Harrison* (1872), L. R. 7 C. P. 606; 41 L. J. C. P. 206; *Hunter* v. *Sharpe* (1866), 4 F. & F. 893, *per* Cockburn, L. C. J.; *Harle* v. *Catherall* (1866), 14 L. T. (N.S.) 801, *per* Martin, B.
(4) *Jones* v. *E. Hulton & Co.* (1909), 2 K. B. (C.A.) 444.
(5) *E. Hulton & Co.* v. *Jones* (1910), A. C. 20, at p. 24.
(6) *Mangena* v. *Wright* (1909), 2 K. B. 958.

entitled to information, may be a privileged communication on the part of that public servant, and, if sent by him to a newspaper and published therein, it may also be the subject of privilege in the proprietor of the newspaper, as that is the ordinary channel by means of which the communication can be made public. (7)

Law of the Code applicable in civil actions.—In an action for libel by a solicitor and county crown attorney against a newspaper publisher, in which the principal defences were justification and fair comment, the charge of the trial judge (Armour, C.J.), on the law of fair discussion and fair comment, in a matter of public interest, was based on the law as laid down in the Code, (8) it having been assumed, as the fact is, that the law of fair comment is the same in both civil and criminal matters. The direction to the jury was held to be erroneous by the Divisional Court, (9) whose judgment was affirmed by the Ontario Court of Appeal, (10) without, however, discussing the law of fair comment, and only to the extent of deciding not to interfere with the discretion of the Divisional Court in granting a new trial. MacMahon, J., who upheld the verdict for the defendant, and dissented from the judgments of Meredith, C.J., and Rose, J., in the court below, setting aside the verdict on the ground of misdirection, remarks in his judgment, that since the Criminal Code came into force, the courts might properly hold that the rule of law in civil cases for libel should conform to that laid down by the Code in criminal cases for libel. For, as pointed out by Lord Blackburn in *Capital and Counties Bank* v. *Henty,* (1) in England, "the law in civil actions for libel was the same as it had been expressly enacted it was to be in criminal proceedings for libel." (2)

Subjects of public interest.—A subject of public interest is stated, in a recent elaborate work, (3) to mean and include the following:—Any deliberative, legislative, or executive, proceeding of Parliament, the State, or the Government, or of any department thereof; (4) any proceeding of any public or local authority; any

(7) *Mangena* v. *Wright* (1909), 2 K. B. 598.
(8) SS. 324, 325 (1).
(9) *Douglas* v. *Stephenson* (1898), 29 O. R. 616.
(10) *Douglas* v. *Stephenson* (1899), 26 O. A. R. 26.
(1) (1882), 7 App. Cas. 741, at p. 775.
(2) *Douglas* v. *Stephenson* (1898), 29 O. R. 616, at p. 640.
(3) Bower's Law of Actionable Defamation, pp. 107 *et seq.*, where cases *infra* are cited.
(4) *R.* v. *Sullivan* (1868), 11 Cox C. C. 44; *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.

political proceeding or question; (5) the administration of justice, either generally, or in relation to a particular judicial proceeding, unless such proceeding is pending; (6) the administration of naval, military, ecclesiastical, or other public or local affairs; (7) any election or appointment to or candidature for any public or local office or position; (8) any institution, establishment, organization, scheme, project, undertaking, business, mercantile or professional custom, practice, system, or course of dealing of a public nature, or which concerns the public welfare; any meeting or assembly which the public is invited or entitled to attend; (9) any speech, writing, opinion, advice, principle, practice, or act of any person in the establishment, advocacy, conduct, or administration of any of the foregoing, or otherwise in relation thereto; (10) any literary, (1)

(5) *Bond* v. *Douglas* (1836), 7 C. & P. 626; *Parmiter* v. *Coupland* (1840), 6 M. & W. 105; *Purcell* v. *Sowler* (1877), 2 C. P. D. 215; *Spearing* v. *Wandsworth Borough News Co.* (1906), *Times*, 3 July; *O'Brien* v. *Salisbury* (1890), 54 J. P. 215.

(6) *R.* v. *Sullivan*, *supra*; *Stiles* v. *Nokes* (1806), 7 East, 493; *R.* v. *White* (1808), 1 Camp. 359; 10 R. R. 705, *note*; *Cooper* v. *Lawson* (1838), 8 A. & E. 746; *Hibbins* v. *Lee* (1864), 4 F. & F. 243; *Hedley* v. *Barlow* (1865), 4 F. & F. 224, *per* Cockburn, C.J., at p. 229; *Woodgate* v. *Ridout* (1865), 4 F. & F. 202; *Kane* v. *Mulvany* (1866), Ir. R. 2 C. L. 402; *Strauss* v. *Francis* (No. 2) (1866), 4 F. & F. 1107; *Risk Allah Bey* v. *Whitehurst* (1868), 18 L. T. 615; *R.* v. *Tanfield* (1878), 42 J. P. 423; *McLeod* v. *St. Aubyn* (1899), A. C. 549, at p. 561.

(7) *Ecclesiastical affairs: Gathercole* v. *Miall* (1846), 15 M. & W. 319; *Kelly* v. *Sherlock* (1866), L. R. 1 Q. B. 686; *Kelly* v. *Tinling* (1866), L. R. 1 Q. B. 699.

Other public or local affairs: Harle v. *Catherall* (1866), 14 L. T. 801, *per* Martin, B.; *Hunt* v. *Star Newspaper Co.* (1908), 2 K. B. 309.

(8) *Harwood* v. *Astley* (1804), 1 Bos. & P. (N.S.) 47, at pp. 53, 54; *Wilson* v. *Reid* (1860), 2 F. & F. 149; *Turnbull* v. *Bird* (1861), 2 F. & F. 508; *Seymour* v. *Butterworth* (1862), 3 F. & F. 372; *Davis* v. *Duncan* (1874), L. R. 9 C. P. 396.

(9) *Institutions, establishments and organizations: Cox* v. *Fenney* (1863), 4 F. & F. 13, at p. 20; *Lefroy* v. *Burnside* (No. 2) (1879), 4 L. R. (Ir.) 556; *Davis* v. *Shepstone* (1886), 11 A. C. 187; *Boal* v. *Scottish Catholic Printing Co.* (1907), Sc. Ct. of Sess. Cas. 1120.

Schemes or projects: Campbell v. *Spottiswoode* (1863), 3 B. & S. 769; *Henwood* v. *Harrison* (1872), L. R. 9 C. P. 396.

Businesses or undertakings: Stuart v. *Lovell* (1817), 2 Stark. 93; 19 R. R. 688; *Macleod* v. *Wakeley* (1828), 3 C. & P. 311; *South Hetton Coal Co.* v. *N. E. News Association* (1894), 1 Q. B. 133.

Mercantile or professional customs, systems, practices, etc.: Dunne v. *Anderson* (1825), 3 Bing. 88; *Eastwood* v. *Holmes* (1858), 1 F. & F. 347; *Paris* v. *Levy* (1860), 9 C. B. (N. S.) 342; *Morrison* v. *Belcher* (1863), 3 F. & F. 614; *Hunter* v. *Sharpe* (1866), 4 F. & F. 893; *Blair & Girling* v. *Cox* (1892), 37 Sol. J. 130; *Dakhyl* v. *Labouchere* (1908), 2 K. B. 325, *note*.

Meetings, etc.: Davis v. *Duncan*, *Purcell* v. *Sowler*, and *Spearing* v. *Wandsworth Borough News Co.*, *supra*; *Ponsford* v. *Financial Times* (1900), 16 T. L. R. 248; *Joynt* v. *Cycle Trade Publishing Co.* (1904), 2 K. B. 292.

(10) See, generally, cases cited *supra*, but particularly *Dakhyl* v. *Labouchere*.

(1) *Dibdin* v. *Swan* (1793), 1 Esp. 28; 5 R. R. 717; *Tabart* v. *Tipper* (1808), 1 Camp. 350; 10 R. R. 698; *Carr* v. *Hood* (1808), 1 Camp. 355; 10 R. R. 701, *note*; *Stuart* v. *Lovell* (1817), and *Macleod* v. *Wakeley* (1828), *supra*; *Fraser* v. *Berkeley* (1836), 7 C. & P. 621; *Strauss* v. *Francis* (No. 1 and No. 2) (1866), 4 F. & F. 939 and 1107; *Devereux* v. *Clarke* (1891), 2 Q. B. 582; *McGuire* v. *Western Morning News* (1903), 2 K. B. 100; *Thomas* v. *Bradbury, Agnew & Co.* (1906), 2 K. B. 627.

dramatic, (2) artistic, (3) scientific, (4) or other work, performance, entertainment, invention, or discovery, which is publicly sold, distributed, circulated, produced, advertised, exhibited, (5) or in any manner whatsoever, and whether orally or in writing, (6) communicated to the public; any other act or expression of the human will or intellect which is done publicly, or made public, or submitted to public judgment or opinion, or given to the public, or which, in the circumstances of the particular case, may be held to be a subject of legitimate interest or concern to the public. Provided that, for this purpose, a subject which immediately or locally or directly affects a particular class or section only of the community is nevertheless deemed a subject of public interest, if in any ultimate or indirect manner it concerns the welfare of the entire public. (7)

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 comments upon the manner in which the duties are performed. (8) So, also, is the investigation of charges against the chief of police of a municipality, by a committee of the municipal council; and therefore a correct report of the evidence given at the investigation will be privileged. (9) On the same principle, where the complainant, in a prosecution for defamatory libel, has himself called public attention to the subject matter of the alleged libel, by obtaining the publication of newspaper articles commending his conduct therein, he thereby invites criticism thereof, and he cannot object that the answer to his own articles is not a publication in the public interest. (10)

See 140

(2) *McQuire* v. *Western Morning News, supra; Clifford* v. *Brandon* (1810), 2 Camp. 358, at p. 369; *Gregory* v. *Brunswick* (No. 2) (1844), 6 M. & G. 953, at pp. 956, 959.

(3) *Soane* v. *Knight* (1827), 1 M. & M. 74; 31 R. R. 714; *Thompson* v. *Shackell* (1828), 1 M. & M. 187; 31 R. R. 714; *Whistler* v. *Ruskin, Times*, 27 & 28 Nov., 1878; *Belt* v. *Lawes* (No. 2). *Times* for July, August, November and December, 1882.

(4) *Hunter* v. *Sharpe* (1866), 4 F. & F. 983; *Henwood* v. *Harrison* (1872), L. R. 7 C. P. 606; *Dakhyl* v. *Labouchere* (1908), 2 K. B. 325, *note*.

(5) *Green* v. *Chapman* (1837), 4 Bing. N. C. 92; *Gregory* v. *Brunswick* (No. 1 (1843), 6 M. & G. 205, at pp. 219, 220; *Jenner* v. *A'Beckett* (1871), L. R. 7 Q. B. 11; *R.* v. *Flowers* (1880), 44 J. P. 377.

(6) *Gathercole* v. *Miall* (1846), 15 M. & W. 319, Pollock, C.B., at p. 333, Alderson, B., at pp. 338, 339, and Rolfe, B., at p. 342. Compare *Kelly* v. *Sherlock* (1866), L. R. 1 Q. B. 686.

(7) This was decided in *Purcell* v. *Sowler* (1877), 2 C. P. D. 215, (with respect to the administration of the poor law locally) by the English Court of Appeal, to this extent reversing the Common Pleas Division.

(8) *Douglas* v. *Stephenson* (1898), 29 O. R. 616.

(9) *Per* Stuart, J., in *Patterson* v. *Edmonton Bulletin Co., Ltd.* (1908), 1 Alberta R., at p. 483.

(10) *R.* v. *Brazeau* (1899), 3 C. C. C. 89. See fuller note of this case in chapter on "Plea of Justification."

Subjects not of public interest.—The following do not concern the general welfare, and have been held not to be subjects of public interest, viz., the relations between landlord and tenant, (1) unless they are of a quasi-public character, as in *South Hetton Coal Co.'s Case* (*supra*), the conduct of a trustee of a private corporation, as such trustee, (2) the administration of a purely private charity, (3) the private actions and conduct of persons taking part in public affairs, except in so far as it affects their public relations, (4) the private character of a journalist, (5) or of an author, (6) and the mere circulation and position of a newspaper. (7)

(1) *Hogan* v. *Sutton* (1867), 16 W. R. 127.
(2) *Wilson* v. *Fitch*, 41 California, 363.
(3) *Gathercole* v. *Miall* (1846), 15 M. & W. 319; *Booth* v. *Briscoe* (1877), 2 Q. B. D. 496.
(4) *Pankhurst* v. *Hamilton* (1887), 3 T. L. R. 500.
(5) *Russell et al.* v. *Webster* (1874), 23 W. R. 59; *Heriat* v. *Stuart* (1796), 1 Esp. 437; *Stuart* v. *Lovell* (1817), 2 Stark. 93; *Strauss* v. *Francis*, *supra*.
(6) *Carr* v. *Hood* (1808), 1 Camp. 355; 10 R. R. 701.
(7) *Latimer* v. *Western Morning News* (1871), 25 L. T. 44.

CHAPTER XIX.

The Sale of Libellous Matter.

Sale of a newspaper containing a libel, when criminal.—The criminal responsibility attaching to the sale of libellous matter is set forth in two sections of the Code, 329 and 330, which, in effect, comprise the whole current literature of the day. The first of these (S. 329) relates exclusively to newspapers, and defines the responsibility of newspaper proprietors, which is discussed in Chapter VIII. Sub-section 3 of that section, which is to be read in connection with the rest of the section, declares that 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. (1)

Proof of knowledge, actual or imputed, of the libel charged.—The meaning of the expression "newspaper" has been already noticed (page 84, *ante*). One of two things is essential under the enactment, in a prosecution for the sale of a newspaper containing a libel, namely, (*a*) actual knowledge that the copy of the paper sold contained the alleged libel; or (*b*) constructive or imputed knowledge of the libel derived from the fact that libellous matter was habitually published in such newspaper. In either case, the indictment must allege the *scienter* on the part of the defendant, and the Crown must prove it. And, for the purpose of proof, all facts from which knowledge might reasonably be presumed, though previous, subsequent, or extrinsic to the sale, would be admissible. Actual knowledge might not be easy of proof, but it might, in some cases, according to the circumstances, be inferred from the fact that the defendant had reasonable means of knowledge, *e.g.*, from his having in his possession, or from his reading, the number or part of the paper containing the defamatory matter, or from his being a regular vendor of, or subscriber to, the paper. Knowledge might also be imputed where, for any reason, it was defendant's duty to know, or it might be supported by the notoriety of the subject matter of the alleged libel either in the defendant's business or calling, or in the neighbourhood or community in which he lived. The admissions of the accused, if material, would of course be cogent evidence against him.

(1) S. 329 (3).

Imputed knowledge.—Where the defendant was aware that the newspaper was in the habit of publishing defamatory matter, he would have something like constructive notice of the libel complained of in the number or part of the paper which he sold; he would, at all events, be considered as having been put on his guard as to sales generally. Constructive or imputed notice has been defined as a presumption of knowledge which will not be allowed to be rebutted; and arises in certain cases where a party has had the means of knowledge and might have obtained it, but for his own gross negligence or wilful abstention. In such cases, whatever is sufficient to put a person of ordinary prudence on inquiry, is constructive notice of all to which that inquiry would lead. (2) Where, therefore, the party charged with selling a newspaper containing a libel knew beforehand that the paper was a common vehicle of slander, or was otherwise aware of its libellous character and reputation, he would appear to be fixed with constructive notice of the particular libel alleged in the indictment. And proof of the fact, on the part of the Crown, and of the sale of a copy of the paper containing the libel, would be sufficient to establish a *prima facie* case against the accused, sufficient, if unanswered, to warrant his conviction. At any rate, as against a plea by the accused, under this section of the Code, that the publication of the libel was made without his knowledge, the Crown may prove the publication of previous libels of the same kind by the same publisher, in order to fix upon the accused responsibility, in the terms of the section, for his persistency in continuing such publications in the conduct of the newspaper. (3) But a sale of a copy of the paper in ignorance of the libel contained in it, or of the evil name or reputation of the paper, would constitute no offence. (4) The onus, however, of proving ignorance would be on the accused, who could testify on his own behalf. (5) In a civil action for damages, on the other hand, the proprietor of a newspaper could offer no such excuse; he would be liable no matter how ignorant he might have been of the libellous publication complained of.

The case of a news-vendor.—There would not be the same liability, however, in the case of a news-vendor. Where a news-

(2) See Brett's Cases in Equity, *sub tit.* Notice.

(3) *Per* Lemieux, J., in *Rex* v. *Molleur* (1905), 14 Q. O. R. (K.B.), 556.

(4) *R.* v. *Nutt* (1729), 1 Barnard, 306; *Chubb* v. *Flannigan* (1834), 6 C. & P. 431; *Day* v. *Bream* (1837), 2 M. & Rob. 54; *Emmens* v. *Pottle* (1885), 16 Q. B. D. 354; *McLeod* v. *St. Aubyn* (1899), A. C. 549; *Mallon* v. *Smith & Sons* (1893), 9 T. L. R. 621; *Martin* v. *British Museum Trustees* (1894), 10 T. L. R. 338; *Vizetelly* v. *Mudie's Select Library* (1900), 2 Q. B. 170.

(5) R. S. C. 1906, c. 145, s. 4.

vendor, in the ordinary course of his business, sold copies of a newspaper containing a libel, and the jury found that he did so without knowing and without negligence in not knowing, that it contained such, and that the newspaper was not of such a character as to be likely to contain libellous matter, it was held, that the news-vendor was not liable to an action for publication of the libel. (6) These decisions are in accordance with section 329 (3) (*supra*), and are authority for saying that, so far as the sale of a newspaper by a news-vendor is concerned, the law is the same in both civil and criminal cases.

The sale of a book, etc., containing a libel, when criminal.—The other section of the Code dealing with the sale of defamatory matter covers every species of literature except a newspaper as defined by the statute. 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. (7)

Sale by a 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. (8)

The onus probandi.—What has been said as to the knowledge of the defendant, with respect to defamatory matter in a newspaper sold by him, applies equally, under section 330 (1), to his sale of such matter in a book, etc. But the clause, it will be observed, is silent as to the defendant's knowledge of the evil reputation of the book, magazine, etc. The fact of a sale must be proved in every case in order to establish his criminality; and in his defence he may show his want of knowledge of the defamatory matter contained in the book, magazine, etc. The whole clause is a declaration of the law prior to the statute. The mere delivery of a libel to a third person, said Wood, B., (9) by one conscious

(6) *Emmens* v. *Pottle* (1885), 16 Q. B. D. (C.A.), 354; 55 L. J. Q. B. 5; *Mellon* v. *Smith & Sons* (1893), 9 T. L. R. 621.
(7) S. 330 (1).
(8) S. 330 (2).
(9) In *Maloney* v. *Bartley* (1812), 3 Camp. 213.

of its contents, amounts to a publication, and is an indictable offence, a ruling more favourable to the defendant because of his knowledge of the fact, than that which held that the bare delivery of a sealed letter was *prima facie* evidence of a knowledge of its contents, of which in fact he might be utterly ignorant. (10) The defendant, however, is permitted to prove that he delivered the libel in ignorance of its true character, *e.g.*, where he delivered a sealed letter, (1) or a package containing libellous posters, (2) or a pamphlet, (3) or where he was unable to read. (4) So, also, even if he had read and published, by delivery or otherwise, what on its face was innocent, but was in reality, from extrinsic facts and circumstances unknown to him, defamatory, he would not be criminally liable. The same rule as to criminal though not as to civil liability, would seem to apply to a publication by inadvertence or mistake, (5) unless in the case of civil liability, the defendant could show, not merely the fact of the mistake, but that it was excusable or involuntary. (6)

Criminal responsibility arising out of agency.—The second sub-section of the above section (330) defines the law as to criminal responsibility arising out of agency in the cases mentioned. The general rule is, that no person is answerable criminally for the acts of his servants or agents, whether he be the prosecutor or the accused, unless he be shown to have had a criminal purpose. (7) The act of the servant or agent may be given in evidence as proof that it was done; for a fact must be established by the same evidence, whether it be followed by a criminal or civil consequence; but it is a totally different question, in the consideration of criminal as distinguished from civil justice, how the principal may be affected by the fact when so established. For though the wrongful or fraudulent act of the agent may involve his principal civilly, (8) it cannot convict him of a crime, unless further proof be given that the principal has directed, or at least assented to, such act.

(10) *R.* v. *Girdwood* (1776), 1 Leach, 142; 2 East P. C. 1120, 1125.
(1) *Per* Lord Kenyon, C.J., in *R.* v. *Topham* (1791), 4 T. R. 129; 2 R. R. 343.
(2) *Day* v. *Bream* (1837), 2 Moo. & Rob. 55.
(3) *Martin* v. *British Museum Trustees* (1894), 10 T. L. R. 338.
(4) *Per* Lord Kenyon, C.J., in *Rex* v. *Holt* (1793), 5 T. R. 44. See, also, *Emmens* v. *Pottle*, *supra*.
(5) *R.* v. *Paine* (1695), 5 Mod. 163; Carthew, 405; *Mayne* v. *Fletcher* (1829), 4 M. & Ry. 311, *note*. See, also, *per* Lord Kenyon in *R.* v. *Topham*, *supra*, and in *R.* v. *Abingdon* (1794), 1 Esp. 228; and Abbott, C. J., in *R.* v. *Harvey* (1823), 2 B. & C. 257.
(6) *Fox* v. *Brodrick* (1864), 14 Ir. C. L. R. 453; *Tompson* v. *Dashwood* (1883), 11 Q. B. D. 43; *Pullman* v. *Hill & Co.* (1891), 1 Q. B. 524, at p. 527, *per* Esher, M. R.; *Shepheard* v. *Whitaker* (1875), L. R. 10 C. P. 502.
(7) *Per* Lord Wensleydale in *Cooper* v. *Slade* (1857), 6 H. L. C. 746, 793, 794.
(8) See Tay. on Ev., 10th ed., p. 638, and cases there cited.

(9) We have seen how this general rule is open to an apparent exception in the case of the proprietor of a newspaper who is presumed to be criminally responsible for defamatory matter inserted and published therein. (10) and also how his responsibility is limited, (1) and the proof which is necessary to establish his criminal liability. (2) So where a libel was sold in a book-seller's shop by his servant in the ordinary course of his employment, this was evidence of a guilty publication by the master; though, in general, an authority to commit a breach of the law is not to be presumed. The exception was founded upon public policy, lest irresponsible persons should be put forward, and the principal and real offender should escape. (3) But, under the statute prior to the Code, such evidence was not conclusive against the master, who might still prove, under the plea of not guilty, that the publication was in fact made "without his authority, consent or knowledge," and that it "did not arise from want of due care or caution on his part." (4)

Former onus shifted under the Code.—Under the above clause in the Code, (5) however, the former onus of proof in such a case is shifted, and the employer is now not criminally responsible for the sale by his servant of a libel contained in any book, etc., unless it be proved by the Crown that the employer authorized the sale, knowing that the book, etc., contained the libel, or, in the case of any part of a periodical, that defamatory matter was habitually contained in such periodical. See remarks (*supra*) as to knowledge actual and imputed.

(9) *Ld. Melville's Case* (1806), 29 How. St. Tr. 707, 764; the *Queen's Case* (1820), 2 B. & B. 306, 307.
(10) S. 329 (1). See remarks in *Rex* v. *Gutch* (1829), 1 Moo. & Mal. 433, 437, by Lord Tenterden, who considered this case as falling strictly within the principle of the rule.
(1) S. 329 (2).
(2) *Ibid.* (2).
(3) *Per* Lord Tenderden in *Rex* v. *Gutch*, *supra*.
(4) See the original Act, 37 Vict., c. 38, s. 10 (D.), subsequently embodied in C. S. C. 1886, c. 163, s. 5.
(5) S. 330 (2).

PART II.

JURISDICTION OF THE CRIMINAL COURTS, PLEADINGS AND PROCEDURE.

CHAPTER XX.

JURISDICTION OF THE CRIMINAL COURTS.

Provisions of B. N. A. Act, 1867, affecting jurisdiction, judicial appointments, etc.—The jurisdiction, pleadings and procedure of the courts in all the provinces, in both civil and criminal matters, are primarily determined by the federal character of the Canadian constitution. Under the British North America Act, 1867, (1) the exclusive legislative authority of the Parliament of Canada extends to the criminal law, except the constitution of the courts of criminal jurisdiction, but including the procedure in criminal matters; (2) while the legislature of each province may exclusively make laws in relation to property and civil rights in the province, and in relation to the administration of justice in the province, including the constitution, maintenance and organization of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts. (3) The Constitutional Act, which contains these enactments, empowers the Governor-General to appoint the judges of the Superior, District and County Courts of each province, except those of the Probate Courts of Nova Scotia and New Brunswick. (4) It also declares and provides that, until the laws respecting property and civil rights in Ontario, Nova Scotia and New Brunswick, and court procedure in those provinces, are made uniform (which has not yet been done), the judges of the provincial courts shall be selected from the respective provincial bars; (4*a*) that the judges of the Quebec courts shall be chosen from the Quebec bar; (5) that the Superior Court judges shall hold office during good behaviour, and be removable by the Governor-General on an address from both Houses of Parliament; (6) and that the Dominion Parliament shall fix the salaries

(1) 30-31 Vict., c. 3 (Imp.).
(2) S. 91 (27).
(3) S. 92, (13), (14).
(4) S. 96.
(4a) S. 97.
(5) S. 98.
(6) S. 99.

and allowances of the judges of all courts, except those of the Probate Courts of Nova Scotia and New Brunswick and those of the Admiralty Courts where they are paid by salary.(7) A general court of appeal, having appellate jurisdiction from all the provinces and known as the Supreme Court of Canada, was created by the Dominion Parliament, in 1878, under section 101 of the Constitutional Act, which also gives power to establish any additional courts in Canada.

Jurisdiction of the criminal courts generally.—The jurisdiction of the criminal courts is defined and regulated by a number of provisions contained in the Code. Every superior court of criminal jurisdiction, and every judge of such court sitting as a court for the trial of criminal causes, and every court of oyer and terminer and general gaol delivery has power to try any indictable offence. (8) The expression "superior court of criminal jurisdiction" means and includes the following courts: (i) In the province of Ontario, the High Court of Justice for Ontario. This court was originally composed of three divisions to which a fourth division, known as the Exchequer Division, was afterwards added by the Ontario Act, 3 Edw. VII., c. 8; (ii) in the province of Quebec, the Court of King's Bench; (iii) in the provinces of Nova Scotia, New Brunswick, British Columbia and Prince Edward Island, the Supreme Court for each of the said provinces respectively; (iv) in the province of Manitoba, the Court of Appeal or the Court of King's Bench (Crown side); (v) in the provinces of Saskatchewan and Alberta, the Supreme Court of the North-West Territories, until the same is abolished, and thereafter such Court as is by the legislatures of said provinces respectively substituted therefor; (vi) in the Yukon Territory, the Territorial Court. (9)

By an Act respecting the establishment of a Supreme Court in and for the province of Saskatchewan, (10) passed by the legislature of Saskatchewan, and cited as "The Judicature Act," the Supreme Court of the North-West Territories was abolished, and there was thereby constituted and established, in and for the province of Saskatchewan, a Superior Court of Record of original and appellate jurisdiction, as well in civil as in criminal cases, called "The Supreme Court of Saskatchewan," and constituting, under such name, one Supreme Court of judicature for the province.

(7) S. 100.
(8) S. 580.
(9) S. 2 (35).
(10) 7 Edw. VII. c. 8, statutes of 1907.

By a similar Act passed by the legislature of Alberta, (1) there was established and constituted, in and for that province, a Superior Court of civil and criminal jurisdiction known as "The Supreme Court of Alberta," and styled "The Supreme Court." This court superseded, and, for all purposes affecting or extending to the province, abolished the Supreme Court of the North-West Territories.

Jurisdiction of provincial courts.—Unless otherwise specially provided, every court of criminal jurisdiction in any province is competent to try a[illegible]ne or offence within the jurisdiction of such court to try, w[illegible]r committed within the province, if the accused is found or apprehended, or is in custody, within the jurisdiction of such court, or if he has been committed for trial to such court, or ordered to be tried before such court, or before any other court the jurisdiction of which has, by lawful authority, been transferred to such first mentioned court under any Act for the time being in force. (2)

This enactment, which was amended in the general revision of 1906, relates quite as much to the question of venue as to that of jurisdiction. What it means is what was meant by the corresponding section in the English Draft Code of 1879, namely, that all provincial courts, otherwise competent to try an offence, shall be competent to try it irrespective of the place where it was committed within the province, the place of trial being determined by the convenience of the court, the witnesses, and the person accused, the county where the offence was committed being, as a general rule, the most convenient place for the pnrpose. (3)

Reasons for the provisions in section 577.—As originally enacted, section 577 (*supra*), which was then section 640, provided that every court of criminal jurisdiction in Canada is competent to try all offences wherever committed, etc. A literal interpretation of the section in that form would have had the effect of giving to our courts an extra-territorial jurisdiction *ultra vires* of the Dominion Legislature. The Canadian courts are not competent to try "all offences wherever committed," and the legislature did not assume to give them any such jurisdiction. It could not, for example, have intended to legislate as to offences committed abroad by a foreigner, as the enactment taken literally might imply. The expression simply meant all offences committed wherever the criminal law of Canada extended. The present section 577 is more

(1) An Act respecting the Supreme Court, 7 Edw. VII., c. 3, statutes of 1907, and cited as "The Supreme Court Act."
(2) S. 577.
(3) 1 Steph. Hist. C. L., ed. 1883, 278.

happily worded, and accords with the decision of the Judicial Committee, that the legislative powers of a colonial legislature are confined to its own territory, and that it cannot legislate as to offences committed beyond the limits of the colony. (4) And although at one time it was thought that our legislature had exceeded its jurisdiction in this respect as to the enactments against bigamy, in sections 307 and 308 of the Criminal Code, (5) the law on that point has been virtually settled by the opinion of the Supreme Court of Canada in the special case in which it was held (Strong, C.J., *diss.*), that those sections are *intra vires* of the Parliament of Canada. (6).

A provincial legislature has no jurisdiction to confer upon a single judge, concurrently or otherwise, the power to determine matters arising under the Criminal Code as to which the full court was formerly the proper forum. (7)

In what courts libel triable.—The superior courts in the different provinces are the only courts which have power to try the offence of libel, blasphemous libel excepted. This latter offence may also be tried by the General or Quarter Sessions of the Peace, (8) and by the County Court Judge's Criminal Court, which has jurisdiction, with the consent of the accused, to try any offence triable at the Sessions. (9) The Courts of Appeal in the different provinces, (10) and the Supreme Court of Canada, under certain conditions, (1) have also the same jurisdiction with respect to libel as they have with respect to other indictable offences. Appeals to the Privy Council in criminal cases are abolished. (2)

Proviso as to newspaper libel.—The original section 640 of the Code contained a proviso in the words of section 888, which enacts that nothing in this Act authorizes any court in one province of Canada to try any person for any offence committed entirely in another province: Provided that every proprietor, publisher, editor, or other person charged with the publication in a newspaper of any defamatory libel, shall be dealt with, indicted, tried and punished,

(4) *McLeod* v. *The Attorney-General N. S. Wales*. 17 Cox C. C. 341; (1891), A. C. 455.
(5) *R.* v. *Brierly* (1894), 14 O. R. 525; *R.* v. *Plowman* (1894), 25 O. R. 656.
(6) *In re Criminal Code*, 1892, Sections 275-276 (1897), 27 S. C. R. 461.
(7) *R.* v. *Beale* (1896), 1 C. C. C. 235; 11 M. L. R. 448, following *In re Bouchur* (1879), 4 O. A. R. 191, and *Reg.* v. *McAuley* (1887), 14 O. R. 643.
(8) S. 583.
(9) S. 825.
(10) S. 1013, *et seq.*
(1) SS. 1013 (3), 1024.
(2) S. 1025.

in the province in which he resides, or in which such newspaper is printed. (3) This is the section which governs the place of trial of newspaper libel as a crime.

Effect of sections 577 and 888.—The effect of section 577 (*supra*) is to abolish local venue in criminal prosecutions in a province, and to enable the offence to be tried anywhere within the province irrespective of the place in the province where it was committed. The effect of section 888 (*supra*) is to preserve local venue in prosecutions for newspaper libel under the conditions stated in the section.

Section 888 as a whole has been said to be confusing; and one eminent commentator (4) has expressed the opinion that the proviso, which is made an exception to the previous part of the section, "is clearly not an exception." The enactment as it stands, however, is capable of an intelligible explanation. The provision originated in two criminal prosecutions for libel in the province of Quebec, of defendants who resided and published newspapers in the province of Ontario. In *Reg.* v. *Sheppard*, the defendant, the publisher of the Toronto *News*, was prosecuted in Montreal, at the instance of a French volunteer officer, for an alleged libel in the defendant's journal upon the regiment when it was passing through Toronto on its return from the Canadian Northwest. The libel was general in its statements, but was charged as including the French officer individually. The defendant was convicted. In *Reg.* v. *Creighton*, the defendant, the manager of the *Empire* newspaper of Toronto, was prosecuted in the city of Quebec at the instance of Hon. M. Mercier, the then Premier of the province, for an alleged libel upon that gentleman. Some questions of law were raised by demurrer to the indictment, and the prosecution was dropped. Both defendants were arrested in the city of Toronto, and compelled to defend themselves in the province of Quebec against alleged offences committed, it was generally believed, in their own province. This was a revelation in our criminal procedure, and led to an amendment (5) of section 140 of the former procedure Act, (6) by adding libel to the list of offences that were protected against vexatious indictment.

The object of section 888.—The two prosecutions above referred to, which are unreported in the regular reports, serve to explain the enactment in question. The offences charged against both defend-

(3) S. 888.
(4) Sir E. T[illegible]eau, C.J., in his comments on s. 640 (now s. 888) of the Criminal [illegible], 3rd ed., p. 728.
(5) 51 Vict., c. 44, s. 3 (D.)
(6) R. S. C. 1886, c. 174.

ants were supposed to have been committed wholly in Ontario, because the publications complained of were originally made in that province; and both defendants resided there. If either defendant had resided in Quebec, the prosecution, had the law been the same as it is now, could have taken place either in Quebec or Ontario. If any prosecution for libel were to arise now against a publisher residing in a certain province, whose paper is printed in a certain other province, the proceedings could be carried on in either province. The offence may be prosecuted in another and different province from that in which the alleged libel was printed, if the publisher resides in that other province.

Changes effected by sections 577 and 888.—Sections 577 and 888 contain a material alteration of the old law. The common law rule was, that every crime must be tried in the county or territorial jurisdiction where it was committed. (6*a*). Our former procedure Act made a number of exceptions to the common law rule. The Code sweeps away the rule altogether, so far as crimes committed in each province are concerned. But a party can be tried for an offence only in the same province where it was committed, if it was wholly committed within such province, except in the case of newspaper libel. In the case of newspaper libel the defendant, who is chargeable with the publication, can be tried either in the province in which the newspaper containing the defamatory matter is printed, or in the province in which he resides. If he resides in the province in which the newspaper is printed, he must be prosecuted in that province. If he resides in some other province than that in which the newspaper is printed, he may be prosecuted in either province. This appears to be the exception intended by the statute.

Libels not triable at the Sessions, blasphemous libels excepted.—No court of General or Quarter Sessions of the Peace has power to try seditious libels, libels on foreign sovereigns, spreading false news, or defamatory libels. (7) All of these offences are within the exclusive jurisdiction of the superior courts of criminal jurisdiction, but blasphemous libels, which one would expect to find in the same category and triable only by the superior courts. are not excluded by section 583 from the jurisdiction of the Sessions, and are, therefore, triable by these courts and by the County Court Judge's Criminal Court *infra*, which has equal jurisdiction with the Sessions. This would seem to be an oversight in the revision of the enactment.

(6*a*) The general rule is, that offences should be tried at the place where they are alleged to have been committed. (*Per* Cross, J., in *The King* v. *Roy* (1909), 14 C. C. C. 368).

(7) S. 583.

County Judge's Criminal Court.—The jurisdiction possessed by the Sessions as to blasphemous libels, and the absence of it in the cases of the other libels mentioned, also applies to the County Court Judges' Criminal Court (not so called, however, in the province of Quebec) (8) for the speedy trials of indictable offences, in all the provinces, except the Northwest Territories and the Yukon Territory.(9) Under the provisions in the statute with respect to this court, (10) the judge sitting on any criminal trial is constituted a court of record. (1) He may be, (i) in the province of Ontario, any judge of a county or district court, junior judge or deputy judge authorized to act as chairman of the General Sessions of the Peace; (ii) in the province of Quebec, in any district wherein there is a judge of the Sessions, such judge of Sessions, and in any district wherein there is no judge of Sessions, but wherein there is a district magistrate, such district magistrate or any Judge of Sessions of the peace, and in any district wherein there is neither a judge of Sessions nor a district magistrate, any judge of the Sessions of the peace or the sheriff of such district; (iii) in each of the provinces of Nova Scotia, New Brunswick and Prince Edward Island, any judge of a county court; (iv) in the province of Manitoba, the Chief Justice, or a puisne judge, of the Court of King's Bench, or any judge of a county court; (v) in the province of British Columbia, the Chief Justice, or a puisne judge, of the Supreme Court, or any judge of a county court; (vi) in the provinces of Saskatchewan and Alberta, a judge of the Supreme Court of the province, or of any district court. (2) Under section 825 every person committed to gaol for trial on a charge of any of the offences referred to in section 582, as being within the jurisdiction of the General or Quarter Sessions of the Peace, may, with his own consent, and subject to the provisions in Part 18, regulating this court and its procedure, be tried in any province of Canada, out of sessions, and out of the regular term or sittings of the court, whether the court before which, but for such consent, he would be triable, or the grand jury thereof, is or is not then in session, and, upon conviction, may be sentenced by the judge. (3)

(8) S. 824.

(9) S. 822. In the provinces of Saskatchewan and Alberta, and in the provisional judicial districts of the province of Ontario, such courts shall be called the District Court Judge's Criminal Court of the district in which the same is held. (S. 824 (*a*) as amended by 8-9 Edw. VII. c. 9, s. 2.)

(10) SS. 822-842.

(1) S. 824 (1).

(2) S. 823, as amended by 6-7 Edw. VII. c. 8, s. 2, and 6-7 Edw. VII. c. 45, s. 6.

(3) S. 825.

The effect of this and other provisions of Part 18 of the Code is to require the accused person to elect whether he will be tried before the judge alone without a jury, or take his trial before a judge and jury at the next court of competent jurisdiction. The consent of the accused, however, does not necessarily confer jurisdiction, and he may, upon an appeal by way of case reserved, object to the jurisdiction of the tribunal which he has himself selected, if the case does not properly come within the provisions of this Part. (4)

Criminal Courts of Appeal.—For the provisions in the Code as to the jurisdiction and powers of the Courts of Appeal in criminal matters in the different provinces, and of the Supreme Court of Canada, and also as to the special powers conferred on the Minister of Justice of Canada to direct a new trial in certain cases, (5) the reader is referred to the chapter on "Proceedings after Verdict."

(4) *R.* v. *Smith* (1898), 3 C. C. C. 467; 31 N. S. R. (R. & G.) 411.
(5) SS. 1012-1025.

NOTE.

Application of Code to provinces and territories.—The Criminal Code applies to the provinces of Saskatchewan and Alberta and the Northwest Territories, when not inconsistent with the Northwest Territories Act as it existed before September 1st, 1905; and to the Yukon Territory, when not inconsistent with the Yukon Act. (S. 9.)

Application of criminal law of England.—The criminal law of England, as it existed on September 17th, 1792, and as unrepealed, altered, varied, modified, or affected, by any Act, Imperial or Canadian, including the Code, and any other Act of the Parliament of Canada, shall be the criminal law of the province of Ontario. (S. 10.)

The criminal law of England, as it existed on November 19th, 1858, and as unrepealed, altered, varied, modified, or affected, by any Ordinance or Act (still having the force of law) of British Columbia or Vancouver Island, passed before the union of those two colonies, or of British Columbia, passed since such union, or by the Code or any other Act of the Parliament of Canada, shall be the criminal law of the province of British Columbia. (S. 11.)

The criminal law of England, as it existed on July 15th, 1870, so far as applicable to Manitoba, and as unrepealed, altered, varied, modified, or affected, as to that province, by any Act of the Parliament of the United Kingdom, or by the Code or any other Act of the Parliament of Canada, shall be the criminal law of the said province. (S. 12.)

CHAPTER XXI.

Criminal Informations.

Information defined.—Besides the ordinary remedies for libel of a civil action or an indictment, which are the means of redress usually resorted to, there is the extraordinary remedy of a criminal information. This mode of prosecution is as ancient as the common law itself. (1) Speaking generally, an information is a suggestion upon record by which, in certain cases, the matter of a suit is allowed to be brought before the High Court of Justice, and is so called from the words by which it gives the court to understand and "be informed of" the facts alleged in it. (2) The Crown was bound to prosecute, or at least lend the sanction of its name to a prosecutor, whenever a grand jury informed it, upon their oaths, that there was a sufficient ground for instituting a criminal suit. So when its immediate officers were otherwise sufficiently assured that a man had committed a gross misdemeanour, either personally against the Sovereign or government, or against the public peace and good order, they were at liberty, without waiting for any further intelligence, to convey that information to the court (held in theory *coram rege*) by a suggestion on record, and to carry on the prosecution in the Sovereign's name. (3)

Different kinds of informations. — There are informations which are partly at the suit of the Sovereign and partly at that of a subject, being in the nature of *qui tam* actions which are carried on by a criminal instead of a civil process; but we are only concerned here with informations which are filed and exhibited in the name of the Sovereign alone. Of these there are two classes, namely, (*a*) those which are truly and properly the Sovereign's own suits, and are filed *ex officio* by his own immediate officer, the Attorney-General, or, in the vacancy of that office, by the Solicitor-General; (4) and (*b*) those in which, though the Sovereign is the nominal prosecutor, yet it is at the relation of some public or private person, or common informer, called "the relator." (5) The objects of the King's own informations, filed *ex-officio*, are properly such enormous misdemeanours as peculiarly tend to disturb or endanger his government, or to molest or affront him in

(1) 1 Show. Rep. 106; Bl. Com. 305; Holt L. L., 2nd ed., 251
(2) Shortt on Informations, 1.
(3) 4 B. & H. Comm. 396.
(4) *R.* v. *Wilkes* (1770), 4 Burr. 2553; Br. P. C. 360.
(5) B. & H. Comm. 394.

the regular discharge of his royal functions. . . . The objects of the species of informations filed by the Master of the Crown Office, upon the complaint or relation of a private subject, are any gross and notorious misdemeanours, riots, batteries, libels, and other irregularities of an atrocious kind, not peculiarly tending to disturb the government, but which deserve the most public animadversion. (6)

Information at instance of relator.—In England the information last mentioned is filed by the King's Coroner and Attorney, usually called the Master of the Crown Office, which is a branch of the King's Bench Division of the High Court of Justice, wherein are settled preliminary and collateral matters of business which cannot be conveniently arranged in open court. It is filed in the Master's office by the leave or direction of the High Court, or of the King's Bench Division thereof, on an order absolute, after no sufficient cause shewn on argument of the rule *nisi*. (7) In Canada such an information would be filed by the Clerk of the Crown in the different provinces, the province of Quebec included, (8) on an order of a superior court of criminal jurisdiction, granted in a similar way. (9) The duties and power of the Clerk of the Crown in such cases are analogous to those of the Master of the Crown Office in England. (10) Courts of Assize and Nisi Prius, and Courts of Oyer and Terminer, cannot grant leave to file criminal informations. (10*a*) In England both classes of informations are confined by the constitutional law to misdemeanours only; for, wherever any felony is charged, the law requires that the accusation be warranted by the oath of twelve men before the party can be put to answer it. (1) In Canada the arbitrary and anomalous distinction between felony and misdemeanour has been abolished by the Code, which divides all criminal offences into (*a*) "indictable offences," for which the offenders may be prosecuted by indictment (howsoever such offences may be therein described or referred to), and (*b*) "offences," which are those punishable on summary conviction. The proceedings in respect of all indictable offences, except in so far as they are varied by the Code, are to be conducted in the same manner. (2)

(6) *Reg.* v. *Labouchere* (1884), 12 Q. B. D. 320; 53 L. J. Q. B. 362; 50 L. T. 177; 32 W. R. 861; 15 Cox C. C. 415; 48 J. P. 165.
(7) Rules S. C., 1883, Ord. 59, r. 1; and Crown Office Rules, 1886, r. 48.
(8) See *Ex parte Guay*, *infra*.
(9) As to what is meant by "Superior Court of Criminal Jurisdiction," see chapter on "Jurisdiction of the Criminal Courts."
(10) *Ex parte Guay* (1858), 8 L. C. R. 353; 9 L. C. R. 51, Q. B. See 4-5 Vict., c. 24, 12 Vict., c. 37, and Judicature Act, 1855, c. 92.
(10*a*) Vin. Ab. "Information," 414; Jones, 193.
(1) 4 B. & H. 396; 2 Hale, 151; 2 Hawk, c. 26, s. 3.
(2) S. 14.

Information and indictment distinguished.—The main difference between a criminal information and an indictment is, that the former, whether of the *ex officio* class or at the relation of an individual, is preferred without the intervention of a grand jury, while the latter is preferred upon the finding of a grand jury. An information is, *ipso facto*, a presentment to the court that the defendant should be put upon his trial for the offence therein alleged against him. (3) An old distinction between an indictment and an information that the latter, unlike the former, might be altered in substance and amended at any time before trial, is of comparatively minor importance under the large powers of amendment conferred by the Code. An information always could be amended as of course at any time, even after demurrer or plea, because technically the allegations are those of the officer who files it; (4) but not so an indictment. The Code, however, permits amendments of the indictment so as to make it conformable with the proof whenever the court is of opinion that the accused has not been misled or prejudiced in his defence. (5) Another difference between the remedies by information and indictment is, that in the former case the applicant waives his right to an indictment and a civil action, (6) puts himself, as it is said, entirely in the hands of the court, while in the case of an indictment he may still bring his action for damages. As a rule, however, the court will give leave to sue for damages if a rule *nisi* for an information be refused; and, if the rule be discharged after cause shown, an action may be brought without such leave. (7) An acquittal of the defendant, upon his trial on an indictment, does not deprive him of an action for malicious prosecution, but no such action will lie on his acquittal on a criminal information, because, as to the first class of cases (*supra*), proceedings are taken only for manifest violations of the law, and the Attorney-General has the right, *ex-officio*, to proceed in any case which he deems fitting, (8) and, as to the second class of cases, because the leave of the court in which the information is filed must be obtained. Wherever a

(3) The terms "indictment" and "count," respectively, in the Code, include information and presentment as well as indictment, and also any plea, replication or other pleading, and any record. (C. C., s. 2 (16)). In *R.* v. *Slater* (1881), 8 Q. B. D. 267, it was held, that "indictment" in a statute will not include "information." This is no doubt the rule; but the interpretation clause of the Code provides as above stated, s. 2 (16).

(4) *Attorney-General* v. *Ray* (1843), 11 M. & W. 464; *R.* v. *Holland* (1791), 4 T. R. 457; *R.* v. *Wilkes* (1770), 4 Burr. 2528, 2532, 2566, 2568, 2573; 1 Str. 185; 2 Str. 871; 12 Mod. 229.

(5) SS. 889, 890.

(6) *Ex parte Gugy* (1858), 8 L. C. R. 353; 9 L. C. R. 51, Q. B.; *Reg.* v. *Sparrow* (1788), 2 T. R. 198; *Rex* v. *Fielding* (1758), 2 Kenyon, 386.

(7) *Wakley* v. *Cooke et al.* (1849), 4 Exch. 511; 16 M. & W. 822; 16 L. J. Ex. 225; *Ex parte Hoare* (1854), 23 L. T. J. 83.

(8) See 1 T. R. 535.

court of competent jurisdiction has once sanctioned a prosecution, this establishes that there was probable cause for instituting it, and no action lies, though the prosecution fail.

Ex officio informations, when filed.—Informations *ex officio* have been filed for libels of a seditious, blasphemous, or obscene character, of which instances are given in the chapters relating to these publications; for libels on persons exercising public functions, such as Ministers of the Crown and other high officers of State, judges, ambassadors, etc., in respect of their official conduct; (9) and for libels which tend to disturb or endanger the government of the Sovereign, or to affront him in the discharge of his royal functions. The law officers of the Crown have also used this power with respect to libels on the Houses of Parliament, when so requested by either House on an address to the Crown; (10) for libellous contempts of courts of justice; (1) and for libels on foreign rulers, (2) or their representatives at the Court of St. James. (3) But it has not been usual for the Attorney-General to interfere, in his official capacity, where the libel affects a private individual only. (4) In England informations filed *ex officio* are properly directed against offences less in degree than treason, felony or misprision of treason, which require immediate suppression, and with respect to which the law has given the Crown the power of taking immediate proceedings, without waiting for previous application to any other tribunal. In cases instituted by the Crown the court will not grant an information; (5) neither will it restrain either the Attorney-General from filing an information, (6) or proceedings for the same libel by both information at the instance of the Crown, and indictment at the instance of a private prosecutor. (7) Nor will the court quash an *ex officio* information, nor an information at the instance of the prosecutor,

(9) *R.* v. *Laurence* (1700), 12 Mod. 311; *R.* v. *Tutchin* (1704), 14 How. St. Tr. 1095; *R.* v. *Francklin* (1731), 17 How. St. Tr. 626; *R.* v. *Horne* (1777), 20 How. St. Tr. 657; 2 Camp. Rep. 672; *R.* v. *Cobbett* (1804), 29 How. St. Tr. 1; *R.* v. *Hunt* (1811), 31 How St. Tr. 408; *R.* v. *Burdett* (1820), 3 B. & A. 717; *R.* v. *The Morning Journal* (1830), 72 Annual Register, 4.

(10) *R.* v. *Reiner* (1733), 2 Barn. 293; *R.* v. *Owen* (1752), 18 How. St. Tr. 1203; *R.* v. *Stockdale* (1789), 22 How. St. Tr. 177; *R.* v. *Reeves* (1796), 26 How. St. Tr. 530.

(1) *R.* v. *Gordon* (1787), 22 How. St. Tr. 177; *R.* v. *Kent*, 4 Wentworth's Pleading, 414; 3 Chit. Cr. L. 878; *R.* v. *White* (1808), 1 Camp. N. P. 359.

(2) *R.* v. *Peltier* (1803), 28 How. St. Tr. 617; *R.* v. *Vint* (1799), 27 How. St. Tr. 627, 643; *R.* v. *Gordon*, *supra*, 175.

(3) *R.* v. *Gordon*, *supra*; *R.* v. *D'Eon* (1764), Folkard's S. & L., 7th ed., 440; *R.* v. *Bew*, 4 Wentworth's Pleading, 410; 2 Chit. Cr. L. 54.

(4) Folkard's S. & L., 7th ed., 445.

(5) *Rex* v. *Phillips* (1767), 4 Burr. 2089.

(6) *Rex* v. *Alexander* (1830), Folkard's S. & L. 7th ed., 445.

(7) *Rex* v. *Carlile* (1819), 3 B. & Ald. 167; 1 Chit. R. 451.

as he may enter a *nolle prosequi;* (8) but in an exceptional case the court will quash an information obtained at the instance of a private individual. (9) In *R.* v. *Gregory* (*supra*), the court refused upon motion to quash an information filed by the Attorney-General. The court also refused upon motion to quash an information which had been exhibited by rule of court, Eyre, J., observing that such informations are amendable. (10) And where a defendant had been convicted on several counts of an information for bribery, it was held that the Attorney-General might enter a *nolle prosequi* on one of them, after a rule *nisi* for a new trial. (1) A defendant who has been acquitted on an *ex officio* information is not entitled to costs under section 1045 of the Code; the section only applies to an information by a private prosecutor for the publication of a defamatory libel. The defendant neither receives nor pays costs on an *ex officio* information. (2)

Judicial opinions against granting leave to file criminal informations. Armour, J.—There is, so far as we can ascertain, no reported case in Canada of an *ex officio* information for libel. There are, however, a number of cases in which an information has been granted by order of the court at the instance of a private prosecutor. Before considering these, or the procedure affecting them, we may notice some expressions of judicial opinion as to the propriety of criminal informations for libel, having regard to the other remedies, civil and criminal, which are open to a complainant. In an Ontario case (3) in which that remedy was unsuccessfully invoked by the general manager of a railway company, Armour, J., said: "I agree in the result of the judgment of the Chief Justice, but I desire to guard against its being thereby assumed that I would ever concur in granting leave to file a criminal information. I think the practice of granting leave to file criminal informations in this country, having regard to the social conditions of its inhabitants and the liberties which they enjoy, is, to say the least of it, of very doubtful expediency, and should, in my opinion, be discontinued, and, if necessary, abolished by legislative enactment (4) The very rule adopted in England, that it

(8) *Rex* v. *Stratton* (1779), 1 Doug. 239; 1 Salk. 372; *R.* v. *Gregory* (1838), 8 A. & E. 907.

(9) See *R.* v. *Roper* (1737), 2 Str. 1072; *R.* v. *Williams* (1757), 1 Burr. 385.

(10) *R.* v. *Nixon* (1732), 1 Str. 185.

(1) *R.* v. *Leatham* (1861), 3 E. & E. 658; 30 L. J. Q. B. 205; 3 L. T. 504; 7 Jur. (N.S.) 674; 9 W. R. 33; 8 Cox C. C. 498.

(2) Hullock, 557.

(3) *Reg.* v. *Wilson* (1878), 43 U. C. Q. B. 583.

(4) The legislature of Prince Edward Island by the Slander and Libel Act, passed April 3rd, 1865, abolished the proceeding by criminal information for a libel on a private individual.

will only be granted to what I may call a 'superior person,' is the strongest reason, to my mind, why in this country it should never be granted at all. Whatever may be deemed desirable in England, I do not think it desirable that in this country there should exist a remedy for the superior person which is denied to the inferior."

Opinion of Cameron, J.—In the same case Cameron, J., said: "There is no real necessity, as far as I am aware, for any one seeking this remedy. Any person libelled has a right to lay an information before a magistrate charging any one who may have libelled him with the offence, and may then, by his oath, deny the truth of the slanderous charges or imputations. This, except where the libel is published during the sittings of the superior courts, would furnish a more speedy means to the person injured of vindicating himself than the remedy by criminal information under leave of the court, and in all probability he would be able to bring the offender to trial earlier, as the forms of procedure through this court are intricate and tedious. There is, therefore, no denial of justice in the denial of the application, . . . and had Mr. Broughton [the applicant] no other means of having the matter investigated, and the defendant punished, if guilty, the peculiar remedy he seeks would not be denied to him." (5)

Brougham, L.C., contra.—In England no similar opinions have been expressed, of late years at least. But, in 1834, Lord Chancellor Brougham expressed a different opinion. In his evidence given at that time before the select committee of the House of Lords, appointed to consider the law of defamation, he said: "The advantage of proceeding by criminal information is this: it erects the Court of King's Bench (and this was always Lord Erskine's opinion) into a court of honour, which may well administer the law of honour between party and party, with a due attention both to the wounded feelings of the individual and to the preservation of the peace. But it has this singular advantage besides, that it enables the party defamed, on his oath, to purge himself of the offence charged, and gives him an opportunity of defying his adversary to prove the truth of his accusation. . . . I am perfectly clear that the proceeding by criminal information is justly an object of great commendation on the part of all those who have seen its practical operation. It may be liable to some speculative objection, but in practice it affords a very substantial relief to a person who has been injured by a libel, of the falsehood of which he is conscious, and from which he instantly proceeds to

(5) See further remarks of Cameron, J., in same case, at p. 226, *post*.

purge himself upon oath, and to obtain the sanction of the court to his innocence by the granting of a rule."

In a subsequent report (in 1843) of the Lords committee, of which he was a member, Lord Brougham stated that subsequent reflection had tended to confirm the opinions which he had previously expressed, and that he considered the power of granting criminal informations for libels "one of the most important and valuable functions of the criminal jurisdiction of the Court of Queen's Bench."

Opinions of English Q. B. Division in Reg. v. Labouchere (1884).—This aspect of the question, and the principles which should guide courts in granting or refusing criminal informations, are fully discussed in the case of *Reg.* v. *Labouchere*, (6) in which leave to file a criminal information for libellous reflections on a deceased foreign nobleman was refused. The application was heard before five judges of the Queen's Bench Division (Lord Coleridge, C.J., Denman, Field, Hawkins and Matthew, JJ.); the judgment, which was unanimous except on a minor point, was delivered by Lord Coleridge. The information was refused, principally on the grounds that the applicant was neither resident nor sojourning in England, and that the libel was on a deceased person. The cases are reviewed, and Hawkins, J., is quoted as saying that "the court will not grant this extraordinary remedy, nor should a grand jury find an indictment, unless the offence be of such signal enormity that it may reasonably be construed to have a tendency to disturb the peace and harmony of the community. In such a case the public are justly placed in the character of an offended prosecutor to vindicate the common right of all, though violated only in the person of an individual; for the malicious publication of even truth itself cannot, in true policy, be suffered to interrupt the tranquillity of any well-ordered society." (7) Reference is also made to *Rex* v. *Topham*, (8) and to Lord Kenyon's judgment therein, and it is remarked that the court in that case appears to assent to the principle laid down by Hawkins, J., that private character is to be vindicated by private action, and that an indictment or information for libel is then only to be justified where there are some incidents in it which concern the public, such as an attempt to injure the government, or an intention or tendency to break the public peace. The learned Chief Justice states that he had been furnished with the reports of fifty

(6) (1884), 12 Q. B. D. 320; 53 L. J. 302.
(7) 1 Hawk. P. C. c. 28, s. 3. This opinion was expressed before truth could be pleaded as a defence.
(8) (1791), 4 T. R. 126; 2 R. R. 343.

cases of criminal information, running over the years from 1860 to 1880, inclusive, and, out of these, four only were cases of informations granted at the suits of persons who were not in some public office or position. And, during that time, there were repeated declarations by various members of the court, not indeed that as a matter of law the information would not be granted at the suit of private persons, but that the court would, as a general rule, leave private persons to their private remedies; and that the remedy by information was, as a general rule, reserved for cases of libel upon persons in an official or judicial position, and filling some office or post which make it for the public interest necessary that the extraordinary jurisdiction of the court should be exercised for the refutation of the libellous charges made. An unreported case in the time of Lord Campbell is referred to, in which the court refused Sir Charles Napier a criminal information for a libel imputing to him great misconduct in regard to his conquest of Scinde, on the ground, among others, that he had ceased to be commander-in-chief in India, and was at the time of his application to the court only a private person. The judgment also deals broadly with the objection that the social position of the applicant, however eminent, was not a ground for granting a criminal information where the libel affects his private character only, and does not reflect upon him in any public office. Lord Coleridge says: "I can find nowhere any trace of the doctrine that a peer, as such, is entitled to exceptional and most important privileges in the administration of the law. If a peer is libelled as a peer, for his conduct in Parliament, or as Lord Lieutenant (if he is one), or as magistrate, or as the holder of a public office, it would undoubtedly be almost of course (all other legal conditions being fulfilled) that the court would interfere in his behalf. But that a peer in private matters is entitled to any interference at the hands of this court—which the court would not exercise in favour of the humblest subject of the Queen—I respectfully but emphatically deny. I am not aware of any authority for such a proposition. *Reg.* v. *Gregory*, (9) where an information was granted against the publisher of *The Satirist* for a series of libels affecting the wife and children of the Marquis of Blandford, is certainly no such authority; and I decline to make one." The judgment concludes with an endorsement of the principle stated by Blackstone as follows: "The objects of the other species of informations filed by the Master of the Crown office upon the complaint or relation of a private subject, are any gross or notorious misdemeanours, riots, batteries, libels, and other immoralities of an atrocious kind, not

(9) (1838), 8 A. & E. 907.

particularly tending to disturb the government (for these are left to the care of the Attorney-General), but which, on account of their magnitude or pernicious example, deserve the most public animadversion." (10)

Opinion of Denman, J.—Denman, J., in the same case, while concurring in the judgment, said that he could not accept the passage from Blackstone as being quite an exhaustive description of the cases in which the court ought to interfere; for example, if a newspaper or an individual were to shew by repeated attacks, and by wide circulation of these attacks, upon a private individual, whether a British subject or a foreigner, whether resident in England or abroad, a persistent determination to persecute, he, as at present advised, should think it would be the duty, in many cases, of the court to protect the individual by granting a rule, and even, in case of further persistence, by making it absolute.

In his evidence before the Lords' committee, in 1834, Lord Brougham states that, in his time, criminal informations were granted by the Court of King's Bench regardless of the rank of individuals, and in almost any case in which the applicant was able to deny upon oath the truth of the published matter; and that, where the party proceeded by indictment instead of by information, it was assumed that he was unable to deny the truth of the matter published. Some of the English text writers state that the records of the Crown office, and the reported cases, shew numerous instances of the granting of criminal informations for libel on the application of persons not holding any public or official position. (1)

Limitations on granting information at instance of relator.—The courts appear to have confined this remedy, on the relation of a private individual, to cases in which some public mischief is apprehended by reason of the libel; or in which the libel is very gross, and has been made public by the defendant; or in which the alleged injury is impending or continuing; or where it appears that the writer or publisher of the libel was actuated by malicious motives towards the applicant; (2) or, as stated in *Reg.* v. *Labouchere* (*supra*), where the applicant holds some public office, and the libel affects him in such office. Some of the English judges have expressed the opinion that the object of the court in giving leave to file a criminal information is less for the purpose of vindicating character than of vindicating public justice; and that, if merely the former object appear to be the one in view, the court

(10) Bl. Com. bk. 4, c. 23, p. 309.
(1) See Folkard's L. & S., 7th ed., pp. 448-9 and *note* (*e*).
(2) *Ex parte Smith* (1869), Folkard's L. & S., 7th ed., p. 449.

should make the granting of the order conditional on counsel for the relator undertaking to prosecute the information with effect.(3)

Conditions precedent to granting an information. Opinion of Harrison, C.J.—In a leading Ontario case, (4) in which the relator, a member of the Senate of Canada and a bank president, moved for three criminal informations against a newspaper publisher, Harrison, C.J., discusses the general requirements of all such applications. One of the objections to the motion was, that the applicant did not come into court with "clean hands," and, therefore, ought not to be heard under any circumstances in support of the application. In dealing with this point the learned Chief Justice said: "The granting of a criminal information is discretionary with the court under all circumstances: *Anon.* Lofft, 323; *Rex* v. *Robinson* (1765), 1 W. Bl. 541. The application is not to be entertained on light or trivial grounds: *Rex* v. *Mead* (1840), 4 Jur. 1014. In dealing with such an application, the court has always exercised a considerable extent of discretion in seeing whether the rule should be granted, and whether the circumstances are such as to justify the court in granting the rule for a criminal information: *Per* Blackburn, J., in *Reg.* v. *Plimsoll, The Times,* 16th June, 1873. There are two things principally to be considered in dealing with such an application: 1. To see whether the person who applies to conduct the prosecution—the relator or the informer—has been himself free from blame, even though it would not justify the defendant in making the accusation; 2. To see whether the offence is of such magnitude that it would be proper for the court to interfere and grant the criminal information. Both of these things have to be considered, and the court would not make its process of any value unless they considered and exercised a good deal of discretion, not merely in saying whether there is legal evidence of the offence having been committed, but also exercising their discretion as men of the world, I may say, in judging whether there is reason for a criminal information or not: *Per* Blackburn, J., in *The Queen* v. *Plimsoll, The Times,* 16th June, 1873. (5) See, also, *per* Mr. Justice Quain, in the same case. When a party is assailed by a grave and serious libel, he may either bring an action, in which the defendant will be heard, or, if the charge is of such a character that he is not satisfied with proceedings of that kind, he may apply to the court and waive his right of action. But I think it is a safe rule, where he takes the latter course, to say that he must deal with

(3) See *In re Horsman: Reg.* v. *The Proprietor of the World* (1876), and *Ex parte Turquand* (1878), referred to in Folkard's L. & S., 6th ed., p. 771.
(4) *Reg.* v. *Wilkinson* (1876), 41 U. C. Q. B. 1.
(5) See, also, 12 C. L. J. (N.S.) 227.

perfect candour with reference to all the circumstances of the case; and he ought to make it appear not only that he is free from blame, but that his conduct is such that there is no colour for the imputations cast upon him: *Per* Archibald, J., in *Reg.* v. *Aunger* (1873), 28 L. T. (N. S.) 634; 12 Cox C. C. 407. In a matter like a criminal information, the object of which is to punish a man, the court will not grant the application unless the circumstances are such as to shew that the relator not only has the object in view of clearing his own character, but that he is also a proper person to be entrusted with it, and that the circumstances are such as to render the proceedings a public benefit: *Per* Blackburn, J." (6)

Principles which should guide the courts. Opinion of Hagarty, C.J.—In *Reg.* v. *Kelly, et al.*, (7) in which an application for an information was made against certain newspaper publishers, by a justice of the peace and reeve of a municipality, for the publication of articles in defendants' paper imputing misconduct to the relator in his office as a justice, Hagarty, C.J., said: "We have examined the authorities bearing on the principles which should guide the courts in granting or refusing rules for criminal informations, especially as laid down in the highly instructive judgments delivered in the cases of *Reg.* v. *Plimsoll* (1873), by Blackburn, Quain, and Archibald, JJ., copied in the *Canada Law Journal*, August, 1876, p. 227, from the *Times*, June 16th, 1873, also *Reg.* v. *Aunger* (1873), 28 L. T. (N. S.) 630, &c. As pointed out there, the court had to act in their discretion. Lord Blackburn, at p. 228, says: "We have no fixed rules to go by here, and we do not like it; but nevertheless in this case we are obliged to exercise our discretion, and to exercise it with considerable latitude, otherwise I think the system of having criminal informations would produce no good at all." Mr. Justice Quain, at p. 223, quotes a well known passage from Blackstone, from which these words are extracted: "The court always consider an application for a criminal information as a summary extraordinary remedy depending entirely on their discretion, and, therefore, not only must the evidence itself be of a serious nature, but the prosecutor must apply promptly, or must satisfactorily account for any apparent delay. He must also come into court with clean hands, and be free from blame with reference to the transaction complained of; he must prove his entire innocence of everything imputed to him, and must produce to the court such legal evidence of the offence having been com-

(6) *Reg.* v. *Wilkinson* (1876), *supra*, at pp. 29 *et seq.*
(7) (1877), 28 U. C. C. P. 35, at p. 38.

mitted by the defendant as would warrant a grand jury in finding a true bill against the defendants." (8)

Procedure for obtaining a criminal information.—The procedure for obtaining a criminal information for libel is by a motion for a rule *nisi* before the full court—in Ontario the Divisional Court—on affidavits by or on behalf of the complainant, who is called the relator. The motion is made *ex parte* by counsel, (9) and not by the applicant in person; (10) and no notice is necessary to the party against whom the application is to be made, except in the case of a justice of the peace who is charged with misconduct in his office. (1) In such a case the English practice has been to serve on the justice personally, or leave at his residence with some member of his household, six days before the motion is to be made, a notice of the motion and of the specific acts of misconduct charged; and the same practice has been followed in Nova Scotia. (2) If the applicant has been convicted by the justice of any offence, he should, in his affidavit, state his innocence of the charge, and should also allege his belief that the justice was influenced by corrupt motives.

The King v. Currie (1906).—In *The King* v. *Currie,* (3) a motion was made under the Crown Rules, before the Supreme Court of Nova Scotia, for leave to exhibit a criminal information against the defendant, a justice of the peace. The applicant in her affidavit stated, that she had been arrested on August 2nd, 1906, under a warrant based on an information laid on August 1st, 1906, before the defendant, by his sister-in-law, for the theft of her watch; that the preliminary examination, at which she gave evidence, was held on the day of arrest; that a bill had been afterwards ignored by the grand jury; that she was innocent of the offence; that she believed the defendant had been actuated in his judicial conduct by corrupt motives; and that he had been actively engaged for the last thirty-three years discharging magisterial functions. The defendant, in an affidavit filed, denied that he knew he was acting illegally at the instance of his sister-in-law, and stated that he would have given the applicant time to prepare her defence if she had asked for it,

(8) *Reg.* v. *Kelly et al.* (1877), 28 U. C. C. P. 35, at p. 38.
(9) *Rex* v. *Justices of Lancaster* (1819), 1 Chit. Rep. K. B. 602; *Rex* v. *Brice* (1824), 2 B. & Ald. 606; *Ex parte Pitt* (1833), 2 Dowl. P. C. 439; 39 R. R. 734; *Rex* v. *Eve* (1836), 1 N. & P. 229; 5 A. & E. 780; 2 H. & W. 450.
(10) *Ex parte Guay* (1858), 8 L. C. R. 353.
(1) *Bustard* v. *Schofield* (1835), 4 U. C. R. (O.S.) 11; *Reg.* v. *Huestis* (1853), N. S. R. (1 James), 101; *Rex* v. *Heming* (1833), 5 B. & Adol. 666; *Ex parte Fentiman* (1834), 2 A. & E. 127; 4 Nev. & M. 126.
(2) *Reg.* v. *Huestis, supra.*
(3) (1906), 11 C. C. C. 343.

and that he did not act from any corrupt motive. Counsel referred to the authorities *infra*. (4) The oral judgment of the court was delivered by Townshend, J., who said they were all of opinion that the application must be dismissed, because it had not been shewn that the magistrate had acted corruptly, although they thought it was very improper for him to have acted in the matter at all. He should have referred the prosecutrix to another magistrate.

Material on which granted.—In all cases of an application for a criminal information, the applicant should have affidavit evidence of the facts and circumstances of the case, (5) of the publication of the statements complained of, (6) of their application to himself, (7) of their libellous character, (8) and of his innocence of the charges made where a denial can be made conveniently. (9)

A criminal information will not be lightly granted; (10) and the affidavits in support of the rule must, therefore, furnish legal evidence; (1) must be explicit and clear; (2) must not be scandalous in their statements or imputations; (3) nor impertinent or unnecessarily prejudicial against the party complained against. (4) As a whole they must make such a case as would justify a grand jury in finding a true bill for an indictable offence for the same cause. (5) The affidavits should be properly intituled, otherwise, it has been said, they will not be receivable; (6) but the English and Canadian courts are not so technical as they once were on this point. In the absence of any rules on the subject, intituling the

(4) *R.* v. *Huestis* (1833), 1 James, N. S. R. 101; *Re Bustard & Schofield* (1835), 4 U. C. R. (O. S.), 11; *Ex parte Jones* (1888), 27 N. B. R. 552; *Ex parte Wallace* (1888), 27 N. B. R. 174; Paley, 8th ed., pp. 44 (26) 47; *R.* v. *Warwickshire* (1855), 3 W. R. 164; *R.* v. *Brooks* (1788), 2 T. R. 195; *R.* v. *Barker* (1800), 1 East, 186; *Foot* v. *Morgan* (1841), 1 Hill, N. Y., 654; *R.* v. *Cozens* (1780), 2 Doug. 426; *R.* v. *Young* (1758), 1 Burr. 556; *R.* v. *Borron* (1820), 3 B. & Ald. 432, 434; *R.* v. *Jackson* (1787), 1 T. R. 653; Shortt on Informations (Blk. Ed.), pp. 58, 59.

(5) *Prideaux* v. *Arthur* (1774), Lofft., 393.

(6) See chapter on "Publication" for mode of proof.

(7) *Rex* v. *Batchelor*, Fitz. 9, 57, pl. 7; Digest L. L. 97; Bac. Abr. tit. Libel, 493.

(8) *Rex* v. *Chappel* (1757), 1 Burr. 402.

(9) See, on this last point, *Rex* v. *Miles* (1779), 1 Doug., 284; *Reg.* v. *Wright* (1815), 2 Chit., R. 162; *Rex* v. *Hascell, et al.* (1780), 1 Doug. 387; *Rex* v. *Williams* (1822), 5 B. & Ald. 595; *Reg.* v. *Aunger* (1873), 28 L. T. (N.S.), 630; 12 Cox C. C. 407; *Duke of Athol's Case* (1790), 1 Doug. 390, *note*.

(10) *Reg.* v. *Mead* (1840), 4 Jur. 1014; *Ex parte Beauclerk* (1843), 7 Jur. 373; *Reg.* v. *Proprietors of Nottingham Journal* (1841), 9 Dowl. 1042.

(1) *Reg.* v. *Willett* (1795), 6 T. R. 294.

(2) *Rex* v. *Taylor* (1837), 1 Jur. 53.

(3) *Reg.* v. *Doherty* (1840-1), 1 Arn. & Hodg. 16.

(4) *Rex* v. *Burn* (1837), 7 A. & E. 190.

(5) *Rex* v. *Willett, supra*; *Ex parte Williams* (1841), 5 Jur. 1133; *Ex parte Guay* (1858), 8 L. C. R. 353.

(6) *Bustard* v. *Schofield* (1835), 4 U. C. R. (O.S.) 11; 6 T. R. 642, *note* (*a*).

affidavits in the court in which the motion is made would seem to be sufficient.

Promptitude required in application.—Applications to the court for criminal informations for libel must be made promptly, and where there has been unnecessary delay, or the delay is not satisfactorily accounted for, the court will either refuse the rule *nisi*, or discharge it on that ground when cause is shewn. The relator, a member of the Senate of Canada and a bank president, applied, in December, 1875, on the last day of Michaelmas term, for three criminal informations against a newspaper publisher for the publication of three alleged libels, on the 5th, 12th and 19th days of November, 1875, respectively. (7) The substance of the libels of 12th and 19th November first appeared in the defendant's newspaper of the 17th of September, 1875, and it was alleged by the defendant, in his affidavit filed on the motion to shew cause, that the newspaper was sent every week to the bank of which the applicant was president. The relator, however, did not appear to have been aware of it, or to have had any recollection of seeing the articles affecting him published prior to the 12th November. One of the objections to the granting of the information was, that the application was not made with the promptitude required by the practice of the court. It was held by the Ontario Court of Queen's Bench that the application was not too late; that the complainant must come to the court either during the term next after the cause of complaint arose, or so soon in the second term thereafter as to enable the defendant, unless by the accumulation of business in the court, to shew cause within that term; and this without reference to the fact whether the assizes intervened or not. Upon all the questions involved, the rule *nisi* was in part discharged with costs, and in part made absolute. (8)

Information refused for delay in moving.—In Trinity term, August, 1876, a rule *nisi* was obtained on behalf of one R. L., a justice of the peace for the district of A. and reeve of a municipality therein, calling upon the publishers of *The Northern Light* newspaper, to shew cause, on the first day of the following term, why an information should not be exhibited against them for certain scandalous libels published against him in their newspaper, on the 23rd

(7) See notes *post*, for fuller particulars of the libels complained of.

(8) *Reg.* v. *Wilkinson* (1876), 41 U. C. Q. B. 1. The following cases are reviewed in the judgment of Harrison, C.J.: *Rex* v. *Robinson* (1765), 1 W. Bl. 542; *Rex* v. *Smith* (1796), 7 T. R. 80; *Rex* v. *Marshall* (1811), 13 East, 322; *Rex* v. *Harries* (1811), 13 East, 270; *Rex* v. *Hartley et al.* (1823), 4 B. & Ad. 869, *note*; *Rex* v. *Jollie et al.* (1838), 4 B. & Ad. 867; *Reg.* v. *Saunders* (1847), 10 Q. B. 484; *Rex* v. *Bishop* (1822), 5 B. & Ald. 612; *Anon.* Lofft, 273; *Rex* v. *Murray* (1837), 1 Jur. 37; *Reg* v. *Harris* (1844), 8 Jur. 516; *Reg.* v. *Kelly et al.* (1877), 28 U. C. C. P. 35.

and 30th March and the 25th May, 1876, respectively. The first article complained of was headed "Strange Developments," and charged that the applicant had gone over the river to the United States where one B. was, and there bargained with the said B., against whom a summons was issued for selling liquor at Sault Ste. Marie to an Indian, for his return, settling the amount of the fine which would be imposed on him. The other two articles referred to this charge. The applicant's affidavit, sworn on the 18th of July, 1876, stated that he was the person named in those articles as R. L.; that the copies of the newspapers in which they were contained were published by the defendants, the publishers and proprietors of the said newspaper, under the name of Kelly, Turner & Company; and that the charges against the deponent of improper acts and conduct were false and malicious, and calculated to prejudice and injure him, and were published by the defendants with that intent. The affidavit distinctly denied the charge above mentioned, and stated that all that took place was a conversation on the Canadian side between the applicant and one Brown, represented as B.'s attorney, the substance of which is not material. The articles complained of were set out verbatim and marked as exhibits to the applicant's affidavit.

In shewing cause to the rule, affidavits were filed on behalf of the defendants which, it was admitted, had been in the hands of the applicant's solicitor for about six months previously. One of these affidavits reiterated the original charge, giving full particulars, and stated that the father of B., who was present at the alleged negotiations between the applicant and B., and could distinctly prove the charges, had died in the month of June previous to the application. The other affidavits tended to corroborate this statement, though not by direct testimony. No affidavits were filed by the applicant in reply, and Easter term, which commenced shortly after the publications complained of, had been allowed to elapse without moving. On the argument of the rule it was urged that there was not sufficient evidence of publication, which must be expressly proved and not inferred; that it should have been proved that the copies of the newspaper, of the dates mentioned, were in fact issued from the office of publication; that the proof in that respect must be the same as in support of an indictment for libel, and that the evidence here would be insufficient for that purpose; that the authorities shew that such an application must be made promptly, or the delay accounted for, which was not done here, inasmuch as the application might have been made in Easter term, and was not made until Trinity term, and the delay was not excused; that it was not shewn that, in consequence of the delay, the defendants were

deprived of the evidence of E. B., who died in June; that the defendants' affidavits clearly proved the truth of the alleged libels; and that, although these affidavits had been in the applicant's hands for over six months, no affidavits were filed in reply. The delay in moving was sought to be accounted for by the fact that the last of the alleged libels did not appear until the 25th May, and that it was impossible to correspond with Toronto, and make application in Easter term; and for that reason the application made in the following term should be held as made in time. The court refused the application on the ground that the delay in moving was not satisfactorily explained, and the statements in defendants' affidavits not answered; but in view of the virulent and unwarranted language of the articles, the court thought that there should be no costs, and an order was made accordingly. (9)

The absence of affidavits by the applicant in reply to those filed by the defendants would in itself be scarcely a good reason for refusing the application. Such affidavits are not always admissible upon a motion for a criminal information. (10)

Other cases in which information refused for delay in moving.—A motion was made before the Court of King's Bench at Toronto, in Michaelmas term, 1835, for leave to file a criminal information for acts of oppression alleged to have been committed by a justice of the peace for the district of L. The affidavits disclosed a strong *prima facie* case, but the acts complained of were alleged to have occurred in February and March of the same year. The rule was refused, the court holding that the motion having been made after two terms (Easter and Trinity) had been allowed to pass, and after a court of oyer and terminer had been held in the district, was too late, and that it was also too late in the then (Michaelmas) term to admit of the justice having notice of the motion and showing cause, a point on which the practice was strict. (1)

The following cases also shew that the application for a criminal information must be made promptly, and that any delay in moving must be satisfactorily accounted for, otherwise the rule will be refused or discharged: *Prideaux* v. *Arthur* (1774), *Loft*, 393; *R.* v. *Marshall* (1811), 13 East., 322; *R.* v. *Taylor* (1791), Nolan, 204; *Rex* v. *Hartley et al.* (1825), 4 B. & Adol. 869, *note; R.* v. *Knight*, Dig. Law Lib. 91; *R.* v. *Harries* (1811), 13 East, 270; *R.* v.

(9) *Reg.* v. *Kelly et al.* (1877), 28 U. C. C. P. 35.
(10) *The Queen* v. *Whelan* (1863), 1 P. E. I. R. 223, citing *The Queen* v. *Gregory* (1838), 8 A. & E. 909.
(1) *Bustard* v. *Schofield* (1835), 4 U. C. R. (O.S.) 11.

Bishop (1822), 5 B. & Ald. 612; *Rex* v. *Murray* (1837), 1 Jur. 37; *Reg.* v. *Hext* (1840), 4 Jur. 339; *Rex* v. *Jollie et al.* (1838), 4 B. & Adol. 867; 1 Nev. & Man. 483; *Rex* v. *Robinson* (1765), 1 Sir Wm. Black. 542; *Rex* v. *O'Meara* (1823), 4 B. & Ad. 869, *note; Ex parte Hopper* (1871), 23 L. T. 164.

Material circumstances of the case must be fully disclosed.—All the material circumstances of the case must also be fully and frankly disclosed, and where this is not done the rule will be discharged; so also where the denial of the charges made is insufficient. Leave to file a criminal information against a justice of the peace for acts of oppression, alleged to have been committed in the district of L., was refused on the ground that the affidavits in support of the motion were unsatisfactory in not disclosing particulars sufficient to enable the court to judge the acts complained of, and in not annexing the copies of the writings referred to in the affidavits, which were stated to have been served on the complainant, and which, for all that appeared, it was in his power to produce. (2) Where the libel complained of has not been filed with the affidavits and motion papers, the rule *nisi* will be refused; (3) and where the rule has been once discharged for irregularities, it will not be granted on amended material. (4)

Denial of libellous charges must be full, clear and specific.—The relator, a member of the Senate of Canada and a bank president, applied on the last day of Michaelmas term, 1875, for criminal informations against the publisher of *The West Durham News*, published at B. in the county of D., for the publication, in that paper, on the 5th, 12th and 19th days of November, 1875, of articles alleged to be highly defamatory of the applicant. The first of these articles was headed "The Ontario Bank and its President," and the part of the article particularly complained of charged the relator with "political intriguing," alleging that his now famous circular to the electors of South Ontario, his extending credit, at a suspicious time, to institutions that control votes, his impudent letter to the Finance Minister, his consultation with the Government as to his reply to certain charges made against him—all point too clearly to the fact of "intrigues in political matters." The article also referred to "his boasting to several parties of how much money he has paid for the purposes of bribery," and charged him with using "money of others corruptly," and his moneyed influence "for corrupt purposes," and that it was "certain he had

(2) *Bustard* v. *Schofield* (1834), 4 U. C. R. (O.S.) 11.
(3) *Ex parte Gugy* (1858), 8 L. C. R. 353.
(4) *Ibid.*

been guilty of both these offences." In his affidavit, filed on the motion, the relator stated that all these charges and imputations were false, malicious and without foundation in fact, and were intended to prejudice and injure him.

In shewing cause to the motion an affidavit by the defendant was read in which he set out a letter from B., the managing director of the *Globe* newspaper, of Toronto, in which the writer referred to the general election contest that was then going on, and said that it was "hard to work up against the enormous sums the Government candidates had in their hands. We have expended our strength in aiding the out counties and helping our candidates; but a big push must be made on Saturday and Monday for the East and West divisions, if we are not to succumb to the cash of the Government." This letter, which was afterwards known as the "big push" letter, went on to say that the writer and his friends had done all they possibly could do, and that he had been urged to write S., the relator, to aid, by a cash subscription, the election funds. The defendant's affidavit also set out a circular which, he said, had been issued and circulated by the relator in the riding of South Ontario with reference to an election which was going on in that riding in January, 1874, and in which circular S.'s friends were asked to "support men who will support the present Government," for certain reasons which were set out in the circular. The defendant stated in his affidavit, that he based the charges contained in the articles published in his paper on the "big push" letter and this circular, and upon information derived from other credible and reliable sources. He also stated that he had never had any personal acquaintance or dealings with S., was not actuated by any malicious motive against him, or the bank of which he was president, had no design of doing him any personal injury, but acted solely in the belief that he was doing his duty in the premises as a public journalist, and that it was for the interest of the public that the charges contained in his newspaper should be made. One of the principal grounds urged for resisting the application was, that there had been no denial sufficiently explicit of the charges made by the defendant; and that the relator had himself shewn by his conduct that he was not entitled to the extraordinary remedy sought.

Judgment of Ontario Court of Queen's Bench.—The court held, that the applicant's denial of the charges made in the first article was not sufficient; for, although his affidavit denied in general terms the charges made, it contained no reference to the circular, or to the letter referred to in the article, or to the alleged consulta-

tion with the Government; and these matters being specified in the article as justifying the charge of political intriguing contained therein, and which was one of the charges particularly complained of, the court should have been informed with regard to these matters, so as to enable them to judge whether they formed grounds for the charge. An information as to this article was therefore refused, and the applicant was left to his ordinary remedy of a civil action, or an indictment. The denial, it was declared, in such an application must, as a rule, be full, clear, and as specific as possible; and all the circumstances must be laid before the court fully and candidly in order that they may deal with the matter. Wilson, J., was further of opinion that, upon the circular and the other documents set out and referred to, and which were brought before the court by the defendant, the charge of political intriguing was so far sustained that the application should be refused on that ground also. (5)

Attachment proceedings for contempt.—The judgment of Wilson, J., in this case, and more particularly that portion of it unfavourable to B. and to the relator on the charge of "political intriguing," and commenting on the "impropriety" of the relator's conduct as a Senator in "interfering with a House of Commons election," was immediately afterwards made the subject of a severe criticism in the *Globe* newspaper, which, in turn, provoked further proceedings in the Court of Queen's Bench of which Wilson, J., was a member. The defendant in the present case, whose trial on the information was then pending, obtained a rule *nisi* calling upon Hon. George Brown, the managing director of the *Globe*, to shew cause why a writ of attachment should not be issued against him, or why he should not be committed for contempt for the publication of the article in question, which, it was alleged, scandalized the court, and was calculated to prejudice the trial of the defendant on the criminal information. The rule was obtained some four months after the publications complained of, which had not been judicially noticed by the court, or by Mr. Justice Wilson, or by any one on his behalf. Mr. Brown appeared in person before the court (Harrison, C.J., and Morrison, J., Wilson, J., taking no part in

(5) *Reg.* v. *Wilkinson* (1876), 41 U. C. Q. B. 1. Reference is made in the judgments to the following cases: *Rex* v. *Webster* (1789), 3 T. R. 388; *Rex* v. *Peach et al.* (1758), 1 Burr. 548; *Rex* v. *Bickerton* (1722), 1 Str. 498; *Ex parte Smith* (1869), 21 L. T. (N.S.) 294: *Reg.* v. *Stanger* (1871), L. R. C. Q. B. 352; 1 Chitty's Crim. Law, 860, 862. See, also, 3 Burr. 1683. As showing how far persons may go in writing and speaking of others upon proper occasions, the following were referred to: *Risk Allah Bey* v. *Whitehurst* (1868), 18 L. T. (N.S.) 615; *Odger* v. *Mortimer* (1873), 28 L. T. (N.S.) 472; *Hunter* v. *Sharpe* (1868), 4 F. & F. 983; *Strauss* v. *Francis* (1866), 4 F. & F. 1107.

the proceedings), and argued the rule, which was discharged owing to a disagreement of the court. Harrison, C.J., was of opinion that the rule should be made absolute; Morrison, J., *contra*. (6)

Procedure when rule nisi made absolute.—In the event of the rule *nisi* being made absolute, thereby permitting a criminal information to be filed, the relator must give security by recognizance, usually in the sum of $200, to prosecute the information with effect and to abide by the orders of the court. The procedure thereafter is not entirely uniform in the different provinces. It is regulated to a certain extent in some of the provinces, British Columbia, for example, by rules of court based on the English Crown Office Rules. In Ontario, the Code provides that the practice and procedure in all criminal cases and matters in the High Court of Justice, which are not provided for in the Act, shall be the same as the practice and procedure in similar cases and matters heretofore. (7)

Special provisions as to Ontario and Nova Scotia.—There are also some special provisions in the Code with respect to criminal procedure in Ontario and Nova Scotia affecting both criminal informations and indictments. If in any prosecution by information or indictment in the High Court of Justice for Ontario, for any indictable offence, the defendant appears in term time in person, or, in case of a corporation, by attorney, to answer to such information or indictment, such defendant, upon being charged with such offence, shall not imparl to a following term, but shall plead or demur thereto within four days from the time of his appearance; and, in default of his pleading or demurring within four days, judgment may be entered against such defendant for want of a plea. (8)

If the defendant appears by attorney, he shall not imparl to a following term, but a rule requiring him to plead may forthwith be given and served, and a plea to the information or indictment may be enforced, or judgment in default may be entered, in the same manner as might have been done formerly in cases in which the defendants had appeared to such information or indictment by attorney in a previous term; but the court, or any judge thereof, upon sufficient cause shewn for that purpose, may allow further time for such defendant to plead or demur to the information or indictment. (9)

(6) *Reg.* v. *Wilkinson: Re Brown* (1877), 41 U. C. Q. B. 47.
(7) S. 599.
(8) S. 902. To "imparl" is to have license to settle a litigation amicably, to obtain delay for adjustment—Wharton's Law Lexion, "Imparl."
(9) S. 903.

If a prosecution for any indictable offence, instituted by the Attorney-General for Ontario, is not brought to trial within twelve months after the plea of not guilty has been pleaded thereto, the court in which the prosecution is depending, upon the defendant's application and upon twenty days' notice to the Attorney-General, may make an order authorizing the defendant to bring on the trial; and the defendant may bring on the trial accordingly, unless a *nolle prosequi* is entered. (10)

All these provisions are applicable to prosecutions for libel in Ontario whether by information or indictment. In Nova Scotia, a calendar of the criminal cases is sent by the clerk of the Crown to the grand jury, along with the depositions and the names of the witnesses. (1)

Shewing cause to rule nisi.—In shewing cause to the rule *nisi* the defendant may, on the grounds mentioned in the cases *infra*, object to the form and substance of the affidavits on which the rule was granted, or may answer them by affidavits filed on his behalf. (2) It is no answer to the order *nisi* that the matter charged is alleged to be true, this not being a question to be tried at that stage on affidavit evidence, but to be determined by the jury on a plea of justification under the statute at the trial; (3) but the truth may be a reason for the court not aiding the relator and leaving him to his remedy by indictment. (4) When there are mitigating circumstances disclosed in the affidavits, the court may, in its discretion, discharge the rule. (5) The rule *nisi* may also be refused or discharged for the reasons mentioned in the following decisions, and the cases referred to in the judgments therein.

Failure of complainant to deny provocation.—The party moving must have been guilty of no misconduct, and have given no provocation, in the matter of which he complains, otherwise the court will leave him to his other remedies for the alleged libel. In

(10) S. 904.

(1) S. 602. See *Queen* v. *Townsend et al.* (1896), 28 N. S. R. 468. The omission to send to a grand jury the depositions taken on the preliminary enquiry, as required in Nova Scotia under this section, will not invalidate an indictment found without the depositions. *R.* v. *Turpin* (1904), 8 C. C. C. 59.

(2) *Rex* v. *Ipswich* (1758), 2 Ld. Ken. 421; *Rex* v. *Cockshaw* (1833), 2 Nev. & M. 378; *Reg.* v. *Stanger* (1871), L. R. 6 Q. B. 352; 19 W. R. 640; 40 L. J. Q. B. 96; *Rex* v. *Batchelor* (1729), Fitzg. 57, pl. 7; *Ex parte* —Gent. One, etc. (1836), 4 A. & E. 576, *note*; *Reg.* v. *Marshall* (1855), 4 E. & B. 475.

(3) See *Rex* v. *Dormer*, Barnard, 13; Digest L. L. 77; *Rex* v. *Draper* (1806), 3 Smith, 391; *Rex* v. *Eve* (1836), 5 A. & E. 780, which is virtually overruled by *Reg.* v. *Labouchere* (1880), 14 Cox C. C. 419; C. C. SS. 331, 910, which prescribe the conditions as to pleading justification.

(4) *R.* v. *Bickerton* (1722), 1 Str. 498; Andr. 299.

(5) *Reg.* v. *Spurr et al.* (1868), Folkard's S. & L., 7th ed., 450.

The Queen v. *Whelan,* (6) a rule *nisi* for a criminal information for libel against the editor and publisher of the *Examiner* newspaper, for an alleged libel on W. H., the editor of the *Islander* newspaper—both papers being published in Prince Edward Island—was discharged, without costs, on the ground that the affidavits filed on the application were insufficient. It appeared that the alleged libel charged W. H. with having, by a previous article in the *Islander,* provoked it, and that W. H., by his affidavit on which he moved for the criminal information, had failed to answer this statement in the defendant's affidavit. Defendant also swore that the alleged libel was published in reply to the *Islander's* article. The court held the applicant's affidavit insufficient in not shewing that he had done nothing to provoke the charge complained of, and made an order discharging the rule on the authority of *Rex* v. *Taylor, infra.*

Opinion of Peters, J.—"The principle," said Peters, J., 'which governs the court in applications of this nature appears to be that the party applying for a criminal information must come into court with clean hands. He must not only shew himself innocent of the charge made against him (that is most fully and satisfactorily done here), but he must not appear to have done anything to provoke the attack of which he complains. In the case of *Rex* v. *Taylor,* (7) where a rule was obtained against the defendant, who was proprietor of the *Manchester Guardian,* for a libel on Mr. Royas, the alleged libel insinuated that certain articles in the *Manchester Chronicle* emanated from Mr. Royas. The defendant does not appear to have used any affidavit in reply. Tollet, in shewing cause, submitted that as there appeared to be a controversy between the two newspapers, there should have been a more explicit denial by Mr. Royas that he had any knowledge of the articles in the *Manchester Chronicle* before they appeared. And on that ground, viz., that the applicant's affidavit did not deny knowledge of these articles, the court discharged the rule. Mr. Pope, in his affidavit, makes no denial of his authorship of the article in the *Islander,* attributed to him in the libel. And we think this case of *Rex* v. *Taylor* (*supra*), is, therefore, conclusive against the rule.

Complainant should answer and explain provocation.—"One difficulty suggested itself to our mind in applying the principle broadly laid down in this case to all cases. And it was this, viz., that the article alluded to in the libel, as provoking it, might really

(6) (1862), 1 P. E. I. R. 220.
(7) (1837), 1 Jur. 53.

be a severe, but merited and justifiable, criticism on an improper publication. . . . The doctrine appears to be that where the libel, either directly or by insinuation, charges the applicant for the rule with having, by a previous writing, provoked it, he is bound in his affidavit, on which the rule is moved, to answer it. This he may do by denying that he is the author, or by admitting it, and then setting out the article in his affidavit, or in some other way shewing the court that it was a proper and justifiable criticism or communication, and not of a nature that could reasonably provoke such a severe retort. Neither of these courses has been adopted here, and we, therefore, think the affidavits are insufficient, and that this rule must be discharged, but, under the circumstances, without costs, and that Mr. Pope shall be at liberty to proceed either by indictment, or action, if he shall see fit." (8)

Information refused where charges provoked.—In *Ex parte Pigott*, (9) the proprietor of the *Irishman* newspaper, who had been committed for trial for the publication of seditious articles in that paper, applied for a criminal information against the publisher of the London *Daily Telegraph*, which had accused him of preaching treason and rebellion, and as identified with Fenianism, and approving of arson and murder. These charges, it was said, were calculated to prejudice the fair trial of the relator. Certain of the *Irishman's* articles were read by the defendant in support of the charges, and the court held that it was not a proper case for an information. "We cannot for a moment doubt," said Cockburn, L.C.J., "that the writer in the *Daily Telegraph* was honestly influenced by these views, and was provoked by the tone and tendency of the publication on which he commented. We ought, therefore, to take into account in considering, as we always do consider, on an application for a criminal information, the nature of the case, and the degree of provocation under which, what might otherwise be deemed libellous, was published; and, upon this principle, we should do wrong if we acceded to the present application." (10)

If the conduct of the prosecutor has been blameable, the court will not grant a criminal information against a magistrate at his instance; but if the conduct of the magistrate is not justifiable, the rule will be discharged without costs. (1) But a rule for a criminal information will be discharged with costs, where the facts upon

(8) *The Queen* v. *Whelan* (1862), 1 P. E. I. R. 220.
(9) (1868), Folkard's S. & L., 6th ed., 741.
(10) See, also, on the question of provocation by previous conduct of the relator: *Rex* v. *Larrieu* (1837), 7 A. & E. 277; *Rex* v. *Hankey* (1757), 1 Burr. 316; Lofft. 314; *Butt* v. *Jackson* (1846), 10 Ir. L. R. 120; *Reg.* v. *Kiernan* (1855), 5 Ir. C. L. R. 171.
(1) *Rex* v. *Munro* (1831), East. Term.

which it was granted were disproved by the affidavits on shewing cause. (2)

Rule discharged where relator otherwise blameworthy.—Reg. v. Whelan (1863).—In another Prince Edward Island case a rule *nisi* for a criminal information, by one newspaper editor against another, was discharged without costs, on the ground that the applicant was himself culpable in the matter. The defendant, in his affidavit in answer, stated that the prosecutor was well known to be the editor of the *Islander* newspaper, wherein attacks of a very gross, malicious and libellous nature were, from time to time, made on the character of the defendant, in his private as well as his public capacity, as editor and proprietor of the *Examiner* newspaper. One of these attacks recently published in the *Islander* signed "Responsis," and which was set out in his affidavit, he believed was published with the knowledge and concurrence of the prosecutor. The defendant also alleged that the prosecutor was in the frequent habit of libelling him. From the affidavits it appeared that the prosecutor and defendant were in the habit of writing with some acrimony against each other. The article signed "Responsis" contained a charge against the defendant of a similar nature to that which the prosecutor complained the defendant had charged against him. It was urged that there was no proof that the prosecutor was the author of the article signed "Responsis," or concurred in it, and that as it appeared as an anonymous communication and not as an editorial, it should not be presumed that he wrote or concurred in it.

Opinion of Peters, J.—"In the nature of things," said Peters, J., "such proof by the defendant was next to impossible; but the defendant swears he believes it was published with his concurrence and knowledge. On an application of this kind the court is bound to weigh the probabilities, and looking at the circumstances that it is evidently a reply to the libel now complained of, and published in the paper of which the prosecutor is editor, we think we may reasonably presume that he was at least not ignorant of it. In *The Queen* v. *Lawson*, (3) where, on an application for a criminal information for a libel by the foreman and several of his fellow jurors, it appeared that the foreman had published a letter commenting in strong terms on the publishers of the libel, though, as it appeared, without the request, knowledge, or concurrence of the other jurors who did not see the letter, and were not aware that any such letter had been sent till after he had sent it, the court, believ-

(2) *Rex* v. *Bates* (1832), Trin. Term.
(3) (1841), 1 Q. B. 486.

ing from the circumstances that the other jurors knew (in sufficient time to have interfered) of the foreman's intention to publish the letter on behalf of himself and fellows, discharged the rule. In the present case (even if the article signed "Responsis" was not written by or with the concurrence of Mr. Pope) we cannot doubt, that, being an answer to an attack upon himself, he must, as editor of the paper, have been informed of it in time to have prevented its publication, and he, therefore, must be affected by it in the same manner as the jurors were affected by the unauthorized publication of their foreman. The defendant's affidavit also contains another distinct allegation that the prosecutor is in the frequent habit of libelling him. Under these circumstances the prosecutor, in our opinion, comes clearly within the rule adverted to by the court on a similar application, recently determined between the same parties, viz., that the party seeking a criminal information against another must himself be free from blame. (4) We think he is not so here, and, therefore, the rule must be discharged.

"It was urged that the prosecutor had no opportunity of answering the defendant's affidavit; but this is always the case with respect to affidavits used in shewing cause against rules *nisi*. And in *The Queen* v. *Gregory*, (5) on an application for a criminal information, we find Lord Denman giving credence to affidavits to which a similar objection was urged. The rule *nisi* must, therefore, be discharged, but without costs, and the prosecutor shall be at liberty to proceed either by indictment or action, as he shall see fit." (6)

Previous libels and information for same as a defence to subsequent proceedings by same relator against same defendant. Reg. v. Wilkinson (1878).—The question to what extent, if any, previous libels and the proceedings by information with respect to the same, can be made a defence to subsequent proceedings by information by the same relator against the same defendant for the publication of subsequent libels, was discussed in *Reg.* v. *Wilkinson*. (7) The second count in the information in that case was based on a newspaper article published on the 19th November, 1875, charging the relator with buying up members of parliament during a political crisis, with having caused a large sum of money to be expended in a certain constituency in bribery, alleging that he was "one of the most corrupt men in Canada," etc. The defendant pleaded the general issue and justification. At the trial

(4) See *The Queen* v. *Whelan* (1862), 1 P. E. I. R. 220, *supra*.
(5) (1838), 8 Ad. & Ell. 907.
(6) *The Queen* v. *Whelan* (1863), 1 P. E. I. R. 223.
(7) (1878), 42 U. C. Q. B. 492.

counsel for the defendant, in cross-examining the relator, proposed to enquire as to an article of the 5th November, 1875, published by defendant in the same newspaper, charging the same relator with political intriguing, and in reference to which the court refused leave to file a criminal information; (8) but, on objection by counsel for the prosecution, the trial judge declined to receive evidence as to that libel, or anything relating to it. The court also stopped cross-examination of the relator as to a certain letter known as "the big push letter," dated 15th August, 1872, from the managing director of the *Globe* newspaper to the relator, and which was alleged to be a request to supply money for corrupt purposes. This letter was set out in the defendant's affidavit filed in answer to the motion for the information based on the article of the 5th November. The defendant having been convicted moved for a new trial for the rejection of this evidence. It was held, *per* Harrison, C.J., that it was properly rejected, and *per* Wilson, J., that it was admissible; but, as it was not formally pressed, the rejection of it formed no ground for a new trial. (9) Counsel for the defendant asked that a judgment should be given so that the defendant could appeal. Thereupon Wilson, J., withdrew his opinion and the rule was discharged.

Where rule refused or discharged on insufficient material.—Where a rule *nisi* has been refused on insufficient or unsatisfactory material, the court will not entertain a fresh application on amended material, unless leave has been reserved for that purpose, or the circumstances are exceptional, as, *e.g.*, a fraud practised on the court on the former application. (10) Nor will the court grant a new rule *nisi*, on additional material, where the former rule has been argued and discharged on the merits. A party moving for a criminal information has some great advantages, and he may reasonably be required to collect all the necessary materials for his application when he first makes it. (1) A new rule in such a case would be a precedent for re-inquiry in almost every instance

(8) See *Reg.* v. *Wilkinson* (1876), 41 U. C. Q. B. 1, and the other references to same in this chapter.

(9) *Reg.* v. *Wilkinson* (1878), 42 U. C. Q. B. 492. The following cases are reviewed in the judgments: *Wright* v. *Doe d. Tatham* (1838), 4 Bing. N. C. 489; *Tabart* v. *Tipper* (1808), 1 Camp. 350; *Finnerty* v. *Tipper* (1809), 2 Camp. 72; *Rex* v. *Lambert et al.* (1810), 2 Camp. 398; *Thornton* v. *Stephen* (1837), 2 M. & R. 45; *May* v. *Brown* (1824), 3 B. & C. 113; *Watts* v. *Fraser* (1837), 1 M. & R. 449; 7 C. & P. 369; *Tarpley* v. *Blabey* (1836), 2 Bing. N. C. 437; *Watts* v. *Fraser* (1837), 7 A. & E. 223; *Hedley* v. *Barlow et al.* (1865), 4 F. & F. 224.

(10) *Ex parte Gugy* (1858), 8 L. C. R. 353; 9 L. C. R. 51 Q. B.; *Ex parte Munster* (1869), 20 L. T. (N.S.), 612; *Ex parte Williams* (1841), 5 Jur. 1133; *Reg.* v. *Franceys* (1834), 2 A. & E. 49; *R.* v. *Eve et al.* (1836), 5 A. & E. 780; 1 Nev. & Per. 229.

(1) *Per* Denman, C.J., in *Rex* v. *Smithson* (1833), 4 B. & Ad. 862.

where a criminal information was moved for without success. It would rarely happen that the party would not be able to mend his case on a second motion. The prosecutor has another remedy. (2)

A criminal information for libel, at the instance of a private individual, must be signed by the clerk of the Crown or Master of the Crown office, who is in fact the clerk of the Crown in each province. (3)

When informations granted.—Reg. v. Wilkinson (1876).—*Reg.* v. *Wilkinson* (*supra*), which came before the Ontario courts on several occasions on applications for criminal informations, and for attachments in commenting on the pending proceedings, is a case in which the law affecting informations is thoroughly discussed. The first applications, which were made simultaneously in December, 1875, were for three criminal informations for libel against the publisher of *The West Durham News*, a newspaper published at B. in the county of D. The relator, S., who was a member of the Senate of Canada and president of the Ontario Bank, complained of three different articles which had appeared in the newspaper named. As to the first article the information was refused. The second article appeared on November 12th, 1875, was headed "Our Charges Again," and accused the relator of having purchased and "paid as high as $30,000" for the votes of three members of Parliament on the occasion of a political crisis referred to, and of having "boasted to different parties" of so doing. The third article appeared on November 19th, 1875, and was headed "Senator Simpson's Denial." It reiterated the charge of corruption, ridiculed the relator's statement in an Ottawa journal that he had never spent a dollar to purchase or secure a vote, and described him "as one of the most corrupt men in Canada." The article concluded: "Our charge at this time is, that he bought up members of the Commons to defeat Sir John Macdonald's Government at the time of the crisis in 1873, and we are not going to let side issues or general statements draw attention from this one fact." In his affidavit for a rule *nisi* the relator denied generally all the charges against him contained in the several articles, and declared that they were intended to prejudice and injure him in public estimation. He also denied categorically the several charges contained in the articles of the 12th and 19th November. A number of other affidavits were also filed in support of the motion.

(2) *Per* Parke, J., in *Rex.* v. *Smithson* (1833), 4 B. & Ad. 862.
(3) *Reg.* v. *Crooks* (1839), 5 U. C. R. (O.S.) 733. See, also, *Ex parte Guay*, *supra*.

Objections to relator's denial of charges.—Upon argument it was objected, besides an objection as to the delay in the application, that the relator had not explicitly denied the charges made against him in the publications of the 12th and 19th November, and had not, with sufficient candour, laid all the facts bearing on the charges before the court. The court, however, held that the denial was sufficient. There was no affidavit of their truth, and no suggestion that the defendant had any personal knowledge of the facts on which the charges rested, so that he would not be prejudiced by being excluded as a witness on his own behalf; (4) and there was no want of candour on the relator's part. As to these charges, therefore, the information was granted. (5)

Opinion of Harrison, C.J.—"It is true," said Harrison, C.J., "this is an application for an extraordinary remedy, and, therefore, the court will not grant it lightly. But they will do justice, and, therefore, they will not withhold it if the nature of the case required it; *per* Lord Mansfield in *Reg.* v. *Dennison* (1773), Lofft, 149. We do not lightly grant it as regards the two last publications. The nature of the case, as shewn in the affidavits of the relator, is such as, in the absence of an affidavit of truth or a retraction and apology, to demand the remedy. There is no attempt at retraction or apology, and there is really nothing disclosed to shew truth. The case, therefore, as regards the last two publications, is a proper one for the exercise of our discretion in favour of granting the leave asked. If it were shewn that the defendant had any personal knowledge of the facts out of which the charges are supposed to arise, we might hesitate to grant the information, the effect of which would be to prevent his giving evidence on his own behalf, and instead of doing so might leave the relator to his remedy by action, where each party would be eligible as a witness on his own behalf. But as nothing of the kind is suggested on the part of the defence, we have no hesitation in making absolute the rule to the extent last mentioned, and discharging it as to the residue." (pp. 30 *et seq.*)

Opinion of Adam Wilson, J.—"The imputation," said Wilson, J., "that a senator bought up members of the Commons to defeat the Ministry of the day, and that he paid a very large sum of money for the purpose, is an offence of the gravest magnitude, and it is so

(4) With a few exceptions, *e.g.*, assault and refusal to supply necessaries to wife and child, the law at that time (1876) did not permit a person accused of an indictable offence to give evidence on his own behalf. This privilege was first allowed by The Canada Evidence Act, 1893, (56 Vict., c. 31, s. 4).

(5) *Reg.* v. *Wilkinson* (1876), 41 U. C. Q. B. 1.

far distinct from the charge contained in the publication of the 5th of November, that the unfavourable opinion I have formed against the complainant upon that charge does not necessarily so affect his reputation or conduct as to preclude him from claiming the sanction of the court for the prosecution of the other charge contained in the papers of the 12th and 19th November." Morrison, J., concurred. (6)

Other cases in which informations granted.—The libels in this case affected the relator in his official character as a member of the Dominion legislature and president of a prominent financial institution. Informations have also been granted for a libel imputing want of professional qualifications and truthfulness to a naval officer; (7) for a libel imputing perjury and improper conduct to a peer as the president of a court martial; (8) and a rule *nisi* for an information was granted against a newspaper publisher for libellous imputations of official corruption against a chief constable. (9) Criminal informations will also be granted for libels on a body of persons, although no particular person is aimed at; (10) for a libel on one of a body where the whole body is libelled; (1) for libels on a public institution and its officers; (2) for libels on trustees; (3) for a publication tending to prejudice the fair trial of accused persons; (4) for a publication reflecting on a magistrate; (5) for libels on a company; (6) for imputing the suspicion of bribery to a jury; (7) for publishing posters in an assize town shortly before the trial of a criminal information aspersing the character of the relator and vindicating that of the defendant. (8)

Information granted for libel on private character of newspaper publisher. Reg. v. Thompson et al. (1874).—Upon an application for a criminal information on behalf of the publisher of

(6) *Reg.* v. *Wilkinson* (1876), 41 U. C. Q. B. 1.
(7) *Rex* v. *Smollett* (1759). Folkard's S. & L., 7th ed., 450.
(8) *Rex* v. *Thicknesse* (1763), Dig. L. L., 85, 86.
(9) *Ex parte Parry* (1877), 41 J. P. 85.
(10) *R.* v. *Osborn* (1732), 2 Barnard, 138, 166; Kelynge, 230; *Rex* v. *Williams* (1822), 1 Dow. & Ry. 197; 5 B. & Ald. 595; *Reg.* v. *Gathercole* (1838), 2 Lewin, C. C. 237.
(1) *Reg.* v. *Sheppard*, a Montreal case, unreported. The defendant was the editor and publisher of the Toronto *News*, and the complainant was an officer in a French-Canadian regiment, which passed through Toronto on its way from active service in the North-West Rebellion.
(2) *Rex* v. *Baillie* (1778). Folkard's S. & L., 7th ed., 451.
(3) *Rex* v. *Benfield* (1760), 2 Burr. 980. See, also, *Booth et al.* v. *Briscoe* (1876), 2 Q. B. D. 496.
(4) *Reg.* v. *Gray* (1865), 10 Cox C. C. 184.
(5) *Rex* v. *Staples* (1738), Andr. 228; Dig. L. L. 80.
(6) *Rex* v. *Nutt* (1729), Dig. L. L. 78; 2 Barn. 114.
(7) *Rex* v. *Wakefield* (1712), Folkard's S. & L., 7th ed., 449.
(8) *Rex* v. *Jolliffe* (1791), 4 T. R. 285.

the *Globe* newspaper, against the publishers of the *National* newspaper, both published in the city of Toronto, for certain libels which the applicant alleged had been published against him (the applicant) in his affidavit filed on the application, stated that he had read the article published in the *National* newspaper on the 16th of July, 1874, (setting it out verbatim); that deponent was the person referred to therein; that the statements concerning him were untrue; that they were intended to prejudice and injure him; that the defendants were, on said 16th of July, proprietors and publishers of said *National* newspaper; that the said article was printed and published by them, and was the same article which was contained in the copy of the said newspaper attached to the affidavit of one R., "filed on this application." R.'s affidavit, sworn on the same day as the applicant's, stated that "the annexed copy of the *National* newspaper, bearing date of 16th July, 1874, was on that day published in Toronto at No. 21 Adelaide St. East," by the defendants, "who are the publishers and proprietors thereof." The newspaper annexed contained the libel set out in the applicant's affidavit. A similar affidavit was filed by the applicant as to each of two other libels, accompanied by a like affidavit, with the newspaper attached. The application for leave to file a criminal information was not made until the 24th of August, two days after the affidavits were sworn.

Defendants' answer alleging provocation, etc. — On shewing cause to the rule *nisi*, which had been granted on reading the three several affidavits of the applicant and the several affidavits of three other persons, and the printed papers thereto annexed, the defendants filed an affidavit to the effect that they received information of the matters stated in the alleged libel from persons whom they believed to be reliable and trustworthy, and that they had no personal knowledge of the matters; that the *Globe* newspaper, which was controlled by the applicant, published a number of articles violently attacking the private and moral character of one Dr. S., the candidate for a public office, and articles upon that subject were continuously appearing in that newspaper; that the applicant was an active politician and used the paper he controlled to attack the personal and private character of persons politically opposed to him; that having attacked the said Dr. S., on a subject akin to the matter alleged to be libellous, the defendants, believing the truth of the statements made to them, made use of the information so given to them, with a view of counteracting the attacks made in the *Globe* newspaper upon the said Dr. S.; and that they published the information so given to them, without malice, believing the

same to be true. The court held that the matters alleged in this affidavit were not a good answer to the application.

Objections to applicant's material overruled.—Upon the argument of the rule a number of objections were made to the material upon which the rule had been granted. The court held that the objections were not well taken, and that the applicant's affidavits were sufficient; that the reference to R.'s affidavit as "filed on this application" could only mean, there being only one application, the application about to be made on these affidavits; that it was no objection that the rule *nisi* was stated to have been moved by counsel for the Crown, instead of for the applicant; and that it was no objection that the applicant's affidavit described the applicant as "Esquire" only, because it was not necessary to show that he occupied any public or official position.

Opinion of Hagarty, C.J.—"We have examined," said Hagarty, C.J., "the late case of *Reg.* v. *Aunger* (9) and the remarks of Blackburn, J., as to the discretion of the court in refusing, in certain cases, to allow this prerogative proceeding. In that case one of the specific charges had not been sufficiently met, and the alleged libel was of a political and public character. Here it is wholly of a private and domestic nature. It is sufficient for us to say, that there is nothing laid before us on this application to warrant our making an exception against the applicant, and refusing to him the leave of this court to file a criminal information for this reiterated publication in a newspaper of matter not pretended either to be not libellous, or to be true in fact. Our judgment is that the rule be made absolute." (10)

Other cases in which informations granted for libels affecting private character.—The libel in this case, as was noticed by the court, was on the private character of the relator. Criminal informations for libels affecting private character have been granted for charges of profligacy and general immorality against a Roman Catholic priest; (1) for libellous letters by a physician to the relator; (2) for singing libellous songs in the street aspersing the prosecutor's wife and daughter; (3) for libels on the private character of living persons by attacks on their dead relatives; (4)

(9) (1873), 28 L. T. (N.S.), 630.
(10) *Reg.* v. *Thompson and Smallpiece* (1874), 24 U. C. C. P. 252.
(1) *Reg.* v. *Newman* (1852), 1 E. & B. 558.
(2) *Reg.* v. *Pattison* (1869), referred to in Folkard's S. & L., 6th ed., 751.
(3) *R.* v. *Benfield et al.* (1760), 2 Burr. 980, 985.
(4) *Rex* v. *Critchley* (1834), 4 T. R. 129, *note* (*a*); *Rex* v. *Weaver et al.* (1822), referred to in Folkard's S. & L., 7th ed., 437.

for libellous charges of bigamy against a peer; (5) for a series of libels affecting the wife and family of a peer; (6) for imputing adultery to a countess; (7) for a statement that a certain nobleman, who was married, had eloped with a young lady of noble birth and rank; (8); and against the mayor of a town for sending to a nobleman a public house license. (9)

Cases in which informations refused.—On the other hand, an information was refused for publishing in a newspaper statements aspersing certain patent medicines; (10) for charges of treachery and fraud against the promoters of a public company; (1) for a charge of personating a physician and taking his fees; (2) for an imputation, in the report of a railway company, of extortion and fraud against a firm of solicitors; (3) for newspaper advertisements, published *bonâ fide*, reflecting on married women; (4) for publishing a sentence expelling the relator from a religious society; (5) for libellous letters sent to the relator, or exchanged between parties; (6) for a libel on a trustee in liquidation proceedings; (7) and for a libel on a postmistress. (8)

Refused for libellous charges against a railway manager.—In November, 1878, a rule *nisi* was obtained on behalf of F. B., General Manager of the Great Western Railway Company of Canada, calling upon the publisher of *The New Dominion* newspaper to show cause why a criminal information should not be filed against him. The libellous matter complained of was contained in

(5) *Rex* v. *Kinnersley* (1760), 1 W. Bl. 294.
(6) *Reg.* v. *Gregory* (1838), 8 A. & E 907.
(7) *Reg.* v. *Long* (1870), Folkard's S. & L., 7th ed. 75.
(8) *Reg.* v. *Yates* (1883), Folkard's S. & L., 6th ed., 748.
(9) *Mayor of Northampton's Case* (1721), 1 Str. 422.
(10) *Rex* v. *Roberts* (1735), Dig. Law Lib. 90.
(1) Dig. Law Lib. 89.
(2) *R.* v. *Bickerton* (1722), 1 Str. 498; *R.* v. *Webster* (1789), 3 T. R. 388; Doug. 270, 371.
(3) *Ex parte Baxter* (1864), 28 J. P. 326.
(4) *R.* v. *Jenner* (1735), Andr. 229; *R.* v. *Elms* (1735), Andr. 229.
(5) 2 Burn's "Ecclesiastical Law," 779. See *Roberts et ux.* v. *Roberts* (1864), 33 L. J. Q. B. 249; 5 B. & S. 384; and *Campbell et ux.* v. *White et ux.* (1856), 5 Ir. C. L. R. 312, as to imputations of unchastity against married women not being actionable.
(6) *Ex parte Hoare* (1854), 23 L. T. J. 83: *Ex parte Dale* (1854), 2 Camp. L. R. 870.
(7) *Ex parte Turquand; In re Willis, Percival & Co.* (1878), *per* Cockburn, L.C.J., and Mellor, J.
(8) *Ex parte The Postmistress of Littleton* (1888), 52 J. P. 264.

two issues of the paper, published in the city of Toronto by the defendant, and consisted of charges of "official delinquencies" and "discreditable transactions" against the relator. On cause being shown, affidavits were filed on defendant's behalf in which no attempt was made by him to deny either the publication of the statements complained of, or that they were intended to apply to the applicant, and in which no ground of justification was shown. The court, following recent English decisions confining the granting of criminal informations for libel to the case of persons occupying official and judicial positions, and filling some office which gives the public an interest in the speedy vindication of their character, or to the case of a charge of a very grave and atrocious nature, refused leave to the applicant to file the criminal information asked for, on the ground that, although manager of a large railway company, he did not come within the description of persons referred to in these decisions.

Opinion of Cameron, J., as to discriminating between applicants for informations.—Referring to the alleged distinction as to persons to whom the remedy is granted, Cameron, J., said: "The granting or denying to a private individual leave to file a criminal information is a matter of discretion, and it ought not to be exercised in favour of the application except for strong reasons showing necessity for such a remedy. It appears to me very undesirable that any distinction of persons should exist. Our courts ought to be open to all alike, high and low, and it is invidious to have it said that one man may secure a remedy for a wrong, criminal or civil, in a way denied to another. Yet there is no doubt it has been the practice in England, in the case of persons holding positions connected with the administration of justice, and official positions, and sometimes in the case of private individuals, to grant criminal informations, while the privilege has been denied to others. There is no reason for perpetuating these distinctions in this country, and, therefore, in the present instance I think the application should be denied. Conceding the highly respectable and very important position held by the applicant, there are many other like officers of private, or perhaps it would not be very wrong to call them public, corporations, who might equally well seek this peculiar remedy for redress in cases of defamatory libel, and one of them could not be otherwise than chagrined and humiliated if he were denied the privilege sought in the present instance, by reason of the railway or other enterprise which he managed being

less extensive or wealthy than another whose manager has made a successful application." (9)

In this case, according to a note by the reporter, Hagarty, C.J., stated, in addition to what is said in the judgments, that it was not to be understood that the court laid down any absolute rule as to further applications for criminal informations, or that they meant to fetter their discretion in dealing with such applications.

Information refused to provincial Attorney-General because libel not in respect of his official duties.—A rule was obtained on the 24th November, 1884, on behalf of M., the provincial Attorney-General and an ex-judge of the Court of Queen's Bench of the province of Manitoba, calling upon the defendants, B., P., and H., to shew cause why a rule should not issue out of the Court of Queen's Bench, for the filing of a criminal information against them for having, on the 17th November, 1884, published a defamatory libel of and concerning M. in the Winnipeg *Daily Sun* newspaper. The defendant B. was one of the proprietors of the *Sun;* P. was the editor; and H. was a reporter on the paper. The article complained of was headed "A startling story told by an ex-policeman of Attorney-General M.," and alleged facts and circumstances, in a certain matter, which involved substantially a charge against the Attorney-General of "aiding criminals to escape justice." The complainant, in his affidavit in support of the rule, declared that the defamatory statements referred to were false and malicious, and without foundation in fact, and were intended to prejudice and injure him. He also related the facts in connection with the matters referred to in the article. The affidavits filed by the defendants shewed that the statements complained of were not without some foundation, and that the complainant had procured the publication in another city journal of the denial by him of the alleged libel. The court refused to make the rule absolute. They held that a criminal information will not be granted except in case of a libel on a person in authority, in respect of the duties pertaining to his office; that this was not such a case; that, although the complainant, as Attorney-General, was a person in au[illegible]rity, the alleged improper conduct on his part took place previously when he was a judge, and did not touch him in his office of Attorney-General; that the applicant for a criminal information must rely wholly upon the court for redress, and must come there entirely free from blame; and that.

(9) *Reg.* v. *Wilson* (1878), 43 U. C. Q. B. 583. See opinion of Armour, J., in same case, at p. 198, *ante.*

where there is a foundation for a libel, though it fall short of justification, an information will not be granted. (10)

Although there is no reference to it in the judgments of the court, the fact that the applicant in this case had previously appealed to the local press on his own behalf, by procuring a denial in another city journal of the alleged defamatory statements, might have been urged as an additional reason for refusing the motion. (1)

(10) *Reg.* v. *Biggs et al.* (1884), 2 M. L. R. 18. The following authorities were referred to on the argument:—By the defendants: 34 Vict. c. 14, s. 2 (D.); 37 Vict. c. 38 (D.); *R.* v. *Holbrook*, L. R. 3 Q. B. D. 60; in appeal, L. R. 4 Q. B. D. 2; *R.* v. *Abingdon*, 1 Esp. 226; *R.* v. *Topham*, 4 T. R. 120; *R.* v. *Harvey*, 2 B. & C. 257; *The Pharmaceutical Society* v. *The London and Provincial Supply Association*, L. R. 5 App. Cas. 857, at p. 870; *R.* v. *Labouchere*, L. R. 12 Q. B. D., at pp. 322, 329; *Ex parte Chapman*, 4 Ad. & E. 773; *R.* v. *Wilson*, 43 U. C. Q. B. 583, 589; *R.* v. *Plimsoll*, 12 C. L. J. (N.S.) 228, 229, 233; *R.* v. *Wilkinson*, 41 U. C. Q. B. 25, 27; *R.* v. *Proprietors of Nottingham Journal*, 9 Dowl. 1042; *R.* v. *Lawson*, 1 A. & E. (N.S.), 486; *Daw* v *Eley*, L. R. 7 Eq. 61; *R.* v. *Marshall*, E. & B. 475; *Ex parte Beauclerk*, 7 Jur. 373; *R.* v. *Larrieu*, 7 A. & E. 277. By complainant: 34 Vict. c. 14 (D.).

(1) See *Reg.* v. *Proprietors of Nottingham Journal* (1841), and *Reg.* v. *Lawson* (1841), *supra*.

CHAPTER XXII.

Publication.

A libel is not an offence unless it is published. Where it is in manuscript, its mere composition without publication is harmless, but it may be in other than written forms, a fact which serves to explain the following definition: (1)

Publication defined.—Publishing a libel is exhibiting it in public, or causing it to be read or seen, (2) or shewing or delivering it, (3) 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. (4)

Publication in civil and criminal cases distinguished.—This statement, it should be observed, requires qualification so far as civil proceedings are concerned. 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. (5) Then again in libel as a crime, unlike libel as a tort, there is no joint responsibility for publication. At common law every one knowingly concerned in the production of a libel may be prosecuted, and it is no defence that some other person concerned with the defendant in the publication has been previously prosecuted or convicted. A different rule prevails with respect to civil proceedings. The recovery of a judgment by one person against another for a certain libel, is a bar to proceedings by the plaintiff against any other person jointly concerned with the former defendant in the publication of the same libel. (6) It has been said, although erroneously, that another distinction between publication in civil and criminal cases is this: that the question of publication in civil cases is partly for the jury and partly for the judge, the former finding whether the facts on which it is sought to prove

(1) See Introduction, *ante*, p. 4.
(2) *Forrester* v. *Tyrrell* (1893), 57 J. P. 532.
(3) *Hird* v. *Wood* (1894), 38 Sol. J. 234.
(4) S. 318.
(5) *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; *Boosius* v. *Goblet Frères* (1894), 1 Q. B. 842.
(6) See *Willcocks* v. *Howell et al.* (1885), 8 O. R. 576, and cases cited therein.

publication are true, the latter deciding whether the facts as proved constitute a publication; whereas, in criminal cases, the question is entirely for the jury, who, in the words of section 956, "may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information." This, however, is a mistake arising from a misconception of the meaning of section 956. In a criminal prosecution, quite as much as in a civil action for libel, the judge has an undoubted right to say whether there is any legal evidence of publication. If there is evidence, he must leave it to the jury, who will give it such weight as they may think proper; if there is no evidence, the case should either be withdrawn from the jury, or, as in *Reg.* v. *Sellars,* (7) they should be directed to acquit the accused. It is only when "the whole matter put in issue," including the fact of publication, is left to the jury, that section 956 applies, and when "the jury sworn to try the issue may give a general verdict of guilty or not guilty." (8) With the differences thus indicated the law of publication in criminal prosecutions for libel is the same as that in civil actions, and the evidence and rules of proof are analogous.

Scope of the rule defining publication.—The statutory rule defining publication is a broad one, and correspondingly broadens the liability to prosecution. Every one concerned in the publication is liable—the author, printer, and publisher, of a libel contained in a book or newspaper, and, in the case of a newspaper, the proprietor also. And they may be indicted either jointly or severally. Not only the party who originally prints, but every party who utters, who sells, who gives, or who lends, a copy of an offensive publication, will be liable to be prosecuted as a publisher.(9) The mere delivery of a libel to a third person by one conscious of its contents (see cases cited in last note) amounts to a publication, and is an indictable offence. (10) In Coke's reports, 126*a*, it is laid down that a scandalous libel may be published *traditione,* when the libel, or any copy of it, is delivered

(7) (1883), 6 L. N. 197.

(8) See S. 956, which is taken from 32 Geo. III., c. 60, s. 1 (Fox's Libel Act).

(9) *Per* Bayley, J., in *R.* v. *Carlile* (1819), 3 B. & Ald. 169. This must be taken with considerable reservation. See sections 329 (3), and 330 (1), by which it appears that the sale must be made knowingly. See, also, Lord Kenyon in *R.* v. *Topham* (1791), 4 T. R. 129; *Day* v. *Bream* (1837), 2 Moo. & Rob. 55; Lord Kenyon in *R.* v. *Holt* (1793), 5 T. R. 444; *Emmens* v. *Pottle* (1885), C. A., 16 Q. B. D. 354; 55 L. J. Q. B. 51; 34 W. R. 116; 53 L. T. 808; 50 J. P. 228; 2 T. L. R. 115; 1 C. & E. 553; *R.* v. *Lord Abingdon* (1794), 1 Esp. 228; and the ruling of Abbot, C. J., in *R.* v. *Harvey et al.* (1823), 2 B. & C. 257. These cases qualify the whole statement of Bayley, J., *supra,* and not merely that as to the sale of a libel.

(10) *Per* Wood, B., in *Maloney* v. *Bartley* (1812), 3 Camp. 213.

over to scandalize the party. So that the mere delivering over or parting with the libel, with that intent, is deemed a publishing. It is an uttering of the libel, and that . . is the sense in which the word publishing is used in law. Though in common parlance that word may be confined in its meaning to making the contents known to the public, yet its meaning is not so limited in law. The making of it known to an individual only is indisputably, in law, publishing. (1) Publication is nothing more than the doing the last act for the accomplishment of the mischief intended by it. The moment a man delivers a libel from his hands, his control over it is gone; he has shot his arrow, and it does not depend upon him whether it hits the mark or not. There is an end of the *locus pœnitentiæ;* his offence is complete; all that depends upon him is consummated; and from that moment, upon every principle of common sense, he is liable to be called upon to answer for his act. (2)

Different modes of publication.—A person may publish a libel and so expose himself to a criminal prosecution, by reading, shewing, or sending it, or causing it to be read, shewn, or sent, to the person defamed, or to any other person; or by retaining it in his possession and making its contents known in any way to such persons; or by requesting or procuring any other person to write or publish the libel. (3) In the first of the cases just mentioned (4) it appeared that the defendant told the editor of a paper the story on which the libel was based, and asked him to "shew up" the prosecutor; that the editor told the story to the reporter, who wrote and published it substantially as related by the defendant, but with comments; and that after the article appeared the defendant approved of it. The court refused a rule for a new trial after a conviction, and held that the defendant was properly convicted of publishing, and causing and procuring the libel to be published. In *Parkes* v. *Prescott et al.* (*supra*), the majority of the court held, that when a man requests another to publish defamatory matter of which, for the purpose, he gives him a statement, whether in full or in outline, and the agent publishes the sense and substance of it, although to some extent in his own language, the person making the request is as liable to an action as the publisher.

(1) *Per* Holroyd, J., in *R.* v. *Burdett* (1820), 4 B. & Ald., at p. 143. See, on the same point, as to publishing a slander: *Griffiths* v. *Lewis* (1845), 7 Q. B. 61; 14 L. J. Q. B. 197; 9 Jur. 370; 8 Q. B. 841; 15 L. J. Q. B. 249; 10 Jur. 711.

(2) *Per* Best, J., in *R.* v. *Burdett* (1820), 4 B. & Ald. 126.

(3) *Reg.* v. *Cooper* (1846), 8 Q. B. 533; 15 L. J. Q. B. (N.S.) 206; *Parkes* v. *Prescott et al.* (1869), L. R. 4 Ex. 169; 38 L. J. Ex. 105.

(4) *Reg.* v. *Cooper, supra.*

Civil and criminal liability for agent's acts distinguished.—Byles, J., one of the dissenting judges, distinguished *Reg.* v. *Cooper* (*supra*), on the ground that it was a criminal case, and that the defendant approved of the article after it was published. "That case," he said, "was . . an indictment for libel; and there is a great distinction between the authority which will make a man liable criminally, and the authority which will make him liable civilly. A principal is not criminally liable for the acts of his agents unless the agent's authority be by the agent duly pursued; but the principal may be civilly liable though the agent have deviated very widely from his authority, or, as Lord Bacon puts it, (5) lawful authority is to receive a strict interpretation, unlawful authority a wide and extended interpretation. Reading the case of *Reg.* v. *Cooper* with the light of this distinction between civil and criminal proceedings, which distinction is clear law and sound sense, it may well be that when a defendant tells the editor of a newspaper, as he did in that case, to "shew another up," and the editor does so in gross terms, unauthorized and not intended by the defendant, the latter may, nevertheless, be criminally liable, though he might not be civilly liable." It has been pointed out (6), that, in the reports of the judgment of Byles, J., in *Parkes* v. *Prescott et al.*, the words "civilly" and "criminally" are evidently misplaced: what the learned judge said, or meant to say, was as above stated, otherwise the distinction drawn by the learned judge is not law.

Publication through negligence.—It is said, also, that there may be publication through negligence, as where the author of a libel, who does not intend to publish it, keeps it so negligently that the contents become public to the detriment of another's reputation. (7) The same text writer refers with approval to the observation of a great authority (Holt, C.J.), that when a libel is produced, written in a man's own hand, he is taken in the *mainer*, and this throws the proof upon him; and if he cannot produce the composer, the verdict will be against him. (8) "If a man write libels for his own perusal, he must be content to enjoy the satisfaction, diminished by the risk and peril, of an *accidental publication* and its consequences."

(5) Bacon's Maxims, 16.
(6) Folkard's S. & L., 6th ed., p. 456, *note* (*m*).
(7) Folkard's S. & L., 5th ed., p. 345, where Buller's Nisi Prius, p. 95, and *Duncan* v. *Thwaites* (1824), 3 B. & C. 584, are referred to.
(8) Folkard's S. & L., 7th ed., p. 265, citing Holt, C.J., in *R.* v. *Beere* (1699), 12 Mod. 221; 1 Lord Raym, 417, and *Mullett* v. *Hulton* (1803), 4 Esp. 248.

Publication authorized by press interview.—"Speaking for publication" in a newspaper may also entail liability. The defendant, a defeated candidate in a parliamentary election, in an interview with a newspaper reporter the day after the election, informed him that the plaintiff (who was a political opponent and an active party worker) had asked defendant, as soon as it was known that he was in the field, to endorse a note for $1,000, which he refused to do, and that, in a speech later on, plaintiff had accused defendant of disloyalty. This was the libel complained of. The innuendo alleged was, that the plaintiff had offered his services and support as a bribe, and had corruptly offered to desert his party and abandon his principles and support the defendant at the election, if he would endorse his note; that his opposition to the defendant's candidature was not due to principle or party loyalty, but to the defendant's refusal to endorse the note; and that because of such refusal the plaintiff not only opposed his candidature, but attacked him personally and accused him of disloyalty. The interview was published, and, when the defendant called next day at the newspaper office, the only thing he found fault with in the report was the omission of a few words in the introductory part. A nonsuit was moved for, but the case was allowed to go to the jury, who found a verdict in favour of the plaintiff. Upon appeal to the Court of Appeal, it was held, that there was evidence that the defendant knew he was speaking for publication; that he authorized what he said to be published in a newspaper; that the communication was not privileged; but that the words were not capable of the meaning ascribed to them by the plaintiff, and (referring to the *Capital and Counties Bank, Ltd.* v. *Henty & Sons* (1882), 7 App. Cas. 741) that the motion for a nonsuit at the close of the case should have been allowed. (9)

Where in an action in the province of Quebec, a person who was interested objected, by means of a notarial protest, to a member of a municipal council taking part in a discussion or vote on the ground that such member had received favours from the party maintaining the opposite interest and would be susceptible of partiality in his favour, it was held, that this was not a publication of the matter contained in the protest; that it was really the exercise of a right, and, in the absence of proof of a fraudulent or malicious intention to cause injury, did not give rise to a recourse in damages for defamation. (10)

(9) *Hay* v. *Bingham* (1905), 11 O. L. R. 148.
(10) *Montreal Brewing Co.* v. *Vallières* (1906), 15 Q. O. R. (K.B.) 201.

A declaration in a New Brunswick case alleged that the defendant, a merchant, falsely and maliciously published a letter charging the plaintiff with theft and threatening to expose him; that this letter was dictated by the defendant to his stenographer, who extended the notes and transcribed the same by a typewriter, and that the transcribed copy was signed by the defendant and sent to the plaintiff. The defendant pleaded absence of malice, and that the letter was drafted by him and given to his typewriter to be copied; that the typewriter was his confidential clerk, who was accustomed to deal with letters of a confidential nature, and that the typewriting of the letter in question was done in the performance of her duty as such confidential clerk; that no person, except the defendant and the typewriter, saw the letter, the contents of which were not disclosed to any person other than the plaintiff. These pleas, it was held, admitted a publication, and did not shew that the occasion was privileged, and, if proved, would not be an answer to the *prima facie* cause of action alleged in the declaration, and were bad on demurrer. (1) It was subsequently held, that the writing of such defamatory statements did not fall within the ordinary business of a merchant, and that the giving of the letter containing the statements to the defendant's clerk to copy was a publication. (2)

Presumptive criminal responsibility of newspaper proprietor. — The presumptive criminal responsibility of a newspaper proprietor for the publication of a libel, by his servants or agents, was the same as his civil responsibility until the adoption in this country of Lord Campbell's Libel Act. (3). Prior to that time the proprietor of a newspaper, which contained a personal libel, was treated as a criminal, though he had not himself committed the criminal act, nor procured or incited another to commit it, nor aided in its commission, nor knew that it was about to be committed. (4) The practical effect of section 7 of Lord Campbell's Act, as shewn by the decisions upon it, is to free from criminal responsibility for a libel every one presumptively responsible for the publication who was not personally engaged in publishing it, and not consciously, or by criminal negligence, a party to its publication. (5) In *Reg.* v. *Holbrook*, (6) in which it was for the first time contended that

(1) *Moran* v. *O'Regan* (1907), 38 N. B. R. 189.
(2) *Ibid.* (1908), 399. See, also, *Puterbaugh* v. *The Gold Medal Furniture Manufacturing Co.* (1902), 1 O. W. R. 250; (1903), 5 O. L. R. 680; (1904), 7 O. L. R. 582; *Pullman* v. *Hill & Co.* (1891), 1 Q. B. 524.
(3) 6-7 Vict., c. 96, s. 7, passed 24th August, 1843.
(4) *Per* Lush, J., in *R.* v. *Holbrook* (1878), L. R. 4 Q. B. D. 42, at p. 49.
(5) Fisher & Strahan's Law of the Press, 2nd ed., p. 234.
(6) (1878), L. R. 4 Q. B. D. 42.

the presumption arising from publication by servants or agents was rebutted, the English Queen's Bench Division (Cockburn, C.J. and Lush, J., Mellor, J., *diss.*) held that, since Lord Campbell's Act, the proprietor of a newspaper is not criminally responsible for a libel published in it if he has given no authority, express or implied, for the publication; and that employing an editor with general authority to conduct the paper, and leaving it to his discretion what should appear in it, did not *per se* amount to evidence of consent or authority for the publication of the libel. Section 7 of Lord Campbell's Act, under which this decision was given, is embodied in section 329 of the Code, but in an amended form (taken from the draft Imperial Code, 1879), which is still more favourable to the newspaper proprietor. For further comments see chapter viii. on "The Criminal Responsibility of Newspaper Proprietors."

Publication summarized.—It seems to be perfectly clear that every person who maliciously lends his aid to the construction of a libel, subsequently published, or who contributes to the publication of one already made, with a knowledge of its contents, is indictable as a principal for the whole mischief produced. And, according to the doctrine laid down in *Lamb's Case,* (7) when a libel has been published, proof that the defendant committed it to writing, or, by parity of reasoning, did any other act contributing to its existence, as, for instance, dictating it, (8) is great evidence that he published it, unless he can satisfactorily explain the motive of his act. (9)

The doctrine of criminal responsibility.—In *Lamb's Case* here referred to, in which the doctrine and principle of criminal responsibility for libel is set forth, it is stated, that every one who shall be convicted of libel either ought to be a contriver of the libel, or a procurer of the contriving of it; or a malicious publisher of it, knowing it to be a libel. For, if one reads a libel, that is no publication of it; or if he hears it, it is no publication of it, for before he reads or hears it, he cannot know it to be a libel; or if he hears or reads it and laughs at it, it is no publication of it. But, if after he has read or heard it, he repeats it, or any part of it, in the hearing of others, or after that he knows it to be a libel, he reads it to others, that is an unlawful publication of it. Or, if he writes a copy of it and does not publish it to others, it is no publication of the libel; for every one who shall

(7) (1610), 9 Rep. 59; 15 Vin. Abr. 91; Mod. 813.
(8) *Reg.* v. *Cooper. supra.*
(9) Folkard's S. & L., 5th ed., 816.

be convicted ought to be a contriver, procurer, or publisher of it, knowing it to be a libel.

Defendant must be proprietor of newspaper at time of publication.—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 with a jury, "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 being the proprietor or publisher at the date of the libel, and it will be your duty to acquit the defendant for that reason." (10)

Admissions as proof of publication. — Publication may be proved by the admission of the defendant, but an admission of writing the alleged libel is no evidence of publishing it. Nor is an admission that the defendant was the editor of a periodical, at a certain date, evidence to connect him with the publication of a libel in the same periodical subsequently to that date. (1) Merely *prima facie* evidence of publication is not satisfactory, and will not be accepted, where conclusive evidence is easily obtainable. (2) Nor will the court in any case accept less evidence than would warrant a grand jury in finding a bill. (3)

Comparison of handwriting.—When the libel is in manuscript and the writing is disputed, it may be compared with genuine handwriting of the defendant. Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by witnesses; and such 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. (4) For this purpose, and in fact for the proof of handwriting generally, evidence may be given of persons who have seen the defendant write, or who have

(10) *Reg.* v. *Sellars* (1883), 6 L. N. 197.
(1) *Macleod* v. *Wakley* (1828), 3 C. & P. 311; *The Seven Bishops' Case* (1783-84), 21 How. St. Tr. 847.
(2) *Reg.* v. *Baldwin* (1838), 8 A. & E. 168.
(3) *Rex* v. *Willett* (1795), 6 T. R. 294; *Ex parte Williams* (1841), 5 Jur. 1133.
(4) R. S. C. 1906, c. 145, s. 8.

become acquainted with his handwriting by seeing or receiving letters or papers which have purported to be written by him, the authenticity of which has not been disputed. Comparison evidence may also be given by experts as well as by persons who have a personal knowledge of the defendant's handwriting. A rule *nisi* for a criminal information has been made absolute on the affidavit of an expert who had compared the handwriting of an authentic paper with the writing in question. (5) If the libel is lost, secondary evidence may be given to connect the defendant with its publication. (6) Or the witness, having received from the defendant another piece of writing subsequently to the writing in question received previously, and which was lost, may, speaking from memory, compare the one with the other. (7) Where there is no direct evidence to shew publication by the accused, proof of the libels charged being in his handwriting, and that the libels had in fact been published, would justify the jury in finding that they had been published by the accused. (8) As to evidence of ill will by the person accused towards the person libelled, and evidence by expert witnesses of a comparison of anonymous libellous letters with the genuine handwriting of the accused, including an alleged similarity of expressions in both writings, for the purpose of proving publication, see *Rex* v. *Law* (*supra*), 475. The admission, even without objection, of criminal or improper acts on the part of the accused against the father of the person libelled, for the purpose of shewing motive for the writing and publishing of the libels charged, where such evidence was given before any attempt was made to connect the accused with the publication of the libels, is improper. It does not come within the rule in criminal cases as to proving motive by proof of acts similar to that charged in the indictment, and the jury should be told to disregard such evidence. (9)

Proof of publication of newspaper.—There is no provision in the Code, as there is in England under The Newspaper Libel and Registration Act, 1881, (10) in Manitoba under The Newspaper Act, (1) and in Quebec, (2) for the proof of the publication of a

(5) *Reg* v. *Waters*, referred to in Shortt's Law of Literature, 2nd ed., p. 604.
(6) *Gathercole* v. *Miall* (1846), 15 M. & W. 319.
(7) *Vye* v. *Alexander* (1889), 16 S. C. R. 501.
(8) *Per* Richards, J.A., in *Rex* v. *Law* (1909), 12 W. L. R., at p. 477, and *per* Perdue, J.A., at pp. 480-81, citing *Reg.* v. *Lovett*, 9 C. & P. 462; *Rex* v. *Beere*, 1 Ld. Raym. 414; *Lamb's Case*, 9 Co. Rep. 59.
(9) *Rex* v. *Law*, *supra*.
(10) 44-45 Vict. c. 60 (Imp.)
(1) R. S. M. 1902. c. 123.
(2) R. S. Q. 1888. Articles 2924-2938.

newspaper. The evidence usually given is that of a witness who has purchased a copy of the paper at the office of publication, and has had it marked for identification at the trial. "I have always understood," said Lord Mansfield, (3) "and take it to be clearly settled, that evidence of a public sale, or public exposal for sale, in the shop, by the servant or anybody in the house or shop, is sufficient evidence to convict the master of the house or shop, though there was no privity or concurrence in him, unless he proves the contrary, or that there was some trick or collusion." A new trial was moved for in that case on the ground that a master was not criminally responsible for the conduct of his servant where his privity was not proved; but the rule was refused. The old rule of law on this point was, however, very much modified by Lord Campbell's Libel Act, (4) and is still more modified by the Code. (5) The affidavit of an accomplice has sometimes been admitted to prove publication. (6) And where the evidence of publication has proved insufficient, the court discharged a rule granted on the strength of it, although the defendant's affidavit in opposition to the rule admitted publication. (7)

For additional cases and comments on the law of publication, see chapters on "Publication," and "Publication in Newspapers," in "King's Law of Defamation."

(3) In *Rex* v. *Almon* (1770), 20 How. St. Tr. 838.
(4) 6-7 Vict., c. 96, s. 7.
(5) See SS. 329 and 330 as to the criminal responsibility of the proprietor of a newspaper, and of the seller of a libel contained in any book, magazine, etc., and the comments thereon in the text.
(6) *Rex* v. *Haswell et al.* (1780), 1 Doug. 387. See, also, *Rex* v. *Steward et al.* (1831), 2 B. & Ad. 12.
(7) *Reg.* v. *Baldwin* (1838), 8 A. & E. 168.

CHAPTER XXIII.

Preferring the Indictment.

Modes of preferring the indictment.—The modes of preferring an indictment for libel are regulated by sections 871-873, inclusive.

By any one bound over to prosecute.—Any one who is bound over to prosecute any person, whether committed for trial or not, may prefer a bill of indictment for the charge on which the accused has been committed, or in respect of which the prosecutor is so bound over, or for any charge founded upon the facts or evidence disclosed on the depositions taken before the justice. (1)

By the Crown counsel.—The counsel acting on behalf of the Crown, at any court of criminal jurisdiction, may prefer, against any person who has been committed for trial at such court, a bill of indictment for the charge on which the accused has been so committed, or for any charge founded on the facts or evidence disclosed in the depositions taken before the justice. (2)

By the Attorney-General or Judge.—The Attorney-General, or any one by his direction, or any one with the written consent of a judge of any court of criminal jurisdiction, or of the Attorney-General, may prefer a bill of indictment for any offence before the grand jury of any court specified in such consent. (3)

By order of the court.—Any person may prefer any bill of indictment before any court of criminal jurisdiction by order of such court. (4)

Except as in this Part previously provided, no bill of indictment shall be preferred in any province of Canada. (5)

These sections extend to all indictable offences the provisions of a former criminal procedure Act, (6) which applied only to certain named offences, defamatory libel included. (7) As applied to defamatory libel the section *infra* of our former criminal

(1) S. 871 (1).
(2) S. 872.
(3) S. 873 (1).
(4) *Ibid.* (2).
(5) *Ibid.* (4). In the provinces of Alberta and Saskatchewan a bill of indictment before a grand jury is dispensed with, and a formal charge in writing substituted. See page 246, *post*, for the enactment.
(6) R. S. C. 1886, c. 174, s. 140.
(7) See *Reg.* v. *Patterson* (1895), 2 C. C. C. 339, at p. 344.

procedure Act was first adopted in England in the Newspaper Libel and Registration Act, 1881. (8) This section, although only part of an Act, was usually described as the "Vexatious Indictments Act," a name given to certain Acts in England, (9) which are there only applicable to certain specified offences. It provided that no bill should be laid before a grand jury unless some one of certain preliminary requirements had been complied with. These requirements were the following: 1st, the prosecutor had to be bound over to prosecute the offence, or to give evidence before the party accused; 2nd, or the accused must have been committed to or detained in custody, or have been bound over to appear and answer to the charge; 3rd, or the indictment must have been preferred by the direction of the Attorney-General of the province, or by the direction, or with the consent, of the proper court or judge. In the case, therefore, of a person sought to be indicted for libel, some one of these requirements or conditions had to be fulfilled. If it was not, he could not be indicted at all. A compliance with any one of the requirements was sufficient, but one of these at least was necessary.

Effect of sections 871-873.—The effect of these enactments as to preferring an indictment, which embody the above section of a former procedure Act (10) is, that all criminal proceedings for libel, except proceedings by criminal information, or on the fiat or consent of the Attorney-General, the order or consent of a judge, the facts disclosed in the depositions, or the order of counsel acting on behalf of the Crown, must be initiated before a justice of the peace, by a complaint under oath by the prosecutor before the justice. In fact a complaint before a justice may be said to be the invariable mode of commencing such proceedings. There is, we believe, no case on record in this country, since the passage of the Vexatious Indictments Act, except proceedings by criminal information, in which any other mode of initiating a criminal prosecution for libel has been adopted. The circumstances would be extraordinary which would warrant any other method, having regard to the quasi-criminal character of such a prosecution, and the right at all times to a civil action for damages.

The procedure to trial.—Assuming that a complaint has been laid before a justice, evidence both for the prosecution and the defence may there be taken in the presence of the accused, (1) and the justice may either dismiss the complaint, (2) or commit

(8) 44-45 Vict., c. 60, s. 6 (Imp.).
(9) 22-23 Vict., c. 17, and certain other Acts.
(10) R. S. C. 1886, c. 174, s. 140.
(1) SS. 682, 686.
(2) S. 687.

the accused for trial to the assizes where alone he can be tried. (3) If the justice dismisses the complaint and refuses to commit or to bail the person accused, he is bound, if required to do so by the prosecutor, to take the prosecutor's recognizance to prosecute the charge before the grand jury. (4) The prosecutor must then either proceed with the prosecution or have his recognizances forfeited, as it would defeat the object of the statute, if he were allowed to have his recognizances discharged, or, in other words, to be freed from his liability to prosecute. (5) Where the prosecutor persists in his prosecution he may be required to give security for costs, and, in the event of the failure of the prosecution, may be compelled to pay the costs of both the preliminary and subsequent proceedings. (6) If the accused is not discharged, but is sent for trial to the assizes, a bill of indictment is there prepared and laid by the prosecutor's counsel before the grand jury. That body hear only the evidence for the prosecution—the accused person not being represented before them—(7) and if they are satisfied with it, they find a true bill; if not, no bill. The grand jury is composed of men chosen from the "body of the county," and, in any province (as, *e.g.*, in Ontario) in which the grand jury is composed of not more than thirteen persons, seven of them must be agreed before a true bill can be found. (8) Where, in any of the other provinces, the grand jury panel is composed of twenty-three persons, (9) twelve must concur in finding a hill. (10) If the grand jury return the bill into court marked "no bill," that ends the prosecution, unless on the fiat or consent of the Attorney-General, or the consent or order of a judge, the bill is laid again before the grand jury. (1) If, however, a true bill is found, the case then comes on for trial before a petit jury of twelve "good men and true" in the assize court. The defendant may there make full answer and defence in person, or by counsel, to the charge, (2) and the jury decide the whole question of libel or no libel, on the evidence offered by both the prosecution and the defence.

(3) SS. 690, 583 (*b*), (*g*).
(4) S. 688. *Reg.* v. *Lord Mayor* (1886), 16 Cox. C. C. 77; *Ex parte Wason* (1869), 38 L. J. Q. B. 302.
(5) *Reg.* v. *Hargraves* (1861), 2 F. & F. 790.
(6) S. 689.
(7) SS. 875-877.
(8) S. 921 (2).
(9) Of the twenty-four properly qualified persons summoned for the grand jury panel, one is not sworn, in order to prevent an equal division of opinion upon any bill laid before them.
(10) See chapter on "The Indictment."
(1) S. 873 (1) (2).
(2) S. 942.

Protection of accused under present law.—The result as a whole of this procedure, which secures a triple investigation of the matter, is to throw a greater protection than formerly around any person charged with this offence. Prior to the change in the law requiring an investigation before a justice of the peace, the proceedings might have been commenced before the grand jury in the first instance. Any person was then at liberty to prefer a bill of indictment for libel against another, before the grand jury, without any previous inquiry before a justice of the peace into the truth of the accusation. This right was liable to abuse, because as the accused is unrepresented before the grand jury, it frequently happened that a person, wholly innocent of the charge laid against him and who had no notice that any proceedings were about to be instituted, found that a grand jury had been induced to find a true bill against him, and so to injure his character, and put him to expense and inconvenience in defending himself against a groundless accusation. It was to remedy this old state of the law, in libel and other prosecutions, that the procedure in the Code was extended to all indictable offences.

Indictment preferred by Crown counsel.—Not unfrequently a justice does not commit for all the offences covered by the evidence taken before him on the preliminary inquiry, and on which, subsequently to the committal, it is deemed advisable to prosecute the accused. Moreover, under the strict interpretation of the former law, the prosecutor had no power to lay an indictment except by the written consent of a judge, unless he had taken the precaution at the preliminary hearing of being bound over to prosecute, the prosecutor, in the majority of cases, not being asked by the justice to submit himself to be bound over. (3) Hence the provision in sections 871 (1) and 872 (*supra*) permitting an indictment to be preferred for any charge founded upon the facts or evidence disclosed in the depositions taken before the justice, by any one who is bound over to prosecute any person, whether committed for trial or not, or by counsel acting on behalf of the Crown, at any court of criminal jurisdiction, with respect to any person who has been committed for trial at such court. (4)

An indictment may be valid as being founded on the evidence disclosed in "the depositions taken before the justice," although the preliminary inquiry was held jointly, in respect of the party indicted and of two others separately charged with the same offence, and the depositions were taken in respect of all of them

(3) See Canadian *Hansard*, 1900, p. 5260.
(4) SS. 871, 872.

in the one proceeding. (5) But where the depositions have not been taken according to law, and a material provision of the statute has not been complied with, the indictment may be quashed under section 871, upon motion at any time before the accused is given in charge to the jury. (6) The depositions cannot be read to a grand jury in any case in which they cannot be used as evidence before a petit jury. (7) Where it is intended to prefer an indictment under the circumstances mentioned in sections 871 and 872, it should be done as soon as possible after the commencement of the sittings of the court at which the bill is to be laid before the grand jury, and notice of the intention to do so should be given to the accused, his solicitor or counsel.

Indictment preferred by Attorney-General.—The expression "Attorney-General," in sub-section 1 of the above section (873), means the Attorney-General or Solicitor-General of any province in Canada in which the proceedings are taken, and with respect to the North-West Territories and the Yukon Territory, it means the Attorney-General of Canada. (8) It has been held in Nova Scotia (*per* Weatherbe, J., Graham, E.J., and Henry, J.), that the preferring of an indictment by an agent of the Attorney-General, acting under a general appointment to attend to all criminal cases at a session of the court, without having obtained the special direction of the Attorney-General, or an order or consent under section 873, is not a compliance with this section, which requires the indictment to be preferred by the person bound over by recognizance to prefer the same; and if the latter fails to appear, the indictment should be quashed. In the same case, however, McDonald, C.J., and Ritchie and Townsend, JJ., were of opinion that a party bound over by recognizance to prosecute need not personally attend at the sittings of the court to prefer an indictment before the grand jury unless required to give evidence, and that an indictment found in his absence is valid, although no order of the court, judge's consent, or special direction of the Attorney-General, was given to prefer the same. Ritchie, J., was further of opinion, that the Crown prosecutor, or counsel appointed for the sittings of the court, sufficiently represents a prosecutor so bound over, to validate the preferring of the indictment by such officer, and the same is to be considered as preferred on behalf of the prosecutor. (9) When the preferring of an indictment is authorised solely on the ground that a direction of the

(5) *Reg.* v. *Skelton* (1898), 4 C. C. C. 467.
(6) *Reg.* v. *Lepine* (1900), 4 C. C. C. 145.
(7) *Per* Wurtele, J., in *Rex* v. *Belanger* (1902), 6 C. C. C. 295.
(8) S. 2 (2).
(9) *Reg.* v. *Hamilton* (1898), 30 N. S. R. 322; 2 C. C. C. 178.

Attorney-General, under section 871 (1), has been given therefor, the written consent or direction must be one with regard to the particular case, and the offence must be specified therein; and a general direction in writing by the Attorney-General, authorizing counsel to take charge of the criminal prosecutions for the Crown at the sittings of the court, will not suffice. (10) Usually, however, it is not necessary to produce and prove the Attorney-General's fiat for the presentment of an indictment under the Vexatious Indictments Act, (1) or to aver in the indictment that the conditions of the Act have been fulfilled. (2) If an indictment for an offence within the Vexatious Indictments Act is preferred without the conditions of the Act having been complied with, with respect to any count of that indictment, such count will be quashed on application. (3) These three last cited decisions will, of course, apply to the modes of preferring an indictment mentioned in the first paragraph of this chapter.

Indictment preferred by order of court or judge.—Under this section (873) as it stood originally, the prosecutor could not prefer an indictment, except by the written consent of a judge, or by order of the court, unless he was bound over to prosecute, and, as this was sometimes overlooked or neglected, the section was amended as stated in sub-section 1. (4) An endorsement made and signed by the judge upon an indictment by which he "directs" that the indictment be submitted to the grand jury, is a sufficient "consent of a judge" to the preferring of the indictment. (5) The order or consent must be put in writing before the indictment is brought in, and it cannot be afterwards made *nunc pro tunc*. (6) It is not necessary to state the consent or order referred to in section 873, sub-sections 1 and 2, in the indictment, (7) nor to prove them at the trial. (8) An objection to an indictment for want of such consent or order must be taken by motion to quash the indictment before the accused person is given in charge. (9) But the accused, against whom an indictment is pre-

(10) *Reg.* v. *Townsend* (1896), 3 C. C. C. 29. See also, *Reg.* v. *Abrahams* (1881), 6 S. C. R. 10; *Reg.* v. *Ford* (1888), 14 Q. L. R. 231.
(1) *Reg.* v. *Dexter* (1899), 19 Cox C. C. 360.
(2) *Reg.* v. *Knowlden*, *infra*.
(3) *Reg.* v. *Fuidge* (1864), L. & C. 390; 9 Cox C. C. 430; 33 L. J. M. C. 74; 10 Jur. (N.S.), 160; 9 L. T. 772; 12 W. R. 351.
(4) See Canadian *Hansard*, 1900, p. 5269.
(5) *Reg.* v. *Weir* (No. 2) (1900), 3 C. C. C. 155.
(6) *Rex* v. *Beckwith* (1903), 7 C. C. C. 450.
(7) S. 873 (3).
(8) *Reg.* v. *Knowlden* (1864), 5 B. & S. 532; 33 L. J. M. C. 219; 10 Jur. (N.S.) 1177; 10 L. T. 691; 12 W. R. 957; 9 Cox C. C. 483; *R.* v. *Boaler* (1888), 16 Cox C. C. 488; 57 L. J. M. C. 85; 59 L. T. 554; 52 J. P. 791; 21 Q. B. D. 284.
(9) S. 873 (3).

ferred by the consent of a judge, is not entitled to have the indictment quashed by reason of the fact that a preliminary inquiry, in regard to the same offence, was at the same time pending before a justice of the peace upon which the justice had not given his decision for or against committal for trial. (10) The fact that the two justices, before whom the preliminary investigation was held, signed a declaration that they were unable to agree, is no ground for a superior court making an order that an indictment be preferred against a person accused of an offence. In such a case the prosecutor should be left to his recourse to an application to the Attorney-General, who can either prefer an indictment himself, or direct one to be preferred. (1) And it is for the Attorney-General, as a part of his executive functions, and not for the court, to say whether the Crown should assume the expenses incidental to a prosecution. (2) When the indictment is preferred by the order of a judge, he must decide what materials ought to be before him on the application, and it is not necessary to summon the party accused, or to bring him before the judge; the court will not interfere with the exercise of the judge's discretion under this section. (3)

Indictment preferred by private prosecutor.—A prosecutor bound over at his own request to prefer an indictment, after the discharge of the accused on a preliminary inquiry, is only permitted to appear by counsel before the grand jury when the practice of the court so authorizes. The practice in the district of Montreal requires a formal application to the court for permission, in which event the accused may at the same time apply for security for costs. (4) Where counsel for the private prosecutor prepared an indictment and had it signed by the clerk of the Crown, and, without leave of the court or notice to the Crown prosecutor, preferred the indictment and examined witnesses before the grand jury, a true bill returned thereon will not necessarily be quashed; but security for costs will be ordered on the defendant's application, in like manner as may be done under section 689 (2) of the Code upon the prosecutor's application for leave. (5)

Indictments preferred by non-trading corporations.—Indictments may be preferred at the instance of corporations, whether

(10) *Reg.* v. *Weir* (No. 2) (1900), 3 C. C. C. 155.
(1) *Ex parte Hanning* (1896), 5 Q. O. R. (Q.B.) 549.
(2) *Ibid.*
(3) *Reg.* v. *Bray* (1862), 3 B. & S. 255; 32 L. J. M. C. 11; 9 Cox C. C. 215.
(4) *The King* v. *Hoo Yoke* (1905), 10 C. C. C. 211.
(5) *Ibid.*

they be trading or non-trading corporations. Where a non-trading corporation has been created under the Benevolent Societies Act of British Columbia, (6) and has the right to acquire property which may be the source of income or revenue, the transaction of the business incidental thereto creates a reputation, rights and interests similar to those of an individual or a trading corporation, and must have the same protection and immunities, and be given the same remedies, in case of injury, as a trading corporation. And so may prefer an indictment for libel.

In the opinion of Morrison, J., who thus held maintainable an action for libel by a non-trading corporation, no differentiation is drawn in the cases (7) between trading and non-trading corporations. "Counsel for the defence would have the principle enunciated in those cases confined to instances where the corporation was injured in the way of its business or trade, using the words synonymously. But I do not read into those learned judgments that limitation. For a trading corporation may be injured as to its property without being injured as to its trade and *vice versa*. True, if a trading corporation is injured in the way of its business, in the sense that its profit dividend making power is crippled, it may maintain an action, but the cases do not go further and say that, in the case of injury to property, a remedy lies only in favour of a trading corporation, and that other corporations are precluded from maintaining an action for libel unless they prove special damage. . . The same principle applies to both, and what clearer authority could be cited for that proposition than the case of *South Hetton Coal Company* v. *North-Eastern News Association*, above referred to, which settles the law that an action for libel will lie at the instance of a corporation for a libel tending to injure its reputation in the way of its business without proof of special damage. It affirms the principle that a corporation is in no respect on a different footing from an individual as to its right to sue for a wrong against it." The learned judge distinguished the other cases relied on by the defendants. (8)

Special provision for Alberta and Saskatchewan.—In the provinces of Alberta and Saskatchewan, it shall not be necessary to

(6) R. S. B. C. 1897, c. 13.
(7) Namely, *South Hetton Coal Company* v. *North Eastern News Association* (1894), 1 Q. B. (C.A.) 133; 63 L. J. Q. B. 293; *Mayor, &c., of Manchester* v. *Williams* (1890), 60 L. J. Q. B. 23; *White* v. *Mellin* (1895), 64 L. J. Ch. (H.L.) 308; *Cox* v. *Feeney* (1863), 4 F. & F. 13.
(8) *Chinese Empire Reform Association* v. *Chinese Daily Newspaper Publishing Co. et al.* (1907), 13 B. C. R. 141.

prefer any bill of indictment before a grand jury, but it shall be sufficient that the trial of any person charged with a criminal offence shall be commenced by a formal charge in writing setting forth as an indictment the offence with which he is charged. (9)

Such charge may be preferred by the Attorney-General, or an agent of the Attorney-General, or by any person with the written consent of the judge of the court or of the Attorney-General, or an order of the court. (10)

Opinion of provincial court and Supreme Court of Canada as to above provision.—After the conviction of the accused on a charge preferred against him by the agent of the Attorney-General, the Deputy Attorney-General, who appeared in person, without obtaining the leave of the judge or a direction from the Attorney-General, no preliminary hearing having been held, preferred a further charge signed by himself against the accused, on which after trial he was convicted. Objection was taken that the Deputy Attorney-General had no authority to prefer such charge without leave of the judge or direction of the Attorney-General, and also on the ground that there had been no preliminary hearing. Upon a case stated by the presiding judge, the court (Wetmore, C.J., Prendergast, Newlands, and Johnstone, JJ.), held (Johnstone, J., *diss.*), that the Deputy Attorney-General is not an agent of the Attorney-General within the meaning of the term as used in the Code, and is not, therefore, authorized to prefer a charge as agent of the Attorney-General; that while by the general Interpretation Act (R. S. C. 1906, c. 1, s. 31) it is provided, that words directing or empowering a Minister of the Crown to do any act or thing includes the lawful deputy of such Minister, such provision is controlled by the special interpretation sections of the Code, and as the deputy is not referred to therein, it must be held, that the deputy of the Attorney-General is not by reason of his office authorized to prefer a charge under the provisions of said section 873 (*a*); and that the Deputy Attorney-General not being an agent of the Attorney-General under those provisions, and so authorized to prefer a charge which was not preferred with the leave or by the order of the court, the conviction of the accused must be quashed. Newlands and Prendergast, JJ., were further of opinion that, as section 873 does not apply in Saskatchewan, no charge in lieu of an indictment can be preferred

(9) S. 873 (*a*), (1), as enacted by the Criminal Code Amendment Act, 1907 (6-7 Edw. VII. c. 8).
(10) *Ibid.* (2).

in that province without a preliminary inquiry before a magistrate, and that section 873 (*a*) does not dispense with the necessity for such inquiry. (1)

Upon a reference, by the Governor-General in Council, of a number of special questions of law respecting the above section to the Supreme Court of Canada for hearing and consideration, it was held (Idington, J., *diss.*), that a preliminary inquiry before a magistrate is not necessary before a charge can be preferred under this section; and, by all the judges, that the deputy of the Attorney-General for either of the said provinces has no authority to prefer a charge thereunder without the written consent of the judge, or of the Attorney-General, or an order of the court. The opinion was expressed by several members of the court, that the answers to the questions submitted and which covered the above points, had not the effect of a legal decision, and that the court or its members would not feel bound, in any concrete case which might arise thereafter, by any expression of opinion they might give on those questions. (2)

(1) *The King* v. *Duff* (No. 2), (1909), 2 Sask. R. 388; 15 C. C. C. 454.
(2) *In re Criminal Code* (1910), 43 S. C. R. 434.

CHAPTER XXIV.

THE INDICTMENT.

Indictment defined.—The usual mode of proceeding, in cases of criminal libel, is by indictment. This is a written accusation against one or more persons of the particular libel alleged, presented upon oath, by a grand jury of twelve men competent to find the bill, where, as in most of the provinces, the panel consists of twenty-three jurors, or by a grand jury of seven, where, as in Ontario, the panel consists of thirteen jurors. (1)

Its form.—At one time all the rules of pleading with respect to a declaration, some of which were exceedingly technical, were applicable to an indictment; but these were gradually abolished by statute. The indictment now consists of little more than a simple statement of the offence, and such as good sense and a regard for justice alone would suggest. One of the most essential requisites of an indictment is, that it should be framed with certainty; there should be no doubt that what is alleged constitutes an offence, and that the statement or description of the offence is not equivocal or misleading.

Provisions as to indictments generally.—The Code contains provisions touching the form and substance of indictments generally, and also special provisions affecting indictments for libel. These have greatly simplified criminal pleading so far as indictments are concerned. The expressions "indictment" and "count," respectively, in the statute, include information and presentment as well as indictment, and also any plea, replication, or other pleading, any formal charge under section 873 (*a*), and any

(1) The change of the law in Ontario, permitting seven instead of twelve grand jurors to find a true bill, was effected by the joint action of the Dominion and provincial legislatures, in order to avoid any constitutional difficulty arising out of their separate jurisdictions. See *Reg.* v. *Cox* (1898), 31 N. S. R. 311; 2 C. C. C. 207. The Dominion legislature, by the Act 57-58 Vict., c. 57, amended the then section 662 of the Code by adding a sub-section (2), now embodied in the Code, s. 921 (2), that, notwithstanding any law, usage or custom to the contrary, seven grand jurors instead of twelve, as formerly, might find a true bill in any province where the panel of grand jurors was not more than thirteen; and that the amendment should not come into force until a day to be named by the Governor by his proclamation. The Ontario legislature, by the Act 55 Vict., c. 12, s. 2, reduced the number of grand jurors to thirteen. The Act was subsequently brought into force on January 1st, 1895. The number of grand jurors in the province of Quebec has been reduced to twelve, but seven of them, if agreed, may find a true bill, although some of those summoned fail to appear. (2)

(2) *R.* v. *Girard* (1898), 7 Q. O. R. (Q.B.) 575; 2 C. C. C. 216.

record. (3) And finding the indictment includes exhibiting an information and making a presentment. (4) It is not necessary, as it once was in some cases, for any indictment to be written on parchment. (5) The venue in the margin usually expresses the county or district in which the offence was committed and the bill found, and in which the accused is to be put upon his trial, but not necessarily each of these things. (6) And although at one time the offence had to be laid, and proved to have been committed, in the county or district within which the bill was preferred, (6*a*) it is not so now. So also it was necessary formerly, after every material allegation in the body of the indictment, to aver time and place, which was signfied by the words "then and there," the word "there" referring to the venue in the margin. But it is not now necessary to state any venue in the body of the indictment; the place named in the margin shall be the venue for all the facts stated in the body of the indictment, except where local description is necessary. (7) Neither is it necessary for the indictment to shew the presentment of the jury upon oath; (8) and any mistake in the heading shall, upon being discovered, be forthwith amended, and, whether amended or not, shall be immaterial. (9) So, also, any defects in the name and addition of the party indicted, or the omission of the statement of time at which the offence was committed, in any case where time is not of the essence of the offence, will not now vitiate an indictment. Nor will an indictment be invalidated by the omission of the formal conclusion which was formerly necessary, that the offence was against the form of the statute in such case made and provided, and against the peace of our Lord, the King, his Crown and dignity. (10)

Counts in an indictment, their form and contents.—The form and contents of the counts in an indictment have also been much simplified by the Code. Every count shall in general apply only

(3) S. 2 (16).
(4) S. 5 (*a*).
(5) S. 843.
(6) See special jurisdiction, SS. 584 *et seq.*; *Reg.* v. *Malott* (1886), 1 B. C. R., pt. 2, p. 212; *Reg.* v. *Sproule* (1886), 1 B. C. R., pt. 2, p. 219; *Re Sproule* (1886), 12 S. C. R. 140.
(6*a*) 8 Mod. 328; Digest L. L. 97.
(7) S. 844. Compare SS. 855 (*g*) and 1152, and for the statutory rule as to change of venue, see S. 884.
(8) S. 845 (1), (2).
(9) *Ibid.* (3).
(10) *Reg.* v. *Doyle* (1894), 27 N. S. R. (R. & G.) 294; 2 C. C. C. 335; *Reg.* v. *Deane* (1853), 10 U. C. Q. B. 464; *Reg.* v. *Walker* (1853), 10 U. C. Q. B. 465; *Reg.* v. *Cummings* (1858), 16 U. C. Q. B. 15; *Reg.* v. *Carson* (1864), 14 U. C. C. P. 309; 32-33 Vict., c. 29, s. 23.

to a single transaction; (1) and shall be sufficient if it contains, in substance, a statement that the accused has committed some indictable offence therein specified. (2) The statement may be made in popular language, without any technical averments, or any allegations of matter not essential to be proved; (3) and may be in the words of the enactment describing the offence, or declaring the matter charged to be an indictable offence, or in any words sufficient to give the accused notice of the offence with which he is charged. (4) Every count shall contain so much detail of the circumstances of the offence as is sufficient to give the accused reasonable information as to the act or omission to be proved against him, and to identify the transaction referred to; (5) and the absence or insufficiency of such details shall not vitiate the count. (6) The intention of the Code seems to be that the count make clear the charge by naming or specifying the offence, by identifying the transaction, and by using such language as will reasonably inform the accused of the acts or omissions relied on to establish it. Even if there should be a failure in the specified particulars to make unmistakably clear the transaction, that does not vitiate the count, as section 859 provides for such a case by authorizing a demand of particulars. (7) A count may also refer to any section or subsection of any statute creating the offence charged therein, and, in estimating the sufficiency of such count, the court shall have regard to such reference. (8).

Requisites of an indictment generally.—Some of these enactments as to the counts in an indictment, the first subsection of section 852 particularly, have been made the subject of criticism; (9) but it is noticeable that the object of the section as a whole is to simplify criminal pleading, and to put an end to those technicalities in the form and construction of indictments which so often led to failures of justice. The three parts of section 852 plainly imply that the essentials of a criminal charge of libel, for example, must appear in the indictment. In fact each count of an indictment must contain a statement of all the essential ingredients which constitute the offence charged. (10) The accused

(1) S. 853 (3).
(2) S. 852 (1).
(3) *Ibid.* (2).
(4) *Ibid.* (3).
(5) *R.* v. *Beckwith* (1903), 7 C. C. C. 450.
(6) S. 853 (1).
(7) *Per* Landry, J., in *The King* v. *Macdougall* (1909), 15 C. C. C. 466, at p. 475.
(8) S. 853 (2).
(9) See the remarks of Sir E. Taschereau, C.J., in his Criminal Code, 3rd ed. (1893), p. 675.
(10) *Reg.* v. *Weir* (No. 5), (1900), 3 C. C. C. 499.

should be able to gather from the indictment whether he is charged at the common law, or under a statute, or, if there should be several statutes applicable to the subject, under which statute he is charged. (1) If the indictment, on its face, fails to shew a substantial ingredient of the offence, the court will arrest the judgment. (2) If it charges the offence defectively the defect may be aided by verdict, but if it charges an act which is no crime, the defect cannot be so aided; (3) it is fatal, and the court is obliged to arrest the judgment, (4) because the defect cannot be remedied by amendment. (5) An indictment is sufficient in form if it contains all the allegations essential to constitute the offence, and charges, in substance, the offence created by the statute; and it is immaterial in what part of the indictment the averment is contained, or that words of equivalent import are used instead of the language of the statute. (6) Where the statutory form of indictment is not followed, but the indictment contains all the averments which the statute requires, the addition of other unnecessary averments does not invalidate the indictment, although it might not be sufficient at common law. (7)

Requisites of an indictment for libel.—Opinion of Wurtele, J.—Referring to an indictment for libel, Wurtele, J., said: (8) "An indictment is the written statement of a charge against an offender, and it must state such charge in clear and precise language. It must contain the averment of every fact or circumstance necessary to constitute the offence for which the charge is preferred, and it must shew clearly some violation of the law. The facts, circumstances and intent, which are the ingredients of the offence, must be given with certainty, and, in short, an indictment must state every element constituting the crime which it is designed to charge. Should any necessary ingredient of the offence be omitted, such omission vitiates the indictment. It is absolutely necessary that an indictment should contain a substantial statement shewing that the person accused has committed a... indictable offence, and, if any necessary ingredient of the

(1) *Per* Esten, V. C., in *Reg.* v. *Cummings* (1858), 4 U. C. L. J. (O. S.) 182, at p. 188.
(2) *Reg.* v. *Lynch* (1876), 20 L. C. Jur. 187; *Reg.* v. *Carr* (1872), 26 L. C. Jur. 61.
(3) *Reg.* v. *Waters* (1848), 1 Den. C. C. 356.
(4) *R.* v. *Mualley* (1761), 2 Burr. 1127; *R.* v. *Turner* (1830), 1 Moo. 239; *Reg.* v. *Webb* (1848), 1 Den. C. C. 338; *Reg.* v. *Carr* (1872), 26 L. C. Jur. 61.
(5) *Reg.* v. *Flynn* (1878), 18 N. B. R. 321; *Reg.* v. *Morrison* (1879), 18 N. B. R. 682; *Reg.* v. *Norton* (1886), 16 Cox C. C. 59; *Reg.* v. *James* (1871), 12 Cox C. C. 127.
(6) *Reg.* v. *Weir* (No. 1), (1899), 8 Q. O. R. (Q. B.) 521; 3 C. C. C. 102.
(7) *R.* v. *Coote* (1903), 8 C. C. C. 199.
(8) In *Reg.* v. *Cameron* (1898), 7 Q. O. R. (Q.B.) 162; 2 C. C. C. 173.

offence should be omitted, the indictment is bad; and when the defendant avails himself of the defects by demurrer or motion, the indictment must be quashed."

An indictment for libel must set out the libellous matter correctly, with all such averments and innuendoes as shall make it intelligible to the court and jury, and applicable to the person libelled, unless it sufficiently appears from the libel itself that he was the person referred to. It must charge the defendant with publishing the libel; the composing or writing of a libel, or the drawing of a libellous picture or caricature, is no offence, unless the libel be afterwards published as provided by the statute. 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. (9) But it is not necessary to allege in an indictment facts which the law will necessarily infer from the proof of other facts which *are* alleged. So that where an indictment for unlawfully writing and publishing a defamatory libel omitted to allege that the libel was published maliciously, it was held that the indictment was nevertheless good inasmuch as, upon proof of the publication of the libel, the legal inference, until rebutted by the defendant, is that it was published maliciously; and the allegation that the publication was malicious was not, therefore, a necessary averment. (10)

Unobjectionable counts in an indictment.—A count in an indictment is not objectionable, however, for charging in the alternative several different matters, acts or omissions, which are stated in the alternative in the enactment describing any indictable offence, or for declaring the matters, acts or omissions charged to be an indictable offence, or on the ground that it is double or multifarious; (1) or that it does not set out any document which may be the subject of the charge; (2) or the words used, where words used are the subject of the charge; (3) or that it does not name or describe with precision any person, place or thing. (4) So also, no count for publishing a blasphemous, seditious, obscene or defamatory libel, or for selling or exhibiting an obscene book, pamphlet, newspaper or other printed or written matter, shall be deemed insufficient on the ground that it does not set out the words

(9) S. 318.
(10) *R.* v. *Munslow* (1895), 18 Cox C. C. 112; 1 Q. B. 758; 64 L. J. M. C. 138.
(1) S. 854.
(2) S. 855 (*d*).
(3) *Ibid.* (*e*).
(4) *Ibid.* (*g*). See other venial objections in this section.

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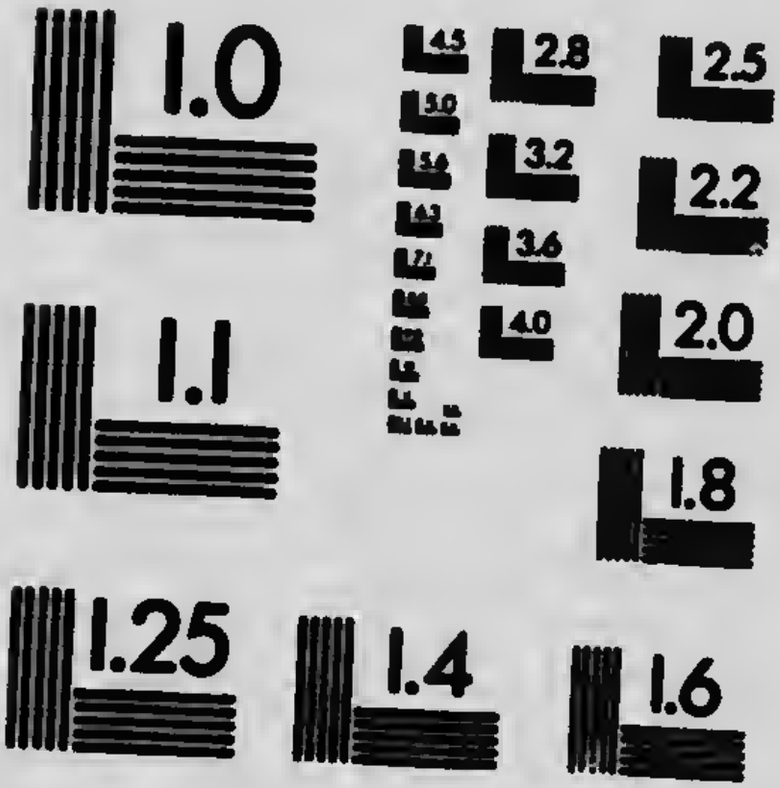

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thereof. (5) But the court may, if satisfied that it is necessary for a fair trial, order that the prosecutor shall furnish a particular further describing any document or words the subject of a charge; or any person, place or thing referred to in any indictment; or stating what passages in any book, pamphlet, newspaper or other printing or writing, are relied on in support of a charge of selling or exhibiting an obscene book, pamphlet, newspaper, printing or writing. (6) Application should first be made to the prosecution for particulars, and, on refusal, to the judge by motion supported by affidavit. (7) The absence or the insufficiency of particulars does not vitiate an indictment; but if it appears that there is a reasonable necessity for more specific information, the court, on the application of the accused, may, in its discretion, order further particulars to be given. (8) The accused may also, at any stage of the trial, apply to the court to amend or divide any count charging an offence in the alternative, or that is double or multifarious, on the ground that it is so framed as to embarrass him in his defence. (9) And the court, if satisfied that the ends of justice require it, may order any count to be amended or divided into two or more counts, and thereupon a formal commencement may be inserted before each of the counts into which it is divided. (10) If the libellous words are in a foreign language, they must be set out in the original, together with the English translation, which must be proved on the trial to be correct. (1)

Particulars.—When any such particular as aforesaid is delivered, a copy shall be given without charge to the accused or his solicitor, and it shall be entered in the record, and the trial shall proceed in all respects as if the indictment had been amended in conformity with such particular. (2) In determining whether a particular is required or not, and whether a defect in the indictment is material to the substantial justice of the case or not, the court may have regard to the depositions. (3) The particulars may be amended at the trial. (4)

(5) S. 861 (1).
(6) S. 859.
(7) *Reg.* v. *Hodgson* (1828), 3 C. & P. 422; *Reg.* v. *Bootyman* (1832), 5 C. & P. 300. These were cases of embezzlement in which particulars were ordered. See, also, *R.* v. *Hamilton* (1836), 7 C. & P. 448.
(8) *Reg.* v. *France* (1898), 7 Q. O. R. (Q. B.) 83; 1 C. C. C. 321.
(9) S. 892 (1).
(10) *Ibid.* (2).
(1) *R.* v. *Peltier* (1804), 2 Sel. N. P. 1048; *Zenobia* v. *Axtell* (1795), 6 T. R. 162; 3 R. R. 142; M. & S. 116; *R.* v. *Goldstein* (1822), 3 Brod. & Bing. 201; 7 Moore, 1; 10 Price, 88; R. & R. C. C. 473; *Jenkins* v. *Phillips* (1841), 9 C. & P. 766.
(2) S. 860 (1).
(3) *Ibid.* (2).
(4) S. 889 (1). See *The King* v. *Lacelle* (1905), 10 C. C. C. 229, as to amendment in a speedy trial charge without re-election.

Object of particulars.—The particulars referred to in these various sections of the Code are intended to serve the same purpose as in civil actions for libel and slander. They are notice, in a fuller and more complete form than that supplied by the pleading itself, of the case which the accused has to meet, and they also define or limit the scope of the prosecution. The application for particulars is addressed to the discretion of the presiding judge, who will exercise such discretion upon the facts as they are made to appear before him, according to established rules and judicial usage. The general principle applies only to the extent of giving such information as is sufficient to enable the defendant fairly to defend himself when in court; but, on the other hand, not to fetter the prosecutor in the conduct of his case. (5) Where, for instance, an indictment for defamatory libel consisting of words, inoffensive in themselves, but capable by irony of being construed as a dishonourable imputation, contains, beyond the offensive words, an allegation of the sense in which they would be understood, the Crown may prove extrinsic circumstances which would cause such sense to be attached to the words. It is not necessary that these circumstances should be set forth in the indictment, and the accused is sufficiently protected from surprise by the right given him to ask for particulars of the charge. In default of a demand for particulars he cannot object to such evidence, and there would be no ground for a reserved case as to the legality of its admission. (6)

Office of the innuendo.—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; (7) and on the trial it shall be sufficient to prove that the matter published was criminal either with or without such innuendo. (8) This rule in regard to the innuendo or meaning which is to be assigned by the indictment to the matter charged as libellous, is the same as the rule in civil actions for damages. The rule was adopted from the English Common Law Procedure Act, 1852. Where the matter published is in its primary sense or on the face of it defamatory, no meaning need be assigned to it, because its publication is manifestly criminal, (9) but where the matter

(5) *Reg.* v. *Stapylton* (1857), 8 Cox C. C. 69.
(6) *Rex* v. *Molleur* (No. 1), (1905), 14 Q. O. R. (K. B.) 556; 12 C. C. C. 8.
(7) S. 861 (2).
(8) *Ibid.* (3).
(9) *Harvey* v. *French* (1832), 1 Cr. & M. 11; *Barrett* v. *Long* (1851), 3 H. L. C. 395.

published is not on the face of it defamatory, *e.g.*, where it is ambignous, or where the libel charged depends on a certain meaning being assigned to certain words in it, the meaning should be set out in the indictment, failing which particulars may be ordered, if demanded. In doing this, however, it is not necessary, as it was under the former practice, to shew by prefatory averments in the indictment how it is that the matter has that meaning, *i.e.*, by being published of and concerning a certain person and certain facts or things. All this may be shewn by evidence at the trial; in fact must be shewn, in such a case, otherwise the prosecution will fail. But where the matter published, independent of the innuendo or meaning so assigned, is defamatory, and therefore criminal, the innuendo may be abandoned at the trial, and it will be sufficient to prove and rely upon the published matter alone without the innuendo. Where on the trial of an indictment for libel, the matter charged did not, in the absence of an averment or innuendo, appear to be *prima facie* libellous, the indictment was held to be bad. (10) A libellous picture or caricature must be fully and particularly described in the indictment, and its defamatory nature or tendency must appear from the description thereof. (1) Unless a libellous meaning be either apparent on the face of the alleged libel, or can be collected from the terms of it, or connected with extrinsic circumstances, no innuendo will make the publication criminal, or subject the publisher to a civil action. (2) Where the criminality of the publication may be gathered from its contents, the averment of the extrinsic facts is unnecessary; and so it was held to be unnecessary to state the fact of a murder having been committed, if the libel asserted the fact, and imputed it to the complainant. (3) But such averments are essential where the terms of the libel are, independent of particular extrinsic facts, innocent or unmeaning, although in reality noxious and illegal in connection with the facts to which they relate. (4) In one of the cases last cited (*Hearne* v. *Stowell*), Lord Denman, C.J., delivering the judgment of the court, says (at pp. 731, 732): "The facts and circumstances that give a sting to a publication apparently innoxious ought to be brought to our notice," otherwise "any words whatso-

(10) *Per* Quain, J., in *Reg.* v. *Yates* (1872), 12 Cox C. C. 233.

(1) See *Carr* v. *Hood* (1808), 1 Camp. N. P. 354; 10 R. R. 701, *note*.

(2) *R.* v. *Burdett* (1820), 4 B. & A. 314; *R.* v. *Alderton* (1756), Sayer, 280; *R.* v. *Horne* (1777), 2 Cowp. 672; *Goldstein* v. *Foss* (1828), 4 Bing. 489; 6 B. & C. 154; *Stockley* v. *Clement* (1827), 4 Bing. 162; *Capital and Counties Bank* v. *Henty & Sons* (1882), 7 App. Cas. 741; 52 L. J. Q. B. D. 232.

(3) *Reg.* v. *Gregory* (1846), 8 Q. B. 572; 15 L. J. M. C. 38.

(4) *Cox* v. *Cooper* (1863), 9 L. T. 329; 12 W. R. 75; *Hearne* v. *Stowell* (1840), 12 A. & E. 719.

ever, whether sensible or otherwise, whether conveying any kind of imputation or not, and stripped of all explanation, would support an action of libel;" and, we may add, a prosecution for libel also. And if the words used are not reasonably capable of the meaning ascribed to them by the innuendo; and there be no evidence in support of the meaning so ascribed, the judge should, in a civil action, either non-suit the plaintiff, or direct a verdict to be entered for the defendant; (5) and, in a criminal proceeding, he should, on the same principle, withdraw the case from the jury or direct an acquittal. (6)

Variances and amendments.—If, on the trial of any indictment, there appears to be a variance between the evidence given and the charge in any count in the indictment, either as found or as amended, or as it would have been if amended in conformity with any particular furnished as provided in section 859, the court before which the case is tried may, if of opinion that the accused has not been misled or prejudiced in his defence by such variance, amend the indictment or any count in it, or any such particular, so as to make it conformable with the proof. (7)

Where indictment under wrong Act or defective.—If it appears that the indictment has been preferred under some other Act of parliament instead of under this Act, or under this instead of under some other Act, or that there is in the indictment, or in any count in it, an omission to state or a defective statement of anything requisite to constitute the offence, or an omission to negative any exception which ought to have been negatived, but that the matter omitted is proved by the evidence, the court before which the trial takes place, if of opinion that the accused has not been misled or prejudiced in his defence by such error or omission, shall amend the indictment or count as may be necessary. (8) The trial, in either of these cases, may then proceed in all respects as if the indictment or count had been originally framed as amended. (9)

(5) *Hunt* v. *Goodlake* (1873), 43 L. J. C. P. 54; 29 L. T. (N. S.) 472; *Mulligan* v. *Cole* (1875), L. R. 10 Q. B. 549; 44 L. J. Q. B. 153.

(6) For further remarks and cases on the innuendo, and the mode of alleging and proving it, see chapter on "The Innuendo," and its office in civil actions for defamation, in "King's Law of Defamation," pp. 371, *et seq.* What is there said is in the main applicable to the innuendo in indictments for libel.

(7) S. 889 (1); *Reg.* v. *Weir* (No. 3), (1899), 3 C. C. C. 262.

(8) *Ibid.* (2).

(9) *Ibid.* (3).

Adjournment if accused prejudiced.—If the court is of the opinion that the accused has been misled or prejudiced in his defence by any such variance, error, omission, or defective statement, but that the effect of such misleading or prejudice might be removed by adjourning or postponing the trial, the court may, in its discretion, make the amendment and adjourn the trial to a future day in the same sittings, or discharge the jury and postpone the trial to the next sittings of the court, on such terms as it thinks just. (10)

In determining whether the accused has been misled or prejudiced in his defence, the court which has to determine the question shall consider the contents of the depositions, as well as the other circumstances of the case. (1)

Amendment a question for the court.—The propriety of making, or refusing to make, any such amendment shall be deemed a question for the court, and the decision of the court upon it may be reserved for the Court of Appeal, or may be brought before the Court of Appeal by appeal like any other question of law. (2)

To be endorsed on record.—In case an order for amendment as provided for in the two preceding sections is made, it shall be endorsed on the record; and all other rolls and proceedings connected therewith shall be amended accordingly by the proper officer and filed with the indictment among the proper records of the court. (3)

Cases as to amendments.—The fairest test of whether a defendant can be prejudiced is this: supposing the defendant comes with evidence that would enable him to meet the case as it stands on the record unamended, would the same enable him to meet it as amended? (4) If whatever would be available as a defence under the indictment, as it originally stood, would be equally so after the alteration was made, and any evidence the defendant might have would be equally applicable to the indictment in the one form as in the other, the amendment would not be one by which the defendant could be prejudiced in his defence, or in a matter material to the merits. (5) If the transaction is not altered by the amendment, but remains precisely the same, the

(10) S. 890 (1).
(1) *Ibid.* (2).
(2) *Ibid.* (3).
(3) S. 891.
(4) *Per* Rolfe, B., in *Cooke* v. *Stratford* (1844), 13 M. & W. 379.
(5) *Gurford* v. *Bayley* (1842), 3 M. & G. 781.

amendment ought to be allowed. (6) But, if the amendment asked would substitute a different transaction from that first alleged, or would render a different plea necessary, it ought not to be made. (7) There is no power, however, to amend the same identical particular more than once; and no amendment can be made so as to change the nature and quality of the offence. (8) An indictment for libel containing merely a general allegation that the newspaper in which it appeared circulated in the district of M., cannot be amended for the purpose of alleging publication in that district of the special article complained of. (9) The whole question of amendment is, as we have seen, a question for the court. (10)

Joinder of counts.—A count for libel may be joined in the same indictment with any number of counts for any offence whatever, murder excepted; (1) but it is not usual to do so, and may be inconvenient. When there are more counts than one in an indictment, each count may be treated as a separate indictment. (2) The court may, if it thinks it conducive to the ends of justice, direct that the accused shall be tried upon any one or more of such counts separately. (3) The order for this purpose may be made either before or in the course of the trial, and, if it is made in the course of the trial, the jury shall be discharged from giving a verdict on the counts on which the trial is not to proceed. (4) The counts in the indictment as to which the jury are so discharged, shall be proceeded upon in all respects as if they had been found in a separate indictment. (5)

Joinder of parties.—All who are accessories to the publication of a libel are parties to the offence, and may be indicted as principals. (6) And, therefore, all who are in any way concerned in the composition, writing, or printing of a libel, with a view to publication, and all who by any means conduce to the publication, are considered in law as principals in the act of publication, and liable to be indicted as such; (7) and a person residing out of

(6) *Cooke* v. *Stratford*, *supra*.
(7) *Reg.* v. *Weir* (No. 3), (1899), 3 C. C. C. 262; *Perry* v. *Watts* (1842), 3 M. & G. 775; *Brashier* v. *Jackson* (1840), 6 M. & W. 549.
(8) *Reg.* v. *Wright* (1860), 2 F. & F. 320; *Reg.* v. *Weir* (No 3), *supra*.
(9) *Reg.* v. *Hickson* (1880), 3 L. N. 139.
(10) S. 890 (3), *supra*.
(1) S. 856.
(2) S. 857 (1).
(3) *Ibid.* (2).
(4) S. 858 (1).
(5) *Ibid.* (2).
(6) S. 69; *Reg.* v. *Greenwood* (1852), 2 Den. C. C. 453; 5 Cox C. C. 521; 16 Jur. 390; 21 L. J. M. C. 127.
(7) *R.* v. *Benfield* (1760), 2 Burr. 983, pl. 3.

the jurisdiction may be indicted for the publication of a libel within the jurisdiction, though he be only an accessory to such publication. (8)

Indictment for libel on a class or body of persons.—An indictment for a libel on several persons, to the jurors unknown, is bad; (9) but a libel upon one of a class or body of persons, without naming the person, is a libel upon the whole, and may be so described. And, therefore, where a libel was published of "an East India director," but without naming any director in particular, it was held to be equally applicable to all the directors of the East India Company; and the court granted a criminal information against the defendant for printing and publishing a libel on the directors of the Company. (10)

Trial of persons jointly indicted.—Upon an indictment of several persons jointly, the Crown may have them tried separately instead of together, and none of them can demand a separate trial as a matter of right. (1) But if the trial of the defendants jointly instead of separately would work an injustice to any of them, the presiding judge may, on due cause being shewn, exercise his discretion to direct a separate trial. (2) This is a matter entirely in the discretion of the court, (3) the accused persons not being entitled as of right to separate trials, (4) although the Crown is so entitled if, in the case in question, separate trials are practicable. (5) In *Reg.* v. *Bradlaugh et al.*, (6) three persons were indicted jointly for publishing a blasphemous libel in a certain number of a newspaper, but two of them had already been convicted on a charge of publishing similar libels in another number of the paper. It was held that the third, whose case was that he was not connected with the paper at all, ought, on his application, to be tried separately, as his trial with the others might possibly prejudice him in his defence, especially as he desired to call them as witnesses, while it did not appear that his separate trial could at all embarrass the case for the prosecution, as the prosecutor would be entitled to give any evidence in his power to fix the defendant with a joint liability for the acts of the others.

(8) *R.* v. *Johnston* (1805), 6 East, 583; 7 East, 65.
(9) *R.* v. *Ohme and Nott*, or *R.* v. *Orme and Nott* (1700), Ld. Raymond 486; 3 Salk. 224.
(10) *R.* v. *Jenour* (1740), 7 Mod. 400.
(1) *Reg.* v. *Weir* (No. 4), (1899), 3 C. C. C. 351.
(2) *Ibid.*
(3) *Reg.* v. *Littlechild* (1871), L. R. 6 Q. B. 293.
(4) *Per* Monk. J., in *R.* v. *McConoley* (1874), 5 R. L. 746.
(5) 1 Bishop's Crim. Proc. 1034; 2 Hawk. P. C., c. 41, s. 8.
(6) (1883), 15 Cox C. C. 217.

(7) The same rules apply to a criminal information as to an indictment so far as the framing of the pleading and the joinder of defendants are concerned, (8) except, perhaps, where there are distinct orders for leave to file distinct informations for the same libel against several persons. In that case it is doubtful whether there can be an information against the accused jointly. (9)

Indictments against corporations.—Opinion of Blackburn, L.J. —The remedy by indictment for libel applies to indictments against corporations. While there has been no question as to individuals being liable to indictments or criminal informations for libel, the liability of corporations to such indictments has not always been admitted. There seems no reason, however, to doubt that a corporate body may be prosecuted and punished for a libellous publication. A corporation may be indicted for libel, both in their collective capacity when the libel has been so published, and also in their individual capacity. (10) Lord Blackburn in the House of Lords was strongly of the opinion that a corporation can be indicted for libel and fined. He said: "I quite agree that a corporation cannot, in one sense, commit a crime—a corporation cannot be imprisoned, if imprisonment be sentence for the crime; a corporation cannot be hanged or put to death if that be the punishment for the crime; and so, in those senses, a corporation cannot commit a crime. But a corporation may be fined, and a corporation may pay damages; and therefore I must totally dissent, notwithstanding what Lord Justice Bramwell said, or is reported to have said, upon the supposition that a body corporate, or a corporation that incorporated itself for the purpose of publishing a newspaper, could not be tried and fined, or an action for damages be brought against it for libel; or that a corporation which commits a nuisance could not be convicted of the nuisance or the like. I must really say that I do not feel the slightest doubt upon that part of the case." (1) It was also held, in a prosecution for libel of a newspaper publishing company in the United States, that while a corporation may not be im-

(7) See also the following: 1 Starkie's Crim. Pldg. 36; 1 Chitty's Crim. Law, 535; 1 Bishop's Crim. Proc. 463, 1018; 1 Wharton's Crim. Law, 433; *R.* v. *Payne* (1872), 12 Cox C. C. 118; *R.* v. *O'Connell* (1844), 11 Cl. & F. 155; 1 Cox C. C. 413; 9 Jur. 25; *Reg.* v. *Hambly* (1859), 16 U. C. Q. B. 617.

(8) See *Rex* v. *Benfield, supra.*

(9) See *Rex* v. *Heydon* (1762), 3 Burr. 1270.

(10) *Whitfield* v. *South E. R. Co.* (1858), E. B. & E. 115; 27 L. J. Q. B. 229; *R.* v. *Watson* (1788), 2 T. R. 199; *State* v. *Atchison* (1897), 3 Lea, Tenn. 729; 31 Am. Rep. 663.

(1) *Pharmaceutical Society* v. *London and Provincial Supply Association*, (1880), 5 App. Cas. at p. 869; specially referred to by the Ontario Court of Appeal in *D'Ivry* v. *World Newspaper Co.* (1897), 17 O. P. R. 387.

prisoned, 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. (2)

The criminal liability of a corporation.—The question of the criminal liability of a corporation is discussed pretty fully in *Reg.* v. *The Union Colliery Company,* (3) in which the company was indicted, under section 247 of the Code, for unlawfully causing the death of certain persons by neglecting to properly maintain a bridge over which certain trains were run when a train broke through. At the trial a verdict of guilty was entered, and a case was reserved for the provincial Court of Appeal (which was equally divided) on the question, whether or not the indictment would lie against a corporation.

Opinion of Supreme Court of Canada.—Sedgewick, J., speaking for the majority of the Supreme Court of Canada (King, J., *diss.*), says: "It was at one time thought that a private corporation could not commit torts, or be held liable for the wrongful acts of its officers or agents, but this view has long since been exploded. A similar notion obtained in early times as to the criminal liability of a corporation, but it has long since been settled that they are liable to indictment for non-feasance, or for negligence in the performance of a legal duty." The learned judge quotes the opinion of Denman, J., in *The Queen* v. *The Great North of England Railway Co.,* (4) and Lord Blackburn's opinion (*supra*) in the *Pharmaceutical Society* v. *London & Provincial Supply Association* (5), and adds: "From these authorities it is manifest, that a corporation can render itself amenable to the criminal law for acts resulting in damage to numbers of people, or which are invasions of the rights or privileges of the public at large, or detrimental to the general well being or interests of the State."

As to the mode of compelling the appearance of a body corporate to an indictment, see sections 916-920.

In the province of Alberta, which has no grand jury system, a corporation may be compelled to answer to an indictable offence by a formal written charge in lieu of an indictment, such charge being preferred by the Attorney-General, or his agent, or by any

(2) *The State* v. *Atchison, supra.*
(3) (1900), 31 S. C. R. 81, being an appeal from the Supreme Court of British Columbia (7 B. C. Rep. 247), affirming the conviction of the appellant company on a case reserved.
(4) (1846), 9 Q. B. 315.
(5) 5 App. Cas. 857.

person with the written consent of the judge of the court, or of the Attorney-General, or an order of the court, and notice thereof being served on the corporation under section 918 of the Code. (6) There is the same law in the province of Saskatchewan. (7)

(6) S. 873 (*a*); *The King* v. *Standard Soap Co.* (1907), 12 C. C. C. 290.

(7) S. 873 (*a*), *supra*; *The King* v. *Duff* (No. 2), (1900), 2 Sask. R. 388; 15 C. C. C. 454. See chapter on "Preferring the Indictment," at p. 246, *ante*.

CHAPTER XXV.

Objections to the Indictment.

How and when taken.—Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer, or motion to quash the indictment, before the defendant has pleaded, and not afterwards, except by leave of the court or judge before whom the trial takes place; and every court, before which any such objection is taken, may, if it is thought necessary, cause the indictment to be forthwith amended in such particular, by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared. (1)

Restriction of arrest of judgment.—No motion in arrest of judgment shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under the authority of this Act. (2) If a substantial ingredient of the offence does not appear on the face of the indictment, the court will arrest the judgment. (3) And where the indictment charges no crime, the defect is a matter of substance and not amendable, and the court is obliged to arrest the judgment. (4) As to defects apparent on the record, a plea of guilty is not a waiver, and does not prevent the accused from moving in arrest of judgment. (5)

With the exception of the words, "except by leave of the court or judge before whom the trial takes place," section 898 (*supra*) is a re-enactment of R. S. C., 1886, c. 174, s. 143, which was taken from 32-33 Vict., c. 29, s. 32 (D). The section applies to "any defect apparent on the face" of the indictment. Some of these defects which are amendable, and some which are not amendable, and are referred to in the previous chapter, as well as certain other defects, not apparent "on the face" of the indictment, afford ground for moving to quash the indictment.

Force and effect of a demurrer.—The objection by demurrer means that the indictment discloses no crime, and is defective in law, and that for that reason the proceedings against the ac-

(1) S. 898 (1).
(2) *Ibid.* (2).
(3) *R.* v. *Carr* (1872), 26 L. C. Jur. 61; *R.* v. *Lynch* (1875), 20 L. C. Jur. 187.
(4) *R.* v. *Carr, supra; R.* v. *Wheatley* (1761), 2 Burr. 1127; *R.* v. *Turner* (1829), 1 Mood. C. C. 239; *R.* v. *Webb* (1848), 1 Den. C. C. 338.
(5) *R.* v. *Brown* (1889), 24 Q. B. D. 357; followed in *The King* v. *Plummer* (1902), 2 K. B. 339.

cused should go no further. A demurrer implies an admission, for the purpose of the objection, of the facts stated in the indictment, but alleges that these are insufficient to constitute any offence; for example, on a charge of libel, it assumes the publication of the statements complained of, but says that they are not libellous in themselves, and are not reasonably capable of the meaning ascribed to them in the innuendo, or of any libellous meaning. An objection to an indictment against a corporation upon the ground that it does not disclose any offence in respect of which the corporation could be liable, must be taken by demurrer and not by motion to quash. (6) This would apply, of course, to a newspaper publishing company.

Motion to quash the indictment.—The accused may, at any time before he is given in charge to the jury, that is, before the jury are sworn, (7) apply to the court to quash any count in the indictment on the ground that it is not founded on the facts or evidence disclosed on the depositions taken before the justice, and the court shall quash such count if satisfied that it is not so founded. (8) And if at any time, during the trial, it appears to the court that any count is not so founded, and that injustice has been, or is likely to be, done to the accused in consequence of such count remaining in the indictment, the court may then quash such count and discharge the jury from finding any verdict upon it. (9) "When a motion is made to quash for a formal defect," said Wurtele, J., (10) "the court may order the indictment to be amended, but when the motion to quash is founded on the total absence of an essential ingredient, so that the indictment charges no offence in law, it must be set aside and quashed; but in such a case a new bill of indictment may be preferred. Defects in matters of substance are not amendable, for the very good reason that, if there is an omission of the averment of a material ingredient, without which there is no offence known to the law charged against the defendant, then there is no indictment; there is nothing to amend, and the only thing to be done is to quash the defective document and set it aside." But there is a difference between an indictment which is bad for charging an act which as laid is no crime, and an indictment which is bad for charging a crime defectively: the latter may be aided by verdict, the former cannot. (1)

(6) *Reg.* v. *Toronto Railway Co.* (1900), 4 C. C. C. 4.
(7) *Reg.* v. *Lepine, infra.*
(8) S. 871 (1), in part and (2).
(9) S. 871 (3).
(10) In *Reg.* v. *Cameron* (1898), 7 Q. O. R. (Q.B.) 162; 2 C. C. C. 173.
(1) *R.* v. *Waters* (1848), 1 Den. C. C. 356.

When and on what grounds.—An objection to an indictment for want of the direction of the Attorney-General, or of the written consent of a judge or of the Attorney-General, or for want of the order of a court, to prefer a bill of indictment before the grand jury, must be taken by motion to quash the indictment before the accused is given in charge. (2) The accused is not "given in charge" to the jury until the jury are sworn. His arraignment and plea of not guilty to the indictment do not constitute a "giving in charge." (3) The indictment may be quashed, under section 871, upon motion at any time before the accused is given in charge to the jury, when the depositions have been illegally taken, and a material provision of the statute has not been complied with. (4) The court will also quash the indictment on the motion of the defendant, even after he has pleaded, where it appears, either on the face of the indictment or by affidavit, that it has been found without jurisdiction. (5) On a plea of guilty to an indictment so framed as not to disclose a criminal offence, the trial judge may of his own motion direct the plea to be struck out and the indictment quashed, whereupon the Crown may prefer a fresh indictment. (6) Where the preliminary inquiry before the justice was held jointly, in respect of the party indicted and of two others separately charged with the same offence, and the depositions were made in respect of all of them in the one proceeding, an objection that the indictment was invalid, as not being founded on the "evidence disclosed on the depositions taken before the justice," was not sustained. (7) The "consent" of the judge to the preferring of the indictment is sufficient when he makes and signs an endorsement upon the indictment by which he "directs" that the indictment be submitted to the grand jury. (8) The fact that a preliminary inquiry in regard to an offence is pending before a justice, who has not given his decision for or against committal for trial, does not entitle the accused, against whom an indictment for the same offence is preferred by a judge's consent under section 873, (1) to have the indictment quashed. (9) So also, the absence or the insufficiency of particulars does not vitiate an indictment or an information; but if it be made to appear that there is a reasonable necessity for more specific information, the court, or the justice on the preliminary inquiry, may, on application of the accused, order that further particulars be given, but such an

(2) S. 873 (1), (2), (3).
(3) *Reg.* v. *Lepine* (1900), 4 C. C. C. 145.
(4) *Ibid.*
(5) *Reg.* v. *Hearne* (1864), 4 B. & S. 947; 9 Cox C. C. 433.
(6) *The King* v. *Labourdette* (1908), 13 C. C. C. 379.
(7) *Reg.* v. *Skelton* (1898), 4 C. C. C. 467 (N.W.T.).
(8) *R.* v. *Weir* (No. 2), (1899), 3 C. C. C. 155.
(9) *Ibid.*

order is altogether within the judicial discretion of the judge or justice. (10) An indictment which charges in terms that the defendant "unlawfully published a defamatory libel," and which sets out particulars of the time, the person defamed and the words claimed to be defamatory, will not be quashed because of failure to also charge that the matter published was likely to injure the reputation of the libelled person by exposing him to hatred, contempt, or ridicule, or was designed to insult him. (1)

Opinion of White, J.—Referring in his judgment in the case last cited to *Reg.* v. *Cameron,* (2) White, J, says: "The report of that case does not set forth the language of the indictment quashed, nor does it shew whether or not the libel was set out in *haec verba,* or with any, or what, innuendoes. Without this information it is impossible to say how far that decision, if we are to follow it, would require us to set aside the counts now in question. Here each count sets forth the words of the defamatory libel with innuendoes, and from what is thus set forth it appears, without any further averment, that these words are such that their publication as alleged was likely to injure the reputation of the person against whom the libel was directed by exposing him to contempt and ridicule and was designed to insult him. But apart from this consideration, I rest my judgment upon the ground that, in my opinion, the counts for libel under which the prisoner was convicted, that is to say, the second, fourth, and tenth counts, are all so framed as to embrace every essential required by the Criminal Code. On comparison of these three counts with the form given by section 852 of the Code, it will be seen that each of them contains every averment called for by the form. Nothing is set forth in the form which is not in like manner set forth in all these counts."

Non-initialling of names of witnesses on indictment.—Section 876 of the Code enacts, that the name of every witness examined, or intended to be examined, shall be endorsed on the bill of indictment; and the foreman of the grand jury, or any member of the grand jury so acting for him, shall write his initials against the name of each witness sworn by him and examined touching such bill of indictment. Failure to comply with this provision has suggested an objection to the indictment as a whole; and so it has been held, that the requirement is imperative and not merely directory, and that the failure to observe it is good ground for

(10) *R.* v. *France* (1898), 1 C. C. C. 321.
(1) *The King* v. *MacDougall* (1909), 39 N. B. R. 388; 15 C. C. C. 466.
(2) (1898), 7 Q. O. R. (Q.B.) 162; 2 C. C. C. 173.

quashing the indictment. (3) But it has also been held that the provision is directory only, and not imperative; (4) and that an indictment is not invalidated, (5) and should not be quashed, (6) because of the omission of the foreman to initial the names of the witnesses sworn before the grand jury. So, too, where witnesses have been summoned by the grand jury of its own motion, the omission to endorse their names upon the bill of indictment does not invalidate the indictment, but the court may send for the grand jury and direct that the names of such additional witnesses be endorsed and initialed so that the accused may have notice upon whose testimony a true bill has been found. (7) In the case of defamatory libel, in which in Ontario and some of the other provinces the prosecution is not permitted to be conducted at the expense of the Government, where any such witness is wanted the counsel for the private prosecutor should be consulted. He is the officer who submits to the grand jury the name of every witness intended to be examined on an indictment for libel. But where in any case objection is taken to an indictment for the non-initialling, by the foreman of the grand jury, of the names of witnesses examined before them, the course adopted in the *King* v. *Holmes* (*supra*) of supplying the omission by returning the indictment to the grand jury, would seem to be the proper course to follow. It is fair both to the prosecution and the accused, who has a right to know upon whose evidence he is to be placed upon trial. The omission to send to a grand jury the depositions taken on the preliminary inquiry, as required in Nova Scotia under section 760 of the Code, will not invalidate an indictment found without such depositions. (8)

Grand jurors not impannelled or not sworn—The presence in the grand jury room of an unauthorised person, summoned as a grand juror but not impannelled, during the deliberations of the grand jury, will not invalidate an indictment then under consideration, if such person was excluded from the grand jury before the presentment, unless it be shewn that the accused was thereby prejudiced. On discovery that a person summoned as a grand juror, and coming into court with the grand jury to present an indictment, had not been sworn and had been admitted to the grand jury room during their deliberations, the court may

(3) *Per* Wurtele, J., in *The King* v. *Bélanger* (1902), 6 C. C. C. 295.
(4) *The King* v. *Holmes* (1902), 6 C. C. C. 402.
(5) *R.* v. *Townsend* (1896), 28 N. S. R. 468; 3 C. C. C. 29.
(6) *R.* v. *Buchanan* (1898), 12 Man. L. R. 190; 18 C. L. T. 293; 1 C. C. C. 442.
(7) *The King* v. *Holmes*, *supra*.
(8) *The King* v. *Turpin* (1904), 8 C. C. C. 59.

exclude such person and direct the grand jury to retire to reconsider the bill without requiring the grand jurors to be resworn. (9)

Objections based on constitution of grand jury.—Section 899 (2) of the Code provides that any objection to the constitution of the grand jury be taken by motion to the court, and the indictment shall be quashed if the court is of opinion, both that such objection is well founded, and that the accused has suffered or may suffer prejudice thereby, but not otherwise. In the provinces where the grand jury has been reduced to thirteen jurors or less, the failure of some of the summoned jurors to attend will not invalidate a bill to which at least seven of the jurors in attendance agree. (10) But where the provincial statute governing the selection of grand jurors requires that only the first six names on the previous grand jury list shall be omitted, and that six new selections be made to fill their places, the drawing of twelve new men as grand jurors is ineffectual to constitute a grand jury, and an indictment brought in by them while assuming to act as a grand jury must be quashed on motion. (1) An objection that a member of the grand jury by which the indictment was found, was not indifferent as between the Crown and the accused because of an alleged interest in the subject matter of the prosecution, and was therefore disqualified from acting as a grand juror in respect of such indictment, is not an objection to the "constitution" of the grand jury which must be raised by motion to quash the indictment under the above section. (2) In the same case Martin, J., was of opinion that the objection to the individual grand juror, not being one relating to his statutory qualifications under the provincial jury law of British Columbia, could not be raised by motion to quash, and that there is no right to challenge a grand juror. Objections to the "constitution" of the grand jury, under this section (899), are restricted to cases where the accused is prejudiced by the irregularity, but this limitation does not apply where a grand jury was never legally constituted. (3) In the province of British Columbia it is imperative that thirteen jurors should be summoned for service on the grand jury, although seven of those appearing are sufficient to constitute a grand jury. When, therefore, the sheriff summoned only twelve grand jurors, and omitted to summon the thirteenth, because he was in-

(9) *The King* v. *Kelly* (1905), Can. Ann. Digest (1905), 172; 9 C. C. C. 130.
(10) *R.* v. *Girard* (1898), 7 Q. O. R. (K. B.), 595; 2 C. C. C. 216.
(1) *The King* v. *McDougall (Donald)* (1904), 8 C. C. C. 283.
(2) *The King* v. *Hayes* (No. 2), (1903), 9 C. C. C. 101.
(3) *The King* v. *Hayes* (No. 1), (1902), 7 C. C. C. 453.

formed that the latter had become demented, seven of such twelve did not constitute a grand jury, and were not competent to find an indictment. (4) Where eleven grand jurors answered their names when the roll was first called, but ten only were impannelled and sworn (one having failed to answer on the second calling), the grand jury was held to have been properly constituted in a province where the panel is not more than thirteen. (5) An order of a superior court to a coroner to summon a grand jury need not shew on its face all the facts which made it necessary that a coroner, instead of the sheriff, should be directed to summon the jury. Where a grand jury has been summoned by a sheriff who is disqualified from acting, because of his relationship to a prosecutor, a new grand jury may be summoned on a *venire* to a coroner, without formally discharging the jury summoned by the sheriff or disposing of the indictment found by them. The indictment found by the sheriff's grand jury is in such case void, and it is open to the coroner summoning another jury to summon persons already summoned by the sheriff. There is at common law inherent power in a superior court of criminal jurisdiction to order one or more grand juries to be summoned; and the sheriff or coroner may be directed by the one order to summon both a grand and a petit jury. (6) The swearing in of a grand jury should take place after its members are duly impannelled, and the foreman's oath should be sworn in the presence of his fellow jurors, they being afterwards sworn to observe the same oath. Where, however, the grand jurors were called and answered to their names, and then the juror selected as foreman was impannelled alone and sworn, after which the other jurors were called from amongst the spectators to the box and were sworn to observe their foreman's oath, their proceedings were held to be invalid, and that an indictment found by them should be quashed on motion. (7) The courts of a province, in which is situate a penitentiary common to that and another province, should not inquire on *habeas corpus* into the validity of an indictment upon which the prisoner was tried in the other province and sentenced to imprisonment in such penitentiary. (8)

Affinity of grand juror to defendant no objection to indictment.—Opinion of **Peters, J.**—In a Prince Edward Island case one of the objections raised by the defendant to an indictment

(4) *The King* v. *Hayes* (No. 1), 1902, 7 C. C. C. 453.
(5) *The King* v. *Fouquet* (1905), 10 C. C. C. 255.
(6) *R.* v. *McGuire* (1898), 4 C. C. C. 12.
(7) *The King* v. *Bélanger* (1902), 6 C. C. C. 295.
(8) *The King* v. *Wright* (1905), 10 C. C. C. 461.

for libel was, that one of the jurors who found the bill was a relation of the defendant, and within the meaning of the rule laid down by Blackstone that "it is a principal cause of challenge that a juror is of kin to either party within the ninth degree." The defendant moved to have the indictment quashed on three grounds: (1) that one of the grand jurors who found the bill was of affinity to the defendant in the seventh degree; (2) that the names of two persons on the jury were not the same as those contained in the panel annexed to the *venire facias*; (3) that one of the grand jurors had, previously to the finding of the indictment, expressed an opinion, as to the defendant's guilt, hostile to the defendant and from ill-will.

Peters, J., with whom Palmer, J., concurred, quoted from Coke, Litt., 157*a*, Archbold's Crown Practice, p. 84, and Harris's Criminal Law, p. 375; and referring to Blackstone's rule (*supra*), he said: "It is argued that this means that a defendant can object that his own relation was on the jury which found the bill. But I do not think the language of the commentator means that, or that it was intended to lay that down as the law. It is correct enough as a general proposition to say that relationship to either party disqualifies a juror, but that is not saying that either party can avail himself of his own relationship to the juror as a ground of challenge. If the prosecutor waive, or do not make, the objection, why should the defendant be allowed to insist on what does not injure but is presumed to benefit him? The defendant's counsel say that they can find no authority on this subject, nor have I found any case in which such a question has been raised, from which I infer that it never was supposed that it could prevail. . . . Coke states the reason of the rule to be that the law presumes that one kinsman doth favour another before a stranger. If that be the reason for the rule, it would seem strange to hold that the man who is presumed to be benefited by the juror's presence should be allowed to quash the indictment, because his kinsman was there and probably exerted his influence to prevent its being found. The concluding part of the extract does not contradict this, for it only in effect says, that one party cannot set off the corresponding affinity of the juror to the other as an answer to such an objection. . . And in every case that I have seen, the affinity objected to is not the affinity to the person making the challenge, but affinity to the opposite party. If what is contended for were law, it would, I think, often greatly impede the administration of criminal justice. A defendant himself may not know all the persons within the ninth degree of affinity to him, but it is very unlikely that a prosecutor will be

acquainted with them; several may be on the jury, but he has no means of ascertaining the relationship so as to get them discharged from the jury before the indictment is laid before them. And yet, because they are there, the indictment is to be quashed, not because the defendant may have been prejudiced, but because he is presumed to have been benefited by their being there. I think this objection cannot prevail." The court also held that the two other objections were fully answered by the affidavits read in answer to the application. (9)

Indictment cannot be quashed by challenge of grand jurors.— Upon a motion by the defendant to quash an indictment, an objection that the grand jurors who found the bill should have been challenged is untenable, because grand jurors cannot be challenged. In the *Queen* v. *Lawson* (*supra*), it was contended on the argument, that the defendant might have challenged the grand jurors, and, therefore, that he was too late in moving to quash the indictment. Peters, J., (Palmer, J., concurring), in dealing with this contention held, that challenges to grand jurors do not lie. "I had some years ago to consider this question of challenge to grand jurors in *The Queen* v. *Dowey,* (10) and *The Queen* v. *Gorbet.* (1) There are, no doubt, authorities to be found that a grand juror may be challenged. In the case of *The King* v. *Kirwin,* (2) some of the judges held that it could, and some that it could not, and I believe I am safe in saying that no English case can be found where it was allowed. As to the numerous cases cited from Bishop's Criminal Law there appears as many decisions one way as the other, and, if they were all one way, American cases would form no safe guide for us. . . . I rather think that the reason laid down for excluding challenges in these cases is the correct one. Such inquests being *ex parte,* the parties who may finally be impugned by the proceeding are not necessarily present, and may be unaware that it is taking place, and, therefore, they are bound to challenge. Besides, how would it work? Suppose a case like the Orange Riots, where twenty or thirty persons are to be indicted. Some might challenge one juror and some another, and so reduce the panel below the sufficient number, and the court having no power to add tales, a complete stoppage of justice would be the result." The rule *nisi* to quash the indictment was discharged. (3)

(9) *The Queen* v. *Lawson* (1881), 2 P. E. I. R. 398.
(10) (1869), 1 P. E. I. R. (Has. & War.) 291.
(1) (1866), 1 P. E. I. R. (Has. & War.) 262.
(2) (1811), 31 State Trials 543.
(3) *The Queen* v. *Lawson* (1881), 2 P. E. I. R., at p. 401.

Challenges to grand jurors unknown to the criminal law.—The right to challenge grand jurors was also discussed and decided in *Reg.* v. *Mercier et al.*, (4) upon an indictment for conspiracy. The defendants objected to the grand jury as a whole by a challenge to the array, and to certain individual grand jurors by a challenge to the polls. The Crown contended that there was no such right of challenge, and its contention was sustained, Bosse, J., after reviewing the authorities, came to the following conclusions: that although both English and Canadian statutes contained provisions for challenging a petit jury, they contained none for challenging a grand jury; that there is in Canada no known precedent giving the right to challenge a grand jury, or any of its members; that, in 1811, it was admitted in England that objections to a grand jury were always taken by plea to the indictment, and not by challenge; that, since 1811, the matter had not been controverted; and that, in 1848, in *Reg.* v. *Duffy*, (5) the only case reported on the subject since 1811, objections to the grand jury were taken by way of plea. The reasons for the difference in the procedure as to objections to the grand jury, and objections to the petit jury, are fully discussed in the learned judge's judgment. In *Reg.* v. *Mitchel*, (6) an objection that a grand juror was disqualified was taken by a plea in abatement. Under the Code pleas in abatement are abolished. (7)

Objections to grand jury, how taken.—Any objection to the constitution of the grand jury may be taken by motion to the court, and the indictment shall be quashed if the court is of opinion both that such objection is well founded, and that the accused has suffered, or may suffer, prejudice thereby, but not otherwise. (8) An objection that the grand jury was composed of more than the legal number of members should be taken by motion; (9) in fact any objection to the constitution of the grand jury should be taken by motion to the court to quash the indictment. Upon such motion it must appear, as the statute provides, that the objection is well founded, and that the accused has suffered, or may suffer, prejudice thereby. The court may be of opinion that the particular objection is a good one: but, notwith-

(4) (1892), 1 Q. O. R. (Q. B.) 541.
(5) (1848), 4 Cox C. C. 172.
(6) (1848), 3 Cox C. C. 93.
(7) S. 899 (1).
(8) *Ibid.* (2). See *R.* v. *Hayes* (No. 1), (1902), 7 C. C. C. 453; *R.* v. *McGuire* (1898), 4 C. C. C. 12; *R.* v. *Bélanger* (1902), 6 C. C. C. 295; *R.* v. *Hayes* (No. 2), (1903), 9 C. C. C. 101.
(9) 1 Bishop's Crim. Proc. 884.

standing this, it will not quash the indictment if it be of opinion that the accused has not been, or will not be, prejudiced, by the existence of the subject matter of the objection. (10)

Temporary absence of complainant no objection to indictment.—So also it is no objection to an indictment that the party libelled was temporarily beyond the jurisdiction of the court at the time the libel was published. The defendant was convicted of the publication, in two issues of the *Mail* newspaper of Toronto, of a defamatory libel against an immigration agent of the Ontario Government. A case was reserved on an objection, at the close of the case for the prosecution, that, as it was shewn that the party libelled was not in the country at the time of the publication, the indictment could not be sustained, although the evidence shewed that his usual residence was in England, and that he had come here with immigrants, and that he had left for a temporary purpose and gone to England *animo revertendi*. The trial judge (Burton, J.A.), had overruled the objection and the court affirmed the ruling. Morrison, J., said that he could "see no ground for holding that, under such circumstances, an indictment could not be sustained. The ruling of the learned judge in that respect was correct." And Wilson, J., said: "I agree that from the facts appearing—that the prosecutor had been in this country and was employed by the Government of this province in England, and had the intention of returning here—that the publication complained of may properly be said to have had a tendency to produce a breach of the peace in this country in his case." Richards, C.J., concurred. (1)

Defects of substance in indictment.—An indictment found by the grand jury, at the city of Montreal, charged that the defendant, on a certain day at the said city, "unlawfully wrote and published a certain false and defamatory libel of and concerning W. H., in the form of a letter, well knowing the same to be false and defamatory, to his great prejudice and injury." The defendant moved to quash the indictment on the ground that it did not set forth and describe any offence against the law, in that it was not averred that the letter was likely to injure H.'s reputation by exposing him to hatred, contempt, or ridicule, or that it was intended to insult him, but merely that it was to his great prejudice and injury. Wurtele, J., was of opinion that the indictment was fatally defective in omitting the essential ingredients of the offence above referred to; and that it could not be amended, but must be

(10) *R.* v. *Belyea* (1854), 1 N. S. R. (James), 220.
(1) *Reg.* v. *Patteson* (1875), 36 U. C. Q. B. 129.

quashed, as the defects were matters of substance. "If," he said, "the publication of the defamatory matter was of the nature to inflict an injury and cause loss and damage to the person libelled, without, however, exposing him to hatred, contempt, or ridicule, or without insulting him, then it would only be a civil wrong for which the remedy would be by action before the civil courts. The averments contained in the indictment merely set out, in direct terms, that Mr. Hogg suffered injury and prejudice by the publication, and, therefore, only set up a civil wrong, and do not shew any criminal offence. To make the publication an offence, which would be liable to create a breach of the peace, it would be necessary to allege, not that the publication was made to the great prejudice and injury of Mr. Hogg, but that it was of a nature to injure his reputation by exposing him to hatred, contempt, or ridicule, or designed to insult him. The indictment, consequently, does not disclose any offence known to law, and, as the defect is one of substance, and not merely a formal defect, the indictment cannot be amended. I therefore quash the indictment, and order that the recognizance given by the defendant be discharged." (2)

A questionable decision.—This decision is not very convincing. It is difficult to see how the accused could have been misled or prejudiced by an amendment supplying the omissions in the indictment which were held to be incapable of amendment. Section 889 of the Code confers large powers of amendment on the court, and these are quite sufficient to supply, in the words of the statute, "an omission to state or a defective statement of anything requisite to constitute the offence." The definition of the offence of defamatory libel in section 317, which appears to have influenced the mind of the learned judge, could hardly limit his power to amend in the particulars mentioned. It would be for the jury, under the direction of the judge, to say whether the defamatory matter in question came within that definition. (2a)

The clauses of the statute permitting amendments should be liberally construed. Of the English statute containing similar clauses it has been said, that "it has been well laid down by a very learned judge (3) that a statute like the 14 and 15 Vict., c. 100, should have a wide construction, and should not be inter-

(2) *Reg.* v. *Cameron* (1898), 7 Q. O. R. (Q.B.) 162; 2 C. C. C. 173.
(2a) See *The King* v. *McDougall* (1909), 39 N. B. R. 388; 15 C. C. C. 466.
(3) Ryles, J., in *R.* v. *Welton* (1862), 9 Cox C. C. 297.

preted in favour of technical strictness, and there are very strong reasons why a liberal construction should be made on such a statute"—which reasons he proceeds to give (4). As already noticed, the propriety of making or refusing to make such amendment shall be deemed a question for the court, and the decision of the court upon it may be reserved for the Court of Appeal, or may be brought before the Court of Appeal by appeal, like any other question of law. (5) If the defect in the indictment is one which might have been cured by an amendment at the trial, an application for a reserved case must be made before verdict in order to preserve the right of appeal from its refusal. (6)

The decisions *infra*, although not relating to libel, illustrate the rule as to liberal amendments of an indictment. They were all given prior to the Code, which has made the rule even broader than it was before. (7)

Difference between the English and the Canadian law.—There is an important difference between section 898 (*supra*) and the English enactment from which it was originally taken. (8) In the English enactment the word "formal" precedes the word "defect." So that it is *formal* defects only which must be objected to before the trial, and *formal* defects only which can then be amended. An eminent commentator (9) enters into an argument to shew that the effect of our statute can be no wider than if the word "formal" were in it; in other words, that it is only to "formal" defects that section 898 applies. This opinion is opposed to the decision in the case next mentioned.

Reg. v. Mason (1872)—The meaning of similar words in a former enactment, (10) substantially the same as section 898

(4) Greaves, in 3 Russ. 324.
(5) S. 890 (3).
(6) *Ead* v. *The King* (1908), 43 N. S. R. (G. & R.) 53; 13 C. C. C. 348.
(7) On a charge of larceny: *R.* v. *Pritchard* (1861), 8 Cox C. C. 461; L. & C. 34; *R.* v. *Vincent* (1852), 2 Den. C. C. 464; *R.* v. *Senecal* (1862), 8 L. C. Jur. 287; *R.* v. *Gumble* (1872), 12 Cox C. C. 248; *R.* v. *Cornwall* (1872), 33 U. C. Q. B. 106; *R.* v. *Jackson* (1869), 19 U. C. C. P. 280. Of intent to murder: *R.* v. *Welton* (1862), 9 Cox C. C. 297. Of nuisance: *R.* v. *Sturge* (1854), 3 E. & B. 734. Of perjury: *R.* v. *Neville* (1852), 6 Cox C. C. 69; *R.* v. *Tymms* (1870), 11 Cox C. C. 645; *R.* v. *Western* (1868), 11 Cox C. C. 93. Of embezzlement: *R.* v. *Marks* (1866), 10 Cox C. C. 367; *Reg.* v. *Senecal*, *supra*. Of murder: *R.* v. *Orchard* (1838), 8 C. & P. 865. Of arson: *R.* v. *Cronin* (1875), 36 U. C. Q. B. 342.
(8) 14-15 Vict., c. 100, s. 25.
(9) Sir E. Taschereau, C.J., in his comments on S. 629 [S. 898] of the Criminal Code, 3rd ed., at pp. 702 *et seq.*
(10) 32-33 Vict. c. 29, s. 32 (D.)

(*supra*), was considered in an Ontario case. (1) The defendant was indicted for having stolen an information and deposition, being a record of the police court of the city of Toronto, contrary to the statute 32-33 Vict. c. 21, s. 18 (D), which made it a felony to steal any record, etc., of or belonging to any court of record or other court of justice, etc. After conviction the prisoner's counsel moved in arrest of judgment on the grounds, that the police court was not a court of record or a court of justice within the meaning of the statute; and that the information and deposition mentioned in the indictment were not records of any such court within the meaning of the statute. The motion was dismissed and the prisoner sentenced. A writ of error was then issued, and the case brought before the Court of Common Pleas on the same objections. Judgment was given in favour of the Crown on two grounds, first, that the objections taken could not be the subject of a motion in arrest of judgment, or on a writ of error, by reason of the provision of the then Act; (2) and secondly, that even if such objection could be taken after verdict, they could not be maintained. Hagarty, C.J., said: "If there be any meaning in the language used by the legislature, we must hold that parties must demur to or move to quash the indictment for any patent defect, and, if not demurred to, such objection shall not be available in arrest of judgment. If the court overrule the demurrer, their judgment is not conclusive, but can be carried further. The object seems to be to prevent waste of time and labour in criminal trials, and to compel a legal defence to be resorted to at the earliest possible stage." Gwynne, J., took the same view of the enactment.

This decision is opposed to the view that it is only to *formal* defects that the provision in question in the Code applies. It is also opposed to the view that defects in substance, however patent they may be on the face of the indictment, need not be objected to by demurrer or motion to quash, but may be attacked on motion in arrest of judgment. The alleged defects in *Reg.* v. *Mason* were not formal but substantial, and yet the court held that they could not form the subject of a motion in arrest of judgment, but must be objected to on demurrer or motion to quash.

Amendment of indictment after verdict.—It is also argued, in the same connection, that the court has no power, on a mo-

(1) *Reg.* v. *Mason* (1872), 22 U. C. C. P. 246.
(2) 32-33 Vict., c. 29, s. 32 (D.), *supra*, which is the same as S. 898 (1) of the Code.

tion in arrest of judgment, to make any amendment of which no mention has been made before verdict. (3) All amendments must be moved for, it is said, before verdict, and, therefore, if, after verdict, the indictment remains in such a defective condition as not to disclose any indictable offence, a motion in arrest of judgment may then be made on that ground. But as no amendment can then be made, it would be no answer to the motion in arrest of judgment, that the objection should have been taken earlier by demurrer or motion to quash for the reason that the taking of the objection is imperative only in cases where, on such demurrer or motion to quash, the defect might be got rid of by amendment. In the case supposed (*i.e.*, a verdict given and the indictment still defective), this could not be done, because the defect is one of substance, or, strictly speaking, is not a defect at all, but a vice which makes the indictment a nullity, and therefore, to amend it, so as to make it a good indictment, would be for the court to usurp the functions of the grand jury.

It seems clear, however, that power is expressly given by section 889 to amend defects of substance. But this power is to be exercised apparently not before plea pleaded, but after evidence has been given. And there is no provision in section 889, or elsewhere, similar to the one contained in section 898, that the objection must be taken at any particular time.

In *Reg.* v. *Carr,* (4) the Court of Queen's Bench, in the province of Quebec, came to a different conclusion from that stated in *Reg.* v. *Mason* (*supra*). In the Quebec case the accused was convicted, under 32-33 Vict., c. 20, s. 10 (D), now section 264 of the Code, of an attempt to murder. The court being of opinion that the indictment was defective on its face, by reason of the omission of words material to the constitution of the offence charged, granted a motion to arrest the judgment and quash the indictment, although the prosecutor invoked 32-33 Vict., c. 29, s. 32, now section 898 of the Code (*supra*), and contended that the prisoner was too late to take the objection. (5) This decision is all the more surprising from the fact that, at the time it was given, there was a provision in the Code, as there is now, in a modified form, that the accused may, at any time before sentence, move in arrest of judgment on the ground that the indictment does not (after any amendment

(3) See Taschereau's Commentary, 3rd ed., p. 839.
(4) (1872), 26 L. C. Jur. 61.
(5) See, also, *R.* v. *Wheatley* (1761), 2 Burr. 1127; *R.* v. *Turner* (1832), 1 Mood. C. C. 239; *Reg.* v. *Webb* (1848), 1 Den. C. C. 338.

which the court is willing and has power to make), state any indictable offence. (6) The present corresponding enactment is substantially the same. It provides that the accused may, at any time before sentence, move in arrest of judgment on the ground that the indictment does not, after amendment, if any, state any indictable offence. (7)

Is an indictment which is not traversed invalid? — This question came before the Ontario courts under the following circumstances: At Toronto assizes in January, 1908, a true bill was returned against the managing editor of the *Globe* newspaper, for several alleged libels published therein on the 28th and 30th December, 1907, reflecting on the character of W. Beattie Nesbitt, who was at the time a candidate for the office of Mayor of Toronto. The articles complained of comprised news despatches from Stratford, dated May 15th and December 28th, 1907, an extract from the Stratford *Daily Herald* of the former date, and two editorials in the *Globe* headed "A question for decent citizens" and "Dr. Nesbitt's case," respectively. The defendant pleaded not guilty, justification (with particulars) and publication in the public interest, and fair comment. Time was given the private prosecutor to reply, the pleas with particulars not to be published meanwhile. The indictment was then traversed from the January to the May sittings of the court and thereafter to the October sittings, when, owing to the absence of the private prosecutor, a traverse to the next sittings in February, 1909, was overlooked. At the sittings of the court in May, leave was given the private prosecutor to file a demurrer to the indictment within a week. The demurrer alleged that the pleas and accompanying particulars were not sufficient in law, and that the private prosecutor was not bound to answer them, the contention being that his acts and conduct as a private citizen, which were set out in the particulars, were no justification of the libels charged against him as a candidate for a public office. The defendant's bail, which had been renewed in May, was not renewed in October, and at the sittings of the court on the 4th February, 1909, counsel for the private prosecutor moved for an order requiring the defendant to file a joinder to the demurrer. This, it was said, was the proper practice, as the prosecution could not otherwise proceed.

Counsel for the defendant contended that no such order could be made, that the indictment not having been traversed

(6) S. 733 (2); *Reg.* v. *Hogle* (1896), 5 C. C. C. 53; 5 Q. O. R. (Q.B.) 59.
(7) S. 1007 (1).

in October, the prosecution had been discontinued and was at an end, at least under that indictment, and, therefore, the court had no jurisdiction to deal with the matter. The presiding judge could only exercise jurisdiction as a judge of a court of oyer and terminer and general gaol delivery. Such a court could deal only with indictments presented by its own grand jury, and as no indictment in this case had been presented at the then sittings of the court, the court could not deal with the case as a court of oyer and terminer.

Counsel for the private prosecutor argued that there were only four modes of getting rid of a criminal indictment, namely, by quashing it, by an acquittal or conviction, or by the Attorney-General entering a *nolle prosequi*. The conditions as to the sittings of the superior courts were different in this country from what they were in England. There was no such thing as a discontinuance in criminal law; this only applied to civil cases. An indictment could not lapse in that way. If it could it would open the door to collusion and fraud, and it was for this reason that an indictment could only be withdrawn by the Attorney-General. Counsel for defendant said discontinuances had not been abolished in England until 1886 by the Crown Office rules, which were not in force in this country. Judgment was reserved, and no further proceedings appear to have been taken in the matter. (8)

(8) *Rex* v. *Macdonald*, *Globe*, February 5th, 1909.

CHAPTER XXVI.

Pleas to the Indictment.

When the accused is called upon to plead he may plead either guilty or not guilty, or the special pleas which are provided for in the statute. (1) If he wilfully refuses to plead, or will not answer directly, the court may order the proper officer to enter a plea of not guilty. (2)

The plea of not guilty: its force and effect.—The usual plea to an information or indictment for libel is the plea of not guilty, or the general issue. This plea makes it incumbent on the Crown to prove every material fact and circumstance constituting the alleged libel, and permits the defendant to give in evidence everything negativing the allegations in the indictment, not covered by the special pleas. He may also under this plea raise the question of jurisdiction, (3) or shew that the alleged libel was a fair and *bonâ fide* comment on a matter of public interest. Under the plea of not guilty, therefore, the defendant is entitled to take advantage of every defect in the evidence for the prosecution; or to rebut that evidence by counter proof tending to convince the jury, either that the act imputed was not committed, or, admitting the publication, to shew from the context (4) or other circumstances, either that the matter published was not criminal in its nature, or, if criminal, that it was published inadvertently (5) and without any guilty knowledge or intention; (6) or that it was published on an occasion which the law recognizes as constituting either an absolute privilege or excuse, independently of the question of intention, or a conditional privilege dependent on the actual intention and motive of the defendant. In short, under the plea of not guilty the accused may make any defence permitted by law, except the defences covered by the special pleas *infra*. One of these, the plea of justification, may be pleaded along with the plea of not guilty, and both pleas may then be inquired of together. (7) The other special pleas must be dis-

(1) S. 900 (1).
(2) *Ibid.* (2).
(3) *R.* v. *Hogle* (1896), 5 C. C. C. 53; 5 Q. O. R. (Q. B.), 59.
(4) *Reg.* v. *Lambert and Perry* (1810), 2 Camp. 398.
(5) *R.* v. *Abingdon* (1794), 1 Esp. 226.
(6) *R.* v. *Holt* (1793), 5 T. R. 436, at p. 444; *R.* v. *Holbrook et al.* (1877-8), 48 L. J. 113; 4 Q. B. D. 42.
(7) S. 911 (2).

posed of, whenever pleaded, before the accused is called on to plead further. (8) No plea in abatement shall be allowed. (9)

The special pleas allowable.—The special pleas allowable are *autrefois acquit, autrefois convict,* and pardon. These are applicable to all indictable offences, and, in addition to these, there may be a plea of justification in cases of defamatory libel. (10) These are the only pleas which may be pleaded; (1) all other grounds of defence may be relied on under the plea of not guilty. (2) The pleas of *autrefois acquit, autrefois convict* and pardon may be pleaded together, and, if pleaded, shall be first disposed of; (3) and, if disposed of against the accused, he shall be allowed to plead not guilty. (4) The pardon pleaded may be either pardon by the Crown, or pardon by statute specially passed to cover any individual cases. This plea is practically obsolete. In any plea of *autrefois acquit* or *autrefois convict,* it shall be sufficient for the accused to state, that he has been lawfully acquitted or convicted, as the case may be, of the offence charged in the count or counts to which such plea is pleaded, indicating the time and place of such acquittal or conviction. (5) It was held prior to the Code, that, if the defect in the indictment was such that the indictment might have been amended, and, if amended, that the accused might have been convicted of the same offence for which he was afterwards indicted, his acquittal would nevertheless not be a bar to his conviction on the subsequent indictment. It was said that what was done, and not what ought to have been done, or might have been done, was to govern in any such case. (6) The Code negatives this doctrine. It is therein provided that, on the trial of an issue on a plea of *autrefois acquit* or *autrefois convict* to any count or counts, if it appear that the matter on which the accused was given in charge on the former trial is the same, in whole or in part, as that on which it is proposed to give him in charge, and that he might on the former trial, if all proper amendments had been made which might have been made, have been convicted of all the offences of which he may be convicted on the count or counts to which such plea is pleaded, the court shall give judgment that he be discharged from such count or counts. (7) If it appear that the accused might, on the former

(8) S. 906 (1).
(9) S. 899.
(10) S. 905 (1).
(1) *Ibid.*
(2) *Ibid.* (2).
(3) S. 906 (1).
(4) *Ibid.* (2).
(5) *Ibid.* (3).
(6) *Reg.* v. *Green* (1856), Dears. & Bell 113; 26 L. J. M. C. 17.
(7) S. 907 (1).

trial, have been convicted of any offence of which he might be convicted on the count or counts to which such plea is pleaded, but that he may be convicted on any such count or counts of some offence or offences of which he could not have been convicted on the former trial, the court shall direct that he shall not be convicted on any such count or counts of any offence of which he might have been convicted on the former trial, but that he shall plead over as to the other offence or offences charged. (8) The judgment in that case is *respondeat ouster*, that is, that defendant "do answer over" by pleading any plea which he is entitled to plead to the indictment for the other offence or offences.

Autrefois acquit and autrefois convict. — The pleas of *autrefois acquit* and *autrefois convict* are founded on the principle that no man shall be placed in peril more than once upon the same accusation. To entitle the defendant to the former plea it is necessary that the offence charged be the same, and that the former indictment, as well as the acquittal, was sufficient. If, on the former trial, the defendant escaped because the indictment was so defective that he could not be convicted, his previous acquittal will be no answer to the subsequent charge, because he has not been in jeopardy so as to entitle him to plead the former acquittal in bar. (9) If the charge be in truth the same, although the indictment differ in immaterial circumstances, the defendant may plead his previous acquittal with proper averments. The pleas of *autrefois acquit* and *autrefois convict* are of a mixed nature, and consist partly of matter of record and partly of matter of fact. The matter of record is the former indictment and acquittal or conviction; the matter of fact, is the averment of the identity of the offence, and of the defendant as the person previously indicted. In the case of the plea of *autrefois convict*, the offence must be the same as that of which the defendant was before convicted, and the conviction must have been lawful on a sufficient indictment, otherwise the plea is not sufficient. (10) The test whether a previous acquittal is a good defence to a subsequent indictment is this: Was the accused placed in jeopardy on the former trial, and could he then have been convicted of all that he is charged with in the subsequent indictment? Or, would the evidence neces-

(8) S. 907 (2).
(9) *R.* v. *Drury* (1849), 18 L. J. M. C. 189; 3 C. & K. 193; *Vaux's Case* (1591), 4 Rep. 45a; 1 Chit. Cr. L. 452; *R.* v. *Clarke* (1820), 1 B. & B. 473; *R.* v. *Turner* (1832), 1 Mood. 239; 2 Hawk., c. 35, s. 8; *Bowman* v. *Norton* (1833), 6 C. & P. 101, 337.
(10) *Vaux's Case*, and other cases in previous foot note.

sary to support the second indictment have been sufficient to procure a legal conviction on the first? (1) The test when the previous conviction is pleaded is: Was the conviction for the same offence? In other words, a previous acquittal is an answer to a subsequent indictment when, and because, it was an acquittal of the same offence for which the defendant is subsequently indicted, or, at all events, when it proves that he could not have been guilty of that offence. A previous conviction is an answer to a subsequent indictment when, and because, the previous conviction is for the same offence charged in the subsequent indictment, or else for an offence which the Crown had the right, at its own option, to regard, and did regard, as being the only offence which the same facts amounted to.

Both of these rules are illustrated by the case of defamatory libel. Every one who publishes a defamatory libel knowing it to be false, is liable to two years' imprisonment, or to a fine of $400, or to both; (2) while every one who simply publishes a defamatory libel is liable to one year's imprisonment, or to a fine of $200, or to both, namely, half the punishment in the previous case. (3) If the accused were *convicted* of simply publishing a defamatory libel, and was afterwards indicted for publishing the same libel knowing it to be false, he could plead the previous conviction, and it would be a complete answer, because, although the two charges are not exactly the same, yet the Crown having chosen to treat the facts as amounting to the less serious offence, could not afterwards withdraw from that position. On the other hand, if the accused were *acquitted* on the first indictment of simply publishing a libel, his acquittal would be a complete defence to a second indictment for publishing the same libel knowing it to be false, because it shewed that there had been no publication of any kind. Apart, however, from the rule of pleading, the case just mentioned is covered by an express enactment in the Code which provides, that when an indictment charges substantially the same offence as that charged in the indictment on which the accused was given in charge on a former trial, but adds a statement of intention, or circumstances of aggravation tending, if proved, to increase the punishment—as in the case of libel, where the possible punishment may be donble for a publication

(1) *R.* v. *Bulmer* (1881), 5 L. N. 92; *R.* v. *Sheen* (1827), 2 C. & P. 634; *R.* v. *Bird* (1851), 2 Den. C. C. 94; *R.* v. *Drury* (1848), 3 C. & K. 193; *R.* v. *Miles* (1890), 17 Cox C. C. 9; *Ryley* v. *Brown* (1890), 17 Co. C. C. 79. But see *R.* v. *Gilmore* (1882), 15 Cox C. C. 85.
(2) S. 333.
(3) S 334.

knowingly false—the previous acquittal or conviction shall be a bar to such subsequent indictment. (4).

Evidence to prove identity of charges.—On the trial of an issue on a plea of *autrefois acquit* or *autrefois convict*, the depositions transmitted to the court on the former trial, together with the judge's and official stenographer's notes, if available, and the depositions transmitted to the court on the subsequent charge, shall be admissible in evidence to prove or disprove the identity of the charges. (5)

Not guilty or justification the usual pleas.—Although the special pleas of *autrefois acquit, autrefois convict* and pardon, may be pleaded to an information or indictment for libel, there is apparently no reported case in Canada in which that has been done, and it is questionable if any case has arisen in which it was necessary to place any such pleas on the record. A full answer and defence has evidently been able to be made, as it still is in most cases, under the pleas of not guilty and justification. which latter is discussed in the following chapter.

Time to plead or demur. — Any person or corporation prosecuted in the province of Ontario must plead or demur to the information or indictment within four days from the time of appearance, and, in default thereof, judgment may be entered for want of a plea; (6) but, upon sufficient cause shewn, further time may be allowed by the court or a judge. (7) Where a defendant has appeared to the information or indictment by attorney, a rule requiring him to plead may forthwith be served, and may be enforced, or judgment in default entered; but further time may be allowed as already stated.

B. C. Rules.—In the province of British Columbia some special rules of procedure have been adopted with respect to the form of pleadings and orders and time to plead, etc. (8) These rules have been adopted from the Crown Office Rules in England.

(4) S. 909 (1).
(5) S. 908.
(6) S. 902.
(7) S. 903.
(8) See B. C. Rules 48-52.

CHAPTER XXVII.

The Plea of Justification.

Nature and origin of plea of justification.—Lord Campbell, C.J.—Although the truth of the defamatory matter is a complete answer to a civil action for damages, for the reason that the injury to the individual, which is the basis of the action, fails, it is not so in criminal proceedings, except on certain conditions, because the imputations, even if true, tend none the less to produce a breach of the peace which is a public wrong. The plea that the matter charged is true, under certain circumstances, was first permitted in Lord Campbell's Libel Act, (1) which was soon afterwards adopted in all the British American Provinces. As the author of the Act said in one of his judgments, "before that enactment the truth of the charges contained in a libel was no defence (2) to an indictment or criminal information for publishing it. The truth could not be given in evidence under a plea of not guilty; and no special justification on the ground of truth could he pleaded. It was even said that 'the greater the truth the greater the libel' The legislature, thinking that such a maxim misapplied brought discredit on the administration of justice, and that, under certain guards and modifications, the truth of the charges might advantageously he inquired into, and might be permitted to constitute a complete defence, passed the statute referred to." (3)

Robinson, C.J.—In commenting upon the corresponding provision in the Upper Canada statute, (4) Robinson, C.J., said that the statute, on which a plea of justification then before the court was framed, had made a change in the law of libel, which might prove of great advantage to the publishers of newspapers or other public journals, in cases where they had stated certain facts, however injurious to the character of an individual, which they might know to have occurred, or which they found stated upon such authority that they were satisfied they could venture to rely upon being able to prove their truth if it should be questioned. "In such cases where the public have an interest in the matter to which they have resolved to give further publicity, and where they do not give with their article any in-

(1) 6-7 Vict. c. 96, s. 6.
(2) See the Case *de libellis famosis*, 5 Coke, 125.
(3) *Per* Lord Campbell, C.J., in *Reg.* v. *Newman* (1853), 558, at p. 573.
(4) C. S. U. C. 1859, c. 103, s. 9.

jurious comments evidently dictated by malice and in a spirit of exaggeration, the statute affords them a fair degree of protection by enabling them to plead by way of justification 'the truth of the matters charged,' which was formerly no defence against a criminal prosecution, and to plead also, as a part of such defence, that it was for the public benefit that such matter should be published. The defendant is allowed to plead this in addition to the plea of 'not guilty,' and if the special plea is pleaded in a manner conformable to the statute, then it will be for the jury upon the trial, if they find that the defendant has published the alleged article, and that it is a libel, to find also whether the matters—that is, all the matters—charged in the libel are true, and whether it was for the public benefit that it should be published." (5)

Reg. v. Tasse (1885).—The English statute, (6) as was said in a Quebec case, did not extend to the law of privileged communications. It created a new defence to libel on certain conditions. It permitted the defendant to plead, together with or without the plea of "not guilty," the special plea that the matter complained of was true, and that it was for the public benefit that the matters charged should be published. Except in so far, the law of libel remains unchanged, and the truth could not be inquired of, and could consequently be no justification, or even a beginning to a justification. In this case the special plea has been put in and it raises two questions of fact—namely, that the statement complained of is true, and that it was published for the public benefit. These two questions of fact the jury, and not the court, must decide. (7)

When truth a defence.—The statutory plea.—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. (8) 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

(5) *Reg.* v. *Moylan* (1860), 19 U. C. Q. B. 521, at pp. 526-7.
(6) 6-7 Vict. c. 96.
(7) *Reg.* v. *Tasse* (1885), 8 L. N. 98 (Q.B.)
(8) S. 331.

charged should be published in the manner and at the time when they were published. (9)

Justification in one of two senses, or by separate pleas. —Such plea may justify the defamatory matter in the sense specified, if any, in the count, or in the sense which the defamatory 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. (10)

Must plead particulars.—The reply.—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. (1) The prosecutor may reply generally denying the truth thereof. (2)

When plea of justification necessary and when not.—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. (3)

Not guilty in addition.—The accused may, in addition to such plea, plead not guilty, and such pleas shall be inquired of together. (4)

Effect of plea on punishment.—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. (5)

Distinction between civil and criminal cases. — Section 910 (1) (*supra*), defining the plea of justification, indicates the main distinction between civil and criminal cases of libel where truth is the defence. However malicious or wanton the libel may be, its truth is a perfect answer to a civil action for damages; but, in a criminal prosecution, not only must the truth of the

(9) S. 910 (1).
(10) *Ibid.* (2).
(1) *Ibid.* (3).
(2) *Ibid.* (4).
(3) S. 911 (1).
(4) *Ibid.* (2).
(5) *Ibid.* (3).

libel be proved, but also that in the manner and at the time of its publication, the libel was for the public benefit. In both cases the facts upon which the truth is based must be set forth in the plea, or in particulars accompanying the plea, but, in a criminal case, they must also disclose the reasons for the publication being for the public good, in the manner and at the time of publication, otherwise the plea will be quashed. (6) The rule is not quite so strict in civil proceedings. In one of the latest cases—an action for libel against a newspaper publishing company — the defendants applied to amend their defence, which was a general denial of the matters complained of, by pleading justification, and they at the same time filed the proposed amended plea charging the acceptance of bribes by plaintiff when holding a municipal office. Upon objection that the matters charged were not stated with sufficient particularity, it was held, that it is not necessary to state the particulars in the plea of justification in the first instance, but that such particulars, if not then furnished, must be subsequently delivered, and, therefore, the proposed amended pleading was not bad, although all the matters therein alleged were not stated with sufficient particularity. (7)

Conditions of pleading and proof must be strictly observed.—This section (910) of the Code differs somewhat from the corresponding section of the English statute; but, under both statutes, the conditions as to pleading and proving justification must be strictly complied with. The truth is a defence only under the statute, and only in accordance with the statutory conditions; otherwise the law prior to the adoption of Lord Campbell's Act (6-7 Vict., ch. 96 (Imp.)) will govern. Pleading the mere truth is not sufficient. So that where a defendant, indicted for publishing a malicious libel, pleaded specially the mere truth of the libel, as well as the plea of not guilty, and, under these pleas, endeavoured to prove a legal justification, it was held that the evidence was inadmissible, as it was necessary, in order to bring the defendant within the statute, not only to plead that the publication was true, but also that it was made for the public benefit, (8) and now, as required by the subsequent amendment of the Act, in the manner and at the time of publishing.

(6) *Reg.* v. *Creighton, infra.*
(7) *Laird* v. *Leader Publishing Co.* (1909), 2 Sask. R. 1. See, also, *Wilkinson* v. *Mail & Empire* (1910), 2 O. W. N. 471; 17 O. W. R. 935.
(8) *Reg.* v. *Hickson* (1880), 3 L. N. 139 (Q.B.).

When the truth may be proved without pleading it.—But although the rule is, that the truth of the matters charged is not to be inquired into without such a plea of justification, (9) there is this exception, that when the accused is put upon his trial for publishing a libel knowing it to be false, he need not plead justification specially, but may, without such plea, give evidence of the truth in order to negative the allegation of knowing falsehood. (10) But in that case also, as in every case where a plea of justification is resorted to, mere proof of the truth, as already observed, is insufficient. The public benefit of the publication, as above defined, is also essential; otherwise the verdict must be for the Crown; for the plea cannot be taken distributively, but as a whole on the strict and single issue raised by the express conditions stated in the statute. (1)

The "public benefit" of publishing a libel.—The test of what is a publication for the "public benefit" was explained in *Rex* v. *Wright*, (2) in which a criminal information was refused for an alleged libel contained in a true copy of a report of a committee of the House of Commons, although it reflected on the relator, and although its publication was not authorized by the House. The decision was based on the fact that the copy was a true copy. Lawrence, J., there stated that the general advantage to the community in having these proceedings made public more than counterbalanced the inconvenience to private persons whose conduct may be the subject of such proceedings. (3)

Charges of personal immorality not for the public benefit.—The question whether the particular publication is for the public benefit, is for the jury at the trial, but it may sometimes be determined before the trial. It was held, on demurrer, in an Ontario case, that the publication in a newspaper of charges of personal immorality was not for the public benefit. In that case the publishers of two evening newspapers were sued for publishing of the plaintiff, in their papers, that he had seduced and betrayed one B. P., and was a man unfit for the society of respectable people, etc. The defendants pleaded 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 pro-

(9) S. 911 (1).
(10) *Ibid.*
(1) *R.* v. *Newman* (1853), 1 E. & B. 558; 22 L. J. Q. B. 156.
(2) (1799), 8 T. R. 293, at p. 298; 4 R. R. 649.
(3) See, also, Cockburn, C.J., in *Wason* v. *Walter* (1868), L. R. 4 Q. B. 87; 8 B. & S. 730; 38 L. J. Q. B. 34; 17 W. R. 169; 19 L. T. 418.

ceedings of public interest and concern. Upon demurrer to this plea as being no answer to the action, it was held (*per* Adam Wilson, C.J.,), that the publication was in no sense for the public benefit, nor in the course of the defendants' duty as journalists. (4) A similar opinion was expressed by the Ontario Court of Queen's Bench in regard to a false statement of a storekeepers' account, which had been advertised for sale. (5)

Demurrer to justification of libel on Minister of the Crown.—A different view was held in a New Brunswick case as to the publication of charges of personal immorality. At the York *nisi prius* sittings of the Supreme Court of New Brunswick on the 19th June, 1907. the publisher of the *Daily Gleaner* newspaper, published at the city of Fredericton, was required to plead to a criminal information, granted on the complaint of H. R. E., for the publication in that paper, on the 27th March, 1907, of the following libel: This Minister was Mr. E. himself (then Minister of Railways and Canals in the Dominion Government), and one of the places from which he was ejected with two women of ill repute, with whom he had been keeping company not long since, was the St. Lawrence Hall, Montreal. The defendant pleaded not guilty, and justification and publication in the public interest and for the public benefit. In the plea last stated it was alleged that, before and at the time of the publication complained of, the complainant was Minister of Railways and Canals in the Government of Canada, and that the personal morals and conduct of members of the Government of Canada were and are matters of public interest, and had been discussed in Parliament and in the press, and it was desirable and proper, in the public interest and for the benefit of the public, that facts of a disgraceful and degrading character in the lives of Ministers of the Crown should be made known and published, so that the Government of Canada might be purged of men whose personal character rendered them undesirable and unfit Ministers of the Crown, by reason whereof it was for the public benefit that the said matters so charged in the said indictment should be published, etc.

This plea was demurred to principally on the following grounds: That the matters intended as a defence were not shewn with sufficient certainty; that the plea did not set forth any sufficient fact by reason of which it was for the public good that

(4) *Farmer* v. *Hamilton Tribune Printing and Publishing Co., et al.* (1883), 3 O. R. 538. See *R.* v. *Brazeau* (1899), 3 C. C. C. 89, *infra*; and, *per contra*, *Rex* v. *Crocket*, *infra*.

(5) See *Green et ux.* v. *Minnes et al.*, *infra*.

the article complained of should be published, or that the publication was for the public good within the meaning of the statute; that, upon the facts stated in the plea, the publication was not for the public benefit; that even if it were true that the personal morals and conduct of members of the Government and of Parliament were of public interest, Parliament was the proper guardian of the honour of its members and the proper place to investigate charges in respect of their private conduct, if these were of sufficient gravity to affect their public usefulness; that so far from being for the public good, it was likely to result in public injury and impair the usefulness of Parliament to have the private life and conduct of members of the Government and of Parliament, not in any way connected with the discharge of their public duties, discussed in the public press; that the plea did not allege that any allegations of improper conduct were made against the complainant in Parliament; that any discussion there, or in the press, would not make any defamatory libel any less so, and would afford no justification for its publication, or justify defamatory allegations of fact not stated in the discussion; that the plea shewed that the defendant was guilty of a seditious libel, which it could not be for the public benefit to publish, and to which the allegations in the plea afforded no justification or defence; that, even if it be advisable and proper for the public benefit that facts of a disgraceful and degrading character in the lives of Ministers of the Crown should be published so that the Government might be purged as alleged, it was not for the public benefit that they should be published in a newspaper which, for personal or malicious motives, might see fit to publish them; that such publication could be justified only if made to the Governor-General or to Parliament, with whom rested the authority to continue the Minister as an adviser of the representative of the Sovereign or to dispense with his services; and that the plea was bad in not setting forth any facts sufficient in law to justify the publication.

Opinion of Landry, J.—Landry, J., who heard the argument and the authorities cited, said: "The ground that presents the most doubt to me is as to the necessity of defining the meaning of the word 'ill-repute.' I incline to the opinion, however, that that word is sufficiently explicit to permit the Crown to interpret it so as not to be misled by the uncertainty of its meaning, and, should it be susceptible of several meanings, I can see no disadvantage to the prosecution in their not being furnished with a statement of the actual meaning relied on. The law authorized the defendant to plead as a defence the truth of the article com-

plained of, and that its publication was for the benefit of the public. There seems to me no doubt that the defendant, by his plea filed, intends to justify on these two grounds. The question, therefore, is, has he used language in his plea that covers technically the requirements of pleading to put those two elements in issue—the truth of the article and the benefit to the public from its publication. I believe he has. I do not feel free to decide, with my conception of the law, that the publication was not for the benefit of the public provided that it can be proven to be true, and I believe the reasons given in the plea are sufficient to entitle the defendant to have his plea sustained. I therefore decide the demurrer in favour of the defendant." (6)

False account of indebtedness advertised for sale.—In a civil action against a firm of merchants who procured the publication of a poster containing a false statement (held to be libellous) of the plaintiff's indebtedness, and advertising the account for sale, Street, J., said: "The publication complained of by the plaintiffs is clearly of a character which a jury might properly hold to be libellous; it is clearly not a matter of public interest or concern, and, whether true or false, it is, therefore, a matter for which the defendants might have been indicted. It is, I think, a matter in which a plea of justification should not be taken to be proved unless the proof go to the full extent of the libel. The statement complained of in the libel is, that the debtor owed $59.33, when, as a matter of fact, she owed but $24.33. Under these circumstances, the plea of justification should not, in my opinion, be held to have been proved." And Armour, C.J., said: "If this had been a criminal prosecution, there would have been nothing to justify the publication of this poster, even if it had been shewn that the debtors therein mentioned were indebted as therein set forth, for it could not have been shewn that its publication was for the public benefit." (7)

A double justification may be pleaded.—The second clause in section 910 (1) is framed in accordance with the decision in *Tench* v. *Swinyard,* (8) and a number of cases referred to therein, in which it was held, as Blackburn, J., says in *Watkin* v. *Hall,* (9) "that the defendant may plead a justification as to the words,

(6) *Rea* v. *Crocket* (1907), 3 E. L. R. 330. An appeal from this judgment was abandoned and no further proceedings were taken.

(7) *Green et ux.* v. *Minnes et al.* (1892), 22 O. R. 177. See, also, *Wolfenden* v. *Giles* (1892), 2 B. C. R. 279, where the above decision is referred to.

(8) (1869), 29 U. C. Q. B. 319.

(9) (1868), L. R. 3 Q. B. 402: 37 L. J. Q. B. 125: 18 L. T. 561: 16 W. R. 857.

with the meaning in the innuendo, and also as to them without the meaning." That is, either in the sense stated in the indictment, or in the sense which appears without such statement, and which, as the defendant may successfully contend, is the ordinary and natural meaning of the words. (10) And, as if to make assurance doubly sure, it is further provided, in the same clause (910 (1)), that the indictment may be regarded as containing two libels in two separate counts, and a justification in the one sense or meaning pleaded to one of the counts, and a justification in the other sense or meaning pleaded to the other count. The effect of this rule is to give the defendant two strings to his bow, and to prevent him being confined to the justification of the words in the sense prescribed by the Crown, and to enable him, if he fails to justify in that sense, to justify in some other sense which may establish a defence under the statute.

Effect of double plea of not guilty and justification.—The provisions in section 911 (2) for the double plea of not guilty and justification, and that "such pleas shall be inquired of together," subserves all the purposes of the English enactment, that nothing in the Act shall take away or prejudice any defence under the plea of not guilty, which it is competent to the defendant to make under such plea to any indictment or information for a defamatory libel. (1) So that both in England and in this country, any defence which was open to the accused under the general issue, prior to the statute, is still available, and may be gone into simultaneously with the justification of the libel charged.

In an English case heard before a Commissioner at the Central Criminal Court, London, the prosecutor, on an indictment for a false and defamatory libel, having unsuccessfully demurred to a plea of justification which dealt in one plea with libels contained in four counts and not having pleaded over, was held entitled by the Commissioner, after consulting Kennedy. J., to go to the jury on the general issue of not guilty. The defendant then admitted, in the hearing of the jury, that he had sent postcards, which on the face of them were libellous. The jury returned a verdict of guilty, but judgment was entered for the defendant, who was at once discharged. (2)

(10) *Tench* v. *Swinyard* decided, what has been often decided since, that a defendant may justify the libel with the meaning in the innuendo. Reference is made in the judgment to *Watkin* v. *Hall, supra; Biggs* v. *The Great Eastern Railway Company* (1868), 18 L. T. (N. S.) 482; 16 W. R. 908; *Alexander* v. *The North Eastern Railway Company* (1865), 34 L. J. Q. B. 152; 6 B. & S. 340; and *Gwynn* v. *The South Eastern Railway Company* (1868), 18 L. T. (N.S.) 738.

(1) 6-7 Vict. c. 96, s. 6.

(2) *Reg.* v. *De la Porte* (1895), 59 J. P. 617.

The truth as a defence in Quebec.—In a prosecution of the publishers of the *Daily Witness*, at Montreal, in the year 1874, Ramsay, J., ruled that the defendants could not plead or prove the truth of the alleged libel, on the ground that the Imperial Act, c. 96 (Lord Campbell's Act), under which the truth of the libel and that its publication was for the public benefit, could be pleaded in England, was not in force in the province of Quebec. (3) This ruling, which was correct as to the English Act, should not have prevented a plea of justification under our own statute. It can only be explained on the supposition that the Dominion Act, 37 Vict., c. 38, which was based on Lord Campbell's Act, and which made the law respecting the crime of libel uniform throughout the Dominion, was not in force at the time the decision was given. The Dominion Act was passed on the 26th May, 1874, and permitted the truth to be pleaded and proved in criminal prosecutions for defamatory libel, so long as it was shewn that the publication of the matters charged was for the public benefit. The Act was subsequently amended so as to require proof in addition, that the manner and time of the publication of the matters charged was for the public benefit. The law, as thus stated, is embodied in the Code. (4)

Justification confined to defamatory libels.—Although the Code is otherwise silent on the subject, there is no doubt that its enactments as to justification are limited, as expressly stated in section 910, to defamatory libels, and that the truth of blasphemous, seditious, or obscene libels cannot be pleaded to an information or indictment. (5) As has been well said, with respect to libels against religion or morality, the permitting such a defence would be attended with consequences almost too absurd to mention. Suppose a person were to publish that no overruling Providence exists; or that to break a promise or an oath is a virtuous act; could the discussion of such questions be tolerated in a court, or brought to issue before a jury? Or, would proof that indecent transactions have actually occurred supply

(3) *Reg.* v. *Dougall et al.* (1874), 18 L. C. J. 85, at p. 87.

(4) SS. 331 and 910 (1). It was held in another Quebec case, that the constitutional liberty of the press in Canada exists under the English law, which applies to actions for defamation in newspapers, and to the defences founded on privilege and fair comment: *Marcotte* v. *Bolduc* (1906), 30 Q. O. R. (S.C.) 222; and, it might have been added, to prosecutions for libel as well under 37 Vict. c. 38, *supra*, and under the Code.

(5) *Reg.* v. *Duffy* (1848), 9 Ir. L. R. 329; 2 Cox C. C. 45; *Ex parte O'Brien* (1882), 15 Cox C. C. 180; L. R. (Ir.) 12 Q. B. 32; *Reg.* v. *Bradlaugh* (1883), 15 Cox C. C. 217; *Reg.* v. *Ramsay et al.* (1883), 15 Cox C. C. 331; *Reg.* v. *Hicklin* (1868), L. R. 3 Q. B. 360; *Cooke* v. *Hughes* (1824), Ry. & M. 112; *R.* v. *Tunbridge* (1822), 1 St. Tr. (N.S.) 168; *R.* v. *McHugh* (1901), 2 Ir. Rep. 569.

any excuse for the public exhibition of them in a print or a pamphlet? The same principles apply to the publication of seditious and blasphemous libels. (6)

Limitations of justification as to pleading and evidence.—The limitations of justification, both as to pleading and evidence, are discussed in *Regina* v. *Patteson,* (7) in connection with the right of the Crown to cause jurors to stand aside on the trial of an indictment or information by a private prosecutor for the publication of a defamatory libel.

Opinion of Richards, C.J.—Richards, C.J., there said: "After the best consideration I can give the subject, and looking at the history of the statute under discussion, both in England and in this country, (8) I think it was intended that the right to justify and give the truth in evidence, on an indictment or information for libel, should be limited to *defamatory* libels on *individuals.* It was, I think, intended not to permit a prosecutor to obtain an advantage over his adversary by complaining of a defamatory libel in the form of an indictment or information thus instituted in the name of the Crown. While, on the one hand, he was not driven to bring a civil action to vindicate his character, on the other, if he sought to vindicate it by a prosecution, he was not to have the right to prevent the defendant shewing that what had been published was true, and that it was for the public benefit that the matter complained of should be published. The statute does not seem to contemplate, nor does the practice for many years past in England shew, that the Attorney-General, on behalf of the Crown, is to institute proceedings for a purely defamatory libel on a private individual. It is true that in practice in this country the Attorney-General selects counsel, who are paid by the Crown to conduct prosecutions at the assizes, but I apprehend that many of these prosecutions are substantially instituted by private prosecutors, who are bound over to prosecute, and who are often sued for malicious prosecutions when they fail to make out a case before a jury. The Imp. stat., 6 & 7 Vict., ch. 96, sec. 6, is in effect the same as secs. 5, 6, 7, 8 and 9 of our Act, 37 Vict. ch. 38 (D); and the opinions expressed by the judges in the case of *Regina* v. *Duffy* (1848), 2 Cox C. C. 45, shew that the clause of the statute was not intended to apply to any but defamatory libels, and reference was made to the provision in the 7th section for the payment of costs

(6) Folkard's L. & S., 7th ed., 481-2; *R.* v. *McHugh, supra.*
(7) (1875), 36 U. C. Q. B. 129.
(8) 37 Vict. c. 38 (D.), borrowed from 6-7 Vict. c. 96 (Imp.).

by the defendant in case the issue on the special plea of justification was found for the prosecution, for, as it was said, the Crown never receives costs. . . . The parties are looked upon as ordinary litigants, so far as to be allowed to receive and pay costs, when they succeed or are defeated on the issues raised on the trial of the indictment." (9)

Blackburn, C.J., and Crampton, J.—Blackburn, C.J., is quoted in this judgment as saying, in *Reg.* v. *Duffy* (*supra*), that "by the 6th section, the power of pleading a justification is extended to cases of private prosecution by way of indictment or information. The benefit which was withheld from defendants, in criminal prosecutions for libel, of pleading a justification, has been extended to those cases by this statute [6—7 Vict., c. 96, s. 6]. And Crampton, J., is also quoted as saying, in the same case, that "the justification allowed by this statute to be put in is just such a one as would be a justification in a civil action for libel, before the statute, shewing that it was personal libels which were intended by the legislature to be affected by the Act."

Must affirm the truth of all the matters charged in the indictment.—Reg. v. Moylan (1860).—The plea of justification must affirm the truth of all, and not merely of some, of the matters charged in the indictment. A criminal information was filed at the instance of J. H. C., a prominent member of the bar of Upper Canada, and at the time grand master of the Orange order, against the publisher of *The Canadian Freeman* newspaper, for the publication of an article in that newspaper headed—"How Orange Law Officials discharge their duty! ! ! Messrs. J. H. and R. D. screening a wife murderer! ! !", and in which the relator was charged, in effect, with wilfully and corruptly perverting the course of justice and preventing the conviction of one M. for wife murder, at a certain assizes at which the relator had acted as Crown officer. M. was convicted of manslaughter, but it was alleged in the publication that he should have been convicted of murder, and that the failure to convict of the graver crime was due to the relator's neglecting to call and examine some seven witnesses who had been subpœnaed for the Crown. The accused, it was said, was a member of the Orange order, and the principal witness against him a Catholic, and, in their conduct of the case at the trial, the article charged that "Messrs. Cameron and Dempsey, the Crown counsel and county attorney, had conspired to defeat the ends of justice." The article, which was set out

(9) *Reg.* v. *Patteson* (1875), 36 U. C. Q. B. 155-6.

at length in the information, was based upon other articles copied from another newspaper, *The York Herald*, published in the place where the murder was committed, and was a severe criticism of both the Crown officers named in the article complained of. The defendant, besides pleading not guilty, pleaded a special plea of justification, which was demurred to by the Crown on the ground of not justifying all the libellous charges contained in the publication and set out in the indictment. The demurrer was sustained.

Opinion of Robinson, C.J.—"It is the plain intention of the statute," said Robinson, C.J., "and in the case of *Regina* v. *Newman* (10) it is laid down, that a plea under the statute must affirm the truth of all the charges, and not merely that some of them are true. Now in this case the plea only affirms that John Hillyard Cameron neglected or omitted to call certain witnesses who had been subpœnaed and were in attendance." Having recited the various charges in the article complained of, which were not affirmed in the plea to be true, the learned Chief Justice continued: "If the fact alone of the witnesses alluded to not having been called justified, in reason, the inference that all these injurious charges and allegations were true, then the defendant could have ventured to rely upon proving the one as sufficient to establish the truth of all the rest, and so might have taken upon himself at his peril to affirm that all the injurious charges and imputations built upon it were true, but he has not done so in the plea, as it was necessary he should to make his plea what the statute requires, namely, a plea setting up as a defence "the truth of the matters charged." We think this plea comes far short of what the statute intends in this respect, and is, therefore, insufficient. . . . The statute expressly enacts (in the 10th section), (1) that, without a plea asserting "the truth of the matters charged"—that is, not of a part of the libellous charges, but of the whole—the truth of the matter shall in no case be enquired into, nor whether it was for the public benefit that such matters should have been published. Our judgment is against the defendant on the demurrer." (2)

Reg. v. Wilkinson (1878).—Opinion of Gwynne, J.—The first count in a criminal information was based upon an article in the defendant's newspaper, which was set out *verbatim* in the indictment, and which, in effect, charged that the relator bribed three

(10) 1853), 1 E. & B. 558.
(1) See S. 911.
(2) *Reg.* v. *Moylan* (1860), 19 U. C. Q. B. 521.

members of the House of Commons. The second count was based upon a subsequent article in the same newspaper, which was also set out in the indictment, and which, in effect, alleged that the relator had caused $2,000 to be expended in a certain constituency during an election contest, and that he was "one of the most corrupt men in Canada," etc. The defendant pleaded not guilty to the whole information, and pleas of justification to the first and second counts mentioned. The trial judge (Gwynne, J.) told the jury that it was necessary for the defendant to prove all the charges which he had justified, and that the evidence fell far short of this. After a verdict for the Crown, the defendant moved for a new trial on the ground of misdirection. The court (Harrison, C J., and Wilson, J.), although disagreeing as to the evidence in support of the pleas of justification, concurred in holding that the direction to the jury that the defendant, under such pleas, must justify his charges fully, was a proper direction.

Opinion of Harrison, C.J.—Harrison, C.J., said: "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 injurious to the plaintiff. (3) This rule applies where a plea of justification is attempted to an indictment or information for libel. (4) It follows that if the defendant has in the article complained of, either in a civil or criminal proceeding, stated more than he can allege to be true, or substantially prove to be true if alleged, he may be found guilty of libel. (5)

Opinion of Adam Wilson, J.—Wilson, J., said that, upon the second count, the Crown was entitled to a verdict, "because the whole of it was certainly not proved," but that the defendant was at liberty to prove as much of it as he could. He thought that "the rule should be absolute for a new trial for the misdirection as to the first count and also as to part of the second count before mentioned." But this opinion, it will be observed, was as to the rulings at the trial with respect to the evidence, not with respect to what is required of the defendant under pleas of justification. (6)

(3) *Helsham* v. *Blackwood* (1851), 11 C. B. 111; *Gibb* v. *Shaw* (1859), 18 U. C. R. 165; *Fitch* v. *Lemmon* (1868), 27 U. C. R. 273; *Davis* v. *Stewart et al.* (1868), 18 C. P. 482; *Davis* v. *Stewart* (1869), 29 U. C. R. 441; *Canada Life Ass. Co.* v. *O'Loane* (1872), 32 U. C. R. 379; *Alexander* v. *North Eastern R. W. Co.* (1865), 6 B. & S. 240.

(4) *Reg.* v. *Moylan* (1860), 19 U. C. R. 521.

(5) *Reg.* v. *Newman* (1853), 1 E. & B. 558; *Reg.* v. *Gowan* (1858), 7 U. C. C. P. 136; *Prior et al.* v. *Wilson* (1856), 1 C. B. (N.S.) 95; *Gwynn* v. *South-Eastern R. W. Co.* (1868), 18 L. T. (N.S.) 738.

(6) *Reg.* v. *Wilkinson* (1878), 42 U. C. Q. B., at pp. 505-6 and 522.

Opinion of Lord Campbell, C.J.—That the truth of all the matters charged must be both affirmed and proved, was distinctly held in *Regina* v. *Newman*, referred to *supra*, which was a prosecution of Dr. Newman for libelling an ex-member of the Roman Catholic priesthood. Lord Campbell, C.J., said in his judgment: "It is quite clear that when the prosecutor has replied to such a plea [*i.e.*, of justification under the statute]—that the defendant wrongfully published the libel without the cause alleged, and issue has been joined upon this replication, the prosecutor is entitled to a verdict unless the defendant proves, to the satisfaction of the jury, the truth of all the material allegations in the plea. The only function allotted to the jury is to say whether the whole plea is proved or not. If they find that it is, the defendant is acquitted. If they think that it is not, they are to declare that the defendant wrongfully published the libel without the cause alleged; and he is convicted. The jury are then *functi officio;* and the legislature did not contemplate that any question would be put to them as to how much of the plea was proved, if the whole was not proved, for, without proof of the whole, a conviction must take place, to be followed by a sentence." (7)

Partial proof of plea does not warrant partial finding for defendant.—And in another place in his judgment, in the same case, Lord Campbell said: "It has uniformly been held that, even in a civil action for libel, the plea of justification is one and entire. It raises only one issue; and unless the whole plea is proved, that issue must be found for the plaintiff. Some difference of opinion has prevailed as to how far a partial proof of the justification ought to operate in reduction of damages; but all authorities agree that there can be no partial finding for the defendant on the ground that the justification is partially established. In a criminal prosecution for libel, had liberty been given by the legislature to plead the truth as a defence, without any special direction as to the proceedings in case the whole plea is not proved, the jury could have had no right to find that a part of the justification is proved; for there are no damages to be assessed, and the sentence to be pronounced rests exclusively with the court. But all doubt upon the subject is removed by the express enactment that, where there is a conviction after a plea of justification, 'the court, in pronouncing sentence, shall consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove or

(7) *Reg.* v. *Newman* (1852), 1 E. & B. 268.

disprove the same .' . . . It is quite clear that the opinion expressed by the jury on any particular parts of the plea (the whole not being proved) could not be entered on the record." (8)

Inferences from facts.—It has been held in a civil action for libel, that this onus of proving the truth of the statements alleged to be libellous is not discharged by simply proving facts from which the truth of the libel might possibly be inferred. The inference from the facts must be necessary or inevitable. (9) There are obvious reasons for the same inference in a criminal prosecution for libel, in which, under the plea of justification, not only must the truth be proved strictly, but also that it was in the public interest that the publication was made in the manner and at the time that the alleged libellous statements were published. There is a similar analogy, in the civil and criminal law of libel, with respect to the facts alleged in support of the plea of justification. These facts will be taken into consideration in awarding damages in a civil action, (9*a*) as they may be in awarding punishment on a verdict of guilty in a criminal prosecution. (10)

All the material allegations as to each separate charge must be justified.—Regina v. Patteson (1875).—Where in a defamatory article published in a newspaper, there are several distinct charges made against the private prosecutor, which are justified by the defendant, the jury cannot find in favour of the plea unless they are satisfied that the truth of all the material allegations as to each separate charge are established by the evidence. If the truth of all such allegations as to any one of the libellous charges is, in the opinion of the jury, not proved by the defendant, they should find a verdict for the Crown. The defendant, the managing director of the *Mail* Newspaper Publishing Co., of Toronto, was indicted for the publication, in two issues of that paper, of a defamatory libel against one W., an immigration agent of the Ontario Government. The defendant pleaded not guilty, and justification under the statute. After the conviction and sentence of the defendant, a case was reserved by the trial judge (Burton. J.A.), as to the charge to the jury with respect to the plea of justification As appears by the case reserved, the article complained of, and forming the subject of the indictment, consisted of a series of distinct and separate charges, each of which was justified: and the learned judge directed the jury that they

(8) *Reg.* v. *Newman* (1853), 1 E. & B. 558, at p. 577.
(9) *Patterson* v. *Plaindealer Co.* (1909), 2 Alberta R. 29.
(9*a*) *Ibid.*
(10) S. 911 (3).

would have to consider whether each of them was libellous, and, if libellous, was the truth of all the material allegations as to that particular portion made out to their satisfaction; and that if any portion of the article forming such distinct and separate charge, and which they found to be libellous, was not so justified, they should find a verdict for the Crown. This was objected to by counsel for the defendant, who contended that under the existing Act this was not necessary. The question was—was this direction proper? If the court should be of opinion that the learned judge was wrong in directing the jury as above stated, the verdict was to be set aside, otherwise not, and the sentence to be enforced. The direction was upheld by the full court. Morrison, J., was of opinion that there was no misdirection, such a charge being in accordance with the decision in *Reg.* v. *Newman* (1853), 1 E. & B. 558. Wilson, J., thought the direction right because the justification should be an answer to the whole libel, (1) and it should cover even the circumstances of aggravation. (2) Richards, C.J., concurred in these opinions. (3)

Reg v. Lady Scott (1897).—If justification is pleaded to an indictment for a defamatory libel, which makes several distinct imputations, and the plea alleges the truth of all, but the evidence fails in any one of them, a verdict will be entered generally against the defendant. The only function allotted to the jury is to say whether the whole plea is proved or not. If they find that it is, the defendant is acquitted. If they think that it is not, they are to declare that the defendant wrongfully published the libel without the cause alleged, and he is convicted. (4)

New trial refused where plea partially proved.—Lord Campbell, C.J.—Where upon the trial of an issue upon a plea justifying the whole of the libel, evidence was offered in support of some only of the imputations, and the jury found that one only of the imputations upon which evidence was offered was proved, the verdict was entered up for the Crown on that issue generally; and the court refused to grant a new trial on the ground that the finding as to the other issues upon which evidence was offered was against the weight of evidence. "It has been very powerfully argued," said Lord Campbell, C.J., "that, with respect

(1) *Ingram* v. *Lawson* (No. 1) (1838), 5 Bing. (N.C.) 66; *Reg.* v. *Newman, supra.*
(2) *Helsham* v. *Blackwood* (1851), 11 C. B. 111.
(3) *Reg.* v. *Patteson* (1875), 36 U. C. Q. B. 129. See, also, *Edsall* v. *Russell* (1843), 4 M. & G. 1090; *Smith* v. *Parker* (1844), 13 M. & W. 459; *Honess et al.* v. *Stubbs* (1860), 7 C. B. (N.S.), 555.
(4) *Reg.* v. *Lady Scott et al.*, *Times*, 8th January, 1897, p. 9, following *Reg.* v. *Newman* (1853), 1 E. & B. 558.

to all these cases, the jury were wrong in saying that the charges were not proved, and that another jury would come to a different conclusion. Even if we should be of opinion, with respect to any one or to all of these charges, that the evidence greatly preponderated against the prosecutor, we conceive that we could not with propriety set the verdict aside and grant a new trial. The only argument used at the bar which would lead to a different conclusion was, that the plea may be considered *distributive*, and that the jury were entitled to find a verdict to be entered on the record for the defendant on any part of the libel, covered by a corresponding part of the justification, which they find to be proved. But this argument proceeds on a fallacious assumption. . . Under these circumstances, how can we set aside the verdict and grant a new trial? This course is to be adopted only where some issue has been improperly found, and a different verdict may be expected. But here it is admitted that the issue has been properly found, and that the jury must again find that the defendant wrongfully published the libel, without the cause or justification which he has alleged in his plea. Again, the defendant must come before us for sentence; and the evidence to be considered by us, in measuring out the punishment, would (as far as we know), be in no respect different from that given upon the trial which has already taken place. For these reasons a new trial must be refused and sentence must be pronounced." (5)

Rumours of the truth inadmissible.—The existence of rumours, before the publication of the libel, to the same effect as the allegations contained in the libel, cannot be proved in justification of the libel. (6) In *Reg.* v. *Dougall, et al.* (*supra*), the defendants attempted to prove that rumours of the truth of the statements complained of had existed in the city prior to the time when the articles in question appeared. An objection to this evidence was upheld by the court on the ground that as the truth could not be proved in justification, (7) much less could the defendants be allowed to prove any rumours of the truth. The belief of the defendants in the truth of the libel might, it was said, be urged on a motion in mitigation of punishment. There are cases of a civil nature *contra, e.g., Leicester (Earl)* v. *Walter*, (8) where such evidence was received reluctantly by Mansfield,

(5) *Reg.* v. *Newman* (1853), 1 E. & B. 558, at p. 568.
(6) *Reg.* v. *Dougall et al.* (1874), 18 L. C. Jur. 85; *Snowden* v. *Smith* (1811), 1 Maul. & Selw. 286, *note* (*a*); *Scott* v. *Sampson* (1882), 8 Q. B. D. 491; 51 L. J. 380. See *Wood* v. *Durham* (No. 2) (1888), 21 Q. B. D. 501; 37 W. R. 222.
(7) See comments on this case at p. 295, *ante*.
(8) (1809), 2 Camp. 251.

C.J., under the general issue, and to which, in a subsequent case, (9) Lord Ellenborough, C.J., assented only to the extent of the evidence shewing a probable occasion of writing the defamatory words in question. Evidence of rumours and suspicions, however, has been admitted in some cases of defamation, (10) but rejected in others, (1) and the weight of authority is against it. It has been said, with respect to civil actions for libel, and the remarks are applicable to criminal prosecutions, that evidence of rumours and suspicions that the plaintiff was generally suspected of the charge or misconduct imputed to him, is open to many objections. Though there are cases in which it has been received, in the majority of cases it has been rejected; and both the weight of authority and principle are opposed to the reception of such evidence. To admit evidence of current rumours and suspicions against the plaintiff, would be to place in the hands of his defamers the power of defeating his claim to damages in every case, by merely starting the rumour beforehand and then calling persons to testify to their having heard it; and thereby encouraging the defendant to spread and aggravate the slander. And it would be a useless contradiction for the plaintiff to call witnesses who knew him best to prove that they had not heard the rumours. (2)

Where justification need not necessarily shew publication for the public benefit.—Where a complainant has called public attention to, and invited public criticism of, the subject matter of the alleged libel, a plea of justification is not necessarily objectionable, and will not be struck out, on the ground that the facts therein alleged do not shew that the publication complained of was for the public benefit. The defendant was charged with the publication, in a Montreal newspaper called *Canada's Democracy*, of a defamatory libel against one J. M. F., a manufacturer of cigars. The editorial was headed "F. (complainant) humbugs his employees—cuts wages and gives turkeys in return." It appeared that in the fall of 1893, F. closed his factory and discharged all his employees. A few days later he notified them that they could resume work, but with reduced wages. A number of them refusd to work at what they called starvation wages, and the cigar makers' union, of which a number of F.'s dismissed employees were members, interfered on their behalf, and demanded the submission of the

(9) *King* v. *Perrott* (1814), Folkard L. & S., 6th ed., 549.
(10) See *Sir John Eamer* v. *Merle*, cited in *Leicester (Earl)* v. *Walter*, *supra*; ——— v. *Moor* (1813), 1 Maul. and Selw. 284; *Richards* v. *Richards* (1844), 2 Moo. & Rob. 557.
(1) *Woolmer* v. *Latimer* (1837), 1 Jur. 119; *Thompson* v. *Nye* (1850), 16 Q. B. 175; 20 L. J. Q. B. 85.
(2) Folkard L. & S., 6th ed., 551.

dispute to arbitration. F. did not acknowledge the receipt of this letter. At the New Year following, F. distributed gratuitously over one hundred turkeys among his employees. This act of generosity was reported in the daily papers of the city, and the donor was highly complimented. In commenting upon the incident the editorial in question stated, that the reduction of the wages meant a saving to F. of $1.00 or $2.00 a week on the already low wages of each of his employees. How many of you, it added, would like to be presented once a year with a turkey which would cost you $50 to $100? The whole article was apparently an answer to the previous comments of the press in F.'s favour, as well as an appeal to the public for support in the struggle of the union and its dismissed members against F., whose goods friends of the workingmen were requested to cease purchasing. The defendant pleaded not guilty and justification. In the latter plea he alleged that it was F. himself who caused the publication of the laudatory articles in the local press, and that it was in the public interest that a true version be published of the relations of F. with his employees, and especially with those members of the union whom he had dismissed. A motion was made by the complainant before Ouimet, J., in the Court of Queen's Bench, Quebec, to strike out the plea of justification on the ground that the facts set forth therein did not shew that the public interest could be served by publishing the article in question. The application was dismissed.

Opinion of Ouimet, J.—"If it is true," said Ouimet, J., "as alleged by the defendant in his plea of justification, and the court at this stage of the proceedings is bound to admit this allegation is true, that Fortier himself caused the publication of the several articles in the daily press signalizing his great liberality towards his employees, in order to win to himself admiration and public sympathy thereby in his fight against the union and its members, it seems to me that the union and the defendant were quite justified in resorting to publicity for the purpose of their own defence. In placing himself before the public as a public benefactor and model master, the complainant has provoked criticism as well as admiration. If the criticism is proved to be unfair, malicious and founded on false representations, his vindication will be more complete. If, on the contrary, it be fair and reasonable, and founded on a statement of facts substantially true, the complainant will have to bear with it. Ogders on Libel (3rd ed., page 56), says: 'Whoever seeks notoriety, or invites public attention, is said to challenge public criticism, and he cannot resort to

the law courts if that criticism is less favourable than he anticipated.' (See cases cited). I shall, therefore, dismiss the motion leaving the parties to prove before the jury the truth of their respective allegations. If the defendant does not prove that the complainant himself caused the publication of the articles that have provoked the answer and criticism of which he now complains, another question, a larger one, will have to be decided by the learned judge then presiding over the court, viz., when a trade union for the sake and protection of itself, and of its members, has undertaken a legitimate fight against a large employer of labour, is it justifiable to resort to publicity in order to fairly lay its case before the public and enlist their sympathies and assistance? I am not called upon to decide this question now." (3)

Facts stated in support of plea is good pleading.—On an indictment for libel found at the Toronto assizes in January, 1889, against the manager of the *World* newspaper of Toronto, a motion was made by the prosecution to quash the defendant's plea of justification on the ground that it was not in accordance with the statute, and was irregular and embarrassing, in setting out the facts relied upon as shewing the truth of the matter alleged to be libellous. It was insisted that all the defendant could allege in his plea was that the defamatory matters published were true, and that it was for the public benefit that they should be published; and that he could not place upon the record the facts relied upon as justifying the alleged libel. The plea objected to, besides justifying in the form prescribed by the statute (C. S. C. 1886, c. 174, ss. 148-151), set out, at considerable length, the facts in support of the allegation that the matters charged were true, and that their publication was for the public benefit. The court (MacMahon, J.) dismissed the motion, holding that the plea was regular and in accordance with the statute (*supra*), and that the facts disclosed were sufficient, if established by the evidence to sustain the plea. It was also held, that the motion to quash the plea was properly made; that an objection to a plea as well as to an indictment might be taken by a motion to quash; and that in many cases it would be the more convenient practice. (4)

Plea must contain particulars, otherwise it may be quashed — A plea of justification which does not contain in itself, or as an accompaniment, the particular facts upon which the defendant

(3) *Reg.* v. *Brazeau* (1899), 3 C. C. C. 89.
(4) *Reg.* v. *Maclean* (1889), referred to in *Reg.* v. *Creighton* (1890), 19 O. R. 339, *infra*, at pp. 344-5.

intends to rely as justifying the alleged libels, and as shewing that it was for the public benefit that they should be published, is a. insufficient plea, and will, on motion, be summarily quashed without being demurred to; but the defendant may have leave to file an amended plea of justification. At the spring assizes for the county of York, 1890, an indictment was found against the manager of *The Empire* newspaper of Toronto, for a series of articles and headings of articles, contained in that journal against the publishers of *The Daily Mail* of Toronto, which were charged to be false, scandalous, malicious and defamatory libels. The articles in question were published in January, 1894, and the excerpts from them, which were set out in full in the indictment, were alleged to mean that the Mail Printing Co., by whom *The Daily Mail* was published and whose property it was, were "plotters against their country and guilty of atrocious rascality and atrociously traitorous conduct; black traitors; secret service agents and informers of foreign assailants of Canada; guilty of treasonable machinations; charged with the blackest crime in the calendar; giving secret information to be used against Canada; culprits; the blackest traitors in their country in the ranks of Canadian journalism." The defendant pleaded not guilty and justification. Counsel for the prosecution moved before the trial judge (MacMahon, J.) to quash the second plea upon the ground of its insufficiency, in not setting out the particular facts upon which the defendant intended to rely as justifying the charges contained in the libels, and as shewing that it was for the public benefit that the matters complained of should be published. The plea was held to be insufficient.

Opinion of MacMahon, J.—MacMahon, J., after referring to sections 2 and 143 in the former Criminal Procedure Act, R. S. C. 1886, c. 174, and to the cases *infra*, (5) said: "Under the 143rd section of the Act, (6) where there is a defect apparent on the face of an indictment, either course prescribed by the statute is open to the prosecutor; he may demur, or he may move to quash; and it is for the court before which the objection is taken to exercise its discretion, as was done by the court in *Reg.* v. *Rea*, (7) and say whether it will give effect to a summary motion to quash, or leave the party to his remedy by demurrer. The Slander and Libel Act, as it appears in the old

(5) The cases referred to are: *Reg.* v. *Lonsdale* (1864), 4 F. & F. 56, at p. 58; *Reg.* v. *Purchase* (1842), 1 Car. & M. 617; *Reg.* v. *Maclean*, *supra*, not reported; *Reg.* v. *Rea* (1863), 9 Cox C. C. 401; *Reg.* v. *Hoggan*, *Times*, 4th November, 1880, cited in Odgers, 2nd ed., p. 597.
(6) Now S. 898 (1) of the Code.
(7) (1863), 9 Cox C. C. 401.

Con. Stat. of U. C. ch. 103, s. 9, provides that it shall be a good defence for a defendant to plead the truth of the matters charged by way of justification "in the manner required in pleading a justification in an action for defamation" — in this following the English Act, 6 & 7 Vict. c. 96, s. 6. When the Libel Act was amended by 37 Vict. c. 38, ss. 5 and 6, the above words in quotation marks were omitted, and are likewise omitted in the R. S. C. c. 163, s. 4. It was urged that the omission of these words from the present Act is an indication that, since the Act of 1874 (37 Vict.), it was not the intention that, in pleading a justification to an indictment or information for libel, the defendant should be required to plead as in an action for defamation, and that all he is now required to say by his plea is that the defamatory matter is true, and that it was for the public benefit it was published. I think, however, the change made by the Act of 1874 has not the effect claimed by counsel for the defendant, and the omission of the words indicated was not intended to limit the mode in which a plea of justification should be pleaded, but rather to widen the jurisdiction of the court in dealing with such pleas when pleaded in such a manner as to withhold what might be deemed sufficient particulars of a charge made by the libel against a prosecutor, and which he is called upon to meet. (8)

"If an indictment were found against a person for libel for publishing that J. B. was a thief, because at a certain time he stole $100 of the moneys of J. S.; or that J. B. was a forger, having forged the name of J. S. to a promissory note for the payment of $500; in either of the cases put, the defendant, in pleading a justification, is only called upon to allege the truth of the matters, and that they were published for the public benefit, because all the necessary facts in the one case shewing how the prosecutor is a thief, and in the other how he is a forger, are stated with sufficient particularity in the libel, and such facts, therefore, need not be repeated in the plea of justification. But if an indictment were found against a person for calling J. B. a thief or a forger, the defendant, if he desires to plead a justification, must in his plea set forth the specific facts in order to shew how the prosecutor is a felon of the class stated in the libel. So in regard to the libels set forth in the indictment found against the defendant, by which libels the prosecutors are called "traitors," and said to have been guilty of "atrocious traitorous conduct," and the *Mail* is called "a black traitor to its country,"

(8) Citing the Slander and Libel Act, as it appears in the C. S. U. C. c. 103, s. 9; the English Act, 6-7 Vict. c. 96, s. 6; *Hickinbotham* v. *Leach* (1842), 2 Dowl. (N.S.) at p. 272; 10 M. & W. 361; Odgers, 2nd ed., pp. 177, 178; *l'Anson* v. *Stuart* (1787), 1 T. R. 748; 1 R. R. 392.

the plea fails to shew how, and in what manner, the prosecutors are "traitors;" or how they have been guilty of "traitorous conduct;" or how the *Mail* has been "a black traitor to its country;" and the prosecutors are entitled to have, in the plea of justification, the facts set forth with sufficient particularity to enable them to see the charge they will have to meet. (9) . . . I have come to the conclusion, for the reasons given, that the plea of justification filed is manifestly insufficient, and must be quashed and removed from the files." (10) The defendant was allowed until the first day of the next sittings of oyer and terminer, at Toronto, in which to file an amended plea of justification. (1)

When plea should be demurred to.—A criminal information was filed for words spoken of and to the prosecutor, whilst acting as mayor of a city in a magisterial capacity, and also for a libel of and concerning him in the execution of the duties of his office. The defendant pleaded the general issue and a plea of justification under Lord Campbell's Act, (2) adding that it was the duty of the defendant, as a city councillor, to speak the words and to publish the libel complained of. Upon a motion to set aside the plea on the ground that the Act did not apply to oral slander, the Court of Queen's Bench in Ireland refused to set it aside, leaving the prosecutor to demur to the plea if he thought fit. (3) The effect of the plea of justification is to give the party, who is in truth an accused person, the means of knowing what are the matters alleged against him, (4) and, if sufficient details be not given in such a plea, the only course is for the prosecutor to demur. (5)

Facts stated in libel or in plea need not be repeated in particulars.—Where the facts relied on as a justification of the libel are set out in the libel itself, or in the plea of justification, they need not be stated in the particulars. In a criminal prosecution for libels contained in certain articles in a newspaper, the complainant moved to strike out two paragraphs in the plea of justification on the ground that the facts mentioned therein, in support of the plea, were not set out in the particulars. Ouimet,

(9) Citing *Reg.* v. *Wilkinson* (1878), 42 U. C. R. 492; Taschereau's Criminal Acts, 2nd ed., p. 229; *R.* v. *Newman* (1853), 1 E. & B. 558, at p. 561; *R.* v. *Moylan* (1860), 19 U. C. R. 521.
(10) See *Laird* v. *Leader Publishing Co., supra.*
(1) *Reg.* v. *Creighton* (1890), 19 O. R. 339.
(2) 6-7 Vict. c. 96, s. 6.
(3) *Reg.* v. *Rea* (1863), 9 Cox C. C. 401; 15 Ir. Jur. 382.
(4) *Per* Alderson, B., in *Hickinbotham* v. *Leach* (1842), 2 Dowl. (N.S.) at p. 272; 10 M. & W. 361.
(5) *Reg.* v. *Hoggan, Times*, 4th November, 1880.

J., dismissed the motion for the reason, as he said, that the facts in question were contained in the articles complained of, and might, therefore, be given in evidence by the defendant. He referred to two similar motions in *Reg.* v. *Raby* (unreported), in which the facts were contained in a printed circular, the subject of the prosecution, which was substantially the same as the newspaper articles in the present case. He dismissed these motions for the same reasons. (6)

Defendant must not plead evidence, comments, or argument.—While a plea of justification may properly set forth particulars shewing why it was for the public benefit that defamatory matter was published, it should not plead evidence, *e.g.*, letters in proof of the particulars, nor should it contain comments and arguments in support of these. And where such a pleading is placed upon the record it will, if objected to, be ordered to be struck out as irregular and illegal; but the defendant may be allowed to plead anew. The defendant was indicted for having published, at the city of Montreal, in a newspaper called *La Libre Parole*, a false and defamatory libel concerning J. I. T., knowing the same to be false. The article complained of alleged that J. I. T. was a trafficker in public offices and contracts, a boodler, a political acrobat and traitor, and a bankrupt, and that he supported himself and his family on money which he had obtained by dubious means. The defendant justified these charges in a plea, which, besides asserting that the charges were true and that their publication was for the public benefit, set forth the particular facts by reason of which it was for the public good that they were so published. The plea also contained statements in the nature of comments and arguments, and embodied a number of letters to establish the facts, which, it was alleged, made the publication of the libel for the public benefit. The private prosecutor moved before Wurtele, J., in the Court of Queen's Bench, Quebec (Crown Side), to have the plea disallowed, or the parts of it embodying the letters struck out. The learned judge held the plea to be irregular and illegal, and ordered it to be struck out, with leave to the defendant to plead anew.

Opinion of Wurtele, J.—"The special pleas which are allowed by the Criminal Code," said Wurtele, J., "are made in writing, and should contain only the statement in a summary form of the material facts on which the party pleading relies, but must not contain the evidence by which it is proposed to prove such facts, nor any statement purely of comment or argument The exist-

(6) *Reg.* v. *Brazeau* (1899), 3 C. C. C. 89.

ence, the date, and the effect, of the document itself, cannot be embodied in the plea As a rule no document can be read to the jury as evidence until the judge has ruled that it can be received, and, therefore, to embody a document relied on as evidence of the facts or circumstances alleged might place before the jury a document which might be disallowed by the judge on its production at the trial, and have the effect, notwithstanding its surreptitious exhibition, of unduly creating a prejudice in the minds of the jurors. . . In this case the defendant, in preparing his plea of justification, has not confined himself to the requirements of the Criminal Code, nor has he followed the plain rules of procedure in criminal matters. Instead of being a concise pleading setting forth simply the truth of the libel, its publication for the public benefit, and the facts which rendered its publication for the public good, his plea is verbose and covers twenty-six pages of printed matter, contains paragraphs which are purely statements of comment and argument, and embodies letters which are referred to as evidence of his pretensions. In its present state it is, therefore, irregular and illegal, and it cannot be allowed to remain as part of the record as it now stands. It is true that, if all these superfluous and illegal statements and letters embodied in a plea were struck out, enough would remain to constitute a proper plea of justification, but the erasement of these statements and letters would not leave the allegations left in the plea in a proper sequence; and to simply order such erasement might, therefore, be prejudicial to the defendant. The plea as it is cannot remain as part of the record, but instead of amending it by striking out the objectionable part, it will be more equitable to reject it altogether and allow the defendant to plead anew." (7)

Evidence inadmissible that libel previously published with impunity.—Coleridge, J.—Where a defendant has justified under the statute, asserting the truth of the imputations contained in the alleged libel, it is not competent for him to prove, in support of the plea, that the same charges were previously made in another publication, and that the prosecutor, knowing this, had taken no proceedings against the publisher. Evidence of this nature had been refused by Lord Campbell, C.J., and, on the motion for a new trial for an alleged improper rejection of the evidence, Coleridge, J., (with whom the other members of the court concurred), said: "The direct issue was the truth of the charge contained in the libel. It will be admitted that a statement made by any third person as to the truth of such charges

(7) *Reg.* v. *Grenier* (1897), 1 C. C. C. 55; 6 Q. O. R. (Q.B.) 31.

is not direct proof of the truth. But it is sought to put in the evidence on the ground of the conduct of the party now complaining, he having had knowledge of the first publication, and having submitted to it. Now, in the first place, I must observe, that not everything which might occur to a person, as morally tending to proof one way or other, is receivable in evidence in a court of justice upon a limited issue. The strongest proof of this is the extent to which the doctrine might be pushed. Exactly on the same principle it might be urged that this charge in the Dublin *Review* is true, because, some time before, it was made in another publication. The answer is, that this is all much too vague to be received as evidence in a court of justice. Apply that to the present case. It is said that you are to infer the truth of the statement made by one set of witnesses against the statement made by another set, because the same circumstances with respect to the same party have been stated before, and that, this having been brought to the knowledge of the party, he submitted. The fallacy is in the word 'submission.' It comes to this only, that he did not prosecute. There may have been many reasons for that: the anonymous nature of the article, the inability to fix on any particular person, the ignorance whether the charge proceeded from a man of character, the poverty of the party himself, and many other circumstances that might be suggested, preventing a man from instituting proceedings in a court of justice on the first occasion on which the charge was made." (8)

Course to be adopted by court where defendant convicted.— The consideration to be given by the court to an unsuccessful plea of justification, and the course which is to be adopted when a defendant who has raised such a defence, either by itself or along with any other defence, has been convicted, is also referred to in the judgment of the court in the same case: "The legislature wisely thought that, although under such circumstances sentence must be passed, the just measurement of punishment may materially depend upon the unsuccessful plea of justification and the evidence given under it. In some cases, the defendant may maliciously plead such a plea, when he has no substantial evidence to support it; or he may try to support it by false evidence. On the other hand, he may have had reasonable ground for believing that he could prove the whole of it; and he may have adduced sincere witnesses to substantiate a part of it, while, without default of his own, a material part of it is not substantiated by legal proof. Where there has been a conviction after a

(8) *Reg.* v. *Newman* (1852), 1 E. & B. 268, at pp. 271-2.

plea of justification, what course is to be followed, so that justice may be done, and a due measure of punishment meted out according to the real guilt of the defendant? It is quite clear that the legislature refers everything to the court alone, after the finding of the jury upon the question whether the whole plea is proved; for it has enacted that, "if after such plea the defendant shall be convicted on such indictment or information, it shall be competent to the court, in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove or disprove the same." (9) And in the same case Erle, J., remarks that, as in a civil action for libel, a plea of justification affords a ground for enhancing the damages, so in a criminal prosecution the same plea, "if pleaded without reasonable ground, would have the effect of aggravation." (p. 581)

Court must consider evidence as a whole and form their own opinion.—"The court," it is further observed, "is to consider the evidence on the one side and on the other, and to form their own conclusion whether it aggravates or mitigates the guilt of the defendant. By that conclusion the sentence is to be regulated, and not by any declaration of the jury as to the credit which they think ought to be given to the witnesses examined. It is quite clear that the opinion expressed by the jury on any particular parts of the plea (the whole not being proved) could not be entered on the record. It might be reported by the judge, who presides at the trial, to the court by whom the sentence is to be pronounced; but still the judges, in deliberating upon the sentence, are bound to form their own opinion upon the evidence; and, as they think that it aggravates or mitigates the guilt of the defendant, they are to apportion the punishment accordingly. The evidence, as it appears on the notes of the judge who presided at the trial, comes in place of the production of affidavits in aggravation or mitigation of punishment when sentence is to be pronounced. It may often be more satisfactory than such affidavits; as the witnesses by whom it was given were examined *vivâ voce* and were subject to cross-examination." (10)

Evidence admissible and inadmissible in mitigation of punishment.—Where a defendant who has pleaded justification has been convicted, he may, in mitigation of punishment, shew by affidavit that, after the publication, but before plea pleaded, information was given to him which, if true, would have supported an

(9) *Reg.* v. *Newman* (1853), 1 E. & B. 558, at p. 574.
(10) *Ibid.* at pp. 578-9.

allegation in the plea, evidence having been given at the trial to account for the non-production of the proof, but no evidence in support of the allegation itself. But where a document, which would have supported the plea, has been rejected at the trial for want of authentication by the place of custody or otherwise, its contents are not admissible in confirmation of the defendant's own affidavit that such a document was communicated to him before plea pleaded. (1) The former species of evidence was addressed to that provision in the statute which enables the court to consider whether the plea of justification, and the evidence in support of it, aggravated or mitigated the defendant's guilt. It was evidence that the defendant had reasonable cause for his plea, and explained, favourably to the defendant, why the whole or any part of the plea was placed on the record. The document, on the other hand, which was tendered to confirm the defendant's assertion of his belief with respect to another part of the plea, not having been properly authenticated, its contents were inadmissible.

(1) *Reg.* v. *Newman* (1853), 1 E. & B. 558, at pp. 581-82.

CHAPTER XXVIII.

Change of Venue.

The common law rule.—As crime is, in a legal sense, local, the common law rule was, that the person charged had to be tried where the offence was alleged to have been committed. And so the offence had to be laid, and proved to have been committed, in the county in which the bill was preferred. (1) As far back as 1762, (2) Mr. Justice Denison said: The place of trial ought not to be altered from that which is settled and established by the common law, unless there shall appear a clear and plain reason for it; viz., that there cannot be there a fair and impartial trial. And Mr. Justice Wilmot said, that the rule that all causes shall be tried in the county and by the neighbourhood of the place, where the act is committed, ought never to be infringed, unless it plainly appears that a fair and impartial trial cannot be had in that county. (3)

Exceptions to the common law rule.—There were some exceptions to the common law rule, (4) and our former procedure Act (5) also made some exceptions. Under the Code it shall not be necessary to state any venue in the body of any indictment, and the district, county or place named in the margin thereof, shall be the venue for all the facts stated in the body of the indictment. (6) If local description is required, such local description shall be given in the body of the indictment. (7)

There are two other sections of the Code which affect the question of venue. The effect of section 577 is, as has been noticed in considering the jurisdiction of the courts, to do away with the rule as to local venue; but the effect of section 888 is to preserve local venue in prosecutions for libel under the conditions stated in the section. (8) The intention of section 577 is, as one of the authors of the English Draft Code, 1879, has said of a similar section (504) therein, that all courts, otherwise competent to try an offence, should be competent to try it irrespective

(1) Dig. L. L. 97; 8 Mod. 328.
(2) In *Rex* v. *Harris*, 3 Burr. 1330, at p. 1334.
(3) *Per* Britton, J., in *Rex* v. *O'Gorman et al.*, 14 O. L. R. (1907), 102, at p. 104; 12 C. C. C. 230.
(4) *Rex* v. *Burdett* (1820), 1 St. Tr. (N.S.) 1; 4 B. & Ald. 95.
(5) R. S. C. 1886, c. 174.
(6) S. 844 (1).
(7) *Ibid.* (2).
(8) See comments on those two sections in chapter on the "Jurisdiction of the Criminal Courts."

of the place where it was committed, the place of trial being determined by the convenience of the court, the witnesses, and the person accused, the county where the offence was committed being, of course, as a general rule, the most convenient place for the purpose. (9) In the case of every indictable offence, as, indeed, in every case civil or criminal, a fair trial must overbear every other consideration, and, therefore, provision is made in the Code for changing the place of trial so as to ensure, as far as possible, a perfectly impartial result. The enactment for this purpose gives the court or judge a large measure of discretion.

The rule under the Code.—Whenever it appears to the satisfaction of the court or judge hereinafter mentioned, that it is expedient to the ends of justice that the trial of any person charged with an indictable offence should be held in some district, county, or place, other than that in which the offence is supposed to have been committed, or would otherwise be triable, the court before which such person is or is liable to be indicted may, at any term or sitting thereof, and any judge who might hold or sit in such court may, at any other time, either before or after the presentation of a bill of indictment, order that the trial shall be proceeded with in some other district, county or place within the same province, named by the court or judge in such order. (10)

Such order shall be made upon such conditions, as to the payment of any additional expense thereby caused to the accused, as the court or judge thinks proper to prescribe. (1) But an order for a change is not open to objection on the ground that it makes no provision for the additional expense to which the accused might be put by the change, if the judge making such order was not asked to make an order as to such additional expense, and if it was not shewn to such judge that additional expense would be occasioned. (2) The principle on which a change of venue will be ordered under this section (884) of the Code is, that there is fair and reasonable probability of partiality and prejudice in the district, county, or place, within which the indictment would otherwise be tried. Where, therefore, on a motion to change the venue by several defendants charged with conspiracy, a strong case was made out for the change if the balance of convenience alone was to be considered, still, as it was not shewn that there was or was likely to be any prejudice against the ac-

(9) 1 Stephen's Hist. C. L. 278.
(10) S. 884 (1).
(1) *Ibid.* (2).
(2) *R.* v. *Coleman* (1898), 2 C. C. C. 523.

cused, and certainly no more where the indictment was found than in the place to which it was proposed to change the venue, the motion was refused. A balance of convenience, as regards the distance which the witnesses would have to travel, is not alone a ground for changing the venue in a criminal case. (3)

Political influence an insufficient reason.—One of the grounds on which the venue was not changed, on the defendant's application, was the alleged political influence of the prosecutors. The defendant was charged with criminal libel in respect of an article in the *Province* newspaper, of Victoria, B. C., reflecting on two members of the provincial Government. The case was tried twice at Victoria, and at both trials the jury failed to agree. The defendant then moved under section 651 [884, *supra,*] for a change of venue from the county of Victoria, upon an affidavit by his solicitor, stating that the prosecutors were, at the time of the alleged libel, and still are, interested in politics, and that, in his belief, it would be impossible to obtain a fair and impartial trial in the city or county of Victoria. The motion was refused by Drake, J., who held that, in order to obtain a change of venue, in a prosecution for defamatory libel, such facts must be shewn as will satisfy the court that a fair trial cannot be had at the present venue, and it is not sufficient that the applicant's solicitor swears to a belief that a fair trial is impossible there because of the prosecutor's interest in political affairs. The fact, he said, that two abortive trials of the cause had already taken place, at both of which the jury disagreed, was not of itself a ground for ordering a change of venue. The prosecutor being interested in politics was a fact applicable to most people in the province. In *Reg.* v. *Ponton et al.*, (4) very full affidavits of the state of public opinion hostile to the prosecution, and threats and demonstrations against the jury, were forthcoming, and the learned judge who heard the application prefaced his remarks with the enunciation of the well established rule, that all cases should be tried where the offence was supposed to have been committed, and that the rule should not lightly be ignored. Here there was no fact sworn to which induced the defendant to believe that a fair trial could not be had in Victoria. If being interested in politics was a ground for change of the place of trial, he should consider it impossible to name a place in the province where the same objection might not be raised. There was no allegation of any political excitement existing, or of any prejudice against

(3) *Rex* v. *O'Gorman et al.* (1907), 14 O. L. R. 102.
(4) (No. 1), (1808), 18 O. P. R. 210.

the defendant, or, in fact, of any interference whatever having been taken in the trial. (5)

Evidence of unfairness in present venue should be cogent.—The desirability of securing a fair trial affords good reason, in both civil and criminal cases of libel, for applications for a change of venue; but the evidence of unfairness in the present venue should be cogent. In an action for libel contained in a local newspaper. it was held to be a ground for a change of venue that the defendant, the proprietor of the paper, possessed great influence in the county in which the venue was laid, and had shewn a disposition to use it to the plaintiff's prejudice. (6) Although the power to change the venue is discretionary and should be used with great caution, (7) the defendant will be entitled to have the venue changed if he can shew that there is no probability of a fair trial in the place the plaintiff has selected, (8) as, c.*g.*, where there have been unfair attacks on the defendant by a local newspaper of extensive circulation, with respect to the subject matter of the action; (9) or where, in a criminal case, it appears upon the prisoner's solicitor's affidavit that, from conversations he had had with the jurors, he was convinced of a strong prejudice against the prisoner; (10) or where it appeared that persons might be called on the jury whose opinions might be tainted with prejudice, and whom the prisoner could not challenge (1) Where, in an action for libel in a newspaper, the plaintiff lays the venue in a county distant from that in which the paper is published and the parties reside, so that the trial may be free from local influences, it will not be changed 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. The obtaining of a fair trial must overbear every consideration of mere convenience. (2) But the fact that many of the witnesses for the accused reside at a distance from the place of trial, and that he has no funds to bring them there, is no ground for a change of venue. (3)

(5) *Reg.* v. *Nicol* (1900), 7 B. C. R. 278; 20 C. L. T. 319.
(6) *Walker* v. *Brogden* (1864), 17 C. B. (N.S.) 571.
(7) *R.* v. *Russell* (1878), Ramsay's Appeal Cases (Que.) 199; *Ex parte Corwin* (1879), 24 L. C. J. 104.
(8) *Walker* v. *Brogden, supra; Pybus* v. *Scudamore* (1839), 1 Arnold's R. 464; *Lord Shaftesbury's Case* (1694), 1 Vent. 364.
(9) *Pybus* v. *Scudamare* and *Walker* v. *Brogden, supra.*
(10) *R.* v. *McEneaney* (1878), 14 Cox C. C. 87; *R.* v. *Phelan* (1881), 14 Cox C. C. 579.
(1) *R.* v. *Russell* and *Ex parte Corwin, supra.*
(2) *Blackburn* v. *Cameron et al.* (1871), 5 O. P. R. 341. See, also, *Roche* v. *Patrick* (1870), 5 O. P. R. 210.
(3) *Reg.* v. *Casey* (1877), 13 Cox C. C. 614.

Motions by the Crown for a change of venue.—Motions by the Crown for a change of venue have been very seldom made. There is no reported case in Ontario prior to 1869, and, in the interval, only two cases of the kind are noted in the reports. In April, 1880, an application was made by the Crown in what was known as the "Biddulph murder cases," *Reg* v. *Carroll et al.*, at the London assizes, on the ground of popular sympathy with the accused in the district from which the jury panel was drawn. Wilson, C.J., the presiding judge, said that to effect a change of venue, or, more correctly, to change the place of trial, the court must be specially moved for the purpose. It does not rest with the Crown to select the place for trial by suggestion or otherwise, as it may desire. And the court will refuse or grant the motion as it may see fit. But it will be granted when there is a reasonable probability that a fair and impartial trial cannot be had in the place where the cause would otherwise be tried. The motion was refused, and the matter was afterwards brought up by *certiorari* before the Court of Common Pleas, in May, 1880, with the same result. The court did not give a written judgment, but, after hearing counsel, determined that there was not sufficient evidence to satisfy the court that it was expedient to the ends of justice to order a change of place of trial. (4)

Reg. v. Ponton et al. (1898-9).—The principal authorities on the subject are collected and reviewed in *Reg.* v. *Ponton et al.*, (5) which came up twice for decision before Robertson, J. It was a motion made by the Crown, under section 651 [884, *supra*,] of the Code, to change the venue from the town of N. to some other place, for the trial of three persons charged with the offence of breaking a bank in N. and stealing money therefrom, upon the ground that the sympathy felt for two of the accused, in the town and county of which N. was the county town, was such that a fair trial could not be had. It was held that the rule, that all causes should be tried in the county where the crime is supposed to be committed, ought never to be infringed, unless it plainly appears from proof of facts as distinguished from sworn opinions, that a fair and impartial trial cannot be had in that county; and that mere apprehension, belief and opinion are not to be relied on as evidence. Popular sympathy with the accused and prejudice against the prosecution is not a ground for a change of venue, where it does not appear that the class of persons from whom the jury would be drawn are likely to be prejudiced, except by those

(4) *Per* Robertson, J., in *Reg.* v. *Ponton et al.* (No. 1), (1898), 18 O. P. R. 210, at pp. 215-16.
(5) (No. 1), (1898), 18 O. P. R. 210; (No. 2), (1899), 429.

feelings which arise from the nature of the offence, and which are common to all communities. Under the circumstances appearing upon the affidavits filed, which disclosed conflicting opinions as to a fair trial at N., the motion was refused. The cases *infra* were referred to. (6)

At the trial subsequently of two of the accused at N., one was convicted, and, the jury disagreeing as to the other, his trial was traversed to the next assizes. The Crown thereupon renewed its motion for a change of venue on the same material as that used on the previous application, supplemented by a number of fresh affidavits. These shewed that, at the abortive trial of the defendant, at which the jury disagreed, a crowd of persons congregated outside the court house while the jury were deliberating, and endeavoured to intimidate the jurors and influence them in favour of the defendant, and afterwards made riotous demonstrations against the judge who presided at the trial. On this state of facts an order was made changing the place of the second trial. It was held, that the question on such an application is not a question as to the jury altogether, but that, if it appears to the satisfaction of the court or judge that it is expedient to the ends of justice, by reason of anything which may interfere with a fair trial in the county in which the offence is supposed to have been committed, to change the place of trial, such a change may properly be made. This change was rendered "expedient to the ends of justice," because the conduct of the crowd tended to bring the administration of justice into contempt, and because of its possible influence on a jury at the next trial; and this notwithstanding the sworn statements of the jurors at the abortive trial, that they were in no way intimidated or influenced by the riotous demonstration, part of which took place within their hearing and during their deliberations. (7)

Change of venue in Quebec.—Whenever, in the province of Quebec, it has been decided by competent authority that no term of the Court of King's Bench, holding criminal pleas, is to be held at the appointed time, in any district in the said province within which a term of the said court should be then held, any person charged with an indictable offence, whose trial should by law be held in the said district, may, in the manner hereinbefore

(6) *The King* v. *Holden et al.* (1833), 5 B. & Ad. 347; *The Queen* v. *Phelan* (1881), 14 Cox C. C. 579; *Rex* v. *Harris* (1762), 3 Burr. 1330; *The Queen* v. *Fay* (1872), 6 Ir. C. L. 436; *Reg.* v. *Casey* (1877), 13 Cox C. C. 614; *The People* v. *Coughton* (1872), 44 Col. R., at p. 95; *Brown* v. *The State* (1869), Ohio St. R. 496.

(7) *Reg.* v. *Ponton* (No. 2), (1899), 18 O. P. R. 429.

provided, obtain an order that his trial be proceeded with in some other district within the said province, named by the court or judge. (8) Under this section of the Code, which applies only to Quebec, and which is taken from 32-33 Vict., c. 29, s. 11, the power to change the venue appears not to be limited to a judge sitting in the district where the offence is alleged to have been committed. (9) Nor is the power limited to a single order transferring the case to another county or district. There still remains power, on cause being shewn, to make a second transfer, or to re-transfer the trial to the place from which it was first transferred. Unless, therefore, the Crown shews good cause for making a different order, an application by the accused to change the place of trial back to the district in which the offence is alleged to have been committed should be granted, where the place of trial had been changed, on the defendant's own application, on the ground that popular resentment against him (arising in this case from failure of a bank) would prevent a fair trial, if the defendant shews that the cause of prejudice has ceased, and that the original venue is the more convenient place of trial. (10)

In civil proceedings for libel in Quebec, the question of the proper place for the trial of an action has given rise to a discussion in the courts as to the distinction between "right of action" under C. C. P. 34, and "the whole cause of action" under C. P. 94. An action was commenced in the district of Quebec for damages alleged to have been caused, in that district, by the publication (circulation) therein of a newspaper containing a libellous article on plaintiff, alleged to have been written, printed and published by defendant, as editor of the paper, in Chicoutimi. Upon a motion objecting to the jurisdiction of the court in the district of Quebec, upon the grounds that both plaintiff and defendant resided in Chicoutimi, where the action was served, and because "the whole cause of action," alleged in the declaration, did not arise in the district of Quebec, it was held, that the action should be referred to the district of Chicoutimi for trial and judgment. (1) In a later case it was decided, that the party injured by a libellous article has his recourse for damages against the editor in the district in which the newspaper is issued and the injury caused, since that is the district in which the injurious and

(8) S. 887 (1).
(9) *Ex parte Brydges* (1874), 18 L. C. Jur. 141.
(10) *Per* Cross, J., in *The King* v. *Roy* (1909), 18 Q. O. R. (K.B.) 506; 14 C. C. C. 368.
(1) *Dubuc* v. *Delisle* (1908), 10 Q. P. R. 252; 33 Q. O. R. (S.C.) 456.

damaging attack was made, and where the cause of action arose. But the new Code of Procedure, in using the words "where the whole cause of action arose," makes no change in the law respecting the right in such actions of suing in a district other than that in which the defendant resides. (2)

Affidavits of jurors, when receivable.—When on a motion for a change of venue, affidavits are filed to shew as in *Reg.* v. *Ponton* (*supra*), that the conduct of the crowd must have influenced the jurors, affidavits of jurors denying that they were intimidated may be received in answer; the objection that they should not be read and should be taken off the files, is not applicable. Referring to the authorities *infra* cited in support of this objection, (3) Robertson, J., said that they affirmed the well understood principle, that after a verdict has been rendered, affidavits of jurors as to what took place between the members of the jury, while in the jury room considering their verdict, or affidavits from outsiders, or those not of the jury, as to statements or admissions made by a juror or jurors, after being discharged, could not be read. The reason for this, as stated by Robinson, C.J., (4) was, that "it would open the door to abuse, and would lead to great uncertainty and vexation in the administration of justice, if courts were to listen to accounts by jurors of what has passed in the jury room; or were to attend to relations of what individual jurors may have said to others of the grounds and reasons of their verdict, after they had rendered it." "Here," said Robertson, J., "no verdict was rendered, and this application is not for the purpose of setting aside any action taken, or to correct any alleged mistake made, by the jury, . . . If the objection was, that the affdavits of the jurors shew no cause for not granting this application, that would be a reason for not giving any effect to them, but that would be no reason for removing them from the file. I think, therefore, I must read the affidavits, and, having done so, I am of opinion that they do not in any way afford an answer to this application." (5) On an application for a new trial, however, an affidavit by a juryman, that he did not assent to the verdict, is inadmissible. (6)

(2) *Chicoutimi Pulp Co.* v. *Delisle* (1908), 34 Q. O. R. (S.C.) 294.
(3) *Doe dem. Hagerman* v. *Strong* (1851), 8 U. C. Q. B. 291; *Jones* v. *Duff* (1848), 5 U. C. Q. B. 143; *Reg.* v. *Fellowes* (1859), 19 U. C. Q. B. 48; *Farquhar* v. *Robertson* (1889), 13 O. P. R. 156; Taylor on Evidence, 9th ed., s. 944.
(4) In *Doe dem. Hagerman* v. *Strong*, *supra*, at p. 292.
(5) *Reg.* v. *Ponton* (No. 2), (1899), 18 O. P. R., at pp. 435-6.
(6) *Nesbitt* v. *Parrett* (1902), 18 T. L. R. 510 (C.A.)

CHAPTER XXIX.

The Trial and the Verdict.

Mode of trial for criminal libel.—The mode of trial of a person accused of libel, whether it be on a criminal information or an indictment, is the same as for any other indictable offence. The rules of evidence in the Canada Evidence Act, 1893, (1) under which the accused may testify on his own behalf, are equally applicable, and the evidence and procedure otherwise are the same as in other cases. The conduct of the Crown case is also supposed to be the same as in other criminal prosecutions, but being in form a public, although in reality a private prosecution, at the instance of the person defamed, the proceedings by the Crown no matter by whom conducted, are, as remarked in one case, unlikely to be managed temperately, much less favourably, for the person accused. There is usually a desire to convict, and the animosity of the litigant is imported into what he wrongly calls a public prosecution. (2)

"The private prosecutor."—What is meant by the term "private prosecutor," and what are the rights of such a person in a criminal prosecution for libel, or, indeed, in any criminal prosecution, are questions which were considered in the case just mentioned. The case arose out of the prosecution of the managing director of the *Mail* Newspaper Company, of Toronto, at the instance of an immigration agent of the Ontario Government, for an alleged libel published in two issues of that journal. As explained by the trial judge (Burton, J.A.), in the case reserved, upon the jury being called, counsel for the Crown directed a juror to stand aside. This was objected to by counsel for the defendant, on the ground that the indictment was by a private prosecutor, and that under the provisions of 37 Vict. c. 38, s. 11, (D), (3) the right of the Crown could not be exercised. Being informed by the counsel who conducted the prosecution, that he appeared there for the Government, and that it was not in the nature of a private prosecution, the trial judge considered that he had no alternative, looking at sections 11, 12, and 13 of the Act, but to allow the right claimed: and he accordingly so ruled, and several jurors were in consequence ordered by counsel

(1) R. S. C. 1906, c. 145.
(2) *Per* Wilson, J., in *Reg.* v. *Patteson* (1875), 36 U. C. Q. B. 129, at p. 153.
(3) Now S. 934 of the Code.

for the Crown to stand aside. The trial proceeded, and the defendant was convicted and sentenced to pay a fine of $200, but, upon objections taken by his counsel, a case was reserved for the Court of Queen's Bench. The force and meaning of the words "private prosecutor," in the enactment in question, is fully discussed in the judgment of the court.

Opinion of Morrison, J.—Morrison, J., said that it was strenuously argued that there was no such person as a private prosecutor in this country; and if by private prosecutor was meant a person who might by himself or counsel conduct a criminal prosecution, irrespective or independent of the Crown, then he quite agreed with that view. But that was not what the statute meant to signify by the term private prosecutor, and no doubt, as was said, in this country the practice was, and it was wisely provided, that criminal prosecutions at the Courts of Oyer and Terminer and the Quarter Sessions are conducted by counsel appointed and paid by the Crown, their duty being to assist and advise the private prosecutor in preferring his accusation and conducting the prosecution at the trial. (4) We were all aware that there were various indictable offences which were in reality private wrongs or grievances, and the legislature was annually adding to the number, giving to the party aggrieved redress or a remedy by indictment. "Now, in all such cases," he said, "it is well understood that what is obviously meant by the expression private prosecutor is the person who puts the criminal law in motion, and if there is a criminal proceeding to which the term private prosecutor is more applicable than another, it is in the case of a defamatory libel—a prosecution, as said by Lord Campbell, uniformly instituted by the party injured. . . I have only to add, as shewing what is meant by the term private prosecutor, that these words are used through our criminal statutes as indicating the person injured or aggrieved, and provision is made for such parties being bound over to prosecute and prefer indictments."(5)

Opinion of Adam Wilson, J.—"Criminal prosecutions," said Wilson, J., "are chiefly carried on by a private prosecutor. The person who has been assaulted or robbed, or had his house burned,

(4) There is no jurisdiction in the General Sessions of the Peace to try the offence of defamatory libel, although there is to try the offence of blasphemous libel. The printed instructions of the Attorney-Generals for the provinces, to counsel retained by them to conduct Crown business, direct that any prosecution for a defamatory libel shall be conducted by counsel retained by the private prosecutor at his own expense.

(5) *Reg.* v. *Patteson supra*, at pp. 140-1.

or has been defrauded, or has had his crops, trees, or mill-dam injured, is naturally the complainant, and is entitled to use the name of the Crown. If he did not prosecute, he would have no occasion to be bound to prosecute. And the reason why the person injured is usually the prosecutor, is, that he naturally desires to have punished the person who has wronged him; and because he cannot, in most cases, prosecute civilly for his own private redress until he has prosecuted criminally for the public wrong." (6) He concurred in the opinion expressed by Morrison, J., and upon the authorities to which he had referred, that the provisions of the statute in question applied to all defamatory publications upon private persons, however high in rank or office, but that the provisions did not extend to those graver offences of seditious or blasphemous libels or others of the like serious nature. It was of no consequence by whom the prosecution was carried on, whether by the Crown officers or otherwise; they were equally prosecutions enforced for the benefit only of the person libelled, who was in truth the private prosecutor as distinguished from the nominal public prosecutor. The fact that the counsel for the prosecutor represented the Government or the Attorney-General would not prevent the prosecution, within the meaning of the Act, being one which was carried on by and for a private prosecutor.

Richards, C.J., agreed with the other members of the court. (7)

Locus standi of private prosecutor.—Where a person convicted of defamatory libel, instead of being sentenced, is discharged from custody upon entering into a recognizance with sureties to appear and receive judgment when called on, it is only on motion of the Crown that the recognizance can be estreated, or judgment moved against him. In such a case a private prosecutor has no *locus standi* to make the application. And where fourteen years had elapsed since the conviction, and the only breaches of recognizances charged were the publication of several newspaper articles alleged to be defamatory of the prosecutor, the latter should be left to his remedy by action or indictment in respect of any fresh libels, even if he had a *locus standi* to enforce the recognizance. (8) Upon a speedy trial for an indictable offence, which may be had, if the accused so elects, before the County Court Judge's Criminal Court, the informant, at whose instance

(6) *Reg.* v. *Patteson*, *supra*, at p. 151. This is not the present state of the law. No civil remedy for any act or omission shall be suspended or affected by reason that such act or omission amounts to a criminal offence. (C. C., s. 13).

(7) *Reg.* v. *Patteson* (1875), 36 U. C. Q. B. 129.

(8) *Reg.* v. *Young* (1901), 4 C. C. C. 580.

the prosecution was begun, has no *locus standi*, and is not entitled to prosecute through his counsel unless authorized so to do by the Attorney-General. (9) This would apply to a case of blasphemous libel, which, being the only species of libel triable before the General Sessions of the Peace may, for that reason, be also tried speedily, with the consent of the accused, before the County Court Judge's Criminal Court. A prosecutor bound over at his own request to prefer an indictment, after the discharge of the accused on a preliminary inquiry, is only permitted to appear by counsel before the grand jury where the practice of the court so authorizes; and the practice in the district of Montreal requires a formal application to the court for permission. The accused, under such circumstances, having the right to apply for security for costs, as provided for in section 689 (2) of the Code, may do so at the time of the prosecutor's application for leave to go before the grand jury. (10)

Right of the Crown to cause jurors to stand aside.—Another question which has arisen in prosecutions for libel is the right of the Crown, while the jury are being selected, to cause certain jurors to stand aside. Under the Code the right of the Crown to cause any juror to stand aside, until the panel has been gone through, shall not be exercised on the trial of any indictment or information by a private prosecutor for the publication of a defamatory libel. (1) The phrase "to stand aside," or its equivalent "to stand by," which is used in this and other sections of the Code relating to challenges of jurors, means that the juror being challenged by the Crown, the consideration of the challenge shall be postponed till it be seen whether a full jury can be made without him. (2) It is in substance a deferred challenge for cause, and cannot be made after the juror has, by direction of the clerk of assize, taken the book to be sworn. (3) But the Crown has no right to direct jurors to stand by when they are called a second time after the panel has been exhausted by challenges and directions to stand by. (4)

The above section (934) originally appeared as section 11, in the Dominion Act, 37 Vict. c. 38. (5) Prior to that enactment

(9) *The King* v. *Clark* (1904), 9 C. C. C. 125. See, also, *The King* v. *Gilmore* (a prosecution for perjury), 7 C. C. C. 219.
(10) *The King* v. *Hoo Yoke* (1905), 10 C. C. C. 211.
(1) S. 934.
(2) *Mansell* v. *The Queen* (1857), 8 E. & B. 54.
(3) *R.* v. *Barsalou* (No. 1) (1901), 4 C. C. C. 343.
(4) *R.* v. *Boyd* (1896), 4 C. C. C. 219. See, also, *Martin* v. *The Queen* (1890), 18 S. C. R. 407, *post*, p. 329.
(5) An Act respecting the Crime of Libel, which was assented to 26th May, 1874.

counsel for the Crown on trials for misdemeanours, which included the misdemeanour of libel, could direct jurors to stand aside until the panel was gone through, without assigning any cause of challenge; but the Crown was not entitled to any peremptory challenges. This latter practice, however, was relaxed in favour of the Crown by 32-33 Vict., c. 29, s. 38, (6) which enacted that in all criminal cases, including misdemeanours, four jurors might be peremptorily challenged on the part of the Crown. The preamble of 37 Vict. c. 38, recited, that "it is expedient that the law respecting the crime of libel should in all respects be uniform throughout all portions of Canada; and for the better protection of private character, and for more effectually securing the liberty of the press, and for the better preventing abuses in exercising the said liberty," it was enacted, etc. This preamble and the provisions of the statute, with the exception of section 11, were substantially the same as those contained in the Imperial Act 6-7 Vict., c. 96, (7) from which the statute of the late Province of Canada (8) was taken, and were subsequently extended by 37 Vict., c. 38, to the whole Dominion. Section 11 of the statute last named was embodied in the former Criminal Procedure Act, (9) and thence found its way into the Code. (10)

The Ontario Court of Queen's Bench has held, that the right of the Crown, which existed prior to the passing of 37 Vict., c. 38, to cause jurors to stand aside in cases of prosecution for defamatory libel, was taken away by section 11 of that statute; (1) and that the language of the Act was express and plain, and as clear as words could make it. (2)

Opinion of Morrison, J.—"The object of our legislature, in my opinion," said Morrison, J., "was to put defendants, prosecuted for private libel, on a par with the Crown in respect of challenges and the empanneling of a jury to try the issues which might be raised under the authority of the statute, issues which in fact are not strictly of a public nature, but only personal to the private prosecutor. If the legislature intended that, when such a prosecution was conducted by the Attorney-General in person, or by counsel specially representing him, (3) the case, in that

(6) An Act respecting Procedure in Criminal Cases, and other matters relating to Criminal Law, which was assented to 2nd June, 1869.
(7) An Act to amend the Law respecting Defamatory Words and Libel, better known as Lord Campbell's Libel Act.
(8) C. S. U. C. c. 103—An Act respecting Slander and Libel.
(9) 49 Vict., c. 174, s. 165.
(10) S. 934.
(1) Now S. 934, *supra*, of the Code.
(2) *Reg.* v. *Patteson* (1875), 36 U. C. Q. B. 129, at p. 137.
(3) The counsel for the prosecution in this case stated that he represented the Attorney-General.

event, should not come within the operation of the section, it is only reasonable to assume that it would have so expressed itself in distinct terms. But it has not done so. The change in the law which the 11th section has effected, is, I think, a very proper one. We may fairly suppose that Parliament had in view the way in which our criminal prosecutions are conducted, such as by the County Crown Attorney, or by gentlemen requested by the Attorney-General, from time to time, to go to the various circuits; and considered that the right in question, when exercised in cases of defamatory libels, would probably be exercised at the suggestion of the private prosecutor, for the purpose of enabling him to select jurors having, or supposed to have, a favourable leaning. I need not refer to a class of cases where obviously such a state of things might arise Parliament deemed it expedient to provide against the exercise of such a right in all such prosecutions" (pp. 144-5.)

Opinions of Wilson, J., and Richards, C.J.—Wilson, J., said it was a wise provision to restrain the right of the Crown—"not the prosecutor's rights but the right of the Crown, be it observed"—from being worked in aid of any such case, and, as that right had been wrongly exercised to the prejudice of the defendant, there had been a mis-trial (p. 153).

Richards, C.J., reached the same conclusion by a general survey of the statute, and a comparison of its provisions with those in the Imperial Act (6-7 Vict., c. 96—Lord Campbell's Act), under which, as under our own Act, a defendant might justify, and, if successful, be awarded his costs. "If costs," he said, "would be awarded to the prosecutor, under the 12th section, then it seems to me to follow, as a corollary, that the defendant had a right to insist, under the 11th section, that the Crown should not exercise the right of directing the jurors to stand aside on the trial" (p. 158). He concurred in the conclusion arrived at by Morrison, J, and thought that the right of the Crown to order jurors to stand aside at the trial was not properly exercised in this case. The court directed a rule to be drawn up declaring that the defendant ought not to have been convicted. (4)

A prosecution for defamatory libel not a "public" prosecution.—In this same case of *Reg.* v. *Patteson,* (5) it was forcibly argued, that notwithstanding the prosecution was for the publication of a private defamatory libel, the fact that the prosecuting counsel represented the Attorney-General, and in that capacity con-

(4) *Reg.* v. *Patteson* (1875), 36 U. C. Q. B. 129.
(5) (1875), 36 U. C. Q. B. 129.

ducted the prosecution, made the proceeding a public prosecution, and not a case within the operation of the 11th section of the statute. Upon this point Morrison, J., said he had already intimated that the right of the Crown in all such cases was in express terms taken away, and it was, therefore, a matter of indifference by whom the prosecution was conducted. He referred to two cases (6) for the purpose of shewing that even where the Attorney-General conducted such a prosecution in person, it was not made a public proceeding.

Right of the Crown to direct jurors to stand aside a second time.—The courts have also had to deal with the question whether the Crown can direct jurors to stand aside a second time. In the selection of a jury on an indictment for murder, after a panel had been gone through and a full jury had not been obtained, the Crown, on the second calling over of the panel, was permitted, against the objection of the prisoner, to direct eleven of the jurors on the panel to stand aside a second time, and the presiding judge was not asked to reserve, and neither reserved nor refused to reserve, the objection. After conviction and judgment, a writ of error was issued, which was quashed by the Court of Queen's Bench for Lower Canada (Appeal Side). Upon appeal to the Supreme Court of Canada the court was divided as to whether the question was one which arose on the trial under R. S. C., c. 174, s. 259, the Criminal Procedure Act immediately preceding the Code. It was held, *per* Taschereau, Gwynne and Patterson, JJ., that the question was one of law arising on the trial which could have been reserved under that section, and the writ of error should, therefore, be quashed. But, *per* Ritchie, C.J., and Strong and Fournier, JJ., that the question arose before the trial commenced, and could not have been reserved, and, as the error of law appeared on the face of the record, the remedy by writ of error under section 266 of the statute, was applicable, referring to *Brisbois* v. *The Queen*. (7) The majority of the court (Ritchie, C.J., and Strong, Fournier and Patterson, JJ.) were of opinion that the Crown could not, without shewing cause for challenge, direct a juror to stand aside a second time, referring to R. S. C. c. 174, s. 164, which limited the right of the Crown to order jurors to stand aside only until the panel had been once gone through, and, in effect, overruling *The Queen* v. *Lacombe*. (8) Gwynne, J., was of opinion that all the prisoner could complain of was a

(6) *Rex* v. *Marsden et al.* (1829), 1 M. & M. 439; *Rex* v. *Bell* (1829), 1 M. & M. 440.
(7) (1888), 15 S. C. R. 421.
(8) (1869), 13 L. C. Jur. 259.

mere irregularity in procedure which could not constitute a mistrial. The court being divided on the main question, the appeal was dismissed without costs. (9)

Rights of jury at the trial.—The most important enactments in our law of libel, both civil and criminal, are those which concern the rights of the jury at the trial. These have been adopted from Fox's Libel Act, (10) and are almost an exact transcript of that famous statute. In the preamble of that Act the reasons are recited for its passage; the declaratory enactments which follow are embodied in the statute law of the provinces, and in the following section of the Code:

Jury may give a general verdict on the whole matter in issue, etc.—On the trial of any indictment or information for the making or publishing of any defamatory libel, on the plea of not guilty pleaded, the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information, and shall not be required or directed, by the court or judge before whom such an indictment or information is tried, to find the defendant guilty merely on the proof of publication by such defendant of the paper charged to be a defamatory libel, and of the sense ascribed to the same in such indictment or information; but the court or judge before whom such trial is had shall, according to the discretion of such court or judge, give the opinion and direction of such court or judge to the jury on the matter in issue, as in other criminal cases; and the jury may, on such or special issue, find a special verdict if they think fit so to do. (1)

Motion in arrest of judgment.—The defendant, if found guilty, may move in arrest of judgment on such ground and in such manner as heretofore. (2)

Fox's Libel Act and misconceptions concerning it.—The Act from which this enactment was originally taken applied only to the trials of indictments and criminal informations, and not to the trial of civil actions, for libel. It became the practice in England, however, after the decisions in *Parmiter* v. *Coupland* (3) and *Baylis* v. *Lawrence*, (4) for the court to define or explain the

(9) *The Queen* v. *Martin* (1890), 18 S. C. R. 407. See, also, *R.* v. *Boyd*, *ante*, p. 326.
(10) 32 Geo. III., c. 60, An Act to Remove Doubts respecting the Functions of Juries in Cases of Libel (1792).
(1) S. 956 (1).
(2) *Ibid.* (2)
(3) (1840), 6 M. & W. 105.
(4) (1840), 11 A. & E. 920.

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 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.

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 as stated in section 956 of the Code is the law as stated in Fox's Libel Act, and was passed for the express purpose of removing this anomaly. The court or judge may now give their or his "opinion and direction" 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 direction" of the court, in which event their verdict, if it be acquittal, is usually final and conclusive, on the principle that no person shall be placed twice in jeopardy for the same offence. (5) but, if it be a conviction, the verdict is open to review and correction for any good legal reason. The jury may also find a special verdict on the facts, leaving the application of the law to the

(5) Usually final and conclusive, because, under SS. 1013, *et seq.*, the *prosecutor* as well as the accused may have a case reserved for the opinion of the Court of Criminal Appeal, who may direct a new trial, even where there has been a verdict of not guilty. But there is no reported case in Canada in which, after acquittal, a new trial has been directed.

court; and, in every case of conviction, the defendant has still the right of moving to arrest the judgment on any gronnd 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 libel on the same footing as trials for other indictable offences, and was not, as is sometimes supposed, to give the jury any greater power over the law of the case in libel than they possessed in regard to any other crime. 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 jnry 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 conrt to pass upon the questions of law arising either during the trial or (in the event of conviction) afterwards, is not taken away; on the contrary, it is specially retained by the provision that the judge may give the jnry his "opinion and direction" as in other cases, and, in order that the verdict shall not be conclnsive of the law against a defendant, by the further provision that the defendant shall have the same right, as he had previonsly, to a motion in arrest of judgment. The claim that the jnry are to be the jndges of the law in any partial sense is thus intentionally and carefully excluded.

Judicial opinions as to the rights of the jury.—Abbott, C.J.—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 direction of the judge (6)

Best, J.—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 jnry 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. (7)

And, in another case, Best, C.J., said, that he did not admit that, even in criminal cases, the jury are the jndges of the law. Before the statute, their province was merely to find whether or

(6) *Per* Abbott, C.J., in *Rex* v. *Burdett* (1820). 4 B. & Ald. 183.
(7) *Per* Best. J., in the same case.

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 may find a general verdict. (8)

Lord Blackburn.—In an appeal which came before the House of Lords, Lord Blackburn, referring to Fox's Act, said, "The legislature, in passing an enactment in favour of defendants, had no intention to put them in a worse position than before, and to make the verdict of a jury conclusive against the defendants. Nor did they enact that the judge might not in this, as in other criminal cases, direct the jury to acquit because he thought that the case had failed in law; it would, I think, have been very injudicious to do so, for jurors are sometimes excited against defendants, though more commonly they are excited in their favour. And the legislature by the 4th section provided that the defendants should still, though found guilty by the jury, have the power to take the opinion of the court on the question of law, by moving in arrest of judgment as before the Act." (9)

Lord Selborne.—And, in the same case, Lord Selborne said—"I do not understand any of the learned judges in the courts below to have been of opinion (nor do I think it is the opinion of any of your Lordships), that the question of libel or no libel must always, and necessarily, be left to a jury as to words not in themselves (*i.e.*, in their proper and natural meaning, according to the ordinary rules for the interpretation of written instruments) libellous, without some evidence either of a libellous purpose on the part of the writer, or of some other extrinsic facts calculated to lead reasonable men to understand them in a libellous sense. I should myself be very sorry if such were the law. . . . It seems to me that without some evidence of facts, which, when connected with the words of the document, would justify the meaning imputed to it, such a case ought not to go to a jury." (10)

The same rule in the United States.—Story, J.—There is abundance of authority in the United States to the same effect. "The jury are no more judges of the law in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case tried upon the general issue. In each they have the physical power to disregard the law as laid down to them by the court. But I deny that in any case, civil or criminal, they have

(8) *Levi* v. *Milne* (1827), 12 Moore 421; 4 Bing. 195.
(9) *Capital and Counties Bank* v. *Henty* (1882), L. R. 7 App. Cas. 751, at p. 775.
(10) *Ibid.* at pp. 744, 748.

the moral right to decide the law according to their own notions or pleasure. It is the duty of the jury to follow the law as it is laid down by the court. If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views which different juries might take of it, but, in case of error, there would be no remedy or redress by the injured party; for the court would not have any right to review the law, as it had been settled by the jury." (1)

Selden, J.—"If jurors were to determine the law, its stability would be subverted, and it would become as variable as the prejudices, the inclinations and the passions of men. Every case would be governed, not by any known or established rule, but by a rule made for the occasion. Jurors would become not only judges, but legislators as well. If the jury finds a verdict in a civil case against law, the court sets it aside. That the same is not done in criminal cases is owing, I think, more to the tenderness of the common law towards persons accused of crime than to any recognized right of jurors to decide legal questions." (2)

Field, J.—Field, J., of the Supreme Court of the United States, in his charge to the jury in *United States* v. *Greathouse*, (3) said: "There prevails a very general but erroneous opinion, that in all criminal cases, the jury are the judges as well of the law as of the fact, that is, that they have a right to disregard the law as laid down by the court, and to follow their own notions on the subject. Such is not the right of the jury. They have the power, it is true, to disregard the instructions of the court, and in case of an acquittal their decision will be final, for new trials are not granted in criminal cases when a verdict has passed in favour of the defendant, but they have no moral right to adopt their own views of the law. It is their duty to take the law from the court and apply it to the facts in the case. It is the province of the court, and the court alone, to determine all questions of law arising in the progress of a trial; and it is the province of the jury to pass upon the evidence and determine all contested questions of fact. The responsibility of deciding correctly as to the law rests solely with the court, and the responsibility of finding correctly the facts rests solely with the jury. The separation of the functions of the court from those of the jury, in this respect,

(1) *Per* Story, J., in *United States* v. *Battiste* (1835), 2 Sumner's U. S. Ct. Repts. 240, at p. 243.
(2) *Per* Selden, J., in *Duffy* v. *The People* (1863), 26 N. Y. 588, at pp. 591-92.
(3) (1863), 4 Sawyer (N.S.) 464.

is essential to the efficacy and safety of jury trials. Any other doctrine would only lead to confusion and uncertainty in the administration of justice. 'I hold it,' says Mr. Justice Story, 'the most sacred constitutional right of every party accused of crime that the jury should respond as to the facts and the court as to the law. This is the right of every citizen, and his only protection.'"

Opinion of Patterson, J.A.—In a civil case which came before the Ontario Court of Appeal, Patterson, J.A., said: "It has not been contended that, in any particular material to the questions we have to decide, an action of libel is to be dealt with on different principles from those which govern the procedure in other actions, and no such contention could, as I apprehend, be successfully maintained. The effect of R. S. O., c. 56, (4) which applies the provisions of Fox's Act to civil actions for making or publishing any libel, requires that the question of libel or no libel shall be dealt with by the jury, and that has been done. The judge, as required by the Act, gave his "opinions and directions to the jury on the matter in issue as in other cases," and the jury found the defendant guilty. The statute was, therefore, satisfied. In *Thomas* v. *Williams* (1880), 14 Ch. D. 864, Fry, J., treated the action as on the same footing as others, even as to the mode of trial. His argument on that point was founded a good deal on the circumstances that Fox's Act applied only to proceedings by way of criminal information or indictment, and that opinion would, therefore, be inapplicable here in view of R. S. O., ch. 56, (5) and of section 45 of the Judicature Act, read along with section 252 of the C. L. P. Act, R. S. O., c. 50; but the judgment supports my proposition that, except as affected by the statute, there is nothing exceptional in the nature or incidents of the action of libel. If the discretionary power of the court was supposed to be narrower in these actions than in others, one would expect to find some allusion to it in a case like *Belt* v. *Lawes* (No. 3) (1884), 12 Q. B. D. 356, where the Court of Appeal elaborately discussed and formally affirmed the right, in an action for libel, to reduce the damages with the assent of the plaintiff, and, therefore, to discharge the rule *nisi* for a new trial which the defendant had obtained on the ground, amongst others, of excessive damages; but no distinction between actions for libel and other actions seems to have been suggested." (6)

(4) R. S. O. 1897, c. 63—An Act respecting Libel and Slander.
(5) *Ibid.*
(6) *Wills* v. *Carman* (1888), 14 O. A. R. 656, at pp. 679-680.

Fox's Libel Act in Quebec.—Opinion of Ramsay, J.—In a prosecution for libel of the publishers of the *Daily Witness* at Montreal, Ramsay, J., held, as against the contention of the prosecution, that Fox's Libel Act ((1792), 32 Geo. 3, c. 60), was in force in Canada, and consequently that it was for the jury to say whether the facts proved constituted a libel, and whether the defendants published it. What was said on that point is noticeable by reason of the fact that the Criminal Code was not then in force, and that the law of property and civil rights in the province of Quebec is embodied in the *Code Civil*, and that, in this particular and the procedure relating to the same, the legal system which prevails there is different, with some exceptions, from that which prevails in the other provinces. It was "urged on the part of the prosecution," said the learned judge, "that that Act, being passed subsequently to the introduction of the English criminal law into Canada, was not in force. I stopped the counsel for the defence in their argument on this point, for I am clearly of opinion that that Act is in the nature of a declaratory Act, and that it is in force here. The prosecution has cited an authority which treats it as an alteration of the law, but that is only a deferential mode of dealing with any expression of opinion on the part of the judges commonly used in England. Historically it is declaratory. It will be remembered that the judges laid down the doctrine that libel or no libel was matter of law for the court, and they only left to the jury whether the defendants published. Juries refused to be guided by this monstrous doctrine, the object of which was really to create an exception to the general rule of the criminal law, and, after a good deal of resistance, Fox's libel bill was passed in 1792 to settle the difficulty, which, I think, is settled for the whole Empire by the assertion of the true principle; and I shall leave the whole case to the jury—whether, under all the circumstances that may properly be proved, there is libel, and whether the defendants published it." (7)

The objection having been again urged at a subsequent stage of the trial, the learned judge said that he would tell the jury what were the constituents of libel, and leave them to find a general verdict on the whole. "You seem to accept with reluctance," he said, "the ruling of yesterday as to Fox's Libel Act being in force; but in addition to its declaratory character, from the whole history of the controversy which led to it, we have our statute (32-33 Vict., c. 29, s. 33) recognizing the fact that the plea of "not guilty" puts the party accused, upon any indict-

(7) *R.* v. *Dougall et al.* (1874), 18 L. C. J. 85, at p. 87.

ment, *upon the country for trial*—of what? Of the whole issue in this as in every other case without exception." (8)

Prosecutor must satisfy both court and jury as to words being libellous.—The enactment in the Code, it will be observed, and the same is true of the provincial laws on the same subject, leaves it to the discretion of the judge to give his opinion as to whether the matter in question is or is not libellous; he may direct the jury that it is, in point of law, a libel, but he is not obliged to do so. (9) In any event, the defendant cannot be convicted unless both the court and the jury are against him. "The onus," said Lord Blackburn, "always was on the prosecutor or plaintiff to shew that the words conveyed the libellous imputation, and, if he failed to satisfy that onus, whether he had done so or not being a question for the court, the defendant was always entitled to go free. Since Fox's Act at least, however the law may have been before, the prosecutor or plaintiff must also satisfy a jury that the words are such and so published as to convey the libellous imputation. If the defendant can get either the court or the jury to be in his favour, he succeeds. The prosecutor or plaintiff cannot succeed unless he gets both the court and the jury to decide for him." (10)

Functions of court and jury under the statute.—The functions of the court and jury, respectively, under the statute, namely, libel or no libel as a question of law for the court, and libel or no libel as a question of fact for the jury, are not always easy to determine, on account of the shadowy line between matters of law and matters of fact. The points presenting most difficulty are those relating to privilege, malice, intention, negligence in assuming the truth of the charge made, and the form and manner of the publication. The offence consists in publishing the matter set forth in the information or indictment in the sense disclosed by the matter itself, or in the sense explained by the innuendoes, with a malicious intention, and without legal justification or excuse. The court has to say whether the words charged are libellous or not; whether, if there be an innuendo, the words are capable of the meaning alleged; whether the facts proved constitute in law a publication; whether, in the case of an innuendo, they support the innuendo; whether, in connection with the occasion and circumstances of the publication, they amount to a legal justification or excuse, either absolute or qualified, *i.e.*,

(8) *Ibid.* p. 89.
(9) *Levi* v. *Milne* (1827), 4 Bing. 195; *Tuson* v. *Evans* (1840), 12 A. & E. 733; *Reeves* v. *Templar* (1838), 2 Jur. 137.
(10) *Capital & Counties Bank* v. *Henty* (1882), L. R. 7 App. Cas. 775-6.

dependent on the real intention of the defendant. The jury have to determine, subject to the opinion of the court on points of law, whether the matter was published in fact, and in the sense alleged in the innuendo; whether (subject to the legal presumption, which must be rebutted by the defendant, that a person intends to do that which the publication is calculated to do) the alleged libel was published wilfully and designedly and with the intent stated on the record; whether, on the one hand, the publication was malicious or wrongful, or, on the other hand, whether it was innocent; and whether the facts connected with the occasion and circumstances of the publication, and on which the defendant relies to give legal justification, exist or not. Questions of the fairness of a report of judicial proceedings are for the jury; (1) and so also are questions of the fairness of a report of a public meeting, and of comments upon matters of fact on any matter of public interest.

Objections to judge's charge.—Having regard to these separate functions of the court and jury in prosecutions for libel, it should be noticed, that objections to the judge's charge should be taken at the trial, and can only be taken afterwards by leave of the court. In a leading Ontario case, in which a number of important points were decided, counsel for the defendant, in moving for a new trial on the ground of misdirection of the trial judge in telling the jury that there was no evidence to support the plea of justification, moved upon the return of the rule, after the expiration of the first four days of term, to amend the rule by adding, as a further ground of misdirection, that the learned judge told the jury that the libel in question implied malice on the part of the defendant, and that it lay upon him to shew, by evidence, such facts as should be sufficient to remove that inference, whereas he should have told the jury that the alleged libel being a privileged communication, the inference of malice was repelled, and that it lay upon the prosecutor to prove express malice on the part of the defendant, which had not been done. It was admitted that no objection of that kind was taken at the trial. The court under the circumstances, as a matter of indulgence, upon the authority of *Rex* v. *Holt*, (2) allowed the new ground of misdirection to be argued, but held that it should have been taken at the time, when, if anything erroneous was stated, it might have been corrected, or when, if anything was said which might be misunderstood, it could have been explained.

(1) *Per* Cockburn, L.C.J., in *Risk Allah Bey* v. *Whitehurst et al.* (1868), 18 L. T. (N.S.) 615; *Street* v. *The Licensed Victuallers' Society* (1874), 22 W. R. 553.
(2) (1793), 5 T. R. 436.

Opinion of Adam Wilson, J.—"There is no authority," said Wilson, J., "for saying that a misdirection in point of law should not be objected to at the time. There is authority that if the judge nonsuit on a point of law, the plaintiff may, without any leave for the purpose, and although he takes no exception at the time, move the court to set it aside: *Hughes* v. *Great Western R. W. Co.* (1854), 14 C. B. 637, 644. It is very likely if the judge were to tell the jury that a simple contract debt was barred by the lapse of two years, or that a person who was not twenty-one years of age could not be sued for an assault and battery, or the like, that the court would at once give relief, although no objection had been made to such statement of law at the trial. How much further the rule might be carried, I need not say, but I apprehend that it cannot be said that every mistake in matter of law can be moved against, which is acquiesced in at the trial. I do not think the matter outside of the rule should, on the merits, prevail." The rule was discharged. (3)

Opinions of Anglin and Davies, JJ.—In a Quebec case, which was appealed to the Supreme Court of Canada, and in which the defendant complained of serious misdirection by the trial judge, for which a new trial was granted, Anglin J., said: "As to this, however, he is in the difficulty that no objection to the charge was taken at the trial, although formal objections in writing were filed on the morning following the verdict. As I read former article 473, C. P. Q., although the judge was only required to reduce to writing the portion of his charge to which objections had been taken (making mention of the objection) as soon as conveniently possible, it was intended that he should have the opportunity of doing so immediately (*sur-le-champ*). Moreover, this article was found under the caption, 'proceedings before the jury.' I therefore think it clear, that under it the party objecting was required to state his objections to the trial judge before verdict. Apart from the provisions of this article, the manifest impropriety and inconvenience of any other course would seem to render this imperative. Although it repeals article 473, the Quebec statute, 8 Edw. VII. c. 77, s. 2, does not, in my opinion, alter the practice in regard to the necessity for taking objections to the charge before verdict. It follows that the appellant cannot, on the ground of misdirection, claim a new trial as of right. But the court may, nevertheless, where the misdirection has been serious and is likely to have resulted in a miscarriage of justice, as

(3) *Reg.* v. *Wilkinson* (1877), 42 U. C. Q. B. 492.

a matter of discretion grant a new trial." (4) And, in the same case, referring to the fact that the full meaning of his misdirection had not been called to the attention of the trial judge at the time, Davies, J., said: "This only goes to shew the imperative necessity of Courts of Appeal insisting, when asked to grant new trials as a matter of right, that only objections to particular statements, made by the judge in his charge to the jury, will be considered or given effect to when it is shewn that objection has been taken to them at a time when their misleading character can be corrected before the jury." (5)

The verdict.—Although, as expressed in the statute, (6) the verdict may be special, it is usually the general verdict of guilty or not guilty upon the one count, if there be only one, or upon each separate count, if there be more than one, in the indictment. But a defendant may be found guilty upon a count in the indictment or information which charges him with having "composed, printed and published" a libel, if he is proved to have *published* without having composed it. "It is enough," said Lord Ellenborough, "to prove publication. If an indictment charges that the defendant did or caused to be done a particular act, it is enough to prove either. The distinction runs through the whole criminal law, and it is invariably enough to prove so much of the indictment as shews that the defendant has committed a substantial crime therein specified." (7)

Duties of judge and Crown counsel at a criminal trial.—Opinion of Morrison, J.—In a case already referred to, counsel for the Crown at the trial, who afterwards argued the reserved case before the full court, complained of the conduct of the presiding judge in reserving certain questions (upon which at the trial he had ruled in favour of the Crown) for the court, after a verdict for the Crown and sentence passed upon the defendant. In approving of the action of the trial judge (Burton, J.) in this particular, Morrison, J., said he could not see the force of such a complaint. In his judgment it was the duty of the judge, if, after the conviction of a person, he entertained any doubt as to his ruling on any matter of law, which might have prejudiced the accused on his trial, to reserve the point for the decision of the full court; and in his opinion, in the present case, the learned judge acted properly in reserving and submitting the matter as he had done. Nor could he see any ground upon which the At-

(4) *Barthe* v. *Huard* (1910), 42 S. C. R. at p. 414.
(5) *Ibid.* at p. 410.
(6) S. 956 (1).
(7) *Rex* v. *Hunt et al.* (1811), 2 Camp. 584-85.

torney-General, throngh counsel representing him, onght to raise any objection to the course adopted by Mr. Jnstice Bnrton; on the other hand, he thought it was the becoming dnty of counsel prosecuting for the Crown in criminal cases to defer to the opinion of the jndge, and in justice to the accused, and in fnrtherance of the administration of justice, to aid the criminal court in having a doubtful matter fairly submitted for the decision of the superior court. In connection with this subject he might properly refer to some remarks made by Mr. Justice Blackburn, in the case of *Regina* v. *Berens*, 4 F. & F. 842, 853. That learned jndge said the position of prosecuting counsel is not that of an ordinary counsel in a civil case, but that he was acting in a quasi-judicial capacity, and ought to regard himself as part of the conrt; that while he was there to conduct his case, he was to do it at his discretion, but with a feeling of responsibility—not as if trying to obtain a verdict, but to assist the judge in fairly pntting the case before the jury, and nothing more. And, as said by Mr. Justice Crampton in *Regina* v. *Puddick*, 4 F. & F. 479, the counsel for the prosecution are to regard themselves as ministers of justice, and not to struggle for a conviction as in a case at Nisi Prius.

Opinion of Adam Wilson, J.—Wilson, J., said that "the learned jndge, feeling the responsibilities of his office, and feeling himself above that which was too freely expressed, did what a conscientious jndge is bonnd to do—considered well what his course should be before he pronounced and enforced his sentence. There is no matter with which any other than the judge has less to do, than when he desires to take advice or to deliberate before he acts. It is his sole concern. It is a matter of conscience and duty with him and with himself alone; and how so much opposition could have been made in the case, and that, too, on behalf of the Crown—the source of mercy as well as of justice—surprises me not a little. The Crown can never desire to convict or to pnnish any one, but on the clearest evidence. The Crown prosecution is in the nature of an inquisition to enquire into and determine what the facts are. It is not a vindictive proceeding, nor a compensatory action, to punish or to recover damages. The proceedings by the Crown are always conducted temperately, and I may say favourably, for the person accused, and it is for the public interest it should be so." (8)

(8) *Reg.* v. *Patteson* (1875), 36 U. C. Q. B. 129.

CHAPTER XXX.

Proceedings After Verdict.

Arrest of judgment.—The Code provides that the defendant, if found guilty, may move in arrest of judgment on such ground and in such manner as heretofore, *i.e.*, as he might have done before the passing of the Act. (1). Defects apparent on the face of the indictment cannot be taken advantage of on such a motion. Every objection to any indictment, for any defect apparent on the face thereof, shall be taken by demurrer or motion to quash the indictment, before the defendant has pleaded and not afterwards, except by leave of the court or judge before whom the trial takes place, and every court before which any such objection is taken may, if it is thought necessary, cause the indictment to be forthwith amended, in such particular, by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared. (2) And no motion in arrest of judgment shall be allowed for any defect in the indictment, which might have been taken advantage of by demurrer, or amended under the authority of the Act. (3) Under section 1007 (1), the accused may, at any time before sentence, (4) move in arrest of judgment on the ground that the indictment does not, after amendment, if any, state any indictable offence. (5) This clause, said Idington, J., (6) "is not as clear as one would wish. Is it only in the case of an amended indictment that the motion lies? The very comprehensive language of section 898 shews how very limited a field is left for motions in arrest of judgment. It is quite possible that, after a prisoner had pleaded instead of demurring, the indictment might erroneously be amended by a trial judge in such a way as to render it bad in law. If he should, over confident of his own judgment, make a mistake in refusing to allow a demurrer to an amended indictment, the only recourse the prisoner would have as of right, save objecting to the amendment and noting of it, would be this motion to arrest judgment."

(1) S. 956 (2).
(2) S. 898 (1).
(3) *Ibid.* (2).
(4) Or, upon leave reserved, after sentence: *Reg.* v. *Caudwell* (1851), 2 Den. C. C. 372, *note*.
(5) See the rest of this section for the procednre on motions in arrest of judgment. The original section, 733, of which S. 1007 (1) is a revision, contained the words "after any amendment (which the conrt is willing to, and has power to make) state, etc.
(6) In *Ead* v. *The King* (1908), 40 S. C. R. 272, at p. 277.

Under section 1010, judgment after verdict, upon an indictment for any offence against the Code, shall not be stayed or reversed for certain formal defects specified in the section. It would appear, therefore, that in the case of a conviction for libel, the defendant may move in arrest of judgment before, or upon leave reserved after, the sentence is pronounced, when the indictment, after any amendments which have been or can be made, is substantially defective as disclosing no offence. The court will of itself arrest the judgment, even if the defendant does not move for it, if it is satisfied that the defendant has not been found guilty of any offence in law. (7) The arrest of judgment sets aside the indictment and all the proceedings, but is no bar to a fresh indictment. (8)

Enactments reserving questions of law.—The principal provisions in the Canadian statutes as to reserving questions of law on criminal trials were originally derived from 11-12 Vict. c. 78 (Imp.). It has been said of this statute that it was passed for the purpose of amending one of the greatest scandals of the law, namely, that whilst, in civil cases, the most trivial objection entitled the parties as of right to a new trial, a prisoner whose life, as in the case in question, depended on the result, was prevented from getting his case reviewed, as to any error of fact, unless he adopted a most circuitous and expensive course. To such an Act of Parliament the courts should give the most liberal construction, for the purpose of allowing a prisoner an opportunity of asserting every right which he legally possesses. (9)

Appeal and case reserved.—The defendant, if convicted, may in libel, as in other indictable offences, appeal from the verdict or judgment of the court or judge to the Court of Appeal in the province in which the trial took place, (10) and a case may be reserved, or a reserved case applied for, either at the instance of the prosecutor or the defendant, for the opinion of such court. (1) Four judges, constituting a majority of the Supreme Court of Nova Scotia, have authority to sit as the Supreme Court of that province *en banc*, to hear a reserved case, the full membership of the court being seven. (2)

(7) *Rex* v. *Waddington* (1800), 1 East, 146; *Reg.* v. *Carr* (1872), 26 L. C. J. 61.

(8) *Reg.* v. *Larkin* (1854), Dears. C. C. 365; 23 L. J. M. C. 126; 4 Rep. 45.

(9) *Per* Martin, B., in *Reg.* v. *Mellor* (1858), 4 Jur. (N.S.) 214, at p. 222.

(10) S. 1013 (1).

(1) S. 1014 (2), (3). See chapter on "Jurisdiction of the Criminal Courts" as to what courts in the provinces such appeals and reserved cases lie.

(2) *George* v. *The King* (1904), 8 C. C. C. 401.

The procedure for case reserved and appeal.—The proceeding by writ of error has been abolished, (3) and, instead thereof, a reserved case involving an appeal may be obtained by the following procedure: The court before which the defendant is tried may, either during or after the trial, reserve any question of law arising on the trial, or on any of the proceedings preliminary, subsequent, or incidental thereto, or arising out of the direction of the judge, for the opinion of the provincial Court of Appeal. (4) Either the prosecutor or the defendant may, during the trial, (5) apply orally or in writing to reserve any such question, (6) If the application is granted, the question reserved is subsequently stated for the Court of Appeal; (7) if it is refused, the court shall make a note of the objection. (8) After a question is reserved the trial proceeds, (9) and, in the event of a conviction, the court may postpone sentence or respite its execution till the question reserved has been decided, the defendant in the meantime being either committed to prison or admitted to bail. (10) If the court refuses to reserve the question, the party applying may move the Court of Appeal. (1) The Attorney-General, or party so applying may, on notice of motion to the accused or prosecutor, as the case may be, move the Court of Appeal for leave to appeal, which may be granted or refused on such evidence as it thinks fit to receive. (2) If leave is granted, a case is stated for the opinion of the court as if the question had been reserved. (3) No such leave is necessary when the sentence is illegal, or when the court has arrested judgment and refused to pass sentence. In the former case either party may give notice to the other side and move for a proper sentence; in the latter case the prosecutor may make the motion. (4)

"During the trial."—In a Nova Scotia case, the Supreme Court of Canada had to determine, on appeal, the meaning of the words "during the trial" in section 1014 (3) (*supra*). The accused was tried for forgery. There was no objection taken to the indictment, the evidence, or the direction of the trial judge, and the

(3) S. 1014 (1).
(4) *Ibid.* (2).
(5) See *Ead* v. *The King*, *infra*, and comments thereon as to the meaning of those words.
(6) S. 1014 (3).
(7) *Ibid.* (6).
(8) *Ibid.* (3).
(9) *Ibid.* (4).
(10) *Ibid.* (5).
(1) S. 1015 (1).
(2) *Ibid.* (2), (3).
(3) S. 1016 (1).
(4) *Ibid.* (2), (3).

accused was convicted. Before sentence was passed, objection was taken, for the first time, that the accused could not on the evidence be convicted of the crime charged. The trial judge declined to reserve a case and sentenced the accused, whereupon the Supreme Court of Nova Scotia, the proper appellate court, at the instance of the accused, directed the trial judge to state a case for the court. This was done and the appeal was dismissed, Meagher, J., dissenting. Upon appeal to the Supreme Court of Canada the objection was taken, as it had been in the court below, that the accused had no right of appeal to either court, and this raised the question as to the interpretation of the clause referred to. On the one hand it was urged, that the words "during the trial" must include everything up to and including the sentence; on the other hand, that the plain ordinary meaning of the word "trial" must be adopted, *i.e.*, that the "trial" ends with the verdict of the jury.

Opinion of Supreme Court of Canada.—"I think," said Idington, J., for the court, "this latter contention the correct one. A man might never be sentenced, yet he stands convicted when found guilty, or acquitted when found not guilty, and either could successfully plead respectively *autrefois convict* or *autrefois acquit*, as the necessities of any later case might render necessary. Sentence so uniformly followed a conviction in olden times as to give the passing of sentence a semblance of part of the trial. It was also the point at which, long ago, most of the serious questions of law raised upon a trial came up for final disposition if not conclusion. Ever since our Canadian statute (in 1869), 32 and 33 Vict. c. 29, was passed, almost all this has changed"—referring to objections to the indictment required to be taken under section 898 (1), and to the radical difference between English and Canadian legislation on that point.

"The chances of legal wrong ever being done by a trial judge to the accused after the verdict are almost infinitesimal, and so easy of remedy by appeal to the clemency of the Crown, that one cannot see injury likely to result from limiting his rights of appeal to that which transpired before the verdict. On the other hand, if the trial referred to in this sub-section 3 of section 1014 of the Code were extended to include proceedings after verdict, then the accused would have left open to him in every case the right to keep silence and only interpose his objections after the verdict when nothing could be amended. The door would be thus thrown wide open to almost interminable appeals nearly all of which might ultimately prove quite unfounded, yet, persisted in, would serve the purpose of the accused who was guilty but who desired pro-

ceedings prolonged until he was quite forgotten, as a satirist tells us happens in the administration of the criminal law, where justice is not swift of foot. . . . I think the appeal should be dismissed simply on the ground that an appeal founded on the way it was did not lie either to the court below or to this court." (5)

The effect of this judgment is that, although by section 1014 (3) of the Code, either party may "during the trial" apply to have a question reserved for adjudication by the Court of Appeal, yet, for the purposes of this provision, the trial ends with the verdict, after which no such application can be entertained.

This, it is submitted, is questionable, as well as the dictum that the sentencing of the accused is not included in the words "during the trial." See the decisions cited at page 349, *post*, in which it was held, that a question raised in the court below by a motion in arrest of judgment is a question arising on the trial and is properly reserved. In the famous Tichborne perjury case, (6) in which the accused was convicted and sentence passed during vacation, the Court of Queen's Bench held that the passing of sentence was part of the trial, and therefore valid as within the statute which permitted a continuance of the trial during vacation. Replying to the prisoner's contention that, on receiving the verdict, sentence should have been delayed until the ensuing term, Blackburn, J., for the court (Cockburn, C.J., Blackburn, Lush and Quain, JJ.), said:—

"We are, however, clearly and undoubtingly of opinion that it is competent for the court to pronounce sentence at the time. As on this point an authority was cited, it is necessary to examine the question fully as we dissent from that authority. All courts of Oyer and Terminer sit for the trial of the causes brought before them. If the issue raised during the trial of one of these causes be on matters of fact, it is to be tried by the jury under the supervision of the court. If it is matter of law, it is to be tried by the judges; if matter of record, by the record itself. The question what the sentence in a criminal case should be, is a question of mixed law and judicial discretion to be guided by the facts proved on the taking of the verdict, and, therefore, is to be determined by the judges and so it is properly and technically included in the word, "Trial." The trial by the court of the cause before it includes all those and the word "trial" is not confined to taking the verdict.

(5) *Ead* v. *The King* (1908), 40 S. C. R. 272.
(6) *Reg.* v. *Castro* (1874), L. R. 9 Q. B. 350.

"To substitute for the word 'trial' the words 'taking of the verdict,' or any similar words, or to construe the word 'trial' as limited to the taking of the verdict, would be an alteration and straining of the words of the legislature for the purpose of defeating their obvious intention. We have no doubt we cannot do so, and we should not have thought it necessary to render our reasons so much at length were it not for the expressions used by Tindal, C.J., in the opinion delivered by him in the case of *O'Connell* v. *The Queen*, 11 Cl. & F., at p. 250, which certainly are an authority to the contrary . . . Tindal, C.J., there assumes that the trial means in this statute the taking of the verdict and nothing more. He gives no reasons for this assumption; it had not been argued at the bar of the House and it evidently was not much considered. If this was part of the *ratio decidendi* of the Lords in that case, we should be obliged to submit to it; but the opinions of the judges rendered to the House are but advice to assist the House, as was strongly shewn in that very case where the Lords, by a majority of one, gave judgment contrary to the opinions of a great majority of the judges." (7)

On a writ of error, taken on other grounds, this judgment was subsequently affirmed by the Court of Appeal, (8) whose decision was in turn affirmed by the House of Lords. (9)

Powers of trial judge as to a reserved case.—The trial judge may, if he sees fit, grant a reserved case during or after the trial, either upon application therefor or of his own motion. (10) The reserved case may be granted at any time, however remote from the date of the trial or judgment, if it is still possible that some beneficial result may accrue to the person convicted by a decision in his favour, (1) and even after sentence has been imposed. (2) But the Court of Appeal can grant leave to appeal only in the case of an application made during the trial being refused. (3) The words "party applying," in section 1015, refer to the application authorized by section 1014 (3) to be made during the trial, either orally or in writing, by the prosecutor or the accused. (4)

(7) *Reg.* v. *Castro* (1874), 9 Q. B. at p. 358.
(8) *Castro* v. *The Queen* (1880), 5 Q. B. D. 490.
(9) *Castro* v. *The Queen* (1881), L. R. 6 A. C. 229.
(10) *The King* v. *Toto* (1904), 8 C. C. C. C. 410.
(1) *Reg.* v. *Paquin* (1898), 2 C. C. C. 134.
(2) *The King* v. *McGuire* (1904), 9 C. C. C. C. 554.
(3) *The King* v. *Toto*, *supra*.
(4) *Ibid.*

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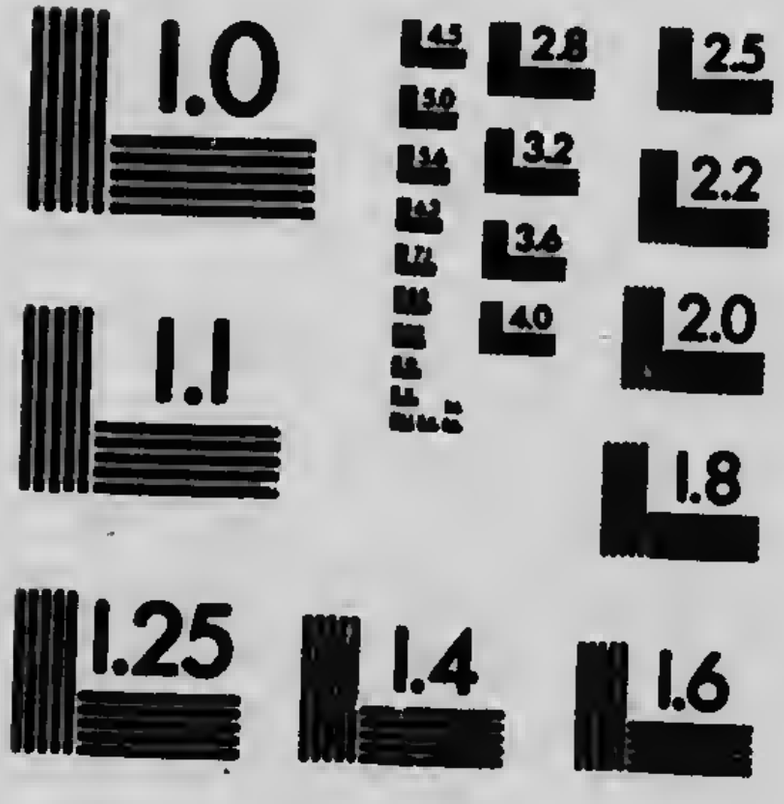

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Cases proper to be reserved or stated.—The decision of the judge on the trial of a charge of defamatory libel, with respect to the selection of the petit jury, and particularly as to the right of the prosecution to require jurors to stand aside until the panel has been gone through, is a question of law arising on the trial, and may be reserved for the Court of Appeal.

Reg. v. Patteson (1875).—The managing director of the *Mail* Newspaper Publishing Co., of Toronto, was indicted for the publication in that newspaper of a defamatory libel against one W., an immigration agent of the Ontario Government. While the jury were being selected, the Crown counsel, representing the Attorney-General, asked several jurors to stand aside. This was objected to by counsel for the defence, but the objection was overruled by the court. After the conviction and sentence of the defendant the trial judge (Burton, J.A.), entertaining doubts as to whether he had properly permitted the jurors to stand aside, reserved a case for the opinion of the court on this and other points. One of the questions was, whether this decision of the trial judge was a "question of law arising on the trial" within the meaning of the statute. (5) The court held that it was.

Opinion of Morrison, J.—Morrison, J., reviewed the sections of the statute bearing on the point, and referred to 32-33 Vict. c. 29, s. 80, which abolished appeals and new trials in criminal cases and allowed a writ of error on certain conditions. He pointed out that the consolidated statute (*supra*) was similar to the provisions in the Imperial statute for reserving cases for the Court of Criminal Appeal, and, after referring to several English decisions, (6) said that he had no doubt, upon the authority of these cases, as well as the reason of the thing, that the question here was one of law, and that it arose during the trial, and so could be reserved by the learned judge.

Opinion of Adam Wilson, J.—Wilson, J., said that the question, whether the Crown was prosecuting on behalf of the public or not, appeared to be more a question of fact than of law. If, however, the statute was to be construed as meaning that all prosecutions were of a private nature, unless those which were plainly blasphemous or of a seditious nature, or which were of that special character affecting the policy of the state in its dealings with foreign potentates or countries, or which affected the public peace or

(5) C. S. U. C. c. 112.
(6) *Reg.* v. *Manning* (1849), 4 Cox C. C. 31; *Reg.* v. *Martin* (1849), 2 C. & K. 950, at p. 956; and *Reg.* v. *Faderman, et al.* (1850), 1 Den. C. C. 565; 4 Cox C. C. 359; 19 L. J. M. C. 147.

welfare—then it must be a matter of law which the learned judge had it in his power to reserve. Richards, C.J., concurred in this opinion. (7)

Reg. v. Smith (1876).—In *Reg.* v. *Smith*, (8) Harrison, C. J., was of opinion that, although the statute then, as now, provided that questions of law might be reserved, the empannelling of the jury was one of mere procedure and not of law. In that case the question arising out of the selection of the jury was not reserved until after the prisoner had been sentenced, and after the judge, who had presided at the trial, was holding the assizes in another county. Wilson, J., in the same case, said that the question, although not reserved at the trial, was, as appeared from the case, properly reserved in the manner and at the time it was done.

Conviction where juror sworn by mistake.—Since these opinions were given, the powers of the court have been greatly enlarged by the Code as to cases reserved, both with respect to the questions of law that may arise and the manner and time of their arising. (9) The provisions in the Code would, *e.g.*, clearly cover a case like the following: On a trial for murder the name of A., a juror on the panel, was called; B., another juror on the same panel, appeared by mistake, answered to the name of A., and was sworn as a juror. The prisoner was convicted and sentenced to death. The next day this irregularity in the jury was discovered, when the judge, being informed of it, reserved the question as to the effect of the mistake on the trial. Although the judges were divided on the question whether the Court of Crown Cases Reserved had jurisdiction over the case, it was held by eight against six that the conviction must stand. (10)

Other cases reserved.—A case may also be reserved on a question raised by a motion in arrest of judgment; (2) as to the

(7) *Reg.* v. *Patteson* (1875), 36 U. C. Q. B. 129.
(8) (1876), 38 U. C. Q. B. 218.
(9) SS. 1014 *et seq.*
(10) *Reg.* v. *Mellor* (1858), 1 Dears. & B. 468. See, also, *Reg.* v. *Morin* (1890), 18 S. C. R. 407, where the Crown was permitted against the objection of the accused, to stand jurors aside a second time, the trial judge not being asked to reserve, and neither reserving nor refusing to reserve, the objection. A writ of error having been issued after conviction, the court was divided as to whether a writ of error should have been issued, but a majority held, that the Crown could not, without shewing cause for challenge, direct a juror to stand aside a second time, overruling the *Queen* v. *Lacombe* (1869), 13 L. C. Jur. 259.
(2) *Reg* v. *Corcoran* (1876), 26 U. C. C. P. 134; *Reg.* v. *Carr* (1872), 26 L. C. J. 61; *Reg.* v. *Deery* (1874), 26 L. C. J. 129; *Reg.* v. *Martin* (1849), 1 Den. C. C. 398; 3 Cox C. C. 447; *Reg.* v. *Kennedy* (1857), 3 N. S. R. (Thomson), 203.

proper constitution of the petit jury; (3) as to a challenge to the array, unless judgment is given on a demurrer by the Crown to the challenge; (4) but not on the question of sufficient evidence to support the charge; (5) nor on a recommendation of the defendant to mercy. (6) Whether the judge presiding at the trial had jurisdiction to summarily try the defendants is a question of law under section 1014, and may be the subject of a reserved case. (7) A case may also be reserved, at the instance of the Crown, as to whether there was any evidence of insanity to support the jury's verdict of not guilty upon that ground; (8) so also, where there is an absolute failure of evidence to sustain the verdict. (9)

Cases not proper to be reserved or stated.—A reserved case should not be granted by the trial judge unless he has some doubt in the matter upon which it is suggested that a question should be reserved; (10) nor to determine a question depending upon the facts or the weight of evidence. (1) If he has no doubt that there was evidence of the offence to go to the jury, he should not reserve a case upon that point. (2) The question as to the order of addresses to the jury by counsel at the close of the evidence, is not a question of law proper to be reserved for the opinion of the Court of Appeal. (3) Where there has been an acquittal, the preferable practice is for the trial judge to refuse to reserve a case upon the application of the prosecutor complaining of an erroneous direction to the jury, and for the prosecutor to apply to the Court of Appeal, under section 1015, for leave to appeal. (4)

Application for and granting leave to appeal.—If the trial judge refuses to reserve a case for the Court of Appeal, the party applying may, as we have seen, move that court for leave to appeal, (5) on such evidence, if any, as it thinks fit to receive. (6) Ample notice of the application should be given to the Attorney-General, and the notice of motion should set forth the grounds

(3) *Reg.* v. *Kerr, et al.* (1876), 26 U. C. C. P. 214.
(4) *Reg.* v. *Plante* (1891), 7 M. L. R. 537.
(5) *Reg.* v. *Lloyd, et al.* (1890), 19 O. R. 352.
(6) *Reg.* v. *Trebilcock* (1858), 1 Dears. & B. 453; 7 Cox C. C. 408; 22 J. P. 12; 27 L. J. M. C. 103.
(7) *Reg.* v. *Paquin* (1898), 2 C. C. C. 134.
(8) *The King* v. *Phinney* (1903), (No. 1), 6 C. C. C. 469.
(9) *R.* v. *Harris* (1898), 2 C. C. C. 75.
(10) *R.* v. *Létang* (1899), 2 C. C. C. 505.
(1) *Reg.* v. *McIntyre* (1898), 3 C. C. C. 413.
(2) *The King* v. *Brindamour* (1906), 11 C. C. C. 315.
(3) *Reg.* v. *Connolly* (1894), 1 C. C. C. 468.
(4) *Per* Osler, J.A., in the *King* v. *Karn* (1903), 6 C. C. C. 479.
(5) S. 1015 (1).
(6) *Ibid.* (2).

relied upon. (7) Where the accused has been acquitted at the trial, and a case has been reserved on the application of the Crown, notice of the application by the Crown for a new trial and of the hearing of the case reserved, should be served upon the accused personally. The authority of the solicitors acting for the accused in the trial proceedings is *prima facie* to be presumed to have terminated upon the latter's acquittal; and proof of service upon the solicitor is insufficient in the absence of evidence rebutting such presumption. (8)

If leave to appeal be granted, a case shall be stated for the opinion of the court, as if the question had been reserved. (9) But the question to be reserved must be a "question of law." (10) "There must," it is said, "have been a trial, an adverse ruling or judgment on a question of law, and a verdict of guilty or a conviction, to give jurisdiction to the Court of Appeal, and in point of fact, a verdict of guilty or a conviction is, under the provisions of section 742 [1013] of the Code, a condition precedent to the right of appeal, by an accused person from a ruling or judgment on a question of law. The dictum of Lord Campbell, in the case of *Reg.* v. *Faderman,* 1 Den. C. C. 573, gives the reason why there must be a ruling or judgment on the question of law raised: 'If judgment,' he said, 'has not been given, we have nothing to consider, for we only sit here to consider something which has been decided, not to give advice prior to a decision by some other tribunal.' Under the provisions of the Code, a reserved case cannot be had where there has been neither trial nor verdict of guilty, nor conviction; and when a question of law has been reserved during a trial, and there is an acquittal, the reservation is no longer of any utility and lapses." (1)

In some cases leave must be obtained from the trial court in order to apply to the Court of Appeal. One of these is under section 1021 (1), where there is an objection to a verdict on the ground that it is against the weight of evidence for which there should be a new trial. This objection as a ground for moving can only be raised by the leave of the trial court. (2) So also, in a case of conviction, a motion for a new trial on the *facts* can only be made before the Court of Appeal, upon leave therefor

(7) *The King* v. *Lai Ping* (1904), 8 C. C. C. 467.
(8) *Reg.* v. *Williams* (1897), 3 C. C. C. 9.
(9) S. 1016 (1).
(10) S. 1014 (2).
(1) *The King* v. *Trepanier* (1901), 4 C. C. C. 259, at pp. 261-62.
(2) *The King* v. *Carlin* (1903), (No. 2), 6 C. C. C. 507. See, also, *R.* v. *McIntyre, supra,* and *R.* v. *Harris* (1898), 2 C. C. C. 75.

granted by the court before which the trial has taken place. (3) This leave, it should be observed, could not be granted in a case of *acquittal*, on the ground of the weight of evidence, because there is no provision in the Code authorizing the granting of a new trial to the Crown on the ground that the verdict of acquittal is against the weight of evidence. (4) In any case in which the judge has reserved a case for the Court of Appeal as to the sufficiency of the evidence to sustain a conviction, he should either state the effect of the evidence given, or extract the material part of it, and not send up the whole body of the evidence with a question as to its sufficiency. (5)

Although the trial judge may, if he sees fit, grant a reserved case during or after the trial, either upon application therefor, or of his own motion, the Court of Appeal can grant leave to appeal only in the case of an application made during the trial being refused. (6) The application for a reserved case must be made before verdict in order to preserve the right of appeal from its refusal, if the defect is one which might have been cured by an amendment at the trial. (7) And where the trial judge has refused to reserve a case upon a question of law, and the Court of Appeal is then applied to for leave to appeal under section 1016, leave cannot be granted in respect of another question of law in respect of which a reserved case had not been asked of the trial judge. (8) An objection to a trial and verdict on the ground that one of the jurors was not indifferent, but had stated before the trial that if he were selected he would send the accused to gaol, raises a question of fact and not a question of law, and the Court of Appeal has no jurisdiction to grant leave to appeal in respect thereof. (9)

Misdirection.—Nor should leave to appeal be granted on the ground that where the trial judge, after five jurors had been sworn, said to counsel for the accused in the hearing of the jurors composing the panel: "If you continue to challenge every man who reads the newspapers, we will have the most ignorant jurors selected for the trial of this cause;" this is not misdirection or undue influence of the jury against the accused or his counsel. (10)

(3) *The King* v. *Fouquet* (1905), 10 C. C. C. 255.
(4) *The King* v. *Phinney* (1903), (No. 2), 7 C. C. C. 280.
(5) *The King* v. *Cohon* (1903), 6 C. C. C. 386.
(6) *The King* v. *Toto* (1904), 8 C. C. C. 410.
(7) *Ead* v. *The King* (1908), 13 C. C. C. 348. See comments on this case, *ante*, p. 346.
(8) *The King* v. *Carlin*, *supra*.
(9) *Ibid.*
(10) *Ibid.*

Neither is it misdirection, entitling the accused to leave to appeal, where the trial judge in charging the jury said: "About forty or fifty witnesses have been examined for the purpose of establishing his (the accused's) good character; it is very strange that it should take forty or fifty witnesses to establish it"—if the statement as to the number of witnesses as to character is in fact correct. (1) But there was misdirection in a civil action for libel where privilege was pleaded, and the judge told the jury that the question of privilege depended upon their finding as to whether or not the defendant believed his statement to be true. No distinction can be drawn between one class of privileged communications and another; they all imply that the occasion rebuts the inference that the defendant is actuated by *mala fides*, and casts the burden of proving malice on the plaintiff. (2) It has also been frequently held, that a new trial will not be granted on the ground of misdirection unless some substantial wrong or miscarriage of justice has been occasioned thereby; (3) but in that case the House of Lords reversed the decision of the Court of Appeal, because the misdirection amounted to a withdrawal from the jury of a question which ought to have been submitted to them and might have influenced their verdict. (4) Where, however, evidence had been wrongly admitted at the trial, but no substantial wrong or injustice had been done, the verdict was allowed to stand. (5) As to a new trial on the ground of misdirection, where the judge at the trial did not properly direct the jury as to the issue of fair comment, see *Hunt* v. *Star Newspaper Co.* (6) See, also, *Dakhyl* v. *Labouchere* (7) and *Anderson* v. *Calvert.* (8) In the case last cited the omission of the judge at the trial of an action for libel to direct the jury sufficiently, that, though they might give punitive damages for malice, they must not give damages for another cause of action, was held not to be a ground for granting a new trial by reason of the rule as to substantial wrong.

There was also misdirection in a civil case, where B., in an article in his newspaper, accused H. (who had been a candidate in a municipal election), of having been drunk during the election,

(1) *The King* v. *Carlin, supra.* See, also, *Reg.* v. *Wilkinson* (1878), 42 U. C. Q. B. 492.
(2) *Jenoure* v. *Delmege* (1890), A. C. 73.
(3) *Ford* v. *Bray* (1894), 11 T. L. R. 32.
(4) *Bray* v. *Ford* (1896), A. C. 44.
(5) *Tait* v. *Beggs* (1905), 2 Ir. R. 525; *The King* v. *Callaghan* (1903), 8 C. C. C. 143. See, also, *Floyd* v. *Gibson* (1909), 100 L. T. 761 (C.A.), and *O'Reilly* v. *McCall* (1910), 2 Ir. R. 42 (H. L.).
(6) (1908), 2 K. B. 309 (C.A.).
(7) (1908), 23 T. L. R. 364.
(8) (1908), 24 T. L. R. 399, at p. 400 (C.A.).

and the judge, in charging the jury, said: "You should consider the case as if the charge of drunkenness had been made against yourselves, your brother, or your friend." It was held that this was calculated to mislead the jury, and was a reason for granting a new trial. "It was," said Davies, J., "an entirely wrong and false doctrine to lay down as to the proper functions of a jury. It was calculated to mislead their minds as to the manner and extent to which they should assess the damages or make their findings. And Anglin, J., said, it was entirely out of harmony with the ideas which have always obtained as to the manner in which a jury should deal with cases presented for their consideration, adding that the charge as a whole did not qualify or modify the effect of the objectionable statement. (9) It is for the party shewing cause against a new trial on the ground of misdirection to shew that the misdirection did not influence the result, and he must do so by authentic evidence. (10) When there is no conflict in the evidence, and it tends indubitably in a direction favourable to the defendant, or does not establish his guilt, a verdict convicting the defendant would not be supported by, nor be based upon, proper evidence, and would manifestly be against the weight of evidence; and in cases where there is an absolute failure of evidence to sustain the verdict, the court can give leave to apply to the Court of Appeal for a new trial. (1) But leave to appeal will not be granted by an appellate court, under section 1015, on the ground of the admission of irrelevant evidence, if, in the opinion of the court, the reception of such evidence did not occasion any substantial wrong or miscarriage on the trial. (2) In the *King* v. *Karn*, (3) Osler, J.A., was of opinion, that where there has been an acquittal, the preferable practice is for the trial judge to refuse a case upon the application of the prosecution complaining of an erroneous direction, and for the prosecutor to apply to the Court of Appeal for leave to appeal.

Evidence for the Court of Appeal.—The evidence for the Court of Appeal, either on an appeal or on an application for a new trial, shall consist of the whole or the material part of the evidence or judge's notes taken at the trial. (4) If the notes are defective the court may refer to other evidence at the trial, or

(9) *Barthe* v. *Huard* (1910), 42 S. C. R., at pp. 409, 415.
(10) *Anthony* v. *Halstead* (1877), 37 L. T. 433.
(1) *R.* v. *Harris* (1898), 2 C. C. C. 75. See, also, *R.* v. *McIntyre* and *R.* v. *Carlin*, *supra*.
(2) *The King* v. *Callaghan* (1903), 8 C. C. C. 143.
(3) (1908), 6 C. C. C. 479.
(4) S. 1017 (1).

may send back the whole case to the court by which it was stated to be amended or re-stated. (5)

Powers of the Court of Appeal.—The Court of Appeal has large powers with respect to any criminal appeal which comes before it for adjudication. It may (*a*) confirm the ruling appealed from; (*b*) or, if of opinion that the ruling was erroneous, and that there has been a mistrial in consequence, direct a new trial; (*c*) or, if it considers the sentence or the arrest of judgment erroneous, pass such sentence as ought to have been passed, or set aside any sentence passed by the court below, and remit the case to the court below with a direction to pass the proper sentence; (*d*) or, if of opinion in a case in which the accused has been convicted, that the ruling was erroneous, and that the accused ought to have been acquitted, direct that the accused shall be discharged, which order shall have all the effects of an acquittal, or direct a new trial; or make such other order as justice requires. (6) But no conviction shall be set aside, nor any new trial granted, because something not according to law was done at the trial or some misdirection given, unless, in the opinion of the court, some substantial wrong or miscarriage was thereby occasioned on the trial: provided that if the court is of opinion that any challenge for the defence was improperly disallowed, a new trial shall be granted. (7) If it appears to the court that such wrong or miscarriage affected some count only of the indictment, the court may give separate directions as to each count, and may pass sentence on any count unaffected by such wrong or miscarriage which stands good, or may remit the case to the court below with directions to pass such sentence as justice may require. (8) The order or directions of the Court of Appeal shall be certified under the hand of the presiding Chief Justice, or senior *puisne* judge, to the proper officer of the court below, before which the case was tried, and such order or direction shall be carried into effect. (9)

New trial.—Assuming that a case for libel, or for any other indictable offence, is before the Court of Appeal for hearing, the court has the power of granting a new trial. (10) A new trial may be directed, (*a*) if the court is of opinion that the ruling appealed from was erroneous, resulting in a mis-trial; (1) (*b*) where the accused has been convicted, that the ruling appealed from

(5) S. 1017 (2), (3).
(6) S. 1018.
(7) S. 1019.
(8) S. 1020 (1).
(9) *Ibid.* (2).
(10) SS. 1018, 1019.
(1) S. 1018 (*b*).

was erroneous, and that the accused ought to have been acquitted; (2) (*c*) that some substantial wrong or miscarriage was occasioned on the trial by the improper admission or rejection of evidence, by something not according to law having been done at the trial, or by some misdirection given; (3) (*d*) that some challenge for the defence was improperly disallowed. (4)

Within what time to be moved for.—In *Reg.* v. *Wilkinson*, (5) Harrison, C.J., referring to the question within what time a new trial must be moved for, said that no absolute rule had, according to the most recent judicial utterance on the subject, been laid down as to the time within which such an application must be made in a case like the present. (6) The courts, under particular circumstances, have allowed the application to be made after the first four days of term, and have, it is said, awarded new trials without any motion for the purpose, when the verdict appeared to be against justice. (7) In *Reg.* v. *Newman* (8) Lord Campbell said: It must be understood that, for the future, when a new trial in a criminal case is moved for, an intimation must be given on one of the first four days of term that counsel is prepared to make the motion.

In *Reg.* v. *Wilkinson* (*supra*), counsel moved for a new trial within the first four days of term on the grounds of rejection of evidence and of misdirection, and, after the expiration of the first four days of term, and, upon the return of the rule, asked for a new trial for another misdirection. The motion was heard as a matter of favour and not as of right.

When granted or not granted in cases of libel.—In libel the defendant may, after conviction, apply to the Court of Appeal for a new trial on the ground that the verdict was against the weight of evidence. Leave may be given for this purpose, as already mentioned, by the court before which the trial takes place, either during its sittings or afterwards, and the Court of Appeal may, upon hearing the motion, direct a new trial if it thinks fit. (9) In directing a new trial the court has discretion, in all cases, to order the defendant to be admitted to bail. (10) A new

(2) S. 1018 (*d*).
(3) S. 1019.
(4) *Ibid.*
(5) (1877), 42 U. C. Q. B. 492.
(6) See *per* Lord Campbell in *Reg.* v. *Newman* (1853), 1 E. & B. 268, 269.
(7) See *Rex* v. *Morris* (1761), 2 Burr. 1189; *Rex* v. *Gough* (1781), 2 Doug. 791; *Rex* v. *Holt* (1793), 5 T. R. 436.
(8) (1853), 1 E. & B. 268, 270.
(9) S. 1021 (1), (2).
(10) S. 1023 (3). See this section as to the intermediate effects of an appeal on the sentence of the Court.

trial may also be granted for misdirection; (1) or on the ground that the verdict was contrary to evidence; or for the wrongful reception or rejection of evidence; or on the ground of surprise; (2) or for the misbehaviour of the jury. (3) Where upon the trial of a criminal information for libel, evidence was rejected as inadmissible for the purpose for which it was tendered, but was admitted for another purpose not alluded to at the trial, the court refused a new trial on the ground of improper rejection of evidence. (4) And where a plea of justification under the statute contained several charges against the private prosecutor, and the jury found one of them proved, but the evidence unsatisfactory as to the others, the court refused to set aside the verdict and grant a new trial, and would have done so even if of opinion that the evidence greatly preponderated against the prosecutor. (5)

Upon motion for new trial for rejected evidence, it must appear that the evidence was pressed.—Where a new trial is moved for on the ground of the rejection or exclusion of evidence, it must appear, from the stenographic notes or otherwise, that the party moving on that ground pressed for the reception of the evidence, and made it clear to the court that he did so. In *Reg.* v. *Wilkinson* (*supra*), the defendant, who was convicted on a criminal information for libel, moved for a new trial for the alleged rejection of evidence of a refusal by the court to grant an information for a previous libel published by him against the same relator, and for rejection of a certain letter set out in the defendant's affidavit in answer to the motion for such information. It appearing, however, that the reception of this evidence was not pressed at the trial, the motion for a new trial on that ground was refused.

Opinion of Harrison, C.J.—"It is singular," said Harrison, C.J., "that defendant, if believing that the testimony rejected supported the defence, did not make some effort to adduce it as a part of the defence, instead of attempting to have it received after the close of the defence. It looks as if defendant . . . was not in earnest in tendering the evidence in aid of the defence, and this, I am informed by the learned judge, was his impression, for he

(1) *Reg.* v. *Holbrook, et al.* (1878), 3 Q. B. D. 60; 47 L. J. 35; 4 Q. B. D. 42; 48 L. J. 113; *Barthe* v. *Huard* (1910), 42 S. C. R. 406, and other cases *ante*, under "Misdirection."

(2) *Reg.* v. *Whitehouse et al.* (1852), 1 Dears. C. C. 41. See, also, *Reg.* v. *Richardson et al.* (1840), 8 Dow. 511.

(3) *Reg.* v. *Fowler* (1821), 4 B. & Ald. 273; *Campbell* v. *Hackney Furnishing Co.* (1906), 22 T. L. R. 318. See Hawkins, P. C., Bk. 2, c. 47, s. 12.

(4) *Rex* v. *Grant, et al* (1834), 3 Nev. & Man. 106; 5 B. & Adol. 1081.

(5) *Reg.* v. *Newman* (1853), 1 E. & B., at p. 577.

says that 'he did not understand that the reception of the evidence was pressed.'" This of itself, according to the cases, would be sufficient to dispose of the application for a new trial on the alleged ground of improper exclusion of evidence, even if the evidence were beyond question admissible. (6) It is, as said by Pollock, C.B., (7) not uncommon for a party at a trial to tender evidence with no idea of pressing its reception, and merely to produce a certain effect. The same learned judge, in the same case, said, (p. 297): "If a party intends to take advantage of the rejection of evidence, he should press its reception, and make the judge distinctly understand that he does so. It would be unfair to allow a party to obtain all the advantage of the rejection of a piece of evidence, without running any of the risk of its reception."

Opinion of Adam Wilson, J.—And on the same point in the same case (*Reg.* v. *Wilkinson, supra*), Wilson, J., said: "The defendant must in such case first prove the fact of such application to the court [*i.e.*, for the criminal information which was refused] and the judgment then pronounced, in a formal manner. If he should have done so, and I think he should, and did not do it (and it does not appear he gave any such proof), then the evidence in question was rightly rejected. . . . In my opinion the defendant would be entitled to a new trial for the rejection of the evidence before mentioned, if he had proved the rule of the court and other proceedings in the cause formally to permit of their use as in the case of a judgment. But even then he would have to shew that he really pressed the evidence which he tendered, and I am not sure he did so. He should not submit to the judge's opinion. He should, after the giving of that opinion, if he did not accept of it, move against it and have his objection noted. I find no such entry made, and the learned judge says the evidence was really not pressed." (8)

Other cases as to new trial.—A new trial should be granted, if the judge's charge was so ambiguous that the jury may have been misled into thinking that a material issue of fact was withdrawn from their consideration as being a matter of law. (9) Most of the cases, however, turn on the broad question, whether there was a "substantial wrong or miscarriage" in the proceed-

(6) See *Whitehouse* v. *Hemmant* (1858), 27 L. J. Ex. 295. See further, *Ferrand* v. *Mulligan* (1845), 15 L. J. Q. B. 103.
(7) In *Whitehouse et al.* v. *Hemmant, supra*, at pp. 295, 297.
(8) *Reg.* v. *Wilkinson* (1878), 42 U. C. Q. B. 492, at pp. 512-13 and 519-20. See, also, *Barthe* v. *Huard* (1910), 42 S. C. R. at pp. 410, 414, *per* Davies and Anglin, JJ., referred to in chapter on "The Trial and the Verdict."
(9) *R.* v. *Collins* (1896), 1 C. C. C. 48.

ings in the court below. The improper admission of evidence shall not in itself constitute a sufficient reason for granting a new trial, the improper admission not necessarily being a "substantial wrong or miscarriage." (10) But where a deposition of a deceased witness, taken on an inquiry before a magistrate, has been improperly admitted in evidence at the trial, and is of such a nature that it must have influenced the jury in their verdict, its improper admission is a "substantial wrong" entitling the accused to a new trial. (1) And if, on a trial for murder, a most important and substantial ground of defence clearly disclosed by the evidence is not submitted to the jury by the judge's charge, the conviction cannot stand, although the prisoner's counsel did not ask at the trial for any other or fuller direction. (2) The improper reception of evidence before a county judge trying a case without a jury, under the speedy trials clauses of the Code, (3) will not entitle the accused to a new trial upon a case reserved, if the judge certifies therein that, apart from the evidence objected to, there was sufficient evidence to warrant a conviction. (4) But where a conviction has been made without the legal proof required by law of an essential part of the crime, this is a "substantial wrong or miscarriage at the trial," and the conviction must be set aside. (5) But a conviction should not be set aside where, although the reception of opinion testimony as to the illegality of the transactions in question was improper, a case against the accused was sufficiently made out without that testimony, and the trial was without a jury. (6) On the other hand, the conviction should be quashed and a new trial ordered, where, upon a case reserved, the appellate court finds that important depositions were improperly received in evidence, and is unable to say that no substantial wrong or miscarriage was occasioned by the irregularity. (7) In deciding whether there should be a new trial on the ground that the verdict against the accused was against the weight of evidence, the question is, whether or not the verdict is one which the jury, as reasonable men, ought not to have found. A new trial will not be granted merely because the trial judge is dissatisfied with the verdict and favours an acquittal. (8) The same rule

(10) *R.* v. *Woods* (1897), 2 C. C. C. C. 159, distinguishing *Makin* v. *New South Wales* (1894), A. C. 57.
(1) *R.* v. *Hamilton* (1898), 2 C. C. C. C. 391.
(2) *R.* v. *Theriault* (1894), 2 C. C. C. C. 444.
(3) Part 18, SS. 822-842.
(4) *The King* v. *Tutty* (1905), 9 C. C. C. C. 544.
(5) *The King* v. *Drummond* (1905), 10 C. C. C. C. 340.
(6) *The King* v. *Harkness* (1905), (No. 2), 10 C. C. C. C. 199.
(7) *The King* v. *Brooks* (1906), 11 C. C. C. C. 188. See, also, some of the cases *ante* under "Misdirection."
(8) *R.* v. *Brewster* (1896), 4 C. C. C. C. 34.

prevails in civil cases. And where on a case reserved, or a case stated by direction of a Court of Appeal, the sole question is, whether there was evidence of guilt, and no leave has been obtained to apply for a new trial on the ground that the verdict is against the weight of evidence, the finding of a jury, or of the trial judge trying the case without a jury, cannot be disturbed as to conclusions or inferences justly capable of being drawn from the evidence, or as to the credibility of the witnesses. (9) Evidence as to character may also, under certain circumstances, be ground for a new trial. The prosecution is not entitled to give evidence of the bad character of the accused unless or until he adduces evidence to prove his good character, either by examining his own witnesses on that point, or by interrogating the Crown witnesses thereon as a part of their cross-examination. And where such evidence was wrongly admitted against the accused, although no objection was made to its admission by his counsel, the court directed a new trial. (10)

New trial at instance of the Crown.—Most of the questions with respect to a new trial have arisen, as might be expected, in cases of conviction; it is only under exceptional circumstances that the Crown asks for a reserved case, or seeks leave to appeal when a case is refused, especially after an acquittal. In any event, the court is less inclined to order a new trial at the instance of the Crown than of the accused, even where it is of opinion that the Crown is right in the objection reserved. Where, for example, a verdict of not guilty was returned by the judge's direction after the evidence was heard, and a reserved case was taken, at the instance of the Crown, upon the ground that the direction was erroneous, and that it was for the jury, and not for the judge, to say whether a certain printed advertisement disclosed an unlawful intent, the court declined to order a new trial although it upheld the objection that such direction was erroneous. The opinion was expressed, that, notwithstanding the power of the court to order a new trial upon a case reserved at the instance of the Crown, the accused should not ordinarily be put in jeopardy a second time for the same offence merely because his acquittal was due to an erroneous direction not resulting in a mis-trial. (1)

Refused where conflicting opinions as to evidence of justification.—In a criminal prosecution the defendant was convicted on

(9) *The King* v. *Clark* (1901), 5 C. C. C. 235.
(10) *The King* v. *Long* (1902), 5 C. C. C. 493.
(1) *The King* v. *Karn* (1903), 6 C. C. C. 479. See opinion of Osler, J.A., as to the preferable practice in such a case, and *R.* v. *Williams*, *supra*, as to notice of the application.

an information for publishing an article accusing the relator of having bribed three members of the House of Commons during the political crisis of 1873. The defendant justified. The trial judge (Gwynne, J.) told the jury that the evidence fell far short of proving the justification; that assuming all that one C., a witness for the defence, deposed to, still the evidence failed to establish the whole matter charged, and that in his opinion, whatever verdict the jury might render upon the plea of not guilty, they ought to find the plea of justification against the defendant. This part of the charge was objected to as misdirection, and was made one of the grounds of a motion for a new trial. The court (Harrison, C.J. and Wilson, J.) being divided, Harrison, C.J., being of opinion that the evidence was insufficient to support the plea of justification, and Wilson, J., *contra,* the rule was discharged.(2) It was held in the same case, that where the alleged libel imputes a crime, it is not misdirection to tell the jury that malice is implied, and that the defendant must shew circumstances to remove that inference, otherwise the jury may find against him.

Refused on ground of surprise and discovery of fresh evidence. —In the following case a new trial was refused the defendant on the ground of surprise and the discovery of fresh evidence. The defendant was indicted for publishing a defamatory libel imputing to one G. N. the crime of perjury. The defendant pleaded not guilty, but subsequently withdrew this plea and admitted publication with leave to plead special pleas of justification under the statute. At the trial the jury found for the Crown on the issues on the pleas of justification, it appearing that G. N. had been presented by the grand jury on another charge, but not for the matter complained of by the defendant and set forth in his pleas of justification. In Michaelmas term following, a rule *nisi* was issued to set aside the verdict and for a new trial, principally on the ground of surprise and the discovery of new evidence. Defendant swore in his affidavit, filed on the motion, that he believed the verdict was based on the prosecutor's testimony that he was not the person named in the presentment for perjury given in evidence at the trial, but that the person named in such presentment was a son of his; that this statement took the defendant by surprise, and he was unprepared at the moment to shew that the prosecutor was the person named in the presentment; that since the trial the defendant had preferred a complaint against the prosecutor, before certain justices, for perjury in that particular; and that the prosecutor was committed and remained a prisoner awaiting his

(2) *Reg.* v. *Wilkinson* (1878), 42 U. C. Q. B. 492.

trial on that charge. There was also an affidavit made by the foreman of the grand jury at the fall assizes, 1844, that a presentment was then made against the prosecutor for perjury; and there were also affidavits from four of the jurors, who had tried the present defendant, stating that they would probably not have convicted the defendant but for the doubt whether the prosecutor was the person named in the presentment for perjury which was produced at the trial. The rule *nisi* was discharged.

Referring to the jurors' affidavits, Draper, C.J., said: "I must observe that the affidavits made by the jurors are not admissible. The rule on this point is so well established, and the exception as to their stating on affidavit only matters which have transpired in open court, so well understood, that I am surprised such affidavits should have been offered. They escaped the attention of the court when the rule *nisi* was granted, or they would have been rejected at once." (3)

On an application for a new trial, an affidavit by a juryman that he did not assent to the verdict is inadmissible. (4)

Where publication not objected to by private prosecutor.—A new trial was also refused defendants in a case in which they procured the publication of the libel in a newspaper without objection on the part of the prosecutor, who knew of the intended publication and published a reply through the same medium. The libel charged consisted of certain resolutions passed at a public meeting reflecting severely upon the private prosecutor B. It appeared that the editor of the paper (who was not indicted) had received the resolutions from the defendants, and before inserting them shewed them to the prosecutor B., who, although indignant, did not intimate any apprehension of injury to his character, or any desire to suppress the publication, but wrote a reply to the resolutions, which was also inserted, and in which he vindicated his conduct from the aspersions contained in the resolutions. Upon this state of facts the defendants, after conviction and upon motion for a new trial, insisted that they ought to have been acquitted of publishing maliciously, on the ground that the prosecutor himself authorized the publication, and inserted an answer to it in the same newspaper. The court held that this was not such a defence as to render the conviction illegal, and a new trial was refused. (5)

New trial where verdict for defendant.—In a Nova Scotia action for libel, in which there was a verdict for defendant, a

(3) *Reg.* v. *Gowan* (1858), 7 U. C. C. P. 136.
(4) *Nesbitt* v. *Parrett* (1902), 18 T. L. R. 510 (C.A.).
(5) *Reg.* v. *McElderry et al.* (1860), 19 U. C. Q. B. 168.

judgment of the Supreme Court of the province directing a new trial was upheld by a majority of the Supreme Court of Canada. Duff, J., who dissented, said: "The function of a Court of Appeal in passing on an application to set aside the verdict of a jury in an action for libel, where the only issue is whether the publication complained of is libellous and the defendant has succeeded, has been thus described by the Judicial Committee in *Australian Newspaper Co.* v. *Bennett* (6): "Whether the verdict found by the jury, for whose consideration it essentially was, was such that no jury could have found as reasonable men?" Theoretically, therefore, the function of the Court of Appeal in such cases does not materially differ from its function in any application to set aside a verdict of a jury as against the weight of evidence, as that expression has been explained and applied in mode cases. In determining the question, however, the court has always in actions for libel regarded the opinion of a jury, that the publication complained of is not libellous, as of the greatest weight. The point in all cases is: Do the words convey, that is, would sensible persons reading them in the locality in which the publication was circulated regard them as conveying, an imputation damaging to the character of the plaintiff? If a jury think they do not convey such an imputation, that of course is not necessarily conclusive. The imputation may be so plain that no reasonable persons could take the view of the jury, and in that case the court may act" (pp. 469-70). Davies, J., who also dissented, said: "The question of libel or no libel is one pre-eminently for the jury, and no case appears to be reported in England, for the last fifty years and more, in which a verdict for the defendant in a libel suit has been set aside upon the ground that the jury should have found the publication to be a libel. The verdict must in cases to justify its being set aside be manifestly wrong, and the alleged libel one admitting of no other construction than a defamatory one" (p. 463)

Anglin, J., with whom Girouard and Idington, JJ., agreed in short judgments, said: "These authorities (7) have never been overruled. No case has been cited, and, so far as I can discover, there is no reported case in which the court, although of opinion that a verdict importing 'no libel' was clearly perverse, and the document in question indubitably not susceptible of any but a libellous meaning, nevertheless refused a new trial on the ground that, in libel cases, a verdict for the defendant upon such an

(6) (1894), A. C. 284, at p. 287.
(7) Namely—*Levi* v. *Milne*, 4 Bing. 195, at pp. 199, 200; *Hakewell* v. *Ingram*, 2 C. L. R. 1397; Odgers' S. & L., ed. 1905, p. 654; Folkard's S. & L., ed. 1908, p. 317; *Parmiter* v. *Coupland*, 6 M. & W. 105.

issue is always conclusive. Such *dicta* as that of Lord Blackburn in *Capital and Counties Bank* v. *Henty* (7 A. C. 741, at p. 776), should not, I think, be taken to mean more than that, where the defendant has had a verdict, the court cannot upon appeal enter judgment for the plaintiff however clear the libel, and may give him no greater relief than a new trial, because in order to succeed the plaintiff must get both the court and the jury to decide for him. I fully appreciate the reluctance of the courts to interfere with verdicts of juries in libel cases. But where, as here, the defamatory character of the publication does not admit of dispute, the order for a new trial should not be disturbed" (pp. 476-7).(8)

A new trial was also granted in an action for libel against a newspaper publishing company, in which two substantial allegations of wrong-doing on the part of plaintiff, as a Minister of the Crown, having been published in the paper, and there being no proof of the truth, and no justification for one of such allegations, the jury, after a charge in favour of plaintiff, returned a verdict for the defendant. (9)

In a Quebec case, which came before the Supreme Court of Canada, the plaintiff H., in order to qualify as a candidate in a municipal election, procured from a friend a deed of land giving him a *contre-lettre* under which he collected the revenues. Having sworn that he was owner of real estate to the value of $2,000 (*i.e.*, the land described in the deed), B., in his newspaper, accused him of perjury, whereupon H. sued B. for libel. On the trial the deed to H. was produced, and the existence of the *contre-lettre* proved, but the notary who had the custody of both documents, and who was a witness at the trial, refused to produce the *contre-lettre*, claiming privilege for it as being a confidential document. The trial judge maintained this claim, but oral evidence was admitted proving to some extent what the *contre-lettre* contained. A verdict having been given in favour of H., the Court of King's Bench for Quebec (Cross, J., *diss.*) affirmed the judgment; but upon appeal to the Supreme Court of Canada it was held, that the trial judge erred in ruling that the notary was not obliged to produce the *contre-lettre*, as it was impossible without its production to determine what, if any, limitations it placed upon the deed, and, therefore, there should be a new trial. (10)

(8) *Sydney Post Publishing Co.* v. *Kendall* (1910), 43 S. C. R. 461.
(9) *Green* v. *World Printing and Publishing Co.* (1908), 13 B. C. R. 467.
(10) *Barthe* v. *Huard* (1910), 42 S. C. R. 406. For other cases of new trial in civil actions for libel, see "King's Law of Defamation," pp. 789-815.

In the same case it was held that, where objection to one or more portions of the judge's charge is not presented until after the jury have rendered their verdict, the losing party cannot demand a new trial as of right, but that an appellate court, in order to prevent a miscarriage of justice, may order a new trial as a matter of discretion.

As to new trial generally, "it is not desirable," said Lord Halsbury, L.C., "that the judges who take part in the discussion of the question whether or not there shall be a new trial, should make any observations about what the effect of the evidence was, or state what might or might not have been the proper course to pursue, because such observations are likely to prejudice the trial which may come on afterwards; therefore the matter ought to be left untouched by the tribunal which orders the new trial." (1)

"Following the established practice by which a Court of Appeal should refrain from prejudging the merits of a case when it orders a new trial, (see, *e.g., S. Pearson & Sons Limited* v. *Dublin Corporation* (1907), A. C. 351, 77 L. J. P. C. 1), I shall say nothing as to the merits, the sole question before us being whether or not there should be a new trial." (2)

Although these observations were made in judgments on appeals in civil actions, the remarks are quite as pertinent to the hearing and determination of appeals in criminal proceedings for libel.

New trial by order of Minister of Justice.—There is also the provision in section 1022, that, if upon any application for the mercy of the Crown on behalf of any person convicted of an indictable offence, the Minister of Justice entertains a doubt whether such person ought to have been convicted, he may, instead of advising His Majesty to remit or commute the sentence, after such inquiry as he thinks proper, by an order in writing, direct a new trial at such time and before such court as he may think proper. This power was exercised in a capital case (the alleged murder by poisoning of the husband of the accused) on the ground of discovery of new evidence. (3)

Appeal to Supreme Court of Canada.—Whenever the judges of the Court of Appeal are unanimous in deciding an appeal, their decision is final; but if any of them dissent from the majority, an

(1) *Jones* v. *Spencer* (1897), 77 L. T. (N.S.) 536, at p. 537.
(2) *Per* Hunter, C.J., in *Green* v. *World Printing and Publishing Co.* (1908), 13 B. C. R. 467. See, also, Morrison, J., in the same case, at p. 470, quoting Halsbury, L.C., *supra*.
(3) *R.* v. *Sternaman* (1898), 1 C. C. C. 1; 29 O. L. R. 33.

appeal lies to the Supreme Court of Canada.(4) So that in any case in which there has been a conviction and an appeal against it which has been affirmed, but not unanimously, by the provincial Court of Appeal, the defendant may, on notice to the provincial Attorney-General, appeal against the affirmance of the conviction to the Supreme Court of Canada. The Supreme Court shall thereupon make such rule or order, either in affirmance of the conviction or for granting a new trial, or otherwise, or for granting or refusing the application, as the justice of the case requires. The notice to the Attorney-General must be given within fifteen days after the affirmance of the conviction, or within such further time as may be allowed by the Supreme Court or a judge thereof. The appeal must be brought on for hearing by the appellant at the session of the Supreme Court during which such affirmance takes place, or the session next thereafter, if the court is not then in session; otherwise the appeal shall be held to have been abandoned, unless otherwise ordered by the court or a judge thereof.(5) The judgment of the Supreme Court is in all cases final and conclusive,(6) as there are no appeals to the Privy Council in criminal cases.(7) This section (1025) of the Code abolishing appeals to the Privy Council was questioned by the Imperial authorities, but it was never disallowed.

Illustrative cases as to appeal to Supreme Court:—The "dissent from the opinion of the majority"(8) by any of the judges of the provincial Court of Appeal, which is necessary in order to confer the right of a further appeal to the Supreme Court of Canada, has reference to the "decision" or "judgment" of such majority in affirmance of a conviction; (9) and where a majority of the provincial Court of Appeal, in directing a new trial, also expressed their concurrence (two of them dissenting) with that part of the decision appealed from by which it was held that certain evidence was properly admitted, the latter decision was not reviewable by the Supreme Court of Canada.(10) Where the provincial Court of Appeal is unanimous in affirming the conviction as to one of the grounds of appeal, but there is a dissent as to another ground, a further appeal to the Supreme Court of Canada, under section 1013 of the Code, can be based on the latter ground only, and the appeal canno' be dealt with in

(4) S. 1013 (2). (3).
(5) S. 1024 (1), (2), (3).
(6) *Ibid.* (4).
(7) S. 1025.
(8) S. 1013 (3).
(9) S. 1024.
(10) *Viau* v. *The Queen* (1898), 2 C. C. C. 540.

respect to the ground on which the provincial Court of Appeal was unanimous.(1) In a case where special leave is necessary from either of those courts, in order to enable an appeal to be taken from the Court of Appeal for Ontario to the Supreme Court of Canada, leave should be refused unless special reasons are shewn apart from the alleged error in the decision sought to be reviewed. (2)

The punishment for libel.—At common law the court has absolute discretion as to the punishment for libel. It may impose fine and imprisonment, and require sureties for good behaviour. There may be the same kind of punishment, except that it is restricted, under the statutory provisions of the Code. Whoever publishes any defamatory libel knowing the same to be false is liable to two years' imprisonment, or to a fine not exceeding four hundred dollars, or to both. (3) Whoever publishes any defamatory libel is liable to one year's imprisonment, or to a fine not exceeding two hundred dollars, or to both. (4) Sureties for good behaviour in each case may also be required. (5) On the other hand, the defendant may be released on certain conditions which are set out in sections 1081 and 1082. Under these two sections of the statute, where a person is convicted before any court of any offence punishable with not more than two years' imprisonment, and no previous conviction is proved against him, if it appears to the court that, regard being had to his youth, character and antecedents, to the trivial nature of the offence, and to any extenuating circumstances under which the offence was committed, it is expedient that he be released on probation of good conduct, the court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a recognizance, with or without sureties, and during such period as the court directs, to appear and receive judgment when called upon, and in the meantime to keep the peace and be of good behaviour. (6)

Costs may be imposed.—The court may also, if it thinks fit, direct that the offender shall pay the costs of the prosecution, or some portion of the same, within such period and by such instalments as the court directs. (7)

Publication of fresh libels no breach of recognizance.—Under this section (1081), where a person had been released from custody

(1) *McIntosh* v. *The Queen* (1894), 5 C. C. C. 254.
(2) *Attorney-General* v. *Scully* (1902), 6 C. C. C. 381.
(3) S. 333.
(4) S. 334.
(5) S. 1058.
(6) S. 1081 (1).
(7) *Ibid.* (3).

on a criminal charge of libel upon entering into a recognizance with sureties to appear and receive judgment when called on, it was held that it is only on motion of the Crown that the recognizance can be estreated, and judgment moved against the offender; and that the publication by the defendant of fresh libels against the private prosecutor is no breach of such recognizance. Upon the prosecution of the proprietor and publisher of the Cornwall *Freeholder* newspaper for criminal libel, at the local assizes held in April, 1887, the defendant was convicted, and was released from custody upon entering into a recognizance with sureties to appear and receive judgment when called upon. In May, 1901, an order *nisi* was obtained, upon the affidavits of the private prosecutor and others, charging the defendant with having failed to be of good behaviour, since entering into the said recognizance, by reason of his having in the said newspaper, in the years 1891, 1895, 1899 and 1900, published articles alleged to be of a defamatory character concerning the said private prosecutor. Upon motion before the Divisional Court to make the order *nisi* absolute, and requiring the defendant to shew cause why he should not be ordered to appear at the next sittings of the Court of Assize, Oyer and Terminer and general gaol delivery, to receive judgment upon the said conviction for libel, the court held, that in such a case it is only on motion of the Crown that the recognizance can be estreated, and judgment moved against the offender. Where such a recognizance has been given in proceedings for libel, the publication of fresh libels against the prosecutor is no breach of good behaviour under such recognizance, for the defendant may have complete defences against such charges of libel, and the prosecutor must be left to his remedy by action or indictment. (8)

Conditions of release on suspended sentence.—Before directing the release of an offender on suspended sentence under section 1081, the court must be satisfied that the offender, or his surety, has a fixed place of abode or regular occupation in the county or place for which the court acts, or in which the offender is likely to live during the period named for the observance of the conditions. (9)

Consequences of recognizance not being observed.—If a court having power to deal with such offender in respect of his original offence, or any justice of the peace, is satisfied by information on oath that the offender has failed to observe any of the conditions of his recognizance, such court or justice may issue a warrant for his apprehension. (10) When apprehended on such warrant the

(8) *Rex* v. *Young*, 2 O. L. R. (1901), 228.
(9) S. 1082.
(10) S. 1083 (1).

offender shall, if not brought forthwith before the court having power to sentence him, be brought before the justice issuing the warrant, or before some other justice for the same territorial division, and such justice shall either remand him by warrant until the time at which he was required by his recognizance to appear for judgment, or until the sittings of a court having power to deal with his original offence, or admit him to bail, with a sufficient surety conditioned on his appearing for judgment. (1) The offender when so remanded may be committed to a prison for the county or place in which the justice remanding him acts, or for the county or place where he is bound to appear for judgment: and the warrant of remand shall order that he be brought before the court before which he was bound to appear for judgment, or to answer as to his conduct since his release. (2)

Affidavits in mitigation of punishment.—Assuming that the defendant has been convicted of defamatory libel, and has not moved against the verdict, or that he has failed in any motion for that purpose and is subject to the judgment of the court, he is at liberty to urge certain matters in mitigation of sentence. He may read affidavits shewing that he was not actuated by malice in the publication but by less reprehensible motives; (3)that he is a person of good character and reputation; (4) that, at the time of publication, he honestly and on reasonable grounds believed the charges to be true; (5) but must not say that they were true; (6) that there was provocation on the part of the prosecutor; that the defendant's newspaper, in which the libel was published, was well conducted, and had been instrumental in effecting municipal reforms; (7) but not a memorial to the same effect unverified by affidavit; (8) that the defendant was absent when the publication took place, and that, on reading the libellous paper, he voluntarily stopped the sale and prevented the paper being seen. (9) The criminal responsibility of a newspaper proprietor, for defamatory matter published therein, may always be rebutted by proof that the matter was inserted without the proprietor's cognizance, and without

(1) S. 1083 (2).
(2) *Ibid.* (3).
(3) *Reg.* v. *Tanfield* (1878), 42 J. P. 423.
(4) *Ibid.*
(5) *Reg.* v. *Newman* (1853), 1 E. & B. 581, 582; 17 J. P. 84; *Reg.* v. *Halpin* (1829), 9 B. & C. 65; *Rex* v. *Burdett* (1820), 4 B. & Ald. 314, 321.
(6) *Rex* v. *Burdett, supra; Reg.* v. *Halpin, supra; Reg.* v. *Bradley* (1828), 2 Man. & Ry. 152; *Reg.* v. *Newman, supra;* Digest L. L. 16.
(7) *Per* Blackburn, J., in *Reg.* v. *Shimmens* (1870), 34 J. P. 308.
(8) *Ibid.*
(9) *Rex* v. *Williams* (1774), Lofft, 759.

negligence on his part. (10) And when the jury have found that the libel was published without the defendant's knowledge, but that he did not use due care or caution to prevent its publication, the court, while sustaining the conviction, will consider the finding of the jury in mitigation of punishment. (1)

Mitigation where libel justified.—Where under section 911 (3) of the Code, the defendant is convicted, after a plea of justification, the court may, in pronouncing sentence, consider whether his guilt is aggravated or mitigated by the plea. In doing this the judge is bound to form his own opinion on the whole evidence, (2) but affidavits are also receivable in mitigation of punishment. (3) The defendant may shew, *e.g.*, that, before pleading, information was furnished him which, if true, would have supported certain statements in the plea, and that, although there was no evidence in support of those statements at the trial, yet the absence of such evidence was there accounted for. (4) In the same case a document, which would have supported the plea of justification, was rejected at the trial for want of authentication as to the place of custody or otherwise. It was also held inadmissible in confirmation of defendant's affidavit that the document was communicated to him before plea pleaded. (5)

Affidavits in aggravation of punishment.—Affidavits may also be read by the prosecutor in aggravation of the punishment. It may be shewn that the defendant has published similar libels since the verdict, or has been guilty of other misconduct; (6) that he published prior libels affecting the prosecutor, and that there are previous convictions against him for libelling the prosecutor; (7) but such evidence should relate to the same subject matter; (8) that the defendant published substantially the same libel in a number of newspapers; (9) and that there was a subsequent justification in the same newspaper of the libel previously published therein. (10) This species of evidence is admissible to shew the animus or intention of the defendant in both civil

(10) S. 329 (1).
(1) *Reg.* v. *Wyman* (1879), *per* Cockburn, L.C.J., and Lush and Manisty, JJ.
(2) *Per* Lord Campbell, C.J., in *Reg.* v. *Newman* (1853), 1 E. & B. 558, at p. 578; 17 J. P. 84.
(3) *Ibid.*
(4) *Ibid.*
(5) *Ibid.*
(6) *Rex* v. *Withers* (1789), 3 T. R. 428, 432.
(7) See *Jackson* v. *Adams* (1835), 2 Scott 599; *Symmons* v. *Blake* (1835), 1 Moo. & Rob. 477; *Barrett* v. *Long* (1851), 3 H. L. C. 395, 414.
(8) *Finnerty* v. *Tipper* (1809), 2 Camp. 72.
(9) *Delegal* v. *Highley* (1837), 8 C. & P. 444; 3 Bing. N. C. 950.
(10) *Barwell* v. *Adkins* (1840), 1 M. & G. 807.

and criminal cases. The defendant will, however, be allowed to answer affidavits in aggravation. (1) And where it appeared, in the prosecutor's affidavits, that expressions repeating the libel and affirming the defendant's guilt had been uttered by him in the hearing of certain persons who refused to swear to the expressions after having mentioned them to the parties making the affidavits, the court, being of opinion that the persons who overheard the expressions were under the defendant's influence, allowed the affidavits to be read; but the defendant and the persons referred to were allowed to answer the affidavits. (2) In such a case, however, it must appear that the persons to whom the libel was repeated, and who refuse to give evidence of it, are under the defendant's influence; otherwise the affidavits will be inadmissible. (3) Where the editor of a newspaper pleaded guilty to an indictment for libel on condition of being discharged on his own recognizance to appear for judgment when called upon, and of not being called upon at all if he ceased publishing libels on the prosecutor, the court required an affidavit from the prosecutor that the defendant had published libels respecting him before it would consent to pass judgment. (4) The Code prescribes no rules of procedure when a defendant is brought up for judgment, but, in some of the provinces, the English Crown Office rules, which are based on the procedure laid down by Lord Kenyon, (5) have been adopted.

Where the conviction and sentence of a person, tried under the speedy trials clauses of the Code, (6) is respited pending the hearing of an appeal by way of case reserved, and the conviction is affirmed on the appeal, another judge may, in the absence of the trial judge from the province, give effect to the respited judgment by virtue of section 831. (7) The Court of Appeal has also power, under section 1018 (*c*), upon hearing a case reserved as to the validity of a sentence, to correct the erroneous sentence. (8)

(1) *Rex* v. *Sharpness* (1785), 1 T. R. 228; *Rex* v. *Archer* (1788), 2 T. R. 203, *note*; *Rex* v. *Withers*, *supra*; *Rex* v. *Wilson* (1791), 4 T. R. 487.
(2) *Rex* v. *Archer*, *supra*.
(3) *Rex* v. *Pinkerton* (1802), 2 East, 357.
(4) *Reg.* v. *Richardson et al.* (1840), 8 Dowl. 511.
(5) In *Rex* v. *Bunts* (1788), 2 T. R. 683.
(6) Part 18, SS. 822-842.
(7) *The King* v. *Brooks* (1902), 5 C. C. C. 372.
(8) *R.* v. *Dupont* (1900), 4 C. C. C. 566.

CHAPTER XXXI.

The Costs.

Costs of prosecution, when payable by defendant.—The only case prior to the Code in which costs could be allowed against a defendant, in a criminal prosecution by indictment, was on conviction for assault. (1) There is the same rule still as to that offence, (2) which is included in the following general provision covering any indictable offence, libel included: Any court by which, and any judge under Part 18 or magistrate under Part 16 by whom, judgment is pronounced or recorded, upon the conviction of any person for treason or any indictable offence, in addition to such sentence as may otherwise by law be passed, may condemn such person to the payment of the whole or any part of the costs or expenses incurred in and about the prosecution and conviction for the offence of which he is convicted, if to such court or judge it seems fit so to do. (3)

Allowance for loss of time.—Such court or judge may include in the amount to be paid such moderate allowance for loss of time as the court or judge, by affidavits or other inquiry and examination, ascertains to be reasonable. (4)

Mode of securing or enforcing payment.—The payment of such costs and expenses, or any part thereof, may be ordered by the court or judge to be made out of any moneys taken from such person on his apprehension if such moneys are his own, or may be enforced at the instance of any person liable to pay, or who has paid, the same, in such and the same manner, subject to the provisions of this Act, as the payment of any costs ordered to be paid by the judgment or order of any court of competent jurisdiction, in any civil action or proceeding, may for the time being be enforced. (5)

When payable from official fund. Reimbursement. — In the meantime, until the recovery of such costs and expenses from the person so convicted as aforesaid, or from his estate, the same shall

(1) R. S. C. 1886, c. 174, s. 248.
(2) SS. 1044, 1046.
(3) S. 1044 (1).
(4) *Ibid.* (2).
(5) *Ibid.* (3).

be paid and provided for in the same manner as if this section had not been passed; (6) and any money which is recovered in respect thereof from the person so convicted, or from his estate, shall be applicable to the reimbursement of any person or fund by whom or out of which such costs and expenses have been paid or defrayed. (7)

Part 18, above mentioned, comprises the sections relating to the speedy trials of indictable offences including blasphemous libels, which are within the jurisdiction of the General Sessions of the Peace, (8) and also, with the consent of the accused, of the County Court Judge's Criminal Court. (9) Part 16 comprises the sections relating to the summary trial of indictable offences.

Under section 1044 (*supra*), a defendant convicted of libel may be ordered to pay the costs of the prosecution including an allowance for loss of time—presumably on the part of the private prosecutor. The costs which would seem to be properly allowable to a prosecutor and his witnesses are expenses incurred in preferring the indictment, and such sums of money, as to the court shall seem reasonable and sufficient, to reimburse the prosecutor and his witnesses for the necessary expenses severally incurred by them in attending before the justice on the preliminary inquiry and before the grand jury, and in otherwise carrying on such prosecution. The corresponding English enactment is 33-34 Vict. c. 23, s. 2, under which, where a person is arrested on a charge of felony, and money belonging to him is found in his possession, an order may be made that the money be applied towards the costs of the prosecution. Where between the arrest and conviction he was adjudged bankrupt, it was nevertheless held that the order was valid, notwithstanding the intervening bankruptcy. (10) Independently of the statute, it seems that, under the previous English practice, if the court on passing sentence imposed a fine on the defendant, part of the fine might be applied towards the prosecutor's costs, whether the prosecution was by indictment or information. (1) There is no such practice in Canada.

Costs of defendant recoverable against private prosecutor.—The costs of a successful defendant, in one class of libel prosecu-

(6) This means that such costs and expenses shall be payable out of funds provided for the administration of criminal justice. The power to order the payment of the costs of a criminal trial out of public money is statutory, the rule at common law being that the Crown neither pays nor receives costs.
(7) S. 1044 (4).
(8) SS. 582, 583.
(9) S. 824.
(10) *Reg.* v. *Roberts* (1873), 9 L. R. Q. B. 77; 43 L. J. M. C. 17; 29 L. T. (N. S.) 674; 12 Cox C. C. 574.
(1) See Corner's Cr. Pr. 126.

tions, are also provided for. The Code enacts that, in the case of an indictment or information by a private prosecutor for the publication of a defamatory libel, if judgment is given for the defendant, he shall be entitled to recover from the prosecutor the costs incurred by him by reason of such indictment or information, either by warrant of distress issued out of the said court, or by action or suit as for an ordinary debt. (2) And he may sue for such costs when taxed. (3)

This enactment was originally contained in the Criminal Libel Act 1874, (4) and was afterwards embodied in the Criminal Procedure Act. (5)

The scale of taxation.—The costs shall, in case there is no tariff of fees provided with respect to criminal proceedings, be taxed by the proper officer of the court according to the lowest scale of fees allowed in such court in a civil suit. (6) And if such court has no civil jurisdiction, the fees shall be those allowed in civil suits in a superior court of the province according to the lowest scale. (7)

Application and effect of S. 1045.—The enactment contained in section 1045 (*supra*) applies exclusively to indictments and informations by a "private prosecutor," (8) and not to prosecutions by the Government by its own law officers, or by counsel retained by the Government, nor to seditious, obscene, or blasphemous libels. Neither does it apply to informations filed *ex officio* by the Attorney-General. (9) Judgment for the defendant would follow his acquittal on the trial of an indictment or information, and would entitle him to recover from the prosecutor all the costs which he has incurred by reason of the indictment or information, including the costs of shewing cause against the rule *nisi* for the information. (10) In *Reg.* v. *Cavendish* (1) it was held that a defendant, under such circumstances, was only entitled to the costs incurred subsequently to the filing of the information; but this decision was not followed in *Reg.* v. *Steel et al.* (*supra*).

(2) S. 1045.
(3) *Richardson* v. *Willis* (1873), L. R. 8 Ex. 69; 42 L. J. Ex. 15; 28 L. T. 71; 12 Cox C. C. 351. See, also, *Mackay* v. *Hughes*, *infra*.
(4) 37 Vict. c. 38, ss. 12-13 (D.).
(5) R. S. C. 1886, c. 174, ss. 153-4.
(6) S. 1047 (1).
(7) *Ibid.* (2). See *The King* v. *Gouillould*, *infra*.
(8) See chapter 29, on "The Trial and the Verdict," as to the meaning of this expression.
(9) See *Reg.* v. *Duffy* (1870), 9 Ir. L. R. 329; 2 Cox C. C. 49. The rule is, that the Crown neither receives nor pays costs on an *ex officio* information.
(10) *Reg.* v. *Steel et al.* (1876), 1 Q. B. D. 482; 45 L. J. 391.
(1) (1848), 12 Ir. L. R. 230.

Costs not demanded on verdict recoverable by action.—In a civil action in the province of Quebec for costs incurred by plaintiff in a criminal prosecution for defamatory libel, it appeared that plaintiff, having been acquitted on such prosecution, made no demand for costs when the verdict was given against defendant, the private prosecutor. After hearing the cause in the Superior Court, the presiding judge discharged the *délibéré* to enable the plaintiff to have his costs taxed before the judge who presided at the criminal trial. This was done and the cause was re-heard. It was then held, that the plaintiff could claim his fees and disbursements from defendant by an ordinary action, though he had not asked for judgment against defendant therefor at the time of the verdict, and that the judge who presided at the criminal trial could, even after proceedings in such action, tax such fees and disbursements. (2)

Security for and recovery of defendant's costs.—Under certain circumstances security for the defendant's costs may be ordered under section 689, in which case the defendant may also, by order of the court, be allowed in addition the costs of the preliminary inquiry before the justice. Section 689 provides for these costs in a case where the justice has discharged the accused, and the prosecutor, still desiring to prefer an indictment, requires the justice to bind him over to prosecute such an indictment. (3) Where this has been done, and the prosecutor does not prosecute the indictment, or the grand jury do not find a true bill, or the defendant is not convicted upon the indictment, the prosecutor shall, if the court so direct, pay to the accused his costs, including the costs of appearance on the preliminary inquiry. (4) The accused having been discharged on this preliminary inquiry, and the commissioner of Dominion police having bound himself by recognizance to prefer and prosecute an indictment on the charge contained in his information, and the grand jury having ignored the bill of indictment, the commissioner was held, under section 689 (*supra*), to be personally liable for the costs incurred by the accused on the preliminary inquiry and before the Court of Queen's Bench. (5) The costs to be allowed under a recognizance under these sections are not the fees and disbursements paid by the accused to his counsel, such payments being a matter between client and counsel, but such costs as are analogous to the costs recoverable from a

(2) *Mackay* v. *Hughes* (1901), 19 Q. O. R. (S.C.) 367; 8 C. C. C. at p. 409. See, also, *The Queen* v *Mosher* (1899), 32 N. S. R. 139; 3 C. C. C. 312, noted at p. 376, *post*.
(3) S. 688 (1).
(4) S. 689 (1).
(5) *R.* v. *St. Louis* (1897), 1 C. C. C. 141.

losing party in a civil suit. These costs should be taxed according to a tariff made for criminal proceedings, and, in the absence of such tariff, they are to be taxed in the discretion of the judge by implication, according to the spirit of the provisions contained in section 1047 of the Code. (6) Upon a motion before the Supreme Court of Nova Scotia to set aside a judgment and order awarding costs against the private prosecutrix in respect of an indictment for assault, on which the grand jury found no bill, it was held (*per* Meagher and Ritchie, JJ., Graham, E.J., and Henry, J., *contra*), that such an order, made by the presiding judge of a criminal superior court, is not subject to review by or appeal to the court *en banc;* but (if such jurisdiction did exist), that where the application for such an order has been made on the last day of the term of the criminal court and judgment reserved thereon, the order may be legally made out of term *nunc pro tunc* as of the date of the application, the delay in such case being the act of the court and not being due to the neglect or fault of the applicant. The court being equally divided the motion was dismissed. (7)

The taxation of costs against an unsuccessful private prosecutor, who has at his own request been bound over to prefer an indictment, is controlled by section 1047 (*supra*). (8)

Under sections 688-689 (*supra*), if an indictment for libel be ignored by the grand jury, although no "judgment is given for the defendant" within the meaning of section 1045, the private prosecutor may nevertheless be ordered to pay all the costs of the defence. But where there has been a committal of the defendant for trial in ordinary course and no bill is found by the grand jury, there is no "judgment," and no costs are recoverable against the private prosecutor. Where, however, "judgment" has been given for the defendant within the meaning of section 1045, the judge has no power to deprive him of his costs. (9) Upon an indictment for defamatory libel, a defendant has no security, technically speaking, for his costs, except in a case coming under sections 688 and 689, where the prosecution is persisted in after defendant's discharge by the justice on the preliminary inquiry; but, where the prosecution takes the form of a criminal information, he has the security afforded by the relator's recognizance, in which the relator is held bound to pay to the defendant such costs as the court may direct. In such case the defendant is entitled on acquittal (even if the judge certifies that there was reasonable cause for exhibiting

(6) *R.* v. *St. Louis* (1897), 1 C. C. C. 141.
(7) *The Queen* v. *Mosher* (1899), 32 N. S. R. 139; 3 C. C. C. 312.
(8) *The King* v. *Gouillould* (1903), 7 C. C. C. 432.
(9) *R.* v. *Latimer* (1850), 15 Q. B. 1077; 20 L. J. Q. B. 129; 15 Jur. 314.

the information), (10) to the whole of the costs sustained by him, including the costs properly incurred by him prior to the filing of the information, (1) and is not limited to the amount of the relator's recognizance.

Costs in the Court of Appeal.—So, also, in the case of an appeal to the Court of Appeal in any province, costs may be awarded either to the prosecutor or the defendant under the general powers of the court; for the court on appeal may direct a new trial, "or make such other order as justice requires;" (2) and where judges are empowered by statute to do a matter of justice, they ought to do it as of course. (3)

English cases as to costs of prosecutor.—There is a rule in England that the costs of an argument, on a point reserved by a Judge for the consideration of the Court for Crown Cases Reserved, may be ordered to be paid to the prosecutor by the judge reserving the point. The words, "and in otherwise carrying on such prosecution," in 7 George IV., c. 64, s. 22, cover the costs of such argument. (4) The court which has been deputed to pass sentence on a prisoner after a point reserved for the decision of the Court of Criminal Appeal, has power to allow the costs incurred in the latter court, including counsel fees. (5) The power to order costs of the prosecution rests with the judge who tries the prisoner, and who may order these at the same time that he orders the other costs of the prosecution. (6) The proprietor of a newspaper, who has been convicted and fined for the publication of a libel in his paper, inserted by the editor without his knowledge and consent, cannot recover against the editor the damages sustained by such conviction, (7) and, of course, cannot recover any part of the costs.

Effect on costs of nolle prosequi by Attorney-General. — The Attorney-General may exercise the power, conferred by section 962 of the Code, of entering a *nolle prosequi* to an indictment for criminal libel, under which the accused is discharged, although the procedings were instituted by a private prosecutor; and where he has done so, the *nolle prosequi* constitutes a "judgment"

(10) *R.* v. *Latimer, supra.*
(1) *R.* v. *Steel* (1876), 1 Q. B. D. 482; 45 L. J. 391.
(2) S. 1018 (*b*), (*d*), (*e*).
(3) 2 Hawk. P. C. c. 26, s. 13; Bac. Abr. Information, D. 5; 2 Ch. Ca. 191.
(4) *R.* v. *Cluderoy* (1849), 3 C. & K. 205.
(5) *R.* v. *Woolley* (1850), 4 Cox C. C. 452.
(6) *Per* Cockburn, C.J., in *R.* v. *Lewis* (1857), Dears. & B. 326; 6 W. R. 41; 7 Cox C. C. 407.
(7) *Colburn* v. *Patmore* (1834), 1 Cr. M. & R. 73.

within the meaning of "judgment given for the defendant" in section 1045 (*supra*), and the defendant is entitled to his costs under that section against the private prosecutor. (8)

Opinion of Hall, J.—"There are only two methods," said Hall, J., who gave this decision in a Quebec case, "by which a person against whom a criminal indictment has been found can be relieved from its effect, viz., a trial and verdict, or a declaration of *nolle prosequi* by the representative of the Sovereign. In the case of a trial it is not the verdict which constitutes the judgment; the verdict is only the report by the jury to the court of their finding upon the facts submitted to them, and thereupon the court pronounces the judgment. In the case of a verdict of guilty, the compliance with the execution of the sentence, on the part of the accused, of course puts an end to his liability under the original indictment; if the verdict is not guilty, the judgment of the court discharges the accused, and he is thereupon relieved from any liability for the offence with which he was charged under the indictment. Equally in the case of the *nolle prosequi*, it is not the declaration of the Attorney-General which constitutes the judgment. If the accused neglected or refused to accept the declaration, it is probable that it might be withdrawn and the indictment still proceeded with. As in the case of a trial and verdict, it is the discharge pronounced upon such *nolle prosequi* which constitutes the judgment of the court." (9)

Defendant discharged under nolle prosequi entitled to costs.—Where a judgment has been obtained in this way for the defendant, he is entitled, under section 1045, to his costs against the private prosecutor. *The King* v. *Blackley* was such a case, and Hall, J., said: "I am of opinion that the discharge pronounced by the court in the present case constituted the judgment for the defendant mentioned in Article 833 [1045, *supra*,] and rendered the private prosecutor liable for defendant's costs. It is true that that discharge is not the equivalent of an acquittal, and that defendant, although not liable to be further prosecuted under the existing indictment, is exposed in law to the renewal of it for the same alleged offence, but his present discharge is a substantial judgment in his favour *quoad* that indictment, and the very fact that the prosecution may be renewed is an additional reason, in my opinion, why effect should be given in similar cases to the stipulation in defendant's favour as to the costs incurred by him in his de-

(8) *The King* v. *Blackley* (1904), 13 Q. O. R. (K.B.) 472; 8 C. C. C. 405.

(9) *The King* v. *Blackley* (1904), 13 Q. O. R. (K.B.) 472, at p. 473; 8 C. C. C. 405, at p. 406.

fence, as otherwise such right of renewal might be exercised so as to operate as an intolerable abuse. . . . The objection that the indictment is laid in the name of the King, and that his representative, the Attorney-General, has absolute control over the procedure, cannot avail to relieve the private prosecutor. The procedure was instigated at his instance, and he must be held responsible for its incidents and its result. As was pointed out in *The King* v. *Patteson* (1875), 36 U. C. Q. B. 129, the enactment as to costs would be a dead letter, if the use of the King's name relieved the private prosecutor from such responsibility, inasmuch as every criminal charge is presented in this country in the name of the Sovereign, and the article of the Code, to be of any use, must be read as applicable to the person at whose instance the procedure in the name of the Sovereign was set in motion." (10)

Defendant's costs of an abortive trial.—In this same case there had been a previous trial, which terminated without a verdict, owing to the illness and death of the presiding judge. In extending the liability of the private prosecutor to the costs of that trial, Hall, J., said: "The private prosecutor, in taking the initial step to prosecute for libel, assumes, it appears to me, the risk both of the incidents and the accidents of that procedure. In *Reg.* v. *Latimer*, 15 Q. B. D. 1077, where the trial in a libel case was interrupted by the absconding of one of the jurors, Lord Campbell, C.J., remarked that, although the prosecutor, strictly speaking, was not to blame for such a result, yet certainly the defendant was not, and in determining who should bear the expense of the ineffective trial, it was not unjust that the defendant, who had been forced into the position by the prosecutor, should be reimbursed by him on an abortive proceeding. I cannot bring myself to adopt any other view." The learned judge ordered the costs to be taxed, as directed by section 835 [1047], by the Clerk of the Crown. (1)

Conflicting decisions.—This decision, it should be noticed, is not in accord with the decision of Drake, J., in the British Columbia cases of *Nichol* v. *Pooley*, *infra*, although these cases, in principle at least, are not distinguishable from *The King* v. *Blackley*. In all three cases the trials were abortive, although not from the same cause. Under the procedure in civil actions in Ontario, if the jury disagree and find no verdict, the judge, at or after the trial, may dismiss the action. (2)

(10) *The King* v. *Blackley*, 13 Q. O. R. (K.B.), at pp. 473-4; 8 C. C. C. at pp. 406-7.
(1) *The King* v. *Blackley*, 13 Q. O. R. (K.B.), at pp. 474-5; 8 C. C. C. at pp. 407-8.
(2) Rule 780, O. J. A.

Costs of two abortive trials and of commission evidence refused. Opinion of Drake, J.—In a prosecution for libel at the instance of certain members of the Executive Council of the province of British Columbia, defendant, in support of his plea of justification, obtained a commission, and had the evidence of certain witnesses out of the jurisdiction taken for use at the trial. The evidence was used at the first trial and the jury disagreed. At the second trial the jury again disagreed. At the third trial 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. (3)

Rondot v. Monetary Times (1898) contra.—In Ontario a different view has been 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 certain witnesses out of the jurisdiction taken under a commission for use at the trial. The evidence was not used at the trial, owing to the plaintiff, who was called as a witness by the defendants, having admitted substantially what was stated by the witnesses in their depositions before the commissioner. It was held, on appeal to the Divisional Court, that the defendants, having obtained judgment in their favour with costs, were entitled to tax against the 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. (4)

Defendant may abandon taxation and sue for his costs.—In a criminal libel prosecution, the defendant, after his acquittal, proceeded to tax his costs and moved before the trial judge for certain costs, and, on obtaining an order with which he was dissatisfied, abandoned the taxation and commenced a civil action for

(3) *Rex* v. *Nichol* (1901), 8 B. C. R. 276; 6 C. C. C. 8. The authorities above referred to are the following: *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. *Clarke* (1843), 12 M. & W. 24, following *Seely* v. *Powers*, *supra*.

(4) *Rondot* v. *Monetary Times Printing Co.* (1898), 18 C. L. T. (Occ. N.) 237.

his costs against the prosecutors. It was held (*per* Irving, J.) on a summons for a stay of proceedings, that plaintiff should not be allowed to pursue both remedies at once, but, as there was no appeal from the order of the trial judge, he should be allowed to proceed with his action only on terms of his undertaking to abide by such order as might be made therein as to the costs of the abandoned taxation in the criminal case. (5) Defendants appealed from this order of Irving, J., who subsequently, upon defendants' application, stayed the trial of the action until after the next sittings of the full court. The court was unanimous in affirming the order.

Judgment of Supreme Court of British Columbia (per Hunter, C.J.).—Hunter, C.J., said the jurisdiction to stay proceedings ought to be exercised only in a plain case, and that the defendants, in the present case, should be allowed to plead any estoppel which they might think existed by reason of the taxation proceedings, or the rulings of Drake, J., (*supra*), disallowing the costs of the commission and of the two abortive trials. He suggested a settlement as there might be a radical difference of opinion, both there and at Ottawa, as to what was meant by the lowest scale of fees allowed in such court in section 835 [1047] of the Code, *i.e.*, whether it is the Supreme Court tariff, or the lowest County Court tariff which is sometimes allowed in a Supreme Court action. (6)

In England the taxing master at assizes, or one of his subordinates, is the clerk of assize, and it has been held that the Court of King's Bench has no jurisdiction to review the taxation by the clerk of assize of the costs of an indictment for libel on the Crown side at the assizes. (7)

(5) *Nichol* v. *Pooley* (1902), 9 B. C. R. 21; 6 C. C. C. 12.
(6) *Nichol* v. *Pooley* (No. 2), (1902), 9 B. C. R. 363; 6 C. C. C. 269, at p. 274.
(7) *R.* v. *Newhouse* (1853), 22 L. J. Q. B. 125. See *The Queen* v. *Mosher* (1899), *ante*, as to the order of the presiding judge of a superior court of criminal jurisdiction awarding costs against the private prosecutor, upon an indictment on which the grand jury found no bill, not being reviewable by the court *en banc*.

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